Federalism Revisited: Constitutional Court Strikes Down New Immigration Act For Formal Reasons

By Nina Arndt and Rainer Nickel

I. Introduction

On 18 December 2002, one of the major legislative projects of the Schröder Government during its first term of office from 1998 to 2002 failed when the Federal Constitutional Court delivered its judgement in the Immigration Act case. In a split decision, the Court declared the new Immigration Act, the "*Gesetz zur Steuerung und Begrenzung der Zuwanderung*" (Act on the Management and Limitation of Immigration) void for formal reasons: It found that the Act did not receive a valid majority vote in the *Bundesrat*, the chamber of the 16 German states (*Länder*) that form the Republic. The Court did not have to deal with any questions related to the content of the Act. It discussed only the constitutionality of the legislative procedure.

The new Immigration Act was the result of a long-term legislative project. A "Commission on Immigration" consisting of delegates from various interest groups and politicians from all parties represented in the *Bundestag* was set up by the Federal Government in 1999. Two years later, it delivered a 326-page report on possible future concepts of immigration law, refugee law, and the law on persons seeking resettlement in Germany (the so-called "Spätaussiedler", persons of German origin living in Russia or other former USSR countries[1]). The

[1] These persons are entitled to German citizenship; according to Article 116 (1) of the German constitution (*Grundgesetz* or Basic Law, BL), they are "Germans within the meaning of the Basic Law" even if they do not have German citizenship. Article 116 (1) reads: "Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of December 31, 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person." The respective "resettlement act" granted even more persons a right to enter Germany and obtain citizenship. In the 1990´s, after the fall of the Soviet Union, hundreds of thousands of persons seeking resettlement entered Germany. They easily outnumbered the number of refugees, but in contrast to the heated discussions about the constitutional right to asylum in the Basic Law, this topic was avoided by all political parties.

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Commission's proposals[2] became the blueprint for the draft Immigration Act, which for the first time in German post-war history welcomed and promoted active immigration.

The report of the Commission on Immigration, lead by Rita Süssmuth, a high-ranking Christian Democrat and former President of the *Bundestag*, was welcomed by many important social groups such as the unions, the federation of employers and the churches. However, the opposition CDU and CSU parties opposed quite a few parts of the legislative proposals as too liberal. Last minute talks with the opposition failed, and the beginning election year 2002 overshadowed the controversial political debate and the law-making process. The peak of the confrontation was reached in February and March when after elections in several *Länder* the Schröder Government lost its majority support[3] in the *Bundesrat*. As it was clear that the Act needed the latter's consent (see below, part III), the Federal Government had to find a way to secure a *Bundesrat* majority for the Act. In prior cases, the Government had either reached a compromise with the opposition parties, or had used financial incentives in order to obtain the support of the *Länder* governments who usually would have abstained from voting.[4] The last prominent case was the Tax Reform Act. It passed the *Bundesrat* although on paper there was no majority for the Government proposal.

This time there was no room for additional financial arrangements which could be helpful to persuade those governments formed by mixed coalitions to support the Act. Therefore, one of the *Länder* governments with the SPD as coalition partner of a party in the opposition at the national level, the Brandenburg government, came into the focus of attention. This very special constellation was responsible for the dramatic events that followed.

II. The legislative procedure of the Immigration Act

The events culminated in the *Bundesrat* debate on 22 March 2002. In the weeks before the plenary session, rumours had come up that the Federal Government had tried to put pressure on Brandenburg's Prime Minister Stolpe in order to gain the majority of the states' votes for the Immigration Act. Speculations grew that Prime

[2] Available at http://www.bpb.de/zuwanderung/dokumente/suessmuth-Bericht.pdf.
[3] Traditionally, "mixed" coalition governments on the state level (*i.e.* between parties that also form the Federal Government and parties that are part of the opposition on the Federal level) stipulate in their coalition treaties that they abstain from voting when controversial issues are at stake.
[4] See, *supra*, note 3.

Minister, Mr Manfred Stolpe (SPD) would break the Brandenburg coalition agreement between SPD and CDU which provided that in case of disagreements within the Brandenburg government, the *Land* should abstain from voting. Hence, many opposition politicians on state and federal levels began to fear that Stolpe would vote yes instead of abstain from voting. Jörg Schönbohm, Brandenburg's Minister of the Interior and head of the Brandenburg CDU, publicly announced that the CDU would drop out of the coalition if Brandenburg voted for the Immigration Act. He and Stolpe held several private meetings on the issue, and all actors in the upcoming drama contacted lawyers and legal scholars for advice. Schönbohm asked Professor Josef Isensee, a well-known legal scholar from the University of Bonn, for assistance. Isensee argued that Schönbohm should articulate loud and clearly his dissent with the Immigration Act, that the Brandenburg votes would then be void in case an approving vote was given by any other Brandenburg delegate, and that the President of the *Bundesrat* would not be entitled to call for a new vote. At the same time, the President of the *Bundesrat*,[5] Berlin Mayor, Mr Klaus Wowereit, also prepared for the *Bundesrat* session. His advisors – namely the *Bundesrat´*s own judicial service - argued that in case of a disagreement between delegates of one *Land* during the session, the Prime Minister would be entitled to vote for the entire *Land*.

The course of the session suggests that Wowereit followed his advisors and proceeded from the assumption that Stolpe would be entitled to cast all four Brandenburg votes, whereas Schönbohm relied on his advisors and played the "no"-part assigned to him. In order to understand the judgement of the Constitutional Court, it is crucial to know the exact wording of the statements given in the voting process.

The following is an extract from the official *Bundesrat* protocol[6]:
[After Schönbohm's announcement[7] that he would vote against the bill and after several other speeches on the topic, the *Bundesrat* President Wowereit started the voting process. When the *Länder* were called upon to cast their votes one after another, the following occurred:]

"Dr. Manfred Weiß (Bavaria), Secretary of the Protocol:

Baden-Württemberg	Abstention
Bavaria	No

[5] The President of the *Bundesrat* is voted for a period of one year, see § 5(1) GOBR. It is usually rotating between the Prime Ministers of the *Länder*.
[6] 774th plenary session of 22 March 2002; plenary record 774 to Drs. 157/02, pp. 171 ff.
[7] Schönbohm finished his speech with a pompous citation from a Prussian General: „Ladies and Gentlemen, I cannot decide otherwise. My responsibility for my father*land* forces me to do so. I want to close with the confession of General von der Marwitz, a contemporary of Friedrich the Great, who said: "I chose disgrace where obedience did not do honour" ["Wählte Ungnade, wo Gehorsam keine Ehre brachte."]. See paragraph 21 of the judgement.

Berlin	Yes
Brandenburg	
Alwin Ziel[8] (Brandenburg):	Yes!
Jörg Schönbohm (Brandenburg):	No!

President Klaus Wowereit: I hereby state that the *Land* Brandenburg has not voted unanimously. I refer to Article 51 Paragraph 3 (2) of the Basic Law. It says that the votes of a *Land* can only be cast as a unit.

I ask Prime Minister Stolpe how the *Land* Brandenburg votes.
Dr. h.c. Manfred Stolpe (Brandenburg): As Prime Minister of the *Land* Brandenburg, I hereby declare Yes.
(Jörg Schönbohm [Brandenburg]: You know my opinion, Mr President![9])
President Klaus Wowereit: With that I state that the *Land* Brandenburg voted Yes."

[After this statement of the President of the *Bundesrat*, loud protest came up from the opposition benches. The protocol contains remarks such as "Impossible!", "Unconstitutional!", "You are breaking the law!". A few days later, the Prime Minister of Saarland, Mr Peter Müller (CDU) publicly confessed[10] that the protest of the opposition had in fact been staged; the actors had met before the session and rehearsed their "spontaneous" protest. - After the uproar, according to the protocol, Mr Wowereit went on as follows:]

„I can also ask Prime Minister Stolpe once again if the *Land* sees any need for clarification.

(Roland Koch [Hessen]: The *Land* has no need for clarification! You manipulate a decision of the *Bundesrat*! What do you think you are doing! – Shouting: Breach of the constitution!)

- No!

(Roland Koch [Hessen]: Mr. President, no! – Further heated shouts)

Prime Minister Stolpe.

Dr. h.c. Manfred Stolpe (Brandenburg): As Prime Minster of the *Land* Brandenburg I hereby declare Yes.

[8] *Alwin Ziel* is Minister for Social Affairs of Brandenburg and was one of the four Brandenburg members of the *Bundesrat*.
[9] Statements noted in brackets in the plenary records are understood as interrupting or heckling statements.
[10] This happened in a talk show where Müller was asked to talk about politics and theatre.

(Roland Koch [Hessen]: Ah! And what does Mr. Schönbohm say?)

President Klaus Wowereit: Ok, then this is stated.

Dr. Manfred Weiß (Bavaria), Secretary of the protocol:

Bremen	Abstention
Hamburg	Abstention
Hesse	Abstention
Mecklenburg-Vorpommern	Yes
Lower Saxony	Yes
Northrhine-Westfalia	Yes
Rhineland-Palatinate	Yes
Saarland	No
Saxony	No
Saxony-Anhalt	Yes
Schleswig-Holstein	Yes
Thuringia	No

President Klaus Wowereit: This is the majority. The *Bundesrat* has consented to the Act."

According to Article 82.1 of the German Constitution (the *Grundgesetz* or Basic Law), the Immigration Act was then passed on to the German President, Mr Johannes Rau for certification. As the provision states that only "laws enacted in accordance with the provisions of this Basic Law" should be certified, everybody now looked at what he would do[11]. It took President Rau unusually long to certify the act, thus nourishing speculations that the Immigration Act might fall at this point of the legislative process. Finally, he certified the act, but issued a written statement in which he reprehended the way the procedure in the *Bundesrat* had been "directed" to serve the political interests of the actors involved and their political parties[12]. President Rau also explicitly regretted that the important project of an Immigration Act had become the object of political strategies.

After hopes of the conservative parties CDU and CSU had failed that the German President might stop the Immigration Act, the only way to prevent its enactment on 1 January 2003 was to initiate a proceeding before the Federal Constitutional Court

[11] So far, in the history of the Federal Republic of Germany the Presidents had denied certification to acts passed on to them in six cases, partly for formal, partly for material reasons. For further information, see www.bundespraesident.de/Downloads/ListeUmstrittenerGesetze.pdf.
[12] www.bundespraesident.de/Downloads/erklaerung.pdf.

(FCC) in Karlsruhe. According to Article 93.1 No. 2 BL any *Land* government can appeal to the Federal Constitutional Court in the event of disagreement or doubts regarding the formal or substantial compatibility of Federal law (or *Land* law) with the constitution (so-called abstract norm control). The Immigration Act was brought before the Constitutional Court by six of the eight *Länder* who either had voted against the new immigration law[13] or had abstained from voting in the *Bundesrat* [14]. They challenged the formal compatibility of the voting procedure in the *Bundesrat* with the Basic Law and sought a nullification of the Act.

The plaintiffs argued that the Brandenburg votes were invalid so that the Act had not gained the necessary majority vote in the *Bundesrat*. In order to understand this argument, it is necessary to take a closer look at the provisions of the Basic Law which rule the legislative procedures on the Federal level.

III. The Legal Background of the Decision

1. The two-chamber system of German federal legislature

As laid down in Article 20.1 Basic Law, the Federal Republic of Germany is a federal state with vertically divided powers between the Federation (*Bund*) and the now sixteen German states (*Bundesländer*, or in short: *Länder*). Thus, legislative power falls within the scope of *either* federal *or* state responsibility.
Yet, the *Länder* are not only responsible for state legislation, but also take part in the federal legislative process in the so-called German bicameral system.

The primary federal legislative forum is the German parliament, the *Bundestag*[15]. Its members are elected in federal elections; they are representatives of the whole people of Germany (Article 38.1 Basic Law). All federal bills have to be adopted by the *Bundestag* first.

The *Länder* participate in the federal legislative process through the *Bundesrat*[16], the second federal legislative forum. The *Bundesrat* has the right to oppose any bill adopted by the *Bundestag* and to refer it to a mediation procedure between the two legislative chambers. In specific cases enumerated by the German constitution the *Bundesrat*'s consent is even mandatory for the bill to become law (so-called consent

[13] Bavaria, Saarland, Saxony and Thuringia.
[14] Baden-Württemberg and Hesse.
[15] Article 77(1)(1) BL.
[16] Article 50 BL.

bills[17]). If only one single provision of an act demands the consent of the Bundesrat, then this requirement extends to the entire legislative proposal.

Due to a set of constitutional regulations concerning the division of legislative power between the *Bund* and the *Länder,* the new Immigration Act fell within the scope of the federal legislative power[18]. And as it included regulations on the implementation of the new immigration law by state administration agencies, it fell within the group of the so-called consent bills pursuant to Article 84.1 Basic Law [19]. Therefore, the new act had to be approved by the *Bundesrat*.

2. The voting procedure in the *Bundesrat*

Articles 50 seq. of the Basic Law set forth the main rules concerning the *Bundesrat*. Its members are not elected, but appointed (and recalled) by the state governments[20]. They must be members of the state government themselves. Each *Land* may appoint a number of delegates corresponding to its respective number of votes[21]. The number of votes varies between three and six, depending on the size of the respective state's population[22]. Any decision of the *Bundesrat* requires at least a majority of the votes cast[23].

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[17] See Article 78 first alternative.

[18] Articles 30, 70(1) BL state that the exercise of all state powers, namely the right to legislation, is incumbent on the *Länder* insofar as the Basic Law does not explicitly confer powers on the Federation. It does so, though, in broad terms, pointing out areas of exclusive federal legislation (esp. Articles 71, 73, 105(1); in areas of exclusive federal legislation, the Federation has sole jurisdiction to legislate), areas of concurrent legislation (Articles 72, 74, 74 a, 105(2); on matters within the concurrent legislative power, the *Länder* have the right to legislate as long as and to the extend that the Federation has not exercised its legislative powers by enacting a law) and areas of federal framework legislation (Article 75; with framework legislation, the Federation has the power to enact provisions forming a framework for *Land* legislation). The Immigration Act fell into the scope of Articles 73(No. 3) (freedom of movement, passports, immigration, emigration), 74(1)(No.4) (the law relating to residence and settlement of aliens), No.6 (matters concerning refugees and expellees), No.12 (labor law), Article 75(1) (No.5) (matters relating to the registration of residence or domicile and to identity cards).

[19] *Fischer-Lescano, Andreas/Spengler, Peter,* Colère publique politique im Bundesrat, *Kritische Justiz (KJ)* 2002, p. 337 at p. 339. For a detailed examination of the legislative and administrative powers of the Federation concerning immigration, see *Bothe, Die verfassungsgemäße Aufteilung der Verantwortung für Zuwanderung und Integration auf Bund und Länder und Gemeinden und Folgerungen für ein Organisationsmodell. Rechtsgutachten im Auftrag der unabhängigen Kommission „Zuwanderung"*, www.bmi.bund.de/Downloads/Bothe.pdf.

[20] Article 51(1) of the Basic Law. During the constitution-making process 1948/49, the discussions in the Parliamentary Council had focused on the question whether to follow the "*Bundesrat* principle" as described above, placing the members of the *Bundesrat* under authority of their home governments, or the "Senate principle", where the *Bundesrat* members would have been voted by their home parliaments and thus independent from the governments of the *Länder*, see *Jahrbuch für das öffentliche Recht der Gegenwart, neue Folge*, Vol. 1, 1950, pp. 379 *et seqq.*

[21] Article 51(3)(1) of the Basic Law.

[22] Article 51(2) BL. Bremen, Hamburg, Mecklenburg-Vorpommern and Saarland are entitled to three votes, Berlin, Bremen, Rhineland-Palatinate, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia to four votes, Hesse to five votes, Baden-Württemberg, Bavaria, Lower Saxony and Northrhine-Westfalia to six votes each.

[23] Article 52(3)(1) of the Basic Law. The majority is reached by 35 (out of a total of 69) votes.

The Basic Law stresses one further decisive point in the modalities of all voting procedures in the *Bundesrat*: As its members are not individually and directly elected, but rather receive their seat as representatives of their *Land*, they are not entitled to cast individual (and differing) votes. Article 51.3 Sentence 2 Basic Law states: "The vote of each *Land* may only be cast as a unit[…]"[24], meaning that there is no splitting of votes allowed within each state's group of representatives. This has lead to the widespread (but not obligatory) practice that the representatives of a *Land* usually reach an informal agreement, appointing one "leading member" within each state's group to cast the vote for the *Land*. When called upon to vote, this member declares whether the state will vote for or against the proposal or whether it will abstain from voting.

IV. The Court's reasoning

In the given situation, the Court had to decide whether the consent reached in the *Bundesrat* from 22 March 2002 had been reached in accordance with the provisions of Article 51.3 Basic Law. Taking into account the numerous articles from university scholars that had been published on the topic since March 2002,[25] the result of the ruling cannot surprise. With two Justices dissenting, the court essentially followed the reasoning of the „Isensee script" and declared that Brandenburg had not casted a valid vote.

1. Common premises of the majority and the dissenting opinion

The majority as well as the dissenting opinion start off from the same set of fundamental, common premises concerning the role of individual *Bundesrat* members in general and the role of their state Prime Ministers in particular:

Without explicitly discussing the broad controversy on the topic in German legal literature, the Court stated that the *Bundesrat* has to be seen as a collegially organized constitutional federal organ.[26] Its members are not the *Länder*, but individual members of the state governments. Hence, Article 50 Basic Law does only describe the function of this federal body when stating: "The *Länder* shall participate through the *Bundesrat* in the federal legislation and administration […]."

[24] The norm goes on: „[...] and only by Members present or their alternates.".

[25] *See Gröschner, Rolf, Das Zuwanderungsgesetz im Bundesrat, Juristenzeitung (JZ),* 2002, 621 *et seqq. with further references; Linke, Tobias, Bundesrat in der Verfassungskrise, Verwaltungsrundschau (VR)* 2002, 229 *et seqq.; Schenke, Wolf-Rüdiger, Die verfassungswidrige Bundesratsabstimmung, Neue Juristische Wochenschrift (NJW)*, 2002, 1318 *et seqq.; Ipsen, Jörn, Gespaltenes Votum bei Abstimmungen im Bundesrat (Art. 51 Abs. 3 Satz 2 GG), DVBl.*, 653 *et seqq.*; *Fischer-Lescano, Andreas/Spengler, Peter, Colère publique politique im Bundesrat, KJ,* 2002, 337 *et seqq.*

[26] Paragraph 136 of the judgment; also dissenting vote, paragraph 174.

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According to the Court, this does not mean direct participation, but rather participation through those members appointed by the state governments.

The court then held that the Basic Law assumes that each member of the *Bundesrat* is equally entitled to vote. However, the constitution would also allow the common practice that only one "leading member" hands in all votes of a *Land* at once. This "leading member" could be the Prime Minister just as well as any other delegate of the respective *Land*[27]. At the same time, each state representative, because of his or her position of equal rank in the *Bundesrat,* – could effectively oppose this "leadership"[28].

The Court's holding may be summarized in the following way: Whether there is a "leading member", the casting all votes of his or her *Land* is to the sole decision of either the state's representatives or their respective state government. The Basic Law does not set forth any preconditions in this respect that could encroach into the constitutional sphere of the *Länder*. From a federal constitutional point of view, the main principle governing the procedure in the *Bundesrat* is the principle of equal membership of all members present, with the consequence that each member has the same right to vote and to oppose and thereby destruct any "leading voting".

2. The court's reasoning – "No means No"

From this starting point, the majority of the Senat's members draws the conclusion that when Brandenburg's Minister Ziel answered the question asked by the President of the *Bundesrat* with "Yes." while Minister Schönbohm answered "No.", both votes where of equal validity. Therefore, the Court stated, the votes of the *Land* were not cast unanimously and were therefore invalid[29]. At this point, the decisive phase of the voting process formally ended. For the debate to be legally re-opened by the President of the *Bundesrat*, it would have needed specific, justifying reasons[30]. According to the Court, those reasons were not at hand. Though the President of the *Bundesrat* is generally entitled to a further inquiry if there is any doubt or insecurity relating to the declarations of intention made in the voting, the Court held that in the procedure at issue there had been no such insecurity. It states that the debate in the preceding plenary session showed that it was the clear and indubitable goal of Minister Schönbohm to render the votes of Brandenburg invalid and thus to prevent the new Immigration Act to come into force[31].

[27] Paragraph 137 of the judgment.
[28] Para. 138.
[29] Para. 140.
[30] Paras. 141 *et seq.*
[31] Paras. 143 *et seqq.*

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Therefore, according to the majority of the Senate, the first voting phase ended with the conclusion that the *Land* Brandenburg had not cast its votes as a unit. Thus, all the events that followed were legally irrelevant[32].

In a second line of reasoning, the Court stressed that even if the President of the *Bundesrat* had been entitled to re-open the voting process for Brandenburg, he would have had to do so with the necessary neutrality, which means by addressing all members of the *Land*, not only the Prime Minister[33]. The Court again emphasized that constitutional provisions of the *Land* Brandenburg and the hierarchical order between the Prime Minister and the other members of his government did not play any role in the procedure. In the *Bundesrat*, the Court found, a Prime Minister of a *Land* has no right to overrule the voting of his Ministers, and from the point of view of the Basic Law, he also has no legal authority over their conduct in the voting process.

Finally, the Court holds that that in the third phase of the voting procedure, the voting process had not been re-opened at all. It states that the sentence of the President of the *Bundesrat*: "I can also ask Mister Prime Minister Stolpe one more time, whether the *Land* has any further need for clarification." did not meet the necessary formal requirements of the usual voting protocol[34].

For all of these reasons, according to the majority of the Court, the counting of the votes of the *Land* Brandenburg as "Yes" was unconstitutional. As the votes of the *Land* had been decisive for the overall outcome of the voting, the *Bundesrat* did not declare its consent in a valid manner and thus the whole Immigration Act was rendered unconstitutional.

3. The dissenting opinion – "Play it again, Klaus!"

The dissenting opinion was written by Justice Osterloh and Justice Lübbe-Wolff. The first point which is worth mentioning here is that the dissenting opinion is more than twice as long than the majority opinion itself. The line of reasoning followed by the two justices authoring the dissenting vote differs in a number of points from the judgment of the Court.

First of all, according to the dissenting opinion, the contradictory voting of the Ministers Ziel and Schönbohm did not only constitute an invalid act of voting in the

[32] Para. 141.
[33] Paras. 149 *et seq.*
[34] Para. 152.

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sense that the votes of the *Land* cannot be counted for the outcome of the voting. It did not constitute an act of voting at all[35]. The Justices hold that this follows from the wording of Article 51.3 Sent. 2 Basic Law. They point out that this article contains the requirement that the votes of each *Land* have to be cast in unity alongside with the requirement of physical presence. As nobody would ever think of counting a voting handed in, for example, by fax, the same would apply in the case at hand. Therefore, the Justices concluded, in the first round of voting the *Land* had not used its right to vote at all: The voting process was not closed at this point, and the President of the *Bundesrat* was not only entitled, but even obliged to further inquiries.

The argument then goes on that even if what happened in the first round of voting was to be seen as a valid (if not countable) act of voting, the *Land* still had had the right to correct its voting afterwards[36]: The Justices point out that decisions passed by the *Bundesrat* do not come into force before the end of the respective session where they were taken[37]. They refer to the Rules of Procedure of the *Bundesrat* (*Geschäftsordnung des Bundesrates,* GOBR)[38] according to which any *Land* can ask for the repetition of the voting of the whole plenum until the end of the session, the only condition being that there was no protest from any other *Land*. A look at the *Bundesrat* records reveals that this regulation is activated on a very regular basis[39]. The Justices conclude that under these circumstances the *Land* should even more have the right to ask for the repetition *of its own cast of votes*[40].

Therefore, the dissenting opinion concludes, the *Land* Brandenburg was still entitled to correct its voting even after the first phase of the voting process had ended. The Justices stress that the presumption that there actually was a need for further clarification could be based on the fact that Prime Minister Stolpe used his chance to answer the second question put by the President of the *Bundesrat* in favor of the legal project[41]. That it was not the *Land* itself that initiated the resumption of the voting could be explained with the immediate inquiry by the President of the *Bundesrat*. Even if that inquiry would be seen as a mistake of procedure, this mistake was due to the President's behavior and could not be shifted onto the *Land*[42].

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[35] Paras. 157 *et seqq.*
[36] Paras. 162 *et seqq.*
[37] See § 32 Satz 1 GOBR.
[38] § 32 Satz 2 GOBR.
[39] In about every second sitting of the *Bundesrat,* paragraph 164 of the judgement. Although one can presume that usually the quest for repetition is due to uncertainty about the proper counting of the votes, no reasons need to be given.
[40] Para. 166 [emphasis added by the authors].
[41] Para. 170.
[42] Paras. 168 *et seq.*

The minority then agrees with the ruling of the judgment insofar as it admits that it was doubtful whether the form in which the second question of the President of the *Bundesrat* was brought forward met the constitutional requirements derived from the Basic Law[43]. When addressing only the Prime Minister, the President of the *Bundesrat* did not call for the vote of the *Land*. The Justices attribute considerable importance, though, to the fact that at the given moment when the procedure took place the legal situation was highly controversial[44]. Also, it had then been an acceptable presumption that the Prime Minister would be the only person with the necessary political (sic!) authority to realize the (hypothetical) interest of the *Land* in casting a valid vote[45].

The dissenting opinion concludes that the form in which the President of the *Bundesrat* called on Brandenburg for a second vote cannot be classified as an *evident irregularity* in the proceedings. In other words, it was not an irregularity that necessarily leads to the nullity of the Immigration Act[46].

Finally, according to the minority of the Senate, the form of the question did not influence the result of the voting. Even though not addressed directly, Minister Schönbohm did have the opportunity to answer to the call for votes, and he even did so, though only by expressing his opinion and not by casting a valid (dissenting) vote[47].

The "Yes" given by the Prime Minister then was the only vote given in the now decisive phase of the procedure[48]. As the President of the *Bundesrat* had opened a new round of voting when he addressed the Prime Minister of Brandenburg, the "No" given by Schönbohm in the first round did not have any more legal validity. The dissenting Justices held that on the other hand, the statement "You know my opinion, Mister President." did not represent a valid vote. The *opinion* of Minister Schönbohm did not have any legal relevance in the voting, as Article 51(3)(2) does not ask for the unanimity of opinions, but of the votes cast[49]. The Justices close with the argument that it could be seen from the case at hand that it would not be unnecessary formalism to demand for clear and unambiguous statements in a voting process. This is the case because one could speculate whether the statement

[43] Para. 174.
[44] Para. 175.
[45] Para. 175.
[46] Paras. 175, 161. The Constitutional Court developed the "evident irregularity" standard in BVerfGE 31, 47 (53); 34, 9 (25); 91, 148 (175).
[47] Para. 176.
[48] Para. 177.
[49] Para. 178.

of Schönbohm was supposed to mean "no" or was deliberately put in an ambiguous form [50].

V. A rose is a rose is a rose is[51]: The Immigration Act case as an example of failed hard case adjudication?

Karlsruhe locuta, causa finita?[52] At first sight, the answer is yes. It is very unlikely that the *Bundesrat* will stage another showdown similar to the "Immigration Act theatre" in the near future (and not only because the Schröder Government seems to be about to lose any chances for regaining the *Bundesrat* majority in the forthcoming *Länder* elections in Lower Saxony and Hesse).[53] But the case is still worth a second look. The judgement of the Court raises a number of questions which will be of great importance in the future. It is apparent that the opinion of the majority disregards the realities and the habits of fifty years of *Bundesrat* voting routine.[54] If measured by the methodical standards of constitutional interpretation, it fails to deliver a sound explanation as to why the voting system should be as inflexible as the Court sees it (see below, part 1). In addition, some other findings of the majority are unclear or contradictory in themselves, and especially the relation between the *Länder* autonomy and the Federal Constitution stays unclear (part 2).

The two justices who openly[55] dissented, Justices Lerke Osterloh and Gertrude Lübbe-Wolf, addressed most of these critical points in their opinion. They argued precisely why there should have been room for a second round of voting. But in a crucial point, their reasoning also does not seem convincing: It gets very soft and generous when it comes to Wowereit´s addressing only the Prime Minister of Brandenburg instead of the whole Brandenburg delegation to cast a (second) vote (see, *infra*, part 3).

In a ruling dating back to 1958, the *Bundesverfassungsgericht* had named the structure of the *Bundesrat* – being influenced by both, federal and state

[50] Para. 179.
[51] *Gertrude Stein*, *Die Welt ist rund*/A rose is a rose is, Hamburg 2001 (Ritter).
[52] Karlsruhe hath spoken, the case is closed.
[53] On 2 February 2003, these *Länder* hold elections for their state parliaments. Most polls see a clear majority for the *CDU* or good chances *for CDU/FDP* coalitions in both states. As a result, *Schröder* will probably have to deal with a *Bundesrat* opposition for the rest of his chancellorship.
[54] 773 is the exact number of sessions of the Bundesrat until 22 March 2002. Each session usually contains of a number of voting procedures on all the topics the *Bundesrat* is involved in.
[55] It is unclear whether there were two or three out of the eight judges dissenting. During his television presentation of the judgement, the Chairman of the Second Senate of the Court, Vice President Professor Hassemer, pointed out that the ruling of the Court does not contain any information about the result of the voting. He argued that the Court did not want to feed the "undue speculations" in the press about Justices not voting along party lines.

constitutional provisions – as "eigenartig",[56] what could be translated either as having "a strange structure" or as showing, literally, "a structure *sui generis*". The decision rendered in the Immigration Act case does not do much to clarify the bottom lines of this structure.

1. Methodology: Constitutional interpretation as a means to an end?

The interpretation of constitutional provisions follows its own rules: Constitutional decision-making has an immediate and important impact on the political process; the Court's "big" cases are usually almost by definition "hard cases". In a judicial system where a constitutional court has the last word (instead of the legislative branch of government), the legitimacy of the court's decisions depends on the overwhelming strength of its reasoning. If the reasoning does not convince, a decision can quickly be characterized as political justice, driven by the political will of the majority. This has been the case when the US Supreme Court decided[57] that the Florida votes for the presidential elections 1998/99 should not be recounted: There was not only a strong reaction from the public, which included harsh criticism for the "Bush court" and for a partisan handling of the case, but also harsh criticism from the minority of judges who dissented. Their opinion expressed in strong words that the judgement represents a political bow to Bush, and not a result of independent and neutral judicial reasoning.[58]

Modern concepts of constitutional interpretation do not, of course, understand the process of decision-finding and –making as a context-free process where only abstract principles guide the result of the reasoning.[59] Instead, the notion of a context-based decision-making demands "open findings and public reasoning", which means that the judges are requested to present their background assumptions in the text they choose as grounds for their findings.

If we measure the Court´s judgement at these standards, then the Court failed to explain its most basic assumption, namely that the votes of a *Land* are once and for all invalid if one of its representatives votes "yes" and another one "no", as it was the case at the beginning of the voting process of Brandenburg . Here, the majority of the Court does not argue or explain its view, but plainly states *ex cathedra* that the President of the *Bundesrat* is not allowed to ask a *Land* for the second time if the

[56] BVerfGE 8, 104 (120).
[57] *Bush et al. v. Gore et al.* (00-949), 12 December 2000. The judgement can be found at http://supct.law.cornell.edu/supct/index.php
[58] See the dissenting opinion written by Justice *Breyer*, (with whom Justice *Stevens* and Justice *Ginsburg* join except as to Part I—A—1, and with whom Justice *Souter* joins as to Part I), http://supct.law.cornell.edu/supct/index.php
[59] See for example *Alexy, Robert*, *Theorie der Grundrechte,* 1986, and *Theorie der juristischen Argumentation*, 2nd ed., 1991; *Simon, Dieter*, *Die Unabhängigkeit des Richters*, 1975.

votes were not unanimous unless there is a special justification for a repetition of the voting process.[60] The court specifies this rule by adding that a repetition of the voting process is not allowed if (1) a unanimous will of the *Land* does obviously not exist and if (2) according to the whole circumstances, it cannot be expected that such a unanimous will can be formed during the session.[61] The critical point here is obvious: Why should it be the task of and within the power and discretion of the President of the *Bundesrat* to judge whether it can be expected that in a second round, the *Land* will vote unanimous? What happens if he errs? How can a voting right depend on factual circumstances? And what happens if the *Land* disagrees with the decision of the President?

These questions remain completely open. Instead, the majority of the Court refers to the concrete situation of the *Bundesrat* session on 22 March 2002 when, according to the judgement, the dissent within the Brandenburg delegation was plain and obvious. The Court's vague standard of an "obvious" dissent has no actual constitutional roots and, literally, comes out of nowhere – or, one might think, out of the intention to cut off all of the difficult ensuing questions that follow if one accepts that the voting process can be repeated without any specific justification.

The next step is even more surprising: Instead of simply stating that the first vote failed and the second was invalid, the court openly criticises the President of the *Bundesrat* for opening another round of voting in the first place. It even suggests that he tried to manipulate the voting process: "Under the given circumstances, the President of the Bundestag was not entitled to guide the voting act of the *Land* Brandenburg in this way."[62] If the dissent within the Brandenburg delegation was obvious, and if at the same time the President of the *Bundesrat* was entitled to take care of a valid voting,[63] then how could a second round of voting be harmful, or even manipulative? And how can it be manipulative if the President of the *Bundesrat* follows the advice of the *Bundesrat* Legal Office, and refers to the one and only example in the *Bundesrat* history when, in 1949, two delegates of North-Rhine Westfalia voted contradictorily and the then *Bundesrat* President and Prime Minister of North-Rhine Westfalia cast the vote for the *Land* deciding the matter?[64] The branding of Wowereit´s action as biased weakens the whole judgement of the Court and makes it even less convincing.

[60] Para. 142.
[61] Para. 143.
[62] Para. 145.
[63] The Court confirmed this right in his judgement; for details, see above under III.
[64] The majority opinion interprets this case as a pure "irritation" or misunderstanding within the delegation of Northrhine-Westfalia, see paragraph 146 of the judgment. The dissenting Justices hold a different point of view: They suppose that a disagreement about how the cabinet of Northrhine-Westfalia had decided to vote was responsible for the yes/no vote, see paragraph 175 of the judgment.

2. A reward for obstruction?

If the main argument of the Court is not convincing, then it should at least be consistent. But a closer look at the judgement reveals some remarkably conflicting arguments.

A critique may start with the question how the case of a contradictory voting cast by different members of one *Land* in the *Bundesrat* should be handled. The court starts off from the point that the *Bundesrat* consists of the members of the state governments and not of the *Länder* themselves. Each member would have the right to take part in the voting process, primarily acting according to her or his own will and discretion (otherwise, the problem of split votes would not even appear). The court protects this right, holding that if a member once states a clear and unambiguous disapproval of a piece of legislation, this "no" would mean "no" forever, not leaving any room for a new round of voting.

This finding, as clear and simple as it may sound, seems inconsistent with the fact that Article 51.3 of the Basic Law does not forbid authoritative directives given by the *Länder* governments: The *Länder* governments have the right and authority to give instructions to their delegates on how to vote in the *Bundesrat*.[65] If this right is taken seriously, then the Basic Law must provide for a possibility to enforce this right in a second round of voting, even if a clear dissent has been stated by one of the representatives of the *Land*. Otherwise, each delegate could – by disregarding his instructions and misusing his right to be present in the *Bundesrat* session – obstruct the whole *Land* from casting a valid vote once and for all by simply stating his dissent once. There was no such directive given in the case at hand. But while the court stresses in broad and general terms that in case of an unambiguous dissent there would be no room for a second vote, it only very indirectly touches upon the question as to how to protect directives given by the state governments, when stating: "*If there is no directive* issued by the *Land* government and if then the representatives of that *Land* and of its government cast different votes, this is not unconstitutional."[66] Thus, the court unnecessarily gave room to misunderstanding and misinterpretation.

Another question arises from what the role of the State Prime Ministers should be in the *Bundesrat*. The Court stressed that (a), the *Länder* would be autonomous in forming and expressing their (unanimous) will and (b), that the Basic Law would allow for directives given to the state representatives in the *Bundesrat*. At the same

[65] See *Herzog, Roman, Zusammensetzung und Verfahren des Bundesrates, in: Isensee, Josef/Kirchhof, Paul (eds.), Handbuch des Staatsrechts* vol. II, 1987, p. 505, 510; *Scholz,* in: *Maunz/Dürig/Herzog/Scholz* (eds.), *Grundgesetz-Kommentar*, vol. III, Article 51 note 16 seq.
[66] Para. 149, emphasis added by the authors.

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time, the Justices firmly stated that "internal statuses on the level of the *Länder* do not play any role on the level of the Bund"[67], all members of the *Bundesrat* holding equal rights, so that Stolpe´s position as Prime Minister of Brandenburg alone was irrelevant in the voting process. Without taking reference to any of the states' constitutions, the court held that the *Land* governments could only jointly issue orders to their respective delegations by decision of the cabinet. The Prime Minister alone was not entitled to cast valid directives in the *Bundesrat*.[68] But the question, whether in urgent cases or other irregular situations (as it was the case here) the Prime Minister of a *Land* as head of the cabinet can act alone on behalf of the *Land* government or not, needs closer arguing than this. The problem could be decided on the level of the respective state's constitution just as well as from a federal point of view. In both cases, though, the issue needed to be addressed in depth and not only in one sentence. The Court, on the opposite, only stated without further arguing, that if there was no directive of the *Land government* (as it was the case here) the Prime Minister would not be entitled to step in. For a convincing judgment the Court should at least have explained why the Brandenburg constitution did not give Stolpe the right to issue directives on the spot (by voting for the whole *Land* himself), and if (or why) the federal constitution would not allow for such a competence. It should have explained as well, whether any formal requirements exist that have to be met in order to explain the binding nature of a governments' directive, for example, whether the directives have to be presented before the *Bundesrat* session, in oral or in written form, and so on.

This way of sweeping difficult constitutional problems under the carpet underlines the impression that the Court failed to deliver a sound, complex and comprising judgement. Thus, the Court unnecessarily risks that the legal solution it delivered could be seen as a means to an end rather than a rational choice between many different (and possible) ways of deciding a singular and difficult case. In the end, the court rewarded Schönbohm for his obstruction of the Brandenburg vote.[69]

3. The dissenting opinion of Justices Osterloh and Lübbe-Wolff

The dissenting opinion attacks with sound reasons the main argument of the Court´s majority that any repetition of a state´s vote needs to be specifically justified. The Justices show in their deep and profound analysis of the legal frame and the traditional voting practices during fifty years of *Bundesrat* sessions that there is, indeed, no such strict regime. Neither does the legal background demand

[67] Para. 149.
[68] Para. 149.
[69] It is worth mentioning, though, that Stolpe broke the coalition agreement between *SPD* and *CDU* when he consented to the act. A judgment counting the Brandenburg vote as valid could thus have been marked as a reward for *Stolpes´* "treason".

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such a rigidity, nor did the *Bundesrat* practise such a strict regime during its hundreds of sessions (see *supra*, part IV.3).

It is also convincing that only very clear and unambiguous statements should be accepted as valid votes in *any* voting procedure, and that therefore Mr Schönbohm's "You know my opinion, Mr. President!" could not be counted as a "No": *Opinions* can be given and discussed in the *Bundesrat* plenum or in the committee sessions that lie before the final voting on a piece of legislation. They have no business in the voting procedure itself where a *decision* has to be taken on the grounds of a clear and unambiguous majority vote.

Taking this into account, it surprises that the Justices did not apply the same legal standard to all actors in the *Bundesrat* session at hand. While in respect of the *casting of votes* they followed a strong formalistic approach (with the described consequence that they did not accept the second statement of Schönbohm as a valid vote), though they found the way Wowereit had re-opened the voting procedure constitutionally "questionable",[70] they did not take this as an "evident" (and thus decisive) irregularity in the procedure.

It is difficult to follow the dissenting opinion in this respect. Though the German constitution does not make any provisions as to how a state's votes ought to be called for, it is clear from what has been said so far that every single *Bundesrat* member has the right to cast a vote. As he or she holds a part (of one third/fourth/…) of the votes of the *Land*, he or she is entitled to influence the outcome of the state's voting. Therefore, a valid call for votes requires that either – in accordance with the wording of § 29(1)(2,3) GOBR – the "*Land*" as a whole or at least *all* its members as: "The representatives of the *Land*" should have been addressed. Obviously this was not the case here. Hence, it can at least be criticized as inconsistent that the fact that Wowereit infringed the rights of the other members of the Brandenburg delegation was seen as a minor mistake, whereas the fact that Schönbohm did not clearly state "No" was taken as a major mistake.

VI. Conclusion

The première of the drama "Trouble in the *Bundesrat*" was a failure, at least from the point of view of the Federal Government. The acting persons – Wowereit, Stolpe, Schönbohm – produced an unnecessary chaos. Instead of delivering a decent performance, they followed two far too different stage directions. The Constitutional Court's majority punished this misery with its verdict of unconstitutionality.

[70] Para. 174.

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On a larger scale, the case and the decision had two major effects: First of all, it provoked another round of discussions about the big influence of the *Bundesrat* on Federal legislation, and about federalism in general. The *eigenartige* construction of the Bundesrat and its veto position on large areas of legislation permits the respective opposition parties to pursue a policy of blockade. The second effect was that the urgent project of a comprehensive Immigration and Naturalisation law came to a halt. One can only hope that the Federal Government and the opposition parties will be able to reach a satisfying compromise about Immigration policy in the near future. It is about time for a modern German Immigration law.