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A Commentary on Selected Aspects of Indonesia's Draft Electoral Legislation

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This paper is intended to contribute to an informed public debate on Indonesia's electoral legislation by addressing certain key issues that may be significant in the development of credible and democratic electoral laws and procedures. It is not intended to serve as a comprehensive assessment of every provision of the draft election law being considered by the DPR. Nor does it consider a number of issues (for example the type of electoral system to be adopted or the level of representation of ABRI in the DPR) which are already the subject of wide and lively discussion.

This paper is divided into two parts. It begins with three important general observations about the draft election law and the process of arriving at a new electoral framework. It then offers specific comments about some of the provisions (both present and absent) of the draft law prepared by the Ministry of Home Affairs team and currently being debated in the DPR. These comments are not intended to be prescriptive—in most cases there are a variety of possible approaches that would be in keeping with internationally-accepted standards for democratic elections. It is up to the stakeholders in Indonesia's elections—including the government, political parties, domestic monitoring organizations and all other concerned citizens—to determine which approach is most desirable in the Indonesian context. With this in mind, the comments that follow are offered in the hope that they will highlight a set of important issues deserving further attention and study by the many Indonesians committed to holding credible and democratic elections.

I. Three General Observations

The value of dialogue and inclusion.

The most basic indicator of the success of elections--and especially elections held during a political transition--is whether the government which emerges from the elections is accepted as legitimate. This

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legitimacy empowers the winners to pursue the program of government that they set forth during the campaign period. It also implies that the losers accept their electoral defeat and acknowledge that they have to wait until the next election cycle to compete for control of the government. Until then, the losers need to be both willing and able to act as a democratic opposition, challenging the government's proposals and holding it accountable.

For a government to gain this legitimacy from the outcome of the election, all significant political actors need to accept the legitimacy of the electoral process under which it has come into being. Thus, the most legitimate elections are those in which all the major contestants have a meaningful say in the entire range of decisions that are likely to affect the conduct and outcome of the elections. These decisions include the choice of electoral system, the timing of elections, rules affecting party formation, the role and composition of the body responsible for administering the election, the myriad regulations governing the conduct of the election, and determining the mechanisms for airing grievances and resolving disputes.

Continuing dialogue about the electoral process, between all actors, and especially between parties within the DPR and parties and groups outside the DPR, is therefore essential. It is not, however, the task of foreign commentators to prescribe the form for such dialogue. But without this, there is the risk that disgruntled parties will boycott the election and that segments of the public will doubt that the elections were fair and meaningful.

The need to ensure openness and transparency.

The basic elements of democratic elections are essentially the same in every country. These include: a commitment to non-violent political competition, establishment of fair and unbiased "rules of the game," competent and impartial administration of the election, respect for the rights of candidates, political parties and voters, and a willingness on the part of the contestants to accept the outcome. There are, however, many ways of translating these basic elements into practice, and there are a wide variety of systems in use in new and established democracies for almost every aspect of the electoral process.

The guiding principles for Indonesia's elections as laid out in the draft law and the explanatory notes state that the election must be direct, general, free, secret, honest and just. These are all very important and admirable, but a further basic principle should be added to this list: that of openness and transparency. An explicit commitment to openness and transparency—especially during transitional elections—is important because transitional elections typically involve a somewhat confusing mix of new rules, new norms and new participants. At the same time, however, the level of trust between government, political parties and citizens is inevitably low during any transition to democracy. Therefore, it is very important not only that elections are conducted properly, but also that the contestants and other interested groups have the right *to see* to their own satisfaction that all aspects of the elections are being done properly. A more explicit emphasis on openness and transparency could be infused into the draft legislation by including detailed provisions ensuring that the operation of all aspects of the election process are open to proper scrutiny throughout.

"Technical" details matter!

Resolution of Election Complaints and Grievances (Articles 16 and 17)

The proper hearing and resolution of complaints and grievances is a very important part of the honesty and integrity of the election. Articles 16 and 17 of the draft law establishes Panwaslak committees to resolve electoral disputes, but there is currently no clarity on how these committees will work.

In particular:

- 1) It is not stated — as is essential for openness — that Panwaslak committees will hear cases in public;
- 2) There are no firm timetables for the submission of complaints to Panwaslak committees or for their resolution by Panwaslak committees;
- 3) It is not clear what right of appeal to a higher level exists if one of the parties to a Panwaslak hearing is dissatisfied with the result; and
- 4) It is not clear what role, if any, the judiciary have in the resolution of electoral complaints (for example, is there an appeal from the national Panwaslak to the Supreme Court?) or if and how the judiciary deal with allegations of criminal election offences under Articles 59 to 62.

Voter Registration (Articles 23 to 29)

Voter registration is a key part of the election process. However good the polling and counting procedures are, it is impossible to conduct a fair election on a bad register. Two issues in particular that might be considered are:

- 1) Is it possible for Indonesians to have multiple KTP identity cards, and will they then be able to register in more than one place?; and
- 2) Does the proposal for the PPS registration team to go out in remote areas, while everywhere else voters go to the PPS for registration, favour some potential participants in the election at the expense of others because all remote voters will be registered but some more urban voters may not be?

Participation of parties and candidates in the election: the nomination process and other issues (Article 30)

Every nation must determine for itself the appropriate balance between representation, which typically is enhanced by a large number of viable political parties, and governmental effectiveness, typically enhanced by relatively fewer parties. There are many internationally-accepted ways to do this. Indonesia's draft election law establishes a number of significant organizational requirements as preconditions to parties contesting the general election. While Indonesia's

Polling procedures (Article 42)

For elections to be credible, citizens must be able to vote easily, safely, and with the knowledge that their vote will be secret and the count will be honest. Thus, the body of rules and procedures that determine the process of voting must be well designed and equally well implemented.

The draft law's provision for polling has very little detail. While much of this detail could be put into regulations, there are some basic principles which should be considered for inclusion in the law itself. In particular, a provision could be included which defines the right of access to polling stations, and restricts it to election officials, voters, party agents, accredited domestic and international observers. It is not desirable, and can be intimidating, for other people to hang around in the polling station for long periods. Another provision also frequently found in election laws states that members of the security forces in uniform may only enter the polling station at the express request of the presiding officer

Discussion is under way on the idea that voters may be marked with indelible ink when they come to vote. to give extra and visible protection against people voting twice or more. This system is used in a large number of countries, including India, Bangladesh and Cambodia. It need not replace registration; unless budgetary restrictions cause a problem, there is no reason why there should not be two separate mechanisms to give confidence that fraud is not taking place on polling day. And it is probably important enough to be written into the law if it is adopted.

Some voters — the blind, and possibly some disabled people and some illiterate people — will need assistance in voting. This could perhaps be provided either by a person trusted by the voter, or by a member of the KPPS. This is an area where suspicion easily arises, and debate and inclusion in the law at this stage might be valuable.

Counting and tabulating the vote (Articles 47 to 52)

The draft legislation provides for observation by party agents of the counting and tabulation at all levels, and for the issue of result reports and certificates to such party agents. This provision will enable parties to check that figures are not changed as results are aggregated. To give further confidence, the legislation could be strengthened by giving a specific right to properly accredited party agents and domestic observers to accompany the transport of result reports, certificates and verifying material from one level to the next.

Independent observation (Article 66)

Observation — the process by which accredited people can watch, listen and ask questions, can form judgments, but cannot interfere in the electoral process — is a very important confidence building tool. This is recognized by the inclusion of Article 66. However, it should be completely clear in the interests of openness and transparency that observers have the right of

access to all electoral facilities and the right to observe throughout the electoral process--and not just on election day.

It is also worth noting that the key task of organizing observation of the process in large numbers of polling stations will fall to the domestic observer organizations, and to party agents. It is therefore just as important that their rights are established and protected as that the rights of international observers are established and protected.

Setting up the KPU: Transitional provision (Article 67)

It is currently planned that debate on the electoral legislation will continue until late January. There will then be a period in which the new national election commission, the KPU, is to be appointed, during which time the existing LPU remains in place on a transitional basis.

Many of the key regulations and operational decisions will in fact need to be taken during the period immediately after the passage of the law. Those involved in the process may wish to consider whether and how the new KPU could be formed very quickly after the passage of the law. It could even be considered whether, to enable the KPU to be established fast, political party membership of the KPU could be based in some way on selection from registered parties rather than from parties which have submitted nominations to contest the election.

Other issues: Media access and balance

The coverage of the election campaign in the media--and especially in the broadcast media -- usually has a major impact on the ability of parties and candidates to establish their credibility and to put across their message. This will certainly be true in Indonesia, both at national and local level. Election laws frequently include provisions that regulate this coverage. For example:

- 1) Provisions which ensure that all parties standing in the election have the right to an allocation of free time on radio and TV: these provisions typically apply to public stations and may also apply to private stations;
- 2) Provisions requiring balance in the coverage of the parties on news and current affairs programs: while difficult to enforce exactly, it is worth considering whether such requirements might be useful; or
- 3) Provisions limiting or banning the purchase of advertising time on the media by political forces, in order not to give extra advantages to parties with money to pay for advertisements.

It would be worth considering whether any provisions of this kind should be added to the legislation.

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