

CONSULTATION PROCESS ON GOVERNMENT REGULATIONS AND PRESIDENTIAL REGULATIONS, MANDATED BY THE LAW ON THE GOVERNANCE OF ACEH

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Three decades of conflict in Aceh came to an end in 2005, after Crisis Management Initiative (CMI), an organization specialized in mediation, successfully facilitated peace talks between the Government of Indonesia and the Free Aceh Movement GAM in Helsinki, Finland. The talks resulted in the Memorandum of Understanding (MoU), which was signed on August 15, 2005. An important aspect of the MoU was that the two parties agreed in the first article (1.1.) that a Law on the Governing of Aceh would "be promulgated and...enter into force as soon as possible and not later than 31 March 2006." With some delay, Law no. 11 on the Governance of Aceh (LoGA) was passed by the national parliament DPR and signed by the President in August 2006. LoGA is an important tool for conflict transformation and conflict resolution in Aceh. However, as is common in the Indonesian legal system, the implementation of a law will require several lower regulations. LoGA foresees the following implementation regulations to be issued by the national government:

- Government Regulation on Local Political Parties in Aceh (issued as GR 20/2007)
- Government Regulation on the Appointment and Dismissal of the Regional Secretary of Aceh (issued as GR 58/2009)
- Government Regulation on the National Government's Authorities in Aceh (see below)
- Government Regulation on the Joint Management of Oil and Gas Resources in Aceh (see below)
- Government Regulation on the Delegation of Government Authorities to the Management Body of the Sabang Special Zone (see below)
- Presidential Regulation on Mechanisms for Consultations and Considerations on Draft International Agreements, Draft Laws and Administrative Policies Directly Related to Aceh (issued as PerPres 75/2008)
- Presidential Regulation on the Cooperation of the Government of Aceh with Foreign Institutions and Agencies (issued as PerPres 11/2010)
- Presidential Regulation on the transfer of Land Administration Offices from the nationalgovernment to provincial and district governments (see below).

According to LoGA Article 8.3, before issuing these regulations (called administrative policies), the national government has to consult the Governor of Aceh and receive his considerations. The mechanisms of conducting consultation and receiving the Governor's considerations are regulated in a Presidential Regulation, which was issued after a lengthy debate between Jakarta and the Government of Aceh in 2008. The issue that held up the enactment of the regulatio was the difference between the wording of the MoU, which calls for the Governor's consent, and the LoGA, which only gives him the right to provide his considerations. However, the lengthy consultation processes on the above-mentioned draft regulations, held since the mechanisms for consultations were set up in late 2008, show that consultations were conducted by both sides following the spirit of the MoU: trying to achieve consensus as a rule. It must be noted, however, that due to the thorough consultation processes, only two regulations have been enacted during a period of nearly two years. Three Government Regulations and one Presidential Regulation still need to be issued. The state of their preparation and problems encountered are briefly discussed in the following sections of this report.

Problems with the Consultation Process

Before examining the pending regulations in more detail, I will briefly discuss more general aspects of the consultation process and some of the problems related to it. As mentioned above, Aceh has some special authorities mandated by LoGA. Notably, the Government of Aceh has the right to require the Government of Indonesia to consult all of its policies directly related to Aceh. In order to apply the LoGA article, the Government of Indonesia issued Presidential Regulation Number 75 in 2008 on the consultation mechanism and consideration in the planning of the international agreements, and the planning of laws and administrative policies, which are related directly to Aceh. LoGA and the Presidential regulation that followed can be seen as tools to reinforce the peaceful development of Aceh and to engage the Government of Aceh and the Government of Indonesia in peaceful dialogue in the framework of conflict transformation.

Although the peace agreement was signed already over five years ago, there are still some articles of LoGA that remain unimplemented by the Government of Indonesia. Even though the facilitator of the consultation process, the Special Autonomy Unit of the Ministry of Home Affairs, stated that the consultation process would be finished by the end of November 2010,² it appears that in some cases the dialogue and consultation process is in deadlock. Therefore, to guarantee the process of consultation, the Government of Aceh needs to advocate more effectively, to push further the preparation of the regulations through a consultation process. There are some obstacles to the consultation process. These include the lack of knowledge on Aceh's special autonomy status, unclarity over the status of LoGA when compared to other national laws, and a lack of coordination amongst Aceh's various negotiation teams.

Although the Ministry of Home Affairs has conducted a socialization program concerning the concept of the autonomous region of Aceh as provided to the relevant departments by LoGA, there still are misperceptions at the national level regarding the special autonomy status of Aceh. Some of the national departments still hold that act number 38 in 2007 on the Division of Functions between the National Government and the Provinces, Districts and Municipalities would apply to Aceh. From the first rounds of consultations it has been apparent that some national departments are not responsive to the special autonomy provided by LoGA. They think, instead, that LoGA is against other national laws, the provisions of which are valid for all Indonesian provinces. The Special Autonomy Unit of the Ministry of Home Affairs that acts as the facilitator has emphasized that the national government still has the right to oversee, and provide norms, standards and procedures for implementation of the functions, as according to LoGA article 11. Furthermore, it also has the right to facilitate the implementation of a function, or to delegate it to the Government of Aceh in accordance with the Law Governing system of Indonesia. In addition to the above misperceptions, the capacity of the people in national government departments to fully conduct the consultations with the Government of Aceh representatives is weakened by the fact that the persons representing the departments often lack the decision-making authority. The process is slowed down as they need to consult higher officials on various issues that have been discussed in the meetings.

This report is based on data collection through (1) documentation of the process of consultation, (2) interviews with key persons or stakeholders, particularly in the Government of Aceh and the Government of Indonesia, and (3) relevant media reports regarding the consultation process.

The statement was made by Mr. Sony Sumarsono, the Director of the Special Autonomy Unit of the Ministry of Home Affairs, during the
consultation process, and was said to reinforce the completion of the Aceh regulations by the end of November.

The status of LoGA as a special autonomy law for Aceh is clearly stated in article 19 point 2 of Government Regulation number 38 in 2007 on the Division of Functions between the National Government and the Provinces, Districts and Municipalities. This article states that the division of function for Aceh and Papua will be regulated by their own special autonomy law. Legally speaking, this means that LoGA as a special law can override other national laws, such as act number 32 in 2004 on Regional Autonomy, as well as other national regulations. Debates on this principle have occurred during the consultation processes. It is important that both parties agree on the primacy of LoGA as the fundamental resource for the consultation process. Otherwise the debates may end in deadlock as both parties stick to their own views. It is difficult to find a solution in situations in which LoGA does not have a specific provision on the matter at hand. In such cases, the parties should use national laws to seek the legal solution.

There are also some problems related to the Government of Aceh representation in the consultation process. The Government of Aceh representation was divided into two teams, due to the organization of the Aceh Government functions. One team, which works for the Draft on Government Regulation on National Central Government's Authority in Aceh, is managed by the Governmental Affairs Bureau of the Government of Aceh, and the other team, which is managed by the Legal Office of the Government of Aceh, focuses on consulting the regulations concerning Sabang, oil and gas, and the transfer of land affairs. There is a lack of coordination between the two Aceh teams. For example, for the oil and gas functions there is a need to coordinate between the two teams. The same need exists also for negotiation over Sabang. The teams should hold coordination meetings to identify the bottlenecks of consultation, for example in the difficult negotiations over the land function and the presidential regulation on the transfer of the national government's offices for land affairs to the provincial and district authorities. The coordination meetings should come up with recommended solutions to be presented to the Governor of Aceh, as well as advocating those regulations that are still in need of advance consultation.

Ongoing consultations

Currently both parties, the Government of Aceh and the Government of Indonesia, are conducting the consultation process of some regulations, which were mandated by LoGA:

- Draft of Government Regulation on National Central Government's Authority in Aceh
- Draft Government Regulation on Distribution of Central Government's Authority to Sabang Counsel Region
- 3. Draft of Presidential Regulation on the transfer of the national government's offices for land affairs in Aceh to the provincial and district authorities
- 4. Draft of Government Regulation on the Joint Management of Oil and Gas Resources
- 5. Regulations on transfer of Islamic Schools to the District Government in Aceh

Government Regulation on National Central Government's Authority in Aceh

According to LoGA (Article 7.1), the Government of Aceh and the district/city governments regulate and execute government functions in all public sectors, except for those functions that are the responsibility of the national government. According to Article 7.2, the latter comprise government functions of national character, foreign policy, defense, security, justice, monetary and fiscal affairs, as well as certain functions in the field of religion. LoGA does further stipulate in Article 270.1 that government functions of national character have to be regulated by "laws and regulations", but does not determine their specific nature. Based on this mandate, the national government has chosen to draft a Government Regulation that basically follows the pattern of Government Regulation 38/2007, which regulates national government functions for the whole country. Adjustments to the special autonomy situation of Aceh were made through a lengthy consultation process between the national government agencies responsible for the individual sectors and the Government of Aceh. This process, called for by LoGA Article 8, has been concluded.

During the consultation process of this regulation that started in June 2009, the two parties have successfully consulted on thirty-two functions, as follows:

- 1. Religion
- 2. Education
- 3. Health
- 4. Agriculture and farming
- 5. Town planning
- 6. Public works
- 7. Housing
- 8. Files
- 9. Library
- 10. Environment
- 11. Women
- 12. Social
- 13. Family planning
- 14. Labor
- 15. Cooperative
- 16. Culture and tourism
- 17. Youth and sport
- 18. Community protection and state unit
- 19. Energy and natural resources
- 20. Village community empowerment
- 21. Trade
- 22. Transportation
- 23. Land
- 24. Demography
- 25. Women empowerment and child protection
- 26. Fishery
- 27. Forestry
- 28. Planning and development
- 29. Investment
- 30. Regional autonomy
- 31. Government
- 32. Statistics

Presently, the draft regulation is in the "harmonization stage", which is a process under the leadership of the Ministry of Justice, mainly to verify and ascertain legal consistency. Since the beginning of October 2010, weekly meetings are held involving the Ministry of Home Affairs and the Government of Aceh to finalize the draft regulation. A final draft was expected to be ready by the end of November 2010. At the time of preparing this report, the parties had harmonized some functions, e.g. education, statistics, industry, family planning, religion, library, health, cooperative and micro enterprise, national planning development, housing, and documentation.

In the harmonization process, both parties reviewed sub functions. According to Aceh's Provincial Secretary, Setia Budi, there has been no objections by either party so far in the harmonization process, which has been chaired by the Ministry of Law and Human Rights. All functions have been agreed in inter-ministerial consultation meetings. Ali Alfatah, the Head of Governmental Affairs Bureau of the Government of Aceh, confirmed this opinion.

Safrizal, the Section Head of the Special Autonomy Unit who has been involved in all processes of Aceh special autonomy regulations said that there are a few points in the draft that will need to be changed, but that these changes do not have an impact on the substance of all subfunctions. Both parties consider LoGA as the basis of consultation. However, he said that there still is a problem in the land functions. There indeed remains to be one open issue: the regulation of responsibilities regarding land affairs. The National Land Agency seems still reluctant to relinquish certain responsibilities to Aceh, which the Government of Aceh believes it is entitled to. The difference of opinion on land affairs (see below) could possibly still hold up the finalization and enactment of this key implementing regulation of LoGA. The Ministry of Home Affairs has reportedly assured the Government of Aceh, that the issue will be brought to the attention of the President for a final decision. However, according to some participants of the consultation process, it seems still doubtful that such a decision will be taken any time soon.

Land function - the bottleneck of the consultation

The dispute over the land function has emerged unpredictably during the final stage of the consultation. In the interviews for this report everybody assumed that the regulation would not be finished by the deadline at the end of November if both parties were coerced to finish the land function. According to Mawardi Ismail, a Legal Expert for the Aceh negotiation team, the Ministry of Home Affairs was reporting directly to the President regarding the status of land function. The Aceh team expected that the President would then present a wise solution to the dispute. However, another team member, Jafar, disagreed, stating that the Governor of Aceh and the Aceh team would have to wait until all functions, including the land function, would be finished. To support this view he pointed out that the land function is an essential issue in LoGA. Were the regulation finalized without including the land function, there would be no guarantee that the central government would ever come back to the negotiations to consult the land function separately. He had personally reported this to the Governor of Aceh, and the Governor had agreed to wait patiently until the completion of the process.

There is a marked difference between the Government of Aceh and the National Land Agency regarding the interpretation of LoGA's regulations on land affairs. LoGA mandates in Article 253 that the (so far nationally-owned) offices for land administration at provincial and district level are to be handed over to the respective local governments at the latest by the beginning of 2008, with details to be laid down in a Presidential Regulation. A draft of this regulation has been prepared by the National Land Agency already in 2008, but was so far not

officially discussed with the Government of Aceh. The draft includes detailed regulations on the assignment of functions to the provincial and district levels. Consequently, those functions that remain with the national government should be stipulated in the Government Regulation on the National Government's Authorities in Aceh. Both regulations complement each other and must therefore deal consistently with the assignment of land management functions across the three levels of government—national, provincial and district governments—based on the legal framework of LoGA.

Besides mandating the handing over of the land offices as mentioned above, LoGA (Article 213.3) defines the functions of the Government of Aceh and the district/town governments explicitly as the authority to issue buildings rights titles (hak guna bangunan) and cultivation rights titles (hak guna usaha), including to domestic and foreign investors. The building rights title gives the right to construct and own buildings on a piece of land that someone else owns, whereas the land cultivation title gives the right to use a state-owned land for the purpose of agriculture. Consequently, the National Land Agency wants to limit Aceh's responsibilities for land affairs to these two authorities. However, the Government of Aceh is of the opinion that handing over of the regional offices for land administration to the local governments, as mandated by LoGA, includes also the transfer of all authorities for land affairs that are still with the national government to the provincial and district governments of Aceh. This would include the authority to issue other land titles as well, particularly land ownership rights. While one could certainly think of assigning those additional functions to Aceh under a co-administration (tugas pembantuan) arrangement, the Government of Aceh would see this as an undue restriction of its special autonomy rights. Reportedly, the National Land Agency had at one stage during the consultations been ready to compromise on the matter, but it seems that they are taking an uncompromising position at the moment. This calls certainly for higher level intervention if the deadlock is to be overcome, which does not only prevent the land offices from being handed over, but might also mean another considerable delay in promulgating the Government Regulation on the National Government's Authorities in Aceh.

Government Regulation on the "Delegation of Government Authorities to the Management Body of Sabang Special Zone"

The process of consultations between the Government of Aceh and the national government on this draft regulation had led to a mutual understanding of the two parties and was therefore successfully concluded. However, during the stage of final inter-ministerial coordination, the Ministry of Finance intervened and demanded that customs duty and excise tax must be applied to the Free Trade Zone of Sabang, as to other regions in Indonesia. When the news reached Aceh, there was a considerable outcry of protest from concerned parties, including GAM. Consequently, the Vice Governor took the opportunity of a meeting with the President to explain the issue to him and ask for his intervention. After a meeting in Jakarta with the team of Aceh and the team of the Ministry of Finance that was also attended by the Ministry of Home Affairs, the parties finally agreed that the customs law and excise tax will be not applied to Sabang as it is a free-trade zone. Thus, eventually the national government agreed not to apply the law on customs and excise taxes for Sabang, which freed the way to continuing the process of legalization. Reportedly, the draft Government Regulation is presently in the Cabinet Secretariat awaiting the signature of the President.

Government Regulation on the Joint Management of Oil and Gas Resources

Reportedly, the Government of Aceh and the national government have reached consensus on the draft Government Regulation on the Joint Management of Oil and Gas Resources. Issues that have originally been the source of conflicting views have eventually been settled. Downstream activities will be handled by the Government of Aceh, which will be regulated through the Government Regulation on the National Government's Authorities in Aceh (authorities that are not mentioned in this regulation will automatically become authorities of the Government of Aceh). An agreement on this was reached in the consultations on May 20, 2010. The regulation that is currently being drafted will only deal with upstream activities, which will be handled by a specially created Joint Oil and Gas Management Agency (*BPMA*), where both the national government and the Government of Aceh will have equally strong roles.

The parties have agreed to regulate the role and function of BPMA in the regulation on Aceh Management of the Oil and Gas. Important provisions that have been regulated so far include data and a general survey of the oil and gas. The draft regulation, for example, stipulates that the Government of Aceh is able to store the copy of data. The functions of BPMA have also been agreed. Its main task is to oversee the implementation of the agreement. The draft provides the following functions to BPMA:

- 1. To sign agreements
- 2. To get the approval from the ministry for the first field development planning
- 3. To give approval for the next development planning
- . To give approval for the work plan and budget planning of the enterprise
- To monitor and evaluate the implementation of the agreement for the ministry and the Governor
- 6. To participate in the negotiations and in preparing contracts on oil and gas matters between the national Government and the Government of Aceh

Composition of BPMA

- BPMA comprises the Head of BPMA, council of wali amanat and an implementing body
- Council of wali amanat includes representative of the National Government, the Government of Aceh and Aceh communities
- 3. There are three members in the wali amanat council
- 4. The implementing body comprises three units, each having two sub-units
- 5. The law will mandate the qualifications of staff members.

Progress has been achieved by the Government of Aceh in having the exploitation of oil and gas for 200 miles. According to Setia Budi, the "Aceh team said that 200 miles is the natural resource area in which the oil and gas exists, and due to this, if the National Government is serious in handing over the right to manage the oil and gas to Aceh, the negotiating teams should agree on the 200 miles even though it is in contradiction with the Law 32/2004 that limits the zone to twelve miles." The joint management of oil and gas resources will cover the 200 miles economic zone and not only the 12 miles zone, to which actually also LoGA limits Aceh's authority. This can be seen as a particular success of the Aceh negotiation team, even though the sharing of revenues generated in the 200 miles zone is still to be discussed and decided upon by the cabinet.

The draft regulation is now awaiting the "harmonization process" under the leadership of the Ministry of Justice. It was to be submitted to the President before the end of 2010.

Regulations on transfer of Islamic Schools to the District Government in Aceh

The transfer of Islamic schools (Madrasah Ibtidaiyah and Madrasah Tsanawiyah) from the national government to the district governments in Aceh is mandated by Article 263 of LoGA, as Article 18 of LoGA assigns the authority to run these schools to the district governments. Article 263 stated that the national government must transfer the personnel, documents, and funds related to the Islamic schools to the district governments in Aceh for at least the first budgetary year, 2008. The implementation of this article is enforced by the fact that the draft does not assign the right to run these schools to the national government any more, but limits its authority to oversee the functions. As LoGA does not foresee the issuing of any specific implementing regulation for the transfer of schools, it must be assumed that the transfer awaits the enactment of the Government Regulation on the National Government's Authorities in Aceh. The draft of the Government Regulation on the National Central Government's Authority in Aceh states, following LoGA, that the national government only has the authority to ensure the following of norms, standards and procedures of the Islamic Schools in Aceh.

Conclusion

LoGA is the basic legal framework for the Aceh autonomous region and it must be respected as the legal entity to support good governance and the peace process in Aceh. There are some good reasons for both parties to apply LoGA: (1) it was mandated by the MoU, (2) the implementation of LoGA could serve as a tool to accelerate the peace process and to enhance the trust-building for both parties, (3) its timely implementation will also accelerate the development of Aceh and (4) LoGA can offer a mechanism of conflict transformation that supports the sustainable peace in Aceh. However, there are still some bottlenecks that must be settled between the Government of Aceh and the Government of Indonesia. These bottlenecks concern particularly the implementation of some critical government regulations and presidential regulations such as the transfer of National Land Affairs, and Oil and Gas Joint Management.

As informed, there are still ongoing consultations for the draft of Government Regulation on the National Government's Authorities in Aceh in the harmonization process. According to the Aceh team, the formal consultation and harmonization were to be finished in December 2010, but some regulations would require direct consultations between the Governor of Aceh and the President. These include the bottleneck issues such as the land function, and the 200 miles exploration zone for oil and gas.

