https://doi.org/10.59821/18294219-2025.1-bal15

Norbert Bernsdorff
Doctor of Law, Honorary Professor at Philipps-Universität Marburg, Faculty of Law, *National key expert on the European Charter of Fundamental Rights (in Vienna), Retired Judge of the Third Instance Court on Social Affairs of Germany, Member of the Editorial Board of the Scientific-Practical Journal „Legality" of the RA Prosecutor's Office*

ADMISSIBILITY AND LIMITS OF SCOLDING OF DECISIONS OF THE HIGHEST COURTS BY PUBLIC OFFICIALS[1]

Abstract
Judgmental scolding has become an important factor in the relationship between politics and the highest courts.

Parliamentarians and ministers use it as a weapon against what they see as the far-reaching decision-making powers of the highest courts. Judges see it as an undisguised attempt to exert influence and intimidation.

The following article comes to the conclusion that criticism of judicial decisions is not only permissible to a large extent, but even necessary. However, politicians are limited by the principle of separation of powers and the principle of judicial independence.

The tense relationship is illustrated below using the example of conflicts between politics and the German Federal Constitutional Court.

Keywords: judgmental scolding; attacks on court's rulings; state criticism; freedom of opinion; separation of powers; principle of judicial independence.

1. Introduction

Courts have always been *scolded* for their judgments, but in recent years it has experienced a renaissance[2] . Two examples illustrate this.

The so-called crucifix decision[3] provides ample illustrative material on the effects of the ruling. On August 10, 1995, the First Senate of the German Federal Constitutional Court ruled by 5 votes to 3 that the state-ordered installation of a crucifix in state compulsory schools violated the fundamental right of negative religious freedom under Article 4 (1) of the German Basic Law (Grundgesetz - GG). Crosses in classrooms led to "pupils being confronted with this symbol during lessons by the state without any alternative and being forced to learn under the cross". Politicians criticized this

[1] The article was presented on 18.03.2025 and was reviewed on 10.06.2025.
[2] See S. Kretikow, Attack on Court's Rulings, FLIES 1972, pp. 610 (612).
[3] Federal Constitutional Court, decision of August 10, 1995 - 1 BvR 1087/91, BVerfGE 93, pp. 1 (26).

decision unprecedentedly and excessively. Some doubted that the decision was binding - contrary to the clear provision of § 31 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). Some called for a boycott of the decision, which was justified by the right of resistance under Article 20 (4) GG. In addition, politicians described the decision as a "devastating ruling" that would not stand and made reform proposals to weaken the German Federal Constitutional Court.

The decision of the Second Senate of March 31, 1998 on the question of Germany's participation in the European Monetary Union[4] also met with considerable criticism of the Federal Constitutional Court's view. The constitutional complaints had been regarded by the Federal Constitutional Court as manifestly unfounded, so that it was possible to proceed in accordance with § 24 BVerfGG. However, many politicians had criticized the fact that the constitutional complaints had not already been considered inadmissible. This decision also led to a public debate on the role of the Federal Constitutional Court.

The *attack on court's rulings* combines a wide variety of motives: anger about individual decisions, general displeasure about the growing power of the judiciary, the discovery of judgments as an election campaign issue, but also the poorly disguised attempt to intimidate an independent third power[5].

2. State or Private Criticism ?

Nowadays, a public official almost always belongs to a party, and there are four conceivable roles in which he can slip into as a critic. Firstly, if he is a minister, he expresses his criticism in his official capacity as a member of the executive. Most ministers are also members of parliament, so that secondly they speak officially as members of the legislature. Thirdly, as a party functionary, the critic belongs to the private sphere, where he may express his opinion in accordance with Article 5 (1) GG and participate in the formation of the political will of the people in accordance with Article 21 (1) sentence 1 GG. Fourthly, politicians are of course also private individuals who, like millions of other Germans, enjoy freedom of opinion.

Article 97(1) GG protects judicial independence from attacks by other powers. It therefore follows from Article 97 (1) GG that a critic of a judgment must be assessed in the role that is attributed to him by the judges concerned, and in particular by the public. It therefore depends on the function in which the challenged judge experiences the critic of the judgment. Judicial independence, however, is not a privilege of the judge but, as an expression of the state's duty to ensure justice, a privilege of the citizens seeking justice. Therefore, the recipient's horizon must also be taken into consideration[6] . The critic has only acted in an official capacity if the public perceived him in this capacity when he criticized the judgement.

[4] Federal Constitutional Court, decision of March 31, 1998 - 2 BvR 1877/97 and others, BVerfGE 97, pp. 350.

[5] In this way R. Mischra, Zulässigkeit und Grenzen der Urteilsschelte, Berlin 1997, p. 24. For more see G. Saula Angriff auf die richterliche Unabhängigkeit, GESA 2001, pp. 316 (323).

[6] See A. Viedma, Die öffentliche Herabwürdigung von Richtern, EuGla 1990, pp. 401 (412).

3. Admissibility of Official Judgment Scolding

It is generally agreed that public officials who make statements in precisely this capacity do not benefit from the fundamental rights protection of freedom of opinion under Article 5(1) GG. Fundamental rights constitute guarantees of freedom that citizens can assert against the state. In contrast, criticism of public officials takes place within the internal sphere of the state, which is divided into powers.

However, the fundamental permissibility of free speech within the internal sphere of state powers arises for another reason. The right of public officials to express judgment can be justified by the principle of separation of powers in Article 20 (2) sentence 2 GG. The permissibility of the official right to criticize judgments follows from the personal and substantive rights of intervention that the legislative and executive powers have vis-à-vis the judiciary. The legislative and executive branches elect or recruit judges in accordance with Article 94 (1) sentence 2 and Article 95 (2) GG. In addition to the public, Parliament and the government are thus also involved in the control process as links in the chain of legitimacy. Pursuant to Article 98 (2) GG, Parliament may bring a so-called judicial impeachment with the aim of removing a judge from office. This power presupposes that Parliament may discuss the decisions of a judge on which it bases its accusations. In addition to co-determination in terms of personnel, parliament and the government determine the factual framework of the judging process. They enact laws, ordinances and other standards to which the judiciary is bound in accordance with Article 20 (3) GG and to which the judge is subject in accordance with Article 97 (1) GG. In order for the legislative and executive branches to be able to carry out their law-making activities effectively, they must be able to discuss all matters that can be regulated without hindrance. This shows that the third power, despite its factual and personal independence, is integrated into a system of de facto dependencies.

4. Limits of Official Judgmentalism

The first limit of official *judgmental scolding* is formed by the provisions of the German Criminal Code (Strafgesetzbuch - StGB) on defamation (§§ 185 to 188), which will not be discussed in detail here.

The principle of separation of powers pursuant to Article 20 (2) sentence 2 GG and the provisions concretizing this principle as well as the principle of judicial independence pursuant to Article 97 (1) GG can be considered as the most important limits to the *scolding* of judgments[7] . First of all, the relationship between these two principles must be clarified.

Art. 20 (2) sentence 2 GG constitutes the administration of justice as a third power and assigns its exercise to special bodies . Article 92 GG takes a concrete form in two directions, firstly by naming the judges as special organs and secondly by entrusting them alone with the judicial power. Article 97 GG guarantees judges the status they need to effectively fulfill the judicial function entrusted to them. However, the judge can only be

[7] G. Saula, Angriff auf die richterliche Unabhängigkeit, GESA 2001, pp. 316 (320).

independent within the framework formed by the functional area of the third power. The principle of judicial independence only unfolds against the background of the judicial function generally described in Article 20 (2) sentence 2 and Article 92 GG.

4.1. The Principle of Separation of Powers - Art. 20 (2) sentence 2 GG

The principle of separation of powers prohibits the exercise of external powers. It applies to all powers and thus also to the administration of justice. It may not be deprived of the powers necessary for the fulfillment of its constitutional duties[8] . The monopoly of jurisdiction lies with the judges in accordance with Article 92 GG. If an activity constitutes jurisdiction in terms of content, it must be exercised with ultimately binding effect by impartial and independent judges. This rules out any systematic cooperation with the other powers and guarantees an "isolation of powers"[9] . The legislative and executive branches violate the principle of separation of powers if they decide legal disputes contrary to their competences or undermine the citizen's right to legal protection and the control function of the third power by disregarding the final binding judgment. According to this principle, the general principle of the separation of powers is generally unaffected by the *scolding of judgments* . It verbalizes displeasure about the result of a dispute decision, but leaves the dispute decision itself with the German Federal Constitutional Court. An *attack on court's rulings* alone does not deprive the judgment of its ultimately binding effect.

However, the principle of the separation of powers also entails a duty to respect each other's powers. This principle does not mean that the decisions of another power must be endorsed in terms of content or that they must remain uncommented. The point is that, despite all differences in the matter, a permissible exercise of authority is respected as such. For the functional area of jurisdiction, it is precisely the unimpeded decision on disputes with ultimate binding force that is characteristic of the duty to ensure justice and the control function of the third power. The principle of the separation of powers is therefore violated where *the scolding of judgments* denies the judiciary this decision-making activity and decision-making effect[10].

There are two groups of cases in which the power of final decision is affected[11] : the *non-observance of judgments* and the *repetition of norms* in the case of provisions that have been declared unconstitutional by the Federal Constitutional Court.

4.1.1. Non-Compliance with Judgments

The control function of jurisdiction and the citizen's right to justice are only guaranteed if the state, as a party to the proceedings, observes the judgment issued

[8] S. Kretikow, Attack on Court's Rulings, FLIES 1972, pp. 610 (613).
[9] Common opinion. See A. Viedma, Die öffentliche Herabwürdigung von Richtern, EuGla 1990, pp. 401 (411).
[10] See S. Kretikow, Attack on Court's Rulings, FLIES 1972, pp. 610 (613).
[11] Thus expressly G. Saula, Angriff auf die richterliche Unabhängigkeit, GESA 2001, pp. 316 (317). See A. Viedma, Die öffentliche Herabwürdigung von Richtern, EuGla 1990, pp. 401 (402, 404).

against it. The power to make final decisions compels state authorities to obey, so that failure to comply with judgments constitutes a violation of the principle of separation of powers. Accordingly, statements by politicians are already inadmissible if they suggest that a judgment does not have to be observed or that there is an obviously non-existent right to resist judgments.

4.1.2. Repetition of Norms

The repetition of norms envisaged in the form of a ruling is also unconstitutional if the proposed legislative act clearly contradicts a ruling of the Federal Constitutional Court. Because the interpretation of the constitution by the German Federal Constitutional Court expressed in the operative part and supporting reasons is binding on the legislature pursuant to Art. 20 (3) GG, repetitions of norms are inadmissible if they are merely fed by the dissatisfaction of the losing state authority with the decision without a change in living conditions. In principle, the legislature is not prevented from enacting a provision with the same content[12] . However, it cannot ignore the reasons for the unconstitutionality of the original law as determined by the Federal Constitutional Court. Rather, a repetition of a provision requires special reasons, which may arise in particular from a significant change in the factual or legal circumstances relevant for the constitutional assessment or the views on which it is based[13].

4.2. The Objective Independence of Judges - Article 97 (1) GG

According to Article 97 (1) GG, German judges are independent and subject only to the law.

It is generally agreed that the independence of judges protects them from instructions and certain psychological influences. According to the case law of the German Federal Constitutional Court, the executive - and correspondingly also the legislature - is prohibited from exerting any "avoidable influence" on the legal status of judges[14] . As part of the principle of the separation of powers, Article 97 (1) GG grants judges the status they need in order to be able to prevent an abuse of power by the other two branches of the judiciary. The control function of jurisdiction can only be realized by a judge who is and feels free to declare acts of the executive and, within the scope of his competence, of the legislature unlawful. Independence is a prerequisite for the neutrality of the judge.

The substantive independence under Article 97 (1) GG thus results in the prohibition, applicable to the executive and legislative branches, of any form of influence which, according to the objective horizon of judges and those seeking justice, is capable of binding

[12] Federal Constitutional Court, decision of October 6, 1987 - 1 BvR 1086/82 and others, BVerfGE 77, pp. 84 (103 et seq.).

[13] See Federal Constitutional Court, decision of July 15, 1997 - 1 BvL 20/94 and others, BVerfGE 96, pp. 260 (263).

[14] See Federal Constitutional Court, decision of June 4, 1969 - 2 BvR 33/66 and others, BVerfGE 26, pp. 79 (93 et seq.); decision of June 27, 1974 - 2 BvR 429/72 and others, BVerfGE 38, pp. 1 (21); decision of January 7, 1981 - 2 BvR 401/76 and others, BVerfGE 55, 372 (389).

the judge in his or her decision on the merits as strongly or more strongly than the law is capable of doing. Art. 97 (1) GG contains the prohibition of exercising influences that are alien to the law. This formula applies to all conduct that may come into conflict with judicial independence, and therefore also applies to the *scolding of judgments*.

Such an influence can result from the content, the form, the context of the criticism, the person of the criticized as well as the person of the critic. The focus here is on a targeted personalization of the criticism. "Judge" *scolding* is more intimidating than purely factual criticism. Factual independence is violated if a judge is explicitly or implicitly announced disadvantages for his judgment. Combined with such content, a particularly harsh form of criticism can be an indication of inadmissible criticism of a judgement. The danger is particularly great if the judge as a person becomes the focus of official criticism. Insults and the announcement of disciplinary sanctions are likely to dissolve the judge's commitment to the law and justice.

5. Conclusion

Judgemental scolding is defined as any negative value judgment by private or official bodies that refers to a court decision. The opposite of *judgment scolding* is *judgment praise*. *Praise* is good for the judge's self-esteem and flatters his vanity. It is claimed *that praise of judgments* has a "subcutaneous" effect, in that it encourages the judge to aim for public applause with his judgment. It is also claimed that the "corrupting power" of *praise of judgments* is stronger than that of criticism of judgments[15].

The limits established for the criticism of decisions of the German Federal Constitutional Court by public officials are very broad, so that they do not in principle stand in the way of a free and heated debate on decisions of the Federal Constitutional Court. However, the climate between the first two branches of government and the German Federal Constitutional Court has cooled noticeably. A remedy is only possible if the judges criticized can be made aware of the permissibility of criticizing judgments, while the politicians criticizing them can be made aware of their limits.

[15] See R. Mishra, Zulässigkeit und Grenzen der Urteilsschelte, Berlin 1997, p. 25.

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Նորբերթ Բերնսդորֆ
Իրավաբանական գիտությունների դոկտոր, Մարբուրգի Ֆիլիպսի անվան համալսարանի պատվավոր պրոֆեսոր, Հիմնարար իրավունքների Եվրոպական միության խարտիայի ազգային փորձագետ (Վիեննայում), Գերմանիայի դաշնային սոցիալական դատարանի նախկին դատավոր, ՀՀ դատախազության «Օրինականություն» գիտագործնական պարբերականի խմբագրական խորհրդի անդամ

ԳԵՐԱԳՈՒՅՆ ԴԱՏԱՐԱՆՆԵՐԻ ՈՐՈՇՈՒՄՆԵՐԸ ՊԵՏԱԿԱՆ ՊԱՇՏՈՆԱՏԱՐ ԱՆՁԱՆՑ ԿՈՂՄԻՑ ՔՆՆԱԴԱՏԵԼՈՒ ԹՈՒՅԼԱՏՐԵԼԻՈՒԹՅՈՒՆԸ ԵՎ ՍԱՀՄԱՆՆԵՐԸ[16]

Համառոտագիր

Դատական ակտերի քննադատությունը դարձել է քաղաքականության և գերագույն դատարանների միջև հարաբերություններում կարևոր գործոն:

Խորհրդարանականներն ու նախարարները այն օգտագործում են որպես միջոց՝ իրենց կարծիքով գերագույն դատարանների որոշումների կայացման լայնածավալ լիազորությունների դեմ: Դատավորները դա համարում են ազդեցություն գործադրելու և միջամտելու փորձ:

Սույն հոդվածում գալիս ենք եզրահանգման, որ դատական որոշումների քննադատությունը ոչ միայն մեծ մասամբ թույլատրելի է, այլև անհրաժեշտ: Այնուամենայնիվ, քաղաքական գործիչները սահմանափակված են իշխանությունների տարանջատման և դատական իշխանության անկախության սկզբունքներով:

Քննարկվող իրավիճակները ներկայացված են քաղաքական գործիչների և Գերմանիայի Դաշնային սահմանադրական դատարանի միջև ծավալվող հարաբերությունների օրինակով:

Հիմնաբառեր- դատական ակտերի քննադատություն, դատարանի որոշումների վրա հարձակումներ, պետական քննադատություն, կարծիքի ազատություն, իշխանությունների տարանջատում, դատական անկախության սկզբունք:

[16] Հոդվածը ներկայացվել է 18.03.2025թ., գրախոսվել է 10.06.2025թ.:

Норберт Бернсдорф
Доктор юридических наук, почетный профессор в Марбургском университете им. Филипса, национальный ключевой эксперт Европейской хартии основополагающих прав (в Венне), бывший судья федерального суда по социальным делам Германии, член редакционной коллегии научно-практического журнала «Законность» Прокуратуры РА

ДОПУСТИМОСТЬ И ПРЕДЕЛЫ ОСПАРИВАНИЯ РЕШЕНИЙ ВЫСШИХ СУДОВ ГОСУДАРСТВЕННЫМИ СЛУЖАЩИМИ[17]

Абстракт

Критика судебных решений стал важным фактором во взаимоотношениях политики и высших судов.

Парламентарии и министры используют его как оружие против того, что они считают далеко идущими полномочиями высших судов по принятию решений. Судьи видят в нём неприкрытую попытку оказать влияние и вмешательство.

В данной статье делается вывод о том, что критика судебных решений не только в значительной степени допустима, но и необходима. Однако политики ограничены принципом разделения властей и принципом независимости судов.

На примере конфликтов между политиками и Федеральным конституционным судом Германии проиллюстрированы эти напряжённые отношения.

Ключевые слова: критика судебных решений; нападки на решения судов; критика государства; свобода выражения мнения; разделение властей; принцип независимости судов.

[17] Статья была представлена 18.03.2025 и прошла рецензирование 10.06.2025.