Headnotes

to the Judgment of 25 August 2005

- 2 BvE 4/05 -

1. **A vote of confidence aiming to dissolve the *Bundestag* is only constitutional if it not only meets the formal requirements, but also satisfies the purpose of Article 68 of the Basic Law. The Basic Law (*Grundgesetz*) seeks to create a viable government by means of Article 63, Article 67 and Article 68.**

2. **The vote of confidence aiming at dissolution is only justified if the viability of a Federal Government which is anchored in Parliament has been lost. Viability means that the Federal Chancellor exercises political will in order to determine the general guidelines of policy, and is aware of having a majority of Members of the *Bundestag* behind him in so doing.**

3. **The Federal Chancellor is constitutionally obliged neither to resign, nor to take measures revealing the political dissent in the majority supporting the Government in Parliament in the event of a doubtful majority in the *Bundestag*.**

4. **The Federal Constitutional Court (*Bundesverfassungsgericht*) examines the expedient application of Article 68 of the Basic Law only to the restricted degree provided by the constitution.**

a. **Whether a government is still politically viable depends vitally on what aims it pursues and what resistance it must expect from the parliamentary sphere. The assessment of viability has the character of a prognosis and is tied to highly individual perceptions and weighing appraisals of the situation.**

b. **By their nature, an erosion of confidence and a withdrawal of confidence which is not openly displayed cannot be easily described and identified in court proceedings. What is legitimately not argued out openly in the political process also does not need to be completely disclosed to other constitutional bodies under the conditions of political competition.**

c. **Three constitutional bodies – the Federal Chancellor, the German *Bundestag* and the Federal President – may each prevent dissolution according to their free political assessment. This helps to ensure the reliability of the presumption that the Federal Government has lost its parliamentary viability.**

Federal Constitutional Court

– 2 BvE 4/05 –

– 2 BvE 7/05 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the application to declare

that the Federal President violated Article 68.1 sentence 1 of the Basic Law

by his order of 21 July 2005 to dissolve the 15th German *Bundestag* (Federal Law Gazette (*Bundesgesetzblatt* – *BGBl*) I p. 2169), and by his order of 21 July 2005 regarding the *Bundestag* elections on 18 September 2005 (Federal Law Gazette I p. 2170), and thereby violated or directly endangered the applicants' rights under Article 38.1 sentence 2 in conjunction with Article 39.1 sentence 1 of the Basic Law (*Grundgesetz* – GG)

Applicant: 1. Jelena Hoffmann,
Member of the German Bundestag, (…)

2. Werner Schulz,
Member of the German Bundestag, (…) –

- authorised representative: Prof. Dr. Dr. h.c. (…) –

Respondent: Federal President Prof. Dr. Horst Köhler, (…)

- authorised representative: Prof. Dr. (…) –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

Vice-President Hassemer,

Jentsch,

Broß,

Osterloh,

Di Fabio,

Mellinghoff,

Lübbe-Wolff,

Gerhardt

held on the basis of the oral hearing on 9 August 2005:

1. **The proceedings are combined for a joint ruling.**

2. **The applications are rejected as unfounded.**

R e a s o n s :

A.

The subject-matter of the *Organstreit* proceedings combined for a joint ruling is the question of whether the orders of the Federal President of 21 July 2005 to dissolve the 15th German *Bundestag* and to set new elections for 18 September 2005 directly endanger or violate the applicants' status as Members of the *Bundestag*. 1

I.

1. The applicants were Members of the 15th German *Bundestag*, which had been elected on 22 September 2002 and which convened for its constituting session on 17 October 2002. The applicant re I. is a member of the parliamentary group of the Social Democratic Party of Germany (SPD); the applicant re II. is a member of the Alliance 90/The Greens parliamentary group. 2

2. a) The SPD received 38.5 per cent of the second votes in the elections for the 15th German *Bundestag*, and Alliance 90/The Greens received 8.6 per cent; the percentage of votes for the Christian Democratic Union (CDU) was 29.5 per cent, for the Christian Social Union (CSU) 9.0 per cent and for the Free Democratic Party (FDP) 7.4 per cent. Taking account of a total of five "overhang mandates" [Translator's note: seats allotted because the proportion of votes in a *Land* exceeded that of actual constituencies won], the SPD accordingly accounted for 251 seats and Alliance 90/The Greens accounted for 55 seats, whilst the CDU and the CSU together received 248 seats and the FDP received 47 seats; the Party of Democratic Socialism (PDS) achieved two direct mandates. 3

The German *Bundestag* elected Gerhard Schröder as Federal Chancellor on 22 October 2002 with the votes of the parliamentary groups of the SPD and Alliance 90/The Greens (see German *Bundestag*, Stenographic Record of the 2nd session of 22 October 2002, Minutes of plenary proceedings 15/2, p. 28). 4

The number of seats accounted for by the SPD fell to 249 in April and July 2004 through the death of or waiver of mandate by holders of two direct mandates which were not to be re-occupied. With the number of Members in the *Bundestag* now to- 5

talling 601, from then on 304 seats have been accounted for by the parliamentary groups of the SPD and Alliance 90/The Greens and 297 seats by the parliamentary groups of the CDU/CSU and the FDP as well as members not belonging to any parliamentary group.

b) In his Policy Statement of 14 March 2003 (see German *Bundestag*, Stenographic Record of the 32nd session of 14 March 2003, Minutes of plenary proceedings 15/32, pp. 2479 et seq.), the Federal Chancellor presented a comprehensive programme of structural changes in virtually all fields of economic, labour market, fiscal and social policy which has become known as “Agenda 2010”. Its main thrust was to reduce benefits from the state, promote people’s own responsibility and require each individual do to more. The core elements of this programme included reorganising and partially renewing the social welfare state, consolidating public budgets, reducing ancillary wage costs (*inter alia* by reforming the healthcare system), improving job placement, combining unemployment benefit and social assistance (so-called Hartz IV Acts (*Hartz IV-Gesetze*)) and reducing corporate taxes. 6

c) Federal Chancellor Schröder resigned from the chairmanship of the SPD at an extraordinary national conference held in March 2004, and Franz Müntefering was elected as the new SPD party chairman. Gerhard Schröder emphasised at the party conference that the reform process would also be continued under the new Chairman (see (http://www.sueddeutsche.de) of 21 March 2004 “Four minutes of farewell applause” (*Zum Abschied vier Minuten Beifall*”)). 7

d) The resignation of the Federal Chancellor as SPD party chairman, as announced on 6 February 2004, coincided with the *Landtag* (state parliament) election in Hamburg, for which a significant defeat had been predicted weeks in advance for the governing Social Democrats. Since the *Bundestag* election in September 2002, the SPD had lost votes – in many cases large amounts of votes – in all subsequent *Landtag* elections and in the European Parliament elections, in comparison to the respective previous elections. After losing 4.4 percentage points in the *Landtag* election in Schleswig-Holstein on 20 February 2005, the SPD finally also lost 5.7 percentage points in the *Landtag* elections in North Rhine-Westphalia on 22 May 2005, and received only 37.1 per cent of the votes. This meant not only the worst result of a *Land* association of the SPD since 1958, but also led to the loss of governmental responsibility in North Rhine-Westphalia. 8

e) After the *Landtag* election in North Rhine-Westphalia, the Federal Chancellor submitted the following statement on the evening of 22 May 2005 (see press release no. 233 of the Federal Government): 9

“Germany is undergoing fundamental changes. It is a matter of orientating our country to meet the requirements of the 21st century, in the special conditions imposed by the process of putting an end to the division of Germany. By introducing Agenda 2010, we have set up important building blocks which will help us achieve this. 10

We have taken steps that were necessary to make the social security systems able to face the future and to make the German economy more competitive. These are indispensable prerequisites for achieving more growth and employment in Germany. There is no mistaking the initial success that has been achieved in this matter. 11

However, it will take time until the reforms have a positive impact on the concrete situation of all people in our country. What is needed above all however is the citizens' support for such a policy. The bitter election result for my party in North Rhine-Westphalia places a question mark over the political basis for the continuation of our work. 12

I consider the unmistakeable support of a majority of Germans to be indispensable right now for the continuation of the reforms, something which is necessary in my view. For this reason, I consider it to be my duty and responsibility as Federal Chancellor of the Federal Republic of Germany to strive to enable the Federal President to avail himself of the possibilities offered by the Basic Law to have new German *Bundestag* elections held as quickly as possible, in other words realistically for the autumn of this year." 13

3. On 27 June 2005, the Federal Chancellor entered a motion for a vote of confidence in accordance with Article 68 of the Basic Law. In this context, he expressed his intention to submit a declaration on this prior to the ballot on Friday, 1 July 2005 (see *Bundestag* document (*Bundestagsdrucksache – BTDrucks*) 15/5825). 14

The debate in the German *Bundestag* on the Federal Chancellor's motion took place on 1 July 2005. The Federal Chancellor reasoned his motion in essence as follows (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, pp. 17465 et seq.): 15

"[…] My motion has one single and quite unmistakeable objective: I would like to be able to propose to the Federal President to dissolve the 15th German *Bundestag* and to order new elections. 17

The bitter outcome of the *Landtag* elections in North Rhine-Westphalia for my party and for me personally was the last link in a chain of in some cases sensitive and painful election defeats. As a consequence, it became clear that the constellation of forces which has become evident will not permit me to successfully continue my policy without a new legitimisation from the sovereign, that is, the German people. 18

This outcome of the *Landtag* election on 22 May has made the negative impact on viability in Parliament finally undeniable. Agenda 2010 with its consequences appears yet again to have been the cause of a vote by the electorate against my party. If this Agenda is to be continued and refined – and it must be – legitimisation through elections is indispensable. 19

It is hence a principle of fairness and decency towards the citizens, towards my party, towards the partner in the Coalition, towards the High House and towards myself 20

to move for a vote of confidence.

Ladies and Gentlemen, all parties represented in the German *Bundestag* have come out very strongly in favour of the dissolution of the *Bundestag*. The electorate support my wish for new elections with an overwhelming majority. We should all be aware of this today. 21

A vote of confidence has been sought four times so far in the history of the Federal Republic of Germany: twice – by Helmut Schmidt and myself – in order to ensure the majority in the *Bundestag*, twice – by Willy Brandt and Helmut Kohl – in order to pave the way for new elections. I am well aware that the mothers and fathers of the Basic Law were certainly not led in the wording of Article 68 by the consideration of opening the door to dissolution of Parliament by means of deliberate defeat. However – the deliberations in the Parliamentary Council (*Parlamentarischer Rat*) also provide us with information on this – they equally did not wish to deny the possibility of new elections if the situation so required. 22

After the foul experiences in the Weimar Republic, the **Parliamentary Council** refused to grant to the Federal President an unconstrained right to dissolve the *Bundestag*. However, Parliament was also denied the right to dissolve itself. We therefore have the Parliamentary Council to thank for regulations which have made Germany one of the most stable, successful and respected democracies in the world. We are grateful for this, even though the success story of our German democracy is not solely due to the wisdom or far-sightedness of our founding generation, but above all to the democratic common sense and the clever instinct of citizens who have always ensured an inner balance of our community. 23

Our state practice, which has also been confirmed by the Federal Constitutional Court as constitutional, is unmistakeable. The consequence of **new elections** linked with the vote of confidence is not opposed by any absolute constitutional reservations. The decisive question is therefore whether the Federal Chancellor can still be sure of the constant confidence of the majority of the House. The urgent problems faced by our country, the continuation of the reforms that have already commenced, the crisis in the European Union, the challenges of globalisation and the risks for peace, security and stability in our One World, do not tolerate a condition of paralysis or of inertia. 24

Ladies and Gentlemen, I have considered maturely and conscientiously the decision to ask initially for a vote of confidence, and then to present myself and my Government for re-election. There have been calls from the opposition for my resignation. But what then? The path to be taken in accordance with Article 63 of the Basic Law is conditional on several unsuccessful ballots, and is hence extremely complicated and does not do justice to the dignity of this High House. 25

This is precisely why my predecessor decisively rejected this path in 1982. **Helmut Kohl** stressed before the German *Bundestag* on 17 December 1982 – I am quoting 26

him word for word –:

The accusation of manipulation would … be justified if I 27

– that is Helmut Kohl – 28

were to elect to resign in accordance with Article 63 of the Basic Law. 29

Further, Ladies and Gentlemen, and I quote Helmut Kohl once more: 30

It would convince no one in the present situation if such a procedure were to be carried out in order to force the Federal President to dissolve the *Bundestag*. 31

I 32

– once again Helmut Kohl – 33

take the view that the path I have chosen to dissolve the *Bundestag* is convincing and constitutionally unobjectionable. 34

I share in my predecessor's reasoning on this matter. 35

Ladies and Gentlemen, the Federal Government and the Coalition parliamentary groups of the SPD and The Greens have initiated a profound process of change in our country. The scope and consequences of this reform process are unique in the history of the Federal Republic. We have tackled something that our predecessor government failed to do. We have started something that the CDU/CSU and FDP had 16 years to achieve, but lacked the courage to begin. 36

With the reforms of **Agenda 2010**, we have fundamentally changed the underlying structures of important areas of our society: In healthcare, in policy on pensions and on the labour market. These reforms are necessary in order to safeguard our social welfare state and to prepare our economy for the challenges of globalisation and ageing. These necessary reforms had to be implemented in the face of massive resistance on the part of interested groups. Some have irresponsibly used citizens' uncertainty as a tool in this situation. Populist campaigns have aroused and fanned fears because the reforms initially entail burdens, whilst their positive impact however will only be tangible later, in some cases certainly not for several years. We remember only too well the public uproar at the introduction of the "practice fee" and the wave of protests against the adoption of the so-called Hartz IV Acts last year. 37

There is no question that the Agenda 2010 reform programme has led to disputes between the parties and within the parties. There has been tension and conflicts about the right direction within the governing parties and parliamentary groups. I do not wish to deny that my party has suffered particularly from this. The SPD has lost votes in all ***Landtag* elections** and in the **European elections** since the adoption of Agenda 2010, in many cases even losing participation in government in the *Länder*. This was a high price to pay for the implementation of the reforms. That we had to pay this high price, most recently in North Rhine-Westphalia, has led to heated debates 38

within my party and my parliamentary group as to the course to be taken by the SPD in the future. This applies similarly to our Coalition partner. It was and is a question of whether the Agenda 2010 reforms are necessary at all, or whether they should indeed be withdrawn. This debate led so far that SPD members were threatening to join a reactionary, left-wing populist party which does not shy away from xenophobia. Some even took this step; that party is now headed by a former SPD Chairman.

39 Ladies and Gentlemen, I had to take seriously and have to take seriously such unmistakeable signals from my party, the leading governing party, especially since there were media reports almost daily on this in the weeks prior to 22 May of this year, also from the parliamentary sphere. The question was open on the table on 22 May as to whether I myself and my policy were still fully **viable** in light of this electoral outcome, especially since the majority for this Government in the German *Bundestag* was rather close from the outset. This majority has been reduced further as a result of the loss of overhang mandates which were not to be re-occupied, and is now only three votes if the so-called Chancellor majority is required.

40 The basic prerequisite for the whole government policy, but in particular for our foreign and security policy, is the ability to plan and the reliability of such planning. This relates to fundamental questions such as negotiations with Turkey on accession to the European Union, the further deepening of our relations with Russia and the expansion of our political and economic relations with China. To this end, the Federal Government relies on the united front of the parliamentary groups within the Coalition. Here too, there have been increasing numbers of dissenting voices, which at least endanger the majority.

41 Ladies and Gentlemen, I do not and cannot cast a moral judgment on the doubters and those who have threatened to resign or to vote outside the party line; **constant confidence** in accordance with Article 68 of our Basic Law is not a moral, but a political category. Article 38.1 of the Basic Law permits the Members of the *Bundestag* to take up dissenting positions. This fact is subject not to a moral evaluation or indeed to a moral judgment of Members of the *Bundestag*. Since however the Federal Chancellor relies on long-term confidence in order to be able to implement his policy at domestic and international level, he must always judge such dissenting announcements, demands or conduct politically. Positions which clearly express dissent may certainly be regarded as justified from a subjective point of view, but must be judged differently by the Federal Chancellor in political terms; he needs a constant, reliable basis for his policy.

42 It must also be clear that where confidence is no longer present, one may not pretend in public that such confidence exists. I have also had to experience that. This too is an element of my political evaluation. And my evaluation is unmistakeable: An evaluation of the constellation of political forces before and after the decision to seek new elections must lead – I am very sure of this – to my not being able to rely under the present conditions on the necessary, constant confidence within the meaning of Arti-

cle 68 of the Basic Law.

Ladies and Gentlemen, as to the present constellation of forces, I must also take account of the impact on **cooperation between the *Bundestag* and the *Bundesrat*** . The situation in the *Bundesrat* with regard to this matter is not only a question of the majority, but it is first of all a matter of stance, as is shown by the example of the number of objections being made after mediation proceedings were concluded. In the current election period, the majority in the *Bundesrat* filed objections to the statute in question after conclusion of mediation proceedings in 29 cases. This is almost as frequently as in the first twelve electoral periods from 1949 to 1994 taken together. The majority in the *Bundesrat* in these and other cases, such as in fiscal policy or with regard to the reduction of subsidies, is evidently no longer about making compromises on content or about state political responsibility, but about power-crazy party politics, which is placed above the interests of the country. I can ask neither of the Government nor of the parliamentary groups within the Government to make repeated concessions and nonetheless to know that the majority in the *Bundesrat* will not renounce its destructive blockade. Only a government policy that has been unambiguously and repeatedly legitimised by the electorate will lead to a reconsideration of this stance in the majority of the *Bundesrat* and – even if not in the short term – to a change in the majority. 43

Ladies and Gentlemen, the goal of retaining power for the sake of power never justifies decisions being taken against the better insight and the advice of conscience. I act in the certainty that the policy of reforms which I have started is right and necessary – for our country and for its people. For this reason, I will also endeavour with all my energy and with all my strength to see to it that the electorate will give me a mandate to continue what has begun. 44

The vote of confidence therefore gives each Member of the *Bundestag* the opportunity to decide. By abstaining, and also by voting No, the Members of this High House open up to the Federal President the possibility to give the decision on future policy and on the future of our country over to the **sovereign**, our citizens. I am convinced that this path complies with the spirit and the letter of our constitution, and I am convinced that the Federal President will take the right decision. 45

Ladies and Gentlemen, I know that I am in agreement with the vast majority of our compatriots that, in the present situation, the electorate should be given their right – not in the course of a plebiscite, not in the context of a referendum, for which our constitution in any case makes no provision, but by new elections, which are the declared goal of my motion for a vote of confidence today. In this sense – there is no denying this – the vote of confidence aims beyond the German *Bundestag*, naturally and in final consequence, at the electorate itself. Superficially, it is a procedure by which the Federal Chancellor entrusts his own fate to the decision of the people. The true dimension of our decision today however points much further. In reality, it is about the possibility of the democratic sovereign to determine the fundamental direction of fu- 46

ture policy for itself.

[…]" 47

The Chairman of the parliamentary group of the SPD, Franz Müntefering, stated the following amongst other matters as to the motion of the Federal Chancellor (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, pp. 17472 et seq.): 48

"[…]

We in the SPD parliamentary group have had a strenuous race to run in the past two years. Behind us lie difficult statutes which made disputes necessary. I am more proud of this than not; difficult laws cannot be taken lightly. 50

We have however also had **election results**. I recall the European elections, the *Landtag* elections in Thuringia, in the Saarland, in Brandenburg – which went well, but minus 7.4 per cent – and in Saxony, the local elections in North Rhine-Westphalia, the *Landtag* elections in Schleswig-Holstein and in North Rhine-Westphalia. Linked to this is a series of bitter election results. The opposition has claimed – and the media have written – that these electoral failures and disappointing electoral defeats had something to do with federal policy, with the **policy of renewal** which Federal Chancellor Gerhard Schröder, his Government and the Coalition have been pushing along energetically since the spring of 2003. 51

We were not able to reject this all in all; if we think about Agenda 2010, Hartz. We are however certain: The reforms are indispensable. We are on the right path. […] 52

It is not simple in a situation like this, with a majority of three votes on the side of the Coalition in the *Bundestag* and with an up-and-coming PDS/ML, to go unwaveringly through the fire of reforms, not for the party, not for the Members of the *Bundestag*. Everyone has been able to read and hear that some among us required the Federal Chancellor and our policy to make serious course changes in this situation. I thought it was wrong, but that's the way it was. 53

After the Minister-President elections in Schleswig-Holstein were made unsuccessful by a traitor, […] and before the *Landtag* election in North Rhine-Westphalia, I was concerned about the **viability** of my party and parliamentary group, and hence ultimately of the Federal Government. I also said this to the Federal Chancellor. It was also my duty to say so. I hear that it has always gone well. Perhaps so. But I presume that the child does not have to fall down the well before one covers the well. We don't have to lose ballots before reacting to the fact that there is a risk of losing ballots or that they can no longer be won, and only avoid this through inaction. 54

The **electoral result in North Rhine-Westphalia** was unmistakeable. The question was evident – and we were also asked it – as to how to continue here in Berlin. There was open speculation on this matter. One will recall this if one wishes to. Germany may however not sleep through its time. We may not have **inertia** in Germany for 55

more than one year as a result of what is not done because it is devoid of prospects in this constellation, or because of things running aground in the *Bundesrat*. […]

… I know from talks with the Federal Chancellor that he did not make it easy for him- 56
self to decide to move for a vote of confidence hoping to bring about new elections. Furthermore, I share his conviction that new elections are the best way to clarify the political direction for Germany and for the **legitimisation** of our political mandate.

Whether someone decides one way or another they can give good reasons for so 57
doing. It is important for us to know from one another that both are respectable, but that we concur in our awareness that Gerhard Schröder, as Federal Chancellor, has the **confidence** of the SPD *Bundestag* parliamentary group and that we want to continue to have him as Federal Chancellor of the Federal Republic of Germany.

(applause from the SPD – calls from the CDU/CSU: No one can understand that! – 58
Further calls from the CDU/CSU)

– You are acting as if it was a matter of mistrust. We're not talking about mistrust to- 59
day.

(Calls from the CDU/CSU: Yes we are!) 60

– Oh, that's interesting! Then, dear Ms. Merkel – you are now standing for Chancel- 61
lor – file a motion for a vote of no confidence. You'll see: You are in a minority in this House. You will experience that quite clearly. […]"

Federal Foreign Minister Joseph Fischer made the following statement, among oth- 62
ers, for the Alliance 90/The Greens parliamentary group (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, pp. 17477 et seq.):

"[…] 63

My parliamentary group, Alliance 90/The Greens, would have liked the Coalition to 64
be able to complete the electorate's mandate, which we were given with the successful *Bundestag* election of 2002, in the interest of our country and to renew our country. Nonetheless, it is the decision of the Federal Chancellor as an institution and as an individual – this is how it is envisioned in Article 68 of the Basic Law; I add that this is also the political decision of our Coalition partner – to move for a vote of confidence if he reaches the conviction that his majority is no longer fully able to bear the burden in these difficult times. […]"

The Chairman of the CDU/CSU parliamentary group, Angela Merkel, stated *inter* 65
alia (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, pp. 17469 et seq.):

"[…] 66

Federal Chancellor, let me say it explicitly at the beginning: The CDU/CSU *Bun-* 67
destag parliamentary group welcomes the fact that you are making a motion for a bal-

lot today in accordance with Article 68 of the Basic Law with the goal of bringing about early elections to the German *Bundestag*. You also have my personal respect for taking this step; it is indispensable in order to save our country from months of tortuous disputes because Red-Green is … unviable. […]”

Similar things were said by the Chairman of the FDP parliamentary group, Guido Westerwelle, in his statement (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, p. 17475): 68

“[…] 69

The Free Democrats support **new elections**. We want new elections and we herewith explicitly express our respect for your decision to pave the way for new elections by asking for a vote of confidence. […]” 70

The PDS Member of the *Bundestag* not belonging to any parliamentary group, Gesine Lötzsch, stated for her party that she was looking forward to new elections. The head of the CSU *Land* group and first deputy chairman of the parliamentary group, Michael Glos of the CDU/CSU parliamentary group, also declared at the end of the debate that he wanted to see new elections taking place (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, pp. 17480-17481). 71

Subsequently to the debate, the applicant re I., in a written statement, and the applicant re II., in an oral statement in accordance with § 31 of the Rules of Procedure (*Geschäftsordnung*) of the German *Bundestag*, presented their constitutional and political objections to the procedure in accordance with Article 68 of the Basic Law. 72

In balloting by name on the motion of the Federal Chancellor, 151 of the Members of the parliamentary groups of the SPD and Alliance 90/The Greens voted “Yes”, whilst the Members of the parliamentary groups of the CDU/CSU and the FDP, and the Members of the *Bundestag* not belonging to any parliamentary group, voted “No” (totalling 296), and eight Members of the parliamentary group Alliance 90/The Greens and 140 Members of the SPD parliamentary group abstained. 73

The applicant re I. voted “Yes”; the applicant re II. did not participate in the ballot on the motion in accordance with Article 68 of the Basic Law (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, pp. 17483 et seq.). 74

4. The Federal Chancellor thereupon proposed to the Federal President to dissolve the German *Bundestag*. The Federal President complied with this application and on 21 July 2005 ordered the dissolution of the 15th German *Bundestag* with the countersignature of the Federal Chancellor (Federal Law Gazette I p. 2169). At the same time, he set the election to the German *Bundestag* for 18 September 2005 (Federal Law Gazette I p. 2170), having obtained the countersignatures of the Federal Chancellor and of the Federal Minister of the Interior in accordance with § 16 of the Federal 75

Electoral Act (*Bundeswahlgesetz – BWahlG*).

In a television address on the same day, the Federal President gave the following main reasons for his decision: 76

"[…] 77

Our country is faced by massive tasks. Our future and that of our children is at stake. Millions of people are unemployed, many for years. The budgets of the Federation and of the *Länder* are in an unprecedented and critical state. The existing federal order is out of date. We have too few children, and we are getting older and older. And we must assert ourselves in the face of worldwide, fierce competition. 78

In this serious situation, our country needs a government which is able to pursue its goals energetically and with constancy. To this end, the Federal Government relies on the support of a reliable, viable majority in the *Bundestag*. 79

The Federal Chancellor made it clear to the *Bundestag* on 1 July that he considered that there was no longer a constant, reliable basis for his policy in view of the narrow majority. He claimed to be threatened with dissenting voting conduct and resignations. 80

The Federal Chancellor does not consider professions of loyalty from the ranks of the Coalition to be reliable in the long term against the background of the problems that are to be solved. The Chairman of the SPD parliamentary group also confirmed to me the Federal Chancellor's appraisal of the situation from his point of view. 81

I know that many people have felt disquiet in recent weeks because of the procedure which has been entered into. They thus show how important the Basic Law is to them. I am glad of this. In fact, our constitution has proven itself in more than 50 years. For good reasons, it only provides for early elections by way of exception. The Basic Law however makes it possible for the Federal Chancellor to ask for a parliamentary vote of confidence with the goal of bringing about early elections. This has taken place twice in the history of the Federal Republic of Germany: in 1972 and in 1983. A defeat of the Federal Chancellor in this ballot by itself is however insufficient to dissolve the *Bundestag*. The political constellation of forces in the *Bundestag* would have to impair or paralyse his viability such that he could not sensibly pursue a policy borne by the constant agreement of the majority. This is the stipulation of the Federal Constitutional Court. And this is the situation in which the Federal Chancellor considers himself to be. 82

I have examined the Federal Chancellor's appraisal in detail. To this end, I have had many discussions with the responsible politicians and with legal experts. I am grateful to the citizens who have let me have their opinions in conversations, letters and e-mails. 83

In accordance with the decision of the Federal Constitutional Court from 1983, the Federal President must consider the assessment of the Federal Chancellor unless 84

another assessment is clearly preferable. I respect all who doubted, and I have heard and seriously considered their arguments. However, I do not see any other appraisal of the situation which is clearly preferable to the assessment made by the Federal Chancellor. I am convinced that this meets the constitutional prerequisites for the dissolution of the *Bundestag*.

It is hence my duty as Federal President in accordance with the Basic Law to decide whether I call new elections or not. In my overall evaluation, I reach the conclusion that the wellbeing of our people is now best served by new elections. 85

It is right for the democratic sovereign – the people – to be able to decide on the future policy of our country in the current situation. […]” 86

II.

1. The applicants oppose the orders of the Federal President with their applications, which were received on 29 July and 1 August 2005, as detailed in the caption. 87

As grounds for their applications, the applicants make the following allegations in essence – with different weighting placed on the respective individual aspects: 88

The Federal Constitutional Court is stated to rightly presume that only the political inviability of the Federal Government caused by the constellation of forces in the *Bundestag* is able to legitimise the submission of an unreal vote of confidence with the aim of dissolving the *Bundestag*. It is said that an interpretation of Article 68 of the Basic Law diverging from the ruling of the Federal Constitutional Court would lead to a fundamental change in the constitutional structure that lends Article 68 of the Basic Law its character. Furthermore, it is stated, the freedom and openness of the parliamentary will-formation process would be at risk because an unrestrictedly permissible unreal vote of confidence would pave the way for the Federal Chancellor to discipline critical Members of Parliament by threatening them with self-dissolution and hence with the termination of their mandate. 89

The grounds given by the Federal Chancellor when announcing new elections on 22 May 2005, and repeated before the *Bundestag* on 1 July 2005, namely that the Federal Chancellor needed the legitimisation of the people for his reform policy, are said to not be able to constitutionally legitimise the submission of an unreal motion for a vote of confidence. 90

The indication given by the Federal Chancellor of the existence of an opposition majority in the *Bundesrat* is also said not to justify the vote of confidence. The *Bundesrat* majority would not change one iota even if, as the Chancellor hoped, the previously governing parties were to win the elections. Directly calling on the people against the *Bundesrat* in order to exert political pressure on it and to bring about a change in the majorities in the *Bundestag* is also said not to be a constitutionally permissible goal of an unreal vote of confidence. An unreal vote of confidence based on such a motive is said to envision an act of plebiscitary democracy, which in light of the experience with 91

the Weimar Republic is said to be alien to the deliberately representative and democratic constitutional order of the Basic Law.

92 The Federal Chancellor is said to be given latitude as to the assessment of the question of whether he still has a sufficient majority in the *Bundestag* and hence his political viability is ensured. Even while taking account of this latitude, there is however said to be a need for rational, comprehensible grounds for the appraisal of the majorities. “Perceived mistrust” is hence said not to be sufficient to move for an unreal vote of confidence. In compliance with the case-law of the Federal Constitutional Court, a non-erroneous assessment of the parliamentary majorities is also said to require the Chancellor to seek to already gain clarity as to the loss of the parliamentary majority and concomitant political inviability when announcing the vote of confidence, which is likely not to have taken place in the case at hand.

93 Whether the Chancellor is able to rely on the confidence of the majority parliamentary groups, i.e. on the fundamental political support for the person and factual programme of the Federal Chancellor, can only be established by external circumstances. The existence of a relationship of confidence is said to be favoured by the fact that, in the past, the Federal Chancellor indeed received the Chancellor majority for ballots in all 39 cases in which he needed one. Even with statutes which had initially been politically highly disputed within the governing parliamentary groups, the Federal Chancellor was always able to obtain the required votes from the governing parliamentary groups. Thus, in the final ballot which was held after the third reading of the Hartz IV Act, all Members of the governing parliamentary groups in the *Bundestag* voted for this statute, with one abstention, including those Members of the *Bundestag* such as Ottmar Schreiner (SPD) who had still been vehemently opposed to the statute at the SPD party conference. It is said that the Government was still able to obtain the agreement of the governing parliamentary groups to 40 statute and other motions on the day before the confidence vote. The party and parliamentary group chairman of the SPD, Franz Müntefering, confirmed on the day of the confidence vote that the Chancellor had the confidence of the SPD parliamentary group and had a majority behind him, in contradistinction to the leader of the opposition. In addition, a number of Members of the *Bundestag*, both from the SPD and from the parliamentary group Alliance 90/The Greens who had been critical towards the Government in the past allegedly assured the Federal Chancellor of their confidence and of their willingness to support him even on statutes which were the subject of dispute within the party, such as the reduction of corporation tax.

94 Past support for the Federal Chancellor, repeatedly demonstrated in decisive ballots, even by the Members of the *Bundestag* from the governing parliamentary groups who were critical towards him, is said to give grounds to a presumption that the Chancellor could also have continued to count on the support of the Members of the governing parliamentary groups. This is said to be all the more so given that the actually politically disputed statutes had already been adopted by the *Bundestag*. There are said to be secure indications that the remaining reform statutes of “Agenda 2010”

would have found a majority in the ranks of the governing parliamentary groups. This is said to be particularly favoured by the fact that a few days after the rejection of the vote of confidence the party leadership of the SPD unanimously adopted a so-called "election manifesto" on 4 July 2005, which was also approved by the Federal Chancellor and with regard to which no single Coalition politician has said a critical word so far. The projects which it listed, which are said to have been explicitly designated as a continuation of "Agenda 2010", are said to have been over and above this implementable in the last year of the legislative term with the existing majorities.

It is also said that the lack of confidence of the *Bundestag* cannot be based on critical statements on the part of individual Members of governing parliamentary groups concerning government policy. The contents of the dossier which the Federal Chancellery presented to the Federal President are said to be restricted to press articles and other statements made in the media which, as is typical for a large mainstream party such as the SPD, reflected the broad spectrum of political opinion within such a party and in which criticism of the Government was expressed. Such statements, including the threat to refuse to obey the Federal Government in the adoption of individual statutes, already existed in the past without this preventing the criticising Members of the *Bundestag* in the decisive ballots on legislative projects (such as with the Hartz IV Acts) from always declaring their solidarity with the Government and supporting it by voting in a certain way. These critical statements can by no means document the lack of confidence in the Federal Chancellor, but are said to be an expression of the intra-party democracy called for by the Basic Law (Article 21.1 sentence 3 of the Basic Law). According to the press reports, a threat to resign is said to have only been stated by the Member of the *Bundestag* Schreiner, who however soon fully reconciled with the party leadership and is said to be the front-runner of the SPD on the *Land* list of the Saarland in the *Bundestag* election planned for September. 95

Even if one were to assume the possibility to derive from the previous statements compiled by the Federal Chancellery that the Chancellor lost the confidence of the majority of the Members of the *Bundestag* prior to the announcement of his vote of confidence on 22 May 2005, it can be presumed – at least after Members of the *Bundestag* who had previously been critical towards him explicitly professed their confidence – that there is now confidence. These professions of confidence cannot be denied as dishonest. For what reasons Members of the *Bundestag* wish to support the Chancellor in future is said to be irrelevant, as in a real vote of confidence. By announcing the vote of confidence on 22 May 2005, the Federal Chancellor is said to have brought about a new political situation in which the announcements of confidence that were made thereupon were rather credible in view of the changed political situation (danger of a defeat in *Bundestag* elections in the autumn, not standing on the election list). 96

Were such professions of confidence not to be taken seriously, the integration potential of Article 68 of the Basic Law would be called into question and the provision undermined and devalued. If, as is said to be indispensable for a mainstream party 97

from the point of view of intra-party democracy, individual Members of the *Bundestag* made statements that were critical of the party leadership and of the Chancellor, they would be deprived of their opportunity to profess confidence in the Chancellor by means of the unreal vote of confidence.

Were one to grant to the Chancellor solely on the basis of critical statements made by individual Members of the governing parliamentary groups the possibility to endeavour to dissolve the *Bundestag* on the basis of the unreal vote of confidence, this would not only circumvent Article 68 of the Basic Law. It would rather also have a major impact on intra-party democracy, parliamentary debate and the status of Members of the *Bundestag* under constitutional law as guaranteed by Article 38.1 sentence 2 of the Basic Law. The freedom and independence of the Members of the *Bundestag* would be impaired far beyond the qualification of Article 38.1 sentence 2 of the Basic Law caused by Article 21 of the Basic Law by their being able to be disciplined by the Federal Chancellor with an unreal vote of confidence or the latent threat of same. With a narrow parliamentary majority, in any case, a small number of votes of Members of the governing parliamentary group are already said to be sufficient to guarantee the rejection of the vote of confidence in conjunction with the *Bundestag* opposition, and hence to set the stage for dissolution of the *Bundestag* and subsequent new elections. 98

At the same time, the principle of parliamentary government is said to be gravely impaired. Parliament can then no longer be said to control the Chancellor, but the Chancellor is said to control Parliament and the majority parliamentary groups. This weakening of the principle of parliamentary government is said to be further strengthened by it being made possible for the Chancellor, by bringing about the early dissolution of the *Bundestag,* to remove from the opposition the control instrument of the committee of inquiry, which is particularly important for the opposition. 99

Moreover, with regard to the goal of stability as contained in Article 68 of the Basic Law, it is to be demanded that the Federal Chancellor must firstly threaten Parliament with dissolution – by means of a “positive” vote of confidence – before seeking the dissolution of the *Bundestag* and new elections with his vote of confidence. 100

The unconstitutionality of the first act of the multi-element procedure is said to lead to a situation in which the dissolution of the 15th German *Bundestag* by the Federal President is also unconstitutional. Beyond this, the order of the Federal President is said to suffer from shortcomings in terms of explanation and reasoning. 101

2. The Federal President, as the respondent, applies for the applications to be rejected. The dissolution of the *Bundestag* and the setting of the date for new elections are said to be compatible with Article 68 of the Basic Law. Both the formal preconditions set out in Article 68.1 sentence 1 of the Basic Law, and the substantive dissolution situation required in accordance with the judgment of the Federal Constitutional Court of 16 February 1983, are said to have applied. The legal situation established in this judgment, which he used to form the basis of his decision, may not be retroactive- 102

ly changed.

In his view, another assessment not preventing dissolution was not clearly preferable to the assessment of the Federal Chancellor, according to which the constellation of forces in the *Bundestag* showed a situation which no longer sensibly facilitated a policy of the Chancellor borne by the constant confidence of the majority. He had carefully examined whether the Federal Chancellor's assessment had been plausibly explained and whether sufficient indications for it had applied. The Federal Chancellor had already pointed out to him on 23 May 2005 in a conversation that he no longer had a stable majority in the German *Bundestag* for the implementation of his policy, and had explained this in detail. According to the Federal Chancellor, the lost *Landtag* election in North Rhine-Westphalia, as well as the *Landtag* elections previously lost in the other *Länder* and the close majority in the *Bundestag*, had led to a situation in which there was a heightened potential for blackmail in his parliamentary group and in the Coalition towards him. What is more, criticism of the course steered by his Government was said to be increasing within the parliamentary group. 103

The Chairman of the SPD parliamentary group, Franz Müntefering, is said to have informed him – the Federal President – that after the loss of government responsibility in Schleswig-Holstein, and in view of the threat of loss in North Rhine-Westphalia, the Federal Chancellor had no longer been able to guarantee a stable majority in the *Bundestag*, even before 22 May 2005. Increasing factual concessions had had to be made to the critics in view of the very close majority. 104

The Federal Chancellor is also said to have claimed in his declaration of 1 July 2005 before the German *Bundestag* that he could not sensibly pursue a policy supported by the constant confidence of the *Bundestag* majority. According to the Federal Chancellor, the reform programme of "Agenda 2010" and the high price paid for the implementation of these reforms – the losses in the *Landtag* elections – had led to heated debates within his party as to the course to be taken in the future. It was said to be a question of whether the reforms of "Agenda 2010" were necessary at all, or whether they should indeed be withdrawn. 105

According to the Federal President, the Federal Chancellor's assessment is conclusive and comprehensible per se. A narrow majority of the governing parliamentary groups in the German *Bundestag* is said to increase the difficulties for governing. Such a narrow majority is said to make it possible for Members of the *Bundestag* who do not agree with the policy of the Government and of their own parliamentary group to force the Government to make concessions by threatening to vote differently. Losses in *Landtag* elections are said not to require a fresh legitimisation of the Federal Government. They are however said to strengthen critics of government policy within the parliamentary group in factual terms if the loss of the *Landtag* elections is regarded as being the result of unsuccessful government policy. 106

It is also said to be comprehensible that the Federal Chancellor included the *Bundesrat* majorities in his appraisal of the situation. When there is a narrow majority in 107

the *Bundestag*, the majorities in the *Bundesrat* are also said to be not without an impact on the continuing viability of the Government. If the opposition in the *Bundesrat* has a majority in political terms, the Government has to attain a Chancellor majority in the *Bundestag* more frequently with “objection acts” [Translator’s note: bills which the *Bundesrat* may challenge and delay, but not overturn if they are passed by a majority of the *Bundestag*] in order to be able to reject an objection of the *Bundesrat*. The Chancellor is said to rely here on the votes of the critics within the parliamentary group. The weight exerted by the critics in the parliamentary group is also said to be increasing with laws requiring the assent of the *Bundestag*. With compromises made in the mediation committee with the political *Bundesrat* majority, concessions also have to be made understandable to the critics in the governing parliamentary group. This will therefore make it necessary to be willing to reach compromises in two contrary political directions.

According to the Federal President, the Federal Chancellor’s assessment is also not countered by the fact that many Members of the governing coalition publicly professed their confidence in the Chancellor subsequent to the Chancellor’s announcement to move for a vote of confidence. It is said to be certainly possible to distinguish between the personal loyalty of the Members of the *Bundestag* towards the Chancellor and factual difference with the policy of the Chancellor. The fact that confidence within the meaning of Article 68 of the Basic Law is constituted by the formally professed agreement of the Members of the *Bundestag* with the person and factual programme of the Federal Chancellor, as inherent in the act of entering a vote, is said not to rule out distinguishing between the components of agreement with the person and agreement with the factual policy. What is more, it is said to be a matter for the Federal Chancellor’s political assessment to what degree he gives credence to corresponding statements for the future, without the pressure of the vote of confidence, in view of his experience of the loyalty-professing Members of the *Bundestag*. 108

The ballot result in the *Bundestag* on the vote of confidence, which only 151 Coalition Members are said to have answered positively, whilst 148 Members from the ranks of the Coalition abstained, is said to rule out misuse of Article 68 of the Basic Law. 109

In the context of the broad political latitude granted to him, he had considered whether the dissolution of the *Bundestag* was in the interest of the German people in view of the number and significance of the problems to be solved, and had ultimately come to the conclusion that it was. 110

III.

The Federal Government has made a statement on the applications. In its view, the dissolution of the 15th German *Bundestag* to which the objection refers is compatible with Article 68 of the Basic Law. The emerging requirements which the Federal Constitutional Court had developed in its ruling of 16 February 1983 were also said to ap- 111

ply to dissolution of the *Bundestag* in the case at hand. The assessment of the political situation as a situation of instability, as submitted by the Federal Chancellor, which the Federal Constitutional Court requires as a substantive precondition in addition to the formal preconditions described in Article 68 of the Basic Law, was said to be plausible on the basis of a large number of indications.

The reforms of “Agenda 2010” were said to be the central element of the Federal Chancellor’s policy. These reforms were said to be the subject-matter of policy disagreements and disputes within the parliamentary groups and parties of the governing coalition. There had been and still were disputes on the fundamental question of whether these reforms were necessary at all, whether they should be kept to, or whether they should be withdrawn. The difficulties linked with the reform programme were said to have led to such disputes that it no longer appeared to be possible to maintain and expand the reforms and in doing so to continue to govern with the constant support of the *Bundestag*. 112

The unmistakeable vote losses and election defeats of the SPD which had occurred in recent times in *Landtag* elections and in the elections to the European Parliament were said to have become a burden on relations between the Federal Chancellor and the *Bundestag* majority. The vote losses and election defeats were said to have been caused by “Agenda 2010” and its consequences, perceived by many voters as an unacceptable burden. This was said to have led to considerable insecurity among Members of the *Bundestag* from the SPD, who were wondering whether they should keep to and expand the reforms. 113

In view of the scant majority of the governing coalition in the *Bundestag*, the policy disagreements and disputes within a Coalition partner were said to take on greater weight as an indication of a situation of political instability. 114

The current majorities in the *Bundesrat*, where the CDU, the CSU and the FDP had a clear majority, were said to further restrict the viability of the Federal Chancellor. He was said to have less latitude to make concessions with bills to critics from his own ranks, and hence to include them in the governing majority in the *Bundestag*, if such concessions were subsequently once more “taken away” in the opposition-dominated *Bundesrat*. 115

It was said not to follow from earlier ballot majorities favouring projects of the Federal Government that the Federal Chancellor could also count on the constant support of the *Bundestag* in future. This was said to apply in particular to ballots which had taken place after the announcement of the vote of confidence. As to the statutes which the *Bundestag* had passed one day prior to the ballot on the vote of confidence, in other words on 30 June 2005, it was added that they had not related to any central political projects of the Federal Chancellor. 116

It was also said to be unobjectionable that the Federal Chancellor did not see a reason to revise his assessment in the subsequent professions of confidence and sup- 117

port given by Members of the *Bundestag* who had been critical towards him prior to the announcement of the vote of confidence.

Finally, the Federal Government stated that the parliamentary group chairman of the SPD had already explained to the Federal Chancellor his concern about the viability of his party and parliamentary group, and hence of the Federal Government, between the *Landtag* elections in Schleswig-Holstein and North Rhine-Westphalia, and had explicitly referred to this in his speech in the *Bundestag* on 1 July 2005. 118

B.

The applications are admissible. 119

1. Recourse to the Federal Constitutional Court is available in accordance with Article 93.1 no. 1 of the Basic Law and § 13 no. 5 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*). Accordingly, the Federal Constitutional Court decides on the interpretation of the Basic Law on the occasion of disputes regarding the extent of the rights and duties of a supreme federal body or of other parties concerned who have been vested with rights of their own by the Basic Law or by the rules of procedure of a supreme federal body. There is a dispute between the Federal President, as a supreme federal body, and the applicants, as other parties concerned who have been vested with rights by the Basic Law (Article 38.1 sentence 2 of the Basic Law), within the meaning of Article 93.1 no. 1 of the Basic Law (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 60, 374 (378)) concerning the scope of the rights and duties of the Federal President from Article 68.1 of the Basic Law on the one hand, and those of the applicants emanating from their status as Members of the *Bundestag* (Article 38.1 sentence 2 in conjunction with Article 39.1 sentence 1 of the Basic Law) on the other hand. 120

This relates not only to the dissolution of the German *Bundestag*, but also to the setting of the election date. The power of the Federal President to set the election date emerges not directly from the Basic Law, but from § 16 of the Federal Electoral Act. The order for new elections is however presumed, as an act of state organisation with a constitutional function, in Article 39.1 and 39.2 of the Basic Law. As an annex decision to the dissolution of the *Bundestag*, it shares its legal fate (see BVerfGE 62, 1 (31)). 121

2. As Members of the German *Bundestag*, the applicants have standing to be parties concerned within the meaning of Article 93.1 no. 1 of the Basic Law and § 63 of the Federal Constitutional Court Act insofar as – as is the case here – they claim rights affiliated to their constitutional status (see BVerfGE 62, 1 (31); 108, 251 (270) with further references). 122

3. The applicants are authorised to file an application (§ 64.1 of the Federal Constitutional Court Act). They are directly affected in their legal position as Members of the 123

Bundestag; and their own rights can also be violated in this sense.

The duration of the electoral period set in Article 39.1 sentence 1 of the Basic Law not only expresses at what intervals the democratic legitimisation of the representation of the people must be renewed by the electorate (Article 20.2 sentence 2 of the Basic Law). Setting the electoral period at four years is also intended to enable the German *Bundestag* to carry out its tasks effectively and continually. The status of the individual Members of the *Bundestag* is a part of this guarantee. Curtailing the current electoral period counter to the preconditions of the Basic Law would thus at the same time encroach on the status of the Members of the *Bundestag* guaranteed by the Basic Law (see BVerfGE 62, 1 (32)). 124

4. The applicants have a legitimate interest in the ruling. Doubts, if any, could exist in the case of the applicant re II, since he did not participate in the ballot on the vote of confidence, and hence could have contributed to creating the conditions for the impugned measures. Even in objective terms, this conduct however does not necessarily express approval of the decision on dissolution. Over and above this, in his oral statement made before the German *Bundestag* on the ballot on the vote of confidence the applicant re II explicitly expressed his objections to the method employed by the Federal Chancellor (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, pp. 17483-17484). 125

5. The requirements as to form and deadline (§ 64.2 and 64.3 of the Federal Constitutional Court Act) have been met. 126

C.

The applications are unfounded. The orders of the Federal President of 21 July 2005 to dissolve the 15th German *Bundestag* and to set elections for 18 September 2005 do not violate the Basic Law. They do not therefore violate or endanger the applicants' status as Members of the German *Bundestag* protected by Article 38.1 sentence 2 of the Basic Law in conjunction with Article 39.1 sentence 1 of the Basic Law. 127

I.

1. A review of the content in the proceedings at hand is required only with regard to the order of the Federal President to dissolve the German *Bundestag*. There are no evident reasons why, in addition, the setting of the election emerging as a consequence of dissolution (Article 39.1 sentence 4 of the Basic Law) might independently encroach on the rights of the applicant in an unconstitutional manner, and the applicants have claimed no such reasons (see BVerfGE 62, 1 (34)). 128

The ordering of dissolution by the Federal President is based on Article 68 of the Basic Law. Accordingly, the Federal President may dissolve the *Bundestag* in response to an application from the Federal Chancellor if a motion of the Federal Chancellor to 129

profess confidence in him is not carried by the majority of the Members of the *Bundestag*. The Federal President takes the decision to dissolve the *Bundestag*, or not to comply with the application of the Federal Chancellor, on his own responsibility as a political leadership decision. This decision lies within the duty-bound discretion of the Federal President. Discretion within the framework of Article 68 of the Basic Law is however only available to the Federal President if the preconditions of Article 68 of the Basic Law are met at the time of his decision (see BVerfGE 62, 1 (35)).

No final decision is needed as to whether the Federal President is obliged over and above a review of evident errors to examine adherence to these constitutional requirements prior to his decision. The Federal Constitutional Court can be called upon in the *Organstreit* proceedings in order to examine compliance with Article 68 of the Basic Law. If a constitutional review reaches the conclusion that the element-related preconditions of Article 68 of the Basic Law are not met, the dissolution of the German *Bundestag* is unconstitutional (BVerfGE 62, 1 (36)). 130

2. The constitutional review standard emerges from Article 38.1 sentence 2 in conjunction with Article 39.1 sentence 1 and Article 68 of the Basic Law. The Members of the *Bundestag* filing the complaints invoke their status as elected representatives of the people. In accordance with Article 39.1 sentence 1 of the Basic Law, they are elected for the duration of four years. The dissolution of the German *Bundestag* prior to expiry of this electoral period encroaches on their status as Members of the *Bundestag*, and is only justified if the Basic Law so permits. The encroachment on Article 38.1 sentence 2 of the Basic Law is however not restricted solely to the early termination of the mandate for the Members of the *Bundestag*. The possible dissolution of the German *Bundestag* can also have an indirect impact on the status of the Members of the *Bundestag* because the position of the Member of the *Bundestag* in the political structure is weakened if this possibility can be easily achieved. 131

II.

A vote of confidence aiming to dissolve the *Bundestag* is only constitutional if it not only meets the formal requirements, but also satisfies the purpose of Article 68 of the Basic Law. 132

The Basic Law seeks to create a viable government by means of Article 63, Article 67 and Article 68. Viability means not only that the Federal Chancellor exercises political will in order to determine the general guidelines of policy, and that he bears responsibility for this (Article 65.1 of the Basic Law), but is also aware of having a majority of Members of the German *Bundestag* behind him in so doing (1.). The Basic Law contains special provisions in order to keep a minority government viable in a political crisis if necessary. Primarily, however, it offers escape routes aiming to restore stable majorities in the German *Bundestag* (2.). A vote of confidence aiming at dissolution is justified as a measure in line with the purpose of Article 68 of the Basic Law if it serves to restore a Federal Government sufficiently anchored in Parliament (3.). The 133

Federal Constitutional Court examines the expedient application of Article 68 of the Basic Law only to the restricted degree provided by the constitution (4.).

1. The constitution aims to create a government anchored in Parliament. The Federal Chancellor is elected by the *Bundestag* (Article 63 of the Basic Law). In order to effectively implement his mandate to shape policy thereby allotted, he requires the continuous support of the majority of the German *Bundestag*. However, each Member of the *Bundestag* is entitled to and responsible for supervising the Government on the basis of his or her free mandate and helping to shape policy in the context of the competences of the *Bundestag*. The task of control falls particularly, but by no means exclusively, to the opposition in the *Bundestag* (see Schneider, *Die parlamentarische Opposition im Verfassungsrecht der Bundesrepublik Deutschland*, vol. 1, 1974, pp. 236 et seq.). Above all in the parliamentary debate, the opposition comments critically on the actions of the Government and publicly formulates alternatives. The majority on the basis of which the Chancellor was elected will by contrast typically support “its” Government and “its” Chancellor, especially in open debates, whilst as a rule it will express only within the parliamentary group or party any criticism of the political course taken by the Government that nonetheless exists. The parliamentary will-forming process unfolds in this relationship between the Government and a parliamentary majority tied personally and factually to the Government on the one hand, and the parliamentary minority which is in opposition to the Government on the other. This process is decisively formed and shaped by parliamentary groups in the *Bundestag* (see BVerfGE 10, 4 (14); 20, 56 (104); 43, 142 (147); 70, 324 (362-363); 84, 304 (324)). This does not rule out public criticism by Members of the *Bundestag* of the governing majority any more than it does the free decision of Members of the *Bundestag* who are subject only to their consciences. The Federal Chancellor however as a rule particularly relies on trustful cooperation with the parliamentary group chairperson(s) of the majority supporting him in Parliament. The leadership of the parliamentary group will endeavour to ensure that an effective and uniform will grows from the freedom of the mandate, which in the case of the parliamentary groups supporting the Government is compatible with the conception of the Federal Government. 134

The Federal Chancellor and his Government need in principle a reliable parliamentary majority. Reliable means in this context that the Chancellor may anticipate fundamental, adequate parliamentary support for the political concept he represents. Whether the Chancellor has this reliable support can only be partly judged from outside. It may be that as a result of the parliamentary and political working conditions the development of the relationship between the Federal Chancellor and the parliamentary groups bearing his policy remains partly hidden from the public. It does not need to emerge openly and unambiguously whether the Chancellor and his Government still have a reliable parliamentary majority. 135

2. If the Federal Chancellor is not (any longer) able to assemble the majority of Members of the *Bundestag* around himself, his position is categorised by the Basic Law as a political crisis and is covered by special provisions which also involve other 136

constitutional bodies in the responsibility for dealing with it (Article 63.4 sentence 3 and Article 81 of the Basic Law; see also Article 111 of the Basic Law). It is also to be possible to nominate a minority chancellor with the approval of the Federal President, and a Government can be kept viable by granting the possibility to carry out indispensable measures and adopt statutes without the participation of the German *Bundestag* (see Badura, *Vorkehrungen der Verfassung für Not- und Krisenlagen*, *Thüringer Verwaltungsblätter – ThürVBl* 1994, pp. 169 (174-175)).

137 However, these are only security measures. In principle, the Basic Law has available such ways out of a parliamentary crisis aiming to restore the majorities in the German *Bundestag*. These escape routes are the resignation and re-election of a Chancellor in accordance with Article 63 of the Basic Law, the election of a new, different chancellor by means of a constructive vote of no confidence in accordance with Article 67 of the Basic Law, and the vote of confidence in the Chancellor in accordance with Article 68 of the Basic Law. Article 68 of the Basic Law covers not only the (so-called real) vote of confidence not aiming at dissolution, by which the viability which is in doubt as to the actual constellation of forces in Parliament can be put to the test; also the (so-called unreal) vote of confidence aiming at dissolution is, accordingly, one of the tools which the Basic Law places at the disposal of the constitutional bodies in order to be able to ensure or restore the viability of the Government with a sufficient parliamentary majority. By its systematic connection with Article 62 and Article 67 of the Basic Law, Article 68 of the Basic Law however does not afford the Federal Chancellor any means to set a re-election date seeming suitable to him in a manner not subject to preconditions, together with a parliamentary majority reliably supporting him (BVerfGE 62, 1 (42-43)).

138 3. The dissolution of the German *Bundestag* is an encroachment on the freedom of a *Bundestag* mandate constitutionally lasting for four years (Article 38.1 sentence 2 and Article 39.1 sentence 1 of the Basic Law). Its justification by Article 68 of the Basic Law is restricted by the purpose of this provision. Accordingly, the Federal Chancellor's justified assessment that the viability of the Federal Government is impaired as to the majorities in Parliament is sufficient.

139 a) Curtailing the electoral period can impair confidence in the viability of parliamentary democracy. The stability orientation of the Basic Law is also a response to experience with early parliamentary elections in the Weimar Republic, which the Members of the Parliamentary Council had in mind, and of which some of them had had personal experience, when drafting the Basic Law. As was shown by the early Reichstag election of 1928, early new elections in a time of relative economic and political stability did no harm even in the political system of the Weimar Republic.

140 The dissolution of the Reichstag, which was ordered by the Reich President on 18 July 1930 after the resignation of the Müller Government, destroyed by contrast a parliamentary constellation in which the parties operating within the Weimar Constitution had a solid majority. In the early elections of 1930, the National Socialists re-

ceived 18.3 per cent, and the Communist Party improved its result from 10.6 per cent to 13.1 per cent, whilst all other parties lost votes. The parliamentary group of the Social Democrats in the radicalised Reichstag tolerated the Brüning Government – in order to prevent a greater evil – until the overthrow of the Government which took place on 30 May 1932. With the early dissolution of the Reichstag on 4 June 1932, the Reich President was now already meeting political demands made by the National Socialists, who set this as a precondition for tolerating the new Cabinet under von Papen. The early elections of 31 July 1932 then made parliamentary government practically impossible because the National Socialists and Communists had achieved more than 50 per cent of the votes, and also of the mandates (see Winkler, *Der lange Weg nach Westen*, 4th ed. 2002, vol. 1, pp. 484 to 491).

The Members of the Parliamentary Council were able to conclude from this development that a rapid series of parliamentary elections favour radical forces in times of economic and political crises and can undermine general confidence in the orderliness of political will-formation in the constitutional state. 141

b) The genesis of Article 68 of the Basic Law confirms that the vote of confidence aiming at dissolution can only be justified if the viability of a Federal Government which is anchored in Parliament has been lost. The constitutional legislature saw the possibility that there was no alternative in Parliament to the acting Federal Chancellor for the path of Article 67 of the Basic Law, but that the Chancellor on the other hand also did not have sufficient majority support for his policy. At its session of 16 December 1948, the Organisation Committee (*Organisationausschuss*) of the Parliamentary Council regarded the constitutional problem of such a constellation as lying particularly in the fact that the Chancellor did not terminate this situation on his own initiative, meaning via a vote of confidence, in order to bring about new elections. A problem was considered to consist in the possibility of the Federal Chancellor “sticking to his chair”, that is remaining in office although his viability is no longer guaranteed. The Organisation Committee responsible for the applicable version of Article 68 of the Basic Law merely considered that an even greater danger lay in the possibility of the *Bundestag* bringing about new elections against the will of the Federal Chancellor via an unconstructive vote of no confidence. Such a proposal of the Editorial Committee (*Redaktionsausschuss*) was hence removed from the draft of the Basic Law (Parliamentary Council, Organisation Committee, 28th session of 16 December 1948, pp. 18 to 22; see also von Mangoldt, *Die Auflösung des Bundestags*, *Die Öffentliche Verwaltung – DÖV* 1950, pp. 697 et seq.). Against this background, a situation of instability between the Federal Chancellor and the German *Bundestag* can only be terminated with lasting effect by the resignation of the Chancellor, or indeed by a vote of confidence aiming at dissolution. 142

Accordingly, measured by the meaning of Article 68 of the Basic Law it is not inexpedient if a Chancellor, threatened by defeat in Parliament only with future ballots, already files a vote of confidence aiming at dissolution. Viability is also lost if in order to avoid open loss of agreement in the *Bundestag* the Chancellor is forced to withdraw 143

from major elements of his political concept and to pursue another policy. The Chancellor must act under the supervision and participation of the *Bundestag*, and in this respect must engage in a process of everyday compromise. The constitution however also does not regard the Government as an executive committee of Parliament. A precondition for effective mutual control of the powers is that the Federal Government also has a delimited area of responsibility (Article 65.1 and 65.2 of the Basic Law). The Federal Government is intended to be an independent constitutional body designing policy, which can only take on responsibility before the German *Bundestag* and before the citizens if it has sufficient independent political latitude in the context of the competence order.

144 The Federal Chancellor is constitutionally obliged neither to resign, nor to take measures revealing the political dissent in the majority supporting the Government in Parliament in the event of a doubtful majority in the *Bundestag*. In the event of resignation, it would remain open whether this led to more stable parliamentary conditions; it would even be uncertain whether the election of a new majority Chancellor in accordance with Article 63 of the Basic Law were possible. A duty incumbent on the Federal Chancellor to make public the political dissent in Parliament could additionally shake the political stability striven for by the Basic Law. There is no duty first to put the constellation of forces to the test in the *Bundestag* with a – real – vote of confidence aiming at agreement with the person and programme of the Federal Chancellor. Finally, it is also not inexpedient if in view of his future political role in his parliamentary group and his party the Chancellor chooses a time in which a dispute does not appear to be as yet irreparable. The Chancellor cannot be forced to exacerbate an unstable situation which he attempts to overcome by moving for a vote of confidence aiming at dissolution in order to simplify the legal review.

145 c) A political situation which justifies a vote of confidence aiming at dissolution doubtless exists if the Chancellor loses his previous majority in the German *Bundestag* through a change of parliamentary group by individual Members of the *Bundestag*, as took place for instance in 1972. The dissolution of the *Bundestag* of 22 September 1972, caused by the erosion of the social-liberal Coalition majority in the *Bundestag*, had been preceded by a political stalemate between governing parliamentary groups and the opposition in which no side had retained the Chancellor majority of at that time 249 votes (see Blischke, *Verfahrensfragen des Bundestages im Jahre 1972*, in: *Der Staat*, vol. 12, 1973, pp. 65 et seq.).

146 The second dissolution of the *Bundestag* of 6 January 1983 took place in connection with a constructive vote of no confidence of which the public debate did not deny the constitutionality, but particularly also in view of the party responsible for the change in the Coalition not so much the legality, but the legitimacy within the meaning of respect for “democratic decency” (see BVerfGE 62, 1 (52, 57-58)).

147 This experience shows that the vote of confidence aiming at dissolution has been used very sparingly and responsibly since the Basic Law entered into force.

4. The Federal Constitutional Court examines the expedient application of Article 68 of the Basic Law only to the restricted degree provided by the constitution. No secure findings can be made on the loss of parliamentary majority alleged by the Federal Chancellor with the means for taking evidence available in constitutional-court proceedings without unsuitably restricting political freedom to act (a). The system of the Basic Law, based on the separation of powers, allots responsibility for the dissolution of the German *Bundestag* to three constitutional bodies whose decisions are furthermore subject to control by the constitutional court (b). Decisive significance attaches in the instant proceedings to whether, when measured by the standards put forward (II. 1. to 3.), the viability of the Government was no longer ensured, or whether the Chancellor – as the applicants submit – only used such an unstable situation as an excuse in order to bring about new elections in an inexpedient manner (c). 148

a) The appraisal of the expedient use of the vote of confidence aiming at dissolution can encounter practical difficulties. Whether a government is still politically viable depends vitally on what aims it pursues and what resistance it must expect from the parliamentary sphere. Such assessments have the character of a prognosis and are tied to highly individual perceptions and weighing appraisals of the situation. 149

The case can be appraised most securely if a majority of the German *Bundestag* openly conducts itself obstructively for a considerable period, and unambiguously declares that it no longer has any confidence in the Federal Chancellor, but equally declaredly cannot agree on the election of a new Chancellor in the manner provided for by Article 67 of the Basic Law. In the case of such an open obstruction, there is no need for a discussion on the intensity of court control and the Federal Chancellor's latitude for assessment because the situation of political instability within the meaning of a minority situation of the Government in Parliament can be clearly recognised. 150

The case would be equally unambiguous if the Federal Chancellor were to evidently file his motion for a vote of confidence solely with the goal of politically de-legitimising the *Bundesrat* with a confirmation of the Federal Government by acclamation via an election. In such a constellation, there would be no instability in the relationship between the Chancellor and Parliament (see BVerfGE 62, 1 (46)) as required by Article 68 of the Basic Law. 151

Constitutional difficulties are however constituted by a case in which the Federal Chancellor has assessed a situation such that constant support of the *Bundestag* majority for his policy is no longer guaranteed before the correctness of this assessment has become evident in corresponding ballot defeats. The appraisal of such a case constellation is made all the more difficult if this allegation is linked to the prognosis that the paralysing impact of such a situation on his political programme was to become clear only in the future. 152

A hidden minority situation of the Federal Chancellor occurs if an organised parliamentary majority – the nominal Chancellor majority – declares its support for the Chancellor whom it has elected, and supports him externally in political terms, but this 153

support for his political course in reality is not so effective that the Federal Chancellor is able to implement the policy asserted by him in conceptual terms.

By their nature, an erosion of confidence and a withdrawal of confidence which is not openly displayed cannot be easily described and identified in court proceedings. What is legitimately not argued out openly in the political process also does not need to be completely disclosed to other constitutional bodies under the conditions of political competition. The Federal Chancellor's assessment that he is no longer sufficiently viable for his future policy is an evaluation which the Federal Constitutional Court cannot clearly or completely examine in practice already, and it is also not amenable to the customary means of taking evidence within proceedings without impairing the system of political action. Even if one were to consider taking evidence to be possible or necessary, the Chancellor would be left with his own latitude for assessment with regard to the facts that have been determined, in particular with regard to their significance for future developments. The political will-formation process, with its permissible modes of conduct and consideration, also characterised by tactical and strategic motives, may not be impaired in questions of political assessment through fact-finding by the court striving for full evidence. The balance between the public authority's effective commitment to the law and the facilitation of effective political freedom to act intended by the Basic Law would otherwise be violated. 154

b) In contradistinction to the Weimar Constitution, the Basic Law has given the decision on the dissolution of the *Bundestag* not solely to one constitutional body, but has shared it among three constitutional bodies and allotted to these in each case their own areas of responsibility (see BVerfGE 62, 1 (51)). The three constitutional bodies – the Federal Chancellor, the German *Bundestag* and the Federal President – may each prevent dissolution according to their free political assessment. This helps to ensure the reliability of the presumption that the Federal Government has lost its parliamentary viability. 155

The chain of responsibility starts with the Federal Chancellor because without his application no path leads to the dissolution of the German *Bundestag*. The constitution grants solely to the Federal Chancellor the competence to file an application in accordance with Article 68 of the Basic Law. With this provision on the vote of confidence, the Basic Law expressly emphasises the prominent status of the office of the Federal Chancellor in the parliamentary governmental system of the Federal Republic of Germany. 156

The German *Bundestag* decides in knowledge of Article 68 of the Basic Law whether to pave the way for dissolution by refusing to profess confidence. No situation is conceivable in which a Federal Chancellor could legally force Parliament to help dissolve itself against its will. Also with a scant majority of the governing coalition, the Federal Chancellor could not bring about dissolution solely with the opposition. The Federal Chancellor could not even instruct Ministers who are at the same time Members of the German *Bundestag* in a legally binding manner to vote in the de- 157

sired manner as Members of the Government; the free mandate of Members of the *Bundestag* takes precedence in this respect. Parliament cannot only answer the vote of confidence positively, but it also has the possibility to elect a new Federal Chancellor. Thus, the attempt of Federal Chancellor Helmut Schmidt in 1982 to bring about new elections via Article 68 of the Basic Law was thwarted by the election of Helmut Kohl as Chancellor, which took place on the basis of Article 67 of the Basic Law. In the case at hand, the Members of the *Bundestag* refused with a large majority to profess confidence in the Federal Chancellor, whilst knowing the possible consequences, and also did not elect a new Chancellor. The majority of Members of the *Bundestag* wanted the *Bundestag* to be dissolved, as was declared by all parliamentary groups in the debate on 1 July 2005.

158 The Federal President ultimately ordered dissolution as the third constitutional body involved, based on his own political appraisal. The Federal President also already carried out an advance legal appraisal of the preconditions of Article 68 of the Basic Law on his own responsibility. Even if in doing so he restricts himself to only examining evidence as to possible misuse by the Federal Chancellor or by the *Bundestag*, his word nonetheless carries weight as a *pouvoir neutre* with regard to the extent of the intensity of court control. The Federal President is an independent constitutional body expressly provided for by the Basic Law in these proceedings, a body which is just as entitled to carry out a legal review as it is called to then provide a political leadership decision as to the ordering or rejection of dissolution. The Federal President has his own possibilities, including those of personal, confidential discussions, to obtain a picture of whether the viability of the Government is at risk or has already been lost in a manner corresponding to the purpose of Article 68 of the Basic Law.

159 The sophisticated mechanism of the separation of powers applicable to dissolution in accordance with Article 68 of the Basic Law may sensibly unfold itself only if the Federal Constitutional Court respects the political assessment of the situation carried out by the previously active constitutional bodies (see BVerfGE 62, 1 (51)).

160 This does not mean that the Federal Constitutional Court is not obliged to effect a constitutional review in *Organstreit* proceedings; its competence and duty to review is restricted, but not eliminated, by the latitude for assessment that is to be respected (see BVerfGE 62, 1 (51)). The Basic Law allots a strong position to constitutional law and to the constitutional jurisdiction. The Federal Constitutional Court has broad competences in an international comparison (see Tomuschat, *Das Bundesverfassungsgericht im Kreise anderer nationaler Verfassungsgerichte*, in: Festschrift 50 Jahre Bundesverfassungsgericht, vol. 1, 2001, pp. 245 et seq.). This has become a characteristic of the German post-war order based on freedom. Nonetheless, the Basic Law only wished to control political rule and not to impose legal regulations on the political process. The Basic Law is about suitably sharing responsibility. Each constitutional body takes on a task of its own to fill the constitution with life and to further develop it. The Federal Constitutional Court takes on a special role here as a constitutional body specially established for this; as a court it reviews in a final, binding manner. It must

however keep open to the other constitutional bodies the space needed to freely shape policy and to freely exercise political responsibility which is guaranteed to them under the Basic Law (see BVerfGE 36, 1 (14-15)). Because of the three-tier decision-making process, the possibilities of the Federal Constitutional Court to carry out a review in the context of Article 68 of the Basic Law have been subjected to greater restriction than in the areas of legislation and implementation of provisions. The Basic Law relies in this respect primarily on the system of mutual political control and political compensation between the supreme constitutional bodies involved, as set out in Article 68 of the Basic Law. Only where standards for political conduct are set out in the constitution can the Federal Constitutional Court counter their violation (BVerfGE 62, 1 (51)).

c) Even if a threat of loss of political viability can best be judged by the Federal Chancellor himself, the Federal Constitutional Court must nonetheless examine whether the limits of his latitude for assessment have been adhered to in order to ensure that all state bodies are committed to the Basic Law. If there are no indications, as measured by the overall political situation as it was found, that the Federal Chancellor has lost or is at risk of losing the support of the parliamentary majority for the acts of his Government and for his political concept, he cannot successfully invoke his prerogative of assessment. His decision must be based on facts. The general political situation however, as well as individual circumstances, need not necessarily lead to the assessment of the Chancellor here, but must only make it appear plausible. The Chancellor's latitude for assessment is only respected to a constitutionally required degree if it is asked in the legal examination whether another assessment of the political situation is clearly preferable on the basis of facts (see BVerfGE 62, 1 (52)). Facts which are also able to support other assessments than that of the Chancellor are only suitable to refute the Federal Chancellor's assessment if they permit no other conclusion to be drawn than that the assessment of the loss of political viability in Parliament is wrong. 161

The Federal Constitutional Court may certainly not ignore such circumstances, particularly also in view of the broad latitude for assessment open to the Chancellor. It may certainly not leave unconsidered facts which counter the appraisal of the Chancellor, even if they do not take place until during the court proceedings and are suited to call into question the plausibility of the Federal Chancellor's appraisal of the situation. 162

It should be taken into account when appreciating the facts that developments in the parliamentary sphere which take place after the announcement of the Federal Chancellor to move for a vote of confidence might not be suited to shake the plausibility of his assessment at the time of this announcement. These developments may in turn be influenced by the mere announcement of the vote of confidence and of the concomitant disciplining impact on the Members of the *Bundestag*. This may be significant in particular in cases in which – as in the case at hand – the Federal Chancellor invokes the existence of a latent minority situation and may be included by the Feder- 163

al Chancellor in his evaluation at the time of the application in accordance with Article 68 of the Basic Law. The Chancellor's announcement that he wishes to bring about new elections via a vote of confidence can make serious changes to the political situation on which entitlement to such action is based. The election campaign which then has an advance effect forces the political ranks to close, forms the parties for competition between themselves and causes the freedom for dissenting conduct within the party to shrink.

III.

The impugned decisions of the Federal President are compatible with the Basic Law. 164

The procedural steps required by Article 68 of the Basic Law have been adhered to. Inexpedient use of the vote of confidence in order to bring about the dissolution of the German *Bundestag* and early elections cannot be established. The Federal Chancellor's assessment that, in light of the constellation of forces existing in the German *Bundestag*, he could not continue to pursue a policy upheld by the confidence of the parliamentary majority has no alternative that is clearly preferable (1.). No errors of discretion are recognisable in the orders of the Federal President. (2.). 165

1. The Federal Chancellor has named facts which speak in favour of his assessment of the political constellation of forces in the German *Bundestag* (a). This assessment also corresponds to the overall political situation as described by the Federal Chancellor (b). No facts have been submitted or are recognisable to unambiguously refute the Federal Chancellor's assessment (c). 166

a) In the session of the German *Bundestag* of 1 July 2005, the Chancellor stated amongst other things as grounds for his vote of confidence that his "Agenda 2010" reform programme had led to disputes not only between the parties, but also within his party, the SPD. The Chancellor spoke here of "heated debates", which were alleged to have been exacerbated because the SPD had lost votes in all *Landtag* elections and in the European elections since the adoption of "Agenda 2010". He stated on this: "It was and is a question of whether the Agenda 2010 reforms are necessary at all, or whether they should indeed be withdrawn. This debate led so far that SPD members were threatening to join a reactionary, left-wing populist party which does not shy away from xenophobia." (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, p. 17467). The Chancellor referred to signals of a desired U-turn from his party which "in the weeks prior to 22 May" were reported in the media on an almost daily basis "also from the parliamentary sphere" (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, p. 17467). 167

The Federal Chancellor stated that he was therefore afraid that dissenting votes would place the majority at risk in future in central fields of his governmental policy, above all "Agenda 2010". He also declared why public professions of loyalty, which a 168

number of Members of the *Bundestag* were inspired to make after his announcement of wishing to strive to bring about new elections, had not changed this assessment:

169 "It must also be clear that where confidence is no longer present, one may not pretend in public that this confidence exists. I have also had to experience that. This too is an element of my political evaluation. And my evaluation is unmistakeable: An evaluation of the constellation of political forces before and after the decision to seek new elections must lead – I am very sure of this – to my not being able to rely under the present conditions on the constant confidence necessary within the meaning of Article 68 of the Basic Law." (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, p. 17467). With this, the Chancellor both named facts and placed them in a political context, a placement on which he based his evaluation and his conclusion. He made it sufficiently clear in doing so that he did not name names out of consideration for members of the party and of the parliamentary group. Additionally, he reported with the weight of his personal trustworthiness of experiences which he had also had with the impropriety of individuals from his own political group, whose names he did not make public.

170 The political connection that has been created, with the ongoing criticism of his "Agenda 2010" policy and the *Landtag* elections by far the most of which the SPD has lost since 2003, relates to generally accessible facts. They support the conclusion drawn by the Chancellor that, after the change of government in Schleswig-Holstein to a Grand Coalition, and the immanent establishment of a new party competing with the SPD, with the participation of the former party chairman of the SPD, in the case of a defeat of the SPD at the latest in the *Landtag* election in North Rhine-Westphalia, the Chancellor would have been forced to submit to pressure, including from the SPD *Bundestag* parliamentary group, to undertake a substantial political change of course if he had failed to announce early elections.

171 This view of the Federal Chancellor is explicitly shared by the party and parliamentary group chairman of the SPD. The Chairman of the SPD parliamentary group in the *Bundestag*, party chairman Franz Müntefering, stated in Parliament on 1 July 2005: "It is not simple in a situation like this, with a majority of three votes on the side of the Coalition in the *Bundestag* and with an up-and-coming PDS/ML, to go unwaveringly through the fire of reforms, not for the party, not for the Members of the *Bundestag*. Everyone has been able to read and hear that some among us required the Federal Chancellor and our policy to make serious course changes in this situation. I thought it was wrong, but that's the way it was." (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, p. 17473). There was also no contradiction in the political sphere of the additional statement of Franz Müntefering that he had "said" to the Federal Chancellor prior to the *Landtag* election in North Rhine-Westphalia that he had been concerned "about the viability" of his party and parliamentary group, and hence ultimately of the Federal Government (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, p. 17474). These statements are

not only a confirmation of the Federal Chancellor's evaluation, but also reflect an additional fact. Accordingly, the one who worked closest with the Chancellor to guarantee constant parliamentary support for governmental policy reported to him of his concern for the viability of the Federal Government prior to the *Landtag* election of 22 May 2005.

The applicants have not denied that such a discussion took place between the Chancellor and the party and parliamentary group chairman. They merely deny that the concern of the parliamentary group chairman had been substantively justified. The Chancellor was however able to base his assessment on the fact that, with regard to the *Landtag* election in North Rhine-Westphalia, the SPD party and parliamentary group chairman, who actively supported his policy, was no longer able to guarantee him support for the Chancellor's policy from the parliamentary group of the SPD in the German *Bundestag*. 172

b) Also the overall political situation does not counter the plausibility of the assessment made by the Federal Chancellor. The presumption of a lack of political viability in Parliament adds itself without contradiction to a series of political events which has accompanied the electoral period of the 15th German *Bundestag* since the announcement of "Agenda 2010". The criticism had previously gone so far that representatives of the party's left wing had demanded the resignation of Gerhard Schröder as SPD party chairman. 173

There are published indications that the surprising resignation of the Federal Chancellor from the office of SPD Federal Chairman and the election of the new Chairman Müntefering at the beginning of 2004 took place in response to pressure from the critics of the course being taken by the Federal Government within the party, and above all linked with the criticism of the reform of the labour market. At least, a large part of the press commented on the announced change in the party chair in the same vein as did the Frankfurter Allgemeine Zeitung of 7 February 2004: "What Chancellor voluntarily places himself under guardianship? That the Social Democrat Schröder – instead of being his own lord and master as before – wished to have parliamentary group chairman Müntefering as his party chairman too sounds good, but is not suitable for the history books. The left wing of the party, from Jüttner through Lafontaine to Ypsilanti, wrested the party chairmanship from the Chancellor, and Schröder can count himself fortunate that Müntefering is acceptable for both sides." Such commentaries do not have to be correct in factual terms. They do however show a picture of the overall political situation in the Federal Republic of Germany which at least does not counter the Federal Chancellor's assessment of the gradual erosion of his confidence base in Parliament. It is also in line with general experience that with each *Landtag* election lost by a governing party, increased political pressure builds up for the Federal Chancellor to deviate from the political path started on if this path is regarded as being unpopular. 174

c) Neither prior to nor after the announcement of 22 May 2005 of campaigning to- 175

wards new elections did facts become evident which refute the Federal Chancellor's assessment and hence make another assessment than that of the Chancellor appear to be clearly worthy of preference.

aa) The idea that he wished to create a new mandate for his policy among the electorate is put forward as an unmistakeable refutation of the Federal Chancellor's assessment in his argument first presented on 22 May 2005 and several times since. 176

The reasoning that the people should decide on the Chancellor's policy is already unsuited through its rhetorical quality and its multiplicity of meaning to clearly refute the Chancellor's assessment as a countering fact. Such wording can be meant as a clichéd rhetoric phrase expressing a reference to the principle of democracy. 177

It can also not be established that the Chancellor is seeking a plebiscite contrary to the purpose of Article 68 of the Basic Law. Anyone standing for election to the *Bundestag* cannot with certainty determine the topics in advance. In the period from 1 July 2005 until the decision taken by the Federal Constitutional Court, no individual factual question was discussed so prevalently that one may speak of an election campaign distorted by plebiscitary elements. Moreover, it is not a matter of whether the Federal Chancellor's decision was accompanied by other motives (BVerfGE 62, 1 (62)). 178

bb) The Chancellor's assessment, furthermore, does not become implausible or refuted by virtue of the fact that he additionally invokes the political circumstances of the *Bundesrat*. With this he only makes it known that his political freedom of movement vis-à-vis his parliamentary group for the policy which he considers to be correct is additionally narrowed by a *Bundesrat* that is influenced by the opposition. Compromises which he must enter into in the mediation committee in order to obtain the approval of the *Bundesrat*, and which he can enter into without violating his concept, may subsequently reduce the prospects of implementing his political line in the governing parliamentary groups. For instance, a letter of 12 July 2005 from the Federal Chancellery to the Office of the Federal President indicates that the majorities in the *Bundesrat* made it more difficult to restore the united front of the Coalition majority in the *Bundestag*, and hence to implement political projects in a parliamentary majority which was narrow in any case (see letter of the Federal Chancellery to the Office of the Federal President of 12 July 2005, pp. 12-13). 179

cc) The Federal Chancellor's assessment that he was threatened with the loss of political viability is not refuted by the fact that parliamentary group chairman Müntefering declared in his statement on 1 July 2005 with regard to the Federal Chancellor's motion for a vote of confidence that the Chancellor had the confidence of the SPD parliamentary group (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, pp. 17474-17475). This statement was made in connection with the remark that the parliamentary group wished to continue to have the Federal Chancellor as Federal Chancellor; it evidently referred here solely to the person of the Chancellor, who was 180

undisputed in this regard, and did not intend to withdraw the prior statements confirming the Federal Chancellor's assessment. The Federal Constitutional Court already decided in connection with the vote of confidence filed in 1982 by Federal Chancellor Kohl that the fact of support being available for a renewed candidacy of the present Federal Chancellor does not rule out the existence of the preconditions of Article 68 of the Basic Law (see BVerfGE 62, 1 (38)). The statement of parliamentary group chairman Müntefering that it was not a matter of mistrust (see German *Bundestag*, Stenographic Record of the 185th session of 1 July 2005, Minutes of plenary proceedings 15/185, pp. 17474-17475) also did not deny the element-related preconditions of Article 68 of the Basic Law. What was clearly meant according to the context was that one was not in a situation of a constructive vote of no confidence; this was confirmed by the speaker immediately after this by his prophesy to the leader of the opposition that she would see that she was in a minority in the *Bundestag* were she to file such a motion.

dd) The fact that the Federal Chancellor in some instances adopts political demands of those Members of the *Bundestag* about whose parliamentary support he had previously expressed doubt with a view to a possible election campaign is also not suited to stand up to a refutation of the assessment. In this context, the circumstance that the allegedly unstable Coalition majority adopted a large number of in some cases disputed statutes with a majority between 22 May and 1 July 2005, and hence proved its viability, is put forward as constituting unambiguous refutation of the assessment made by the Chancellor. 181

The corresponding assessment made by the Chancellor would for instance be refuted if either the Chancellor majority had been mobilised particularly for legal projects that were disputed within the party and the parliamentary group and which must be unmistakeably seen as conceptually significant and decisive in the dispute of opinions – in the case at hand above all in the reform of labour market policy. The Chancellor's assessment could also be refuted if he himself had taken the initiative for statutes which evidently ran counter to his previous policy. 182

There was however no bill on the agenda in the session of the German *Bundestag* held on the day before the vote of confidence which could be regarded as a U-turn from the political concept of the Chancellor, and hence would deprive his argument of plausibility. Conversely, they were not statutes which could have been perceived by his critics within the party as an imposition. For instance, the parliamentary groups within the Coalition with their own majority accepted statutes on environmental statistics, on the law on fertilisers and trade in seeds, on acceleration of the implementation of public-private partnerships, on the law on Members of the *Bundestag*, on the Kyoto Protocol and on the Federal Agency for Digital Radio of Security Authorities and Organisations (see German *Bundestag*, Stenographic Record of the 184th session of 30 June 2005, Minutes of plenary proceedings 15/184, pp. 17305 et seq.). The extension of the duration of drawing unemployment benefit for older unemployed people already adopted in the *Bundestag* is a correction of the original reform of the labour 183

market (see draft of a Fifth Act Amending the Third Book of Social Law and other Statutes, *Bundestag* document 15/5556). This is however not a serious encroachment on the reform concept, and certainly not a fundamental U-turn from the political goals associated with it.

ee) The presumption of the applicant re I. that the amendment of the agenda of the German *Bundestag* of 30 June 2005 was connected with the vote of confidence is also not unambiguous. In the view of the applicant re I., the removal of the planned expansion of the Posted Workers Act (*Arbeitnehmer-Entsendegesetz*) from the agenda (see German *Bundestag*, Stenographic Record of the 184th session of 30 June 2005, Minutes of plenary proceedings 15/184, p. 17305), which provided for second and third readings, pursued the goal of not proving the viability of the governing coalitions particularly also in politically difficult matters by adopting this statute with a Chancellor majority. The multiplicity of meaning already emerges from the fact that the planned legal amendments were not related to disputed fundamental questions of the labour market reform policy, and hence required a grave political concession neither for the critics of the Federal Chancellor's policy within the parliamentary group, nor in turn for the Chancellor and his reform policy. In this sense, the amendment of the Posted Workers Act was not a test of the reliability of the Coalition majority. The removal of the draft Bill could moreover also have had completely different reasons, such as the intention to remove the basis for objections from the opposition which could be used in an election campaign ((http://www.Bundestag.de), *hib-Meldung* of 29 June 2005). 184

2. There are no indications that the Federal President overstepped the limits imposed on him by the constitution with the order to dissolve the 15th German *Bundestag*. 185

The Federal President examined the proposal to dissolve the German *Bundestag* submitted to him by the Federal Chancellor. It cannot be established that the Federal President committed a violation of the Basic Law in exercising the broad political discretion granted to him. The Federal President saw and used the political freedom to decide that was open to him. He made discretionary considerations and in his overall consideration reached the constitutionally unobjectionable conclusion that the wellbeing of the people was best served by a new election. 186

D.

The decision was ultimately passed with 7:1 votes and re C. II. with 5:3 votes. 187

Hassemer Jentsch Broß

Osterloh Di Fabio Mellinghoff

Lübbe-Wolff Gerhardt

Dissenting opinion of Judge Jentsch

on the judgment of the Second Senate of 25 August 2005

– 2 BvE 4, 7/05 –

In my conviction, the applications are well-founded. 188

The grounds submitted by the Federal Chancellor do not permit one to conclude his lack of political viability and hence a substantive dissolution situation which could justify a motion in accordance with Article 68.1 sentence 1 of the Basic Law and the early dissolution of the German *Bundestag* (1.). The Basic Law knows only a constructive vote of no confidence on the part of the German *Bundestag* against the Federal Chancellor, but not “constructed mistrust” of the Chancellor against Parliament (2.). The interpretation and application of Article 68.1 sentence 1 of the Basic Law as found by the Senate majority weakens the position of the German *Bundestag*, impairs the free mandate of the Members of the *Bundestag* and entails a risk of destabilising the political system (3.). 189

1. The Federal Chancellor reasoned the vote of confidence in the German *Bundestag* on 1 July 2005 by claiming that the previous election defeats submitted had made it clear “that the constellation of forces which has become evident will not permit me to successfully continue my policy without a new legitimisation from the sovereign, that is, the German people.” As grounds he referred to threats by SPD members that they would leave the party if the reform policy of “Agenda 2010” were to be continued. Additionally, increasing numbers of members of the parliamentary groups within the Coalition had threatened to vote outside the party line, or to resign. Finally, the *Bundesrat* majority could only be moved to re-think their “blockade” by an unambiguous vote on the part of the electorate. 190

These reasons do not prove a political situation of instability between the Federal Chancellor and the *Bundestag*, which would be the only reason that could justify an “unreal” vote of confidence (aiming at dissolution) according to the correct standards of the Senate ruling of 16 February 1983 (BVerfGE 62, 1). The view of the Senate majority adopts these standards without it being necessary, and without making this evident. 191

Neither the vague prospect of the majority in the *Bundesrat* changing its stance, nor the threat of or actual resignation of SPD members from the party, can give rise to a substantive dissolution situation since they are not sufficiently linked to parliamentary events in the German *Bundestag*. In terms of constitutional law, only the argument that a constant and reliable majority for his governmental policy had no longer existed in view of the threat of dissenting voting conduct by various members of the *Bundestag* remains relevant. This was the only point referred to by the Federal President in his television address of 21 July 2005. 192

There are however no visible or provable indications of this last-mentioned assessment. The Federal Government led by the Chancellor did not lose a single ballot in 193

the last legislative term in which the Chancellor majority was required. The draft Bills as yet introduced into the legislative proceedings on the implementation of "Agenda 2010" were also successful in the *Bundestag*. Here, the critics within the party also repressed their reservations and voted for the respective government bills (with one abstention). If one therefore considers the past events in the 15th German *Bundestag*, there are no indications of a lack of parliamentary support for the Chancellor or his governmental policy.

No other picture emerges, even if one takes into account that the Federal Chancellor must already accommodate the real constellation of forces in advance, and that it was impossible to present to the *Bundestag* draft Bills for which a majority in the government camp was not assured. There are no evident concrete indications of the lack of a reliable basis for the implementation of parliamentary projects by the Federal Government. Neither has the Federal Chancellor named any, nor is it recognisable which concrete legislative projects were set back in light of the threatened dissent. A current crisis situation, a situation of inviability of the Federal Chancellor, cannot therefore be derived from the information provided by the Chancellor and by the known objective circumstances. 194

This also applies to the implementation of "Agenda 2010" stressed by the Chancellor. Firstly, most of the statutes necessary for this have already been adopted, and have always obtained the support of the parliamentary groups within the Coalition. Secondly, the remaining "20 measures to continue Agenda 2010" were also unanimously adopted in the SPD parliamentary group. The presumption that there was no sufficient parliamentary support for the continuation of these reform projects hence has no comprehensible factual basis. The single circumstance that some Members of the *Bundestag* in the SPD and Alliance 90/The Greens had voted for the draft Bill of the Hartz IV provisions, but not for the proposed amendments of the mediation committee, does not justify any other appraisal. On the one hand, as regards the mediation result in particular, it was not just the reform ideas of the Chancellor which were to be voted on; on the other hand, the *Bundestag* majority was ensured in this ballot by the announced agreement of the opposition. There is hence also no question of an impairment of the viability of the Government in this context. There are also no visible indications of this being different in future as alleged. Rather, it is also confirmed in the SPD's "election manifesto" of 4 July 2005 that "Agenda 2010" is consistently implemented. Critical or threatening votes by SPD Members of the *Bundestag* on this have not become known in public. 195

Moreover, the viability of a Government cannot be denied solely if a Chancellor is no longer able to implement individual reform proposals. This is a – wanted and inevitable – consequence of the parliamentary government system constituted by the Basic Law. It allots authority to determine general policy guidelines to the Federal Chancellor (which in any case only refers only to the Cabinet), but fundamentally presumes the picture of the free Member of the *Bundestag*, who does not have to act in a monolithic fashion on all individual questions with his or her party or "his or her" Chan- 196

cellor. If one wished to see this differently, not much would be left of the freedom of the Members of the *Bundestag* as provided for in Article 38.1 sentence 2 of the Basic Law. In order to be able to infer the paralysis of the viability of the Government from the voting conduct of individual Members of the *Bundestag* deviating from the majority, this must hence certainly relate to central topics, lying particularly in the core area of the Chancellor's authority to determine general policy guidelines.

All in all, the submission of the Federal Chancellor hence does not prove itself to be sufficient in order to demonstrate the alleged lack of parliamentary support. The objectively comprehensible events in the German *Bundestag* and in the parliamentary groups of the governmental parties, rather, establish on the contrary a presumption that the Chancellor has so far able been able to rely on the support of a parliamentary majority, and can also count on it in the future. This appearance is further supported by the accompanying circumstances of the vote of confidence. According to information provided by Members of the *Bundestag* Hoffmann and Schulz – which was substantiatedly countered neither by the Federal Minister of the Interior, nor by the authorised representative of the Federal Government – the resolution on the draft Posted Workers Act set for 30 June 2005 was cancelled at short notice despite a certain majority because drawing on the Chancellor majority on the day prior to the vote of confidence "looked bad", and hence one could "not risk" this now. It also appears to be worthy of note, finally, that the members of the SPD parliamentary group could only be moved to abstain from the ballot in the vote on 1 July 2005 by their party chairman, who praised abstention as a profession of confidence in the Chancellor. A lack of a majority looks different; it does not require any "constructed mistrust". 197

2. Were one to grant to the Federal Chancellor by referring to his prerogative of assessment also the possibility to ask for a vote of confidence in situations such as the one at hand, one would level a path towards the dissolution of Parliament in which only compliance with formal preconditions is called for, but substantive criteria are factually renounced. It is then no longer possible to substantively review the Federal Chancellor's decision. This step, which comes very close to a right of self-dissolution – which is alien to our constitution for good reasons – undermines the stability of popular representation and of the political system striven for by the Basic Law, and impairs the freedom of mandates of Members of the *Bundestag*. It paves the way to manipulation and opportunities for misuse, and must be reserved for an explicit textual amendment in the constitutional document. 198

Such broad latitude for decision for the Federal Chancellor also contradicts the previous case-law. It means de facto abandoning the substantive preconditions which the Federal Constitutional Court found in its landmark judgment of 16 February 1983 to be an unwritten element of Article 68.1 sentence 1 of the Basic Law (see BVerfGE 62, 1 (6th headnote)). The Court concluded from an interpretation of the genesis, system and teleology of the relevant constitutional provisions that a Federal Chancellor who is attempting to bring about the dissolution of the *Bundestag* may only endeavour to effect a vote of confidence if a political situation of instability exists between the 199

Federal Chancellor and the *Bundestag*. The precondition for this is that the political constellation of forces in the *Bundestag* must impair or paralyse the viability of the Chancellor in such a way that he is no longer able to sensibly pursue a policy relying on the constant confidence of the majority of Members of the *Bundestag*. How and on what basis however should the Federal President and the Constitutional Court be able to object to such an assessment if this is to be measured solely by the Chancellor's appraisal of the situation?

200 Insofar as the Senate majority refers to an allegedly "hidden minority situation" facing the Federal Chancellor, in which the political support of the parliamentary majority was given only "externally", this is based on an incorrect understanding of parliamentary confidence. In the system of parliamentary government, confidence means the willingness of Members of the *Bundestag* to support the person and the government programme of the Federal Chancellor in Parliament (see BVerfGE 62, 1 (37)). Support for the Chancellor means that the Member of the *Bundestag* stands behind the Chancellor and his projects where it matters, where decisions are taken on parliamentary projects, i.e. in the ballots in the German *Bundestag*. Whether the Member of the *Bundestag* also personally trusts the Chancellor, whether he or she follows him out of conviction or only reluctantly and with personal reservations, is irrelevant here. Dissent in content terms, even with the united action of a parliamentary group, belongs to the essence of inner-party democracy, and it cannot be pretended to be non-existent in a democratic mainstream party which must always take on board different social currents. It forms a part of the discursive system of parliamentary government, and certainly does not impair the viability of the Government as long as it remains ensured that the Government can build on a parliamentary majority in the ballots on its central reform plans. In order to be able to guarantee this joint action where necessary despite resistance within the party, the Basic Law has given the Chancellor the opportunity to move for a vote of confidence. However, the point of reference here always remains the voting conduct of the Members of the *Bundestag*. A further "subordination" or "forcing into line" with the Chancellor's ideas is not required, and is also not envisioned in the balanced system of the Basic Law with the figure of the freely acting Member of the *Bundestag*. Inner reservations or attitudes of the Members of the *Bundestag* are hence not important.

201 The vote of confidence is hence intended in systematic terms to ensure maintenance of the ability to govern. It is a tool and an expression of the parliamentary governmental system in which the fate of the Chancellor lies in the hands of the majority of Members of Parliament. Dissolution of the *Bundestag* after a failed vote of confidence is a consequence of the fact that a Chancellor who is in office no longer enjoys sufficient parliamentary support for his person or his government programme. It remedies a political situation of instability between the Federal Chancellor and the *Bundestag*. The Federal Chancellor is not to be expected to continue to govern with the constellation of forces at hand if his viability is impaired or paralysed in such a way that he is no longer able to sensibly pursue the policy he has chosen. However, it is

not the special difficulties of a task arising which must be decisive for this; rather, it is decisive whether the Federal Chancellor can presume that a long-term, stable parliamentary majority can no longer be brought into being (see BVerfGE 62, 1 (42-43)).

202 There were objective indications of this presumption in the situation found at the turn of 1982/83, emerging from the policy disagreements within the FDP parliamentary group as a consequence of the change of government that had been adopted, and which found their visible reflection in the resignations of Members of the *Bundestag*. The acid test in which the FDP found itself after the break-up of the social-liberal Coalition cannot be compared with today's circumstances in the German *Bundestag*. In view of the ice-thin ballots in the party's Federal Board at that time, the protests by whole *Land* associations, the open resistance of prominent function-bearers and the resignations of prominent party members – including in particular also three Members of the German *Bundestag* – it was possible for the Federal Chancellor to regard the parliamentary group as "unreliable". The Federal Constitutional Court hence reached the conclusion that it could be "regarded as ruled out that an attempt on the part of the Federal Chancellor to continue his government work regardless of this to the end of the electoral period would have been aided by the parliamentary group of the F.D.P." (BVerfGE 62, 1 (61)).

203 It is not at all possible to say anything similar with regard to the current situation. There were no resignations from the parliamentary groups of the parties supporting the Government in the course of the 15th legislative term. Members of the *Bundestag* to whom such an intention has been imputed in the media have all categorically rejected this. The Member of the *Bundestag* Schreiner, repeatedly named in the media as a candidate for resignation, is leading the party in the Saarland as front-runner into an electoral campaign which has explicitly committed itself to the consistent continuation of "Agenda 2010". The other critics of the reform policy pursued by the Chancellor within the party have also repeatedly assured their fundamental loyalty to the Government and their willingness to support the draft Bills to implement "Agenda 2010". In diametric contradistinction to the situation in December 1982, in which the then Federal Chancellor was confronted with the unmistakeable declaration of intent of the FDP members of the *Bundestag* not to continue to support the Government after 6 March 1983, today's Chancellor has a parliamentary majority which has assured him of its unrestricted future support. In the oral hearing, Member of the *Bundestag* Hoffmann went so far in this respect as to pointedly ask what else she could actually do in order to prove her confidence to the Chancellor.

204 No visible signs are hence recognisable that the Federal Chancellor could be paralysed in view of the constellation of forces in the *Bundestag*. Despite repeated enquiries by the Court, the authorised representative of the Federal Government also did not name any concrete indications of it in the oral hearing. That majorities cannot be guaranteed in advance with any certainty if one's lead is only slight is a simple matter of course, and has been the situation for many governments in the Federation and in the *Länder*. There is however no experience that there is an increase of dis-

senting conduct with close majorities. Rather, experience shows that the fact of every vote being potentially vital welds the parliamentary groups in question together because each member is aware that even the dissent of an individual can have far-reaching consequences. The same can also be said for the voting conduct in the 15th German *Bundestag*. The hypothetical presumption that viability might be impaired in future may hence change nothing as to the existing ability of the Government to function properly. This is also made clear in comparison with the situation in which Federal Chancellor Brandt found himself in the late summer of 1972. At that time, the Chancellor did not ask for a vote of confidence until the Government was no longer able to command a simple majority in the German *Bundestag*, and hence was not even able to adopt the draft budget for the current year.

3. The instrumentalisation of the vote of confidence in the manner that took place here also leads to a change in the political system. It weakens the position of the *Bundestag* to the disadvantage of quasi-plebiscitary elements. Since the Federal Chancellor can achieve no more in institutional terms than what he has at present, even in the event of a successful election, namely a majority of Members of the German *Bundestag*, the only goals remaining are those of obtaining legitimisation and strengthening the majority and its programme in content terms. Hence, the election is used as a plebiscite on the (reform) policy of the Federal Government. 205

Apart from the fact that plebiscites and ballots on individual matters called to strengthen the existing governing majority are alien to the Basic Law, this approach also impairs the representative function of the *Bundestag*. It is certainly, implicitly at any rate, based on the idea that the elected Members of the German *Bundestag* are not (any longer) suited to portray the will of the people or to represent them. In order to bring government policy back into contact with the people and to re-determine the political orientation, the democratic sovereign – in other words the people itself – would therefore have to be consulted directly. This is not compatible with the structure of representative democracy, as expressed by the Basic Law, in particular in Article 20.2 sentence 2, Article 29.2, Article 38.1 sentence 2 and Article 39.1. 206

In view of the significance of the coming reform measures and their controversial nature, the argument that the population should decide whether the government programme is still approved of by a majority of people in Germany is also not convincing. The Federal Government and the majority of Members of the *Bundestag* supporting it has a mandate for four years (Article 39 of the Basic Law). Within this period, it is obliged to determine the policy and shape circumstances. It bears responsibility for this and has to face the political consequences in the elections to the next *Bundestag*. The idea that incisive decisions are not covered by this and need a renewed acclamation via new elections is not compatible with the picture of representative democracy contained in the Basic Law. Rather, it is particularly a task of a viable government to make decisions also on questions which were not yet in the foreground at the time of the election. This also applies if the atmosphere on this in the public domain does not agree with the course taken by the Government – as was the case with the decision 207

to re-arm the Federal Republic of Germany. Ballots among the people on corresponding factual questions are alien to the Basic Law, and it does not provide for the indirect involvement of the people by means of new elections.

Moreover, the Federal Constitutional Court already answered the call for a fresh legitimisation in its judgment of 16 February 1983: “With regard to the maintenance of the democratic state based on the rule of law which the Basic Law constituted, it would be an irresponsible endeavour to devalue or undermine constitutional procedures by claiming that they required further legitimisation in addition. In accordance with the Basic Law, constitutional legality means at the same time democratic legitimacy. A different view affects the meaning of the fundamental democratic principle of free elections and of the representative free mandate of Members of the *Bundestag* within the meaning of Article 38.1 of the Basic Law” (BVerfGE 62, 1 (43)). The statements made by the Federal Constitutional Court in view of the constructive vote of no confidence (Article 67 of the Basic Law) apply particularly to the status of Members of the *Bundestag* and their mandates. 208

The opposite view moreover entails a risk that in future a call would be issued in many cases for renewed confirmation by the people, and hence for new elections. The political system however requires institutional stability particularly in times in which momentous decisions are to be taken. The guiding concept inherent in Article 68 of the Basic Law and the other provisions on the dissolution of the *Bundestag* is also in compliance with this. According to this, Parliament and the Government are to remain in their office and their function as long as possible in order to guarantee the viability of the Federal Republic of Germany (see on this dissenting opinion by Zeidler, BVerfGE 62, 64 (66)). The dissolution of the *Bundestag* in accordance with Article 68 of the Basic Law, despite the continued existence of a governable majority, hence reverses the statutory purpose of the system balanced by the Basic Law: Instead of getting, through dissolution of Parliament as an *ultima ratio*, from a situation of instability to stability by (hoped for) new majorities, there would be the risk, if the Government is stable, of reaching a situation of instability, in other words a situation which the Basic Law particularly wishes to avoid (see for instance already the dissenting opinion by Rinck, BVerfGE 62, 70 (74)). Finally, fundamental decisions which had to be dealt with have also been taken so far by Parliament itself, even in the period of office of the red-green Federal Government, which for instance dealt with the first deployment abroad of the Federal Armed Forces (*Bundeswehr*) despite controversial debates in the parliamentary sphere, without (new) confirmation by the electorate having been demanded. 209

On closer inspection, the dispute as to whether the vote of confidence requested by the Federal Chancellor complies with the constitutional requirements of Article 68.1 sentence 1 of the Basic Law can finally be traced back to the fundamental question: May a Federal Chancellor who has a stable majority in the *Bundestag* bring about an “unreal” vote of confidence with the aim of bringing about new elections if he concludes that his policy is no longer accepted by the majority of the population in the 210

country? Indeed, the Chancellor's dilemma is based not on the lack of a parliamentary majority, but on a series of electoral defeats in *Landtag* elections and in a European election, which in the general assessment were caused by the Government's policy being rejected by a large majority of the population. In a nutshell: Although the Federal Chancellor hence has a majority in the *Bundestag*, he fears that he may no longer have the majority of people in the country behind him.

Moreover, the Federal Chancellor himself never made a secret of the fact that with this approach he was particularly concerned with obtaining a fresh legitimisation from the people, and not with remedying a crisis situation in Parliament. He already made it explicitly clear in his television address on the evening of 22 May 2005 that the fundamental political situation for the continuation of his government work was called into question by the electoral defeats. He thus considered the unambiguous support of a majority of Germans to be necessary for the continuation of the reforms. This was not a matter of difficulties in Parliament or indeed of a lack of viability. Accordingly, the new election is also reasoned in the SPD's "election manifesto" of 4 July 2005 by the necessary direction decision having to be taken now and not in a year's time. 211

The question as to whether in this situation the path of Article 68 of the Basic Law may be taken must be answered with an unambiguous no. It is a matter for the Federal Chancellor to decide whether in this situation he holds onto the policy which he feels to be correct, and hence exposes himself to the risk of a further loss of popularity. If he considers himself unable to do so, he is at liberty to change the guiding lines of his policy or to resign from office. The dissolution of the *Bundestag*, by contrast, cannot be justified in this way. 212

Jentsch

Dissenting opinion of Judge Lübbe-Wolff

on the judgment of the Second Senate of 25 August 2005

– 2 BvE 4, 7/05 –

1. The vote of confidence, like the question asked before the wedding altar, is not a question of knowledge to which the person asked could respond as well as another, or indeed better. The Federal Chancellor who is requesting a vote of confidence asks not about knowledge, but about the will of Parliament and of the Members of the *Bundestag*, to whom the question is to be addressed in accordance with Article 68 of the Basic Law: their willingness to support him and his political programme with their future voting conduct. The vote of confidence can hence only be answered by Parliament itself. 213

The interpretation of Article 68 of the Basic Law, which the Federal Constitutional Court developed in 1983 and which it has confirmed today in essential aspects, instead has the consequence that the answering of this question has been put up for review by the Federal President, and the Federal Constitutional Court, and hence robbed of its meaning dependent on the addressee. In accordance with this interpretation, the German *Bundestag*, to which the vote of confidence is to be addressed in accordance with Article 68 of the Basic Law, only apparently remains its real addressee. The Members of the *Bundestag* may answer, but their answer need not, indeed may not, be taken at face value in this interpretation. If the motion of the Federal Chancellor to profess confidence in him does not obtain the majority provided for in Article 68.1 sentence 1 of the Basic Law, in other words if the motion has been rejected by the *Bundestag*, the Federal President, and in the event of a dispute the Federal Constitutional Court after him, is supposed to be entitled and obliged to examine whether a precondition of Article 68 of the Basic Law, derived from the purpose of Article 68 of the Basic Law – originally referred to as an “unwritten element” (see BVerfGE 62, 1 (37)) – applies, in accordance with which the *Bundestag* may only be dissolved if the Federal Chancellor *really* cannot be sure of the support of the majority of the *Bundestag*, and hence his ability to act is indeed impaired. The Federal President and the Federal Constitutional Court are therefore supposed to mistrust the response of Parliament and are supposed to decide if necessary that the lack of confidence professed by Parliament in fact does not exist at all. 214

2. Both the judgment of 1983 and today’s ruling obscure this meaning of the selected interpretation by focusing not on the *Bundestag* and its response as an object of mistrust, but on the Federal Chancellor and his question. Already the Federal Chancellor, according to the ruling of 1983, may only *request* a vote of confidence if the constellation of forces in the *Bundestag* no longer facilitates a policy borne by the constant confidence of the majority (BVerfGE 62, 1 (49-50)). The present ruling follows this approach. It presumes that the very *motion* for a vote of confidence, certainly if it aims for dissolution, is “only justified exceptionally” if the viability of the Federal Government has been lost, which is said to apply in the case of parliamentary support 215

which is “doubtful” or no longer “reliable”. In terms of the words, the review as to whether the procedure was constitutional is thus concentrated on the question posed by the Chancellor. In fact, the allegation of only having unconstitutionally pretended that an “unstable situation” existed in which there was a lack of confidence of necessity also inevitably concerns Parliament; the review of whether this is the case also places the decision of Parliament under scrutiny.

The applicants circumnavigate this insight with the presumption that the constitutional violation, which is said to lie in a vote of confidence unsuitably requested by the Federal Chancellor, certainly continues to have an impact on the following stages of the procedure in accordance with Article 68 of the Basic Law (see also already BVerfGE 62, 1 (36)). In other words: The Chancellor determines; everything depends on his question. The *Bundestag* hence appears as a will-less appendage, instrument and victim of the Federal Chancellor, forcibly infected by his errors and unable to comply with the constitution where he fails to respect it. There is no need for further reasoning that this presentation does not do justice to the constitutionally envisioned role of the *Bundestag*. If there is a fall from grace in the drama on the vote of confidence, the *Bundestag* is the one who bit into the apple. The Senate does not deny this in substantive terms. It refers to the legal freedom of the *Bundestag* to decide in answering the motion for a vote of confidence, but does not draw the necessary conclusion from it: 216

The interpretation of Article 68 of the Basic Law which places the Federal President and the Federal Constitutional Court in a situation in which they can review a vote of confidence requested by the Federal Chancellor as to its situational justification, and may have to judge it as unconstitutional, is tantamount to the entitlement and obligation to also qualify as incorrect, under the same circumstances, the response of the *Bundestag*, and hence the exercise of the mandate of Members of the *Bundestag*, since one appraisal encompasses the other. If the Federal Chancellor wrongly requested the vote of confidence, namely in a situation where confidence in fact existed, the *Bundestag* cannot have rightly denied it. The role allocated by the Federal Constitutional Court through this interpretation to the Federal President and to itself is miscast. The fact that the envisioned players cannot and may not exercise it lies in the nature of the vote of confidence as a question not aimed at obtaining a declaration of knowledge describing reality, but a reality-forming (performative) expression of intent and in the nature of the free mandate of Members of the *Bundestag* (Article 38.1 of the Basic Law). Performative expressions can as a matter of principle not be sensibly corrected by descriptive ones. 217

The lack of sense of such an endeavour is also shown using a characteristic of the vote of confidence which is linked to its performative goal. As a question aimed at obtaining Parliament’s profession of its will, and the concomitant political self-committing effect, the vote of confidence is, appropriately, undetermined. The Members of the *Bundestag* should not – and cannot as to Article 38.1 of the Basic Law – give any legally binding promises with regard to their voting conduct on concrete fu- 218

ture political projects of the Chancellor. Also an attempt by the Federal Chancellor at least to obtain from them legally unbinding, but concrete, detailed and project-related assurances for future ballots is provided for neither in Article 68 of the Basic Law, nor in Article 81.1 sentence 2 of the Basic Law. The consensus-creating potential of the vote of confidence lies in the fact that the limited political self-commitment of Parliament which was entered into under the pressure of a threat to dissolve the *Bundestag* with a profession of confidence the content of which is largely undetermined can serve to overcome conflicts which lie in the details of what is to be decided in the future. *If* the vote of confidence has a stabilising impact over and above the respective individual ballot, its impact hence lies particularly in its undeterminedness. Any external examination of the question of whether the Federal Chancellor can count on Parliament following him for his policy, by contrast, would be contingent on an initial determination of what policy it is all about. For the purpose of the review which the Senate requires of the Federal President and of itself, if it were to be taken seriously, the Federal Chancellor would therefore have to be urged to give precise details of the political programme for which he claims not to be able to expect sufficient parliamentary support, before an attempt is made to ascertain whether his allegation is correct. The demand to be precise would encroach on the competence of the Chancellor to shape his policy since the decision on what policy is pursued, revealed and provided in precise detail at what point in time is in itself an important element of policy. Where, moreover, an attempt at verification or falsification of the anticipation of a lack of support alleged by the Federal Chancellor leads to is made clear in the proceedings at hand: It leads to a situation in which questions relating to the will of Parliament are not being decided upon by a parliamentary ballot, but outside Parliament using contradictory statements and assessments by different players, declarations by the Federal Chancellor, declarations by individual Members of the *Bundestag*, “published indications” in press articles, presumptions on the concession or imposition character of political decisions that have been taken and speculations on the possible impact of past events on the future conduct of Members of the *Bundestag*.

A legal review programme which instructs the bodies allegedly obliged to carry out a review to determine in this manner under cover of constitutional review the true policy of other constitutional bodies has been rejected as unsuitable in a large part of the legal literature dealing in any detail with the interpretation of Article 68 of the Basic Law, already in connection with the vote of confidence of Federal Chancellor Kohl and the decision handed down on it by the Federal Constitutional Court (from the discussion at the time see in particular Seuffert, *Archiv des öffentlichen Rechts – AöR* 108 (1983), pp. 403 et seq., Geiger, *Jahrbuch des öffentlichen Rechts der Gegenwart – JöR* 33 (1984), pp. 41 et seq., and Ladeur, *Recht und Politik – RuP* 1984, pp. 68 et seq.; see also Hermes, in: Dreier, *GG*, vol. 2, 1998, *Art. 68*, marginal no. 15; Badura, *Thüringer Verwaltungsblätter* 1994, pp. 169 (174); Püttner, *Neue Juristische Wochenschrift* 1983, pp. 15 (16); Grote, *Demokratie und Recht – DuR* 1983, pp. 26 (29); Liesegang, *Neue Juristische Wochenschrift* 1983, pp. 147 (149)). 219

3. The lack of suitability of the review programme that has been established cannot be escaped by the fact that latitude for assessment is allotted to the Federal Chancellor for requesting a vote of confidence which is not to be regarded as having been overstepped unless a derogating appraisal is clearly preferable. If anything of the allotted control function is left, even though this latitude for assessment exists, it does not remedy the problem which it is intended to solve. If nothing is left of the control function due to the latitude for assessment, nothing even remains of the unwritten element to which the latitude for assessment relates which could provide an insight into whether the element is established at all. In factual terms, it then no longer works as a criterion for decision-making that would earn the name “element”, but only as a starting point for stage-managing of control in which the Federal Constitutional Court has allotted to itself a role which merely appears to be significant. 220

This is how things stand. The power and duty to establish the real will of Parliament, which the Court has allotted to the Federal President and to itself by setting up an unwritten element of Article 68.1 sentence 1 of the Basic Law, is restricted, through the latitude for assessment that has been granted, to cases in which the Federal Chancellor *clearly wrongly* presumes insufficiently reliable willingness within Parliament to provide support. The significance of the element that has been established as a measure of control is hence reduced so much that the Federal Constitutional Court can practically no longer find itself in a situation in which it has to declare as incorrect the assessment of the Federal Chancellor (more precisely: the result of the President’s review of this assessment, and hence indirectly also this assessment itself, as well as the outcome of the ballot in the *Bundestag*). 221

The decision now taken makes this even clearer than the previous decision on dissolution of the *Bundestag* after the vote of confidence of Federal Chancellor Kohl by explicitly also declaring that it is sufficient to invoke forms of the conflict which are “concealed” and “by their nature” not describable in court proceedings – in short: on a “hidden” minority situation – without further requirements as to disclosure. An element the fulfilment of which can be sufficiently demonstrated by one being able to refer to something that is hidden and concealed and by its nature not describable before a court leads only an imaginary existence in legal terms. 222

The legal standards hence appear to have been relaxed in comparison to those of the preceding decision. In fact, however, they were already designed to be porous in the judgment of 1983. The fact that the Federal Chancellor’s latitude for assessment did not end until the threshold of the *unambiguous* preferability of a contrary assessment was reached can already be found in this judgment (see BVerfGE 62, 1 (51)). Already by these means, the Court has made itself unable to play the reviewer role which it had allotted itself by establishing an unwritten substantive element-related precondition of Article 68 of the Basic Law. What should ever enable the Federal President and the Federal Constitutional Court to establish that the assessment made by a Federal Chancellor that he could no longer be sure of constant parliamentary support, and hence of his own viability, was *unambiguously incorrect*, and thus 223

that the reliable willingness to support the *Bundestag* which, in the view of the Chancellor, was lacking was hence *unambiguously present?*

In accordance with the assessment made by the applicants, the parliamentary groups within the Coalition, in the words used by the applicant re I., stand behind the Federal Chancellor like a German oak. According to the Federal Chancellor's assessment, this in particular is however not the case. The dissent hence relates to the question of whether or not the "real" confidence situation in Parliament corresponds to the ballot result of 1 July 2005. That the question of who is right in this instance is not amenable to unambiguous proof here is not due to the fact that confidentiality interests are to be respected or political relationships spared in this instance, but that the question does not have a set of facts that are susceptible to ascertainment at all (re contradictions in the decision of 1983 in this point see already Seuffert, *Archiv des öffentlichen Rechts* 108 (1983), pp. 403 (406)). 224

Mere stage-managing of the lack of a reliable *Bundestag* majority cannot hence be effectively countered by invoking the significance attached by the Federal Constitutional Court to Article 68 of the Basic Law. The very interpretation that according to Article 68 of the Basic Law, it is not sufficient that the motion of the Federal Chancellor does not find a Chancellor majority threatens on the contrary to cause such stage-managing (see Grote, *Demokratie und Recht* 1983, pp. 26 (27-28)) and systematically creates in a factual area in which by nature only presumptions may be made the *impression* of unconstitutional stage-managing and spineless approval of this by other constitutional bodies. It is likely to be more damaging to the stability interests invoked by the Court for this interpretation than any early elections. Attempts to counter this by imposing more stringent requirements as to the proof of any loss of confidence (see for instance Gussek, *Neue Juristische Wochenschrift* 1983, pp. 721 (724)) cannot change anything as to this sensitivity to stage-managing and suspicion of stage-managing; they correspond more to a proposal to make the director's instructions more complicated. 225

Since the intentions of the Chancellor to bring about new elections do not provide information on whether the current majority in Parliament is willing to support the policy of the Chancellor or not, the even more restrictive presumption that a vote of confidence is also permissible and "real" only if it aimed to bring about confirmation, is invalid. Hence the Court rightly rejected this view earlier already (see BVerfGE 62, 1 (38); see also Herzog, in: Maunz/Dürig, *GG*, *Art. 68*, marginal no. 24; Klein, *Zeitschrift für Parlamentsfragen – ZParl* 1983, pp. 402 (404-405); Schneider**,** *Juristenzeitung – JZ* 1973, pp. 652 (655)). 226

4. There is nothing to prevent the Federal Constitutional Court from rejecting the unexecutable control function which falls to it with the addition of an unwritten substantive element-related precondition to Article 68 of the Basic Law. None of the arguments which have been listed for this interpretation are absolute. 227

Article 68.1 sentence 1 of the Basic Law links the possibility to dissolve the *Bun-* 228

destag to the fact that a *motion of the Federal Chancellor for a vote of confidence in him is not carried by the majority of Members of the Bundestag*. The wording of this provision contains nothing to support the presumption that the empowerment of the Federal President to dissolve the *Bundestag* depends not only on the ballot of Parliament on the Federal Chancellor's motion, but also on additional preconditions.

The Federal Constitutional Court already found correctly in 1983 that the wording of Article 68 of the Basic Law is not revealing in this sense (see BVerfGE 62, 1 (36, 38); for the prevailing opinion in the legal literature see Epping, in: von Mangoldt/Klein/Starck, *GG*, vol. 2, 4th ed. 2000, *Art. 68*, marginal no. 13-14; Oldiges, in: Sachs, *GG*, 3rd ed. 2003, *Art. 68*, marginal no. 16; Hermes, in: Dreier, *GG*, vol. 2, 1998, *Art. 68*, marginal no. 10; Püttner, *Neue Juristische Wochenschrift* 1983, pp. 15 (16); Liesegang, *Neue Juristische Wochenschrift* 1983, pp. 147 (148); Geiger, *Jahrbuch des öffentlichen Rechts der Gegenwart* 33 (1984), pp. 41 (49, 51); other view taken by Rinck, dissenting opinion re BVerfGE 62, 1, ibid. pp. 70 (71); Mager, in: von Münch/Kunig, *GG*, vol. 2, 5th ed. 2001, *Art. 68*, marginal no. 15; Delbrück/Wolfrum, *Juristische Schulung – JuS* 1983, pp. 758 (761); Hochrathner, *Anwendungsbereich und Grenzen des Parlamentsauflösungsrechts nach dem Bonner Grundgesetz*, 1985, pp. 61, 65-66). 229

The wording of Article 68 of the Basic Law does not state that the Federal Chancellor may move for a vote of confidence only with the aim in mind of gaining confidence. It does not follow from the definition of "motion" that motions may be lodged solely with the goal of obtaining a decision in line with the motion. There is also no such general legal or constitutional principle. It cannot thus be concluded from the fact that Article 68 of the Basic Law uses the word "confidence" that the Federal Chancellor may only lodge a motion to profess confidence in him, or that the motion lodged only *constitutes* a request for profession of confidence, if no intentions stand behind it aiming at bringing about new elections. Such an interpretation would also involve a risk of only hiding such intentions. 230

The wording of Article 68 of the Basic Law accordingly, to say it more clearly, speaks *against* the interpretation selected by the Federal Constitutional Court since it does not contain the element-related precondition added by the Court by means of interpretation. 231

5. Furthermore, the systematic, historic and teleological reasons with which the enrichment of Article 68 of the Basic Law to include this element-related precondition was justified in the case-law and the legal literature are unconvincing. 232

The system of the Basic Law provides no indication of a restrictive interpretation of Article 68 of the Basic Law. The finding frequently put forward as an element of the reasoning, namely that the Basic Law provides for the possibility of the dissolution of Parliament only for cases covered by Article 63.4 sentence 3 of the Basic Law and of Article 68 of the Basic Law, is correct, but is not suitable as an argument in favour of a specific interpretation of these provisions. The further finding that the Basic Law in 233

these cases only opens the path to dissolution “under strict procedural and substantive-law preconditions” (BVerfGE 62, 1 (41)), has as its precondition what would have to be substantiated.

The same applies to arguments which are based on the duration of the electoral period provided for in Article 39 of the Basic Law. In accordance with Article 39.1 sentence 1 of the Basic Law, the *Bundestag* is elected for four years, but “save the following provisions”, which relate *inter alia* to the case of dissolution of the *Bundestag*. This reveals nothing for the interpretation of the provisions governing the preconditions for dissolution of the *Bundestag* (see also Geiger, *Jahrbuch des öffentlichen Rechts der Gegenwart* 33 (1984), pp. 41 (46)). The guiding idea of the restrictive interpretation of Article 68 of the Basic Law, namely that the Basic Law seeks to institutionalise for the four-year duration of the legislative term a type of coercion to see the term out, and allows Article 68 of the Basic Law to be broken only in the case of a crisis that is otherwise not manageable (fundamentally von Mangoldt, *Die öffentliche Verwaltung* 1950, pp. 697 (699 & passim)), is also astonishing because a *Bundestag* majority determined to bring about new elections in cooperation with the Federal Chancellor cannot be prevented from bringing about a right of dissolution of the Federal President by means of the resignation of the Chancellor (Article 63 of the Basic Law) (see also Heun, *Archiv des öffentlichen Rechts* 109 (1984), pp. 13 (24-25); Schneider, *Neue Juristische Wochenschrift* 1983, p. 1529). The attempt, which is consistent from the point of view of the restrictive interpretation, to close this exit also (Schenke**,** *Neue Juristische Wochenschrift* 1982, pp. 2521 (2526-2527)) suffers in an even more evident manner than the restrictive interpretation of Article 68 of the Basic Law from the fact that this legal view is merely a paper tiger because it does not take account of the conditions for its implementability (see also Klein, *Zeitschrift für Parlamentsfragen* 1983, pp. 402 (413)). 234

That the Basic Law, in agreement with statements from the drafting process, does not contain a right of Parliament to self-dissolution, and reform efforts in this direction have not yet asserted themselves (see Rinck, dissenting opinion re BVerfGE 62, 1, ibid. pp. 70 (80-81); from the legal literature instead of many Schenke, *Neue Juristische Wochenschrift* 1982, pp. 2521 (2523)), is also not an argument in favour of the necessity to supplement Article 68 of the Basic Law by element-related preconditions which were not provided for by the parliament adopting the Basic Law (see Schröder, *Juristenzeitung* 1982, pp. 786 (788)). There can be no question of a right of Parliament to dissolve itself, as provided for instance by the Austrian Constitution (Article 29.2 B-VG) and all German *Land* Constitutions, if the alleged unwritten element-related precondition of Article 68 of the Basic Law is renounced since in accordance with this provision the dissolution of Parliament does not depend solely on Parliament itself. Without the Federal Chancellor asking for a vote of confidence and, if Parliament answers this negatively, without a decision by the Federal President, which is left to his discretion, dissolution does not take place. The fact that the Basic Law grants discretion to the Federal President for his decision on dissolution speaks on 235

the contrary against the presumption that his freedom of discretion does not apply until further preconditions are met in addition to those explicitly set out in Article 68 of the Basic Law. Were the path to be free for dissolution of the *Bundestag* after a vote of confidence which did not obtain a Chancellor majority only under the precondition to be reviewed by the Federal President, and ultimately also by the Federal Constitutional Court, that the ballot outcome is based on a crisis situation which can no longer be terminated other than by new elections, it would be incomprehensible that the Federal President should be granted discretion to *not* permit new elections in this situation.

6. The genesis of Article 68 of the Basic Law provides confirmation of restrictive interpretations only if one works to eliminate well-known indications to the contrary by interpretation and to neglect less well-known ones altogether. 236

In contradistinction to a common interpretation aimed at averting “plebiscitary” elements (fundamentally von Mangoldt, *Die öffentliche Verwaltung* 1950, pp. 697 (698); see also Hopfauf, *Archiv des öffentlichen Rechts* 108 (1983), pp. 391 (393 et seq.)), the rejection encountered in the Parliamentary Council by the proposal of the Editorial Committee to grant the possibility of dissolution of the *Bundestag* also in response to a parliamentary vote of no confidence does not document the intention of keeping the right to dissolve the *Bundestag* within as narrow limits as possible. The intention behind this was, rather, to permit the parliamentary vote of no confidence, in contradistinction to the practice under the Weimar Constitution (Article 54 of the Weimar Constitution (*Weimarer Reichsverfassung – WRV*)) exclusively as a constructive one (Article 67 of the Basic Law) in order hence to exclude the unproductively delegitimising impact of professions of no confidence which are devoid of legal consequences (see the discussion carried on in the 4th session of the Main Committee (*Hauptausschuss*), in: Parliamentary Council, *Verhandlungen des Hauptausschusses*, Bonn 1948/49, pp. 41 (44); on the history of non-constructive votes of no confidence in the Weimar Republic see Brandt*, Die Bedeutung parlamentarischer Vertrauensregelungen*, 1981, pp. 30 et seq.). 237

The finding supported by several statements of Members of the *Bundestag*, namely that in drafting Article 68 of the Basic Law the Parliamentary Council had had in mind above all the constellation of a *minority chancellorship* (see BVerfGE 62, 1 (46); Hopfauf, loc. cit., pp. 391 (393 et seq.); Schenke, *Neue Juristische Wochenschrift* 1982, pp. 2521 (2523)) is not helpful for an interpretation. It is unclear what was understood in these statements by a minority government or a minority Chancellor. Were the term to be meant in technical terms, in other words, were it to refer to the case of an appointed Chancellor not elected by the majority of the *Bundestag* (Article 63.4 sentence 2 of the Basic Law) (such as evidently BVerfGE 62, 1 (46)), the idea that Article 68 of the Basic Law was to cover this specific case only was hence evidently not entailed by the repeated emphasis of this special case (see also Federal Constitutional Court – BVerfG, loc. cit.). There was no disputing the fact that Article 68 of the Basic Law *certainly* in very general terms was to provide a way out in the event that the 238

Chancellor did not have the “majority behind him”, whether from the outset or only on the basis of subsequent developments (see the statement of the Member of the *Bundestag* Dr. Dehler in the 25th session of the Organisation Committee, in: *Der Parlamentarische Rat 1948 - 1949*, *Akten und Protokolle*, vol. 13, sub-vol. 2, 2002, p. 868). Even if one presumes that the terms “minority Chancellor” and “minority government” were used non-technically in the Parliamentary Council in the sense that they were generally referring to this latter case, the repeated emphasis of this case nonetheless does not provide information on the correct understanding of Article 68 of the Basic Law. This shows only that this case was the conceptual occasion for the creation of the provision. The decisive question as to whether it was held to be desirable, possible and sensible to restrict the use of this provision in a legally controllable manner to the conceptual causational case is hence not answered. Not only the wording of Article 68 of the Basic Law speaks against this, which in this point, had it been desired, could have been worded more clearly without causing any problems. Also a number of discussion contributions in the deliberations of the Parliamentary Council give information to the contrary.

239 The Member of the *Bundestag* Dr. Katz – later Vice President of the Federal Constitutional Court – declared in the 4th session of the Main Committee that Article 68 of the Basic Law (Article 90a of the draft version at that time) was “a possibility to afford to the Federal Government a right of dissolution in the event that the Federal Government finds itself in a serious political conflict, or in the event that the Federal Government desires to have an important political question decided on by the people” (in: Parliamentary Council, *Verhandlungen des Hauptausschusses*, Bonn 1948/49, pp. 41 (44)). In an abundantly clear manner, and uncontradicted, the desire of the Federal Government to have a decision taken by the people was *alternatively* also named here as a possible occasion for the vote of confidence in addition to the case of a serious political conflict. This statement was not made *en passant* in an unimportant place; it served to explain the draft of Article 90a of the Basic Law, which *Katz* had just submitted to the committee in the name of his parliamentary group, which the committee then accepted with 16:2 votes, and which became law as Article 68 of the Basic Law with no factually relevant amendment. The statement made by the same Member of the *Bundestag* in the 33rd session of the Main Committee that “The purpose of Article 90a” was “to give the Government the opportunity for new elections if it considers them to be necessary” remained equally uncontradicted (loc. cit., pp. 403 (415)) – a clear indication that there was by no means any thought of unwritten substantive preconditions by means of which the Federal President or indeed the Federal Constitutional Court would have to review the “opinion” of the Federal Chancellor.

240 These two unambiguous statements have been opposed in the legal literature by the repeated reference of Members of the *Bundestag* to the situation of the minority Chancellor – already discussed and also mentioned elsewhere by *Katz* himself. This was what the conclusion was based upon that also the quoted statements referred only to the case of a minority Chancellor, regardless of their wording (see above all

the detailed survey of the genesis in Hopfauf, *Archiv des öffentlichen Rechts* 108 (1983), pp. 391 (393 et seq., 398); BVerfGE 62, 1 (46) leaving it open). That one had to take them literally, and that for the interpretation of Article 68 of the Basic Law, one had to take them seriously, was also considered improbable with the argument that Article 68 of the Basic Law would then become a plebiscitary element in the Basic Law, which was otherwise deliberately conceived to act on the basis of representation (Hopfauf, loc. cit., pp. 391 (400); see also von Mangoldt, *Die öffentliche Verwaltung* 1950, pp. 697 et seq.; on the use of the word "plebiscitary" in connection with Article 68 of the Basic Law see Zeh, *Zeitschrift für Parlamentsfragen* 1983, pp. 119 (125)). A further remark which has been neglected in the legal discussion of Article 68 of the Basic Law however shows that that *Katz* certainly knew what he was talking about. In the deliberation of the Main Committee on the introduction of referenda, he spoke against their necessity amongst other things particularly by indicating possibilities which were already offered by Article 68 of the Basic Law: "Referenda are not an indispensable component of democracy. The electorate elects every few years, every four years and if prior dissolution comes about, then even sooner. If important questions were to be contentious, the dissolution of the *Bundestag* is brought about" (minutes of the 22nd session, in: Parliamentary Council, loc. cit., pp. 255 (264); see also Niclauß, *Aus Politik und Zeitgeschichte – APuZ* 1992, pp. 3 (14)).

Accordingly, and in contradistinction to the view of the Senate, the restrictive interpretation of Article 68 of the Basic Law also finds no basis in the genesis of the Basic Law. 241

7. As the Senate rightly finds, Article 68 of the Basic Law is an element of a system of provisions orientated towards stability, for the conception of which invocation of the Weimar experience played a major role. It is however not even certain that particularly the control facade which the Federal Constitutional Court establishes with an interpretation of Article 68 of the Basic Law that is susceptible to stage-managing and suspicion of stage-managing serves the purpose of stabilisation if one considers that stability is best guaranteed by elections taking place as infrequently as possible. 242

8. If the law establishes demands against the circumvention or apparent or stage-managed fulfilment of which it has nothing to offer, it does not promote good order, but simulation or even the very creation of what is to be avoided. It is better to blame the mistaken legal conditions for the impression of “unfairness” which practice may give rise to in such legal circumstances, and for the mistrust which of necessity emerges against the institutions and the ordering force of law, than those who have to act under these conditions. The mistaken legal conditions are the only aspect which can be changed here with prospects of success. The substantive element-related precondition allegedly dictated by the purpose of Article 68.1 sentence 1 of the Basic Law, which makes external parties a judge of the existence of political confidence in Parliament, is a mistaken legal condition. For the above reasons, I believe that it has no basis in the constitution. 243

Lübbe-Wolff

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