Vote of Confidence Procedure and "Gesetzgebungsnotstand":
Two Tooth- and Clawless German Tigers
of Governmental Agenda Control

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1. Introduction

The aim of this paper is to analyse some strange German particularities of two devices crucial to any rational choice account of governmental control of the legislative voting agenda. It may be tempting to take the wording of three articles of the German Constitution at face value and interpret these articles as manifestation of a rational choice logic incorporated into the Constitution from the outset in 1949. The German Constitution, called Grundgesetz (Basic Law), explicitly makes provisions for vote of confidence procedure (Article 68 of Constitution), caters for the possibility of minority government (Articles 63.4 and 81.1 of Constitution) and armours such a minority government with last-offer authority (Article 81.2 of Constitution). It would be nice to think of a renewed parliamentary government rising from the ruins of Nazi dictatorship very early on adopting the clarity of rational choice agenda setting rules.

It is the purpose of this paper, firstly, to show that such a rational choice interpretation of the wording of the three articles is utterly alien to the institutional design pursued by the framers of the constitution and that, secondly, what counts even more, vote of confidence procedure and last-offer authority under the state of Gesetzgebungsnotstand are nested into a sequence of a set of additional rules that work against a rational choice logic of parliamentary behaviour. It shouldn’t be a surprise, therefore, that the last offer privilege according to Article 81.2 has never ever been invoked in the 55 year history of the Federal Republic and that the vote of confidence procedure has only been used once, and quite recently in 2001, according to the model laid down by Huber (1996).

This first ever use of the vote of confidence procedure in a logic laid down by rational choice models may, thus, be labelled a belated birth of rational choice in the German Bundestag. To be sure, a vote of confidence was asked by German Chancellors in three other instances before 2001. But this paper will demonstrate that in two of these cases it had nothing to do with and in one case was only faintly related to a governmental up-or-down proposal over policy.

This paper is divided into five parts. The first part compares the German confidence vote procedure with Huber’s model to show how the German version of this standard rational choice procedure exhibits peculiarities making it difficult to be used as an instrument for governmental control of the legislative agenda.

The second part scrutinizes the governmental last-offer privilege of a German minority government to show how misleading and erroneous it would be to interpret this German rule as part and parcel of a budding rational choice model. On the contrary, reconstructing German minority government at central state level as envisaged by the Basic Law (Grundgesetz) in terms of Tsebelis’ veto players framework it turns out last offer authority to rest on preconditions alien to rational choice and to produce if ever called counterproductive results.

Part three briefly describes the strange and deviating ways in which the confidence vote procedure was employed twice not to enact contested government policy as envisaged by the rational choice model but as a trick, subsequently being criticised by the constitutional court, for bypassing the constitution. Pretending to have no confidence by the supporters of the government was used as a trick to achieve dissolution of the Bundestag and call for new elections during a legislative term in spite of this definitely being ruled out by the constitution.
Part four pays attention to the question whether or not the use of the confidence vote procedure by Chancellor Helmut Schmidt in 1982 did at least implicitly link legislative enactment of disputed policy to the government’s staying in office even if he did not explicitly link such a policy question to his request of a confidence vote.

Part five proceeds to solve the puzzle why Chancellor Schröder at last invoked the vote of confidence procedure in the rational choice spirit after it had been laying unused in the constitution for half a century.

2. Two toothless tigers of agenda control in the German Constitution

2.1. The vote of confidence

The most widely discussed models about the vote of confidence are Huber (1996) and Diermeier/Feddersen (1998). Hubers’ basic idea is that the vote of confidence linked to a certain policy can be used as an agenda-setting tool by the Prime Minister. With this instrument the Prime Minister can threaten possibly defecting members of his majority with dissolution of parliament and thus a possible electoral defeat leading to the loss of their seats. So he is able to connect the members’ policy considerations with re-election aims. The basic utility function of the actors is thus the proposed policy in relation to the Status Quo and the electoral costs a member or the Prime Minister is faced with. Those electoral costs also include the position-taking incentive by members of parliament (Huber 1996: 270, 277) to distinguish themselves from a policy.

Three structural features are important using the vote of confidence: (1) Unilateral introduction through the Prime Minister, (2) proposition of a policy and (3) a simple majority needed to win the vote. Assuming the Status Quo might be changed by the Prime Minister, various intersections of the policy preferences of the involved actors might lead to different outcomes:

(1) an area where the majority accepts unwanted policies to avoid censuring the Prime Minister
(2) an area where the Prime Minister accepts his majority's wishes to avoid the electoral costs using the vote of confidence
(3) an area where the majority proposes a new policy rather than risking a vote of confidence.

The majority only has the possibility to propose a new policy which avoids a vote of confidence, if area 2 and 3 overlap. Otherwise they only can accept a point in area 1 or vote the Prime Minister out of office. What might also play a role in Huber's model are the position-taking incentives of individual members in combination with the heterogeneity of the majority, the salience of an issue and the censure costs of the majority.

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1 His model proceeds in four steps: Firstly, a cabinet minister proposes a policy. This policy can secondly either be accepted by the majority or rejected. In the latter case the majority proposes a refined policy which is either trying to avoid a vote of confidence or not. This refined policy can thirdly either be accepted or rejected by the Prime Minister who can then decide whether to use a vote of confidence to push his policy through. If he uses the vote of confidence, his majority has to decide in the fourth step to accept this policy or vote the Prime Minister out of office to avoid this unwanted policy (Huber 1996: 273).
2 In Huber's formal model the censure costs of the Prime Minister, the dimensions of the policy space and the original proposal of the cabinet minister do not play a role.
Diermeier and Feddersen (1998) add a time-dynamic discount of future policies to this model for coalition governments and argue that coalition partners have to trade off between the possibilities to vote an unwanted bill down and all other policies a government could agree on in its remaining future. Hence, the longer this future is in the perception of the partners, the less likely a vote of confidence will be lost. In other words: a coalition running high in the polls and having a several years in power left would spoil future policy gains by voting the government down on one issue.

What are the crucial differences of these general models to the German case? And as there are crucial differences indeed, which impact do they have on the mechanisms?

There are two main differences distinguishing the German case from the general models. The first one concerns the voting rule, the second one the dissolution of parliament.

(1) Voting rule

The Huber model relies on the assumption that a vote of confidence is decided upon by the simple majority of those voting (i.e. plurality). But we find three different voting rules in European countries, each of them has different effects on the likelihood of the Prime Minister to win a vote of confidence and the point he is able to choose ceteris paribus. The three voting rules are:

(1) The simple majority of those voting must support the government (e.g. United Kingdom)
(2) The absolute majority of those voting must support the government (e.g. Spain)
(3) The government wins unless an absolute majority of the chambers members votes it down (e.g. France).

Huber states that Germany like France V is in the third category (1996: 271). This is not true. According to Article 68 of the constitution the Chancellor must win the votes of the majority of the members of the Bundestag, the so called *Kanzlermehrheit*, to survive a vote of confidence. Thus, like Spain, Germany is in the second category needing an absolute majority.

The difference of these voting rules lies in the way abstentions are counted and work in favour or to the detriment of the Prime Minister. In the second category abstentions in the governmental coalition work against the government, oppositional abstentions have no effects. In the third category, abstentions on both sides work in favour of the government. In the first category the effect of abstentions is dependent on number of governmental abstentions versus abstentions on the opposition side. This leads to the conclusion that the governments in category 3 have the highest incentive to use a vote of confidence and the governments in category 2 have the lowest.

Do these voting rules make any difference on the policy a Prime Minister chooses for the confidence vote? The aim of the spatial model below is to illustrate that apart from the size of

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3 The chancellor's vote of confidence only carries with an absolute majority of the members of the Bundestag, but the policy is adopted with simple majority. If the confidence vote is linked to a policy, the members are only allowed to vote simultaneously yes or no for the confidence vote and the policy (Herzog 2002: 16, Mager 2001: 1170). Thus, in Germany, three outcomes are possible: the Chancellors both wins the confidence and the policy, both looses the vote and the policy and looses the confidence but wins the policy. The fourth theoretical outcome of loosing the policy and winning the confidence as in France IV is not possible because members can cast only one vote on both.
the majority, the point a Prime Minister can choose to survive a vote of confidence is also different.  

Graph 1: Vote of Confidence and the effects of different voting rules

The graph shows six members of parliament, a Prime Minister (pm), three further government ministers (g1, g2, g3) and two opposition leaders (o1, o2). We can see the indifference curves of all actors passing through the Status Quo (sq). There is an intersection of government actors where pm as agenda-setter could choose a point to change sq without a vote of confidence. If he wants to pass a proposal which is closer to his ideal point, he needs to use a vote of confidence. A vote of confidence forces the members of his majority (g1, g2, g3) to accept a lower utility depicted as broken lines. The same is true for the opposition parties but vice versa. Their utility functions shrink. While they might have supported the government without a vote of confidence, they will not when the policy is linked to a vote of confidence.

What is the outcome under different voting rules? Consider following two examples:

Example 1: g1, g2, g3 and pm are voting for the government, o1 against it and o2 abstains.

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4 We do not discuss a situation where the majority of the assembly will be able to propose a point where the Prime Minister is willing to accept their proposal because his electoral costs are higher than his policy gains when using a vote of confidence. The difference is excellently shown by Huber (1996: 276).

5 We follow the standard conventions of spatial models here which are also applied by Huber (1996) and Heller (2001). They are that actors have ideal points, equidistant preference functions and assess the possibility for change in regard of the status quo.

6 G1 does not need to accept a lower utility here as the ideal point of pm makes it better of anyway.
Under all three voting rules, the Governments will win the vote of confidence. To survive the vote, the British Government needs a 3/5, the French a 3/6 and the German a 4/6 majority. The result in the British case is a 4/5 majority, in the French case a 4/6 majority and in the German case equally a 4/6 majority. So, the German government only gets the minimum number of votes required to survive.

The outcome of the policy is very different as well. A British Prime Minister will choose point vcf1 which is closest to him in the intersection of pm, g1, and g2. G3’s vote is irrelevant here. A French Premier playing a safe game will also choose vcf1. A Premier playing hard and loose will choose his ideal point pm because there is no intersection of o1, o2, g2 and g3 under the vote of confidence procedure to vote him out of office with an absolute majority (consider broken lines for g2, g3, o1 and o2). A German chancellor can only choose point vcf2 which is closest to his ideal point in the intersection g1, g2, g3 and pm. While being closer to his ideal point than without a confidence vote he is still far away from what might have been possible under other voting rules.

Example 2: g1, g2 and pm are voting for the government, o1 against it and g3 and o2 abstain.

In this example the outcome is even more different. The German chancellor wouldn’t survive a vote of confidence here because he still needs a 4/6 majority but gets only 3 votes (g1, g2, pm) - thus he is out of office but could win the policy at the point vcf1 because the policy is accepted with simple majority. A British Prime Minister gets a 3/4 majority with the votes of pm, g1 and g2. In the French case, the Premier still gets his necessary 3/6 majority to block an absolute majority able to unseat him.

A British Prime Minister will again choose point vcf1 to win, so there is no difference here. The same is true for the French Premier. He is still able to get his ideal point pm because there is even now no majority voting him out of office because of the two abstentions.

This example highlights the differences of the voting rules best: while a German chancellor does not survive, the French Premier still gets his ideal point! This suggests that the vote of confidence will be found least often in countries requiring an absolute majority in favour of the vote like in Germany.

(2) Dissolution of Parliament

The second major difference is the dissolution of parliament by the Prime Minister after he has lost a vote of confidence. The basic feature of the confidence vote and the theoretical models to understand it is the introduction of electoral cost in the considerations of members of the majority parties. Members who wouldn’t agree with the Prime Ministers policy are forced to accept it because he threatens them with dissolution of parliament, general elections and thus a possible loss of their seat. In Diermeier/Feddersen’s (1998) understanding they choose between the control of a single policy and the control of all future policies.

Hence, the whole idea of the vote of confidence procedure is based on the dissolution threat. This dissolution can be achieved by free will of the Prime Minister or enforced by tradition, the standing orders of the parliament or the constitution. While this is true for most countries, this is not true for Germany.

Indeed, two constitutional provisions define the situation here. The first one (Article 68) states that the Chancellor may ask the Federal President to dissolve Parliament. After this question,
the Federal President may dissolve parliament or he may not. So, the decision to dissolve the Bundestag is not entirely in the hands of the Chancellor but in those of the President who in case of a lost confidence vote of the Chancellor regains some powers he was stripped off after the collapse of the Weimar Republic. In fact, a new veto player is introduced in the decision to dissolve and we find a nested decision. According to the second provision (Article 67) a chancellor can only be deselected by a constructive vote of no confidence which means, that a new chancellor has to be elected by secret vote. A lost vote of confidence on its own does not automatically lead to the resignation of the chancellor, dissolution of the parliament or the formation of a new government. Indeed, a German chancellor might loose as many votes of confidence as he likes to without any consequences (De Winter 1995)\(^7\).

So is the Chancellor’s threat to call for a general election perceived as a real threat by a member of his majority? The answer to this question lies in the motives of the Chancellor to ask for dissolution and in those of the President to dissolve. The following matrices assume complete information on the side of the Chancellor on the actions of the President so we consider the President first.

The President takes two considerations into account when deciding to dissolve parliament or not. The first one is a policy motive, the second one an electoral aim. In fact the President's behaviour is driven by his party membership and the re-election chances of the government. This likelihood is not only dependent on the poll ratings of the Chancellor's party but also on the availability of an appropriate coalition partner if his party has not got an absolute majority.

<table>
<thead>
<tr>
<th>Congruent Chancellor</th>
<th>No Re-election</th>
<th>Re-election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dissolution</td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>No dissolution</td>
<td>(3)</td>
<td>(4)</td>
</tr>
</tbody>
</table>

Table 1: Decision of the Federal President after the Chancellor asked for dissolution

If the President belongs to the same party as the Chancellor, he will obviously call a general election when the re-election prospects are high but allow a minority government when an electoral defeat is likely. If the President is a member of an opposition party, he will not dissolve when the government has good poll ratings and leave a possibly malfunctioning minority government. If the re-election prospects of the chancellor are slim, he will dissolve. Taking into account only the President's decision, a dissolution threat is perceived as being real in cases 1 and 4 but not in cases 2 and 3.

The next table will show how likely the Chancellor will ask the President for dissolution if he takes the possible decision of the President into account.

\(^7\) A lost vote of confidence might constitute indeed an ideal situation for a German chancellor. His options are: (1) Ask the President for the dissolution of Parliament, (2) get a new coalition partner, (3) do nothing and go on as a minority government if the coalition partner is lost, (4) ask for the Gesetzgebungsnotstand if going on as a minority government, (4) do nothing and ignore the lost vote if it is just one occasion, (5) ask for another vote of confidence.
<table>
<thead>
<tr>
<th>Congruent President</th>
<th>Re-election</th>
<th>No Re-election</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Ask</td>
<td>(2) Will not ask</td>
<td></td>
</tr>
<tr>
<td>Incongruent President</td>
<td>(3) Will not ask</td>
<td>(4) Will not ask</td>
</tr>
</tbody>
</table>

Table 2: Decision of the Chancellor to ask the Federal President for dissolution

Only in case 1 the chancellor will only ask to dissolve parliament, which is when he has good chances of being re-elected and a congruent President. If he has no re-election prospects, he will not ask a congruent President; even if he would ask, the President wouldn’t dissolve (case 2). In case 3 he will not ask because the President wouldn’t dissolve anyway and in case 4 he will not ask because he will loose the general elections and the incongruent President would take the chance to dissolve.

In the end, the perceived dissolution threat by the members of his coalition exists only in case 1. To put it in the terminology of veto players theory, only when the President is equivalent as veto-player and re-election chances of the incumbent are good. This is a major difference to a Prime Minister who is either forced to dissolve or can dissolve at free will.

2.2. Last offer under a state of legislative emergency (Gesetzgebungsnotstand)

Another rule in the German Constitution looks like a powerful instrument of rational choice, or to use metaphorical language here once more, would appear to launch a second "tiger" of exercising agenda control by granting procedural last-offer authority to government once a Gesetzgebungsnotstand has been declared in a complicated procedure described below. Although granted for a limited period of time only, a German government may make any bill an up or down proposal under the exceptional circumstances of legislative emergency. If a Gesetzgebungsnotstand has been declared a government may have its bill enacted precisely in the form it wants to, while alterations by the House which the government does not like are declared void and the bill still becomes law provided the Second Chamber agrees. Thus, Article 81 regulating the Gesetzgebungsnotstand states:

“[...] the Federal President, at the request of the Federal Government and with the consent of the Bundesrat, may declare a state of legislative emergency with respect to a bill, if the Bundestag rejects the bill although the Federal Government has declared it to be urgent [...] (2) If, after a state of legislative emergency has been declared, the Bundestag again rejects the bill or adopts it in a version the Federal Government declares unacceptable, the bill shall be deemed to have become law to the extent that it receives the consent of the Bundesrat. The same shall apply if the Bundestag does not pass the bill within four weeks after it is reintroduced” (Basic Law, authorized translation).

Casual observers may be lured to see behind this article the rational choice logic of amendment control of a take it or leave it proposal loom large. However, closer inspection does quickly reveal that the procedure is completely different from the practice of last-offer amendment authority some parliamentary governments do frequently resort to fight fire with fire according to the general model of amendment control as formalised by William Heller (2001). Heller relied on “personal communications from […] Peter Nowak (for the German Bundestag)” and correctly stated: “Standing orders in Germany […] suggest extra Government authority with respect to amendments but do not provide last offer authority” (Heller 2001: 783).
So this section of our paper will demonstrate, firstly, how alien to Heller's model frequently practiced by parliamentary governments elsewhere this German version of last-offer authority under *Gesetzgebungsnotstand* really is. It will then proceed to discuss, secondly, the one and only possible point worth comparing the German version of last-offer authority with quite different last-offer authority of governments elsewhere, i.e. the use of last offer by minority governments.

Let us take up the two points of comparison in turn. Table 3 summarises the rather large discrepancies between what a *last offer* is in Germany and elsewhere. Comparing the sequence of the complicated *Gesetzgebungsnotstand* game with the last-offer authority game shows both procedures to be worlds apart. Striking dissimilarities are related to a) the relation of confidence vote procedure and last-offer authority to each other, b) the type of government that may invoke the procedure, c) the number of players involved in triggering the procedures, d) the subject of the procedure, e) temporal limitations to the procedures' applicability, and f) voting rules and consequence of rejection of government's last offer by the House.

<table>
<thead>
<tr>
<th></th>
<th>Last-offer authority of minister (Heller)</th>
<th>Gesetzgebungsnotstand (Article 81.2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Relation of last offer to confidence vote procedure</td>
<td>alternative options as felt appropriate: prime minister may invoke either of two procedures – <em>last offer</em> or confidence vote</td>
<td>consequentially tied to each other: Chancellor must have lost confidence vote before being able to embark on <em>last offer</em></td>
</tr>
<tr>
<td>b) Restriction to particular type of government</td>
<td>no</td>
<td>yes, explicitly and exclusively restricted to minority government</td>
</tr>
<tr>
<td>c) Triggering of last offer procedure</td>
<td>easy: at minister's discretion by declaring amendment to be <em>last offer</em> after which no other amendments will be considered</td>
<td>complex: Before procedure can be invoked by government agreement of 4 veto players required (1. Chancellor, 2. Cabinet, 3. Federal President and 4. Second chamber Bundesrat) in sequence of steps 1 to 5</td>
</tr>
<tr>
<td>d) Subject of last offer</td>
<td>last amendment to bill constitutes <em>fighting fire with fire</em></td>
<td>complete bill en bloc: no possibility of <em>line-item</em> amendments by government</td>
</tr>
<tr>
<td>e) Temporal limitation</td>
<td>none: applicable to all bills during tenure of government</td>
<td>fixed period: window of opportunity open only for a period of six months procedure cannot be used a second time during a Chancellor's term of office</td>
</tr>
<tr>
<td>f) Voting rule and consequence of non-adoption of last offer</td>
<td>vote for bill as amended by House required or else reversion to status quo without bill</td>
<td>vote against bill by House required for last offer procedure can be considered</td>
</tr>
</tbody>
</table>

Table 3: Discrepancies between the familiar game of last-offer authority and the German last offer under *Gesetzgebungsnotstand*

Let us briefly explain why interaction of four veto players is required to trigger last offer procedure and authorize government to use it.

1. Before being able to proceed to use *Gesetzgebungsnotstand* the Chancellor must have asked for and lost a vote of confidence either linked to a contested bill or not tied to any bill or resolution at all;
2. Having lost the vote of confidence, the Chancellor is free opt for one of two games - either appealing to the Federal President's discretion to dissolve the Bundestag (this window of opportunity is open for only 21 days) or initiating the sequence of steps leading to *Gesetzgebungsnotstand*;

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(3) If a contested bill was already previously linked to the lost confidence vote procedure the Cabinet (a collective veto player apart from the agenda-setting Chancellor) may appeal to the Federal President's discretion to declare Gesetzgebungsnotstand;

(4) (Can be skipped if bill was linked to confidence vote procedure): if, however, no contested bill was linked to the lost question of confidence, the Cabinet as collective veto player must submit a bill with a declaration of urgency to Bundestag and wait for this bill to be rejected before appealing to the Federal President;

(5) Before declaring a Gesetzgebungsnotstand the Federal President must ask for, and be granted, second chamber's approval;

(6) Having being empowered to use procedure of Gesetzgebungsnotstand by preceding sequence of five (alternatively four) steps the Cabinet, not Chancellor, must resubmit contested bill to the Bundestag;

(7) If the Bundestag either rejects the contested bill for a second time or adopts it "in a version the Federal Government declares unacceptable" or if Bundestag does refrain from voting on the bill at all over a period of four weeks' time after its resubmission to Bundestag, the bill becomes law with consent of the Second Chamber only.

In other words, rather than requiring consent of two chambers as usual, Gesetzgebungsnotstand does no more and no less than enacting a bill with approval of the second chamber only. Table 4 looks at the use, a minority government may make of last offer authority in Germany and elsewhere.

<table>
<thead>
<tr>
<th></th>
<th>Tsebelis' modelling of minority government's use of last offer</th>
<th>German minority government according to Article 81 Basic Law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Is minority government only special case of general rule applying to all types of government?</strong></td>
<td>yes, if last offer exists in a country's parliament it may be used by all types of governments</td>
<td>no, last offer explicitly and exclusively restricted to minority government</td>
</tr>
<tr>
<td><strong>Who is the agenda-setter?</strong></td>
<td>prime minister or individual ministers have power to propose up-or-down vote on bill after many rounds of amendments</td>
<td>collective decision by majority in Cabinet required</td>
</tr>
<tr>
<td><strong>Voting rule for last offer</strong></td>
<td>positive rule: House must vote for last offer to avoid undesirable reversion to status quo</td>
<td>negative rule: House must vote against bill or defeat government by amending bill against government's intention for last offer</td>
</tr>
<tr>
<td><strong>Is last offer contained in winset?</strong></td>
<td>Yes, within winset agenda setter moves last offer closest to his ideal point</td>
<td>no, paradoxically non-existence of winset is the very precondition for last offer to come into effect at all</td>
</tr>
<tr>
<td><strong>Is admissibility of last offer procedure dependent on number of veto players?</strong></td>
<td>no, undisputed right of agenda setter to apply or not to apply procedure as he thinks appropriate</td>
<td>yes, many veto players must decide beforehand whether or not procedure may be granted to minority government</td>
</tr>
<tr>
<td><strong>How does number of veto players affect policy content of last offer?</strong></td>
<td>the more players the less useful last offer, but if agenda setter's ideal policy point is located between other veto players, utility of procedure is increased even in the presence of many veto players</td>
<td>if minority government requests last offer it cancels hostile Bundestag as veto player but will have to get approval from second Chamber</td>
</tr>
<tr>
<td><strong>Is median position of agenda setter useful?</strong></td>
<td>more often than not minority government is in median position utilizing the benefits of agenda control via last-offer authority</td>
<td>median position only relevant if minority government seeks policy within winset of Bundestag parties which paradoxically implies foregoing last offer authority</td>
</tr>
</tbody>
</table>

Table 4: Differences between Tsebelis' minority government and the German minority government under Art. 81 Basic Law
Heller observed with aggregate data a certain coincidence between the availability of last-offer authority by government in parliamentary systems and the occurrence of minority governments in those countries (Heller 2001: 791). In producing this argument Heller took up some plausible points from “an anonymous referee […] pointing this out” to him (Heller 2001: 791) but he did not explain why this correlation theoretically ought to be expected. Theoretical substance was lent to Heller’s intuition by George Tsebelis’ veto-player theory. He formalised the importance of agenda setting, of which last offer authority is an example, for the definition of a decision point close to or identical with the agenda-setter's ideal point and still being acceptable to the other veto players (Tsebelis 2002: 36). It is to this treatment of agenda control by minority government that we must turn, to bring out German exceptionalism of Gesetzgebungsnotstand. Table 4 lists the rather huge differences between minority government’s invocation of last offer in Germany and elsewhere.

Without need for repeating its self-evident contents, it becomes clear from the table that the last offer in Germany works rather differently, sometimes even oppositely, from the other instruments within the rational choice armoury of agenda control. First of all, a German government does not normally command last-offer authority. But a Chancellor having lost a vote of confidence, i.e. Germany minority government, may, as one option among several others in a complex game, be granted a state of Gesetzgebungsnotstand. (A German Chancellor defeated on a vote of confidence does not need to step down but remains in office as long as he is not removed by the constructive vote of no-confidence.)

Graph 2: Gesetzgebungsnotstand and additional incongruent veto-players
How could such a minority chancellor use last offer under *Gesetzgebungsnotstand*? Reconstructing the situation of a German minority government with the assistance of Tsebelis' model helps clarify this bulky German procedure carries little of the elegance with which an agenda-setting minister can in Heller's and Tsebelis' and all other rational choice models turn last offer to a policy advantage within the winset of veto players. In Germany, by contrast, the government must confirm that no winset exists before the procedure of last offer may start being granted. Figure 2 represents the situation after the Chancellor has lost a vote of confidence on policy.

After having lost a vote of confidence, proposal power for last offer under *Gesetzgebungsnotstand* passes on from the Chancellor who was free to pose or not to pose a question of confidence, to the Cabinet as a collective decision making body. Trying to achieve a cabinet decision, the Chancellor may still rely on his *Richtlinienkompetenz* guaranteed by the constitution (Article 61 grants the Chancellor proposal power to "determine and be responsible for the general guidelines of policy.") Let us assume in figure 2 the cabinet to consist of ministers from three government parties g1, g2 and g3 and the Chancellor (ch) in spite of belonging to party g1 being located slightly south-westerly from g1. A chancellor governing with all three parties could only choose a point in the winset of g1, g2, g3 and ch. If party g3 defects and leaves him in a minority situation, the Chancellor may by his *Richtlinienkompetenz* choose a point within the winset of the parties g1 and g2. In our model he is able to propose his ideal policy point (ch) as new policy. So, a minority chancellor would be in a very comfortable situation with a last offer procedure. But this is not the end of the game but only the beginning of the sequence of steps to get the procedure of last offer granted before it can be applied to policy.

According to George Tsebelis’ reconstruction of the advantages of the agenda setting powers in multi-party coalitions, i.e. multi-veto players situations, advantages for policy can be achieved if the agenda-setters ideal position is situated somewhere in the middle between the status quo and all the other decisive veto players. But the Constitution requires two more on top of his coalition partners in cabinet, i.e. Federal President (bp) and the second chamber Bundesrat (br). Only if the policy positions of both are located south-westerly to the Chancellor will a last offer by the Cabinet stand a chance of getting enacted under *Gesetzgebungsnotstand*. If only one of the two additional veto players added by the founding fathers to granting the procedure of *Gesetzgebungsnotstand* is located north-easterly from the status quo, nothing can change at all and complete blockage of decision making results occurs even under the state of emergency-provisions for legislation as the winset becomes empty. In other countries where last offer exists there is either no symmetric and incongruent second chamber as in Germany (under *Gesetzgebungsnotstand* with veto in all cases and not just for *Zustimmungsgesetze*). Nor is elsewhere the consent of the President required to invoke the procedure whereby he becomes a veto player for triggering this procedure.

Thus, our reconstruction of German *Gesetzgebungsnotstand* in terms of the rational choice framework by George Tsebelis has proven the founding fathers have been anxious to put up additional checks and balances. They created a situation in which the advantages of agenda setting powers by a Chancellor against a hostile parliamentary majority may be systematically counter-acted by many veto players in the German constitution. In conclusion, if neither President nor the Bundesrat are absorbed by the minority government coalition the game as outlined by the German constitution systematically would ruin what advantages are by Tsebelis’ theory assigned to last-offer authority of a minority government. The detailed

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8 The opposition parties are not shown here. They are expected to be in the northeast of the Status Quo.
sequence of the hypothetical German game as outlined by the constitution but never ever invoked so far could serve effectively to block any advantage that last offer may confer on a minority government in the rational choice model.

What from the point of view of rational choice looks rather odd, perfectly made sense to the framers of the Constitution. The founding fathers had their minds geared towards the collapse of the Weimar Republic and Nazi dictatorship. They by all means wanted to prevent the situation like that of the agony of the Weimar Republic between 1930 and 1933 happening again (Fromme 1999: 92-102 and 139-142) without any knowledge of how democratic parliaments in other countries worked according to rational choice procedures. Hence, they imagined a minority government to be confronted with a hostile parliament where support of a government had effectively broken down and a majority of anti-system parties such as the Communists and the National Socialists in the last Reichstag preceding Hitler’s dictatorship were unable to agree on a policy programme supporting a majority government.

In the constitution of the Federal Republic of Germany last offer authority was constructed not as a device facilitating agreement by limiting choice to a policy point located in a winset but as a declaration of emergency where a winset has disappeared when government is confronted with hostile anti-system parties. In its backward-looking constitutional engineering the founding fathers of the constitution never hit upon the idea of providing a Chancellor or minister with positive rather than negative last offer authority as a subtle and operational means of making government policies stick even under a multi-party system and minority government.

Having outlined the rules of the game of the two apparently so powerful tigers of governmental agenda control in Germany it turned out they exhibit features so different from other parliamentary democracies that these two animals of rational choice instruments are held captive in the German political setting. The following sections study in detail the application of the confidence vote procedure. So bulky is as demonstrated the German procedure of Gesetzgebungsnotstand and so exclusively is it geared to a crisis of state short of the collapse of democracy that luckily it never had to be used in the now over fifty years of the history of the Federal Republic and can be obliterated.

3. The facade of lost confidence as a trick to achieve normally impossible dissolution of Bundestag

The vote of confidence was applied four times in the history of the Federal Republic. In September 1972 the vote of confidence was used for the first time by Chancellor Willy Brandt (SPD). The second chancellor to use the confidence vote was Helmut Schmidt (SPD) almost ten years later in February 1982, followed by Helmut Kohl just ten months later in December the same year. The most recent application was under Gerhard Schröder (SPD) in 2001. (Schindler 1984: 411ff).

While Brandt and Kohl used the confidence vote procedure as a vehicle to by-pass the Constitution and achieve the otherwise impossible dissolution of parliament (Art. 43 Basic Law), Schmidt desperately attempted to glue his breaking coalition together. Schröder used it to keep his troops aligned on a controversial vote. Due to the different motives of the chancellors we will discuss Brandt and Kohl in this section first instead of chronologically looking at past events.
3.1. Brandt 1972

Willy Brandt (SPD) came into power after the elections in October 1969. In a surprising move he convinced his own party to build a minimum winning coalition with the pivotal liberal party FDP despite the fact that the CDU/CSU was the biggest parliamentary party (Görtemaker 1999: 498). Due to the uneasiness in the conservative wing of the FDP about the coalition and the highly controversial Ostpolitik in his own party, his coalition soon started to lose members like a perforated bucket of water. In 1970, three senior FDP members switched to the CDU, followed by an SPD member in 1972 (Jäger 1986: 68f). In April 1972, another FDP member changed the red line to the CDU reducing the governments’ majority to just one vote (Görtemaker 1999: 550).

On April 27th, 1972, the CDU opposition took its chance. When it was sure it had convinced a further two FDP members and could obtain a majority of votes against Brandt, it initiated a constructive vote of no-confidence to elect their party leader Rainer Barzel as new chancellor. But to everybody’s surprise, Barzel lost by two votes. The victory of Brandt was only temporary – in May 1972 an SPD member was excluded from the party group leading to a stalemate between government and opposition. On September 19th, the government lost the majority with the resignation of another member – and only had the majority to control the agenda left due to the different status of the Berlin members. At this point, government and opposition started to agree that only elections could solve the dilemma. However, an early dissolution of the Bundestag is impossible through the Chancellor alone or any majority of the Parliaments members. The term is fixed on four years (Art 43 Basic Law).

Only two back doors are left open. Firstly, a chancellor may resign and if after a fortnight of unsuccessful attempts a new chancellor is not elected or elected only with a simple majority, the Federal President can dissolve parliament (Art 63 Basic Law). The second alternative is a lost vote of no confidence (art. 68 Basic Law). In this case, the chancellor will loose the vote on purpose instead of winning it to ask the President for dissolution: a “negative” vote of confidence. While the opposition obviously preferred a resignation of Brandt, Brandt himself and the SPD proposed the way via a vote of confidence (Jäger 1986: 74).

Brandt finally asked for a vote of confidence to be held on September 22nd, 1972. As expected, the majority denied the confidence to the Chancellor and Brandt instantly asked the Federal President Gustav Heinemann (SPD) to dissolve the Bundestag and hold elections on November 19th. Heinemann agreed and Brandt won a landslide victory with his SPD/FDP coalition.

3.2. Kohl 1982

The second time, a vote of confidence was used to dissolve the Bundestag was on December 17th, 1982. Three months earlier, the ruling coalition of social democrats and liberals had fallen apart because of major disagreements on economic, social and foreign policy issues and on October 1st, Helmut Kohl (CDU) was elected Chancellor by a constructive motion of no confidence.

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9 Actually, not to everybody’s surprise. Apparently, the famous East German Secret Service Stasi provided the money to buy at least two CDU members votes to keep Brandt in power (Görtemaker 1999: 553, Knabe 2001).
10 Until the unification of Germany the members elected by the citizens of West Berlin were not allowed to vote on policy matters. They were only allowed to give their vote on decisions about the standing orders and the agenda.
11 The result was 233 yes, 248 no and 1 abstention. Only 482 members participated (Schindler 1984: 405).
Despite the solid majority the new coalition had, all parties agreed that a call for general elections was necessary: the government hoped for legitimisation and the opposition for a punishment of the liberals (Rupp 1999: 230, Jäger 1987: 261). Kohl declared in his first major address to the Bundestag two weeks after his election that general elections were to be held in March 1983. He submitted a roadmap to the Federal President Karl Carstens (CDU) suggesting a vote of confidence for the 17th of December. Although the social democrats agreed to general elections they preferred a resignation of Kohl – similarly to what the CDU did ten years before when they were in the same position.

In the vote, the members of the CDU and FDP mainly abstained, only eight voted Yes, while the 218 members of the SPD voted No. Straight after the vote Kohl asked the President for the dissolution who followed his request on the 6th of January. In the elections, the new coalition was confirmed despite losses of the FDP (Schindler 1984: 415-17).

Several members of Parliament filed an Organstreit – a horizontal conflict of competence – at the Constitutional Court claiming the Federal President violated the constitution when dissolving the Bundestag despite having a stable majority. In their eyes, this behaviour would constitute an unlimited right of the Chancellor and a willing President to dissolve parliament early whenever it seems reasonable for electoral purposes. The court ruled in a lengthy 118 pages decision that the Federal President was right in this case but stated that Chancellor and President must consider the future stability of the governments’ majority (BVerfGE 62, 1). As a result, the German chancellor is indeed a chancellor constrained (Southern 1994) and cannot dissolve Parliament at his discretion.

In the end, the use of the confidence vote procedure by Brandt and Kohl is quite similar. Both chancellors sought an opportunity to dissolve the Bundestag and call general elections. Their intention was to loose the vote, not to win it. In both cases, the population and the opposition were in favour of the dissolution as well. Therefore, neither the congruent Federal Presidents nor the Constitutional Court had the wish to withstand and block the dissolution.

4. Schmidt's confidence vote in 1982: twilight and strange shadows

After the founding of the Federal Republic more than thirty years passed before anything approaching the use of the confidence vote according to the provisions formalised by Huber (1996) happened. The invocation of the confidence vote procedure by chancellor Helmut Schmidt on 5 February 1982 was surrounded by ambiguities and oddities and the question posed in so contorted, staggered, and devious a manoeuvring that it cannot possibly have been used in a spirit of a rational choice to force a decision over hard policy choices.

Digging into the quasi-archaeological layer of what really happened on that memorable afternoon of 5 February 1982 one makes a surprising discovery. Schmidt put the question of confidence in disjunction from any detail of a scrutinizable controversial policy. At 3 pm Bundestag started proceedings to vote on the Chancellor’s question of confidence who had conflicts with his liberal coalition partner about a number of policies. Schmidt did no more than talk in vague terms about the program his cabinet had approved of two days ago and requested the Bundestag to support this “general course” by expressing confidence into him. But in the plenary protocol of the same day any vote on any contested policy is missing and the CDU opposition in fact criticised that no such proposal was submitted for scrutiny to the Bundestag at all (Deutscher Bundestag, Plenarprotokoll 9/84).
Strangely it was only about six weeks later on March 24th that the rumoured program was introduced into the Bundestag, where it was approved in final reading two days later on 26 March by show of hands without any counting of votes. By having requested a vote of confidence six weeks ago in disjunction with the hard choices of a detailed policy yet to be seen by dissenting coalition members on the floor, Schmidt achieved unanimous support without laying the ugly pieces of controversy on the table. Thus conflict in the coalition was papered over for just another seven months when he was eventually in the autumn of the same year removed from office by the up to now one and only successful constructive vote of no-confidence in the history of the Federal Republic.

In conclusion, his playing the confidence vote procedure for the first time ever was not a rational-choice device of getting acceptance for clear-cut policy proposals let alone amendments tabled to parliament but a piece of clever gamesmanship rallying for the time being the ranks of a crumbling coalition – with contested policy details only to be served later to the rank and file. Having unanimously expressed confidence in him they could not but swallow the policy, too, when it was eventually submitted in Schmidt's staggered way. So the break-up of the coalition was postponed.

From a reassessment of Schmidt's confidence vote in terms of our systematic exposition of the cross-tabulations of tables 1 and 2 above it becomes obvious why Schmidt could not possibly have played the real, rather than staggered and deviating, rational choice card at all. On both parameters of these cross-tabulations it would not have been conducive to play the rational choice game proper. Firstly, after Schmidt’s taking of office as Chancellor the Federal President had been replaced by a politician from the CDU/CSU opposition, Karl Carstens. Secondly, while the Schmidt coalition had won the general election of 1980 its standing in polls of Landtagswahlen (elections to state parliaments) had by 1982 sunk to only 40.3 per cent for SPD and 5.3 per cent for its coalition partner FDP teetering on the brink of the five per cent clause possibly throwing it out of the Bundestag while the CDU and CSU opposition was running high at 49 per cent if one simultaneously takes all election results to the 10 German state parliaments into account.

But didn't Schmidt at least by implication link policy to his tenure of office by hinting at the program adopted by his cabinet two days before the confidence vote and submitted to the Bundestag six weeks later? Under the impression of Schröder successfully doing precisely this without any detours in 2001 quite a few scientists nowadays assert Schmidt by implication, too, had linked policy to his confidence vote (Brockhaus Online 2005). However, if one consults literature that has not been written by political scientists from today’s point of view but from contemporary historians taking stock of the Schmidt-era, a quite different picture emerges. Several scientists enjoying highest reputation among the profession reconstruct the confidence vote by Schmidt in 1982 as a great make-believe-show. He deliberately trumped up conflict with his coalition partner, the Liberals FDP, in order to rally and close the ranks of his own dissenting party (Jaeger 1987: 231f).

Relying on the detailed reconstruction of events in January and February 1982 by contemporary historians looking at the matter not from the point of view of Schröder in 2001 but from an assessment of the situation as it presented itself in 1982 one may conclude that the confidence vote was by Schmidt not exercised in the bright and decisive light of rational choice laying policy alternatives open but put on the stage in the dim light of a confidence trick. This twilight was finally removed when Chancellor Schroeder entered stage as brilliant victorious up-or-down proposer exercising for the first time in German history the vote of confidence procedure according to all facets of the rational choice game.
5. A teething tiger in the limelight: the birth of rational choice under Schröder 2001

So what is the difference between the previous use of the vote of confidence and Schröder's application in 2001? Do we indeed find a birth of rational choice politics in the German Bundestag? Why was he able to use the confidence vote linked to a certain policy as a means of agenda control?

(1) Preferences in the government
Gerhard Schröder was elected chancellor in 1998 with the support of a coalition consisting of his social democrats and the Green party as small coalition partner. Both parties are conforming on most policy issues and they campaigned on a common ticket. Both parties also contain a rather strong pacifist wing, especially the Green party. The effects could be seen on the vote to deploy the Bundeswehr to Macedonia in August 2001 within the framework of NATO – 24 members of the coalition opposed the intervention when the Government only had a majority of seven votes (WDR-online 30.8.2001). Schröder could only send troops with the support of the opposition.

(2) The Afghanistan vote
Under these circumstances, after the events of September 11th 2001 Schröder promised unrestrained solidarity to the United States and offered German troops to support the “War on Terror” in Afghanistan. Schröder submitted the proposal on the 7th November for a vote to be held on the 15th (Feldkamp 2002: 6). Four days later, eight members of the Green parliamentary party declared their intention to vote No and a further seven reported a likely No to the whips. Also, about 20 members of the SPD either wanted to abstain or vote the proposal down. Schröder now increasingly came under pressure from the opposition and the press to either step down or get his majority in line. The opposition even demanded a vote of confidence after a possibly lost vote (Der Spiegel 47/2001, Feldkamp 2002: 6). Why was Schröder able to use the vote of confidence linked to the Afghanistan-intervention in this situation and thus able to control the behaviour of his coalition despite the difficulties of the German procedure?

(3) Perceived dissolution threat
In the theoretical part we learned that the essential mechanism to change the utility function of policy-seeking members is the dissolution threat. We also demonstrated that this threat is limited through the introduction of the new veto-player Bundespräsident who in our model takes the electoral costs of his party and his party membership into account. In Schröder's case, both parameters of our cross-tabulation of preconditions for a successful confidence vote procedure were met. The President belonged to his party, his poll ratings were excellent and he could choose between different coalition partners.

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12 To deploy armed troops to countries outside the NATO area, the Bundestag has to be asked and take a formal vote with simple majority. Only to avert danger the government is allowed to deploy troops without the parliament’s decision but the Bundestag has to seek consent afterwards. The Bundestag is able to withdraw the Bundeswehr instantly if the consent is denied (BVerfGE 90, 186).
As we can see from table 5 Johannes Rau was Federal President in 2001. He is a former Prime Minister of North-Rhine Westphalia, a senior member of the SPD who competed with Helmut Kohl in the 1987 elections for the chancellorship and a close advisor to Gerhard Schröder. The congruence of Chancellor and President is occurring in about two thirds of the years between 1949 and 2004, although every chancellor apart from Helmut Kohl and the short-lived Ludwig Erhard had to deal with incongruent Presidents for some time. Therefore the requirement of congruency is fulfilled and the new veto-player is absorbed.

The same requirement applies for the chances of the incumbent to get re-elected. Here we assumed that a chancellor must have good poll results and/or an alternative coalition partner. This was the case in November 2001. Table 6 shows the poll ratings. Indeed, Schröder and the SPD were on an all-time high of their popularity while the CDU/CSU, the “natural majority parties” were in an all-time low. The Greens were in a low as well, while the liberals showed excellent results. Despite the PDS being in the Bundestag, Schröder would have been able to govern in a minimum winning coalition with the liberals.

Table 6: Election results and Sonntagsfrage (opinion polls), Sources: Infratest and Statistisches Bundesamt

The chancellor played this card from the very beginning. Just one day after the resistance began he met with his critics the SPD talking to them about his options and stressing the excellent poll results. The participants later mentioned that it was clear after the meeting that the chancellor would opt for a vote of confidence if necessary (Der Spiegel 47/2001). He also surprisingly met with the leader of the liberal party, Guido Westerwelle, on that day. Westerwelle even interrupted a press conference for the meeting and was encouraged by Schröder to talk publicly about the meeting. Schröders message was clear: Being unhappy...
with the Green partner from the beginning, his move sent an obvious signal to the dissenting members of the Greens threatening them with a loss of office and likely electoral annihilation as they were close to the 5%-threshold. It also threatened possibly dissenting SPD members with the deselection from the party list when a general election would arise. Thus, the basic requirements of the application of the vote of confidence were given: a congruent President and a high chance for re-election with a new coalition partner.

After the meeting with his party and Westerwelle, Schröder decided to link the Afghanistan policy with a vote of confidence which was announced one day later (Der Spiegel 47/2001). In this situation, the vote of confidence constituted a win-win situation for Schröder. Either he would win and domesticate his critics or he would loose and could take a re-election for granted forming a new government with the liberal party.

(2) Future policies and Bargaining
But Schröder wasn’t just using sticks, he also offered several carrots. Excellently fitting into Diermeier/Feddersens dynamic model, he stressed the past success of the coalition and outlined possible future policies with the Green party before the press and in a meeting of their parliamentary party one day later (Der Spiegel 47/2001). Having governed just two years they had at least two years left, taking into account Schröders aim of at least one re-election, six years. Schröder forced the Greens to trade-off six years of possible reforms against just one policy – a considerable amount of time. This view was supported by Erhard Eppler, a left-wing former development government minister under Helmut Schmidt who wrote a letter of support “on his old typing-machine with the skewed letters” sending it to all members of the coalition (Der Spiegel 47/2001).

The carrots also implied bargaining on different policies (in fact, the possibility of bargaining is the direct logical deduction from the trade-off assumption). Firstly, on the Afghanistan vote: both parliamentary parties agreed on minor amendments to the proposal to give the dissenters the possibility to save their face and support the vote of confidence despite their public position-taking (Feldkamp 2002: 7, Spiegel-Online 13.11.2001). Secondly, several substantial concessions on future policies were offered to the Green party (Interview 1, Spiegel-Online 15.11.2001). A fine example of bargaining at point blank is the case of Sylvia Vöß (Greens) who was one of the eight public dissenters. She decided to support the Afghanistan proposal after the whips moved the vote on her political baby, a new law on landscape protection, on the timetable after the vote of confidence on the same day (Der Spiegel 47/2001, Interview 1).

(3) Position-taking and Voting rule
A crucial element neglected by Huber is the behaviour of the opposition and the voting rule. Both opposition parties, the conservative CDU/CSU and the liberal FDP declared they would support Schröders Afghanistan proposal but couldn’t do so if linked to a vote of confidence (Feldkamp 2002: 7). This fits into our general model. The indifference curves of the opposition parties narrow down and although there is a winset between the opposition parties and the chancellor in the beginning, it empties under the vote of confidence procedure.

Position-taking may also occur in the government's ranks. This can either be the case when the members’ emotions run high because issues are considered as salient (Huber 1996: 278) or because they are directly elected thus owing responsibility to the constituency which may be against the vote (compare Diermeier/Feddersen 1998: 617). Apart from voting no or abstaining, the standing orders of the Bundestag allow oral or written position-taking by members before a vote with a personal declaration (Art. 31 GOBT). They are often used to
express discontent with the party line despite accepting the whip in the vote. In the case of the Afghanistan vote, 15 members of the coalition gave oral statements and 73 written statements (Feldkamp 2002: 9, Deutscher Bundestag 14/202, 14/203). This personal declaration allows supporting the vote of confidence despite distaste for the policy and thus supports the chancellor. Without this personal declaration, the position-taking incentive might cost several more votes.

The second major difference between the general model and the German vote of confidence is the voting rule which requires an absolute majority. This voting rule states a major problem, because abstentions count against the government. When the chancellor asked for the vote of confidence on 14th November, there were still up to ten dissenters in both parties and he was still lacking three votes to gain an absolute majority. One day before the vote, the SPD member Christa Lörcher decided to leave the SPD rather than voting for Schröder. Thus she reduced the governments’ majority down to six because she didn’t hand her mandate back13. Under the simple majority rule the remaining dissenters would not have been a problem, as four members of the CDU/CSU and the PDS abstained in the vote of confidence.

On the 16th November 2001, the day of the vote, there were still eight Green dissenters left, while all of the remaining SPD members declared to vote for the chancellor. They finally decided to take a strategic decision. Four of them would vote in favour of the government, and four against, thus guaranteeing the absolute majority to Schröder and expressing discontent at the same time. In the end, the vote was narrow. Schröder won by just two votes. All remaining SPD members voted Yes, four Greens voted with No, the others with Yes. The CDU/CSU, the FDP, the former SPD member and the post-communist PDS voted No apart from three CDU members and one PDS member who did not attend the vote at all (Feldkamp 2002: 9).

The behaviour of the eight Green members is the result of a strong position-taking incentive on a salient issue which even put the positive policy gains of government they support at risk. To put it in one of the four dissenters’ words: “I’m in the schizophrenic situation that I’ve voted No, but I’m happy with the result of the vote”14.

6. Discussion and Conclusion

Two agenda-setting instruments written into the German Constitution - the Chancellor's request for a vote of confidence and government's last offer of a bill under the procedure of a state of legislative emergency (Gesetzgebungsnotstand) - at first sight look like two powerful instruments from the rational choice armoury of governmental control of the legislative agenda. But our in-depth study of Constitutional norms and political practice demonstrated that due to exceptional German features alien to parliamentary systems elsewhere these two apparently very powerful looking “tigers” from the familiar hunting grounds of rational choice are in reality fairly tooth- and clawless.

13 In the German electoral system when an incumbent resigns or dies he or she is replaced by deputies from the party list. The only exemptions are in a Bundesland where a candidate who won a direct mandate resigns and if there are also surplus mandates (Überhangmandate) or there are no further members on the party list (§ 48 Abs. 1 Satz 2 BWahlG, BVerfGE 97, 317).

14 Christian Ströbele in Spiegel-Online 16.11.2001. All four dissenting members of the Green party were ranked badly on the party list for the elections in 2002. Two members had to leave the Bundestag (Christian Simmert and Anneliese Buntenbach), one moved only by chance on a safe place on the electoral list because a member being in front of him had to resign (Winfried Herrmann) and one won a direct mandate against all odds (Christian Ströbele).
It turned out the first of the two instruments, last offer in its unique German version, has nothing to do with rational choice at all. In stark contrast to last offer authority of democratic governments elsewhere, a German minority government cannot count on last offer authority for running normal legislative business but may use it only for a limited period of six months provided that a declaration of legislative emergency (*Gesetzgebungsnotstand*) has been promulgated by interaction of four veto players in a complicated sequence of steps. This rule is alien to amicable decision making between agenda setter and veto players within a winset of acceptable policy that is better than retention of the status quo. It was devised by the founding fathers not for normal business but for a situation of crisis of state when there is a dualism between the besieged island of a few good democrats in government and majority of hostile anti-system parties in parliament such as during the last two years of the Weimar Republic before the Nazi dictatorship. If there is still a winset of possible agreement between the government recruited from the parties in parliament and a legislative majority in the Bundestag last offer in Germany is ruled out.

Captured in a Maginot Line thinking of preventing Hitler happening again, the drafters of the constitution never hit upon the idea of providing a Chancellor or minister with positive, rather than negative, last offer authority as a subtle and operational means of making government policies stick even under a multi-party system and minority government. So bulky is this German procedure of *Gesetzgebungsnotstand* and so exclusively geared towards a breakdown of parliamentary government that it is not surprising it has never been used so far and hopefully will not have to be used in future.

The second of the two at face value powerfully looking tigers, the vote of confidence procedure, is no doubt steeped in the world of rational choice. But its capacity for hunting for policy support in the face of intra-party dissent among the governing coalition's rank and file is seriously hampered by two rules. The first is the voting rule. In most countries a plurality of deputies present suffices for the confidence motion, and hence the policy linked to it, to be carried. In contrast, a German Chancellor must look for an absolute majority of the Bundestag voting in favour of his proposal. Thus is ruled out the convenient position taking game of his own parties' dissenter abstaining on the vote and still having the confidence motion securely carried as in France.

The second rule making the tiger of the confidence vote procedure toothless at times is the impossibility to dissolve the Bundestag in order to appeal to the citizens in a new general election except in the case of a lost confidence vote. But even if the Chancellor were to lose the confidence vote and wanted to call upon the popular sovereign to endorse him for another term in office he must reckon with the possible veto of another player, the Federal President who in a strange twist gains veto power only in the case of a lost vote of confidence and who normally has no veto powers as long as the Chancellor commands a majority. So there is no reason for surprise the confidence vote procedure in spite of being written in the Constitution has only four times in over fifty years been invoked by a Chancellor, with two of these four cases having nothing at all to do with the rational choice model of getting stark choices over policy accepted.

Twice the procedure served to bypass the Constitution and to obtain the dissolution of the Bundestag normally ruled out by the Constitution. Once it showed ambiguous rational choice qualities but came near no more than a confidence trick. Only recently, under Chancellor Schröder do we belatedly in Germany witness a fully-fledged application of the classic rational choice model of the confidence vote procedure over policy. Keeping Chancellor
Schröder’s successful play of hand of this procedure in 2001 in mind it would appear to have been the case, too, with Schmidt’s invoking of the confidence vote procedure two decades ago. But digging into contemporary history and reconstructing the definition of the situation as it was seen by actors then and not from a point of view after the belated birth of rational choice in 2001 clearly shows there was no sign yet of employing the confidence vote procedure according to the rational choice paradigm. In 1982 it was more a bark than a bite in the rational choice spirit of an up-or-down proposal over policy.

It is worth asking whether our peculiar German findings may be generalized after all. Similar to an eclipse of the sun that can only happen if a certain constellation arises a Prime Minister's invocation of the confidence vote procedure might more frequently happen if, not only in Germany but everywhere, the chief executive can be assured of, firstly, abstentions being counted in his favour, secondly, easy dissolution of the House if necessary, thirdly, the probability of being re-elected by the citizens according to the polls. To be sure, opinion polls may be misleading but good results in the polls and no obstacles to dissolution if need be would appear to be a precondition everywhere for the tiger of the confidence vote being called upon by the chief executive in parliamentary systems. If so, German exceptionalism would turn out to be no more than a very special form of a general model applicable to all parliamentary democracies. In conclusion, it might be worth our while to think about collecting pooled data for all parliamentary democracies after 1945 enabling us to run a logistic regression of the likelihood of confidence votes being invoked by Prime Ministers.
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