DYNAMIC LEGAL PLURALISM IN MODERN INDONESIA: 
THE STATE AND THE SHARIA (COURT) IN THE CHANGING 
CONSTITUTIONS OF ACEH

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I. INTRODUCTION

The plural legal constellations in Aceh have been present since before Indonesia’s independence. During the Aceh’s sultanates, Islamic shari’a and adat co-existed and they were hardly distinguished. In fact, there was a widely shared framework suggesting the harmony between Islamic shari’a and adat: *hukom ngon adat, lagee zat ngon sifeut* [the relationship between shari’a and adat is similar to the link between the substance of something and its characteristic] (Munir 2003). The presence of the colonial legal regime at the turn of the twentieth century in Aceh, however, made demarcation between Islamic shari’a and adat much more observable. The way the Dutch appreciated adat institutions and adat leaders, while in the same time attempted to appropriate Islamic shari’a and Muslim leaders, mostly due to political reasons, had fundamentally split the close relationship, at least in theory, they both had before. Additionally, the fierce tension between the *ulebalang* (local aristocrats) and the *ulama* (religious scholars), as a result of the Dutch tactics of co-option and divide and rule, had only exacerbated the relationship between adat and Islamic shari’a in Aceh (Syamsuddin 1985).

In the post-independence Indonesia, the colonial legacy of legal pluralism continued with some modifications. While adat legal institutions (*peradilan desa*) were largely eliminated in the 1950s for the sake of Indonesian unity and integrity, adat norms are retained and applied by the general state courts (*pengadilan negeri*). On the other hand, limited areas of Islamic sharia are upheld by the religious state court (*pengadilan agama*). With this legal policy, Indonesia has embarked on the path towards legal pluralism, allowing a variety of legal sub-systems to be operative in the realm of the single sovereign power of the state (Salim 2006, Lubis 2003). These plural legal orders, paradoxically, have been founded on the Indonesian legal policy that promotes the modernization of law,1 in which legal centralism and legal positivism are the key themes. This paradox is not only existing in the formal legal institutions, but also observable in Indonesian national legislations. The Basic Agrarian Law (UU 5/1960) and the Marriage Law (UU 1/1974) are clear examples of how the policy of legal centralism results in the practice of legal pluralism.

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1 Legal modernity emphasizes the importance of the legislative organs of the state as the lawmaker and rejects the authority of any law with a source outside the state unless it has been given the force of law by the state. See Cammack (1999).
In fact, since early 1990s, Indonesian legal policy has dramatically shifted to include the principle of so-called 'legal distinction', where particular groups of citizens would have certain specific laws applicable for them exclusively (Salim and Azra 2003). This situation has led Indonesia to further develop a national legal system that segregates citizens based on their respective religious backgrounds (Salim 2006), thus paving the way for legal pluralism to deepen in which religious identity turns to be an important legal basis in some areas.

The issue of pluralism of values as well as plural legal constellations in Aceh is not new. Bowen’s work (2003) has discussed Muslims struggle to reconcile different sets of social norms and laws, including those derived from Islam, local customs, and contemporary ideas about gender equality in Aceh in particular and in Indonesia in general. He identified the ways in which citizens take account of their own pluralism of values as they go about living their lives as Muslims in communities in Aceh and in the Indonesian nation. Additionally, Bowen found that the state is trapped in a difficult position between recognizing the respective autonomy of religions to regulate themselves on the one hand, and claiming that the state has a right to determine which religious norms may operate on the other.

This paper would like to investigate further the extent to which legal pluralism is increasingly developed in Aceh, especially in the post-New Order era. Focusing on the growing role of shari`a as well as the expanding authority of shari`a court in Aceh, this paper is aimed at demonstrating the dynamics of legal pluralism in Aceh. In such dynamic legal pluralism, there is a constant reconstruction and hybridization processes within both state and non-state laws. According to Yilmaz (2005), there are some possible identified scenarios as follows: First, state law can destroy non-state (local) laws through the introduction of new concepts and legal solutions. Second, non-state law continue to flourish, with most members of the groups recognizing its authority and considering official state law is irrelevant to their lives. Third, local law and state law may co-exist so that disputants can choose either state law or local law according to their advantage calculations. Fourth, state law can delineate new areas of official social control by moving through legislation into areas previously unregulated by state law. And the last, state law may codify previously unwritten social control or local law, raising this non-state law to the status of state law which can be used in the official courts.

As pointed out by Benda-Beckmann (2006: 19), “elements of one legal order may change under the influence of another legal order, and new, hybrid or syncretic legal forms may emerge and become institutionalized, replacing or modifying earlier legal forms or co-existing with them”. This paper will argue that changes in Aceh’s plural legal orders, where the shari`a (court) now plays an important role, has not simply to do with the central state's concession, but largely due to the changing constellations that are now concurrently taking place in Aceh: (1) the transition to peace process, (2) the post-tsunami recovery process, and (3) the internationalization of Aceh. In short, once a constellation changes, it leads to a change in another constellation.

This paper will examine how these three simultaneously changing constellations have shaped the dynamics of legal pluralism in Aceh. Although all these changing constellations have been closely interrelated with each other, the post-tsunami
reconstruction process has been an important axis that accelerates current changes in plural legal constellations in Aceh. The following section will present a brief overview of legal pluralism. The third section will briefly trace the historical background of shari’a in Aceh. The fourth section will discuss how each of changing constellations in Aceh has created an opportunity for the shari’a (court) in Aceh to expand its jurisdiction. The last section will provide a short review about the future dynamics of legal pluralism in light of those changing constellations in Aceh.

II. A BRIEF OVERVIEW OF LEGAL PLURALISM

Legal pluralism has emerged as a scholarly topic only since the early twentieth century. Despite its widespread use by anthropologists, sociologists, legal scholars and political scientists, the term ‘legal pluralism’ is differently understood and applied. Following Benda-Beckmann (2006), this paper would like to employ legal pluralism mostly as an analytical tool rather than as an explanatory theory. As an analytical approach, it not only helps distinguish variations within the empirical complexities of bodies of law and their interrelationships (Benda-Beckmann 2006: 14), but also reveals the political nature of the discussion of law and legal pluralism and points to the inevitable political dilemmas and logical constraints of political actors (Benda-Beckmann 2006: 17).

By and large, there are, at least, two major understandings of what the term legal pluralism is meant. First is ‘weak legal pluralism’ in which the sovereign commands different bodies of law for different groups in the population (Griffith 1986). In this case, legal pluralism is considered a legal arrangement where different groups of the population are defined in terms of their respective ethnicity, religion, nationality or geography. Legal pluralism is thus justified as a technique of governance on pragmatic grounds (Griffith 1986: 5). It is also often understood as a situation of the co-existing two or more laws that interact in the legal modernization programs of nation states (Hooker 1975). This weak legal pluralism is seen as too state-centered and does not pay enough attention to the dynamic interaction between legal orders (Fitzpatrick 1983) or to the relationship between non-state ‘semi-autonomous social fields (Moore 1978; Griffiths 1986).

Second is ‘strong legal pluralism’ where neither all law is state law nor administered by state institutions. Instead, it is the co-existence of legal orders in a social setting which do not belong to a single system (Griffith 1986: 8). These different legal orders exist together and do not necessarily have to recognize or negate each other (Moore 1978). In this ‘new’ legal pluralism, the main focus has shifted from examining the effect of law on society or otherwise to conceptualizing a complex and interactive relationship between official and unofficial laws (Merry 1988). Santos (1987) also shares this view of legal pluralism arguing that it is a conception of different legal spaces superimposed, interpenetrated, and mixed in people’s minds as much as in their actions.

Various nomenclatures on the binary distinction between weak vs. strong types of legal pluralism above also include: classic vs. new, early vs. late, juristic vs. sociological, and state law pluralism vs. deep legal pluralism (Woodman 1999). In the former type of legal pluralism, the only legal pluralism that can exist is one where the
state recognizes multiple sources, systems, or regimes of law, while in the latter type, legal pluralism is a social fact and is not dependent on its recognition by the state (Griffiths 1986: 17). Or in Woodman’s words, “the only difference between the two types of legal pluralism is that the different bodies of law in ‘state law pluralism’ are branches of one larger body of norms, whereas in the case of ‘deep legal pluralism’ state law and the other of law or laws have separate and distinct sources of content and legitimacy” (Woodman 1999: 10). Instead of prioritizing or overlooking one type of legal pluralisms from another, this paper prefers to consider different types of legal pluralism interactive orders in which they are operating in the context of dynamic legal pluralism (Yilmaz 2005).

III. A HISTORICAL SKETCH OF THE SHARI`A (COURT) IN ACEH

In the modern nation-state era, unification and homogenization attempts of states often clash with local differences, ethnic diversities, indigenous normative orderings and religious laws. This has much to do with the fact that a modern nation-state “seeks to unite the people subjected to its rule by means of homogenization, creating a common culture, symbols, values, reviving traditions and myths of origin, and sometimes inventing them” (Guibernau 1996: 47).

One important factor that deepens plural legal orders is ‘resistance from the periphery or challenge of the local’ (Yilmaz 2005: 26-27). Current plural legal constellations in Aceh have been an accumulated result of prolonged struggle of the periphery against the dominant central state. The relationship between Aceh (the periphery) and the national government (the centre) in the formative early years of Indonesia was crucial to that development.

As set out by Benda (1970): “[u]nder the banner of a distinctly Islamic local and ethnic patriotism, Aceh thus entered independent Indonesia as a virtually autonomous imperium in imperio.” The first years after the independence of Indonesia in 1945 found the Acehnese ulama (religious scholars) controlling political positions in the regional government. For the ulama, it was now time to realize “their primary aim [which] was to apply as much Islamic law as possible in Acehnese society” (Syamsuddin 1985: 111). The willingness of the Acehnese, the ruling ulama in particular, to integrate Aceh into Indonesia is partly because majority of the population in the other regions of Indonesia was Muslim. Hence, the new republic of Indonesia was considered to have similar and unified identity with the Acehnese. This integration was also very much determined by the belief that an independent Indonesian state would allow the Acehnese to officially uphold Islamic law in their region (Salim 2004).

As far as legal pluralism is concerned, the first challenge of the periphery to the centre was the demand for the re-establishment of an autonomous Islamic court or the Mahkamah Syar‘iyah in Aceh. The shari’ a court is not a novel institution in Aceh. Its long pedigree can be traced back to the institution of Qadi Malik al-Adil in the Sultanate of the sixteenth century (Hadi 2004). During the colonial time, the Dutch replaced the shari’a court with the Musapat Tribunals (Angelino 1931). Later, under the Japanese occupation, the court was given the Japanese name, Syukyo Hoin, but with a limited jurisdiction, mostly in private matters (Ismuha 1980).
Despite the Governor of Sumatera, Teuku Mohammad Hasan, approved the reinauguration of shari’a court in Aceh in 1947, the central government did not recognize it arguing that Governor’s instruction was not sufficient to justify the establishment of that court. The rebellion led by Teungku Daud Beureu-eh in 1950s, and then the proclamation of Aceh as a separate territory from Indonesia and to be a part of the Islamic State of Indonesia (NII) declared by Kartosuwirjo, was in part a result of the discontent among the Acehnese elite over the reluctance of the national state to allow the implementation of shari’a in Aceh (Salim 2004). It was not until 1957 that the shari’a court in Aceh finally obtained a clear legal basis, with the issuance of the Government Regulation (Peraturan Pemerintah) 29/1957, though its jurisdiction remained similar to that in colonial times (Lev 1972: 81-83) and was very ambiguous.

That the shari’a courts co-existed in the province of Aceh as well as in some districts, along with the general state court, do not necessarily imply that the role of shari’a at both level of the state and society was fully functional. The status of special region granted to Aceh in 1959 had no substantive legal effect for undertaking the agenda of state law pluralism in Aceh. This distinct status immediately evaporated into the air. According to Boland (1982: 185), the central government held the view that permitting state law pluralism in particular region would lead to the end of the unitary Indonesian state. Thus, it was not surprising that, on the ground of ‘unity and the unitary nation’, the New Order regime later reinforced legal centralism by issuing Law 5/1974 on the Regional Government which effectively abolished the special status of the province of Aceh, though the ‘special region’ label remained on paper (Salim 2004).

There was a minor development about the nomenclature of the Mahkamah Syar’iyah that took place after Law 7/1989 on the Religious Judicature passed. Its title was changed to Pengadilan Agama (religious court), as one of the purposes of the Law was to unify the structure and the status of the Islamic courts throughout the country (Cammack 2003). However, as will be discussed in detail later, new political developments in the post-New Order era revived the previous name of the shari’a court of Aceh, the Mahkamah Syar’iyah, and have enlarged its jurisdiction to include a number of minor shari’a criminal offences (jinayah).

The whole episode of the emergence of the shari’a court in Aceh since Indonesia’s independence to the post-Soeharto period demonstrates one of the contests between legal centralism versus legal pluralism. For the centre, which sought to apply legal modernity, either weak or strong legal pluralism is seen as to threaten the authority, the integrity and the sovereignty of the modern nation-state. On the other hand, the periphery considers the state’s homogenizing project as a threat to its distinct identity, and hence, insists to have formally plural legal orders. This mode of interaction clearly depicts the political nature and the inevitable political dilemmas faced by political actors, both the central government and local leaders. The contest has not yet been concluded, and, therefore, the following section will discuss how plural legal orders in Aceh have been established thanks to the changing constellations that have taken place since the last decade.
IV. THE SHARI`A (COURT) IN THE CHANGING CONSTELLATION OF ACEH

Both recent historical developments and extraordinary events have caused many changes in the socio-legal and political constellations in Aceh. Three modes of changing constellations in Aceh, as mentioned earlier, the transition to peace process, the post-tsunami recovery process, and the internationalization of Aceh, have provided political incentive as well as legal institutionalization process, especially for the extension of the authority of the shari`a court in Aceh.

Political incentive includes a series of Enactments in the post-Soeharto era that granted a special autonomy to Aceh. With this special autonomy, not only adat institutions were revived and recognized, but sharia-supporting bodies were established and reinforced. For instance, the local ulama council was transformed to be the Ulama Consultative Assembly (MPU, Majelis Permusyawaratan Ulama) that holds legislative authority purportedly equal to the position of provincial legislature. Additionally, a new organ, which is the Islamic Shari`a Department (DSI, Dinas Syariat Islam), was established within provincial as well as district bureaucracy to manage the implementation of shari`a in Aceh. And the last, the special autonomy of Aceh also allowed the transformation of the local religious court (Pengadilan Agama) to its ‘new shape’ with wider jurisdiction that other religious courts outside Aceh do not enjoy.

Legal institutionalization process consists of the dynamic relationship between the periphery and the centre as will be discussed in the section below. It is worth remarking, however, that compared to the other authorities at the centre, the Supreme Court, the highest legal institution in Indonesia, has been the most leaning in extending its assistance towards plural legal institutionalization at the periphery. This has much to do with internal dynamics within Indonesian legal system in the post-New Order period.\(^2\) One obvious change resulted from this dynamics was the growing Islamization of the Supreme Court. Although further study is needed to confirm this contention, one may assert it based on the fact that among more than 50 Justices of the Supreme Court, 15 of them, at least, have shari`a training or Islamic studies backgrounds.\(^3\)

The Transition to the Peace Process

The consolidation of plural legal orders in Aceh was in part a result of series efforts to bring peace to Aceh. The willingness of the central government to allow legal pluralism in Aceh appeared to become an initial step towards political peace process. The central government believed that greater local authority over religion, customs, and education would overcome the widespread problem resulted from bloody conflict in Aceh. For this reason, the Habibie government (1998-1999) enacted Law 44/1999 on the Special Status of the province of Aceh that formally acknowledges the special status of Aceh. Two years later, the implementation of shari`a in Aceh was officially declared through Law 18/2001 on the Special Autonomy for the Province of

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\(^2\) This was true especially following the passage of Law 35/1999. This particular Law is the amendment to Law 14/1970 on the Fundamental Rules of Indonesian Judiciary. The main aim of this amending Law is to integrate and manage different courts, which were previously supervised by different ministries, under the auspice of the Supreme Court (Salim 2003).

\(^3\) Interview with Rum Nessa, a Secretary of the Supreme Court, 29 July 2004.
Nanggroe Aceh Darussalam. This Law, among other things, entailed the (re-)establishment of a special court, the Mahkamah Syari'iyah. Additionally, only just last year another statute (Law 11/2006 on the Governance of Aceh) was passed to reconfirm the jurisdiction of the Mahkamah Syari'iyah.

In order to understand the dynamics of the relationship between different legal institutions that led to the consolidation of plural legal orders in Aceh, the following pages will present the way the newly revived shari`a court of Aceh has its jurisdiction expanded.

**Plural Legal Institutionalization**

During the New-Order period, the Religious Court (the Mahkamah Syari'iyah) in Aceh has co-existed with the General State Court (Pengadilan Negeri). While the Religious Court exercises its jurisdiction mostly in family matters (marriage, divorce, inheritance and child guardianship), the General State Court examines a broad range of legal matters, such as family issues of non-Muslims, commercial disputes, criminal offences, land and labor disputes. The post-New Order era is witnessing the expansion of the Mahkamah Syari’iyah’s jurisdiction, while in the same time it is also seeing the gradual diminution of the jurisdiction of the General Court of Aceh. This clearly indicates that a change in one legal order influences another legal order.

The shift of jurisdiction in this local plural legal orders has been an outcome of the changing legal and political constellations in Aceh. This process began for the first time at the discussion of Law 18/2001 in the Legislature. It was not clear what form the Mahkamah Syari’iyah should ideally take. The provisions of the Law (Article 25 and 26) do not specify whether the Mahkamah Syari’iyah would be a part of the existing religious judicature (Pengadilan Agama) or the general judicature (Pengadilan Negeri). There were different views among the Acehnese regarding the form of the Mahkamah Syari’iyah that would be developed.

First, many wanted to establish the Mahkamah Syari’iyah as a replacement for the existing religious courts. The historical relationship between the Mahkamah Syari’iyah and the religious court was perhaps the most important factor in this decision. Under this scheme, the structure and personnel of the Pengadilan Agama were transformed into that of the Mahkamah Syari’iyah, but with a wider jurisdiction that now included certain criminal acts, such as gambling, consumption of liquor and khalwat (unlawful proximity between unmarried couple). By transforming the religious court to become the Mahkamah Syari’iyah, the proponents of shari‘a thought that they could revive their historical authenticity, as well as a unique Acehnese identity.

Second, few proposed that the Mahkamah Syari’iyah would not be a new institution but a grouping umbrella for all kind of existing courts (including the General Court, the Religious Court, the Military Court and the Administrative Court) in the province of Aceh. Each of those courts would handle litigation in accordance with their respective jurisdictions under the name of the Mahkamah Syari’iyah. In addition, the jurisdiction over any new provision enacted in the Qanun would be allocated in accordance with each court’s authority respectively. Instead of being handled by the Religious Court, the offence of gambling, for example, would be dealt with by the General Court. In this sense, the Mahkamah Syari’iyah would not be a physical entity, but an ad hoc institution that organized and facilitated judges from various courts to
settle disputes and litigation arising from the enactment of the Qanuns in Aceh. In short, the re-establishment of Mahkamah Syar’iyyah would not require the foundation of a new court, but would merely complement, for not saying ‘Islamize’, the rules and procedures of the existing courts, consistent with the implementation of shari’a in the region (Sarong 2002). However, this idea did not meet with a positive response, as it was considered too simple and not sufficiently prestigious for the special autonomy of Aceh.

In 2003, President Megawati issued Presidential Decree 11/2003 to ‘further regulate’ the operation of the Mahkamah Syar’iyyah.\(^4\) This regulation, however, contradicted Article 31 of Law 18/2001 on the Special Autonomy of Nanggroe Aceh Darussalam, which states that any further implementing rules would be in the form of a Government Regulation or Qanun.\(^5\) Opposing this Presidential Decree, Abubakar (2004: 43-44) argued:

> [i]f the establishment of the Mahkamah Syar’iyyah is regarded as within the authority of the central government, then [it] must be enacted in the form of a Government Regulation…. On the other hand, if [the foundation of the Mahkamah Syar’iyyah is] considered within authority of the Provincial Government, [the Mahkamah Syar’iyyah] should be ratified by the Qanun.

The form of legal enactment is also crucial, because the higher the position in the formal legal hierarchy of a regulation, the more authoritative and the broader its scope and influence.\(^6\) The fact that the Mahkamah Syar’iyyah was regulated by a lower status instrument (Presidential Decree) decreased its importance in the implementation of shari’a in Aceh.

**Ambiguous Jurisdiction**

Many proponents of Islamic shari’a in Aceh have treated with scepticism the central government’s offer to re-establish an independent Mahkamah Syar’iyyah in Aceh. This was mainly because of the ambiguous jurisdiction granted to the Mahkamah Syar’iyyah. Article 25 (2) of Law 18/2001 mentioned that the Mahkamah Syar’iyyah’s


\(^5\) The text of Article 31 of Law 18/2001 is stated as follows: “(1) Ketentuan pelaksanaan Undang-Undang ini yang menyangkut kewenangan Pemerintah ditetapkan dengan Peraturan Pemerintah” [The Implementing rules of this Law so long as they related to the authority of the government would be provided by Government Regulation. “(2) Ketentuan Pelaksanaan Undang-Undang ini yang menyangkut Pemerintah Provinsi Nanggroe Aceh Darussalam ditetapkan dengan Qanun Provinsi Nanggroe Aceh Darussalam” [The Implementing rules of this Law provided that they related to the authority of the Provincial Government of Nanggroe Aceh Darussalam would be enacted by Qanun of the Province of Nanggroe Aceh Darussalam].

\(^6\) MPR Decree III/2000 on the Sources of Law and the Hierarchy of Regulations provides that the legal hierarchy in Indonesia, from top down is: (1) Undang-Undang Dasar or Constitution, (2) Undang-Undang or Law, (3) Peraturan Pengganti Undang-Undang (Perpu) or the Substitute Regulation for Law, (4) Peraturan Pemerintah or Government Regulation, (5) Keputusan Presiden or Presidential Decree, (6) Peraturan Daerah or Perda/Qanun. However, Law 10/2004 on the Formation of Legal Enactments modified and replaced this scheme as follows: (1) Undang-Undang Dasar or Constitution, (2) Undang-Undang or Statute and Peraturan Pengganti Undang-Undang (Perpu) or the Substitute Regulation for Law, (3) Peraturan Pemerintah or Government Regulation, (4) Peraturan Presiden or Presidential Regulation, and (5) Peraturan Daerah or Perda/Qanun.
jurisdiction was subordinated to the prevalent national legal system. The text of Article 25 (2) stated:

“Kewenangan Mahkamah Syar’iyah…didasarkan atas syariat Islam dalam sistem hukum nasional, yang diatur lebih lanjut dengan Qanun Propinsi Nanggroe Aceh Darussalam” [The jurisdiction of the Mahkamah Syar’iyah…is based on Islamic shari’a within the national legal system, which will be further arranged through the Qanun of the province of Nanggroe Aceh Darussalam].

In this Article we find two phrases that seem to contradict each other. On the one hand, the first phrase “Islamic shari’a within the national legal system” emphasises that the jurisdiction of the Mahkamah Syar’iyah over shari’a matters should be solely and completely within the scope of the secular Indonesian legal system. This implies that the national legal system must be given priority over the Islamic shari’a. On the other hand, the phrase “which will be further arranged through the Qanun” in that Article, suggests that the jurisdiction of the Mahkamah Syar’iyah should be based on what is stated in the Qanun.

The problem that emerges is the limits of the jurisdiction of the Mahkamah Syar’iyah. Under the first phrase (“Islamic shari’a within the national legal system”), the limit of the jurisdiction is the national legal system itself. This means that so long as the national legal system has accommodated the implementation of particular aspects of shari’a, these aspects fit under the jurisdiction of the Mahkamah Syar’iyah. Because the national legal system has not recognised many aspects of shari’a, this jurisdiction is very limited. The limit of the jurisdiction of the Mahkamah Syar’iyah under the latter phrase is, however, provincial legislature enactments in the form of the Qanun. Provided that a particular shari’a rule was enacted in a Qanun, even if it is not acknowledged by the national legal system, it is part of the Mahkamah Syar’iyah’s jurisdiction, which would thus be broad.

The ambiguity of the Mahkamah Syar’iyah’s jurisdiction under Law 18/2001 is only the beginning of the problem. If Law 18/2001 made the jurisdiction of the Mahkamah Syar’iyah vague, the Presidential Decree 11/2003 went even further, by diminishing the broad jurisdiction of the Mahkamah Syar’iyah as stated in the Qanun 10/2002 on Islamic Shari’a Justice. Article 49 of this Qanun provides that the jurisdiction of the Mahkamah Syar’iyah will include ahwal al-syakhshiyyah (personal matters), muamalat (trade and commerce) and jinayah (criminal acts). This Qanun was passed following the ambiguity of the Mahkamah Syar’iyah’s jurisdiction in Law 18/2001. The ambiguity of the Mahkamah Syar’iyah’s jurisdiction mostly lies in managing the cases that related to criminal offences (jinayah). The Qanun was enacted partly to clarify this ambiguity. However, the Presidential Decree 11/2003, which was issued five months after the enactment of that Qanun, limited the jurisdiction of the Mahkamah Syar’iyah to “that of the Religious Court plus any other legal authority that related to social life in rituals (ibadah) and activities that glorify Islam (siyar Islam) as stated in the Qanuns.” Given that the Presidential Decree has a higher legal status than the Qanun (which is a Perda or Regional Regulation) and in view of the fact that the Mahkamah Syar’iyah’s jurisdiction over jinayah cases (criminal acts) was

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7 See Article 3 (1) of Presidential Decree 11/2003 on the Mahkamah Syar’iyah.
not mentioned in the Presidential Decree, it is reasonable to infer that the Decree was intended to invalidate the jinayah jurisdiction of the Mahkamah Syar’iyyah as found in the Qanun 10/2002. This particular episode and the following discussion clearly show how the executive branch of the centre was reluctant to concede the consolidation of plural legal orders in Aceh.

The Presidential Decree not only blurred the jurisdiction of the Mahkamah Syar’iyyah, but also lacked any provisions or explanation on the role of other important legal institutions, such as the police and the Public Prosecutor (Kejaksaan Negeri), and their interaction with the Mahkamah Syar’iyyah. Their involvement was necessary for the Mahkamah Syar’iyyah to function in exercising of its new additional jinayah jurisdiction (Abubakar 2004). And last, the Decree lacked a provision that regulated the transfer of partial jurisdiction, the jinayah jurisdiction in particular, from the General Court to the Mahkamah Syar’iyyah. This was necessary to determine which cases should come under the jurisdiction of the Mahkamah Syar’iyyah and which should remain with the General Court. A provision of this kind is obviously needed to resolve disputes relating to jurisdiction between the General Court and the Mahkamah Syar’iyyah in the future.

The Futile Solution to the Ambiguity
Given these impediments to the Mahkamah Syar’iyyah in exercising its new additional jurisdiction granted by the Qanun, efforts have been taken to confirm the jurisdiction of the Mahkamah Syar’iyyah for jinayah acts. Inclusive in these efforts was the arrangement to make the police and the Prosecutor Office actively involved with the Mahkamah Syar’iyyah in jinayah cases.

The first effort was to prepare a draft Government Regulation (Peraturan Pemerintah) on the Application of Islamic Shari`a Justice intended to implement Law 18/2001 on the Special Autonomy of Nanggroe Aceh Darussalam. However, this effort failed as a senior official at the President Megawati’s Cabinet Secretary refused to validate it. In correspondence with the Coordinating Minister of Politics and Security and the Governor of the Province of Nanggroe Aceh Darussalam, the Cabinet Secretary stated that the Draft had been refused on the grounds that the essence of the provisions in the Draft were already dealt with in Article 15 (2) of Law 4/2004 on the Judicial Power. This Article states,

[p]eradilan Syariat Islam di Provinsi Nanggroe Aceh Darussalam merupakan pengadilan khusus dalam lingkungan peradilan agama sepanjang kewenangannya menyangkut kewenangan peradilan agama, dan merupakan pengadilan khusus dalam lingkungan peradilan umum sepanjang kewenangannya menyangkut kewenangan peradilan umum [Islamic Sharia Justice in the province of Nanggroe Aceh Darussalam is a special court within the structure of religious court, so long as its jurisdiction relates to the jurisdiction of religious court, and it is a special

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8 A copy of this draft Government Regulation is held by me.
9 The disapproval was expressed by a senior official of the Cabinet Secretariat (I have been asked to keep official’s name anonymous) at a meeting held on 21 April 2004 attended by representatives from different institutions such as the Supreme Court, the Ministry of Home Affairs, the Ministry of Justice and Human Rights, the Ministry of Religious Affairs and the National Police Force.
10 See Letter number B.41/Waseskab/05/2004 dated 7 May 2004 and Letter number B.53/Waseskab/06/2004 dated 10 June respectively. Copies of both letters are held by me.
court within the structure of the general state court, so long as its jurisdiction involves the jurisdiction of the general state court].

This brief provision was certainly not sufficient to regulate the role of the police and Public Prosecutor in the Mahkamah Syar’iyyah cases. The Cabinet Secretary explained, however, that if police personnel and public prosecutors in Aceh were in doubt about their tasks for the Mahkamah Syar’iyyah, legal guidance from the Head of National Police Force and the Attorney General respectively would be adequate. Obviously, this maneuver by the Cabinet Secretary was seen by the proponents of shari’ a as an attempt to thwart the implementation of shari’ a in Aceh in general and the operation of Mahkamah Syar’iyyah in particular.

According to the Cabinet Secretary’s letter, the initiative to examine the jinayah case now went to the public prosecutor, but the Office of the Provincial Prosecutor (Kejaksan Tinggi) seemed ambivalent. The Provincial Prosecutor argued that in order to submit a jinayah case to the Mahkamah Syar’iyyah, a particular legal foundation (a Government Regulation) would be required, although, in fact, Article 17 Qanun 11/2002 provides that the public prosecutor has an obligation to investigate jinayah offences. This arrangement was, however, regarded by the Provincial Prosecutor as too weak (as the Qanun have a lower legal status than a Government Regulation) and also because it omitted detailed procedures on how to carry out the investigation on jinayah offences.

It was suspected, however, that the Provincial Prosecutor lacked good faith and did want to support the implementation of shari’ a in the region and the upholding of jinayah rules in particular, despite there being a provision (Article 39) in Law 16/2004 on the Prosecution, stating that the authority of the public prosecutor includes offences regulated by Aceh’s Qanun. In response to this suspicion, a meeting between advocates for the implementation of shari’ a in Aceh, such as the chief of the Mahkamah Syar’iyyah and chairman of the Office of Islamic Shari’ a (DSI, Dinas Syariat Islam) and the Head of the Provincial Prosecutor’s Office on 9 June 2004, it was finally decided that by August 2004, at the latest, the public prosecutor should be ready to submit a jinayah case to the Mahkamah Syar’iyyah of Banda Aceh. However, until the Tsunami hit Aceh on 26 December 2004, there had no jinayah cases presented to the Mahkamah Syar’iyyah.


12 The Article says, “Kejaksaan berwenang menangani perkara pidana yang diatur dalam Qanun sebagaimana dimaksud dalam Undang-Undang nomor 18 tahun 2001 tentang Otonomi Khusus bagi Provinsi Daerah Istimewa Aceh sebagai Provinsi Nanggroe Aceh Darussalam, sesuai dengan Undang-Undang nomor 8 tahun 1981 tentang Hukum Acara Pidana.” [The Prosecutor is authorized to deal with a penal offence that regulated by Qanun, as within the meaning in Law 18/2001 on the Special Autonomy of the Province Aceh as Nanggroe Aceh Darussalam, in accordance with Law 8/1981 on Penal Proceedings].

13 See Jufri Ghalib’s Records of the Results of the Meeting held in the Provincial Prosecutor Office on 9 June 2004. Amongst those attended this meeting: Andi Amir Achmad (Head of the Provincial Prosecutor Office), Ayub Chandra (Head of Administrative Affairs of the Provincial Prosecutor Office), Alyasa Abubakar (Head of Dinas Syariat Islam), Soufyan M. Saleh (Chairman of the Provincial Mahkamah Syar’iyyah) and Jufri Ghalib (Justice of the Provincial Mahkamah Syar’iyyah). A copy of Jufri Ghalib’s Records is held by me.
Resolving Overlapping Jurisdiction

The other step taken by the proponents of *shari’a* in Aceh to overcome the barriers to the *Mahkamah Syar’iyah* exercising its *jinayah* jurisdiction was by coordinating various relevant provincial institutions, such as the Governor, the Police Force, the Prosecutor Office, the General Court and Provincial Office of the Ministry of Justice and Human Rights, to issue a Joint Decree (*Keputusan Bersama*). This was intended to synchronize their commitment to the implementation of *shari’a* in Aceh in general, and to the operation of the *Mahkamah Syar’iyah* in particular. The Joint Decree explains the tasks of every provincial institution in relation to supporting the *Mahkamah Syar’iyah*’s jurisdiction in examining the *jinayah* offence. This effort was effective and the Joint Decree was eventually signed, on 9 August 2004.\(^{14}\)

The last initiative involved inviting the Supreme Court to solve the problem of the overlapping jurisdiction between the *Mahkamah Syar’iyah* and the General Court, especially as regards *jinayah* offences. On 6 October 2004, the Supreme Court issued a Decree of the Chairman of the Supreme Court (*Surat Keputusan Ketua Mahkamah Agung*) that declared the transfer of partial jurisdiction of the General Court to the *Mahkamah Syar’iyah*.\(^{15}\) The Decree states that the transferred jurisdiction includes *muamalah* (civil) and *jinayah* (criminal) cases as provided for in the Qanuns.

The status remains unclear, however, of other criminal matters, such as theft, murder and rape, which are currently not yet dealt with in a Qanun and are still under the jurisdiction of the General Court. Will they automatically go under the jurisdiction of the *Mahkamah Syar’iyah* if the Provincial Legislature passed a Qanun relating to these offences in the future? In an interview that took place several weeks after the issuance of the above Decree of Chairman of the Supreme Court, Al Yasa Abubakar, the Head of the DSI, explained that no new regulation is necessary and that the current Decree is sufficient for future application.\(^{16}\) Should that precisely occur, the General Court would ironically become a ‘special court’ that adjudicates only cases brought by non-Muslims in Aceh for almost all other relevant legal aspects, either civil or criminal, that involve Muslim citizens will be under the Qanuns and examined by the *Mahkamah Syar’iyah*.\(^{17}\)

Despite the claims of the proponents of *shari’a* in Aceh, it remains debatable whether both legal instruments (the Joint Decree of Higher Provincial Institutions and the Decree of the Chairman of the Supreme Court) are, in fact, sufficient to grant the *Mahkamah Syar’iyah* jurisdiction to examine a *jinayah* offence. Both instruments, in fact, rank below the legal hierarchy of the Indonesian legal system.\(^{18}\) Apparently,

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\(^{14}\) This Joint Decree was signed by Governor, Head of Provincial Police Force, Head of Provincial Prosecutor Office, Chairman of the Provincial *Mahkamah Syar’iyah*, Chairman of the Provincial General Court and Head of the Provincial Office of the Ministry of Justice and Human Rights. A copy of this Decree is held by me.

\(^{15}\) See the Decree of the Chairman of the Supreme Court no. KMA/070/SK/X/2004 on the Transfer of Partial Jurisdiction of the General Court to the *Mahkamah Syar’iyah* of the Province of Nanggroe Aceh Darussalam.

\(^{16}\) Interview with Al Yasa Abubakar, 30 October 2004.

\(^{17}\) Labor matters and land disputes, so long as there is no inheritance matter involved, seem to be an exception and remains under the jurisdiction of the General Court, unless there are new Qanun enacted stipulating otherwise.

\(^{18}\) See footnote no. 5 above.
both legal instruments were provided as a type of the shortest possible route to the expanding jurisdiction of the *Mahkamah Syar’iyyah* in Aceh.

**The Post-Tsunami Recovery Process**

The Tsunami that severely damaged most coastal areas of Aceh on 26 December 2004 and caused great loss of life and building destruction, unpredictably created a momentum for pushing further the implementation of *shari’a* in the region. As mentioned, by the end of 2004, no *jinayah* case had been brought to the *Mahkamah Syar’iyyah*. All related cases, and gambling in particular, were dealt with in the General Court.

However, in the post-Tsunami period, the *Mahkamah Syar’iyyah* of the Bireuen District in fact had for the first time sentenced more than twenty people for gambling offences, and 15 of them were publicly caned in the mosque yard in Bireuen on 24 June 2005.  

**The Significance of Tsunami**

Whether or not the Tsunami was the decisive factor in speeding up the application of *shari’a* in Aceh depends much on the way the people conceived the catastrophe itself. Many Acehnese saw it as a spiritual test or even a punishment from God. They saw the Tsunami as creating an opportunity for accelerating the application of *shari’a* in Aceh. For them, the Tsunami was not merely a coincidence, but the will of God. There is a belief that through the Tsunami, God told the Acehnese to stop committing sinful deeds, to reconcile with each other and to return to religion as a way of salvation. In short, the Tsunami brought a message that the Acehnese people should comply with *shari’a* rules and the provincial governments should enforce its implementation in earnest.

Some other Acehnese, however, perceived the Tsunami merely as a natural process (*sunnatullah*), a geological shift under the earth. For them, the Tsunami has nothing to do with the implementation of *shari’a*. They argued that even if the *shari’a* was fully implemented in Aceh, there is no guarantee that another Tsunami would not hit Aceh in the future. As Aceh unfortunately was located in areas where earthquakes often occur, the Tsunami is one occurrence and the application of *shari’a* is another matter. This sort of argument was in line with the views of Alyasa Abubakar, the Head of DSI. He claims, in fact, that the Tsunami was not an escalating factor for the implementation of *shari’a* in Aceh. The caning punishment held in Bireuen was a result of the ongoing process of the implementation of special autonomy granted to Aceh. Alyasa has described the process chronologically.

The year 2001 saw the formal establishment of *Mahkamah Syar’iyyah* (*shari’a* court) through Law 18/2001 on the Special Autonomy for Nanggroe Aceh Darussalam; the year 2002 witnessed the enactment of the Qanun of the *Mahkamah Syar’iyyah* by the provincial parliament; the year 2003 saw the formal inauguration of the *Mahkamah Syar’iyyah*, which was transformed from the existing Religious Court, by the Presidential Decree; the year 2004 saw the formal transfer of some criminal

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20 Interview with Hamid Sarong, 14 June 2005; Interview with Safir Wijaya, IAIN professor and currently deputy chief of BRR, 17 June 2005.
jurisdiction (jinayat) from the General Court to the Mahkamah Syar‘iyyah by the Decree of Chairman of Supreme Court; and the year 2005 is seeing the operation of the Mahkamah Syar‘iyyah and the execution of its verdicts.21

This latter argument sounds much more logical than the interpretation based on the Tsunami being God’s will, as described above. However, in my view, to deny totally any significance to the Tsunami event would be too hasty. The post-Tsunami recovery process had created a context for the proponents of shari’a to emotionally pressure the executive branch of governance to more earnestly apply shari’a in Aceh. In fact, the caning in Bireuen could have never happened without support from the Acting Governor of Aceh, Azwar Abubakar,22 and the Attorney General’s consent. The approval of the Attorney General, Abdul Rahman Saleh, was also needed, since both the Provincial and the District Public Prosecutor had doubts. For this reason, some proponents of shari’a sought to meet the Attorney General in Jakarta to request his support for the implementation of the Mahkamah Syar‘iyyah’s jinayah jurisdiction, the caning punishment in particular.23 It was only after persistent efforts that they secured it.24 In sum, this changing constellation resulting from the post-Tsunami recovery process facilitated the next step of the increasing role of shari’a in Aceh.

The Shari’a Court’s Jurisdiction over Land Matters

Additionally, the post-tsunami recovery process offered another opportunity for the Mahkamah Syar‘iyyah to exercise its broad civil jurisdiction in land disputes particularly that involve inheritance matters. This specific case has only become enormous following the tsunami devastation in which many landowners, probably including their legitimate heirs as well, died or missing. As mentioned earlier, the litigation over land issues actually falls under the jurisdiction of the General Court. However, the Mahkamah Syar‘iyyah considered the Decree of the Chairman of the Supreme Court, which was discussed in the previous section, providing legal authority to adjudicate such land disputes (Saleh 2005). This Mahkamah Syar‘iyyah’s exercise was supported by the MPU, whose credibility in Islamic affairs is widely recognized. The MPU released a fatwa (3/2005) stating that the Mahkamah Syar‘iyyah is authorized to deal with disputes of ownership and of land inheritance.

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21 Interview with Alyasa Abubakar, 18 June 2005.
22 Azwar Abubakar, in fact, issued a Governor’s Decree (Peraturan Gubernur Provinsi Nanggroe Aceh Darussalam nomor 10 tahun 2005 on Petunjuk Teknis Pelaksanaan Uqubat Cambuk or the Technical Guidance of the Implementation of Caning) to signify his approval. A copy of this regulation is held by me.
23 The Attorney General gave his approval in an unscheduled meeting on 3 June 2005 at his office in Jakarta. Amongst those who attended the meeting with the Attorney General were Chairman of the Provincial Mahkamah Syar‘iyyah, Soufyan Saleh, Chairman of the Ulama Consultative Assembly, Muslim Ibrahim, Chairman of Aceh Adat Council, Badruzzaman Ismail, Chairman of Provincial Office of Islamic Shari’a, Alyasa Abubakar, and Chairman of Commission E of the Provincial Legislature. The presence of those leading figures in Jakarta was a coincidence of their return trip to Aceh from Semarang, where a conference on the Tsunami Devastation was held by the Bappenas. The role of Bappenas was crucial here. According to Muslim Ibrahim, who was present in the meeting with the Attorney General, initially the Attorney General had no time to meet, as he was very busy in that week. It was only with the help of Bappenas (the National Development Planning Agency) officials, whose institution is responsible for the post-tsunami rehabilitation and reconstruction of Aceh, that the meeting could be facilitated. Interview with Muslim Ibrahim, 17 June 2005.
24 See “Jaksa Agung Dukung Hukuman Cambuk di NAD”, Republika, 6 June 2005.
The Recognition to the Adat Judicature

Finally, as legal problems (e.g. inheritance, orphaned children and the status of properties whose owners were missing) rapidly increased in the aftermath of Tsunami, the MPU also issued a fatwa 2/2005 (9) suggesting that the Mahkamah Syar’iyah should allow village leaders to settle disputes over those issues before being examined by the shari`a court. In addition, the DSI published a number of special leaflets suggesting the village government to undertake some legal duties related to the post-tsunami recovery process. The adat judicature in Aceh reemerged following a series of national and regional regulations in the post-New Order era, including the Bylaw 7/2000 on the Administration of Adat Life, which details the structural arrangement as well as functional jurisdiction of this village justice.

Although Islamic shari`a greatly influenced the Acehnese adat, the shari`a-supporting institutions in Aceh had barely given such kind of formal and explicit recognition to the adat judicature before the tsunami disaster. Instead, what often found was the proponents of shari`a in Aceh frequently put an emphasis that adat must not contradict the dictates of shari`a. Whether the post-tsunami recovery process has created a special momentum for open recognition to the adat judicature at the village level remains in question, and, hence, deserves further scrutiny.

The Internationalization of Aceh

As Benda-Beckmann (2006) argued, changes within a set of relationship have tended to trigger changes in the others as well. The devastating tsunami has caused the exposure of Aceh to international humanitarian agents who came to help reconstruct the infrastructure of Aceh, including its legal order. These international actors not only interact with the state representatives, but also directly with their new partners at the local levels. In this case, it is important to recall what Turner (2006) has observed in Morocco, that, on the one hand, there is always a contest among international actors for the opportunity to implement their respective legal standards, and, on the other hand, there might be a local resistance towards programs carried out by those international institutions.

The presence of various international actors in the post-Tsunami Aceh might have introduced new values as well as social changes through their humanitarian assistances. The international donor agencies have closely involved in providing or facilitating dispute management at the village level. The extent to which international actors have been influential in deepening the existing configuration of legal pluralism in Aceh remain at issue. However, there is no much can be said at this stage as it is too early and still needs further intensive investigation. Nevertheless, it is worth noting here that in the plural legal constellations very often local people are overwhelmed by a flood of overlapping legal information delivered by the state organs or transmitted by international actors.

The other impact of the Tsunami that ushered Aceh into international attention was the acceleration of the peace process through the support of the international mediator, the Crisis Management Initiative, led by the former president of Finland, Martti Ahtisaari (Aspinall 2005). The Helsinki Agreement signed by the Government of Indonesia and the Free Aceh Movement (GAM) on 15 August 2005 marked an important stage of the whole peace process in Aceh and led to the end of prolonged conflict in the region.
The Helsinki Agreement served as legitimate basis for the reconfiguration of socio-political system in Aceh by implicating the issuance of the Law 11/2006 on the Governance of Aceh, which is seen to have explicit provisions on state law pluralism. This recent legislation has further consolidated plural legal orders in Aceh by formally recognizing adat institutions as well as Islamic legal institutions in undertaking dispute resolutions in their respective jurisdictions. It not only reinforced the status of adat institutions in Aceh, but also filled gaps and eliminated ambiguities in the previous regulations in relation to the application of shari’ah in Aceh. The legitimacy of shari’ah rules, the status of Mahkamah Syar’iyah and its jurisdiction have been strengthened and widened. In fact, it made the status of Mahkamah Syar’iyah higher, albeit symbolically, over the General Court. For instance, it is stipulated that the Governor, Mayor or Head of District in Aceh must take the oath of office at the presence of Chairman of the Mahkamah Syar’iyah.

V. CONCLUSION

The foregoing discussion has demonstrated the gradual shift from legal centralism to legal pluralism in Aceh in the sense that there has been an official recognition of non-state laws. The centre eventually acknowledges and accommodates the periphery’s demand by incorporating certain aspects of shari’a to be a part of the official legal system. Moreover, the pre-existing customary law and its institutions have been formally facilitated in the realm of state law pluralism. This case of Aceh shows that there has been a shift in legal pluralism itself from its description as separately distinct social fields that have different sources of content and legitimacy to plural legal orders that belongs to a single legal system. In other words, legal pluralism has transformed from sociological fact to legal reality. This reveals that, as I pointed out earlier, two different types of legal pluralism are not mutually exclusive, but in fact they are interactive in the context of dynamic legal pluralism.

The dynamics of legal pluralism in Aceh is largely due to the changing constellations that have concurrently taken place since the demise of the New-Order regime. While the transition to peace process began this dynamics and helped initiate plural legal orders in Aceh, the post-tsunami recovery process has accelerated and consolidated it. The post-tsunami rehabilitation process is the hub of this dynamic legal pluralism since it not only has pushed efforts to end the long-standing Aceh conflict, but also accidentally unlocked Aceh from the international isolation. Legal assistances provided by international actors may likely convey certain principles of international law, resulting to deepening legal pluralism in Aceh.

25 See Article 96-99 of the Law.
26 See shari’a-related provisions in this Law, such as on the application of Islamic Shari’a (Article 125 to 127); the shari’a court (Article 128 to 137); the MPU or ulama council (Article 138 to 140); the Police Force (Article 207 (1 and 4)); the Public Prosecutor (Article 208 (2) and 210; and Human Rights (Article 227 (1c)).
27 See Article 69c and 70c of Law 11/2006.
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