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Election Offences as the Ground of Election Petition: A Comparative Analysis

Topo Santoso, S.H., M.H.*

Artikel ini bermaksud membandingkan ketentuan mengenai tindak pidana pemilu sebagai dasar mengajukan gugatan pemilu. Pertanyaan utamanya adalah apakah yang menjadi dasar mengajukan gugatan pemilu di Indonesia, Malaysia, Singapura, dan Filipina. Apakah tindak pidana pemilu menjadi salah satu dari dasar atau alasan mengajukan gugatan pemilu? Dalam penelitian ini terbukti bahwa di Indonesia dasar dari gugatan pemilu (ground of election petition) hanyalah adanya kesalahan penghitungan dari KPU, jadi tindak pidana pemilu tidak dinyatakan sebagai dasar gugatan. Hal ini berbeda dengan pengaturan di negara-negara lain dimana tindak pidana dapat menjadi dasar gugatan.

A. Introduction

The sanctity of the general elections is very important for democracy. Therefore, the legislative has declared several unfair practices in general elections as criminal acts. In this regard, law regarding general elections, besides regulating general election process, also forbids several actions, which can obstruct the essence of free and fair elections, and threatening the perpetrators with sanction. The sanction could be in the form of criminal sanction or administrative sanction. In some countries, election offences become ground of election petition. However, in Indonesia, ground of election petition is limited to error or mistakes in votes counting conducted by election commission. The aim of this article is to compare legal frameworks of four countries (Indonesia, Malaysia,

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Singapore, and the Philippines) regarding election offences as ground of election petition.

B. Definition of Election Offences

Election offences are a term, which is widely discussed in general elections. Another term is corrupt practices. To assure a free and fair general election is very important for a democratic state in order to protect the voters, the parties contesting general elections, or the people in general from fear, intimidation, bribery, fraud, and unfair practices, which will affect the purity of the general election result.¹ If the election is won through unfair practices (malpractices), it would be difficult to claim that the elected leaders or legislators in the parliament are the true representatives of the people.

The concept of election offences in the election law can be identified from elements of the criminal provisions that exist in Sections 137 to 140 of Law No. 12 of the year 2003. In Malaysia, the word election offences can be found either in the Election Act 1958 or in the Election Offences Act 1954. The Malay term for election offences is "*kesalahan pilihan raya*" (election offences). This term can be found in the court decisions in Malaysia.²

Actually, if we discuss the term and definition of election offences in Singapore, it is the same as and would be difficult to differ it from that of Malaysia, since at the beginning these two countries are one country (1963-1965) and they inherited the same legal system, i.e., from the British. Accordingly, the same as in Malaysia, where the term election offences can be found, however the law does not provide any definition of what election offences are.

¹ Hans Raj Jhingta, *Corrupt Practice in Elections*, New Delhi: Deep & Deep Publications, 1996, pp. 1-4.

² For decisions regarding election offences in Malaysia, we can refer to Tunku Sofiah Jewa, *Malaysian Election Laws*, Kuala Lumpur: Pacifica Publications, 2003, Vol. 1-3.

In the Philippines, the word election offences can be found in the Omnibus Election Code of the Philippines, i.e., in Section XXII. Even though the term election offences are an original law term, once again, its definition is not provided by the law. Apparently, from the substance being regulated and from the intention of formulating the law, it is understandable what election offences are.

Patrick Patino and Djourina Velasco use term "election violence" which comprises killings; abductions; terrorism; physical attacks on rallies, homes, offices and vehicles of candidates and supporters; and any other acts that result in deaths, physical injuries and/or damages to properties. Election-related violence will also refer to intimidation, coercion and non-physical forms of harassment. These are not strictly incidents of violence *per se*. However, Philippine election laws include these as election offences since they curtail voters' decision-making and are preliminary acts to violence.³

In this article, the "election offences" is defined as: "All violations of provisions related to general election process as far as such violations are threatened by criminal sanctions under the laws regulating general elections".

Based on this definition, actions related to the general election but not stipulated in the laws on general elections cannot be categorized into "election offences".⁴ This is very reasonable since, in Indonesia for example, election offences are often interpreted too

³ Patino and Djourina Velasco, "Election Violence in the Philippines", http://www.fes.org.ph/papers_elecviolence.htm, September 5, 2005.

⁴ As an example, criminal action related to the general election but stipulated in the Political Parties Law (and not in the General Election Law) is not classified as "election offences". Other example is violation of traffic regulation when conducting campaign in the free way is an ordinary criminal action (i.e., violating the Traffic Law) and not election offences. All the same, an action of corrupting the campaign budget, conducted by general election coordinator, is included as corruption criminal action (violating the Corruption Law) and not violating the General Election Law. Violation of the General Election Law, which is only threatened by administrative sanction or only by civil sanction, is not categorized as election offences in this definition.

broad, that is, every violations that take place during general election period. In this broad sense election offences includes any offences such as, battering (or even murder) related with political affiliation or traffic violations during campaign (which actually violation of Traffic Law). Even administrative violations are often considered as election offences.⁵

In addition to the term "election offences", we are also familiar with the term "corrupt practices". Sometimes those two terms are used interchangeably. The term "election offences" is broader than the term "corrupt practices" since corrupt practices is only one type of election offences. In addition to corrupt practices, there are also illegal practices and other types of deviations. For example, in the United Kingdom, the corrupt practices have been provided under the heading of 'election offences' which besides corrupt practices also consist of illegal practices, illegal payments, and employment and hiring.⁶

Referring to the United Nations' Human Rights Standards Regarding Elections Especially concerning the Common elements of Electoral Laws and Procedures wherein stated that the national electoral law must also protect the political process from corruption, official misfeasance, obstruction, undue influence, personation, bribery, treating, intimidation and all other forms of illegal and corrupt practices⁷. Indonesia, Malaysia, Singapore, and the Philippines have also stipulated those types of election offences.

⁵ The differentiation of election offences and violations categorized as election offences is also important since it relates to the institutions authorized to process it, for example, in Indonesia, traffic violations during campaign period (since it is not election offences) do not need to be reported to the General Election Supervisory Committee. As well as with the battering by political oppositions, it is an offence in the Criminal Code (KUHP), therefore it can be directly reported to the Police.

⁶ Representation of People Act, 1983, Sections 168, 169, 175, and Section 102.

⁷ United Nations, Professional Training Series No. 2 Human Rights and Elections a Handbook on Legal, Technical, and Human Rights Aspects of Elections, New York and Geneva: United Nations, 1994, p.16.

C. Election Offences as Ground of Election Petition

The purpose of submitting petition over general election is especially to request that the general election result acquired by another party is cancelled due to a certain ground. Is there any relation between election offences and election petition? Are all election offences become the ground for petition over general election? To answer such questions, it must first be explained whether there is any rules regarding petition over general election in each country.

1. Indonesia

In Indonesian election legal framework, the general election result can only be overruled through petition for the disputes over the general election result before the Constitutional Court. The election offences settlement process only gives criminal sanction to the convict, but it will not affect the general election result.

What can be the ground for submitting election petition in Indonesia? Can the occurrence of election offences become a ground of election petition? If yes, what kinds of offences? Referring to Section 75 of Law Number 24 of 2003 and the Constitutional Court Regulation Number 04/PMK/2004, the ground for submitting election petition is only existed if there is an assumption of vote miscalculation announced by KPU, there is no other ground mentioned. Therefore, the occurrence of election offences is also not a ground to submit request for petition over the general election result to the Constitutional Court.

The only ground is the occurrence of miscalculation by KPU. What happen if such miscalculation occurs due to election offences (for example, manipulation of election result)? Can this irregularity become the ground of an election petition? My position is that, since the Law No. 12 of the year 2003 formulates it in general term, i.e., the occurrence of miscalculation, then it must be interpreted in a broad definition (including mistakes by coincidence, negligence or deliberateness). Therefore, if any election offences occur and possibly influence vote calculation by KPU and eventually

influence the acquirement of seats, then this can be the ground for election petition in Indonesia. What kinds of election offences can influence the calculation of votes by KPU and eventually influence the acquirement of seats?

As has been mentioned previously, there are several offences which are actually very dangerous and can highly influence the acquirement of votes and seats (but not considered related to the cancellation of the general election result) i.e., offences stipulated in Section 140 paragraphs (1),⁸ (2),⁹ (3)¹⁰ and (4)¹¹ of the Law No. 12 of the year 2003. Once again, since the Law formulates it in general, i.e., the occurrence of miscalculation, the actions stipulated in the Section 40 paragraphs (1) to (4) can be stated as causing miscalculation, therefore, can be the ground for submitting election petition in Indonesia. However, other offences (including bribery for voters) cannot be the ground for it since they are not (directly) related to miscalculation. Nevertheless, Law Number 24 of the year 2003 (concerning constitutional court) does not mention these grounds explicitly.

Hence, it is clear that the ground of election petition in Indonesia only single thing, namely the existence of "vote miscalculation conducted by Election Commission". The law does not mention election offences as a ground of election petition. In my opinion, this provision should be clarified because in nature there are some election offences that could let votes miscalculation, i.e., (i) intentionally commits an action which causes the voting right of

⁸ Anyone who intentionally commits an action which causes the voting right of a voter becomes invaluable or causes a certain general election participant acquires additional votes or its acquirement of votes is decreased.

⁹ Anyone who is intentionally damaging or losing the sealed general election result.

¹⁰ Anyone who due to his negligence causes the damaging or losing of the sealed general election result.

¹¹ Anyone who intentionally alters the general election result and/or the minutes and the certificate of the general election result.

a voter becomes invaluable or causes a certain general election participant acquires additional votes or its acquirement of votes is decreased; (ii) intentionally damaging or losing the sealed general election result; (iii) by negligence causes the damaging or losing of the sealed general election result; and (iv) intentionally alters the general election result and/or the minutes and the certificate of the general election result.

The occurrence of votes miscalculation → Ground of Election Petition

In reality, the Constitutional Court did accept ground of petition in the form of: (i) the existence of votes miscalculation; and (ii) the existence of election offences that influencing the vote's miscalculation.¹² Vote's miscalculation as a ground of petition, is for example, rose by *Partai Bulan Bintang* [Crescent, Star Party/PBB]. According to this petitioner, KPU had implemented a wrong method in votes calculation and actually against the law, resulted the harm to this particular party. The petitioner argues that KPU conduct calculation by joining the amount of acquirement of party votes with individual votes. In Banten II constituency as one example, PBB claim gaining 97,616 votes, not 57,385 (as declared by KPU).¹³ At another case, Constitutional Court also accepted petition from *Partai Nasionalist Banteng Kemerdekaan* [Freedom Bull Nationalist Party/PNBK] due to the vote's miscalculation in constituency 3 of Gianyar Municipality (Bali).¹⁴ According to Constitutional Court (MK) the votes obtained by PNBK in TPS (Polling Station) 1 and TPS 17, Batuan Village, Sub District

¹² The other election offences such as money politics (bribery), violence, and campaign beyond the campaign period not accepted as a ground of petition.

¹³ Case No. 045/PHPU.C1-II/2004.

¹⁴ Case No. 015/PHPU.C-II/2004.

Sukawati that were not included in PPK and KPU Gianyar Municipality votes recapitulation shall be taken into account.¹⁵

In fact, the occurrence of manipulation toward vote's recapitulation document indeed accepted as a reason to grant an election petition from petitioner. The relevant case deal with this issue is the petition from *Partai Amanat Nasional* [National Mandate Party/PAN] in *Sulawesi Tengah* [Central Sulawesi] constituency for DPR member election.¹⁶ In this constituency, the petitioner alleged that there was irregularity in KPU data. At the conclusion, The Constitutional Court granted the petition, thus, the seat that previously belongs to *Partai Demokrat* [Democratic Party], change over to *Partai Amanat Nasional* [National Mandate Party/PAN].¹⁷

Hence, in practice the ground of election petition accepted by Constitutional Court is vote's miscalculation by KPU, either caused by negligence or caused by intentional conduct (which could be regarded as election offences). However, the definition of "election result" is remain interpret in a narrow sense, namely "result approach", and not "process approach".

2. Malaysia

The Election Offences Act 1954 provides two grounds for disputing or rejecting the general election result, i.e.: avoidance by conviction of candidate¹⁸ and avoidance of election on election petition.¹⁹ In the case of *Hamad Bin Mat Noor v. Tengku Sri*

¹⁵ Constitution court, *Berita Mahkamah Konstitusi* [Constitution court News], *Edisi Khusus Penyelesaian Perselisihan Hasil Pemilu 2004* [Special edition Settlement of 2004 General Election Dispute], No. 5, June-July 2004, pp. 16-17.

¹⁶ Case No. 039/PHPU.C-III/2004.

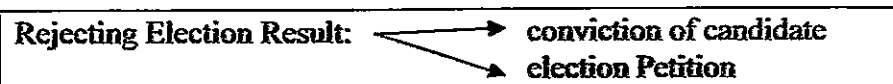
¹⁷ Constitution court, *Op.Cit.*, 22.

¹⁸ Part VI Section 31 of the Election Offences Act 1954.

¹⁹ Part VI Section 32 of the Election Offences Act 1954.

Paduka Raja & Ors,²⁰ the judges affirmed that: "Part VI of the Act provides for two types of grounds for the avoidance of elections – one, by reason of a conviction in a criminal court under Section 31, and two, by the finding of an election judge by way of a petition to him on any of the grounds set out in section 32."

Different from Indonesia where rules concerning election petition are not stipulated in the General Election Law (Law No. 12 of the year 2003), but in the Constitutional Court Law (Law No. 24 of the year 2003) as an institution authorized to settle election petition; in Malaysia, the provisions concerning election petition are stipulated in the Election Offences Act 1954 especially in Part VII which regulates, among others, regarding the administering judge, who may present petition, relief which may be claimed, and time for presentation.



According to the Federal Constitution, no election to the House of Representatives or to the Legislative Assembly of a state shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.²¹

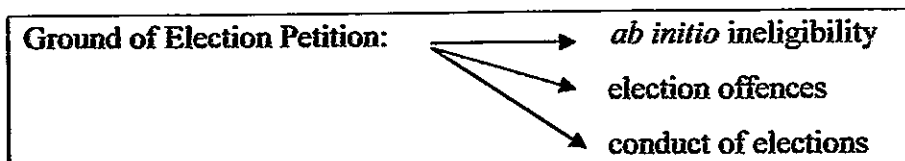
In Malaysia, every petition is trialed by the Chief Judge or by a judge of any High Court nominated by the Chief Judge.²² It is now possible for a Chief Justice to appoint a judge of any High Court in Malaysia, including those of which he is not the Chief Justice, provided he consults the Chief Judge of that High Court.²³

²⁰ *Hamad Bin Mat Noor v. Tengku Sri Paduka Raja & Ors* [1993] 2 AMR.

²¹ The Federal Constitution, Article 118.

²² Election Offences Act 1954, section 33 (1).

What are the grounds for election petition? What offences can be the grounds for the submission of election petition? Actually, there are five grounds to submit election petition as stipulated in Section 32 of the Election Offences Act 1954. However to simplify, they can be categorized into three category: a) *ab initio* ineligibility; b) election offences (comprising three grounds);²⁴ and c) conduct of the elections.²⁵



Two of the above three categories of election offences need to be further discussed, i.e., (1) corrupt or illegal practice by the candidate or with the candidate's knowledge or consent, or by any agent of the candidate; and (2) general bribery, treating, intimidation or other misconduct and circumstances - which have so extensively prevailed that they may reasonably be supposed to have affected the result of the election. The first category is not limited to what types of corrupt or illegal practice can be the ground for election petition; therefore, any types of corrupt or illegal practice if it is conducted by the candidate or with the candidate's knowledge

²³ Sothi Rachagan, *Law and the Electoral Process in Malaysia*. Kuala Lumpur: University of Malaya Press, 1993, p. 198.

²⁴ The first of these pertains to the appointment of the election agent or other agents and canvassers; The second category of offences pertains to corrupt or illegal practice by the candidate or with the candidate's knowledge or consent, or by any agent of the candidate; and the third category of election offences comprises general bribery, treating, intimidation or other misconduct and circumstances which have so extensively prevailed that they may reasonably be supposed to have affected the result of the election. See Sothi Racahagan, *Id.*, 212-214.

²⁵ *Id.*, 210.

or consent, or by any agent of the candidate then it can be the ground for petition. The second, here the offence need not have been committed by the candidates or agents. What is crucial is whether the results of the election were affected.²⁶

Hence, the answer to the above question is clear, i.e., any types of corrupt or illegal practices can be the ground for the submission of election petition, i.e., if it is conducted by the candidate or with the candidate's knowledge or consent, or by any agent of the candidate.

3. Singapore

Just like other issues, in this particular issue there are similarities between Singapore legal framework and that of Malaysia. According to the Parliamentary Elections Act, there are two grounds to contest or refuse the general election result, i.e.: avoidance by conviction of candidate and avoidance of election on election petition. The first ground is affirmed in Section 89, which states that: "The election of a candidate as a Member is avoided by his conviction for any corrupt or illegal practice." Meanwhile the second ground is the avoidance of election on election petition and five grounds to submit election petition are stipulated in detail in Section 90, which states:

"The election of a candidate as a Member shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge: (a) that by reason of general bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate or group of candidates whom they preferred; (b) non-compliance with the provisions of this Act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election; (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by any agent of the candidate; (d) that the candidate personally engaged a person as his election agent, or as a

²⁶ Sothi Rachagan, *Id.*, 214.

canvasser or agent, knowing that the person had, within 7 years prior to the engagement, been convicted or found guilty of a corrupt practice by a District Court or by the report of an Election Judge; (e) that the candidate was at the time of his election a person disqualified for election as a Member."

Both contents and formulation of the provisions are similar to Section 31 and Section 32 of the Election Offences Act 1954, except for the types of the court in letter (d) in Singapore is the District Court, meanwhile in Malaysia is the Session Court. The rest are almost having no differences.

Therefore, it can be concluded that in this country, the answer to the above question is clear, i.e., that any types of corrupt or illegal practices can be the ground for the submission of election petition, i.e., if it is conducted by the candidate or with the candidate's knowledge or consent, or by any agent of the candidate.

4. The Philippines

Different to Malaysia and Singapore legal framework which provide explicitly two grounds to contest or refuse the general election result which are stipulated consecutively in one section, i.e., avoidance by conviction of candidate²⁷ and avoidance of election on election petition;²⁸ in the Philippines, there is one mean to disqualify a candidacy through the process of election offences and two possibilities to refuse the general election result: (i) the provisions regarding pre-proclamation controversy and second; (ii) the provisions regarding election contest.

Through pre-proclamation controversy, Comelec can order the partial or total suspension of the proclamation of any candidate-elect or annul partially or totally any proclamation; meanwhile

²⁷ Part VI Section 31 of the Malaysia Election Offences Act 1954 and Section 89 of the Parliamentary Elections Act of Singapore.

²⁸ Part VI Section 32 of the Malaysia Election Offences Act 1954 and Section 90 of the Parliamentary Elections Act of Singapore.

avoidance of election result through election contest is stipulated in Section XIX of the Omnibus Election Code of the Philippines.

A pre-proclamation controversy refers to any question pertaining to or affecting the proceedings of the board of canvassers which may be raised by any candidate or by any registered political party or coalition of political parties before the board or directly with the Commission, or any matter raised under Section 233 (when the election returns are delayed, lost or destroyed), 234 (material defects in the election returns), 235 (when election returns appear to be tampered with or falsified) and 236 (discrepancies in election returns) in relation to the preparation, transmission, receipt, custody and appreciation of the election returns.²⁹

The Commission have exclusive jurisdiction of all pre-proclamation controversies. It may *motu proprio* or upon written petition, and after due notice and hearing, order the partial or total suspension of the proclamation of any candidate-elect or annul partially or totally any proclamation, if one has been made, as the evidence shall warrant in accordance with the succeeding sections.³⁰

What is the effect of filing petition to annul or to suspend the proclamation? The filing with the Commission of a petition to annul or to suspend the proclamation of any candidate shall suspend the running of the period within which to file an election protest or *quo warranto* proceedings.³¹

There are several issues that may be raised in pre-proclamation controversy as the following:³² (a) illegal composition or proceedings of the board of canvassers;³³ (b) the canvassed

²⁹ Section 241 Omnibus Election Code.

³⁰ Section 242 Omnibus Election Code.

³¹ Section 248. Omnibus Election Code.

³² Section 243. Omnibus Election Code.

³³ Section 244. Contested composition or proceedings of the board. - When the composition or proceedings of the board of canvassers are contested,

election returns are incomplete, contain material defects, appear to be tampered with or falsified, or contain discrepancies in the same returns, or in other authentic copies thereof as mentioned in Sections 233, 234, 235 and 236 of the Code; (c) the election returns were prepared under duress, threats, coercion, or intimidation, or they are obviously manufactured or not authentic; and (d) when substitute or fraudulent returns in controverted polling places were canvassed, the results of which materially affected the standing of the aggrieved candidate or candidates.

Notwithstanding the pendency of any pre-proclamation controversy, the Commission may, *motu proprio* or upon the filing of a verified petition and after due notice and hearing, order the proclamation of other winning candidates whose election will not be affected by the outcome of the controversy.³⁴

Pre-proclamation controversies are limited to challenges directed against the Board of Canvassers and proceedings before said board relating to particular election returns to which private respondent should have made specific verbal objections subsequently reduced to writing. A pre-proclamation controversy is limited to an examination of the election returns on their face. As a rule, the Comelec is limited to an examination of the election returns on their face.³⁵

Different from the settlement for all pre-proclamation controversies as has been mentioned, issues such as fraud or terrorism attendant to the election process, the resolution of which would compel or necessitate the Comelec to pierce the veil of election returns which appear to be *prima facie* regular, on their

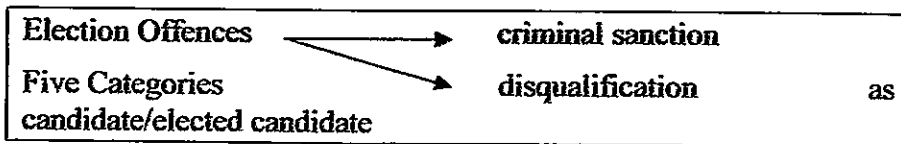
the board of canvassers shall, within twenty-four hours, make a ruling thereon with notice to the contestant who, if adversely affected, may appeal the matter to the Commission within five days after the ruling with proper notice to the board of canvassers. After due notice and hearing, the Commission shall decide the case within ten days from the filing thereof.

³⁴ Section 247. of the Omnibus Election Code of the Philippines

³⁵ *Bandala vs. Comelec*, G.R. No. 159369, March 3, 2004, 424 SCRA 267, 274.

face, are anathema to a pre-proclamation controversy. Such issues should be posed and resolved in a regular election protest, which is within the original jurisdiction of the Regional Trial Court (RTC).³⁶ In a regular election protest, the parties may litigate all the legal and factual issues raised by them inasmuch detail as they may deem necessary or appropriate.³⁷ It is beyond the Comelec's jurisdiction to go beyond the face of the returns or investigate election irregularities.³⁸

Section 68 of the Omnibus Election Code of the Philippines states that the candidate who is found guilty of conducting five categories of election offences³⁹ shall be disqualified as a candidate or cancelled if he has been elected.



Section 264 of the Omnibus Election Code of the Philippines states that "Any person found guilty of any election offense under this Code shall be punished with imprisonment of not less than one year but not more than six years". In addition, there is an additional sanction, i.e.: "the guilty party shall be sentenced to suffer

³⁶ *Ibid.*, p. 186.

³⁷ *Supra.*, *Bandata case*, p. 276.

³⁸ *Matalam vs. Comelec*, G.R. No. 123230, April 18, 1997, 271 SCRA 733, 745.

³⁹ Five categories: (1) bribery [giving money or other material consideration to influence, induce or corrupt the voters or public officials performing electoral functions]; (2) terrorism [terrorism to enhance his candidacy]; (3) excess in election campaign [spent in his election campaign an amount in excess of that allowed by this Code]; (4) solicited, received or made any contribution prohibited under Sections 89, 95, 96, 97 and 104; and (5) violated any of Sections 80, 83, 85, 86 and 261, Paragraphs d, e, k, v, and cc, Sub Paragraph 6.

disqualification to hold public office and deprivation of the right of suffrage.” The provision of this section states that the subject of offence or the offender is any person whose conduct any election offense under this code (thus, do not always a candidate). Besides criminal sanction, he/she also disqualified to hold public office and deprivation of the right of suffrage. While rule of Section 68, the subject is a candidate, that is a candidate conducting five category of election offences; besides received a criminal sanction he/she also shall be disqualified as a candidate.

Offences and Election Petition

	Provisions regarding Election Petition	Grounds for the submission of election petition	Limitation of offences as the ground for petition
Indonesia	Yes, In the Constitutional Court Law	Vote miscalculation	No provision
Malaysia	Yes, In the Election Offences Act	(a) <i>ab initio</i> ineligibility; (b) election offences; and (c) conduct of the elections	All corrupt or illegal practices
Singapore	Yes, In the Parliamentary Elections Act	(a) General bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate or group of candidates whom they preferred; (b) Non-compliance with the provisions of Act relating to	All corrupt or illegal practices

	Provisions regarding Election Petition	Grounds for the submission of election petition	Limitation of offences as the ground for petition
		elections, if it appears that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election; (c) Corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by any agent of the candidate; (d) Candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that the person had, within 7 years prior to the engagement, been convicted or found guilty of a corrupt practice by a District Court or by the report of an Election Judge; (e) That the candidate was at the time of his election a person disqualified for election as a member	
The Philippines	Yes, In the Omnibus	<u>In Pre-Proclamation Controversies</u> ⁴⁰	Not stipulated in the Law

⁴⁰ Refers to any question pertaining to or affecting the proceedings of the board of canvassers which may be raised by any candidate or by any registered political party or coalition of political parties before the board or directly with the Commission.

*Election Offences as Ground of Election Petition:
A Comparative Analysis*

	Provisions regarding Election Petition	Grounds for the submission of election petition	Limitation of offences as the ground for petition
	Election Code of the Philippines	(a) Illegal composition or proceedings of the board of canvassers; (b) The canvassed election returns are incomplete, contain material defects, appear to be tampered with or falsified, or contain discrepancies in the same returns or in other authentic copies; (c) The election returns were prepared under duress, threats, coercion, or intimidation, or they are obviously manufactured or not authentic; and (d) When substitute or fraudulent returns in controvert polling places were canvassed, the results of which materially affected the standing of the aggrieved candidate or candidates; (e) Material defects in the election returns; (f) Election returns appear to be tampered with or falsified; and (g) Discrepancies in election returns; and (h) ineligibility or of disloyalty to the Republic of the Philippines.	
		<u>In an election contest</u> All legal and factual issues, election irregularities as	

	Provisions regarding Election Petition	Grounds for the submission of election petition	Limitation of offences as the ground for petition
		fraud, vote-buying and terrorism	

Weaknesses in Indonesian legal framework relating to the cancellation of general election result is that election offences are not resulted in the cancellation of general election result, they only cause the cancellation of the candidates found guilty of election offences and it is only explicitly stated for one election offence, i.e., bribery. There are several offences, which are truly dangerous and very much affect the acquirement of votes and seats but the law does not at all relate it to the cancellation of general election result, i.e., offences stipulated in Section 140 Paragraphs (1), (2), (3) and (4) of the General Election Law. In other words, if election offences are occurring, the offender shall be punished, but the general election result is not affected. In Indonesia, general election result can only be avoided through petition of general election result to the Constitutional court.

The settlement process of election offences only causes criminal legal effect to the offender, but it does not affect the general election result. The occurrence of election offences does not also become the ground for submitting petition over general election result to the Constitutional Court. The sole ground is only the occurrence of miscalculation by KPU. Since law formulates it in general, i.e., the occurrence of miscalculation, then it must be interpreted in a broad definition (covering mistakes by accident, negligence or deliberateness). Therefore, if there is any election offence that affect the calculation of votes by KPU and then affected the acquirement of seats, then it can be the ground for petition of disputes over general election result.

Different from other countries that clearly stipulated several offences as the grounds for submitting election petition; this matter

is not clearly stipulated in Indonesian law. As well, in other countries, if anyone is convicted for election offences, besides punished with criminal sanctions, his general election result can also be cancelled. In Indonesia, a candidate could be punished for conducting election offences, but the general election result is not cancelled, therefore the allocated seat will fall to other candidate from the same party. Such provision is certainly not fair since the conducted offences could, in some way, affect the acquirement of votes of such party. Therefore, if only the candidate is being cancelled, but the seat remains, it will certainly aggrieve other political parties.

Based on the above description, in brief, the weaknesses in the cancellation of general election result are as follows: (1) It is no provision that states relation between conviction of election offences and cancellation of general election result. There is only a stipulation of relation between the proofing of one type of offences, i.e., bribery and the cancellation of a candidate, but the seat remains for the relevant political party. (ii) It is no provision that expressly stipulate certain election offences can be the grounds for submitting election petition. The ground for submitting election petition is too general, i.e., "the presence of votes miscalculation of KPU".

Such insufficiency of course have to be improve, firstly, by adding election offences type that causing disqualification; not merely bribery, but also doing other election offences relevant with requirement defect as a candidate (for example, using forged document in candidacy), and any types of election offences if it is conducted by the candidate or with the candidate's knowledge or consent, or by any agent of the candidate.

Secondly, by assuring the existence of consequence, that is besides penal sanction also cancellation of general election result. Thus, not merely candidate disqualification because the offences make a profit for other candidates in the same party. However, other candidate may feel unjust if he/she do not conduct any mistake, but the result of general election of its party is canceled so that he also fail to reach for chair. The relevant issue may arise that this regulation could suffer innocent candidate who do nothing of the

offences. I think this problem only arise in system of general election with multi member and multi candidate of every party (as practice in Indonesia).

To deal with such problem, in my opinion, we need a legal formula affirming that if election offences are proven, then the candidate who involve in such case shall be disqualified. In additional to that, from the substance of the decision we should see whether or not the offences highly affected the result of election for particular party. If the answer is positive, then the result of election shall be avoided. This of course more appropriate to process through election petition settlement, rather than through criminal process. Hence, election offences (especially those highly affected the result of election) should be ground of election petition.

E. Conclusion

In Indonesia, the settlement of election petition where election offences occurred can be one of the grounds of election petition before the Constitutional Court. Indonesia does not recognize the existence of election court or election judge, in the Constitution, it is affirmed that the settlement for the disputes over the general election result is the authority of the Constitutional Court.

Contrary to that, both in Malaysia and Singapore, the existence of election court/election judge authorized to handle and settle election petition is recognized. In addition, its procedure is stipulated in the General Election Law along with its subsidiary legislations.

In the Philippines, for all contests relating to the election, returns, and qualifications of Members of the Senate and the House of Representatives, the Senate or the House of Representatives Electoral Tribunal is the sole judge. For other contests, we can divide into three kinds of settlements: (1) Election contests for *Batasang Pambansa* regional, provincial and city offices, (2) Election contests for municipal offices, and (3) Election contest for *barangay* offices. The Commission conducts settlement for case number (1). Settlement for case of number (2) is conducted by the proper regional trial court. Meanwhile, the settlement for case

number (3) is conducted by the proper municipal or metropolitan trial court.

BIBLIOGRAPHY

Legislations

Indonesia:

Undang-Undang Dasar 1945 [the 1945 Constitution of the Republic of Indonesia]

Undang-Undang No. 8 Tahun 1981 tentang Hukum Acara Pidana [Indonesia Criminal Procedural Code]

Undang-Undang No. 12 Tahun 2003 [Law No. 12 of the Year 2003].

Undang-Undang No. 22 Tahun 2003 [Law No. 22 of the Year 2003].

Undang-Undang No. 24 Tahun 2003 [Law No. 24 of the Year 2003].

Peraturan Mahkamah Konstitusi No. 04/PMK/2004 tentang Pedoman Beracara dalam Perselisihan Hasil Pemilihan Umum. [Constitutional Court Regulation No. 04/PMK/2004]

Malaysia:

The Federal Constitution of Malaysia

Election Offences Act 1954

Elections Act 1958

Criminal Procedure Code (Act 593)

The Sedition Act 1948

Singapore:

The Constitution of the Republic of Singapore

Parliamentary Elections Act.

The Presidential Elections Act

The Singapore Penal Code

Supreme Court of Judicature Act

The Singapore Criminal Procedural Code

The Philippines:

The 1987 Constitution of the Republic of the Philippines
Omnibus Elections Code of the Philippines
The Parliamentary Elections Petition Rules.
Philippines 1985 Rules of Criminal Procedure
Comelec Rules of Procedure (1993)

Statutes/ Legislation from Other Countries

Indian Penal Code

The Corrupt and Illegal Practices Prevention Act, 1883.

The Government of India Act, 1919.

The Declaration of Independence of the United States, July 4, 1776.

Official Reports/ Documents

United Nations Centre for Human Rights. Professional Training Series No. 2, Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections (New York and Geneva: United Nations, 1994).

Mahkamah Konstitusi [Constitution Court]. *Buku Pedoman Beracara dan Proses Administrasi Perselisihan Hasil Pemilihan Umum di Mahkamah Konstitusi*. [Guidance Book Regarding Procedure of General Elections Settlement in Constitution Court]. Jakarta: Mahkamah Konstitusi, 2004.

Panitia Pengawas Pemilu [General Election Supervisory Committee]. *Laporan Pengawasan Pemilu DPR, DPD, DPRD*. [Final Report of 2004 General Elections for Member of DPR, DPD, and DPRD Supervising]. Vol. 1-7. Jakarta: Panitia Pengawas Pemilu, 2004.

Panitia Pengawas Pemilu [General Election Supervisory Committee]. *Buku Saku Pedoman Operasional Pengawas Pemilu 2004* [Handbook on 2004 General Election Supervisory Committee], Jakarta: Panitia Pengawas Pemilu, 2003.

Books/ Journals/ Articles

Adhy Aman. "Tinjauan Kritis atas Sistem Penyelesaian Perselisihan Hasil Pemilu" [Critical Review of Election Dispute Settlement

- System], in *Menjaga Denyut Konstitusi* [Defending Constitutional Throb]. (Eds Refli Harun, Zainal A.M Husein, and Bisariyadi). Jakarta: Mahkamah Konstitusi, 2004.
- Abdul Aziz Bari. *Malaysian Constitution A Critical Introduction*. Kuala Lumpur: The Other Press, 2003.
- Ahmad Ibrahim and Ahilemah Joned. *Sistem Undang-Undang di Malaysia* [Legal System in Malaysia]. Kuala Lumpur: Dewan Bahasa dan Pustaka, 2002.
- Autheman, Violaine. Autheman, Violaine, "Penyelesaian Sengketa Berkaitan dengan 'Hasil Pemilu': Kilasan Praktek Peradilan di Beberapa Negara di Seluruh Dunia" [Settlement of Dispute concerning Result of Election: Court Practices in Some Country of the Word], Paper presented in Workshop The Role of Constitutional Court on Settlement of Result of Election Disputes through a Transparent Court Process, February, Bogor, 2004.
- Black, Henry Campbell. *Black's Law Dictionary*, 6th Edition. St. Paul, Minn: West Publishing Co, 1990.
- Felipe Celino, Capiz Elections Case Ruling Comes three Years After Polls http://www.inq7.net/reg/2004/jun/10/reg_4-1.htm, 15 September 2005.
- International IDEA, *International Electoral Standards, Guidelines for Reviewing the Legal Framework of Elections*, 2002.
- International IDEA. *Kerangka Hukum Pemilu Indonesia Tahun 2004* [Legal Framework of Indonesia 2004 General Election]. Jakarta, IDEA, 2004.
- International Institute for Democracy and Electoral Assistance. *Standar-standar Internasional Pemilihan Umum – Pedoman Peninjauan Kembali Kerangka Hukum Pemilu*. [International Electoral Standards, Guidelines for Reviewing the Legal Framework of Elections] Jakarta: IDEA, 2002.
- Jhingta, Hans Raj. *Corrupt Practices in Elections – A Study Under The Representation of The People Act, 1951*. New Delhi: Deep & Deep Publications, 1996.
- Mahkamah Konsitusi [Constitutional Court], *Berita Mahkamah Konstitusi* [Constitutional Court News], Edisi Khusus Penyelesaian Perselisihan Hasil Pemilu 2004 [Special Edition

- Settlement of 2004 General Election Dispute], No. 5, June-July, 2004.
- Maruarar Siahaan. *Hukum Acara Mahkamah Konstitusi Republik Indonesia* [The Procedure Law of Constitution Court of the Republic of Indonesia]. Jakarta: Konstitusi Press, 2005.
- Merloe, Patrick. *Pemilihan Umum Demokratis: Hak Asasi, Kepercayaan Masyarakat dan Persaingan Yang Adil*. [Democratic General Election: Human Rights, People Trust and Fair Competition]. Jakarta: Dinas Penerangan Amerika Serikat (USIS), 1994.
- Myint Soe, *The General Principles of Singapore Law*. Singapore: The Institute of Banking and Finance, 1978.
- Noor Aziah Mohd Awal. *Pengenalan kepada Sistem Perundangan di Malaysia* [Introduction to Malaysian Legal System]. Petaling Jaya: International Law Book Services, 2003.
- Patino and Djorina Velasco, "Election Violence in the Philippines", http://www.fes.org.ph/papers_elecviolence.htm, 5 September 2005.
- Sintong Silaban. *Tindak Pidana Pemilu (Suatu Tinjauan dalam Rangka Mewujudkan Pelaksanaan Pemilu yang Jujur dan Adil)* [Election Offences, An Overview Toward Free and Fair Election]. Jakarta: Sinar Harapan, 1992.
- Sothi Rachagan, *Law and the Electoral Process in Malaysia*. Kuala Lumpur: University of Malaya Press, 1993.
- Tan, Kevin Y.L and Thio Li-An, *Constitutional Law in Malaysia and Singapore* (2nd ed). Singapore: Butterworths Asia, 1997.
- Topo Santoso. "Pelanggaran Pemilu 2004 dan Penanganannya" [2004 General Election Violation and its Settlement] in *Jurnal Demokrasi & HAM* [Journal of Democracy and Human Rights], Vol. 4, No. 1, 2004.
- Tunku Sofiah Jewa. *Malaysian Election Laws*, Vol. 1 – 4. Kuala Lumpur: Pacifica Publications, 2003.
- United State Information Agency, "What is Democracy?", October, (1991).
- Wallace, J. Clifford. "Gugatan Pemilu di Amerika Serikat" [Election Petition in the United States of America], Paper presented in Workshop The Role of Constitutional Court on

Settlement of Result of Election Disputes through a Transparent Court Process, February, Bogor, 2004.

Wu Min Aun. *An Introduction to the Malaysian Legal System*. Kuala Lumpur: Heinemann Educational Books (Asia) Ltd, 1975.

Wasis Susetio, "Ketika Musim Pemilu Tiba (Tinjauan Terhadap Hukum Beracara di Mahkamah Konsitusi) [When Elections Seasons Come] in *Menjaga Denyut Konstitusi* [Defending Constitutional Throb]. (Eds. Refli Harun, Zainal A.M. Husein, and Bisariyanti). Jakarta: Konstitusi Press, 2004.

Internet

<http://www.supremecourt.gov.ph/jurisprudence/2005/jun2005/166229.htm>

<http://www.supremecourt.gov.ph/jurisprudence/2005/jun2005/165677.htm>

<http://www.supremecourt.gov.ph/jurisprudence/2004/nov2004/158610.htm>

<http://www.spr.gov.my/proses.htm>

http://ms.wikipedia.org/wiki/Sistem_majoriti

<http://www.freedomhouse.org/reports/century.pdf>, 10 September 2005.

http://www.fes.org.ph/papers_elecviolence.htm, 5 September 2005.

<http://ms.wikipedia.org/wiki/Demokrasi>

"Political Parties in Singapore," www.singapore-elections.com, 17 September 2005.

"Parliamentary Elections," <http://www.elections.gov.sg>, 20 September 2005.

http://www.inq7.net/reg/2004/jun/10/reg_4-1.htm, 15 September 2005.

<http://www.spr.gov.my/PP-KPR.htm>

"Presidential Elections," <<http://www.elections.gov.sg>>, 17 September 2005.

http://www.supremecourt.gov.ph/profiles/davide_speech/role_phil_courts.htm, 23 September 2005