

## A COMPARATIVE STUDY OF THE LEGAL POSITION OF POLITICAL PARTIES AND THEIR POTENTIALITY TO OCCUPY THE SEATS OF PARLIAMENT IN GERMANY AND THE FEDERATION OF MALAYA

### 1. THE LEGAL POSITION OF POLITICAL PARTIES

#### (a) GENERAL OBSERVATIONS

The conduct of democratic and responsible government requires the service of political parties.<sup>1</sup> They are the driving forces behind the constitution.<sup>2</sup> Party politics of the ruling party and the politics of a government are usually co-ordinated. This is often demonstrated by the fact that the Prime Minister is the leader of the party with the largest number of supporters in the House.<sup>3</sup> The opposition in Parliament is usually also composed of one or more political parties. The growth of the party system in many countries has resulted in votes being cast more for a party and its leaders than for local representatives on their own merits. An elector votes as much to choose a Prime Minister as to choose his local member.<sup>4</sup>

Germany and Malaya are no exceptions to the rule. In both Parliaments the will of the people is nearly entirely represented by members of political parties. The independent deputy in Parliament is to-day an exception.<sup>5</sup> Under such circumstances, it is necessary for a discussion on the composition of a Parliament to start with remarks on the legal position of parties and the right of citizens to organize them. Further it is necessary to find out which legal means are in force to prevent parties from entering the parliamentary stage. When the composition of a Parliament is under consideration, the right of other parties to get a chance to compete successfully with the represented parties is, of course, relevant.

#### (b) THE SITUATION IN GERMANY

(i) The Basic Law recognizes the importance of political parties by a

1. Finer, *Governments of Greater European Powers*, (1956), p. 701.
2. Hickling, *An Introduction to the Federal Constitution*, (1960), p. 73.
3. Germany and Malaya are typical examples. Federal Chancellor Erhard is chairman of the Christian Democrats; Tunku Abdul Rahman chairman of the Alliance Party.
4. Wade & Phillips, *Constitutional Law* (6th ed. 1960), p. 118; Jennings, *Parliament*, (2nd ed. 1957), p. 26.
5. Since 1953 the German Bundestag has no independent deputy; the House of Representatives has only four independent deputies *Federation of Malaya, Official Yearbook 1962*, p.449.

special provision. The German constitution framers have entered by this provision a new field of constitutional law.<sup>6</sup>

Article 21 Basic Law reads:

“(1) The political parties participate in the forming of the political will of the people. They may be freely formed. Their internal organization must conform to democratic principles. They must publicly account for the sources of their funds.

(2) Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany, are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.

(3) Details will be regulated by federal legislation.”

This provision distinguishes the political parties from other types of associations. An association which is not a political party is subject to Article 9 Basic Law which reads:

“(1) All Germans have the right to form associations and societies.

(2) Associations, the objects or activities of which conflict with the criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited.”

Thus a society, the activities of which are directed against the constitutional order and which is subject to Article 9, is generally prohibited. The prohibition shall be made acute by a ‘dissolving order’ of the appropriate administrative authority.<sup>7</sup> No previous procedure before a court is necessary. The prohibited society may file a suit later before an administrative court in order to challenge the administrator act which constituted the dissolving order. In Germany, every administrative act may be examined by an appropriate court on its consistency with applicable law.

If an association is a political party, it may not be prohibited by an administrative order, but only by a preceding judgment of the Constitutional Court following the principles of Article 21 Basic Law.

Article 21 has to be considered as a ‘*lex specialis*’ in its relation to Article 9, which represents a ‘*lex generalis*’ on all associations.<sup>8</sup> The rule ‘*lex specialis derogat legi generali*’ has to be applied. Thus, political parties are entirely subject to Article 21<sup>9</sup> even if their activities are directed against criminal law.

6. Maunz & Duerig, *Grundgesetz*, (hereinafter cited as Maunz & Duerig), Art. 21 No. 1 (1961).

7. Maunz & Duerig, Art. 21 No. 40; Hamann, *Das Grundgesetz*, (hereinafter cited as Hamann), Art. 21, and ann. B5 (2nd. ed. 1961).

8. 2 *Entscheidungen des Bundesverfassungsgerichts* (English: Decisions of the Federal Constitutional Court, hereinafter cited as *BVerfGE*) 13. Maunz & Duerig, Art. 21 No. 38. Hamann, Art. 21 ann. A3.

9. 1 *BVerfGE* 210 (headnote 10 d).

Therefore political parties are obviously privileged by Article 21 in comparison with all other associations governed by Article 9.

(ii) It is difficult to determine the essentials of a political party. There is no legal definition, but certain features are now recognized as essential characteristics:

“Political parties are political associations, which are organized for a longer period in order to influence directly the forming of the political will of the people. To achieve this object, the parties nominate candidates for elections to representative bodies on federal or Land level.”<sup>10</sup>

The features of a political party are not determined by their success. The party concept applies also to parties which are not represented in Parliament. Decisive is the aim of the party to get into an Assembly<sup>11</sup>.

There must be a political programme of the party but its legal position is not determined by the contents of the programme.

(iii) Germans are free to form political parties; the formation is not dependent upon a special licence or permission of a government authority. The federal legislature may not enact laws which require for the foundation of a political party the observance of an official procedure of recognition.<sup>12</sup>

(iv) An established political party may be prohibited. The procedure of prohibition is in detail as follows: The Bundestag, the Bundesrat, or the Federal Government are permitted to apply for a decision on the unconstitutionality of a political party.<sup>13</sup>

The Constitutional Court determines the unconstitutionality of the party concerned.<sup>14</sup> This does not mean that the statement of the Court is only of a declaratory character. On the contrary, the judgment has a conclusive effect. The unconstitutionality is stated ‘*ex nunc*’. Therefore, before the judgment is issued, neither the government nor any administrative authority may act against the party in question in a way which would prejudice its position. The Constitutional Court in its verdict may also order the dissolution of the party; it may prohibit the creation of substitute societies and may order the confiscation of the property of the dissolved party.<sup>15</sup> The leading case for the application of these principles is the prohibition of the Communist Party on August 17, 1956.<sup>16</sup> In this case, the Court authorized the Ministers of Interior of the German Laender (States) to execute the judgment.

10. Commission on Party-Law, Report on Problems of a Party-Act 129 (1957) — Maunz & Duerig, Art. 21 No. 11.

12. Maunz & Duerig, Art. 21 No. 32.

13. Federal Constitutional Court Act (hereinafter cited as FCCA) of March 12, 1951 as amended by Act of July 21, 1956 *Federal Gazette I, 1956*, p. 662, Art. 43. Bundestag and Bundesrat are the two Houses of Parliament in Germany.

14. Art. 46 (1) FCCA.

15. Art. 46 (3) FCCA.

16. 5 BVerfGE 111; headnotes also reported in 1956 *Neue Juristische Wochenschrift* 1393.

The Federal Government is under no legal obligation to apply for the determination of the unconstitutionality of a political party. This is within its discretion. But the discretion should not be abused.

The main difficulty for the Constitutional Court is the determination of facts which establish the unconstitutionality. A few decisions have helped to clarify this matter.<sup>17</sup>

The internal organization of a party must conform to democratic principles.<sup>18</sup> A basic principle is that the organs of the party be elected from the bottom to the top and not nominated in the vice versa direction or from forces outside.<sup>19</sup> There is also the necessity to fix the rules of the society and to vote on them and to lay the society's statements of accounts before the members.<sup>20</sup>

The Constitutional Court once decided:

"If the internal constitution of a political party does not correspond with democratic fundamental principles, then, in general, the conclusion follows that the party will carry out in the State the structural principles which it has established for itself, and will discard the essential components of a free democratic constitution that is the creation of the will of the State as a result of the free play of political forces, in favour of an authoritarian system."<sup>21</sup>

The Court added that when the degree of repudiation of the democratic structure reached the point where enmity to democracy was clearly manifest, the party must fall under the ban of Article 21 Basic Law.<sup>22</sup>

On the question under what circumstances a party seeks to impair the free democratic basic order, the Court has issued the following principles:

"A free democratic basic order in the meaning of Article 21 paragraph 2 is a political order based on the rule of law, freedom and equality and the self-determination of the people, according to the actual will of the majority. Such an order excludes any despotism and tyranny."<sup>23</sup>

"A party shall not be considered unconstitutional only because it does not recognize in theory the leading principles of a free democratic basic order. The party must rather take a more active and aggressive attitude to the existing political order. But it is enough that the political course of the party is principally and permanently determined by the intention to attack the free democratic basic order."<sup>24</sup>

17. 5 BVerfGE 111; 2 BVerfGE 14 (judgment of Oct. 13, 1952 against the Sozialistische Reichspartei).
18. Art. 21 para 1 sentence 3 BL.
19. Maunz & Duerig, Art. 21 No. 62.
20. *Ibid*, No. 63.
21. 2 BVerfGE 14.
22. English translation quoted from Finer, *op cit.* supra note (1), p. 702 See also Maunz & Duerig, Art. 21 No. 77.
23. 2 BVerfGE 1, headnote 2.
24. 5 BVerfGE 111, headnotes 5, 6, 8, 9.

(v) Parties are required by the Constitution to account publicly for the sources of their funds.<sup>25</sup> This provision seeks to prevent pressure groups from gaining secret influence by their financial subsidies to parties. However, at the present time, the parties do not render accounts of their sources.<sup>26</sup> This provision is not considered currently applicable because no implementing federal legislation regulating the details for rendering accounts has been enacted.<sup>27</sup> The long expected party act is not yet enacted due to the difficulties in defining details.<sup>28</sup>

(c) THE SITUATION IN MALAYA

The Federation of Malaya Constitution contains no special provision referring to the legal status of political parties, though they are not of lesser might than those in other democratic countries.<sup>29</sup> The Malayan Constitution states under Article 10 paragraph 1 (c) the right of citizens to form associations, which probably includes the right to form political parties.<sup>30</sup> If so, a political party is required to meet the criteria of an association. The latter has been defined as “a collection of persons, who have joined together for a certain object, which may be for the benefit of the members, or the improvement, welfare or advantage of the public, or some scientific, charitable or similar purpose”.<sup>31</sup> It is important that an association customarily presupposes organization<sup>32</sup> and a relation of permanence between the individual members.

Under these circumstances, the details of law governing the foundation, organization and management of a political party would appear to be regulated by the law of associations.

In Malaya the ‘Societies Ordinance, 1949’<sup>33</sup> is relevant. Under section 2 of the Ordinance ‘society’ includes any club, company, partnership or association of ten or more persons, whatever its nature or object. The Ordinance does not pay special attention to political parties.

Societies have to be registered. It is stated under Section 9 that “every local society, not being a registered society or an exempted society, shall be deemed to be an unlawful society”.

25. Art. 21 para 1, last sentence BL.

26. Maunz & Duerig, Art. 21 No. 78.

27. Eschenburg, *Staat und Gesellschaft in Deutschland* (hereinafter cited as Eschenburg), (4th ed. 1960), p. 527.

28. Preparatory work has been going on for years, see Report cited supra note (10).

29. See supra note (5).

30. 1 Basu, *Commentary on the Constitution of India* (3rd ed. 1955) Art. 19, p. 211.

31. *Ibid*, p. 211 referring to Ballentine, *Law Dictionary*, (1948) p. 118.

32. Duverger, *Political Parties*, (1959), p. v, remarks: “....Party is organized opinion, said Disraeli....”.

33. “An Ordinance to provide for the Registration of Societies” of August 22, 1949 (No. 28 of 1949).

The Registrar shall under Section 5(3) refuse to register a local society where “(a)... he is satisfied that such local society is a branch of, or is affiliated or connected with, any organization or group of a political nature, established outside Malaya and (b) it appears to him that such local society is likely to be used for unlawful purposes or for any purpose prejudicial to or incompatible with peace, welfare or good order in the Federation”.

The Registrar may with the approval of the High Commissioner in Council<sup>34</sup> exempt any such society from registration. But with the same approval, the Registrar may under Section 5(5) rescind at any time any exemption granted by him “...if he is satisfied that it is expedient so to do on the ground that the society concerned is affiliated or connected with any organization or group of a political nature established outside Malaya or on the ground that such society is likely to be used for unlawful purposes or for any purpose prejudicial to or incompatible with peace, welfare or good order in the Federation”. These grounds are also the reasons under which the Registrar may at his discretion cancel at any time the registration of any society.

Section 5(7) is of the highest importance because it offers the only remedy against adverse decisions of the Registrar: “Any office-bearer or member of a local society, who is aggrieved by the Registrar’s refusal to register such society or his decision to cancel the registration thereof, may appeal against such refusal or decision to the High Commissioner in Council whose decision shall be final.”

Section 5(6) provides that the office-bearer of the society concerned shall have an opportunity to submit reasons why the registration should not be cancelled. This is tantamount to the right of the society to be heard before the administrative authority, but nothing more.<sup>35</sup>

Under these circumstances there are important differences between the status of a political party in Germany in Malaya. In Malaya: (i) A party is treated like every other association; (ii) there is a duty to apply for registration, which is in fact for a political party an application for permission to come into being; (iii) the prohibition of a party may be pronounced by a simple administrative act against which only an appeal to the higher administration is permitted. No court has jurisdiction. It may be questioned whether the situation in Malaya is conducive to a stable party system. It has to be kept in mind that the Societies Ordinance, 1949, came into force at a time when Malaya was still a colonial territory.

34. The High Commissioner is succeeded by the head of the executive, this is the Cabinet with the Minister of the Interior, under whose direction the “Registrar of Societies” supervises the implementation of the Ordinance; Federation of Malaya, Official Yearbook 1962, p. 89.

35. The situation in India is similar, see I Basu *op. cit.* supra note (30), Art. 19 p. 212. Acts done under the Indian Criminal Law Amendment Act (XIV of 1908) cannot be questioned in any court, save as provided in the Act itself. But it has been held that the power of restrict the right of association ‘without a hearing’ is an unreasonable restriction. — Row v. State of Madras, A.I.R. 1951, Mad. 147 (154), affirmed by State of Madras v. Row, A.I.R. (39) Supreme Court 196 (199).

The High Commissioner, who decided finally on the admission or prohibition of a society, was as an expatriate civil servant the head of the administration. He was in theory a 'neutral', not directly involved in the different political trends of the country. It may be said that at the time when political parties emerged in Malaya he was more in favour of one group than of another, but certainly he was not the direct representative of one of the Malayan parties.

This situation has now entirely changed. The head of administration is a national authority. But in a parliamentary democracy the working head of the executive consists now of members of the majority party. The Minister of the Interior, who decides now finally on the admission or prohibition of political parties, is not even in theory a neutral figure, but a party representative. He has the power to prohibit an opposition party or to prevent its emergence without being checked by any neutral non-political authority. It should not be difficult to find some reason for the view that the activities of an opposition group are incompatible with peace or good order in the Federation.

Under these circumstances it can be said that sitting in Parliament are only those parties which are tolerated by the party in power. It may be that these 'tolerated parties' are at the present time parties which would exist in Parliament if the Minister of the Interior had not the discretion to decide finally on their existence.

But in a country without long democratic tradition, as Malaya is, it will always be a temptation to the Cabinet and the Minister of Interior to overcome difficulties with the opposition by a simple cancellation of the registration of the party or parties.

An argument can be made that political parties should not be treated like other associations. The admission or prohibition of parties should be finally decided by a court or at least by an independent commission, consisting of members with the independence of judges and not representatives of a political group.

## 2. THE LAW OF ELECTION

### (a) GENERAL OBSERVATIONS

For the composition of a parliament, the law of election is of highest importance. The franchise decides to a certain degree to what extent the parties shall be represented in the House. It is in fact nearly impossible to develop a system which reflects exactly the will of the people, is easy to handle, and creates a workable House of Parliament.

If, for example, a body of ten persons shall be elected, it can be provided that every voter votes for one person or that every voter votes for ten persons or that the election area is divided into ten constituencies from everyone of which the candidate with the simple majority shall be elected.

All the three procedures mentioned represent a franchise of 'simple majority vote'. Under each the deputy has direct contact with his voters.

The results may be different if it is examined from the viewpoint of parties. If two-thirds of the electorate vote for party A and one-third for party B, in a system of simple majority vote, there shall be elected only deputies of party A. If the election area is divided into constituencies, members of the party B shall be elected in constituencies in which party B is stronger than party A.

The majority system of Britain usually brings about a parliament not exactly representing the opinions of the people.<sup>36</sup> Minority parties therefore consider this system very often as unjust and demand an electoral reform guaranteeing a more proportional representation.<sup>37</sup> The disadvantage of a system of proportional representation is that it favours the emergence of numerous small parties and prevents the emergence of clear majority conditions in Parliament, which are often the only basis for a stable government.

#### (b) THE ELECTORAL-SYSTEM IN GERMANY

(i) Germany has experimented with different principles of voting. The present system tries to do some justice to smaller parties, to maintain some aspects of the British system of simple majority and to avoid under all circumstances the results of elections with pure proportional representation, which characterized the German Parliaments of 1919-33.

Thus, the present franchise is a combination of different systems and has to be seen first in its historical perspective.

"The Weimar Assembly [of 1919] had adopted a system of proportional representation which put mathematical justice higher than political common-sense. Germany was divided into thirty-five large constituencies in which not candidates but parties fought one another, and the elector chose not a person but a list of persons. It followed that when a deputy died or retired, there was no by-election, but [the person with] the next number of the party's list replaced him. Every party obtained one 'mandate' for every 60,000 votes.... This meant that the number of members of the Reichstag changed with the number of valid votes actually cast in an election. In the early 'thirties' the feeling of crisis drove many more people to the polls, and the Reichstag, which in 1920 had had only 459 members, grew in 1933 to 647. ... It [the system] represented, too faithfully, the political vagaries of a drifting electorate. It encourages the formation of more and more splinter groups, until they numbered well

36. In the British Election of 1959 the Conservatives won 365 seats out of 630 with 49.4% of the votes cast; see Butler & Rose, *The British General Election of 1959*, p. 239. In the election of 1959 in Malaya, the Alliance was returned to power with 73 seats out of 104 but received only 51.5% of the votes cast; statistics of the 1959 elections in *Federation of Malaya, Official Yearbook 1962*, p. 68.

37. For these general observations see Maunz, *Deutsches Staatsrecht* (hereinafter cited as Maunz) (10th ed. 1961), pp. 290-91. For reform suggestions in Britain see Hansard Society, *Parliamentary Reform 1933 - 1960: A survey of suggested reforms* (hereinafter cited as Reform) 6 (1961).

over thirty, and atomizes the moderate centre while promoting radicalism amongst the frustrated masses.”<sup>38</sup>

(ii) Now Article 38 Basic Law reads:

“(1) The deputies to the German Bundestag are elected in universal, direct, free, equal and secret elections. They are representatives of the whole people, are not bound by orders and instructions and are subject only to their conscience.

(2) Anyone who has attained the age of twenty-one is entitled to vote; anyone who has attained the age of twenty-five is eligible for election.

(3) Details will be regulated by a federal law.”

In Article 38 paragraph 1 ‘universal election’ means that in principle all Germans<sup>39</sup> who are residents of the federal territory are entitled to vote. Exceptions to the rule have to be defined and may occur only in a few cases.<sup>40</sup>

‘Direct election’ means that the vote of the elector must be cast directly for one or several deputies, who would then be elected into Parliament. An election of delegates who shall then elect the members of Parliament is not permitted.<sup>41</sup>

‘Free election’ means that the voter may not be put under pressure by a public authority or a private group to vote in favour of a certain party.<sup>42</sup> Voting is not compulsory, but the introduction of such a provision is not prohibited by the Basic Law.<sup>43</sup>

‘Equal elections’ entitles every voter to one vote or, if more than one, to an equal number of votes with other voters. This does not exclude the possibility that the weight of a vote may be different in different constituencies. There should be equal chances for all competing parties. ‘Secret election’ prohibits public voting. The secrecy for the voter’s decision must be guaranteed.<sup>44</sup>

(iii) Significant, but typical for the situation, is the fact that the Basic

38. King-Hall & Ullmann, *German Parliaments*, (1954), p. 87.

39. Usually, a German is a person who possesses German citizenship; for details see Art. 116 Basic Law.

40. Maunz 290; Maunz & Duerig, Art. 38 No. 39. Whether persons who have been convicted may vote depends on each individual court judgment. A court may pronounce the loss of civil rights for a certain period which entails the disqualification to vote or to be elected; for details see German Penal Code paras 32-34.

41. 7 BVerfGE 68.

42. As to election offences see *infra* note (57).

43. Mangoldt & Klein, *Das Bonner Grundgesetz* (hereinafter cited as Mangoldt & Klein) Art. 38 ann. III 2e (2nd ed. 1961).

44. For ‘universal, direct, free, equal and secret elections’ see Maunz, 290; Hamann, Art. 38 ann. B2 - 5; Maunz & Duerig, Art. 38 No. 43 - 54.

Law contains no provision as to whether there shall be election by proportional representation or by simple majority vote. All attempts at electoral reforms after 1945 dealt with this matter. It is now the most important part of the 'Federal Election Act' of 1956,<sup>45</sup> which regulates the details of the elections for the Bundestag. This Act is considered by the present political parties in Germany as a final regulation for future federal elections.<sup>46</sup>

There are now 494 deputies in the Bundestag with 22 consultative representatives from Berlin. The whole Federal Republic is divided into 247 (one-half of 494) constituencies with approximately equal population.<sup>47</sup> In each constituency, the candidate obtaining the largest number of votes is elected. The other 247 deputies are elected from the 'Land lists'.<sup>48</sup> This is possible, because each voter has two votes (hence so-called 'double-tracked election'), the first of which he can give to a candidate put up in his own constituency, the second one for a list of candidates, being proposed by a party in the Land. The order of candidates on the Land list is fixed by the management of the party concerned. After the election, the 494 seats in the Bundestag are first distributed according to the 'maximum ratio' procedure of D'Hondt.<sup>49</sup> But from the number of deputies on each Land list are subtracted those seats which the party in question received in the Land's constituencies.

The system is complicated. The following example might help to explain it:

Party X puts up candidates in all 50 constituencies of Land L. The

- 45. Federal Gazette I 1956, p. 383 and amendments on page 1011.
- 46. Maunz 293; Maunz & Duerig, Art. 38 No. 61. For the elections of 1949 and 1953 provisional election acts were in force. Between the elections, the political parties always haggled over the next law of election. The main questions have been settled since 1956.
- 47. The size of these constituencies is not too important because the distribution of seats results in proportional representation, see examples infra.
- 48. The term 'Land' of the Federal Republic of Germany corresponds to the term 'State' of the Federation of Malaya. The political parties in Germany are centralized on Land (State) basis.
- 49. This system was invented by the Belgian D'Hondt in 1882. Let us assume there were four parties competing and ten seats are to be distributed, 4740 votes were cast; Party A got 1800, B — 1300, C — 940 and D — 700 votes. Each of these four figures are divided by the numbers 1, 2, 3, 4, 5, 6, etc. The seats are now distributed in accordance with the sequence of the highest figures, which are brought about through the divisions. In the following diagram the ten highest figures are italicized. The distribution of seats follows the sequence indicated by numbers in parentheses. Party A gets four seats, party B three, party C two, and party D one seat.

*Diagram*

divided by	A	B	C	D
1	<i>1800</i> (1)	<i>1300</i> (2)	<i>904</i> (3)	<i>700</i> (5)
2	900 (4)	650 (6)	<i>470</i> (8)	350
3	<i>600</i> (7)	<i>433</i> (10)	313	233
4	<i>450</i> (9)	325	235	175
5	360	260	188	140

This example is quoted from Maunz, 292.

party X receives 40% of the votes for the Land list and 30 of its candidates in these 50 constituencies receive the largest number of votes. These 30 candidates are elected. But a percentage of 40% of the votes for the Land list entitles party X to approximately 40 deputies for the Parliament. It has to be kept in mind that the Bundestag has double the number of seats than the whole country has constituencies. Thus, if the Land L has 50 constituencies, approximately 100 deputies of this Land shall get seats in the Bundestag.<sup>50</sup> Thus, party X may send another 10 deputies from the Land list into the Bundestag in order to have 40 deputies in the House, to which the party is entitled.

Usually on the Land list are numerous candidates who are at the same time put up in a constituency. These successful candidates are not taken in consideration when the deputies are drawn from the Land list. Example: On the Land list of party X are the candidates A, B, C, D, E, F, G, H . . . . etc. If A, B, E were also candidates in constituencies and received a simple majority vote, the ten deputies from the Land list shall be selected in the sequence C, D, F, G, H . . . . etc. It may be that C was also a candidate in a constituency but failed to get a majority vote. Nevertheless, he becomes deputy in the Bundestag, because his party has put him in a good position on the Land list.

If the small party Y received only 10% of the votes cast and no candidate obtained in a constituency a majority vote, all its deputies shall be drawn from Land lists. It may happen that in Land L with 50 constituencies 45 candidates of the party X were successful in getting a majority vote though the party-list received only 40% of the votes. So, party X may send to the Bundestag 5 deputies more than it would get under strict rules of proportional representation. This is the only way for a party to get more seats than it is mathematically entitled to.

There shall be no by-election during the legislative term. If a deputy retires or dies, the person with the next number on the party's Land list replaces him. The voter has by his vote accepted the sequence of candidates as it has been proposed by the party concerned. This system does not contradict the principle of a direct election.<sup>51</sup>

This system might still encourage splinter parties to try their fortune in elections. Therefore, for the distribution of seats according to the percentage of votes cast for a Land list, only such parties as received 5% of the votes in the whole Federal Republic or have won at least a simple majority in three constituencies are taken into consideration.<sup>52</sup>

50. These figures correspond only approximately to the practice. There is a final calculation on the distribution of seats, which takes into account the percentage of votes cast for all the Land lists of a party in the whole Federal Republic of Germany. This 'federal system' adds some further complications without changing the basic principle of distribution of seats.

51. 3 BVerfGE 50; 7 BVerfGE 63.

52. In order to get a workable Parliament and Cabinet based on stable majorities, the Constitutional Court considered a stop-clause of 5% as still consistent with the equality-rule of Art. 38 para 1 BL. 1 BVerfGE 249, p. 252; 3 BVerfGE 27; 4 BVerfGE 40; 6 BVerfGE 93; approving Maunz & Duerig, Art. 38 No. 50.

Thus, when the Bundestag assembles the first time at the beginning of the term, 50% of the deputies can claim that they are personally elected, the other 50% became Members of Parliament entirely through management of their parties. Thus the Bundestag has two categories of deputies, though there is officially no difference between them.<sup>53</sup> The German system has in spite of its complexities some advantage. It gives to a smaller party, if it is more than just a small splinter group, a chance to be represented in the Bundestag. There is maintained a direct contact at least between half of the deputies and the electorate. The politicians of the big parties consider a main advantage of the Land list system that it offers a chance to bring into the Bundestag learned persons or experts who normally would not be willing or able to run successfully an election campaign in a constituency. In other words the German politicians believe that a Parliament needs a sufficient number of experts for legislative work who are only available through the device of the Land list.<sup>54</sup>

(iv) The scrutiny of elections is the direct responsibility of the first House of Parliament, the Bundestag.<sup>55</sup> This power includes the right to scrutinize the working of the election law. Decisions of the Bundestag on the validity or voidness of elections are prepared by the committee for scrutiny of elections. Scrutiny is done if a complaint is filed.<sup>56</sup> It may be filed by any voter, by any election-supervisor of a Land, by the Federal Supervisor of Elections<sup>57</sup> and by the President of the Bundestag. Against the decision of the Bundestag, an appeal lies to the Federal Constitutional Court, which decides finally on the validity of any election results. If any corrupt and illegal practices become known to public authorities, such practices shall be punished by the ordinary courts. Penal regulations are provided in the German Penal Code.<sup>58</sup>

### (c) THE ELECTORAL SYSTEM IN MALAYA

(i) The electoral principles of Malaya have no tradition. The present system is the first one and follows British lines.

In spite of the fact that even in Britain herself discussion arises

53. One is more honoured as a directly elected deputy. When a newspaper gives a report on a Member of Parliament, it usually mentions whether the deputy concerned was able to win a constituency or was drawn from a Land list.
54. Maunz, 293; Eschenburg, 524.
55. Art. 41 Basic Law reads: (1) The scrutiny of elections is the responsibility of the Bundestag. It also decides whether a deputy has lost his seat in the Bundestag. (2) Against the decision of the Bundestag an appeal lies to the Federal Constitutional Court. (3) Details will be regulated by a federal law.
56. Details are regulated by the 'Scrutiny of Elections Act' of March 12, 1951, Federal Gazette I 1951, p. 166.
57. In charge of the federal supervision of elections is the President of the 'Federal Office for Statistics'.
58. See German Penal Code paragraphs 107 — 108d referring to a number of offences: Interference with Elections, Election Fraud, Devising and Election Fraud, Violation of the Secret Ballot, Electoral coercion, Deception of Voters, Bribing of Voters.

from time to time as to how the voting system should be improved<sup>59</sup> no experiments have been made. It appears that the British system of 'one member one constituency' with elections based on simple majority vote was in 1957 not really questioned in Malaya<sup>60</sup> and the constitution makers did not hesitate to entrench it in the Constitution. It is curious that in a communal society such as Malaya, no consideration appears to have been given to any electoral system based on proportional representation.<sup>61</sup>

(ii) The Malayan Constitution provides for certain rules which outline the electoral system of Malaya.

Article 116 paragraph 2 reads:

"The total number of constituencies shall be equal to the number of members, so that one member shall be elected for each constituency...."

Details are regulated by the Election Ordinance 1958,<sup>62</sup> Section 13, which reads:

"(1) ....the candidate for a constituency who polls the greatest number of valid votes cast by the electors of such constituency shall be deemed to be the elected member of such constituency...."

"(2) Every person voting at an election shall cast his vote by means of a ballot paper to be marked by him so as to indicate his vote....in such manner that such vote shall be secret...."

Thus, in these single member constituencies each elector can vote for only one candidate. The Election Ordinance does not refer to political parties.

(iii) The Federation of Malaya was for the election of 1959 divided into 104 parliamentary constituencies. This is going to last for the next elections.<sup>63</sup>

The individual divisions of constituencies may be altered in future. Each constituency ought to have an equal number of electors, but because of communication difficulties and other disadvantages facing rural areas, such rural constituencies may contain as little as one half of the electors of any urban constituency.<sup>64</sup>

59. See Reform, *op. cit.*, supra note (37) at 15.

60. *Food and Agriculture Organization of the United Nations, Report of the Federation of Malaya Constitutional Commission* (1957) pp.23, 27. The report does not discuss electoral principles which should be adopted. Only questions on the organization of elections are taken into consideration.

61. Hickling, *An Introduction to the Federal Constitution*, (1960), p. 69.

62. Election Ordinance, 1958 (No. 33 of 1958).

63. Art. 46 FMC and Section 1 of the Thirteenth Schedule of the FMC as amended by the Constitution (Amendment) Act, 1962, (No. 14 of 1962).

64. S. 2(c) of the Thirteenth Schedule.

The delimitation of constituencies and the manner in which elections are conducted are the responsibility of the Election Commission.<sup>65</sup> As far as the delimitation of constituencies is concerned, the powers of this Commission are subject to certain limits. Its recommendations shall be laid before the House of Representatives. There they may not be accepted. In such a case the Prime Minister may, after consultation with the Commission, amend the draft as he may consider necessary and lay the draft so amended before the House of Representatives.<sup>66</sup> Thus, the Prime Minister and his majority in the House have the power to make final decisions on the size of constituencies.<sup>67</sup>

The Election Commission itself<sup>68</sup> is appointed by the Yang di-Pertuan Agong on ministerial advice after consultation with the Conference of Rulers. It consists of a Chairman and two members.<sup>69</sup> They must be men of impartiality and integrity without political affiliations, and they must not be engaged in business or other paid employment. They retire at the age of sixty-five or may resign earlier, but they cannot be removed from office except in the manner prescribed for a Judge.<sup>70</sup>

The Election Commission authorized to require the assistance of all public bodies in the performance of its electoral duties. The Commission is responsible not only for the organization and direction of all elections to the House of Representatives but also for the State Legislative Assemblies.<sup>71</sup>

Whenever there is a casual vacancy among the members of the House of Representatives caused for example by death or resignation of a deputy during the legislative term, the vacancy shall be filled within sixty days from the date on which it occurs. For this purpose by-elections are held in individual constituencies.<sup>72</sup>

(iv) A comparison of the election principles provided in the Basic Law with those of the Malayan Constitution and the Ordinances on the subject show similarities.

The elections in Malaya are also 'universal', because every citizen residing in the Federation may vote. The attainment of the age of 21 entitles one in both countries to the vote. The elections in Malaya are also direct. The candidate in a constituency winning the highest number of votes is returned.

65. Art. 113 para 1 FMC.

66. S. 11 of the Thirteenth Schedule.

67. Details of procedure for delimitation of constituencies in ss. 4-12 of the Thirteenth Schedule.

68. Details on the Election Commission are regulated in the 'Election Commission Ordinance, 1957' (No. 76 of 1957).

69. Art. 114 para 1 FMC.

70. Art. 114 para 3 FMC.

71. Art. 113 para 1; 115 para 2 FMC.

72. Art. 54 FMC.

The election shall be free. This is in Malaya ensured by the Election Offences Ordinance,<sup>73</sup> which is especially enacted to prevent electoral offences and corrupt and illegal practices at elections.<sup>74</sup> The elections are made secret.<sup>75</sup>

As a main difference with Germany, it appears that the 'one member one constituency' system of Malaya is entrenched in the Constitution, while the variations of these principles in Germany are subject to ordinary legislation.

The basic rules of the Malayan Constitution together with the regulations of the Election Ordinance, 1958 do not provide very much mathematical justice to the parties. These regulations make little provision for the representation of minorities. However, the system has proved its efficiency in conveying clear majority conditions. The German system results always in approximately proportional representation. Only minorities below five percent without some strongholds in the country are neglected. This system has also proved to be efficient. A remarkable difference is also that in Germany no by-elections are held and if a casual vacancy occurs, the person next on the Land list becomes the new member of the House. Thus, a party cannot lose its strength in Parliament by death or resignation of a deputy.

In Malaya, a by-election offers for all parties the opportunity to win a new constituency.

(v) The rules of the Malayan Constitution on election matters are not so narrow that no other system could be introduced without constitutional amendment.

The so-called alternative vote system could be applied within the existing electoral framework. If the alternative vote were adopted, single member constituencies would be retained, but the elector would be allowed to express his choice of candidates in order of preference. If no candidate obtained a clear majority, the lowest on the list would be eliminated, his votes being distributed according to the second preferences, as shown on the voting paper. The alternative vote would not provide adequately for the representation of minorities in the country but it makes it more probable that in each particular constituency the final choice would be the real choice of the electors.<sup>76</sup>

Such a method could be adopted in the Federation, if at any time

73. Election Offences Ordinance, 1954 (No. 9 of 1954).

74. Section 4 codifies offences by election officers, Section 5 punishes any breach of secrecy, Section 9 ensures that there is no undue influence.

75. See s. 13(2) of the Election Ordinance quoted supra in this essay, chapter (c)ii.

76. Wade & Phillips, *op. cit.*, supra note (4), p. 110; see also Reform, *op. cit.*, supra note (37), pp. 10 - 12, where examples for the usefulness of this system are given.

the 'first past the post' method proved unsuitable.<sup>77</sup>

However, for Malaya, the present system seems to be still the most suitable one. For this country with a certain percentage of illiterate voters the present arrangement is least complicated, and easier to handle and to explain to the people than any other electoral system.

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77. Hickling, *op. cit.*, supra note (61), p. 69.