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

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Summary

The State Legal Pluralism

The Intersection of Adat, Jinayah, and National Penal Law in Gayo, Indonesia

This book discusses the dynamic intersection of three bodies of law; adat, Aceh Shari'a and national penal law, and the institutions applying them. This book focuses on how these address public morality and criminal offences of a sexual nature as they play out in the Gayonese community of Central Aceh, Indonesia. Data collection for this work was conducted in Gayo society in Central Aceh for one and half years (2014-2015 and 2017). I employed ethnographic methods to explore how the three penal systems interact, and which actors play a dominant role in managing their implementation. My research questions were the following: What is the interest of the state and non-state legal agents in implementing adat law? What effect does the state's implementation of adat penal law have on the offender, victim, village apparatus, the Aceh Shari'a police at the village, the normal police and public prosecutors? How does this implementation affect or shape the power relationships between them?

Chapter II found that state legal pluralism in Aceh started officially after the state recognized adat as part of its political and legal structure. This recognition was part of a resolution to end a long armed conflict between the Aceh rebel movement and the Indonesian government. At the national level, the Indonesian government also issued a number of regulations allowing all ethnic groups in Indonesia to re-apply their traditional political structures and recognize the enforcement of adat law in the village. This shifted Indonesia – at least in part – from a project of legal centralism to one of legal pluralism as applied before by the Dutch colonial government.

In Aceh, the traditional political structures and practices were recognized by the government, which gave them the authority to engage in all village governance aspects. They are now village government organizations validated and authorized by the state. In the case of Gayo, this development combined with modernization. The development projects of the state have changed Gayonese political practice, adapted their social arrangements, and the territorial basis for governance; shifted the adat head's political and legal authority from persons to territory, and made the relations in the community from more to less reciprocal. These changes happened recently after the introduction of democracy replaced the authoritarianism of the New Order regime. Before the introduction of democracy, Gayonese social arrangements had in fact not been much affected by the

authoritarianism, unlike those of their Sumatran neighbors of Minangkabau and Rejang-Lebong whose traditional social arrangements, which provided the basis for their social and political relations and cultural practices, were strongly affected.

Although the New Order successfully abolished the Gayo's traditional political structures in accordance with the national policy on villages, it did not completely change the social arrangements and the role and practices of each of the political offices. The *imam*, for example, retained his position as a fundamental part of the village organization, despite the fact that it was not recognized by the national government. After the start of democracy the (central) state introduced democratic election for the village head and the imam in Gayo, (in other districts in Aceh, the imam is appointed by the elected village head as his assistant in religious affairs) , provided salaries for all village officials and disbursed development funds to the village. This allowed the state to keep a considerable degree of control over village politics.

Interestingly, the increase in control of the state over villages is limited to political and developmental aspects. In the sphere of law, this chapter found a reverse outcome: here the state has become dependent on the village government following the delegation of power to village officials in judicial matters which are resolved on the basis of adat. Together with the resulting increase in local authority this has opened up opportunities for the village government to gain considerable autonomy from the state. These developments together with the limits of the state in legal enforcement and the hierarchy of the legal systems introduced by the state have reinforced the application of adat law, which is the domain of the village government. The increased authority of the village in legal aspects has moreover extended beyond the limits for eighteen minor offenses assigned formally by the state to the village jurisdiction. This can be clearly perceived where sexual offenses are concerned. The village government has often addressed sexual offenses that are supposed to be within the jurisdiction of Aceh Shari'a and national penal law.

Reflecting on the development and the current practices of adat in Gayo, both concerning family and penal law aspects, and on the impact of the state recognition of adat on the authority of the village government, Chapter III finds that adat law is a transformative collective idea used to maintain social stability and continuity, centered on the village and extended family. The transformative collective idea means that adat changes over time as a consequence of adaptation to external influences, whether they are religious campaigns, state projects, or secular norms promotion. The outcome of this transformation varies from one place and time to another due to a different response by the village government and the community to each particular situation. As religion has had an increasing

influence on adat, which is the outcome of a long and continuous contextualization and adaptation of the religion to social and cultural contexts, adat is now locally considered as an expression of religious (Islamic) teachings.

Nonetheless, for some actors adat law is still an effective instrument for social transformation and social engineering. The significance of the adat for these purposes, makes it a contested concept and an arena for various actors to debate how Gayonese should lead their lives. Developing or transforming the content of adat directly affects how local people lead their lives and how they judge their own actions and those of others.

This change of adat is not a recent phenomenon. It has been driven by many developments, which go back to at least the second half of the 19th Century. The Gayonese have gone through wars (against the Dutch and Japanese), armed conflicts (Ulama revolt and Free Aceh Movement against the Republic of Indonesia), and natural hazards. All of these have brought in people and ideas from other places and the Gayo response, adaptation and reaction to them have led Gayonese to adapt their adat to these new encounters. Gayonese adat has been continuously (re)defined, (re)constructed, (re)organized by the locals to set new standards to social life and to introduce a new way of looking at themselves and others. Hence adat contains many different norms and values derived from both Islam and secular ideologies, thus confirming as the Von Benda-Beckmanns' typification of adat as a hybrid law.

In family law, adat is now used to maintain the continuity of kinship. Justifying their practices by creative religious legal reasoning, actors ignore the standard Islamic law or the scripturalist views on Islam. Even though external observers consider them to deviate from Islamic law, such as in the case of inheritance divided equally between brother and sister, they do not consider themselves betraying Islam. They believe they apply the basic principles of Islamic teachings and do not go against the basic theological concept of Islam, which is the oneness of God.

For the purpose of recognition of adat, the provincial government of Aceh codified some aspects of adat for all ethnic groups inhabiting Aceh province and suggested districts and villages to codify more aspects of adat following the codified general norms. These village codifications have sharpened adat differences from one village to another and eliminated the flexibility of adat. However, both state and non-state legal agents have used the opportunity to use adat for 'social engineering projects' and overcoming the limitations of legal enforcement by the state. In some cases, activists and paralegal have developed adat rules to protect vulnerable groups such as women and children. However,

such progressive developments did not occur in all places in Gayo as in many localities adat was developed in the opposite direction; i.e. repressive toward women and children.

Aside from allowing the village government to develop and use adat for their legal and political purposes, the practice of legal plurality gave also more options to state legal agencies to use legal differentiation in resolving cases by seeking out particular forums (legal institution) for prosecution or dispute resolution. This development was limited for disputants by the formal hierarchical order of legal pluralism as designed by Aceh province, in which adat is the first legal system disputants should use to resolve their case. On the other hand, the formalization of adat penal law has provided an opportunity to state legal agencies to choose an appropriate law to promote for instance the interests of the victim of a sexual crime..

It is not only central state, village level actors and private individuals who can use adat for their purposes. Being aware of the authority of adat, the district government has utilized adat in its efforts to enforce Aceh Shari'a in the region. The idea that adat is an actualization of Islamic teachings has led the government to grant power to the village apparatus in enforcing adat law related to crimes and offences concerning sexuality, in particular *zina* (premarital and extramarital sex) and public immorality. This new extra authority has increased the significance of adat law and reinforced the power of the village government.

Chapter IV has found that a culture of shame has been the fundamental element of adat law on which social relations and arrangements are based. In Gayo, adat has been used to stress and protect the morality from outside threats such as globalized popular culture that can now be accessed through cable TV and internet connections. Facing such threats to morality, the district government has not only relied on the instruments provided by Aceh Shari'a, but together with village officials (who are also adat leaders) they have developed adat as a tool for moral protection. Aceh Shari'a and adat are now complementary in providing moral protection.

Central to adat in this matter are the culture of shame and *farak* (temporal banishment from the community on account of illegal sexual intercourse). They rule public morality, social appropriateness, social interaction, and sexuality. Both strongly relate to the local mechanisms to maintain internal stability and social arrangements. Based on the importance of these aspects, which are considered part of the enforcement of Islamic teachings, Gayonese consider committing *zina* not only as merely breaking religious order but also as a fundamental threat to social stability and structure. This cultural system provides a mechanism to not

only punish the offender but also to restore the offender's place within the social arrangement, to protect the victim involved from stigma and to guarantee the patriarchal lineage for any children who are born as a result of sexual offences. For the perpetrators of *zina* undergoing an adat punishment is a way to reclaim their and their family's dignity as well as their offspring's position. The religious significance is less important than restoring the social arrangement. Although traditionally the Gayonese believe that the punishment is part of the Shari'a, they also believe that enforcement of the punishment does not free the offenders from the sin; it is up to the offenders to repent in order to get cleaned from the sin and restore their relation with God. The communal interest behind the adat punishment is to restore the social equilibrium.

The Aceh Shari'a's legal conception of *zina* is rather based on the theological objective to make sure that Aceh's Muslim community lives under God's order. This new form of interpretation of the Divine Shari'a has been arranged in such a way that the state faces considerable shortages in financial and human resources to support its enforcement. The limitation of adat is that it not enforceable on village members with a migrant background. The district government of Central Aceh has combined these two different legal systems to compensate their respective limitations in governing public morality. This has produced a system of interlegality, in which adat uses provisions of Aceh Shari'a to legitimize its enforcement against those who do not fall under its jurisdiction. The district government has delegated power to adat institutions at the village level to take over the state's legal jurisdiction and provided funding for the enforcement of adat law. This has reinforced the authority of the village government vis-à-vis the village community.

Using the *Dana Desa* disbursed by the central state, the district government has made the adat institutions even more autonomous. The recognition of non-state law (adat) has moved adat institutions further away from control by the district government and the local community. As a result, in some fields adat institutions' legal practices have gone against central state projects such as discouraging underage marriage.

Chapter V discusses how in addition to the adat law and Aceh Shari'a national penal law operates in the same field and dynamically interacts with both legal systems. These three legal systems have made use of each other to support their interest in public order. These three legal systems of penal law: adat, *jinayah* (the Islamic penal law incorporated in Aceh Shari'a), and Indonesian national penal law are creatively managed by legal agents (police, public prosecutor and paralegals/activists) to realize their interests.

Non-state legal actors play a significant role in developing local knowledge on sexuality and legal choice and how they are regulated in the three legal systems discussed. Sometimes, the non-state actors manage to break the formal legal boundary between adat, Aceh Shari'a and national penal law and move cases from one jurisdiction into another. However, this does not mean that these three legal systems have been contesting one another. Conversely, they have complemented and become alternatives to one another. The state, non-state legal actors and adat officials observe certain limits of each legal system and shop the forums available or apply legal differentiation. In some cases, legal actors have managed to make sure that one defendant received two (complementary) punishments from two different legal systems. While this may look like it goes against the principle of *ne bis in idem* in fact the punishments were each of a different nature and complementary (for instance a fine and a prohibition to return to the place where the victim of sexual abuse lived). Among the actors involved, the police was the most influential in directing the use of the three legal systems. They decided which legal system suited best for the victims', offenders' and their own interest. They were the bridge between legal systems in the pluralism of penal law in Aceh. Public prosecutors further decided whether to make an indictment on the basis of national penal law or on the basis of Aceh Shari'a.

These legal developments in Gayo suggest that state recognition of non-state law (adat law) as part of the state legal system may give a high degree of autonomy to adat institutions. This goes against the frequent claim that recognition of adat always leads to more control by the state. The reason is that state legal agencies cannot penetrate and make interventions in adat institution. In other words, it strengthens the Semi-Autonomous Social Field of the adat institutions. Similar situations have been described in other parts of the world. In her research on South Africa, Barbara Oomen showed that when the state recognizes non-state law (customary law) and gives chiefs the authority to control affairs on land management, the chiefs use such authority to assert their dominance and position themselves as the only true representatives of their communities to the central government. My findings are in line with this argument, contrary the argument by John Griffiths that, state recognition over non-state legal systems subjects non-state law to the state's command