
INFORMATION NOTE

Compliance of the Electoral System of the Legislature with the International Covenant on Civil and Political Rights: Germany

1. Background

1.1 At the meeting of the Panel on Constitutional Affairs (Panel) held on 20 March 2006, Members discussed the methods of electing members of the legislature in other places. During the deliberations, questions were raised about the mixed member proportional (MMP) electoral system adopted by Germany and New Zealand. In particular, a Member expressed a concern that the MMP system might not comply with the requirements set out in Article 25 of the International Covenant on Civil and Political Rights (ICCPR)¹, which states that:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2² and without unreasonable restrictions:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) to have access, on general terms of equality, to public service in his country."*

1.2 The Research and Library Services Division (RLSD) was asked to study whether or not the MMP system complied with Article 25 of the ICCPR. RLSD has published its findings regarding the New Zealand MMP system³, and this information note provides information regarding the German MMP system.

¹ Germany and New Zealand ratified the ICCPR in March 1976 and March 1979 respectively.

² Article 2 of the ICCPR is in Appendix for Members' easy reference.

³ An information note entitled *Compliance of the Electoral System of the Legislature with the International Covenant on Civil and Political Rights: New Zealand* (IN25/05-06) was published on 12 May 2006.

1.3 To prepare this information note, RLSD has studied the relevant research materials and has asked both the German Parliament⁴ via the Consulate of Germany in Hong Kong and the Office of the United Nations High Commissioner for Human Rights (UNHCHR) to provide the required information. As at the publication of this information note, only the Bundestag has responded to RLSD's enquiry.

2. The parliamentary electoral system

Historical development

2.1 After the First World War, parliamentary government was established by the constitution of the newly formed Weimar Republic⁵, which meant the majority party in the Bundestag would form the ruling government.

2.2 Members of the Bundestag were elected by the proportional representation (PR) electoral system. Each party put up a list of candidates equal to the number of seats in a district. Voters indicated their preference for a particular party on the ballots. Seats would be allocated to parties in proportion to their share of the vote.

2.3 At the time, there was no minimum election threshold so seats were allocated in proportion to the votes obtained by each party. This PR electoral system resulted in a legislature with a large number of parties, including those with low levels of votes. For instance, 14 of the 32 contesting parties in the 1930 election gained parliamentary seats. No party attained a majority in the Bundestag and it was very difficult for parties to form and maintain stable coalition governments.

2.4 The Nazis came to power in 1933 against the background of unstable coalition governments contributing to social and economic problems that peaked in the Great Depression. The Nazis suspended the Weimar constitution and ordered Parliament to hand over the legislative power to the Nazi government. From mid-1933 until the end of the Second World War, the Nazi government outlawed all parties except its Nazi Party. In the elections of the Bundestag since 1933, the Nazi Party was the only party contested. This totalitarian one-party regime collapsed when Germany was defeated in 1945 by the Allies in the Second World War. The Allied Control Council, consisting of members from the United States, Britain, France and the former Soviet Union, was established to govern Germany. No parliamentary elections were held between 1946 and 1948.⁶

⁴ The German Parliament consists of an upper house, the Bundesrat, which is composed of representatives appointed by the state; and a lower house, the Bundestag, whose members are directly elected for a four-year term of office by universal suffrage. Currently, the Bundestag has 614 seats.

⁵ The Weimar period refers to the period of 1919-1933.

⁶ For details, please see the information note entitled *Supplementary Information on the Regulatory Framework of Political Parties in Germany, the United Kingdom, New Zealand and Singapore: Historical Development of Political Parties* (LC Paper No. IN32/04-05).

2.5 The electoral law introduced for the 1949 parliamentary election, although based upon the principle of PR, required parties to receive at least 5% of the votes cast in at least one of the 16 states of Germany in order to be eligible for the seats in the Bundestag. The requirement was intended to reduce the fragmentation in the Bundestag. Despite this new requirement, 11 parties gained representation in the Bundestag in the 1949 election. In the 1953 election, the 5% threshold was tightened and set at the federal level. Hence, the number of parties represented in the Bundestag dropped to six.

The current parliamentary electoral system

2.6 The electoral law was further amended in 1956 to implement the MMP electoral system, which has been adopted till today. The Bundestag states that the MMP electoral system has the following two advantages:

- (a) Fairness among political parties. In the interests of fairness and equality, the number of seats gained by a political party should be proportional to the number of voters who support that political party.
- (b) Effective representation of constituents. An important function of individual constituency representatives is to act on behalf of constituents who need help in their dealings with the government. The voting system should therefore encourage close links and accountability between individual constituency representatives and their constituents.

2.7 Under the MMP electoral system, each voter casts two votes, namely a direct vote for a constituency candidate, and a party vote for a list of candidates⁷. Constituency seats are filled by the first-past-the-post system, under which the candidate obtaining the largest number of votes in each constituency is elected, whereas the allocation of list seats is determined by the national percentage of votes a political party obtains (those political parties obtaining less than 5% of the votes or failing to win three constituency seats are disregarded). If a political party has won one or two constituencies only, it is entitled to keep the constituency seat(s) but is not able to take part in the proportional list seat distribution. According to the Bundestag, the purpose of this clause is to prevent the proliferation of small extremist parties so that the Bundestag can function properly and provide a basis for stable government.

⁷ Party lists are closed lists such that voters cannot choose individual candidates on the lists or alter the order of such lists.

3. Compliance of the mixed member proportional electoral system with Article 25 of the International Covenant on Civil and Political Rights

3.1 In responding to RLSD's enquiry, the Bundestag states that the MMP electoral system is compatible with the requirements set out in Article 25 of the ICCPR.

3.2 Under the electoral law, independent candidates are not prohibited from contesting the constituency elections. Independent candidates may establish a political party⁸ or attach themselves to a political party in order to contest the party list elections. According to the Bundestag, in practice, there have been very few cases of independent candidates contesting the party list elections.

3.3 In addition, the UNHCHR has not expressed any concern regarding the MMP electoral system adopted in Germany⁹.

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⁸ Under the Basic Law of Germany, political parties may be freely established. However, their internal organization must conform to democratic principles. For details, please see the research report entitled *Regulatory Framework of Political Parties in Germany, the United Kingdom, New Zealand and Singapore* (LC Paper No. RP05/03-04).

⁹ RLSD has not been able to find any published UNHCHR report discussing the compliance of the MMP system with Article 25 of the ICCPR.

Appendix

Article 2 of the International Covenant on Civil and Political Rights

A.1 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

A.2 Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

A.3 Each State Party to the present Covenant undertakes:

- (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (b) to ensure that the competent authorities shall enforce such remedies when granted.

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