

# The Afterlife of the Relocation of Judicial Cases

Ágnes Czine\*

## Abstract

*The requirement of an independent and impartial tribunal established by law is set out in Article 6(1) ECHR and Article XXVIII(1) of the Fundamental Law of Hungary. The elements of the definition of the right to a fair trial are closely tied to the requirement of judicial independence, impartiality and a court established by law. These guarantees' purpose is to ensure that the applicant receive a judgment that is not prejudged by other branches of power, such as the influence of the executive, or the arbitrariness of the judiciary. This important human and fundamental rights requirement is monitored by bodies dedicated to the protection of democratic institutions. According to the laws of Hungary, lawsuits may be transferred to another court by the National Office for the Judiciary in order to reduce the workload. This solution has received strong international attention and scrutiny. Although these are actually not in force, they still have repercussions, which must be dealt with by the Constitutional Court. This article seeks to provide insight into the constitutional afterlife of this system of reallocation.*

**Keywords:** right to a lawful judge, National Judicial Council, relocation of judicial cases, reasonable time, length of proceedings.

## 1. Introduction: A Historical Overview

The legal institution of transferring a case in order to avoid lengthy procedures was established by Act CLXXXIII of 2010 on the amendment of certain laws for the efficient operation of courts and the acceleration of court proceedings which introduced by law from 7 January 2011. Pursuant to this Act, the Act on the Organization and Administration of Courts (Court Organization Act), the 1952 Act on the Code of Civil Procedure and the 1998 Act on Criminal Proceedings were amended. As a general rule, Section 33/A of the Court Organization Act provided that

“The Supreme Court shall have powers to reassign – in exceptional cases, upon recommendation by the President of the National Council of Justice certain cases from the court of original jurisdiction to another court of analogous jurisdiction, if providing a reasonable timeframe for hearing the case or a group of specific cases assigned to the court cannot be ensured

\* Ágnes Czine: justice, Constitutional Court of Hungary, Budapest; associate professor of law, and acting rector, Károli Gáspár University of the Reformed Church, Budapest.

otherwise due to the irregular and disproportionate workload of the court, and if having additional cases assigned will not burden the court affected beyond reason.”

It is interesting to mention that at that time, the President of the Supreme Court was the President of the National Council of Justice. The 1998 Act on Criminal Proceedings<sup>1</sup> and the 1952 Act on the Code of Civil Procedure<sup>2</sup> were also amended in accordance with the amendment of the Court Organization Act to provide for the possible reallocation of cases.

On 1 January 2012, the Fundamental Law of Hungary entered into force, and the National Office for the Judiciary (NOJ) and the National Judicial Council (NJC) started operation.<sup>3</sup> Rules on the transfer of cases were changed and a new level of regulation appeared governing the transfer of cases, notably the Transitional Provisions of the Fundamental Law that also contained rules to this effect:

“In the interest of the enforcement of the fundamental right to a court decision within a reasonable time guaranteed by Article XXVIII(1) of the Fundamental Law, and until a balanced distribution of caseload between the courts has been achieved, the President of the National Office for the Judiciary may designate a court other than the court of general competence but with the same jurisdiction to adjudicate any case.”<sup>4</sup>

A significant change compared with the previously mentioned rules is that here, it is no longer the President of the Supreme Court who may decide on the reallocation, but the President of the NOJ. The elaboration of the relevant regulation was also improved, with the regulations issued by the President of the NJC and the President of the NOJ defining the detailed rules of reallocation.<sup>5</sup> However, by its *Decision No. 45/2012. (XII. 29.) AB*, the Constitutional Court annulled the rules of the Fundamental Law's Transitional Provisions governing

- 1 Section 20/A of Act XIX of 1998 on Criminal Proceedings: “The Supreme Court shall have powers to reassign – upon a recommendation by the President of the National Council of Justice – certain cases from the court of original jurisdiction to another court of analogous jurisdiction, if providing a reasonable timeframe for hearing the case cannot be ensured otherwise due to the irregular workload of the court, and if having additional cases assigned will not burden the court affected beyond reason.”
- 2 Section 47(1) of the Act III of 1952 on the Code of Civil Procedure: “The Supreme Court shall have powers to reassign – on a recommendation by the President of the National Council of Justice – certain cases from the court of original jurisdiction to another court of analogous jurisdiction, if providing a reasonable timeframe for hearing the case or a group of specific cases assigned to the court cannot be ensured otherwise due to the irregular and disproportionate workload of the court, and if having additional cases assigned will not burden the court affected beyond reason.”
- 3 About the Hungarian self-governing system of the judiciary, see e.g. <https://birosag.hu/en/national-office-judiciary>.
- 4 Transitional Provisions of the Fundamental Law, Article 11(3).
- 5 See (in Hungarian) Decision No. 36/2012. (VIII. 17.) OBT.

Ágnes Czine

the transfer of cases with retroactive effect to 31 December 2011.<sup>6</sup> The Constitutional Court also annulled the provisions on the transfer of cases laid down in the Court Organization Act and the 1998 Act on Criminal Proceedings with its *Decision No. 36/2013. (XII. 5.) AB*.<sup>7</sup>

Following the two decisions of the Constitutional Court, on 25 March 2013, the Parliament adopted the Fourth Amendment to the Fundamental Law, which elevated to the constitutional level the President of the NOJ's power to transfer a case.<sup>8</sup> According to the newly adopted Article 27(4) of the Fundamental Law,

“To give effect to the fundamental right to a court decision taken within a reasonable time and to balance the workload across courts, the President of the National Office for the Judiciary may appoint, in the way defined by cardinal Act, a court other than a court of general competence but with the same powers to hear particular cases defined by cardinal Act.”

These rules governing jurisdiction were thereby reinforced, for up until then, they were only included in the Transitional Provisions of the Fundamental Law and regulated as a temporary, extraordinary measure. Yet as of 2013, *the possibility of reallocation was incorporated into the main text of the Fundamental Law*. The amendment of the Fundamental Law also meant that *the Constitutional Court had no power to review (and annul) the rules concerning the reallocation of cases*, since the Constitutional Court only has jurisdiction to review the Fundamental Law of Hungary for procedural reasons. According to Article 24(5) of the Fundamental Law of Hungary,

“The Constitutional Court may review the Fundamental Law or the amendment of the Fundamental Law only in relation to the procedural requirements laid down in the Fundamental Law for making and promulgating it.”

These provisions of the Fourth Amendment to the Fundamental Law garnered an unfavorable international response already in the drafting phase. The European Commission expressed its serious concerns on the Fourth Amendment and asked that the constitution-maker take into account the relevant opinion of the Venice Commission.<sup>9</sup> *The Venice Commission strongly criticized the broad power of the President of the NOJ to transfer cases from one court to another based on the vague criterion of “adjudicating cases within a reasonable time”*. It emphasized the importance of the “right to a lawful judge” and stressed that the problems caused by the extraordinary and disproportionate workload of individual courts must be resolved by less intrusive means. These may include, in particular: ensuring adequate number of judges and court staff, redistribution of jurisdiction, or

6 Decision No. 45/2012. (XII. 29.) AB.

7 Decision No. 36/2013. (XII. 5.) AB.

8 Article 27(4) of the Fundamental Law of Hungary.

9 See at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_13\\_327](https://ec.europa.eu/commission/presscorner/detail/en/IP_13_327).

relocating judges on a voluntary basis. The Venice Commission pointed out that this kind of reallocation system should not be applicable in its entirety, even if it is completely objective. The panel also recalled that the Hungarian Constitutional Court had already reviewed the case transfer system and had not found the earlier law to be in line with the Constitution in force at the time. Nevertheless, the Parliament had reintroduced the transfer of cases as a part of the Transitional Provisions of the Fundamental Law. In the Venice Commission's view, if a transfer is a temporary solution, it must rely on objective criteria, both as regards the selection of cases and the designation of the host court.<sup>10</sup>

The power of the President of the NOJ to reallocate cases has also triggered an intense debate in the legal literature. This debate not only centered on the theoretical approach to the right to a lawful judge, but also revolved around specific, factual data. The original, proclaimed purpose of the power to reallocate cases was to redistribute the court burden proportionately, in order to enforce the principle of disposing of cases within a reasonable time. Contemporary analyses have shown that this power has not lived up to expectations because the number of cases to be reallocated was negligible compared to the tremendous volume of cases handled in those years.<sup>11</sup>

Károly Zaicsek arrived at the conclusion that

“the volume of cases to be transferred is not justified in light of the extraordinary and disproportionate workload of the court seized, which would have provided a legal basis for removing the parties from a lawful judge. While the principles underlying the transfer of cases provide guidance for deciding what situations may be classified as constituting an extraordinary and disproportionate workload, these principles are nevertheless not stipulated in procedural law.”<sup>12</sup>

Finally, in order to meet international expectations, *the Parliament adopted the Fifth Amendment to the Fundamental Law*,<sup>13</sup> which *abolished the power of the President of the NOJ to transfer cases*. The Amendment entered into force on 1 October 2013 and *does not contain a retroactive provision regarding the previously reassigned cases*.

10 CDL-AD (2012) 020-e, Opinion adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), at [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)020-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)020-e).

11 László Örkényi, 'Arányos ügyteher elosztás az igazságszolgáltatásban – elvek és teendők', *Debreceni Jogi Műhely*, 2012/1, pp. 13-36.

12 Károly Zaicsek, 'Törvényes bíróhoz való jog az ügyáthelyezés jogintézményének tükrében', in István Varga (ed.), *Codificatio processualis civilis. Studia in honorem Németh János II.*, ELTE Eötvös, Budapest, 2013, p. 537 (translation by the Author of this article).

13 Article 7(1) of the Fifth Amendment of the Fundamental Law, repealing Article 27(4) of the Fundamental Law.

## 2. The Right to a Lawful Judge

The central constitutional and international law issue of the case reallocation solution presented earlier and the legal dispute unfolding around it was the protection of the right to a lawful judge. The Hungarian regulation of this right does not differ from the applicable European requirements in its essence. In Article XXVIII(1) of the Fundamental Law, the right to a lawful judge as a part of the right to a fair trial is based on the principles elaborated by the ECtHR. Therefore, let us first consider the essence of the system of principles developed by the ECtHR.

According to the case-law of the ECtHR, under Article 6(1) ECHR, the court must in all cases be “*established by law*”. The term is based on the rule of law, which forms an integral part of the system of legal protection established by the ECHR and its Additional Protocols.<sup>14</sup> According to the Article 6(1) ECHR, “*law*” means not only legislation governing the establishment and jurisdiction of judicial bodies,<sup>15</sup> but also any provision of domestic law the breach of which would render irregular the participation of one or more judges in a case.<sup>16</sup> Examples for such provisions are those governing the independence of members of the judicial panel, the length of their term of office, their impartiality and the existence of procedural guarantees.<sup>17</sup> In other words, the term “*established by law*” refers not only to the legal basis for the existence of the court, but also to the fact that the court must comply with it in all cases.<sup>18</sup> In principle, a breach by a court of the provisions of domestic law relating to the establishment and jurisdiction of judicial bodies also violates Article 6(1) ECHR. The ECtHR may therefore assess whether national legal provisions have complied with this requirement. Nevertheless, in view of the general principle that it is primarily for the national courts to interpret domestic law, the ECtHR has stated in several judgments that it may not call into question the interpretation of national courts unless there has been a manifest breach of national law.<sup>19</sup>

The practice of the ECtHR can therefore be summarized as follows: the selection of the trial judge and the principles and other legal aspects of the case allocation system must always be verifiable. Otherwise, national regulation may give the appearance of a lack of independence and impartiality and that it does not ensure the foreseeability and certainty that is necessary for a court to qualify as a court “*established by law*”. The ECtHR also emphasized that the above procedural errors could not be remedied by a subsequent appeal or review.<sup>20</sup>

14 *Jorgic v Germany*, No. 74613/01, 12 July 2007, para. 64

15 *Lavents v Latvia*, No. 58442/00, 28 November 2002, para. 114.

16 *Gorguiladze v Georgia*, No. 4313/04, 20 October 2009, paras. 20 and 68; *Pandjigidze and others v Georgia*, No. 30323/02, 27 October 2009, para. 104.

17 *Coeme and others v Belgium*, No. 32492/96 and 4 others, 22 June 2000; *Gurov v Moldova*, No. 36455/02, 11 July 2006, para. 36.

18 *Sokurenko and Strygun v Ukraine*, No. 29458/04 and 29465/04, 20 July 2006, para. 24; *Buscarini v San Marino (dec.)*, No. 31657/96, 4 May 2000.

19 See *Coeme and others*, para 98; *Lavents*, para. 114.

20 *Miracle Europe Kft. v Hungary*, No. 57774/13, 12 June 2016, paras. 45-52 and 63.

Hungarian legal thinking was significantly influenced by the German legal approach, so it is worth looking at the relevant practice of the German Federal Constitutional Court (*Bundesverfassungsgericht*). In the German legal system, the establishment of new courts clearly falls within the competence of the legislature, since it enforces one of the elements of the right to a lawful judge through regulation by law. The executive also has some power to decide on the organization of the judiciary, *i.e.* it can set up or suspend judicial bodies, but such measures must not be case-specific, but must be governed by general organizational considerations. These requirements were summarized as a prohibition of arbitrariness by the German Federal Constitutional Court.<sup>21</sup>

According to the consistent practice of the Hungarian Constitutional Court, the requirement of the right to a lawful judge includes a judicial forum (*judge*) acting in a specific case in accordance with the general rules of competence and jurisdiction established in procedural laws. This constitutional principle is enshrined in the Court Organization Act, foreseeing among the principles of the Act that no one may be deprived of his or her legal judge.<sup>22</sup> A judge established by law is a judge designated on the basis of a pre-established order of division of cases in a court with jurisdiction in accordance with the rules of procedure.<sup>23</sup> The order of case allocation is established by the president of the court in the previous year in order to ensure objectivity and impersonality, to exclude arbitrariness, which may be changed in the current year only in the interests of service or for important reasons affecting the operation of the court.<sup>24</sup> It follows that the assignment of case to a judge can only be constitutionally made on the basis of objective rules determined in advance.<sup>25</sup>

It follows from the above, that the principles applied by the Constitutional Court are based on internationally accepted standards and necessarily led the body to declare *the power of the President of NOJ to transfer cases as unconstitutional*, since it violates the rights to a lawful judge. In the words of Nóra Balogh-Békési, this led to the abolition of a complete legal institution enshrined in the Fundamental Law. Although a more proportionate distribution of cases within the judiciary is a legitimate goal, the way it was implemented did not stand the test of constitutionality and time.<sup>26</sup>

### 3. Cases from the Afterlife of Relocation of Cases

The Parliament therefore extinguished the unlawful power of the President of the NOJ to reallocate cases from the Hungarian legal system. In accordance with

21 András Osztovits, 'A törvényes bíróhoz való jog a német szövetségi és az osztrák alkotmánybíróságok gyakorlatában', *Jogtudományi Közlöny*, Vol. 60, Issue 10, 2005, p. 422.

22 Section 8(1) of the Court Organization Act.

23 Id. Section 8(2).

24 Id. Section 9(1).

25 Decision No. 36/2013. (XII. 5.) AB, Reasoning [32]; Decision No. 3272/2018. (VII. 20.) AB.

26 Nóra Balogh-Békési, 'A bírói hatalmi ág az Alaptörvény rendszerében', *Iustum Aequum Salutare*, Vol. 12, Issue 4, 2016, p. 12.

international principles, the rules of jurisdiction are regulated by law and the assignment of cases also takes place on the basis of an objective system of case allocation. However, a dilemma arose in cases that were “diverted” by power of the President of the NOJ. Where should those cases that were diverted” from the lawful judge continue?

Two approaches are possible. (i) One approach, retroactive or *ex tunc*, is that, as a result of the annulment of a power, the case should be treated as if it had not been “diverted”, as if that administrative power had not originally existed. Thus, the case in question should be reallocated to the court where it should have been disposed of under the general rules of jurisdiction. However, this would require a legislative provision that would bring some of the “hijacked” cases back within the scope of the general rules, amounting to an intervention in court proceedings by another branch of government. (ii) According to the other view, the consequence of the abolition of this reallocation power is that the proceeding court must be designated in accordance with the general rules in force. In this case, it should be taken into account that the case was already pending before a court (*ex nunc* approach). Fewer than a dozen such cases have reached the Constitutional Court, from among which I would like to present two examples.

### 3.1. Order No. 3272/2018. (VII. 20.) AB

In the case underlying the constitutional complaint, the prosecutor’s office filed the indictment with the Budapest-Capital Regional Court. Upon the initiative of the President of the Court, the President of the NOJ appointed the Szolnok Regional Court to conduct the proceedings after seeking the opinion of the Prosecutor General and the President of the Curia of Hungary. In view of the annulment decision of the Constitutional Court,<sup>27</sup> the Szolnok Regional Court found that it had no jurisdiction in the criminal proceedings pending before it and referred the case to the Budapest-Capital Regional Court. The Budapest-Capital Regional Court also declared that it had no jurisdiction due to priority because the case was already pending at another court, so the Szolnok General Court referred the case to the Curia of Hungary for designation.

The Curia of Hungary re-appointed the Szolnok Regional Court to conduct the first-instance proceedings on the basis of the “ordinary provisions of the Criminal Proceedings Act”. According to Section 20(3) of the Act on Criminal Proceedings, “[t]he acting court shall also be designated by the Curia of Hungary if the conditions for determining jurisdiction cannot be established.” Section 17(2), (4)-(6) also regulated how the question of jurisdiction shall be decided. The reasoning of the Curia of Hungary’s order emphasized that the criminal proceedings conducted by the Szolnok Regional Court could not be disregarded when making the decision on the issue of jurisdiction, and thus, this procedure provides a basis for applying the precautionary principle. It also emphasized that the proceedings of the Szolnok Regional Court were not affected by *Decision No. 36/2013. (XII. 5.) AB*, so the lawsuit was not unconstitutional in itself. The petitioner appealed to the Constitutional Court against order of the

27 Decision No. 36/2013. (XII. 5.) AB, which annulled Sections 62-63 of the Court Organization Act.

Curia of Hungary. In its decision,<sup>28</sup> the Constitutional Court also emphasized that *the re-appointment of the Szolnok Regional Court, as emphasized in the decision of the Curia of Hungary, was based on the “ordinary” provisions of the Act on Criminal Proceedings*. During the proceedings at first instance, a judge appointed in accordance with the pre-established order of division of cases proceeded as designated court in accordance with the rules of competence and jurisdiction specified in the Act on Criminal Proceedings. The Constitutional Court therefore dismissed the complaint on the basis that there was no conflict with the Fundamental Law that significantly affected the judicial decision, nor did the case raise constitutional law issues of fundamental importance.

### 3.2. Order No. 3310/2020. (VII. 24.) AB

In the case related to the constitutional complaint, the Kecskemét Regional Court acted as the court of first instance. In the course of the proceedings, the Kecskemét Regional Court, taking into account *Decision No. 36/2013. (XII. 5.) AB*, established that it had no jurisdiction and referred the case to the Budapest-Capital Regional Court. The Budapest-Capital Regional Court also found that it had no jurisdiction and transferred the case to the Curia of Hungary. The Curia of Hungary finally appointed the Kecskemét Regional Court to conduct the proceedings.

In the statement of reasons of the order rendered by the Curia of Hungary, it emphasized that *Decision No. 36/2013. (XII. 5.) AB* did not affect the validity of judicial decisions made on the basis of the unconstitutional reallocation provision, if the proceedings were otherwise fair. Referring to the uniformly followed jurisprudence,<sup>29</sup> the Curia of Hungary also pointed out that in criminal proceedings pending at the time of the entry into force of a new law, procedural acts implemented under the previous law remain valid even where these differ from the new legislation. It also stressed that under the previous Act on Criminal Proceedings,<sup>30</sup> following the commencement of a trial, lack of jurisdiction can only be taken into account in two cases: (i) if the adjudication of the case exceeds the jurisdiction of the court; or (ii) another court has exclusive jurisdiction over it. As none of these statutory grounds for exclusion existed in the present case, *the Curia of Hungary found that the jurisdiction of the Kecskemét Regional Court had been fixed at the beginning of the trial and designated this court to continue the proceedings*. The petitioner appealed to the Constitutional Court primarily for violation of the right to a lawful judge. The Constitutional Court emphasized that the re-appointment of the Kecskemét Regional Court, as stated by the Curia of Hungary in its decision, was based on the former Act on Criminal Proceedings. Although the same court had been appointed, the designation of the jurisdiction of the court of first instance and, consequently, the court competent for conducting the procedure of first instance, was not based on an earlier decision of the President of NOJ. Instead, the Kecskemét Regional Court was appointed in accordance with

28 See Decision No. 3272/2018. (VII. 20.) AB.

29 See BH 2004.455.

30 See Act XIX of 1998 on the Criminal Proceedings, Sections 308(1) and 17(5)-(6).



the rules of jurisdiction enshrined in the previous Act on Criminal Proceedings that were not affected by *Decision No. 36/2013. (XII. 5.) AB*, and a new judge was appointed in accordance with the pre-established order of case distribution of this court. Again, the Constitutional Court dismissed the complaint on the basis that there was no conflict with the Fundamental Law that significantly affected the judicial decision, nor did the case raise constitutional law issues of fundamental importance.

#### 4. Conclusions

What is the conclusion that may be drawn from these examples? The competence in the cases did not change by virtue of the fact that the right of the President of the NOJ to transfer the case was declared unconstitutional by the Constitutional Court and the Parliament abolished the rules establishing this competence. This is because the general and 'ordinary' rules of jurisdiction have fixed proceedings that are already in progress.

It appears that, in the end, the same courts were involved in these cases as those appointed by the President of NJO, so nothing changed. However, this is not the case. Based on the case-law of the ECtHR, the term "established by law" in Article 6 ECHR is intended to ensure that "in a democratic society the judiciary does not depend on the discretion of the executive power but is governed by laws of Parliament."<sup>31</sup> In countries with codified law, the organization of the judiciary cannot be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some leeway in interpreting the relevant domestic law.<sup>32</sup>

In the light of all these principles, the situation in the present case is in fact different from when the President of the NOJ exercised her power of transfer, because the final word on jurisdiction was not spoken by an administrative body but by the judicial system itself – and not on the basis of the former reallocation rules. Jurisdiction was determined based on general laws adopted in accordance with the requirements of international law and consistent domestic judicial practice.

In my view, the right to a lawful judge rests on two important pillars. (i) One is *legislation governing the establishment of courts, the determination of their jurisdiction, basic operating conditions, as well as the independence and impartiality of a judge*. This pillar is based on internationally accepted principles and structured similarly in any democratic society. (ii) The other pillar is *the order of case distribution*, in respect of which *ad hoc* influence exercised from outside the organization, primarily by the executive power, must be excluded. In this matter, therefore, the judicial system itself must be the one to have the final word, as illustrated by the examples in this article. Meanwhile, objectivity in case distribution based on uniform principles must be ensured internally, too. The

31 *Zand v Austria* (ECommHR dec.), No. 7360/76, 16 May 1977.

32 *Coeme and others*, para. 98; *Savino and others v Italy*, No. 17214/05, 20329/05 and 42113/04, 28 April 2009, para. 94; *Fruni v Slovakia*, No. 8014/07, 21 June 2011, paras. 21 and 134.

international debate concerning the reallocation power of the NOJ's President and the legislative process following it have provided a number of important lessons in this regard.