

The Megalomania of a Political Party: The FDP Loses before the Federal Constitutional Court and then Loses the Election

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A. Introduction

[1] During Germany's recent general elections the *Freien Demokratischen Partei* (Free Democratic Party – FDP) (1) sought to position itself as the focal point of the heated political race between the Christian Democratic Union / Christian Social Union (CDU/CSU), led by Bavarian Governor Edmund Stoiber, and the Social Democratic Party of Germany (SPD), led by incumbent Chancellor Gerhard Schroeder. By staking out the ideological middle ground and employing a well-packaged campaign, the FDP hoped to assure itself the role of coalition partner in any government formed after the September 22nd general election. The FDP, in a first for one of the smaller political parties, ran its photogenic Chairman, Guido Westerwelle, as an independent candidate for Chancellor. The party also set for itself the goal of obtaining 18% of the popular vote (a target nearly triple its performance in the 1998 general election), making "18/2002" the party's campaign slogan. Had the FDP succeeded in obtaining only 9% of the popular vote (half its goal), it would have indeed played the controlling role in post-election negotiations over a coalition government. (2) As it turned out, however, the FDP stumbled through debilitating controversy up to the last minute of the election and ended with a mere 7.4 percent of the vote. (3) Incumbent Chancellor Gerhard Schroeder was able to turn to the Green Party (which charged to a surprising 8.6% of the vote), his coalition partner of the last four years, to break his party's deadlock with the CDU/CSU and remain in power. (4)

[2] The FDP's Westerwelle was plagued, almost from the beginning of his ground-breaking campaign for the Chancellorship, by controversy stirred by Juergen Moellemann, the party's Chairman in the state of Nordrhein-Westfalen. Moellemann, a former paratrooper, bucked Westerwelle's order that a junior member of the state party who had made anti-Israeli statements (many found them to be anti-Semitic) be censured. As Moellemann very publicly locked horns with the high-profile Jewish talk-show-host Michael Friedman, Westerwelle looked unable to control his own party, which was foundering on the charges of anti-Semitism. Moellemann remained defiant to the end: though banned from the FDP's election-day conference by Westerwelle, Moellemann held a bile-filled appearance for the press outside the conference.

[3] As if in an effort to persuade the electorate of his legitimacy as a Chancellor candidate, in spite of the fact that his own party deputy seemed unmoved by his leadership, Westerwelle pressed a last-ditch effort in the lead-up to the election to participate on equal terms in the campaign's televised debates between Governor Stoiber and Chancellor Schroeder, the "other" candidates for the Chancellorship. Even without Westerwelle's sensational legal challenge to secure his participation, the televised debates represented a dramatic novelty in a German political campaign. (5) Westerwelle's requests to participate in the debates were turned down by the television networks, decisions that were upheld by the ordinary courts. (6) The FDP and Westerwelle appealed to the *Bundesverfassungsgericht* (BVerfG -- Federal Constitutional Court) for emergency injunctive relief from these decisions as the date of the last debate was approaching.

B. The Case Before the Federal Constitutional Court

I. Background

[4] The FDP, in its application to the Federal Constitutional Court, asserted that the denial of Westerwelle's request to participate in the televised debates constituted a violation of the fundamental principle of equality established by Article 3.1 of the *Grundgesetz* (GG – Basic Law), (7) which finds its expression in the election context in Article 5.1 of the Political Parties Act. Article 5.1 reads:

Where a public authority provides facilities or other public services for use by a party, it must accord equal treatment to all other parties. The scale of such facilities and services may be graduated to conform with the importance of the parties to the minimum extent needed for the achievement of their aims. The importance of a party is judged in particular from the results of previous elections for central or regional government. In the case of a party represented in the Bundestag by a Parliamentary Party, the significance accorded to it must amount to at least half that granted to any other party. (8)

These provisions of law applied, the FDP argued, particularly with respect to the debate to be televised by the publicly-funded television network. (9)

II. Analysis

[5] The Second Chamber of the Second Senate of the Federal Constitutional Court resolved the FDP's case on procedural grounds, refusing to admit the case for the Court's full review. (10) In justifying its procedural decision, however, the Chamber spoke extensively to the substantive issue presented by the case, namely, whether it was unconstitutional for a small party's candidate for the Chancellorship to be excluded from a debate to be televised by a public television network. The Court answered this question in the negative. First, the Chamber considered the nature/character of the televised debate and concluded that, where the purpose of a program is to provide a forum wherein the two major parties of an election are to debate *and not to provide campaign advertising*, the equal opportunity guaranteed by Article 5 of the Political Parties Act is not at stake. (11) The Chamber explained that, in spite of the debate's potential advertising effect, the debate was more accurately characterized as lying within the sphere of the networks' editorial programming and therefore not a part of the "public facilities or other public services" regulated by Article 5.1 of the Political Parties Act. (12) The Chamber further justified this characterization of the debates by referring to the constitutionally guaranteed principles of journalistic freedom at stake in the selection of the participants for the debate as well as the content of the questions posed to them. (13) It was, the Chamber explained, a legitimate exercise of this journalistic freedom to make the editorial decision to focus the debate only on those candidates with a realistic chance of ultimately winning the Chancellorship. (14) On this point, the Chamber noted that the FDP itself did not dispute the conclusion that Westerwelle had no realistic chance of assuming the Chancellorship after the election. (15)

[6] Moreover, the Chamber explained that, even within the terms of Article 5.1 of the Political Parties Act, there is no obligation to provide access to public facilities or services in strict proportion to the popular support or public profile of a political party. Citing *The West German Media Case* of 1962, the Chamber reaffirmed that: "The principle of equal opportunity does not require a differential allocation [of radio and television time] depending on the size, [leadership] abilities, and political goals of the parties. It merely demands that the legal order guarantee each party fundamentally equal campaign chances, and thus equal opportunity in their competition for votes." (16) The Chamber concluded that these terms had clearly been met by the fact that the television networks under scrutiny in the case had provided the necessary time allotments for small parties in furtherance of equal advertising and that Westerwelle would have the opportunity to present himself to the electorate in a separate round-table discussion program (called "The Favorites") that was to be broadcast on September 17th.

[7] Finally, the Chamber dismissed the FDP's constitutional equal protection allegation. While Article 3.3 of the Basic Law provides that "No person shall be favored or disfavored because of . . . political opinion," the Court again concluded that the FDP's exclusion from the debates was based on legitimate editorial discretion (the relevance of the debate being affected by the participation of a candidate with no chance of winning) and not on the FDP's political opinions/platform. (17) The Chamber again explained that the editorial concept of the program was to have two moderators question the Chancellor candidates whom the networks identified as having the greatest chance of attaining the Chancellorship. The Chamber accepted the argument that the FDP's participation would not have furthered the program's objective.

C. Conclusion

[8] The Federal Constitutional Court blocked this part of the FDP's efforts to reshape the German political landscape, making it more open and responsive to small political parties and the interests they represent. The Chamber seems to have forgotten that even the major parties of today were scraped together out of coalitions of minor political interests and that the FDP might someday grow into a major political presence. In this sense, the Court lost an opportunity to cast a more inclusive and vital vision of German democracy. But, in spite of having lost before the Federal Constitutional Court, the FDP proved, in the end, to be its own worst enemy. A grander future for the FDP will have to wait, at least four more years. Until then, scarred by anti-Semitic controversy and humiliated by missing, by more than half, its target of 18% of the vote, the Court's decision looks more like a confident rebuff of an egomaniacal small party.

(1) Newly founded after the War on December 11, 1948, the Free Democrats promote a Liberal platform, supporting a mixture of left-liberal social and right-liberal political/economic values. The FDP, therefore, has staked out a position in the middle ground between Germany's two large political parties of the center-right (CDU/CSU) and center-left (SPD). Though the FDP has served as a coalition partner for both of the large political parties, it last shared a role in government during Chancellor Kohl's (CDU/CSU) sixteen-year tenure that ended in 1998.

(2) The major parties found themselves in a dead-heat at the end of the election, both the CDU/CSU and SPD having earned 38.5% of the popular vote. See, *Bundestagswahl* 2002, FAZ.NET, 30 September 2002, <http://faz.net/s/RubB14F8BC87A2B47C8ABC9226E5D69CB15/Tpl~Eevent~Soverview.html>.

(3) See, *Bundestagswahl* 2002, FAZ.NET, 30 September 2002, <http://faz.net/s/RubB14F8BC87A2B47C8ABC9226E5D69CB15/Tpl~Eevent~Soverview.html>.

(4) See, *Bundestagswahl* 2002, FAZ.NET, 30 September 2002, <http://faz.net/s/RubB14F8BC87A2B47C8ABC9226E5D69CB15/Tpl~Eevent~Soverview.html>.

(5) There had never before been televised debates between Chancellor candidates. The German political system is (and remains so, in spite of the evolution indicated by this year's debates) party-centered as opposed to personality-centered.

(6) BVerfG, 2 BvR 1332/02 from 30 August 2002, <http://www.bverfg.de/> (citing the decisions of the Higher Administrative Court for the State Nordrhein-Westfalen, 8 B 1444/02, 15 August 2002; Regional Administrative Court of Cologne, 6 L 1634/02, 19 July 2002).

(7) "All persons shall be equal before the law." Article 3.1, GG.

(8) Article 5.1, Political Parties Act.

(9) The Networks ARD (*Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands*) and ZDF (*Zweite Deutsche Fernsehen*) broadcast the second of the two scheduled debates on September 8, 2002.

(10) The Chamber found that the FDP's application had not fulfilled the preconditions for the Court's acceptance of a case for full review: the case does not present a matter of fundamental constitutional importance; to the degree that the case presented a question regarding the equality of opportunity established by Article 3.1 of the Basic Law, the Court had already clearly determined the issue. See, Article 93a.2 *Bunderverfassungsgerichtsgesetz* (BVerfGG – Federal Constitutional Court Act). BVerfG, 2 BvR 1332/02 from 30 August 2002, Para 1, <http://www.bverfg.de/>.

(11) BVerfG, 2 BvR 1332/02 from 30 August 2002, Para 4, <http://www.bverfg.de/>.

(12) BVerfG, 2 BvR 1332/02 from 30 August 2002, Para. 4, <http://www.bverfg.de/>.

(13) BVerfG, 2 BvR 1332/02 from 30 August 2002, Para 6, <http://www.bverfg.de/> (citing, BVerfGE 97, 298 (310)). Article 5.1 of the Basic Law provides, in part: "Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed."

(14) BVerfG, 2 BvR 1332/02 from 30 August 2002, Para 7, <http://www.bverfg.de/>.

(15) BVerfG, 2 BvR 1332/02 from 30 August 2002, Para 6, <http://www.bverfg.de/>.

(16) 14 BVerfGE 121 (translation from Donald P. Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (2nd ed. 1997)).

(17) BVerfG, 2 BvR 1332/02 from 30 August 2002, Para 7, <http://www.bverfg.de/>.