The Law on the Governing of Aceh

the way forward or a source of conflicts?

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The Helsinki Memorandum of Understanding (MoU) foresaw the promulgation of a new Law on the Governing of Aceh as an essential precondition and cornerstone of the peace process. The new law was supposed to provide Aceh with the framework for effective self-government that previous laws had failed to deliver and expectations in Aceh were high. However, the drafting process, which involved a large number of stakeholders, resulted in a legal product that disappointed many, particularly within the Free Aceh Movement (GAM).

Law No. 6/2006 on the Governing of Aceh (LoGA) was promulgated with considerable delay in August 2006. It is an extremely complex piece of legislation that is not limited to the core issues of ‘autonomous’ regional governance, but covers numerous aspects that are usually regulated in sectoral laws. It includes, for example, regulations on public health and education, natural resources management, including fisheries and mining, economic development and investment, human rights, the armed forces, the police and the judiciary. This wide scope of rather superficial regulations, which necessitate many references to the more detailed sectoral laws, distracts from focusing on the basic principles of ‘special autonomy.’ In seeking to ascertain Aceh’s control over as many governance issues as possible, the proponents of the law have instead achieved the opposite. Furthermore, the direct involvement of an unusually large number of stakeholders with a vast scope of varying interests in all stages of the drafting process has led to many compromises, which often come at the cost of clarity and consistency of the law.

While GAM itself had originally proposed a rather condensed and focused draft of the law (albeit containing some fairly radical ideas of how Aceh’s “self-government” should look, including Aceh’s membership in certain UN organizations), the intention of the provincial parliament and government to accommodate as many opinions as possible led eventually to a rather complex and voluminous draft. The work of four local universities charged by the

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provincial authorities with preparing inputs for the law was merged into a single draft, which was discussed with various parties in the region before being exposed to an assembly of (reportedly) around one thousand stakeholders in Banda Aceh. Then, the provincial government took over from the provincial parliament and finalized the draft with the help of an advisory team of legal experts, and submitted it to the central government. Here, the Minister of Home Affairs had established its own drafting team consisting of government officials and academics, who used the draft submitted by the province as reference for their work. The draft was reviewed and reformulated over six months to harmonize it as far as was deemed necessary with existing laws and regulations, drawing on expertise from relevant central government agencies. Considerable changes were finally introduced through the deliberations of the national parliament, which obviously felt free to see the MoU rather as general guidelines than as commitments to adhere to, because it was not one of the negotiating parties.

The main reason for concern on the part of GAM and many other stakeholders in Aceh is indeed that some parts of the LoGA deviate considerably from the stipulations of the MoU. The four main legal principles that GAM had negotiated in Helsinki promised a fundamentally revised relationship between Aceh and the central government. The way they have been translated into the law does not do justice to this promise.

Aceh and the exercise of authority

The first and probably most fundamental principle of the MoU (article 1.1.2 a) reads, ‘Aceh will exercise authority within all sectors of public affairs… except in the fields of foreign affairs, external defence, national security, monetary and fiscal matters, justice and freedom of religion, the policies of which belong to the Government of the Republic of Indonesia in conformity with the Constitution.’ The definition of central government responsibilities in the law (article 7) is a bone of contention: ‘governmental affairs having the characteristics of national affairs, foreign affairs, defence, security, judicial, monetary, national fiscal, and certain affairs in the religious sector.’

GAM (and some other stakeholders in Aceh) misinterpreted the MoU principle as meaning that Aceh would have the right to exercise all authorities within all sectors of public affairs – and that the central government’s authority in Aceh would be restricted to the six sectors mentioned in the MoU. The wording of the MoU does not justify this interpretation, and such an arrangement would also be unrealistic as there are numerous functions outside the six sectors mentioned in the MoU that need to be regulated and/or implemented by central government. This is particularly true for those government functions that constitute the constitutional obligations of the central government, are related to international conventions that have been translated into national law, or to government
functions, the implementation of which by the government of Aceh would affect other regions of Indonesia or even other countries.

The potential for conflicts has been aggravated by the fact that the national parliament chose to elaborate on the additional functions of the central government in Aceh by calling them ‘governmental affairs having the characteristics of national affairs’ and proceeding to elucidate on this in a way that leaves room for multiple interpretations. Making use of another imprecise stipulation of the law, the central government has decided to regulate its own functions in Aceh by a Government Regulation (Peraturan Pemerintah). The draft of this regulation, which has been submitted to Aceh for comments, suggests that the central government intends to exercise largely the same responsibilities in Aceh as in all other provinces of Indonesia (except for Papua). Judging from comments from GAM and high ranking provincial government officials so far, further heated dialogue between Aceh and the central government on this draft regulation can be expected.

The controversy will not end here, but will extend to issues regarding the way in which the central government intends to implement its responsibilities in Aceh. The stipulation of the LoGA that ‘the central government sets norms, standards and procedures and conducts the supervision over the implementation of government functions by the Government of Aceh and District/City governments’ (article 11.1) suggests a broad range of central government authorities over the implementation of regional governance. This seems far from what the proponents of the MoU, principally GAM, understood by effective self-government. While the imposition of national norms, standards and procedures may be justified in many cases, this must be handled with care if the basic idea of special autonomy for Aceh is to be safeguarded. The potential for a substantial diminution of Aceh’s perceived special authorities by tight central government rules and standards is particularly great when it comes to the issuance of concessions, permits and licenses, particularly related to investment and the exploitation of natural resources.

A further problem arises in article 7: ‘The Governments of Aceh (province) and Kabupaten/Kota (districts) have the authority to regulate and implement government functions in all public sectors except government functions that are the authority of the central government.’ In other words, the law demands shared responsibility between the province and the districts in implementing Aceh’s special autonomy. GAM intended that full responsibility for the implementation of special autonomy be assigned to the provincial government. Instead, the LoGA assigns authority to both levels of government without providing sufficient clarity regarding the distribution of government functions. Therefore, Aceh has to find a way of establishing power-sharing arrangements between the province and the districts in order to avoid conflicting regulations between the two levels of government. Lack of consistency between provincial and district level regulations could lead to legal uncertainty, which would have a detrimental impact on Aceh’s investment climate. Equally, an overly dominant role of the province in determining the regulatory framework for Aceh’s special autonomy might nourish the impression that centralism has shifted from Jakarta to Banda Aceh and reinforce tendencies in some districts to break away from Aceh and form their own provinces.

Further deviations

There are other ways in which the LoGA deviates substantially from the first principle of the MoU that will probably have less immediate consequences for the way Aceh will be governed. The national parliament as well as the central government’s drafting team regarded the MoU’s additions of ‘external’ to the term ‘defence’ and of ‘national’ to the term ‘security’ as limitations of the roles of the Indonesian Armed Forces and the police respectively. These additions were seen as irreconcilable with existing laws and regulations and the terms have therefore not been adopted in the LoGA. Instead, article 202 states, ‘the Indonesian Armed Forces (TNI) are responsible for maintaining the security of the state and for other duties in Aceh in accordance with laws and regulations.’ The reference of the LoGA to existing laws and regulations (in this case the Law 34/2004 on the Indonesian Armed Forces), indicates that the TNI will have the same duties in Aceh as elsewhere in Indonesia, including dealing with internal security disturbances, although in cooperation with other institutions (article 6.1c and respective elucidations of Law 34/2004). Whilst some in GAM hope for an amendment of the LoGA to bring it in line with the MoU in this respect, it may be more realistic to hope for an amendment of the TNI Law, restricting the military forces to their external defence role, except for disaster-related and humanitarian tasks.

A particularly sensitive field of potential conflict is opened up by another major LoGA deviation from MoU principles. The second MoU principle (article 1.1.2b) states that, ‘international agreements entered into by the GOL which relate to matters of special interest to Aceh will be entered into in consultation with and with the consent of the legislature of Aceh,’ and the third principle (Article 1.1.2.2a) says that, ‘decisions with regard to Aceh by the legislature of the Republic of Indonesia will be taken in consultation with and with the consent of the legislature of Aceh.’ Both were
substantially altered when they were translated into law because the national parliament in agreement with the central government regarded these provisions of the MoU as constitutionally problematic. As they would infringe upon the constitutional authorities of the President and national parliament respectively, their inclusion in the LoGA might have led to a judicial review by the constitutional court. The principles have therefore been translated into the LoGA (article 8) by using the formula: ‘in consultation with and with the consideration of DPRA’ (the provincial parliament of Aceh) – in other words, replacing ‘with the consent of’ with ‘with the consideration of:’

Similarly, the fourth MoU principle (Article 1.1.2 d), stating that, ‘administrative measures undertaken by the Government of Indonesia with regard to Aceh will be implemented in consultation and with the consent of the head of the Aceh administration,’ has been translated into the LoGA with the phrase ‘in consultation and with the considerations (not the consent) of the Governor.’ This adjustment was seen as necessary because the governor, neither as head of the region nor as the representative of the central government in the region, can have the authority to approve central government decisions. Again, the MoU’s proposal would probably have prompted a judicial review.

The question which has been raised, but not answered satisfactorily, is why the Indonesian government representatives were ready to sign agreements with GAM of which it was to be expected that their implementation could raise serious constitutional concerns. Some observers of the Helsinki process have hinted at the possibility that Jakarta advised its negotiation team to accept potentially problematic provisions in order to make sure that GAM would sign the MoU, hoping at the same time to be able to hide behind the national parliament’s sovereign authority, should the latter choose to reject the adoption of such provisions in the law.

The need for further regulations
The LoGA stipulates that the way in which consultations with Aceh are to be conducted and the provincial parliament’s and Governor’s considerations are to be obtained will be determined by a Presidential Regulation. The prolonged process of discussions between Aceh and the central government on the draft of this Presidential Regulation suggests that neither side will easily give up its position. Aceh insists that any consultative mechanism determined by the Presidential Regulation must lead as close as possible to ‘consensus as a rule,’ while the central government maintains its claim for the final decision-making authority of the national parliament and President. It is not easy to foresee a workable compromise on this difficult issue.

On the other hand, it is critical that some of the central government regulations mandated by the LoGA, which must pass through the above mentioned consultation process, be issued as soon as possible. This applies in particular to the Government Regulation on the Joint Management of Oil and Gas Resources by the Government of Aceh and the Central Government. Given the parties’ highly conflicting interests in this field, an orderly consultation is of utmost importance. The establishment of a participatory, transparent and fair consensus-finding mechanism will also be critical for resolving potential conflicts around the above-mentioned draft Government Regulation on Central Government Authorities of National Character in Aceh. Likewise, it will help to come to terms with such critical issues as the presidential regulations on the cooperation of Aceh with foreign institutions and participation in events abroad, and on the transfer of responsibilities of the National Land Agency to the province and the districts.

Conclusions
The way in which Jakarta regulates and conducts consultations with Aceh on essential national policies that have a direct impact on Aceh will be critical for building trust and confidence between Aceh (not only GAM) and the central government. Likewise, in implementing the LoGA and particularly its own authorities in Aceh, the central government must respect the spirit of the MoU if it wants to show commitment to peace. It would be detrimental to peace and stability in the province if it proves right those critics who claim that the LoGA not only fails to fulfill the promises of the MoU, but generally offers very little to justify the notion of special autonomy, except for the allocation of additional funds. In view of the lack of clarity and the ambiguity of many regulations, and the constraints on the way in which Aceh can exercise its special autonomy, the LoGA has the potential to become a source of substantive conflicts between Aceh and the central government, rather than an effective means of fostering and stabilizing their relationship. However, with both sides apparently open to a pragmatic approach to its implementation, the LoGA may indeed become a way forward, albeit a less good way than could have been expected had it been more loyal to the MoU and internally consistent. This pragmatic “way forward” will certainly be tested if the consultations on substantive issues related to its implementation reach deadlock. The real test, however, will come should a revision of the law be initiated as requested by many parties in Aceh, particularly GAM. However desirable a revision in view of the LoGA’s many shortcomings may be, it is equally necessary to keep expectations at a realistic level. Readiness to grant even greater concessions to Aceh will, rather, diminish as time goes by.