



Chambers or Panels? – (Un)ambiguity in the Administration of Hungarian Courts

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ABSTRACT

The paper aims to analyze how, through case allocation, court administration affects the right to a natural judge, an important component of the right to a fair trial. For this purpose, it reflects on the requirements of the European Convention on Human Rights, the Fundamental Law of Hungary, the Hungarian Court Organization and Administration Act, and their practical implementation. The research examines the case allocation schemes of administrative divisions of general courts and highlights their deficiencies. Besides, it addresses how the supervisory powers of the Hungarian central court administration over court executives could ensure that case allocation schemes observe the right to a natural judge. The conclusions also emphasize the importance of heads of jurisdiction reporting on their managerial activity to users of justice.

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1. INTRODUCTION

The quality of justice is predominantly determined by the individual judges who render judgments on contentious cases. The regulation of the composition of courts unequivocally constitutes crucial safeguards in all judicial proceedings. This fundamental issue of justice shall be examined from a constitutional point of view, but equally important is the aspect of judicial administration since these two are inseparable elements in the functioning of the judiciary.

The case allocation process determines who will adjudicate a specific case, which has the most significant direct impact on the litigants' rights. This is governed by the courts' case allocation schemes in addition to the constitutional and statutory restrictions on the makeup of courts: the abstract rules on the composition of courts are concretized through these instruments, having, thus, at least as much impact on a procedure as the statutory rules do. Judicial administration and procedural rules interact with both national constitutional provisions and international treaties; only through an understanding of these can we obtain a full picture of the makeup of courts. The most direct factor shaping the composition is the allocation of cases, which, according to Fabri and Langbroek, is "the core-business of court organizations because it touches upon some of the essential aspects of rendering justice: judicial independence, and impartiality, organizational flexibility, and efficiency. Organizing case assignment properly is a *conditio sine qua non* of public trust in the absence of bias in the courts."¹

2. MULTI-TIERED REGULATION OF THE RIGHT TO A FAIR TRIAL AND TO A NATURAL JUDGE

The right to a fair trial and its component, the right to a natural judge, are safeguarded by the international and national legal instruments that establish the right to a fair trial. Of particular importance is Article 6 of the European Convention on Human Rights (ECHR), which states that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The ECHR thus establishes three major requirements for courts: they must be independent, impartial, and established by law; all these conditions are closely interrelated. Despite the initial impression that Article 6 of the Convention solely pertains to civil and criminal matters, while administrative disputes fall entirely outside the scope of Article 6, the case law of the European Court of Human Rights (ECtHR) suggests otherwise.² The Court applies autonomous meanings of civil rights and obligations, allowing disputes arising from legal relationships governed by administrative law according to their respective national classification to be dealt with according to Article 6 of the ECHR.³ At the Hungarian national level, the right to a fair trial is based on Article XXVIII of the Fundamental Law, which includes the

¹ Marco Fabri and Philip M. Langbroek, *The Right Judge for Each Case*, (Intersentia, 2007), 27.

² Such cases concern the right to education (*Oršuš and Others v. Croatia*, no. 15766/03), to practice a profession (*Albert and Le Compte v. Belgium*, no. 7299/75 7496/76) or compensation for expropriation (*Sporrong and Lönnroth v. Sweden*, no. 7151/75 7152/75).

³ David Harris, Michael O'Boyle, Ed Bates, and Carla M. Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, 2009), 212–213.

requirement of an independent and impartial tribunal established by law, from which one can derive the right to a natural judge.

Ius de non evocando (also known as the right to a natural/legal judge) implies that the allocation of cases is based on objective, predetermined criteria and that no one is deprived of his/her lawfully designated judge.⁴ Certain nations, like Germany, Belgium and Spain, have constitutions that explicitly state this right.⁵ However, the Fundamental Law of Hungary, like the Polish Constitution, is based on a broad notion that does not explicitly specify the right to a lawful judge, but rather the right to a fair trial, which is the basis for the right to a natural judge. The Venice Commission, in contrast, is in favor of an approach that centers on the individual judge.⁶ Polish commentaries derive the right to a natural judge from the provision “*competent court*”⁷ as part of the right to a fair trial. According to this argument, “*competent*” does not only mean that the court with jurisdiction shall act (external competence), but that the judge assigned to the case in accordance with the case distribution rules shall hear the case (internal competence).⁸ In Hungary, the right to a lawful judge can also be derived from the phrase “*right to an independent and impartial court established by law*” as part of the right to a fair trial enshrined in the Fundamental Law. Albeit not explicitly enshrined in the constitution, it is expressly formulated at the statutory level in the Act CLXI of 2011 on the Organization and Administration of Courts (*a bíróságok szervezetéről és igazgatásáról szóló 2011. évi CLXI. törvény, Bszi.*). The Hungarian regulation follows the same principle as the German concept “*der gesetzliche Richter*”, namely that the judiciary must be protected against manipulations by the executive branch, the government or by justice administration bodies.⁹

The right to a natural judge is best comprehensible from the perspective of judicial independence through the allocation of cases. The case assignment scheme must guarantee the court integrity (e.g., that the assignment of cases is not manipulated and that the formation of the court is not driven by undue influence). The court, which may consist of a single judge or a panel, is the center of attention to this particular issue. The phrase “panel packing” may be used in relation to panel assignment to refer to the practice of purposefully assigning judges to a case to obtain a specific

4 Albin Eser, “Der “gesetzliche Richter” und seine Bestimmung für den Einzelfall,” in *Straf- und Strafverfahrensrecht, Recht und Verkehr, Recht und Medizin: Festschrift für Hanns Karl Salger zum Abschied aus dem Amt als Vizepräsident des Bundesgerichtshofes*, ed. Albin Eser, Hans J. Kullmann, Lutz Meyer-Gossner, Walter Odersky and Rainer Voß (Carl Heymanns Verlag, 1994), 251–252.

5 According to Article 101 (1) of the Grundgesetz, “no one may be removed from the jurisdiction of his lawful judge.” Article 24 (2) of the Constitution of the Kingdom of Spain stipulates that “all have the right to the ordinary judge predetermined by law.” Article 13 of the Constitution of Belgium states that “no one can be separated, against his will, from the judge that the law has assigned to him.”

6 Igor Gontarz, “Electronic case distribution as a measure enhancing neutrality in the assignment of cases,” in *Supervision over Courts and Judges*, ed. Wojciech Piątek (Peter Land Verlag, 2021), 89. <https://doi.org/10.3726/b18615>.

7 Under Article 45 (1) of the Polish Constitution, “everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.”

8 Igor Gontarz, “Electronic case distribution as a measure enhancing neutrality in the assignment of cases,” in *Supervision over Courts and Judges*, ed. Wojciech Piątek (Peter Land Verlag, 2021), 89. <https://doi.org/10.3726/b18615>.

9 Philip M Langbroek and Mirjam Westenberg, “*Court Administration and Quality Work in Judiciaries in Four European Countries*” (Stämpfl, 2018), 73.

result.¹⁰ Since the court manager in charge of case assignment might assign cases arbitrarily, the right to a legal judge must be guaranteed with respect to the judge hearing the case.¹¹ A neutral assignment of cases can eliminate this risk. A neutral assignment of cases to judges is part of the rule of law and protects the independence of courts in four ways:

- (a) it protects the courts from external influence,
- (b) is conducive to public confidence in the impartiality and independence of the judiciary,
- (c) guarantees that everyone has the same chance of getting a judge favorable to their cause,
- (d) ensures that fundamental rights are not compromised.¹²

2.1. THE REQUIREMENT OF AN INDEPENDENT COURT

The European Court of Human Rights (ECtHR) evaluates a tribunal's perceived independence, precautions against outside pressure, tenure, and the appointment method of its members when determining whether it may be deemed independent.¹³ The requirement of an independent court demands, on the personal side, independence primarily from the litigants and the executive, and on the institutional side, a guarantee of institutional independence. In its assessment of independence, the ECtHR concentrates primarily on the assessment of institutional independence, while the personal independence of the individual judge is assessed in the context of impartiality. As the Constitutional Court of Hungary noted in its decision 38/1993. (VI.11.), there is a connection between institutional and personal independence. Specifically, since the judge must be independent of everyone, including other judges, their independence must be guaranteed by similar safeguards against administrative influences, whether they come from within or outside the judicial organization. The guarantee of judicial independence cannot, therefore, be identified with the separation of judicial power from the other two branches of government, but it is a more general issue that must be resolved within the judicial organization.¹⁴ According to the ECtHR, undue influence in the course of the proceedings may come from court executives if they abuse their administrative authority. The ECtHR concluded this can provide grounds for challenging the court's independence and impartiality.¹⁵

According to the practice of the ECtHR, Article 6 of the ECHR applies to all internal case management regulations governed by national law,¹⁶ including the case distribution schemes that impact which judges may participate in the adjudication of a case. It

10 Petra Butler, "The Assignment of Cases to Judges," *New Zealand Journal of Public and International Law* 1, no. 1 (January 1, 2003): 85–114, <https://www.wgtn.ac.nz/nzciel>.

11 Angelika Nussberger, "Comments on European Standards as regards the Independence of the Judicial System: Judges," *European Commission for Democracy through Law* 494 (2011).

12 Butler, *The Assignment of Cases*, 86–87.

13 Campbell and Fell v. the United Kingdom, no. 7819/77 and 7878/77.

14 Resolution 38/1993. (VI.11.) of the Constitutional Court of Hungary, ABH 1993. 256., 261.

15 *Agrokompleks v. Ukraine*, no. 23465/03. or *DMD Group, A.S. v. Slovakia*, no. 19334/03, § 72.

16 Katharina Pabel, *Judicial independence and the court's organisation*, in *Supervision over Courts and Judges*, ed. Wojciech Piątek (Peter Land Verlag, 2021), 32. <https://doi.org/10.3726/b18615>.

has been established that a significant proportion of cases that courts deal with as administrative disputes fall within the scope of Article 6. Therefore, the case allocation system for administrative disputes must be designed in a way that is fully compatible with Article 6 since it must be applied in a considerable part of these court procedures. The issue of case allocation primarily arises in the ECHR in the context of the court's independence.¹⁷ *Zand v Austria* established a precedent that the court's independence may be questioned if the formation of the court was motivated by improper influence, for instance, by a motive that seeks to influence the outcome of the case.¹⁸ Since the interpretation of this occurrence hinges on institutional independence, a possible demonstration could be the introduction of a case assignment strategy that unlawfully empowers the court executive with discretionary authority to assign a case to a judge or panel that is more likely to deliver the desired result. Of course, this also interferes with a judge's personal independence, as the arbitrary assignment of cases can influence the relationship between judges if one member of a tribunal can decide the distribution of cases among the members of that particular tribunal.¹⁹ Not only does this undermine the judge's independence, but it also undermines public trust in the judiciary.

2.2. THE REQUIREMENT OF A TRIBUNAL ESTABLISHED BY LAW

On the one hand, the requirement of a tribunal established by law suggests that the judiciary's structure is set by law rather than at the executive's discretion.²⁰ On the other hand, it demands that the judge of the court with material and territorial jurisdiction hears the case; furthermore, the case assignment scheme has to be in accordance with the law, and the allocation of cases has to be made on this basis. Like in the case of independence, the legality of the appointment of judges by the executive plays a role here, too.²¹ This latter issue is becoming an increasingly visible problem both in Hungary and abroad. The process in which an unlawfully appointed judge takes part does not meet the standards of a tribunal established by law and violates the European Convention on Human Rights. The Convention is deemed violated if the appointment amounts to a flagrant infringement and a breach of the fundamental rules of the appointment procedure against which the national courts do not provide an effective remedy.²² The ECtHR introduced a test in an Icelandic case, where it concluded that a court could not be regarded as established by law if the appointment of its judge was illegitimate.²³ Several irregularities with judicial appointments have surfaced recently in Poland. The ECtHR has held in these cases

¹⁷ Krisztina F. Rozsnyai and Barbara Koósné Mohácsi, Tisztességes tárgyaláshoz való jog, in *Az Emberi Jogok Európai Egyezményének kommentárja*, ed. Pál Sonnevend and Eszter Bodnár (HVG-ORAC, 2021), 123.

¹⁸ David Harris et al., *Law of the European Convention on Human Rights* (Oxford University Press, 2023), 287.

¹⁹ Christoph Grabenwarter, *European Convention on Human Rights* (Bloomsbury Publishing, 2014), 116.

²⁰ Marc L. W. M. Viering, Right to a Fair and Public Hearing (Article 6), in *Theory and Practice of the European Convention on Human Rights*, ed. Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (Intersentia, 2006), 623.

²¹ Pabel, "Judicial independence," 14.

²² David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, 2014), 448.

²³ *Guðmundur Andri Ástráðsson v. Iceland*, no. 26374/18.

that procedures carried out by judges who were not appointed in compliance with the law violate Article 6 of the ECHR.²⁴

Since a judge's appointment to an executive position — such as president of a chamber — in violation of the law may impact the proceedings, the issue is also related to the case allocation system. Presidents of “grand chambers” in Hungary have significant discretion in selecting judges for adjudicating panels. This will be explained in detail in the next chapter. A tribunal established under such influence will, in our opinion, meet the requirements of the ECtHR's above-mentioned three-step test. The Court will probably have the chance to clarify its doctrine in light of the potential further complaints that are pending and potential future cases that could reach the ECtHR on this matter (for example *Dudek v. Poland*, no. 41097/20). This may result in more possibilities of redress for irregularities in the composition of the tribunal.

Complying with internal case allocation rules is just as crucial as adhering to the well-known material and territorial jurisdiction (external competence) requirements of a court established by law. It does not suffice for the court with jurisdiction to have a panel of judges with the composition laid down by the code of procedure. The constitutional requirements for the members of the panel must also be met (the judge must be appointed in full compliance with the rules of the selection process, take the oath before taking up judicial duties, etc.). The case allocation scheme must comply with the statutory requirements on the basis of which the case must be assigned to the appropriate panel or judge. The violation of any of these conditions may lead to an irregularity of the proceedings.

Article 6 also applies to any internal regulation which makes it irregular for a judge to participate in the adjudication of a dispute. A court can be considered established by law if its case assignment scheme complies with the statutory requirements; the composition of the court's panel must comply with all the regulations in force for that court.

3. CASE ASSIGNMENT IN THE PRACTICE OF HUNGARIAN JUDICIAL ADMINISTRATION

3.1. REGULATION ON CASE ASSIGNMENT AND THE ESTABLISHMENT OF GRAND CHAMBERS

Articles 9–11 of the Bszi. and Instruction 6/2015 (XI.30) of the President of the National Office for the Judiciary (*Országos Bírósági Hivatal, OBH*) provide standards regarding the establishment of case assignment schemes. These rules include the publication of the case assignment scheme and the right of the affected division and the judicial council of the court to submit their opinion. The OBH instruction gives detailed rules on the six principles encompassed in the Bszi., which are designed to protect the right to a natural judge.²⁵ While the principles of stability, workload balancing, and analogousness of the applicable rules are beyond the scope of this study, the completeness, abstractness, and differentiatedness of case allocation procedures are of particular interest. Additionally, the Bszi.'s provision may raise problems regarding

²⁴ *Advance Pharma sp. z o.o v. Poland*, no. 1469/20; *Reczkowicz v. Poland*, no. 43447/19; *Dolińska-Ficek and Ozimek v. Poland*, no. 49868/19, 57511/19.

²⁵ Article 115 (1) of the OBH instruction.

the control of potential deviations from the case assignment scheme.²⁶ This paper mostly focuses on how these standards apply in ordinary circumstances without any assignment scheme disruption.

Since its entry into force, the Bszi.'s clause on the implementation of the right to a natural judge²⁷ has been amended several times. The original version was based on Article 11(4) of Act LXVI of 1997 (the old Bszi.), which merely stated that the composition and number of the chambers of the court should be determined in the guidelines for the allocation of cases. This criterion, however, did not lead to the establishment of permanent chambers, which became necessary and finally happened in 2002. Given the possibility of two interpretations — a teleological one with stronger guarantees and a textual one — this 2002 amendment was a necessary first step. Still, it was not sufficient to secure the right to a natural judge.

At this point, it is necessary to explain the terminology of Hungarian court administration. The Bszi. uses the term “tanács” for both chambers and adjudicating panels, hence the ambiguity that opens the way to two interpretations. This meant that more judges were assigned to each such administrative unit (chamber) than the required number of judges in an adjudicating panel, the difference marked by referring to it in Hungarian as the grand chamber.²⁸ This interpretation can potentially violate the *ius de non evocando* if its use is not restricted to certain justifiable situations.

The president of the chamber is in charge of allocating cases among the members of the grand chamber. Together with the assignment the president also designates the judges of that adjudicating panel. Since the case assignment scheme only includes the composition of chambers, it is impossible to ascertain the adjudicating panel's composition in advance. This unfettered discretion of the presidents of the chambers in the distribution of cases among the members of their chambers poses a threat. The chamber presidents can personalize the agenda for the chamber and, taking into account the members' stance on the case law, assign more delicate cases to the judges who are most likely to produce the desired outcome. As a result, the grand chamber system makes room for potential pressure while falling short of legal standards. Within the case assignment scheme is drawn up by the president of the court, the establishment of grand chambers provides an informal system of case allocation, which does not comply with the concept of *ius de non evocando*. Not to mention that, in this form, it is a covert subdelegation that violates the principle of *delegatus non potest delegare*, since the Bszi. vests the right to constitute the case allocation scheme in the president of the court and not in the president of the chamber. Similar criticism has been made in France, where heads of divisions allocate cases instead of the court president.²⁹ According to the Constitutional Court of Hungary, subdelegation within the executive branch is prohibited similarly to legislation. This means that the official bestowed with executive power is not permitted to subdelegate that authority.³⁰ This applies to the executive authority of court presidents since their actions serve the interests of the lawful operation of the court system, which includes

²⁶ Article 11 (2) of the Bszi.

²⁷ Article 10 (1) of the Bszi.

²⁸ Eser describes a similar phenomenon in Germany, but an important difference is that such overstaffing is only permissible if it is necessary due to organizational reasons of the court. Eser, “Der “gesetzliche Richter,” 287–288.

²⁹ Fabri et al, *The Right Judge for Each Case*, 208.

³⁰ Resolution 12/1990 (VI.23.) of the Constitutional Court of Hungary.

the right to a fair trial, among other things. In grand chambers of Hungarian courts, the chamber presidents actually exercise an administrative power conferred upon the court president. This constitutes an unlawful delegation.³¹

Legislature explained the obligation to set up permanent chambers in 2001 with the need for more straightforward phrasing of legal regulation.³² This suggests that before 2001, the meaning of the right to a natural judge was not clear and had to be concretized. However, because there are still two interpretations possible, this attempt was insufficient to advance the cause. Of course, the correct interpretation — one that is consistent with both the Fundamental Law and the Bszi.'s intention — would have been to refer to chambers as adjudicating panels and not as administrative units. This is especially true given that Article 11(1) of the previous Bszi. emphasized the principle that no one may be deprived of their right to a natural judge. It was only with the 2019 amendment³³ to the Bszi. that this became the sole valid interpretation. According to the new text, “in order to enforce the right to a natural judge, case allocation rules shall be laid down to ensure that the chamber to which the case was assigned can be ascertained in advance.” The revised text makes it clear even twice that a judicial panel is the only entity to which the term “chamber” refers to, not any administrative unit. On the one hand, as mentioned in the article's opening sentence, Parliament enacted this provision to guarantee the right to a natural judge. On the other hand, it also states that the chamber that will hear the case must be identifiable from the case assignment scheme. It is evident from the last sentence that the legislature is referring to adjudicating panels. This can be inferred from the fact that in the case of a grand chamber, it is not the whole chamber that adjudicates the case, but only some members of the chamber. It is impossible to predict which panel will hear a particular case if grand chambers are established in the case assignment scheme. The number of members of an adjudicating panel required by law must match the number of members of a chamber established in a properly structured case assignment scheme unless a grand chamber has an internal case allocation scheme.

3.2 THE EVOLUTION OF THE GRAND CHAMBER SYSTEM IN FIRST INSTANCE ADMINISTRATIVE COURTS

It is worth analyzing how administrative divisions of general courts adhere to the statutory standards. We have chosen the administrative divisions because the recent changes in the organization and procedure of administrative justice³⁴ made it necessary to form new first-instance chambers. Previously, so-called Administrative and Labor Courts were the first instance of the administrative justice system. These specialized courts were organized on the same level as local courts, thus making them inferior to general courts.³⁵ Following the elimination of Administrative and Labor Courts in 2020, general courts were required to establish new chambers alongside the administrative divisions as the primary administrative tribunals. Moreover, the 2020

³¹ David Stott and Alexandra Felix, *Principles of Administrative Law* (Cavendish Publishing, 1997), 60.

³² Explanatory memorandum to Act CV of 2001.

³³ Article 58 of Act CXXVII of 2019, entered into force in 2020.

³⁴ Krisztina F. Rozsnyai, “Judicial Review in Hungary: The Turmoil of Organisational Changes through the Lenses of Procedural Law,” *ELTE Law Journal* 11, no. 1 (2023): 95–110, <https://doi.org/10.54148/ELTELJ.2023.1.95>

³⁵ F. Rozsnyai, *The Turmoil of Organisational Changes through the Lenses of Procedural Law*, 95–110.

amendment of the Bszi. ought to be reflected in these new case assignment schemes. In general, case assignment schemes created by presidents of general courts should primarily consist of three-member chambers if they adhere to the Bszi.³⁶ Otherwise, the schemes are of concern as the grand chambers do not have a transparent internal case allocation plan. Although some doubts may arise as to whether it is always possible in practice to establish a case assignment scheme that fully complies with the aforementioned provision of the Bszi., it can be stated with certainty that the smaller the number of members of a chamber is (preferably three), the more the schemes of general courts are in accordance with the Bszi. For this analysis, the case assignment schemes of general courts with an administrative division in force at the time of the analysis (December 2022) have been used.³⁷

GENERAL COURT									
	METROPOLITAN	BUDAPEST ENVIRONS	DEBRECEN	GYŐR	PÉCS	VESZPRÉM	MISKOLC	SZEGED	
number of chamber members	3	5	6	2	2	1			
	4	5		3	1		4	2	
	5	2				1		1	
	6		1						
	7	1							
	8				1	1			

The table demonstrates that the case assignment scheme of the Budapest Environs General Court best corresponds with the Bszi., while the Metropolitan Court and the General Courts of Pécs and Veszprém display the opposite. Six of the seven chambers at the Budapest Environs General Court meet the requirement that it is straightforward which chamber will adjudicate a case. The Metropolitan Court has the most diverse case assignment system, with alternating lawful and unlawful chambers and, remarkably, an extra-large seven-member chamber. Even more extreme examples are the eight-member chambers of the General Courts of Pécs and Veszprém. Furthermore, the Szeged and Miskolc General Courts, as well as the Veszprém General Court, lack a legally compliant chamber. All of this data points to the conclusion that, despite the Bszi.'s revised regulation, nearly no court presidents have aligned their case assignment policies to the modified text of the Bszi.

3.3. GRAND CHAMBERS VS. ADJUDICATING PANELS

Allowing for misuse through opaque case allocation strategies, the above-depicted case allocation mechanism provides cause for concern. There does not have to be a concrete proof of abuse to be able to state that the abuse is objectively already created by such an ambiguous case assignment scheme. Not to mention that it is easier to exert pressure on a more sensitive case by, for instance, selecting three judges from a chamber of eight judges, who are more likely to deliver a judgment

36 According to Article 8 of the Administrative Court Procedure Act, the court of first instance shall proceed in a panel of three professional judges unless otherwise stated by an Act.

37 Available here: https://drive.google.com/drive/folders/1JWchcrGPz5eWfdnJ4gXjdjzHGxI_e1LC?usp=sharing [accessed February 26, 2024].

in favor of the pressurizer. This is, of course, true for political and any other kind of pressure. Automatic case assignment can eliminate this possibility. Without a doubt, an automatic case assignment system is better from the standpoint of the rule of law since it strengthens the court's independence by reducing the amount of outside pressure applied through possibilities to manipulate the composition of the panel. In the case of manual case assignment, this is achieved if the grand chambers have an internal case allocation order or if the administrative unit chambers are identical to the adjudicating panels.

The limited independence of the judiciary during the communist years led to the need for automatism during the democratic transition of the 1990s.³⁸ Before the transition, the case assignment system allowed the person responsible for case allocation to assign politically sensitive cases to politically reliable judges.³⁹ It seems that the fear of continuing on this path was not strong enough to overcome the organizational obstacles that arose in the development of an automatic case assignment system. The risk present during the communist era has evolved rather than vanished, and the possibility of misuse through the manual assignment of cases is essentially unaltered. It is impossible to demonstrate this with the data at hand. Evidence of abuse is not required because the threat of misuse is already a compelling argument in favor of an automatic case allocation system.

While a system of case assignment that is not predetermined and randomized may be legitimate, the appearance of judicial independence is better reinforced by a system based on these elements.⁴⁰ However, such a system may exceptionally be acceptable if the president of the court establishes chambers that do not coincide with the adjudicating panels in the case assignment scheme. This is the case if the allocation of cases within a chamber is done in a predetermined, automatic way rather than manually by the head of the chamber. A similar system has been in place at all divisions of the Kúria (the Supreme Court of Hungary) since the middle of 2023.⁴¹ This is due to an amendment to the Bszi,⁴² which requires the Kúria to implement a case allocation system in which cases are automatically assigned to grand chambers, and judges inside the grand chamber are then automatically selected based on a predetermined algorithm. Even though it can be deemed a step towards a sounder case allocation process, this modification raises particular concerns.

First, the question comes up: why do these regulations apply solely to the Kúria and not to other courts? The amendment falsely suggests that other courts are not as important as the Kúria and that increased transparency in case distribution is only required at the highest level. Second, the amendment distinguishes between adjudicating panels and chambers, indicating that the two are not always synonymous. This goes against the 2019 Bszi. amendment, which stipulated that the two must logically

38 András Sajó, *Az önkormányzó hatalom* (Közgazdasági és Jogi Könyvkiadó–MTA ÁJTI, 1995), 278.

39 Zoltán Fleck, "A bírói függetlenség állapota," *Fundamentum* 6, no. 1 (2002): 33.

40 Attila Badó and Kata Szarvas, "'As luck would have it...': Fairness in the Distribution of Cases and Judicial Independence," in *Fair Trial and Judicial Independence. Hungarian Perspectives*, ed. Attila Badó (Springer, 2013), 60–61, <https://doi.org/10.1007/978-3-319-01216-2>.

41 "Case allocation scheme of the Kúria for 2024," Kúria, accessed February 26, 2024, https://kuria-birosag.hu/sites/default/files/szabalyzatok/a_kuria_2024_januar_1_napjatal_hatalyos_ugyelosztasi_rendje_modositasokkal_egysegesszerkezetben.pdf.

42 Act X of 2023.

mean the same thing. This should not be an issue at the Kúria, since the automatic allocation of cases within grand chambers is ensured, but the distinction between the two terms creates dogmatic incoherence and has the potential to undermine the preceding amendment in the administration of lower instance courts. Before the 2023 amendment took effect, all courts were required by principle to have chambers that coincide with adjudicating panels. The current regulation is counterproductive as it suggests that the requirement of identical chambers and panels only applies to the Kúria and by this endangers the enforcement of the *ius de non evocando* in lower courts. One way to address this problem could be for the legislator to make it a general rule that chambers and adjudicating panels must be the same; however, exceptionally, the two can differ, in which case the grand chamber must have an internal automatic case allocation system.

3.4. HOW CAN THE DIFFICULTIES OF CASE ALLOCATION BE ADDRESSED?

For the establishment of case allocation schemes ensuring the right to a natural judge, the best scenario would be if court presidents were to seek to establish primarily chambers that coincide with adjudicating panels in accordance with the Bszi. Of course, there are sometimes objective obstacles hindering this to be fully applied. Such a hindrance would be the inability to divide the total number of judges serving in the court's administrative division by three (or by five if the procedure of five-member panels is customary, as it is the case for the Kúria in administrative disputes). As a solution to this problem, the court president could create a new chamber for those judges who were not assigned to any chamber (because if the number of judges cannot be divided by three, one or two judges will remain outside of the chamber if all chambers have three members) and assign one or two judges who are already members of another chamber to ensure that all judges are assigned to a chamber. This is necessary because procedural law allows a single judge to refer their case to a panel of three judges in procedures designed to be decided by a single judge. However, this could result in an uneven workload, so due consideration for the principle of workload balancing must be observed. Problems of coordinating hearings and deliberations could also arise. Given their flexibility and greater adherence to the rules regulating case allocation, grand chambers with a predetermined automatic internal case assignment timetable seem to be better equipped to handle this issue.

Another sound solution would be to allocate cases to pre-established chambers under the case assignment scheme but assign each case to a single judge, regardless of whether procedural law directs it to be heard by a panel or by a single judge. The chamber that the judge is a member of will then hear cases that need a panel and those that have been referred to one by a single judge; the rapporteur judge would be the one to whom the case was initially assigned.

It must be acknowledged that since courts are dynamic institutions, it is impossible to establish a completely automatic method for allocating cases; life sometimes overrides pre-determined plans and court managers must find solutions. It is not an issue if an unforeseen circumstance leads to changing the case assignment scheme or to reallocating cases provided these actions are carried out transparently. The same logic was previously followed by the ECJ in the *W.Ż. v. Poland* case.⁴³ However, it

⁴³ C-487/19, request for a preliminary ruling from the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Chamber), Poland), ECLI:EU:C:2021:798.

is still an unresolved question how profound the control of the legitimate aim and the non-discriminatory nature of such a decision can be.⁴⁴ This problem is well illustrated in the case of Hungary late in 2023, when the President of the Kúria simply dissolved Chamber K.II. of the Administrative Law Division of the Kúria and transferred its judges to other chambers, but in this case within the division. As this decision only affected one chamber, it *per se* seems discriminatory. Interestingly, this chamber previously delivered several judgments that did not fit the government's agenda. Additionally, no detailed grounds were given for its dissolution, thus, a viable supposition might be that these judgments have contributed to the decision.⁴⁵ Measures that lack transparency may implicate unlawfulness and arbitrariness even when they might be reasonable. Consequently, full transparency can ensure legality and may help prevent arbitrary decisions by the judicial administration to strengthen public trust in the judiciary. Transparency means that substantial reasons must be provided when such measures are applied. Meaningless and unverifiable reasons might reinforce the formal legality of the decision but not its transparency,⁴⁶ as it happened in this case, too.

The abilities of court managers and the need for legitimacy and transparency in court administration must be balanced. However, transparency is not a priority of court executives in Hungary. The remnants of the communist government linger,⁴⁷ and the experiences indicate that the period since the democratic transition has been insufficient for society to shed the behaviors inherited from the old socialist systems and cultivate a substantial demand for comprehensive reform.⁴⁸ The evolution of the Bszi. shows some progress, but the autonomous model of court administration (implemented in 1997 and eliminated in 2011) with its anti-public control stance continues to influence the current judicial administration system.⁴⁹

During socialist times, many Eastern European judiciaries – including the Hungarian one – experienced that court administration by the Ministry of Justice posed a threat to judicial independence⁵⁰ and therefore achieving administrative independence was a priority. The Judicial Council model was seen as an obvious solution to this

⁴⁴ Cf. again a similar case before the Highest Administrative Court of the Czech Republic, Decision 6 As 22/2022 – 58 of 26.05.2022, where this court, reflecting on C-487/19 stated: “the reassignment must pursue a legitimate aim and must not be discriminatory.... The administrative courts are not empowered to assess the appropriateness, reasonableness or effectiveness of the criteria on the basis of which a particular judge was selected for reassignment beyond that framework.”

⁴⁵ Ágnes Kovács, “*Taking Revenge for Dissent*,” *Verfassungsblog*, December 13, 2023, <https://doi.org/10.59704/a82592bde1176b48>.

⁴⁶ Attila Vincze, “*Schrödinger's Judiciary—Formality at the Service of Informality in Hungary*,” *German Law Journal* 24, no. 8 (November 1, 2023): 1438–39, <https://doi.org/10.1017/glj.2023.71>.

⁴⁷ Before the democratic transition, the communist government regularly “interfered in substantive issues” of the justice system through administrative tools, thus violating judicial independence. Consequently, judges see an alternativity between judicial independence and executive supervision over the judiciary. Fleck, *A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts*, 18–20, <https://doi.org/10.1007/978-3-319-01216-2>.

⁴⁸ Zoltán Fleck, *Bíróságok mérlegen I.* (Pallas Kiadó, 2008), 213–214.

⁴⁹ Fleck, *Bíróságok mérlegen I.*, 213–214.

⁵⁰ Michal Bobek and David Kosař, “*Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*,” *German Law Journal* 15, no. 7 (December 1, 2014): 1266–67, <https://doi.org/10.1017/s2071832200019362>.

demand⁵¹ and the National Council for the Judiciary (*Országos Igazságszolgáltatási Tanács*, OIT) was created in 1997.⁵² This organization bears all the hallmarks of a typical Euro-model judicial council with all its advantages and disadvantages.⁵³ The primary aim of this model was to ensure judicial independence; however, promoting accountability and transparency was not among the priorities of judicial councils.⁵⁴ Not surprisingly, a judiciary that was left unsupervised became untransparent and avoided accountability.⁵⁵ The two decades of unsupervised functioning obviously strengthened this need to minimize control over the internal administration of courts, which is, to a significant part, the reason why today most of the courts' internal administrative activity, including case allocation, is a gray area. Court executives still perceive public control as a dangerous and unnecessary burden.⁵⁶ The current situation is more in line with the court managers' desire for flexibility (efficiency), from which there is an urgent need to move towards a stronger assertion of the litigants' right to a fair trial (legality). Automatic allocation of cases would certainly improve this situation, but at the same time, it has its disadvantages. The most frequent criticism of automatic case allocation is that it is too rigid, does not necessarily consider the changes in the life of the court and limits the possibility of specialization of judges.⁵⁷ Other concerns include the lack of transparency of the algorithms and the difficulties of workload balancing because of not taking into account the complexity of cases.⁵⁸ This could be remedied by manually classifying each case by complexity and having the algorithm distribute them evenly afterwards.

The allocation scheme that best meets these criteria is, therefore, automatic and objective; it does not allow manipulation, is albeit flexible, and allows manual changes in cases specified by law.

4. THE ROLE OF THE CENTRAL COURT ADMINISTRATION IN CASE MANAGEMENT

In the Hungarian framework of court administration, the OBH is responsible for the central administration of courts, while court presidents are deconcentrated organs of court administration. The President of the OBH supervises and directs the administrative activity of the presidents of general courts and regional courts of appeal. The definition of supervision is not provided by law, but its elements include the monitoring of compliance with the provisions concerning the governance of the judiciary, administrative time limits and regulations, and conducting investigations and inspections in that respect. Based on the findings of these investigations and inspections, the President of the OBH takes the necessary measures falling within his

⁵¹ Bobek et al, *Global Solutions*, 1257.

⁵² Article 34 of Act LXVI of 1997 on the Organization and Administration of Courts.

⁵³ Bobek et al, *Global Solutions*, 1266–68.

⁵⁴ Bobek et al, *Global Solutions*, 1279–80.

⁵⁵ Bobek et al, *Global Solutions*, 1271.

⁵⁶ Samantha Joy Cheesman and Attila Badó, "Judicial Reforms and Challenges in Central and Eastern Europe," *International Journal for Court Administration* 14, no. 2 (January 1, 2023): 5–7, <https://doi.org/10.36745/ijca.532>.

⁵⁷ Gontarz, *Electronic case distribution*, 95–97.

⁵⁸ Gontarz, *Electronic case distribution*, 94–99.

or her authority, supervises their implementation, and eventually initiates disciplinary proceedings.⁵⁹

There are four types of judicial accountability: legal, public, managerial, and cooperative accountability.⁶⁰ As Hungarian society is unlikely to have a real impact on the exercise of public powers⁶¹ – including executive powers of court presidents, e.g., establishment of case assignment schemes – the importance of legal and managerial accountability becomes even more important. These types of accountabilities lie with the OBH. This central organ is responsible for ensuring the lawfulness of the administrative activity of court presidents and the independent, impartial administration of justice. If the president of the OBH finds the case assignment scheme of a court unlawful, it is his or her duty to instruct the court president to eliminate the unlawfulness and monitor the implementation of the necessary measures. If the court president fails to establish a lawful case allocation scheme, the President of the OBH shall take disciplinary measures and may even dismiss the court president.⁶²

Nevertheless, the pertinence of problems relating to the unlawfulness of case assignment schemes shows that the President of the OBH does not exercise his hierarchical powers effectively and does not require court presidents to correct unlawful case assignment schemes. The predecessor of the OBH, the OIT, also failed to exercise its administrative powers effectively in controlling and supervising the administrative activity of court presidents. At that time, this was also due to the fact that the members of the council were mostly court presidents who were supposed to supervise themselves.⁶³ There is no need to say that the OIT's investigations into the administrative activities of court presidents were not transparent, and there was no effective hierarchical direction and supervision. Despite the criticism, the 2011 judicial reform adopted provisions on the hierarchical direction and supervision of administrative activities of court presidents that were almost unchanged from the old Bszi.⁶⁴ The legislators believed that a new body with a different composition but the same toolkit would be better able to carry out this task. However, this does not seem to be the case.

As “the primary objective of the supervisory function is to ensure that the court as a whole is working properly,”⁶⁵ the OBH should clarify and reinforce its role of administrative control over court presidents, at least regarding the legality of case allocation. It is indispensable for an efficient judiciary that the central organ of court administration oversees and directs the subordinated organs' administrative activities. These administrative instruments are conceived as tools of retrospective control, whereas the activities of the supervised organs should be monitored

59 Article 76 (6) of the Bszi.

60 Francesco Contini, “Judicial Evaluation: Traditions, Innovation and Proposals for Measuring the Quality of Court Performance,” VDM Verlag, 2008, 54–61. <https://doi.org/10.13140/2.1.1085.4720>.

61 Tímea Drinóczi and Agnieszka Bień-Kacata, “Illiberal Constitutionalism: The Case of Hungary and Poland,” German Law Journal 20, no. 8 (December 2019): 1148–66, <https://doi.org/10.1017/glj.2019.83>.

62 Article 76 of the Bszi., Article 9 (1) b) of the OBH Instruction.

63 Fleck, “A Comparative Analysis,” 41.

64 Article 41 of Act LXVI of 1997.

65 Andreas Lienhard, “Supervisory Control and Court Management,” International Journal for Court Administration 2, no. 1 (August 15, 2009): 13, <https://doi.org/10.18352/ijca.110>.

constantly.⁶⁶ Besides, more emphasis should be put on the training and education of court executives. What does this mean in the field of case allocation? The OBH should collect and continuously evaluate data on the case allocation schemes and practices of courts. This allows for detecting discrepancies between the practice and the law timely and addressing them to ensure the lawful functioning of the judiciary. If the vast majority of court presidents do not understand the significance of the concept of the right to a natural judge, administrative instruments will not suffice to resolve the issue. The OBH has to promote the right to a natural judge by educating court executives within its task of organizing the training of judges. As a prospective control instrument, the drafting and circulation of a model-allocation scheme can help, too.

A proper case allocation scheme is the foundation of a well-managed court and a guarantee for both stakeholders and judges that the administrative activities of court executives do not interfere unnecessarily with the adjudicative function. After all, the ultimate endeavor of supervisory control is to build trust and to spell out the responsibilities.⁶⁷

5. CONCLUSIONS

An effective justice system is in the interest of the entire society. Courts are responsible for protecting individual rights, and public trust in them is a precondition for fulfilling their role. As Lord Hewart, former Lord Chief Justice of England stated, “*justice must not only be done, but must also be seen to be done.*” Stakeholders should be able to see how justice is done so that they can trust the process. However, it is unlikely to happen if cases are allocated to judges arbitrarily; that makes room for manipulation.

The right to a natural judge is shaped by the ECHR’s criteria for an independent and impartial tribunal established by law. This “*ius de non evocando*” can be best guaranteed if it is a right declared at the constitutional level or as a statutory right. The emphasis is on how the court administration implements this fundamental right. The analysis has revealed that a neutral, automatic allocation of cases is the most suitable way to form an impartial, independent tribunal established by law. The automation helps ensure that members of the adjudicating body are independent not only from other branches of government but also from other judges since they do not face the risk that court executives decide, at their discretion, which types of cases they shall adjudicate. Therefore, automatism in case allocation ensures that the tribunal is established by law and not by the discretionary decisions of court executives.

Although court administration has unique characteristics, it belongs to the realm of public administration with basic principles of public administration also applying to this specific field. It is not surprising though that the central court administration plays an important supervisory role over its subordinate organs which need its guidance.

As essential functions within this framework, the OBH should, first of all, promote the right to a natural judge and monitor continuously its proper observance; secondly, if a case allocation scheme or decisions on case distribution in specific cases are of concern, the President of the OBH should immediately take appropriate supervisory measures. Without the central administration’s active contribution, the legality of case allocation cannot be ensured. This undermines public trust in courts.

⁶⁶ Lienhard, *Supervisory Control and Court Management*, 2.

⁶⁷ Lienhard, *Supervisory Control and Court Management*, 2.

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16

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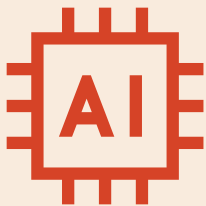
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