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DYNAMIC LEGAL  
PLURALISM IN  
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THE SHIFT IN PLURAL  
LEGAL ORDERS OF  
CONTEMPORARY  
ACEH

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# Dynamic Legal Pluralism in Indonesia: the shift in plural legal orders of contemporary Aceh<sup>1</sup>

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## Abstract

The paper discusses the relationship between *shari'a* courts and other courts in the framework of dynamic legal pluralism in Indonesia. It explains how the shift in plural legal orders in contemporary Aceh is taking place, in which the *shari'a* court now has an ascent position. The paper argues that this current order has not simply to do with the state's offer of the formal implementation of the *shari'a* in Aceh since 2001, but thanks largely to social and political processes that ensued the 2004 Boxing Day tsunami.

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## Introduction

The issue of pluralism, legal and otherwise, is not new in Aceh. John Bowen (2003) has discussed local struggles to reconcile different sets of social norms and laws, including those derived from Islam, local custom, and contemporary ideas about gender equality in Aceh, as well as elsewhere in Indonesia. Yet, the explanation of how a shift takes place within plural legal orders of Aceh remains beyond scholars' attention. As pointed out by Ido Shahar (2008), the time has come for understanding the relationship between *shari'a* courts and other tribunals in the framework of legal pluralism.

This paper seeks to accomplish the task by presenting a case of the increasing jurisdiction of *shari'a* courts, on the one hand, and the declining authority of civil courts in current Aceh, on the other. In Aceh, and elsewhere in Indonesia, two parallel courts (civil and religious ones) co-exist but operate in different domains. During the New-Order period (1968–1998), the state religious court (*pengadilan agama* or *Mahkamah Syar'iyah*) co-existed along with the state civil court (*pengadilan negeri*), the latter having a slightly higher legal standing. While the religious court exercises its jurisdiction mostly in family matters (marriage, divorce, inheritance, and child guardianship), the civil court examines a broad range of legal matters, such as family issues of non-Muslims, commercial, land and labour disputes as well as criminal offences. However, in the post-New Order era, an important change developed. The jurisdiction of the *shari'a* court expanded, while, on the other hand, the jurisdiction of the civil court in Aceh gradually diminished.<sup>3</sup>

This situation of dynamic legal pluralism is characterised by constant reconstruction and hybridisation processes of legal change. As pointed out by Franz and Keebet von 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.” Taking Aceh's plural legal orders as a case study, I would like to take this argument a bit further by showing that elements in plural legal orders actively interact and even contested one another, which at last leading to their shifted positions.

This paper will investigate the extent to which the shift in Aceh's plural legal orders has been developed and further consolidated. By studying the growing role of Islamic law and the expanding authority of *shari'a* courts in Aceh, I will contest that profound changes in Aceh's plural legal orders not simply have to do with the formal implementation of Islamic law by the state, but even more with the changing nature of Acehnese society since the 2004 Boxing Day tsunami.

The following section of this paper will briefly discuss the concept of legal pluralism and how plural legal orders came to exist in Indonesia, in Aceh in particular. The section afterwards will present the historical background of the co-existence of *shari'a* and customary (*adat*) law in Aceh before presenting the discussion on the extending jurisdiction of the *shari'a* court in the post-New Order period. As this paper argues, the state's offer for the formal implementation of *shari'a* in Aceh does not practically enhance the role of *shari'a* courts as its locus. In fact, the ambiguity as well as the confusion as a result of plural legal orders was observable in a number of ways. The section before the conclusion will point out how the constellation of existing plural legal orders changed particularly due to the post-tsunami social and political processes. The paper will then

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<sup>3</sup> See “Potret Buram PN Pasca UU PA” [The Gloomy Picture of the Civil Court in the Aftermath of Law on the Governance of Aceh], *Modus Tabloid Hukum dan Politik*, July 31, 2006.

conclude with a short outlook over the future dynamics of legal pluralism in light of these rapid social and political changes in Aceh.

### **Legal Pluralism**

Legal pluralism has become a topic of increasing scholarly interest since the early twentieth century, although understandings of this concept can differ significantly between anthropologists, sociologists, legal scholars, and political scientists. However, most scholars tend to employ a descriptive scale between ‘weak’ and ‘strong’ legal pluralism. Under the condition of a ‘weak’ legal pluralism, the sovereign commands different bodies of law for different groups in the population (Griffith 1986). In such cases, legal pluralism is considered a legal arrangement where different groups of the population are defined in terms of their respective ethnicities, religions, or other categorisations. Legal pluralism is in such systems often justified as a technique of governance on pragmatic grounds (Griffith 1986: 5). It is also often understood as a situation characterised by the co-existence of two or more laws that interact within the processes of modernisation programmes in nation states (Hooker 1975). This ‘weak’ legal pluralism is however often criticised for being too state-centred (Fitzpatrick 1983) and for neglecting important aspects of the complex relationships between non-state and ‘semi-autonomous social fields’ (Moore 1978, Griffith 1986).

‘Strong’ legal pluralism is characterised by situations in which all law is neither state law nor administered by formal state institutions. Rather, it presents, in a social setting, the co-existence of different legal orders, which do not belong to a single system (Griffith 1986: 8). These different legal orders exist together and do not necessarily have to recognise or negate each other (Moore 1978). In discussions of strong legal pluralism, the main focus has shifted from examining the effect of law on society or otherwise toward conceptualising a complex and interactive relationship between official and unofficial laws (Merry 1988, Santos 1987). Among various scholars, this distinction between ‘weak’ and ‘strong’ types of legal pluralism is expressed in terms of other binary oppositions, including: classic vs. new, early vs. late, juristic vs. sociological, and state law pluralism vs. deep legal pluralism (Dupret, Berger and Al-Zwaini 1999). 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 law or laws have separate and distinct sources of content and legitimacy” (Woodman 1999: 10). Following Franz and Keebet von Benda-Beckmann, this paper uses the idea of legal pluralism as an analytical tool rather than as an explanatory theory. Employed in this way, it not only helps distinguish variations within the empirical complexities of bodies of law and their interrelationships (Benda-Beckmanns 2006: 14), but also reveals the political nature of discussions of law and legal pluralism by pointing to the inevitable political dilemmas and logical constraints of various actors (Benda-Beckmanns 2006: 17).

### **Plural Legal Orders in Indonesia**

Plural legal orders in Aceh have been present since before Indonesia’s independence. During Aceh’s sultanates, Islamic law and *adat* co-existed and at times were hardly distinguished. In fact, there was a widely known Acehnese aphorism suggesting harmony between *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 Dutch colonial presence in Aceh at the turn of the twentieth century, however, contributed to sharper demarcations between *shari'a* and *adat*. Dutch policies tended to support *adat* institutions and *adat* leaders to the detriment of specifically Islamic interests in Aceh. Dutch agendas of cooptation as well as ‘divide and rule’ tactics further exacerbated tensions between the *ulebalang* (local aristocrats) and the *ulama* (religious scholars) as representatives of increasingly distinct spheres of *adat* and Islam respectively (Syamsuddin 1985).

In 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 judicial integrity, *adat* norms were retained and continued to be applied by the state civil courts (*pengadilan negeri*). At the same time some particular areas of Islamic law were applied by an Indonesian system of state religious courts (*pengadilan agama*). With such arrangements, Indonesia developed a complex system of legal pluralism that allowed a variety of legal sub-systems to be operative in the realm of a single sovereign state power (Lubis 2003). Somewhat paradoxically, these plural legal orders were founded upon the Indonesian legal policies designed to promote the modernisation of law, a process in which legal centralism and legal positivism are usually key themes. As pointed out by Cammack (1999), legal modernity emphasises the importance of the legislative organs of the state as the lawmaker and rejects the authority of any law from a source outside of the state unless it was given the force of law by the state. This paradox exists not only in formal legal institutions, but is 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 Indonesian policies appealing to legal centralism have actually resulted in legal pluralism.

Since the 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 exclusively to them (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, thus paving the way for a deepened legal pluralism.

### **The Deepening of Plural Legal Orders**

In the modern nation-state era, unification and homogenisation 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 homogenisation, creating a common culture, symbols, values, reviving traditions and myths of origin, and sometimes inventing them” (Guibernau 1996: 47). The various changes in the legal status and designation of *shari'a* courts in Aceh since Indonesian independence demonstrate one of the tensions between legal centralism and legal pluralism in the country’s history.

According to Yilmaz, 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 protracted struggle of the periphery (Aceh) against the

dominant central state (Morris 1983).<sup>4</sup> For the centre, which aspires to ‘legal modernity’, legal pluralism was seen as threatening the authority, integrity, and sovereignty of the modern nation-state. By contrast, the Acehnese often viewed the state’s homogenising project as a threat to its distinct identity and in response strove to preserve the institution of a distinct system of *shari’a* courts. The struggle, however, has not yet come to a definite conclusion.

#### *Early Development of Aceh’s Shari’a Courts*

The *shari’a* court is not a novel institution in Aceh, and in some sense analogous institutions can be traced as far back as the office of the Qadi Malik al-Adil in the sixteenth century (Hadi 2004). During the Dutch occupation, however, independent *shari’a* courts were replaced by the *musapat* tribunals<sup>5</sup> (Angelino 1931). Later, under the Japanese occupation, Islamic religious courts were given the Japanese name *syukyo hoin*<sup>6</sup>, which then had limited jurisdiction, mostly over private and personal status matters (Ismuha 1980).

The relationship between Aceh and the national government in the formative early years of Indonesia was crucial to the initial development of Aceh’s *shari’a* courts. The first years of independence of Indonesia after 1945 found the Acehnese *ulama* in control of key political positions in the regional government. For the *ulama*, it was now time to realise “their primary aim [which] was to apply as much Islamic law as possible in Acehnese society” (Syamsuddin 1985: 111). Because the majority of the population in the other regions of Indonesia was Muslim, the new republic of Indonesia was considered to share an Islamic identity with the Acehnese. It was the belief of the *ulama* that an independent Indonesian state would allow the Acehnese to formally implement Islamic law, and thus they demanded the establishment of an autonomous *shari’a* court or of the *Mahkamah Syar’iyah* in Aceh (Salim 2004).

After Indonesian independence, the Governor of Sumatera, Teuku Mohammad Hasan, had approved the reinauguration of *shari’a* courts in Aceh in 1947, however the Indonesian central government overrode that decision. Partially in response to the frustration of Islamic interests in Aceh, a rebellion led by Teungku Daud Beureueh arose in 1950s proclaiming Acehnese independence from Indonesia in connection with an earlier rebellious movement in West Java for the establishment of an Islamic State or Darul Islam led by Kartosuwirjo who regarded himself as Head of this Islamic State of Indonesia (Salim 2004). In an attempt to end this armed conflict, the Government Regulation (*Peraturan Pemerintah*) No. 29 of 1957 was issued acknowledging the *shari’a* courts in Aceh. Even then, however, their jurisdiction remained limited in ways similar to colonial times (Lev 1972: 81–83).

Further persuasive effort in 1959 to provide Aceh with ‘special region’ status had no substantive legal effect for the strengthening of *shari’a* courts in the province. According to Boland, the Indonesian central government held the view that permitting such institutions would threaten the power of the unitary Indonesian state (Boland 1982: 185). 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 of 1974 on Regional Government, which effectively abolished the special status of Islamic religious courts in the province of Aceh (Salim 2004). In 1989, with the passing of the Religious Judicature Act, the *Mahkamah Syar’iyah* in Aceh were re-designated as *pengadilan*

<sup>4</sup> Eric E. Morris (1983) made and developed the distinction between the centre to represent the national government and the periphery to indicate the position of the Acehnese.

<sup>5</sup> *Musapat* tribunal was a court established by the Dutch to uphold justice for the Acehnese.

<sup>6</sup> *Syukho hoin* was the other name for religious court during the Japanese occupation, 1942-1945.

*agama* (religious courts), as a further step toward unifying the structure and the status of the Islamic courts throughout the country (Cammack 2003). However, as will be discussed in detail later, social and political developments in the post-New Order era revived the earlier terminology of *Mahkamah Syar'iyah*, and enlarged its jurisdiction including a number of *shari'a* criminal offences (*jinayah*).

### **The Shift in Aceh's Plural Legal Orders**

The shift in Aceh's plural legal orders is the outcome of complex legal and political changes in Aceh, especially during the post-New Order era. The willingness of the central government to allow more legal pluralism in Aceh appeared to become an initial step towards the political peace process. The central government believed that greater local authority over religion, customs, and education would overcome the widespread problem that resulted from bloody conflict in Aceh, which re-emerged since Hasan Tiro established the Independent Aceh Movement (GAM) in 1976 (see Kell 1995, Smith 2002, Aspinall 2002).

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 the *shari'a* in Aceh was officially declared through Law 18/2001 on the Special Autonomy for the Province of Nanggroe Aceh Darussalam. This law, among other things, entailed the (re-)establishment of a special court, the *Mahkamah Syar'iyah*. Additionally, only five years later, a statute (Law 11/2006 on the Governance of Aceh) was passed to reconfirm the jurisdiction of the *Mahkamah Syar'iyah*.

These local developments of Islamic institutions in Aceh were all fostered in various ways by the power of the Indonesian central government. The Indonesian Supreme Court, in particular, has been leaning towards extending its assistance of the plural legal institutionalisation at the periphery. This has a lot to do with internal dynamics within the Indonesian legal system in the post-New Order period (Salim 2003), among them the growing Islamisation within the Supreme Court.<sup>7</sup> 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.

'Special autonomy' for Aceh was part of a series of *Reformasi* era enactments, in which not only *adat* institutions were revived and recognised, but *shari'a*-supporting bodies were established and reinforced. The local *ulama* council was transformed to become the *Ulama* Consultative Assembly (MPU, *Majelis Permusyawaratan Ulama*), holding legislative authority that would come to be seen as equal to that of the provincial legislature. Additionally, a new provincial bureaucracy, the Islamic *Shari'a* Department (DSI, *Dinas Syariat Islam*), was established to manage the implementation of the *shari'a* in Aceh. And, most important to the subject of this essay, Acehnese 'special autonomy' also allowed for the transformation of local religious courts (*pengadilan agama*) into their new form as *Mahkamah Syar'iyah* with wider jurisdiction than that of other religious courts outside Aceh.

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<sup>7</sup> Although further study is necessary to confirm this contention, such developments could be seen as supported by the fact that among more than 50 Justices of the Supreme Court, at least 15 of them have *shari'a* training or Islamic studies backgrounds (Interview with Rum Nessa, a Secretary of the Supreme Court, 29 July 2004).

The expansion of *Mahkamah Syar'iyah*'s jurisdiction began with legislative discussions of Law 18/2001 with regard to the form and limits of authority of the proposed *Mahkamah Syar'iyah*. The provisions of this law (Article 25 and 26) did not specify whether it would be part of the existing religious judiciary (*pengadilan agama*) or the general civil judiciary (*pengadilan negeri*), leading to debates among the Achenese legislators. Some wanted the *Mahkamah Syar'iyah* to replace the existing religious courts. Under this scheme, the structure and personnel of the *pengadilan agama* would be transformed into that of the *Mahkamah Syar'iyah*, but with a wider jurisdiction that now included certain criminal acts such as gambling, alcohol consumption, and *khalwat* (unlawful proximity between unmarried couples). By transforming the existing religious courts into *Mahkamah Syar'iyah*, some proponents of the formal implementation of the *shari'a* thought that they could thereby revive their historical authenticity as well as a unique Acehnese identity.

Others, however, proposed that the *Mahkamah Syar'iyah* instead serve as an over-arching rubric for various kinds of existing state courts (including the civil court, the religious court, the military court, and the administrative court) in the province of Aceh. Each of those courts would thus continue to handle litigation in accordance with their respective jurisdictions, but now under the name and ultimate authority of the *Mahkamah Syar'iyah*. In addition, the jurisdiction over any new provision enacted in the *qanun*<sup>8</sup> (would be allocated in accordance with each court's respective authority. Under this model, for example, the offence of gambling would be dealt with by the civil courts rather than by the religious courts. In this sense, the *Mahkamah Syar'iyah* would not be a physical entity, but an ad hoc institution that organised and facilitated judges from various courts to settle disputes and litigation arising from the enactment of the *qanuns* in Aceh. In other words, this model of the *Mahkamah Syar'iyah* would not require the establishment of a new court, but would merely complement and 'Islamicize' the rules and procedures of the existing courts, consistent with the implementation of the *shari'a* in the region (Sarong 2002). However, this idea was not well received, as it was considered too simple and not sufficiently prestigious for the special autonomy of Aceh.

### *The Ambiguous Jurisdiction*

Many proponents of the *shari'a* in Aceh were already predisposed toward viewing the central government's offer to re-establish an independent *Mahkamah Syar'iyah* in Aceh with considerable scepticism. This was mainly due to the ambiguous jurisdiction granted to the *Mahkamah Syar'iyah*. Article 25 (2) of Law 18/2001 mentioned that the *Mahkamah Syar'iyah*'s jurisdiction was subordinated to the prevalent national legal system. The text of Article 25 (2) stated:

“The jurisdiction of the *Mahkamah Syar'iyah* (...) is based on the Islamic *shari'a* within the national legal system, which will be further arranged through the *Qanun* of the Province of Nanggroe Aceh Darussalam.”<sup>9</sup>

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

<sup>8</sup> Exclusively refers to Regional Regulations produced by the legislature of Aceh from the year 2002 onwards, whether or not relating to Islamic norms.

<sup>9</sup> “Kewenangan Mahkamah Syar'iyah (...) didasarkan atas syariat Islam dalam sistem hukum nasional, yang diatur lebih lanjut dengan *Qanun Propinsi Nanggroe Aceh Darussalam*”

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 the Acehese provincial *qanun*.

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 the *shari'a*, these aspects are under the jurisdiction of the *Mahkamah Syar'iyah*. However, because the national legal system has not recognised many aspects of the *shari'a*, this jurisdiction is very limited. Under the second clause, however, the limit of the jurisdiction of the *Mahkamah Syar'iyah* is set by provincial legislature enactments in the form of the *qanun*. This provision would conversely have the effect of broadening the *Mahkamah Syar'iyah*'s jurisdiction to cover any *shari'a* rule, provided it was enacted locally in the form of the *qanun*.

The ambiguity of the *Mahkamah Syar'iyah*'s jurisdiction under Law 18/2001 is only the beginning of the problem. Debates over such issues continued and, in 2003, President Megawati issued Presidential Decree 11/2003 to ‘further regulate’ the operation of the *Mahkamah Syar'iyah*.<sup>10</sup> This regulation, however, was viewed by many Achenese as contradicting Article 31 of Law 18/2001 on the Special Autonomy of Nanggroe Aceh Darussalam, which states that any further rules to be implemented would be in the form of a government regulation or *qanun*.<sup>11</sup> Opposing this presidential decree, Abubakar (2004: 43–44) argued:

“[i]f the establishment of the *Mahkamah Syar'iyah* 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'iyah* is] considered within the authority of the Provincial Government, [the *Mahkamah Syar'iyah*] should be ratified by the *Qanun*.”

The form of legal enactment is also crucial, because the higher the position of a regulation in the formal legal hierarchy, the more authority, broader a scope, and influence does it yield.<sup>12</sup> The fact that the *Mahkamah Syar'iyah* was regulated by a lower status instrument (presidential decree) was thus seen as detracting from its importance in the implementation of the *shari'a* in Aceh.

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

<sup>10</sup> “*Lewat Keppres, Mahkamah Syar'iyah di Aceh Diresmikan*”, <http://www.detik.com/peristiwa/2003/03/04/20030304-115935.shtml>. (accessed on 4 March 2003)

<sup>11</sup> 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 the *Qanun* of the Province Nanggroe Aceh Darussalam].

<sup>12</sup> The Decree III/2000 of MPR (People Consultative Assembly) 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* (constitution), (2) *Undang-Undang* (law), (3) *Peraturan Pengganti Undang-Undang (Perpu)* (substitute regulation for law), (4) *Peraturan Pemerintah* (government regulation), (5) *Keputusan Presiden* (presidential decree), and (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* (constitution), (2) *Undang-Undang* (statute) and *Peraturan Pengganti Undang-Undang (Perpu)* (substitute regulation for law), (3) *Peraturan Pemerintah* (government regulation), (4) *Peraturan Presiden* (presidential regulation), and (5) *Peraturan Daerah or Perda/ Qanun*.

jurisdiction of the *Mahkamah Syar'iyah* will include *ahwal al-syakhshiyah* (personal matters), *muamalat* (trade and commerce), and *jinayah* (criminal acts).

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 (*syiar Islam*) as stated in the *qanuns*.”<sup>13</sup> 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 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'iyah* 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, despite other support for the institutionalisation of Islamic law in Aceh from other sectors.

The presidential decree not only blurred the jurisdiction of the *Mahkamah Syar'iyah*, but it 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'iyah*. Their involvement was necessary for the *Mahkamah Syar'iyah* to function in exercising of its new additional *jinayah* jurisdiction (Abubakar 2004). And lastly, 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'iyah*. This was necessary to determine which cases should come under the jurisdiction of the *Mahkamah Syar'iyah* 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'iyah* in the future.

#### *Dealing with the Ambiguity*

Given these impediments to the *Mahkamah Syar'iyah* in exercising its new additional jurisdiction granted by the *qanun*, subsequent efforts have been taken by Acehnese supporters of *shari'a* implementation to confirm the jurisdiction of the *Mahkamah Syar'iyah* for *jinayah* acts. Inclusive in these efforts was the arrangement to actively involve the police and the Prosecutor's Office with the *Mahkamah Syar'iyah* in dealing with *jinayah* cases. This was facilitated by the preparation of 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.<sup>14</sup> However, this effort failed as a senior official in Megawati's cabinet refused to validate it.<sup>15</sup> In correspondence with the Coordinating Minister of Politics and Security and the Governor of the Province of Nanggroe Aceh Darussalam,<sup>16</sup> 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,

<sup>13</sup> See Article 3 (1) of Presidential Decree 11/2003 on the *Mahkamah Syar'iyah*.

<sup>14</sup> I obtained a copy of this draft Government Regulation.

<sup>15</sup> The disapproval was expressed by a senior official of the Cabinet Secretariat (I have been asked to keep the official's name confidential) 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.

<sup>16</sup> See letter number B.41/Waseskab/05/2004 dated 7 May 2004 and letter number B.53/Waseskab/06/2004 dated 10 June respectively. I obtained copies of both letters.

“Islamic *shari’a* justice in the province of Nanggroe Aceh Darussalam is executed in a special court within the structure of the religious court, so long as its jurisdiction relates to the jurisdiction of the religious court, and it is a special court within the structure of the general state court, so long as its jurisdiction involves the jurisdiction of the general state court.”<sup>17</sup>

This brief provision was certainly not sufficient to regulate the role of the police and public prosecutor in the *Mahkamah Syar’iyah* cases. The Cabinet Secretary explained, however, that if police personnel and public prosecutors in Aceh were in doubt about their tasks in the *Mahkamah Syar’iyah*, legal guidance from the Head of the National Police Force and the Attorney General respectively would be adequate. However, the office of the provincial prosecutor (*kejaksaan tinggi*) seemed ambivalent about this arrangement, arguing that in order to submit a *jinayah* case to the *Mahkamah Syar’iyah*, a particular legal foundation (a government regulation) would be required.<sup>18</sup> Although Article 17 *Qanun* 11/2002 already provided the public prosecutor with an obligation to investigate *jinayah* offences, this arrangement was regarded by the provincial prosecutor’s office as too weak (as the *qanun* has 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.

This manoeuvre by the Cabinet Secretary was, however, seen by the proponents of the *shari’a* as an attempt to thwart the implementation of the *shari’a* in Aceh. It was suspected that the provincial prosecutor lacked good faith and did not want to support the implementation of the *shari’a* in the region but rather uphold the *jinayah* rules, in particular, despite there being a provision (Article 39) in Law 16/2004 on the Prosecution,<sup>19</sup> 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 the *shari’a* in Aceh, such as the Chief of the *Mahkamah Syar’iyah* and the Chairman of the Office of Islamic *Shari’a* (DSI, Dinas Syariat Islam) and the Head of the Provincial Prosecutor’s Office was held on 9 June 2004, and 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’iyah* of Banda Aceh.<sup>20</sup> Until the tsunami hit Aceh on 26 December 2004, however, there had no *jinayah* cases presented to the *Mahkamah Syar’iyah*.

During that time, other steps were taken by the proponents of the *shari’a* in Aceh to overcome the barriers to the *Mahkamah Syar’iyah* exercising its *jinayah* jurisdiction. Prominent among them were efforts to coordinate various relevant provincial institutions, such as the governor’s office, the police force, the prosecutor’s office, the general court and provincial office of the Ministry of

<sup>17</sup> “[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”.

<sup>18</sup> “Belum Ada Dasar untuk Mahkamah Syariah”, *Kompas*, 6 November 2003. See also “Pelaksanaan Mahkamah Syar’iyah di Aceh Masih Terganjil”, see <http://hukumonline.com/detail.asp?id=9237&cl=Berita>. (accessed on 14 March 2005)

<sup>19</sup> 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 authorised to deal with a penal offence that is regulated by *qanun*, as within the stipulations of Law 18/2001 on the Special Autonomy of the Province Aceh as Nanggroe Aceh Darussalam, in accordance with Law 8/1981 on Penal Proceedings].

<sup>20</sup> See Jufri Ghalib’s records of the results of the meeting held in the provincial prosecutor’s office on 9 June 2004. Amongst those attending this meeting were: Andi Amir Achmad (Head of the Provincial Prosecutor’s Office), Ayub Chandra (Head of Administrative Affairs of the Provincial Prosecutor’s Office), Alyasa Abubakar (Head of Dinas Syariat Islam), Soufyan M. Saleh (Chairman of the Provincial *Mahkamah Syar’iyah*) and Jufri Ghalib (Justice of the Provincial *Mahkamah Syar’iyah*). I obtained a copy of Jufri Ghalib’s records.

Justice and Human Rights, to issue a Joint Decree (*Keputusan Bersama*). This was intended to synchronise their commitment to the implementation of the *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.<sup>21</sup> This called for 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, and 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 over *muamalah* (civil) and *jinayah* (criminal) cases to the *Mahkamah Syar'iyah*.<sup>22</sup>

However, the status of other criminal matters, such as theft, murder, and rape, which are currently not yet dealt with in a *qanun*, remain unclear, and so, at present, they remain under the jurisdiction of the civil court. The question is whether or not they will be automatically transferred to the jurisdiction of the *Mahkamah Syar'iyah* if the provincial legislature passed a *qanun* in the future relating to these offences? In an interview of the Chairman of the Supreme Court, Alyasa Abubakar, that took place several weeks after the issuance of the 2004 decree, he explained that no new regulation is necessary and that the current decree is sufficient for future application.<sup>23</sup> Should such a situation occur, the civil court could eventually be reduced to a kind of a 'special court' that adjudicates only cases brought by non-Muslims in Aceh, while all other relevant legal aspects, either civil or criminal, that involve Muslim citizens could be ruled according to an expanded corpus of *qanuns* and examined by the *Mahkamah Syar'iyah*. However, labour matters and land disputes, so long as there is no inheritance matter involved, seem to be an exception and remain under the jurisdiction of the general court, unless there is a new *qanun* enacted stipulating otherwise.

Despite such claims of the proponents of the *shari'a* in Aceh, it remains debatable whether both legal instruments (the joint decree of the higher provincial institutions and the decree of the chairman of the Supreme Court) are, in fact, sufficient to grant the *Mahkamah Syar'iyah* general jurisdiction to examine *jinayah* offences not specifically stipulated in existing *qanuns*. Apparently, both legal instruments were provided as shortcuts toward the expanding jurisdiction of the *Mahkamah Syar'iyah* in Aceh. However, both instruments have a rather weak standing within the hierarchy of the Indonesian legal system.<sup>24</sup>

The above description of the ambiguity of the *shari'a* court's jurisdiction demonstrates that the state has no ultimate goal to generate the shift in Aceh's plural legal orders, in which the *shari'a* court would have an ascent position. The offer for the formal implementation of the *shari'a* in Aceh was merely proposed to be a governmental means to persuasively solve the prolonged conflict in Aceh.

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<sup>21</sup> This Joint Decree was signed by the Governor, the Head of the Provincial Police Force, the Head of the Provincial Prosecutor's Office, the Chairman of the Provincial *Mahkamah Syar'iyah*, the Chairman of the Provincial General Court, and the Head of the Provincial Office of the Ministry of Justice and Human Rights. I obtained a copy of this decree.

<sup>22</sup> See the Decree of the Chairman of the Supreme Court no. KMA/070/SK/X/2004 on the Transfer of Partial Jurisdiction from the General Court to the *Mahkamah Syar'iyah* in the Province of Nanggroe Aceh Darussalam. I obtained a copy of this decree.

<sup>23</sup> Interview with Alyasa Abubakar, 30 October 2004.

<sup>24</sup> See note no. 12 above.

## Dynamics towards the Shift

Recent historical developments have caused a number of significant changes in the socio-legal and political structures of Aceh in the post-New Order period. The post-tsunami recovery process, the accompanying internationalisation of Aceh, and the development of the post-peace process have each in their own ways stimulated the extension of the authority of the *shari'a* court system in Aceh and the decline of the jurisdiction of Aceh's civil courts.

### *The Post-tsunami Recovery Process*

By the end of 2004, no *jinayah* offences had been examined by the *Mahkamah Syar'iyah*. All related cases, gambling in particular, were dealt with in the civil court. However, the tsunami that severely damaged most coastal areas of Aceh on 26 December 2004 unpredictably created a surge of momentum for the further implementation of the *shari'a* in the province, including the actual authority of the *shari'a* court. In the aftermath of tsunami, the *Mahkamah Syar'iyah* of the Bireuen District had, in fact, for the first time convicted more than twenty people for gambling offences, and 15 of them were publicly caned in the mosque yard in Bireuen on 24 June 2005.<sup>25</sup>

There is a belief among Acehnese 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. For some, the tsunami brought the message that the Acehnese people should comply with the *shari'a* rules and that the government should enforce its implementation in earnest.

One may contend that the tsunami is merely a natural process (*sunnatullah*), caused by a geological shift under the earth, that has nothing to do with the implementation of the *shari'a*. Indeed, the argument continues, as there is no guarantee that another tsunami would not hit Aceh in the future even if the *shari'a* was fully implemented, as Aceh is located in a geologically unstable area where earthquakes often occur.<sup>26</sup>

Similarly, there is a view that the tsunami was not an escalating factor for the implementation of the *shari'a* in Aceh. The current stage of the formal implementation of the *shari'a* in Aceh was considered a result of the ongoing process of the implementation of special autonomy granted to Aceh. Abubakar described the process chronologically:

“The year 2001 saw the formal establishment of the *Mahkamah Syar'iyah* (*shari'a* court) through Law 18/2001 within the Special Autonomy for Nanggroe Aceh Darussalam; the year 2002 witnessed the enactment of the *Qanun* of the *Mahkamah Syar'iyah* by the provincial parliament; the year 2003 saw the formal inauguration of the *Mahkamah Syar'iyah*, which was transformed from the existing Religious Court, by the Presidential Decree; the year 2004 saw the formal transfer of some criminal jurisdiction (*jinayat*) from the General Court to the *Mahkamah Syar'iyah* by the Decree of the Chairman of the Supreme Court; and the year 2005 is seeing the operation of the *Mahkamah Syar'iyah* and the execution of its verdicts.”<sup>27</sup>

This chronological account sounds much more logical than the interpretation based on the tsunami being God's will, as described above. Yet, in my view, to totally deny the tsunami had any significance would be too hasty.

<sup>25</sup> “15 Penjudi Dicambuk”, *Serambi Indonesia*, 25 June 2005.

<sup>26</sup> Interview with Hamid Sarong, 14 June 2005; Interview with Safir Wijaya, professor of IAIN (State Institute for Islamic Studies) and currently deputy chief of BRR (Board of Rehabilitation and Reconstruction), 17 June 2005.

<sup>27</sup> Interview with Alyasa Abubakar, 18 June 2005.

The post-tsunami recovery process had created a context for the proponents of the *shari'a* to emotionally pressure the executive branch of governance to more earnestly apply the *shari'a* in Aceh. The caning in Bireuen could have never happened without pressure upon the acting governor of Aceh, Azwar Abubakar, who issued a Governor's Decree (*Peraturan Gubernur Provinsi Nanggroe Aceh Darussalam* 10/2005) on the Technical Guidance of the Implementation of Caning to signify his approval.<sup>28</sup>

Above all, the Attorney General's consent was necessary since both the provincial and the district public prosecutor had doubts about the procedure. This consent was only secured after persistent efforts were exerted in the highly energised contexts following the tsunami. Some proponents of the *shari'a* sought to meet the Attorney General in Jakarta to request his support for the implementation of the *Mahkamah Syar'iyah's jinayah* jurisdiction, and the caning punishment in particular. The Attorney General gave his approval in an unscheduled meeting on 3 June 2005 at his office in Jakarta.<sup>29</sup> Amongst those who attended the meeting with the Attorney General were the Chairman of the Provincial *Mahkamah Syar'iyah*, Soufyan Saleh; the Chairman of the *Ulama* Consultative Assembly, Muslim Ibrahim; the Chairman of the Aceh *Adat* Council, Badruzzaman Ismail; the Chairman of the Provincial Office of Islamic *Shari'a*, Alyasa Abubakar; and the Chairman of the Religion and Social Welfare section 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 National Development Planning Agency). The role of Bappenas was crucial here. According to Muslim Ibrahim, who was present in the meeting with the Attorney General, the Attorney General had initially no time to take the meeting, as he was very busy that week. It was only with the help of Bappenas officials, whose institution is responsible for the post-tsunami rehabilitation and reconstruction of Aceh, that the meeting could take place.<sup>30</sup>

The post-tsunami recovery process not only provided a chance for the *Mahkamah Syar'iyah* to have real jurisdiction over minor penal offences as discussed above, but it also offered other opportunities to exercise a broader civil jurisdiction in land disputes, particularly those involving inheritance matters. The caseload for these matters increased enormously following the tsunami as many landowners and their legitimate heirs had died or gone missing. However, litigation over land issues had actually fallen under the jurisdiction of the civil court. The *Mahkamah Syar'iyah* 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'iyah's* exercise was supported by the MPU, whose credibility in Islamic affairs is widely recognised. The MPU released a *fatwa* (3/2005) stating that the *Mahkamah Syar'iyah* is authorised to deal with disputes of ownership and land inheritance.

### *The Internationalisation of Aceh*

The devastating tsunami attracted worldwide attention and exposed Aceh to a massive influx of international humanitarian agencies that came to help reconstruct the infrastructure of Aceh, including its legal order. These international actors not only interacted with the state representatives, but also directly with their new partners at the local levels. In this case, it is important to recall

<sup>28</sup> I obtained a copy of this regulation.

<sup>29</sup> See "Jaksa Agung Dukung Hukuman Cambuk di NAD", *Republika*, 6 June 2005.

<sup>30</sup> Interview with Muslim Ibrahim, 17 June 2005.

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 to programmes carried out by those international institutions.

The presence of various international actors in post-tsunami Aceh introduced new values as well as social change through their humanitarian assistance. The international donor agencies have been closely involved in providing or facilitating dispute management at the village level. Legal assistance provided by international actors may likely convey certain principles of international law, resulting in, and perhaps even further deepening, legal pluralism in Aceh.

The extent to which international actors have been influential in deepening the existing configuration of legal pluralism in Aceh, however, remains to be clarified. At this early stage the long-term effects of this phenomenon are still unclear. Nevertheless, it should be noted that in such plural legal situations local people can become overwhelmed by a flood of overlapping legal information delivered by various state organs as well as by international actors.

As legal problems of inheritance, orphaned children, and of the status of properties whose owners were missing rapidly increased in the aftermath of tsunami, the *shari'a* court was immediately encumbered with the immense caseload. This situation urged the village authorities to assume some legal duties related to the post-tsunami recovery process. This development was facilitated by the issuance of 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 arrangements as well as functional jurisdictions of customary village structures of community justice.

The reemergence of *adat*-based dispute settlement in Aceh in this context as another means of dispute settlement in post-tsunami Aceh has been the main concern of several international agencies, which are actively working in Aceh. The International Development Law Organization (IDLO), for instance, has compiled customary local principles as well as nationally applicable rules that comparatively delineate stipulations on land issues, matrimonial property, inheritance, guardianship, and orphanage. Additionally, IDLO organised a particular training for village leaders in many tsunami affected areas on mediating between parties effectively. Whether the post-tsunami recovery process has created a special momentum for open recognition to the customary judicature at the village level, and thus deepened and led to another shift in Aceh's plural legal orders, deserves further scrutiny in the future as this remains an ongoing process.

#### *The Development in the Post-Peace Processes*

Beyond this, perhaps the most far-reaching changes that the tsunami brought about in Aceh 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 a major advance in the peace process and led to the end of a prolonged conflict in the region. The Helsinki Agreement also served as a legitimate basis for the reconfiguration of the socio-political system in Aceh by implicating the issuance of the Law 11/2006 on the Governance of Aceh, which contains explicit provisions on state law pluralism. This has not only reinforced the status of *adat* institutions<sup>31</sup> in Aceh, but also filled gaps and eliminated ambiguities in the previous regulations in relation to the application of the *shari'a* in

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<sup>31</sup> See articles 96–99 of Law 11/2006.

Aceh.<sup>32</sup> This recent legislation has thus further consolidated plural legal orders in Aceh by formally recognising *adat* institutions as well as Islamic legal institutions in matters of dispute resolution in their respective jurisdictions. The legitimacy of *shari'a* rules, the status of the *Mahkamah Syar'iyah* and its jurisdiction have been strengthened and widened in the process. In fact, the 2006 Law on Governing Aceh is seen by some as further elevating the status of the *Mahkamah Syar'iyah*. For instance, it stipulates that the Governor, the Mayor, or the Head of the District in Aceh must take the oath of office in the presence of the Chairman of the *Mahkamah Syar'iyah* instead of the Chairman of the (High) Civil Court of Aceh, as it is being practiced in other provinces and was before in Aceh.<sup>33</sup>

## Conclusion

The foregoing discussion has demonstrated the gradual shift from legal centralism to legal pluralism in Aceh. The centre eventually acknowledges and accommodates the periphery's demand more and more by incorporating certain aspects of the *shari'a* to be a part of the official legal system. Additionally, the pre-existing customary law and its institutions have been formally reinstated in the realm of state law pluralism.

In the case of Aceh, its history shows that there has been a shift in legal pluralism itself from its description of separately distinct social fields that have different sources of content and legitimacy to plural legal orders that belong to a single legal system. In other words, legal pluralism has transformed from sociological fact to legal reality in Aceh, thus demonstrating how two different types of legal pluralism are not mutually exclusive, but they are, in fact, interactive.

The dynamics of legal pluralism in Aceh are largely due to the changing constellations that have concurrently taken place since the demise of the New-Order regime. While the transition to the peace process started these dynamics of plural legal orders in Aceh, the post-tsunami recovery process has accelerated and consolidated them. The post-tsunami rehabilitation process is the hub of this dynamic legal pluralism since it has not only pushed efforts to end the long-standing Aceh conflict, but also accidentally unlocked Aceh from international isolation.

The shift in Aceh's plural legal orders, in which the *shari'a* court was given increased authority, has arguably demonstrated the development of the *shari'a* court from a peripheral legal body, where its jurisdiction was previously limited to family law, to a significant institution that step by step secures more legal authority including in Islamic financial issues, property disputes, and penal offences. However, the extent to which this new additional authority of Aceh's *shari'a* court is effectively exercised remains to be seen over the next several years.

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<sup>32</sup> 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 (articles 128 to 137), the MPU or *ulama* council (articles 138 to 140), the Police Force (article 207, 1 and 4), the Public Prosecutor (articles 208 (2) and 210), and Human Rights (article 227, 1c).

<sup>33</sup> See articles 69c and 70c of Law 11/2006.

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