PUBLIC LAW

The Decision of the German Constitutional Court on the Immigration Act

By Florian Becker

A. Introduction

Even experienced scholars will have to think for quite a while when asked to remember whether a similar situation has ever occurred: A tiny constitutional provision in the organisational part of the *Grundgesetz* (GG – Basic Law), not exactly neglected by learned writers but definitely never seen as a source of major problems, became the starting point of one of the most emotional outbursts German politics has ever experienced. The said provision, Article 51.3(2) of the Basic Law, dealing with the voting procedure in the *Bundesrat* innocently says that the votes of one *Land's* representatives "can" ("können") be cast only unanimously.[1] In order to understand the causes for the earthquake that struck the German political and constitutional system in the 774th session of the *Bundesrat* on 22 March 2002 it is essential to shed light on the structure and the constitutional role of the *Bundesrat*.

I. The Structure and the Constitutional Role of the Bundesrat

The *Laender* (Federal States) participate in creating legislation for and administering the Federal State through the *Bundesrat* (Article 50 GG). The governments of the German *Laender* send three or more representatives to the *Bundesrat* (the actual number depending upon their population[2]). According to Article 78 of the Basic Law the constitution requires legislative acts to be passed by both chambers,[3] the

[1] The translation of the German word "können" influences the understanding of the provision. In German the meaning of this word is ambiguous. It may express either a prohibition or an impossibility of differing votes. The majority of the judges and the dissenters were not unanimous in their characterization of the meaning of this word.

[2] According to Article 51.2 of the Basic Law each *Land* has at least three votes in the *Bundesrat*. *Laender* with more than two million inhabitants have four, *Laender* with more than seven million inhabitants, six votes. Article 51.3 of the Basic Law says that each *Land* may delegate as many representatives as it has votes. All in all there are 69 votes to be cast in the *Bundesrat* which means that 35 votes constitute a majority. The votes are distributed as follows: Baden-Württemberg (10.61 million inhabitants/6 votes); Bavaria 12.34/6; Berlin (3.39/4); Brandenburg (2.59/4); Bremen (0.66/3); Hamburg (1.73/3); Hesse (6.08/5); Mecklenburg-Western Pomerania (1.76/3); Lower Saxony 7.96/6); North Rhine-Westphalia (18.05/6); Rhineland-Palatinate (4.05/4); Saarland (1.07/3); Saxony 4.37/4); Saxony-Anhalt (2.57/4); Schleswig-Holstein (2.81/4); Thuringia (2.41/4); source: http://www.bundesrat.de/Englisch/Wissen/index.html.

[3] The difference between *Zustimmungsgesetze* (acts to which the *Bundesrat* must also to agree) and *Einspruchsgesetze* (acts to which the *Bundesrat* may object, but which the Parliament may pass as an override)

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Bundestag (Federal Parliament) and the *Bundesrat* (Federal Council of the States). This constitutional situation makes it necessary for a German Federal Government to rely not only on its majority in Parliament. In order to pass legislative acts the government and its supporting parliamentary majority also need political support from the majority of *Laender* governments; or formally speaking: by the majority of *Laender* representatives in the *Bundesrat*. If the political background of a *Land* government does not comply with the background of the Federal Government it is highly unlikely that the representatives of a *Land*, acting in their capacity in the *Bundesrat*, will consent to an act proposed by the Federal Government and the majority in Parliament.

But since the political structure of Germany nowadays is far more complicated than it was in the founding days of the Federal Republic it does not automatically follow that if party A and B support the Government in *Land* X, that A would not also be part of a parliamentary majority coalition with party C at the Federal level, while C is part of the opposition in X. As a consequence, a party supporting the Federal Government may well be in opposition against a government in a *Land* although its coalition partner on the federal level may be supporting the government on the *Laender* level.

It has often been lamented that competences attributed to the *Laender* governments through the *Bundesrat* are used not to foster federalism but to carry on political opposition in another forum.[4] The Constitutional Court has encouraged such tactics by saying that the motives of the *Laender* (or better, their representatives in the *Bundesrat*) for not consenting to an Act are completely within their discretion.[5] As a result, the *Bundesrat* has become a second political arena for legislation.[6]

This constitutional system demands a high degree of political bargaining, especially if high profile reform projects of a Federal Government are at stake. This was the case with the Immigration Act of the red-green coalition[7] elected in 1998.[8] After

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does not have any importance here. About that difference, *see*, Johannes Masing, *in* DAS BONNER GRUNDGESETZ Vol. 2, Art. 77 para. 47 et seq (Hermann v. Mangoldt / Friedrich Klein / Christian Starck eds., 4th ed.). About the difference these categories make for the legislative process, *idem.*, Art. 78 para. 5 et. seq.

[4] *See*, Fritz W. Scharpf, OPTIONEN DES FÖDERALISMUS IN DEUTSCHLAND UND EUROPA, p. 65 et seq.; Fritz W. Scharpf, *Die gefesselte Republik*, DIE ZEIT 35/2002; Rudolf Wassermann, 2003 NJW p. 331.

[5] BVerfGE 37, 363 (381). *See also*, Hans Peter Bull, *in* ALTERNATIVKOMMENTAR ZUM GRUNDGESETZ Vol. 2, Art. 84 para. 26 (2nd ed. 1989); Peter Lerche, *in* GRUNDGESETZ, Art. 84 para. 67 (Theodor Maunz / Günter Dürig et. alt.); Hans D. Jarras and Bodo Pieroth, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, Art. 77 para. 4 (5th ed., 2000).

[6] The question whether the *Bundesrat* is, in the perspective of the constitution, a second chamber of legislation is discussed by Korioth at Art. 51 para. 24. *in* v. Mangoldt / Klein / Starck, *supra* note 3.

[7] The Social Democratic Party (SPD) and the party "Bündnis 90 / Die Grünen" lend their political colours for this denomination.

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1998 the parties supporting this coalition on the federal level had not been particularly successful in winning *Laender*-elections. In most of the *Laender* either opposing parties had come to power or the SPD was required to establish a coalition with a party opposing them on the federal level (Christian-Democratic Union (CDU) and the Liberals (F.D.P.)). As usual, the parties supporting these coalitions at the *Land*-level had an agreement to abstain from voting in the *Bundesrat* if they cannot consent on a political project.[9] Consequently, the Federal Government could not rely on a solid majority of representatives agreeing to its projects in the *Bundesrat*.

II. The Immigration Act in the Bundesrat

This was the political situation in which the Federal Government proposed the Immigration Act (the content of which does not play any role at all in this context) in the Parliament, where the Act was passed with a solid majority by the red-green coalition. The Act, however, then passed to the *Bundesrat* for consideration. According to Article 84.1 of the Basic Law, the Immigration Act could only be passed with the consent of the *Bundesrat*, meaning the majority of representatives had to vote "yes" (Article 52.3(1) GG) while any abstention would have the same effective consequence as a "no"-vote.

All other *Laender* governments had already made up their mind in public whether to support or to reject the Act or to abstain from voting. This situation made it necessary that, in order to reach the required number of votes, all four Brandenburg representatives had to cast a "yes"-vote to let the Act pass.

Unfortunately for the red-green coalition, Brandenburg, at that time, was governed by a "grand" coalition between the SPD and the CDU, the latter being the main opposition party at federal level. Following the usual procedure, when constituting their coalition in the *Land* Brandenburg, the two parties had reached an agreement that any controversy between them about how to vote in the *Bundesrat* would result in an abstention. Nevertheless there were solid rumours that the Prime Minister of Brandenburg, SPD member Manfred Stolpe, had been put under enormous pressure by the Federal Government to ensure a "yes" of all representatives of his *Land* in the *Bundesrat* vote on the Immigration Act. At that time nearly no scholar, and even less so any politician, doubted that according to Article 51.3(2) of the Basic

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[8] "Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern" (Zuwanderungsgesetz); draft by the parliamentary parties of SPD und Buendnis 90/Die Grünen, 8[t] November 2001 (BT-Drcks. 14/7387; to be found under http://www.bundestag.de/).

[9] *See*, Section 5.2.2 of this coalition agreement between the SPD and the CDU of Brandenburg (http://www.brandenburg.de/spd-fraktion/wir/koalitionsvertrag.htm (27 January 2003). But it has to be said that these contracts are of a political as opposed to a binding nature. Any violation does not have a legal effect on the violating act. *See*, Korioth at Art. 51 para. 24 *in* v. Mangoldt / Klein / Starck, *supra* note 3.

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Law all four representatives[10] had to say "yes" unanimously or the votes of Brandenburg would be invalidated altogether,[11] resulting in the *Bundesrat's* rejection of the Immigration Act.

In an emotional discussion during the now infamous 774th session of the *Bundesrat* on 22 March 2002 dealing with the Immigration Act one of Brandenburg's representatives, Minister Schoenbohm (CDU) [12] made his point very clear that his vote would be "no".[13] In this speech Minister Schoenbohm made clear that his Prime Minister Stolpe (SPD) felt enormous pressure not only to vote "yes" himself but to take care that all of Brandenburg's votes counted as a "yes". Such an result, Minister Schoenbohm argued, would violate the coalition agreement between the two parties at the *Land*-level, which required the representatives of Brandenburg to abstain from the voting process if they could not form consensus on a certain subject matter. Hence, Minister Schoenbohm announced in his speech that he would vote "no" in order to invalidate the "yes" he expected from his Prime Minister. Hereby he wanted to invalidate all four votes of Brandenburg by purpose. He made it perfectly clear that no consensus among the representatives of Brandenburg had been reached and that he did not want anyone else to cast a vote for him.

After a few more contributions to the discussion the voting process started.[14] According to the voting mode chosen in this instance each *Land* had to be addressed in order to cast its votes.[15]

[10] About the possibility that one of the representatives casts the votes for all representatives of one *Land*, *see*, the text *infra* at note 12.

[11] Hartmut Bauer, *in* GRUNDGESETZ Vol. 2, Art. 51 para. 22 (Horst Dreier ed., 1999); Roman Herzog, *in* HANDBUCH DES STAATSRECHTS Vol. II, § 46 para. 20 (Josef Isensee / Paul Kirchhof (2nd ed., 1998); Jürgen Jekewitz, *in* ALTERNATIVKOMMENTAR, Art. 51 para. 10, *supra* note 5; Korioth at Art. 51 para. 21, *in* v. Mangoldt / Klein / Starck, *supra* note 3; Theodor Maunz at Art. 51 para. 27, *in* Maunz / Dürig, supra note 5; Walter Krebs, *in* GRUNDGESETZ-KOMMENTAR Vol. 2, Art. 51 para. 13 (Ingo v. Münch / Phillip Kunig 5th ed., 2001); Jarras / Pieroth at Art. 51 para. 6, *supra* note 5; Gerhard Robbers, *in* GG, Art. 51 para. 15 (Michael Sachs ed., 3rd ed. 2003); Hans Schäfer, DER BUNDESRAT p. 53 (1955). Different opinions were developed by DAS BONNER GRUNDGESETZ Vol II., Art. 51 Note III 4 b (Hermann v. Mangoldt / Friedrich Klein eds., 2nd ed. 1966); Klaus Stern, DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND Vol. II, § 27 III 2 b (1980). Stern was followed by Dieter Blumenwitz, *in* BONNER KOMMENTAR ZUM GRUNDGESETZ, Art. 51 para. 26, 29 (Rudolf Dolzer / Klaus Vogel / Karin Graßhof eds., 1987).

[12] It is essential to point out the fact that, though Minister/Prime Minister being the title for the capacity the acting persons have as a member of their *Laender*-government, in the sphere of the *Bundesrat* they all are "representatives" and not Ministers or Prime Ministers.

[13] Protocol of the 774th session of the *Bundesrat* on 22 March 2002, p. 147 et seq. (to be found under http://www.parlamentsspiegel.de/).

[14] *See*, Protocol (supra note 13), p. 171 et seq.

[15] See, Section 29.1(2) of the standing order of the *Bundesrat* (German version http://www.bundesrat.de/Wissen/index.html). According to this provision one *Land* after the other is called to cast its vote.

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In general, only one representative, the so called "*Stimmführer*" (voting leader) of a Land casts a vote. The answer of this single representative is then attributed to his fellow representatives who do not even have to be present in the session. But even if they are present, under normal circumstances they remain silent and hereby agree to the vote cast for them by the voting leader.[16] In this instance, when it was Brandenburg's turn to vote, the first representative (Minister Ziel (SPD)) voted "yes". Immediately after that vote the second representative (Minister Schoenbohm (CDU)) voted "no".

The President of the *Bundesrat*, at that time the Prime Minister of the *Land* Berlin and a member of the SPD, declared that Brandenburg had not voted unanimously contrary to the provision of Article 51.3(2) of the Basic Law. This declaration ended what in the following will be referred to as the "first voting round". The President of the *Bundesrat* turned to the Prime Minister of Brandenburg asking how Brandenburg would vote. Prime Minister Stolpe answered that "as the Prime Minister" he declared that "the *Land* Brandenburg" would vote "yes". The Prime Minister hereby deliberately broke the provision of the coalition agreement between the coalition parties of the Brandenburg *Land* government, according to which the *Land* would have had to abstain from voting.

According to the protocol of the proceedings Minister Schoenbohm declared to the President, without being asked: "You know my point of view". Nevertheless the President declared that "the *Land* Brandenburg" had cast a "yes" vote. This declaration concluded what will be referred to as the "second voting round". Following this declaration a storm descended upon the *Bundesrat* and its President. The representatives of the *Laender* yelled at each other and at the President some trying to defend his action some trying to persuade him that he had improperly declared the vote of Brandenburg by ignoring the first "no" of Minister Schoenbohm and taking the vote of Prime Minister Stolpe as the consensus vote of Brandenburg (and its four representatives). In the middle of the storm the President again addressed Prime Minister Stolpe asking whether there is need of clarification among the representatives of Brandenburg. The Prime Minister expressly denied that a review of his vote was necessary. Once more he declared "as the Prime Minister" that "the *Land* Brandenburg" would vote "yes". Minister Schoenbohm, again without being queried by the President, remained silent. This exchange will be referred to as the "third voting round". Ignoring the fierce protest of several other Prime Ministers the President continued with the voting process and, not surprisingly, came to the result that there had been enough affirmative votes in the

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[16] In a seemingly similar situation in 1949, a Prime Minister (being also the President of the *Bundesrat* at that time) authoritatively decided about how "his Land" would vote after the representatives of that Land had not reached consensus. The other representatives remained silent and hereby seemed to agree to that decision of their Prime Minister. *See*, Protocol of the 10th session of the *Bundesrat* on 19 December 1949, p. 116.

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Bundesrat to allow the Immigration Act pass.

The Act was handed over to the *Bundespraesident* (Federal President) who, after a period of legal consultation, drew up and signed the Act into law, but not without seriously criticizing what had taken place in the *Bundesrat*. Although the *Bundespraesident* would have had authority to reject any Act not passed in accordance with the formal provisions of constitution,[17] he claimed that the legal situation was not entirely clear and that it would be preferable for the Constitutional Court to decide whether there had actually been enough votes for the Act in the *Bundesrat*. Six *Laender* took the question to the *Bundesverfassungsgericht* (Federal Constitutional Court), asking the Court to abrogate the Act because of its formal incompatibility with the procedural provisions of the constitution. The Court delivered its decision on 18 December 2002.[18] In the meantime the constitutional question at the core of the discussion had already been widely analysed in newspapers and legal journals.[19] Among the issues debated were the following questions. Had the voting process of Brandenburg been finalized by the vote of the first representative of Brandenburg (who voted "yes") in the first voting round? On this point it should be borne in mind that typically only one representative is called to cast the vote for his colleagues, therefore not leaving room for the dissenting "no" vote of Minister Schoenbohm. Had Brandenburg voted at all? Did Prime Minister Stolpe have the competence to vote "yes" for all the representatives of Brandenburg in the second voting round even though one of his *Land's* representatives had taken the unusual measure of independently voting "no" and thereby making it perfectly clear that he

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[17] About this competence of the *Bundespraesident*, *see*, Schlaich at § 49 para. 33 et seq, *in* Isensee / Kirchhof, *supra* note 11.

[18] Decision of the *Bundesverfassungsgericht* (2 BvF 1/02), 18 December 2002 (www.bverfg.de). In the following text I refer to the decision by citing its paragraphs.

[19] A few days after the conflict arose the first opinions were published in newspaper articles (Peter Lerche, Christian Pestalozza, Martin Morlok, *in* the SÜDDEUTSCHE ZEITUNG, (25 March 2002)). The FRANKFURTER ALLGEMEINE ZEITUNG of 25 March 2002 printed parts of the counselling opinion Josef Isensee had delivered to Minister Schoenbohm before the session of the *Bundesrat* about the constitutional implications of the coming situation. Apart from those articles dozens of interviews and readers' opinions written by lawyers or non-lawyers were published in every German newspaper. Not surprisingly, the legal journals and their authors worked hard and quickly to publish articles about the constitutional question at the core of the conflict. It did not take long until a huge number of articles was published. *See,e.g.*, Wolf-Rüdiger Schenke, 2002 NJW p. 1318; Carsten F. Soerensen, 2002 NJW Vol. 24, p. XII; Roland Fritz / Karl-Heinz Hohn, AUSLÄNDER- UND ASYLRECHT (AuAS) – special edition on 19 April 2002; Claus-Peter Bienert, 2002 THÜRVBL. p. 108; Florian Becker, 2002 NVWZ p. 569; Jörn Ipsen, 2002 DVBL. p. 653; Werner Hoppe, 2002 DVBL. p. 725; Dieter Dörr / Heinrich Wilms, 2002 ZRP p. 265; Rolf Gröschner, 2002 JZ p. 621; Albert v. Mutius / Jörg Põße, 2002 LKV p. 345; Tobias Linke, 2002 VERWALTUNGSRUNDSCHAU p. 229; Hartmut Bauer, 2002 RUP p. 70; Jürgen Jekewitz, 2002 RUP p. 83. The articles are compiled and commented in a book edited by the counsellor of the Federal Government. *See*, ABSTIMMUNGSKONFLIKT IM BUNDESRAT IM SPIEGEL DER STAATSRECHTSLEHRE (Hans Meyer ed., 2003). In this article I will cite the texts as they can be found in the book. After the deadline of the book the following articles were published: Rolf Lamprecht, 2002 NJW p. 2686; Peter Lerche, 2002 BAYVBL p. 577; Christian Burkiczak, 2002 BAYVBL p. 578; Thomas Starke, 2002 SÄCHSVBL p. 232; Andreas Fischer-Lescano / Peter Spengler, 2002 KJ p. 337; Kerstin Odendahl, 2002 JUS p. 1049.

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did not want anyone else to cast a vote for him? These seemingly simple questions have deeply-rooted constitutional, historical and, last but not least, political implications. So it was no surprise that the answers to them varied widely.

B. The Decision of the *Bundesverfassungsgericht*

The Court held that the Act had been passed in a way that was formally incompatible with the constitution. According to the Court the votes of Brandenburg were invalid because of their disagreement. This disagreement had not been overcome in the course of the following events. As a result, there had not been the sufficient number of "yes" votes necessary to pass the Act and the provision of Article 78 of the Basic Law, requiring the consent of the *Bundesrat* to this Act, had been violated.

I. The two steps of the Court

It took the Court two steps to reach this conclusion: *First*, the initial voting round had resulted in a dissenting vote from the *Land* Brandenburg since not all of its representatives could agree on voting "yes" or "no".[20] Thus, the votes of Brandenburg had to be counted as invalid altogether. *Secondly*, the subsequent events, especially the statements of Brandenburg's Prime Minister, had not changed this situation.[21]

Considering the structure of the *Bundesrat* as well as taking the relationship between federal constitutional law and the constitutional law of the *Laender* into account[22] it becomes perfectly clear that only this point of view respects the structure of Article 51.3(2) of the Basic Law. It is true that the *Laender* participate in the legislation and administration of the Federal State through the *Bundesrat* (Article 50 GG). But that does not mean that the *Laender* are members of the *Bundesrat*. Membership is vested in the representatives sent to this body by the *Laender*.[23] According to a constitutional provision (Article 51.1(1) GG) these representatives have to have cabinet status in their *Laender* governments. But as representatives of their *Land* they step out of its constitutional sphere into the sphere of the Federation. When acting (e.g. voting) in the *Bundesrat* the representatives do so by using powers conferred upon them by Federal Law. This

[20] Para. 136 et seq. of the decision.

[21] Para. 141 et seq. of the decision.

[22] *See*, Gröschner at p. 84 (91) *in* Meyer, *supra* note 19.

[23] Para. 136 of the decision. *See, also*, Herzog at § 46 para. 1, 3, supra note 11; Korioth, Art. 51 para. 2 *in* v. Mangoldt / Klein / Starck, *supra* note 3; Maunz at Art. 51 para. 5 *in* Maunz / Dürig *supra* note 5. A different approach is followed by Konrad Reuter, *in* PARLAMENTSRECHT UND PARLAMENTSPRAXIS IN DER BUNDESREPUBLIK DEUTSCHLAND, § 56 para. 5 (Hans-Peter Schneider / Wolfgang Zeh eds., 1989). He refers, *inter alia*, to the historical development of the *Bundesrat*.

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means that, because there is no such provision in the (federal) Basic Law, the hierarchical structure of the cabinet on the *Laender*-level (under certain circumstances including the authority of the Prime Minister to issue binding directives to the members his cabinet[24]) has no validity in the *Bundesrat*.[25] Every single one of the representatives, be it a *Land's* Prime Minister or its most junior Minister, has the same competences in the *Bundesrat*.

The consequence of this is twofold: *First*, the Prime Minister[26] may under certain conditions issue a legally binding directive to any other representative as to how to cast his vote. But although any representative will have to live with the political consequences of dissenting from a cabinet decision or the Prime Minister's wish, from the external point of view of federal law he is entirely free to choose how to vote. If the representatives violate a cabinet decision (or a directive of the Prime Minister) this does not have any effect upon the validity of his vote since two different legal spheres are touched. Any legal obligation to vote in a certain way derives from the constitutional sphere of the *Land* while the powers to act as a representative of the *Land* in the federal sphere derives from the federal constitution and is entirely independent of any external preconditions. *Secondly*, no one of the equal representatives can be overruled by one of his fellow colleagues. The fact that normally one of the three or more representatives of one *Land* casts the vote for all of them is a good practice. But it functions only under normal circumstances: as the *Bundesrat* is not convened permanently, during its sessions a high workload has to be managed.[27] Additionally, under normal circumstances the representatives of one *Land* will agree before the session to vote unanimously, be it "yes" or "no" or be it (because there was no agreement as to how to vote) to abstain. This makes it easy to let one "*Stimmführer*" (voting leader) cast the vote for his or her fellow representatives.[28] But he or she is mandated to do so not by the *Land* he or she represents (or its cabinet) but by his or her fellow representatives. As they are entirely equal and, from the federal point of view, legally free to vote as they choose, they can refuse to grant someone else a proxy over their voting

[24] *See, e.g.*, Article 89.1 of the Brandenburg Constitution.

[25] This does not mean that the directives would be invalid. But acting against the directive does not have any influence on the validity of the vote.

[26] It mainly depends upon the constitutional law of the respective *Land* who has the authority to issue directives to the members of the *Bundesrat* and under which conditions. The *Grundgesetz* (GG – Basic Law) gives hints that it expects such a competence to exist on the level of the *Laender*, but it is not clear whether Federal Law demands the whole government to decide about such a question. *See*, Becker at p. 59 (62) *in* Meyer, *supra* note 19. Section 12 Abs. 1 lit. (d) of the standing order of the Government of Brandenburg (4 July 2000) says that decisions about how to vote in the *Bundesrat* have to be made by the whole government. But the government had not decided in that matter (*See*, Para. 144 of the decision). In any event, in subjects of eminent political importance (as is the case here, *see*, Schenke at p. 18 (27) *in* Meyer, *supra* note 19) the constitutional right of the Prime Minister to issue binding directives prevails (*See*, Article 89.1 of the Brandenburg Constitution).

[27] *See*, Herzog at § 46 para. 2, *supra* note 11.

[28] The concept of the voting leader has a long tradition (*See*, Gröschner at p. 84 (92) *in* Meyer, *supra* note 19).

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competences. If they do so, and Minister Schoenbohm could not have made himself more clear on that point during his speech, one of the fellow *Land* representatives does not have the competence to take over the voting right of the dissenter and the President of the *Bundesrat* also lacks the competence to "redirect" the voting-right of the dissenter to one of the *Land's* other representatives. Because everyone attending the session knew that Minister Schoenbohm had the intention to vote "no" (and that was exactly what he did after the first representative of Brandenburg had cast his "yes"-vote) the first voting round was not finished after the first representative of Brandenburg had cast his "yes" vote. The standard procedure of one representative voting for his or her fellows could not apply since one of them, Minister Schoenbohm, had made it clear that he did not want anyone voting "yes" to act on his behalf.

Only at the first sight does it make a difference for the answer to the central constitutional question whether the voting rights are attributed to the *Land* or to the members of the *Bundesrat*.[29] Since the *Land* as a legal person cannot act itself, natural persons have to act on its behalf. No one claims this voting right to be a private matter of the representatives. But this insight does not help with the question at the core of the discussion, namely, how is the will of "the *Land*" be formed and articulated?[30]

This question immediately leads to the second step taken by the Court. In the first voting round it had become perfectly clear that the votes of Brandenburg had not been cast unanimously. After the President of the *Bundesrat* had declared that "the *Land* Brandenburg"[31] had not cast its vote unanimously, according to the Court the voting process was finished as far as Brandenburg was concerned and could not be re-started in order to find a new (and maybe more favourable) result. Although the President of the *Bundesrat* has a legal obligation to care for a regular voting process and to enlighten any vagueness in its course, according to the Court this duty was not to be carried out under the given circumstances.[32] After the first voting round there was no doubt whatsoever that the representatives of Brandenburg did not

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[29] But this is one of the main points the counsellor of the Federal Government in that case makes in his furious article commenting the literature published up to that point. Meyer at p. 146 (149 et seq.) *in* Meyer, *supra* note 19.

[30] It becomes clear that the "ownership" of the votes does not necessarily predetermine the outcome of the constitutional question rooted in Article 51.3(2) of the Basic Law if one takes into account that one of the few writers claiming that the *Laender* should be considered members of the *Bundesrat* (Reuter, *supra* note 23) comes to the conclusion that the voting leader only announces the result of a previously formed consensus between the representatives of a *Land* (*See*, Reuter, PRAXISHANDBUCH BUNDESRAT, Art. 51 GG para. 62 (1991).

[31] From what has been said before it should have become clear that it was not the *Land* Brandenburg but its representatives that did not vote unanimously. The discussion whether the votes belong to the *Land* or to the representatives is carried out by Meyer at p. 146 (149 et seq.) *in* Meyer, *supra* note 19. He claims the former and can point at several constitutional provisions that say "the votes of the *Land*" (see p. 151). But these are reminiscences of an older *Bundesrat*-construction. *See*, the text *infra* at note 42.

[32] Para. 143 et. seq. of the decision.

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vote unanimously - by purpose and knowing the consequences of such a split vote. Hence, there was no reason at all to start "investigating" for "clarification". There was no need to rectify a mistake committed by one of Brandenburg's representatives (or all of them).

II. The reasoning of the dissenting judges

While the majority of judges saw the first voting round as the relevant moment for the legal analysis, two judges issued a dissenting opinion in which they stressed the importance of the second voting round.[33] They took the view that, while the first voting round at best resulted in a dissenting vote of Brandenburg's representatives if not a "non-vote", the second round led to a different result.[34]

According to the opinion of the dissenting judges the *Land* Brandenburg was entitled to correct its conduct of the first round in the second round. In order to find a need for such a correction, the dissenting opinion seems to favour the interpretation that after the end of the first voting round "the *Land*"[35] had not yet cast its votes. To underline this, the dissenting opinion establishes two categories of failed voting:[36] On the one hand a vote that had not, in a legal sense, been cast at all; on the other hand, a vote that had been cast but with a content leading to its invalidity. The dissenting judges attribute Brandenburg's votes from the first voting round to the former category, resulting in the conclusion that Brandenburg had not voted at all after the first voting round. Since Article 51.3(2) of the Basic Law does not say that votes "must" (or should) be cast only as a block-vote but says that they "can" ("können") only be cast that way,[37] the dissenting judges concluded that the constitution attempts to construct a legal impossibility for disputed votes. As the same sentence also demands the physical attendance of any voting representative this is seen as a confirmation for that point of view.[38] The dissenting judges therefore refer to a fictional case:[39] The representatives Ziel and Schoenbohm try to cast their differing votes by fax although Article 51.3(2) of the Basic Law clearly says that votes can only be cast by members present. After having read these votes

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[33] Para. 154 et seq. of the decision.
[34] Para. 177 et seq. of the decision.
[35] The misunderstanding, that it is the *Land* that has to cast its votes and not its representatives can be seen throughout the dissenting opinion. Hereby it becomes obvious that the dissenting opinion relies upon a highly questionable approach to the structure of the *Bundesrat*, saying that the majority denies the "right of the Land Brandenburg" to correct its dissenting vote from the first voting round (para. 155 of the decision). But if one talks of the *Land*, than there is only a short way to go to a reintroduction of hierarchical structures within the *Land*. And this is exactly what happens.
[36] Para. 157 et seq. of the decision.
[37] *See*, *supra* note 1.
[38] Para. 158 of the decision.
[39] Para. 158 of the decision. A similar case was constructed by Meyer at p. 146 (168 et seq.) *in* Meyer, *supra* note 19.

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the President would have been entitled to ask those representatives of Brandenburg that are present "how Brandenburg would vote". Even if the President would not ask this question the representatives of Brandenburg would be entitled to deliver a statement about Brandenburg's votes. The contradiction of the faxed votes would not have hindered this. If in a case like this the votes of the representatives not present would have to be ignored the same has to be said about differing votes (as occurred, in this case, in the first voting round). They have to be ignored. They do not exist from a legal point of view.

By claiming that this problem has not yet been discussed in the literature, the dissenting judges give a hint that they do not want to contradict the writings of all those scholars coming to the conclusion that differing votes result in the general invalidity of the vote.[40] But the opposite is true. The distinction introduced by the dissenting judges would have as a consequence that there is no such thing as differing votes, since they always would have to be ignored from a legal point of view. All learned statements about the consequence of differing votes would be obsolete. This would be surprising but not entirely impossible because even a predominant view in law can be wrong. In this instance, it is not.

The argument of the dissenting judges seems to be strong. But, apart from the fact that it does not say how long under the given conditions the President of the *Bundesrat* has to wait for a not existing vote to change into an invalid vote, the whole argument is founded on a state theory deriving from the 19th Century. At that time (and with a view to a similar provision in the constitution of the German Reich[41]) the German *Laender* themselves, not the authorised persons they send to this organ, were members of the *Bundesrat*.[42] Hence, it was common sense that unanimity of the votes was a theoretical necessity, as a state could not have two or more wills.[43] But the structural change of the *Bundesrat* in the current constitution, from the *Laender* themselves to *Laender*-representatives as its members, speaks against this interpretation of the provision.

The hypthetical set up by the dissenting judges does not prove the opposite. They are of the opinion that the vote of any absent representatives cannot lead to a dissent within the Brandenburg votes as faxed votes would have to be ignored according to Article 51.3(2) of the Basic Law. As the necessity of presence and the necessity of unanimity are put together in the same provision, according to the dissenting judges, any violation of both must have the same consequence: the vote

[40] Para. 159 of the decision.
[41] Article 6.2 of the *Reichsverfassung* 1870/71: "Every member of the Federation can send as many authorized persons to the *Bundesrat* as it has votes, but the whole of the votes can only be cast unanimously."
[42] Paul Laband, DAS STAATSRECHT DES DEUTSCHEN REICHES Vol. I, p. 97 (5th ed., 1911).
[43] *See*, Laband at p. 243, *supra* note 42.

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has to be treated as not existing. But equating the necessity of attendance with the necessity of unanimity, especially with a view to the respective consequences, is not convincing. The idea that a violation of both necessities would have to have the same consequence, the non-existence of the votes from a legal point of view, can also be turned against its aim. The hypothetical faxed vote exists (it came to the President's attention as a vote) but it cannot be attributed to the *Land's* votes since it has been cast in an irregular way and does not fulfil the requirements of a proper vote. Certainly, the President would have to discuss with the members present what their will is. Since only one representative has to be present and since he or she can cast all votes if being mandated to do so by his or her fellow representatives the present representative can cast all votes for the absent representatives – *if* he or she has a mandate to do so.

The usual procedure of voting leadership results in the assumption that, in the event that one representative votes for a *Land*, he or she has received a mandate to cast all votes for the *Land*. But this assumption can be destroyed by the positive knowledge of a contrary set of circumstances. Here the fictional faxed vote comes into play. Under normal conditions the President can assume that the voting leader has a mandate to vote for his or her fellow representatives. But when it comes to the President's attention within the session that no such mandate has been given he or she can accept the vote by the representative present only as his single vote. Basically, the fax is not only a failed vote that could be healed by repetition from one of the *Land's* present representatives. Furthermore, it is a hint for the President that the mandate to vote contradicting the fax has not been transferred to the representative present. This shows clearly that the example as well as the difference between existing and not existing votes as set up by the dissenting judges is completely artificial and neither respects the provision of Article 51.3(2) of the Basic Law nor respects the actual structure of the *Bundesrat* and the legal construction of its voting process.

The dissenting judges continue in saying that even if there had been a vote cast, Brandenburg would have had a right to correct its vote. This may be true[44] as long as it is clear that it is not "Brandenburg" but its representatives that have a right to correct their votes. The dissenting judges criticize the majority for saying that the President of the *Bundesrat* was not entitled to investigate the "true will" of the Land Brandenburg.[45] But at closer look this is not what the majority criticizes in the first place. The majority builds its case on the fact that the President of the *Bundesrat* in the second and third round had only addressed the Prime Minister.

[44] All decisions come into force at the end of the session (*See*, § 32.1 of the standing orders of the *Bundesrat*). The dissenting judges show that in numerous cases the President of the *Bundesrat* has been asked to repeat a voting process. *See*, para. 164 of the decision.
[45] Para. 169 of the decision.

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As hierarchical structures within the respective *Land* do not play a role if ministers are acting within their capacity as representatives of their *Land* in the *Bundesrat*, it was not within the President's discretion to exclusively address the Prime Minister in order to investigate the "true will" of Brandenburg.[46] As it is not the true will of Brandenburg but the true will of its representatives that would have to be investigated the formal position of the Prime Minister is not decisive in that respect. This is why, according to Section 29.1(2) of the standing order of the *Bundesrat*, the *Land* has to asked about its vote. This procedural provision respects the autonomy of the *Laender* and the equality of their representatives by not laying down which one of the representatives is to be asked. It also makes quite clear that the representatives are expected to have reached consensus before the voting process starts, as at least one of them has to give an answer to the question, if the votes are not to be invalidated.[47]

Under the given conditions the President would also have had to address the dissenting representative. Even after the "yes"statement of his Prime Minister in the second voting round, by which the Prime Minister claimed to speak for "the *Land* Brandenburg" (he must have meant "all" of Brandenburg's representatives), Minister Schoenbohm again referred to his speech and his first vote by saying: "You know my point of view," making it perfectly plain that he would not transfer his competences to his Prime Minister as voting leader. Under these circumstances even the third voting round could not change this situation. In the first place one has to doubt whether this was a voting round at all, since the Prime Minister was only asked whether there is need for clarification among the representatives of Brandenburg. Apart from the fact that this is not the correct question in the voting procedure,[48] by claiming to cast a vote as the Prime Minister for the "*Land* Brandenburg" (without being asked to do so) Stolpe again referred to his hierarchical position, which, as discussed above, is not relevant among the representatives of the *Land* in their representative capacity in the *Bundesrat*. If there had been a need for clarification the dissenting representative would have had to be asked as well. Apart from the fact that, considering that the dissent among Brandenburg's representatives had been obvious, there was neither a pressing need nor a compelling legal basis for a second and a third voting round, Minister Schoenbohm's silence could not change the situation for two reasons. First, because of the President's question it has to be doubted that the third voting round was a proper voting round at all. Secondly, the dissenting Minister Schoenbohm again was not addressed. And after having made his dissent clear in the second voting

[46] Para. 145 of the decision.
[47] See, Maunz, *Der Bundesrat als Verfassungsorgan und politische Kraft*, *in* BUNDESRAT 193, 206 (1974).
[48] According to Section 29.1(2) of the standing order of the *Bundesrat* the *Land* is to be called to cast its vote.

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round without being asked no one could have demanded from him to shout that out again.

So even if the dissenting judges were right in saying that Brandenburg had not voted in the first round at all or if Brandenburg would have had a right to correct its invalid vote this would not change the situation at all since the voting procedure of the second round had not been correct as well. But the dissenting judges follow a different train of thought also in that respect: Although paying lip service to the inevitable, the Prime Minister not being the superior to his Ministers when acting in the *Bundesrat*,[49] the dissenting judges say that it was obvious that the President of the *Bundesrat* would have to address the Prime Minister as being the only one having the political power ("politische Autorität") to resolve the situation.[50] In the end this notion of "political power" reasserts a hierarchy within the block of one *Land's* representatives that is not recognized by Article 51.3(2) of the Basic Law (or other constitutional provisions).

Consequently, the dissenting judges have the opinion that the word of the Prime Minister in the second voting-round ("As the Prime Minister of the Land Brandenburg I hereby vote 'yes'") was decisive as a "yes" vote of "the *Land*", meaning all four individual representatives.

Their argument is quite weak since it mainly foots upon an isolation of the second voting round. The President of the *Bundesrat*, knowing perfectly well about the dissent between the Brandenburg representatives and the unwillingness of the "no"voter to be represented by any of the "yes" voters,[51] asked only *one* of the representatives and takes his single vote to stand for all of them. If the President of the *Bundesrat* ignores the other representatives this puts the burden of protest upon their shoulders. Although Minister Schoenbohm had already made his dissent abundantly clear in the first instance, he would have had to protest against the President addressing only the Prime Minister, again without being asked to do so. At least during a procedure being as formal as voting procedures regularly are, this would be an extremely surprising burden. Bearing in mind the clear announcement of Minister Schoenbohm the President would have had to ask him as well about his vote or at least whether he transferred his voting competences to the Prime Minister. Even if one follows the dissenting judges by assuming in a pretty formalistic fashion that the unsolicited objection of Minister Schoenbohm referring

[49] Para. 174 of the decision.
[50] Para. 175 of the decision. Similarly, *see*, v. Mutius / Pöße at p. 96 (104) *in* Meyer, *supra* note 19.
[51] This knowledge did not result from any background information, rumours or newspaper reading, as the dissenting judges imply, but from the clear and unequivocal announcement during the debate and from the "no" vote of the first voting round.

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to his first "no" is not to be seen as a further "no" vote in the second round,[52] this objection at least made quite clear that Minister Schoenbohm still had not transferred his voting rights to his Prime Minister. This is the decisive omission the dissenting judges make leading them to their mistaken result.

The Prime Minister could also not unilaterally take over these voting rights.[53] Even if he could issue a directive to Minister Schoenbohm as to how to cast his vote,[54] this directive binds the minister only internally (with respect to affairs at the *Land* level), meaning that Minister Schoenbohm could act against this directive in his *Bundesrat* activities without impairing the legal validity of his action.[55] Furthermore, the Prime Minister was not entitled to self-execute his implied directive by stepping in for his Minister as in general[56] there is no such right of self execution. At best, the Prime Minister cast a "yes" vote for himself and Minister Ziel (the first representatives casting a "yes" vote) in the second voting round. He did not have the mandate to vote for Minister Schoenbohm, a fact which was well known to the President of the *Bundesrat* and strengthened by Minister Schoenbohm's repeated objection.

Furthermore, it leaves the reader with a strange feeling that the dissenting judges go every extra mile in attributing the right to the President to ask the Prime Minister how Brandenburg would vote[57] (in a potentially unlimited number of voting rounds until finally a "valid" vote is cast) while they have enormous difficulties constituting a presidential duty to enlighten what Minister Schoenbohm wanted to express by his unsolicited referral to his well known point of view.[58] This argument opens up a possibility of collusion between the Prime Minister and the President in order to ignore the competences of a *Land's* other representatives. And it deprives the dissenting opinion of its persuasiveness.

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[52] Para. 178 of the decision.

[53] For the following, *see*, Becker at p. 59 (63 et seq.) *in* Meyer, *supra* note 19.

[54] One has to assume that the conditions of Article 89.1 of the Brandenburg Constitution are met and that it does not matter that the Prime Minister deliberately violates the coalition agreement between the coalition parties, saying that in case of political dissent the representatives of the *Bundesrat* will abstain from voting (*See*, *supra* note 9). Furthermore, one has to assume that a directive (to vote "yes" or at least not to contradict someone else to do so) can be given implicitly by voting. This has to be doubted. *See*, Schenke at p. 18 (29) *in* Meyer, *supra* note 19.

[55] *See*, Meyer at p. 146 (165 et seq.) *in* Meyer, *supra* note 19; *supra* note 26.

[56] Apart from those scholars denying such a right to self execution in general (Norbert Achterberg at § 52 para. 20 *in* Isensee / Kirchhof, *supra* note 11; Martin Oldiges, DIE BUNDESREGIERUNG ALS KOLLEGIUM, p. 456 (1983); Schenke at p. 18 (24) *in* Meyer, *supra* note 19; Meinhard Schröder at Art. 65 para. 26) *in* v. Mangoldt / Klein / Starck, *supra* note 3. There are few making exceptions for those cases in which the Prime Minister would face serious parliamentary consequences for damage caused by a disobedient minister (*See*, Oldiges, ibid., p. 457). This cannot be assumed where the Prime Minister deliberately violates the contract between the parties supporting his government by issuing a directive.

[57] Para. 168 et seq. of the decision.

[58] Para. 178 et seq. of the decision.

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C. Conclusion

Brandenburg's representatives did not vote unanimously, neither in the first nor in the second voting round. This resulted in all four votes of Brandenburg being invalid (Article 51.3(2) GG). All attempts to construct a valid second voting round are based upon the wrong assumption that Prime Minister Stolpe was able vote authoritatively for the dissenters, which he could not do in the manner in which it was carried out. The Court was right to declare the formal incompatibility of the Act with the constitution. Only few would have doubted this conclusion, had not such a highly controversial topic been at stake.

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