[DE] Federal Constitutional Court rules in dispute over public broadcasters' presentation of election results

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On 21 September 2024, the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) issued an interim decision in which it overturned a previous ruling of the *Oberverwaltungsgericht Berlin-Brandenburg* (Berlin-Brandenburg Higher Administrative Court – OVG) of 18 September 2024 regarding the presentation of election results by public broadcasters. Unlike the OVG, the BVerfG thought that ordering *Rundfunk Berlin-Brandenburg* (Berlin-Brandenburg state broadcasting authority – rbb) to show the individual election results of parties receiving more than 2% of votes and therefore requiring it to adapt its broadcasting concept represented a severe intrusion of its broadcasting freedom that could not be justified based on political parties' legitimate interests.

In August 2024, in the run-up to the Brandenburg state election, the *Partei Mensch, Umwelt, Tierschutz* (Animal Protection Party) had applied to the *Verwaltungsgericht Berlin* (Berlin Administrative Court – VG Berlin) for an interim injunction against rbb, one of Germany's nine state public broadcasting authorities. The injunction would have forced rbb to show the Animal Protection Party's (expected) election results in all presentations of Brandenburg state election results on its state television channel, provided that it received at least 2% of the votes, so that a maximum of ten candidate lists would need to be shown separately. In its post-election coverage of the previous state election in 2019, rbb had failed to report the party's 2.6% share of the vote (which had been very significant for such a small party), but had included it with those of other smaller parties under the heading "Other" in some graphics. Although the Animal Protection Party had won a court appeal (IRIS 2023-8:1/26), it had been too late to change the coverage after the event. By applying for an injunction against rbb, the party wanted to prevent the same thing from happening again and to ensure its results were specifically mentioned in the reporting of the 2024 election. After its application had been rejected by the VG Berlin, the OVG Berlin-Brandenburg – which had previously ruled in the party's favour in proceedings relating to the 2019 election – granted it and ordered rbb to mention the party's results separately under the aforementioned conditions. In its reasons, the court accepted that the party's right to equal opportunities under the Basic Law was graded by its size. However, the publicity associated with the mention of individual election results in television coverage on election night could have a significant impact on the public perception of smaller parties that failed to reach

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the 5% threshold required to obtain seats in the state parliament. The OVG ruled that, since obliging rbb to mention the party's election result would only represent a minor intrusion in the broadcaster's editorial freedom, the Animal Protection Party's legitimate interest should take precedence.

The BVerfG disagreed and overturned the OVG's decision. In interim relief proceedings, in which its remit is limited to a summary weighing the potential consequences of the successful or unsuccessful application, the BVerfG concluded that rbb's legitimate interests should prevail. Unlike the OVG, the BVerfG thought that such an order would significantly infringe broadcasting freedom because it did not just concern conceptual adaptations to graphics and the accompanying explanation, but also interfered with editorial freedom in the creation and implementation of concepts for a broadcast, which was protected under the freedom of programming, a key element of broadcasting freedom. Under this principle, broadcasters must be able to decide how to fulfil a journalistic task free from external influence. The OVG's order would have a "profound" impact on this freedom (regardless of whether the interference was justified, which was not examined in this case). The setting by a court of a fixed percentage of votes above which a party's election result must be shown, the criteria for which could not be determined either in fact or in constitutional law, limited rbb's freedom to adapt its editorial concept where necessary in programme planning that did not always follow a predictable course. This freedom outweighed a political party's right to be mentioned on election night. The publicity that the Animal Protection Party claimed would increase its chances of winning a greater share of the vote in future elections was largely irrelevant, especially in post-election coverage. Election night reporting was primarily focused on the distribution of seats in the newly elected parliament and its impact on the formation of the next government.

BVerfG, Beschluss der 1. Kammer des Ersten Senats - 1 BvQ 57/24 –

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2024/09/qk20240921_1bvq005724.html

Federal Constitutional Court, decision of the 1st chamber of the First Senate - 1 BvQ 57/24

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