

A BRIEF ASSESSMENT OF THE CASE ALLOCATION SCHEME AND SYSTEM OF THE KÚRIA BASED ON THE EXPERIENCES OF THE PERIOD SINCE THE ENTRY INTO FORCE OF THE JUDICIAL REFORM

26 September 2023

Act X of 2023 on Amending Certain Laws on Judicial Matters in Connection with the Hungarian Recovery and Resilience Plan¹ (**Reform**), entered into force on 1 June 2023. The Reform significantly modified the provisions of Act CLXI of 2011 on the Organisation and Administration of Courts (**OAC**) concerning the allocation of cases at the apex court of Hungary (**Kúria**). In the following, we have collected the problems we have observed in reviewing the case allocation scheme and system of the Kúria and their practical application, based on our experience gained in the period lapsed since the entry into force. In addition to the legal provisions in force, our assessment relies on the following documents and information:

- (i) the effective case allocation scheme of the Kúria (**Case Allocation Scheme**);²
- (ii) presidential order No. 20/2020 of the President of the Kúria (**Presidential Order**) on the procedure for the establishment of five-member chambers;³
- (iii) the content of the logs generated by the case allocation system of the Kúria which are published on a weekly basis on the Kúria's website.⁴

On 6 July 2023, the Hungarian Helsinki Committee submitted a freedom of information request to the Kúria to obtain the contract for the development of the software operating the case allocation system of the Kúria, the software specification and the source code of the software or, in their absence, the data proving that the Kúria ensures the implementation of the legal requirements of the OAC as in force after 1 June 2023, in particular the implementation of the automated case allocation without human intervention and with the use of an electronic system.

In its reply,⁵ the Kúria claimed that it does not apply any specific software to comply with the requirements of the OAC. The Kúria uses the same electronic systems applied in general at all courts.

¹ See the adopted legislation in Hungarian at: <https://mkogy.jogtar.hu/jogszabaly?docid=A2300010.TV>.

² The present assessment was carried out on the basis of the effective Case Allocation Scheme effective from 16 July 2023, see: https://kuria-kozasatok.birosag.hu/sites/default/files/field_attachment/a_kuria_2023_januar_1_napiatol_hatalyas_ugyelosztasi_rendje.pdf.

Between 1 June 2023 and 16 July 2023 the Kúria operated under the rules of the former Case Allocation Scheme. The modifications were published in a separate document, see: https://kuria-kozasatok.birosag.hu/sites/default/files/field_attachment/a_kuria_ugyelosztasi_rendjenek_modositasa_2023_julius_16_napiatol.pdf.

³ Presidential Order No. 20/2020 of the President of the Kúria was last amended on 21 January 2022. https://kuria-birosag.hu/sites/default/files/szabalyzatok/az_ottagu_tanacsok_felallitasanak_rendje.pdf

⁴ Case allocation logs are published weekly, by departments on the Kúria's website: <https://kuria-birosag.hu/kuria-ugyelosztasi-rendszer>.

⁵ See the reply of the Kúria in Hungarian at https://helsinki.hu/wp-content/uploads/2023/08/Kuria_ugyelosztasi_rend_szoftver_20230804.pdf

According to the Kúria, the applied software was not modified in connection with the Reform, despite the new legislation requiring a higher degree of automation in allocating cases and the absence of human intervention at several phases of the case allocation. This would not be a problem, as upgrading the already used software could have enabled compliance with the law. However, the Kúria did not provide solid proof of compliance with the requirements of the Reform. Instead of concrete data, compliance with the new system was justified only by a firm statement that the new provisions *"are fully implemented in the detailed rules and the guarantees of the constitutional principles in the case allocation system and the system of the Curia"*. Nevertheless, the response of the Kúria does not explain exactly how full implementation is reached. Although some of the responses indicated that the Kúria could not provide information on the software used because the National Office for the Judiciary (NOJ) is the data owner, the freedom of information request submitted by the Hungarian Helsinki Committee to the NOJ did not confirm compliance with the law. According to the NOJ, *"it is for the President of the Curia to answer these questions."*⁶

Neither the Kúria nor the NOJ could provide proof that a proper IT system guarantees the due application of the new rules on case allocation at the Kúria that entered into force with the Reform.

PROBLEMS IDENTIFIED

- (1) The requirement of having a pre-established order of case allocation does not, in fact, apply, because the exact composition of the adjudicating chamber in a specific case cannot be determined from the pre-established Case Allocation Scheme. The reason for this is that the *"case allocation scheme"* under the provisions of the OAC can be interpreted as a document⁷ (which is called that) and not a closed logical system according to which cases are allocated. This means that it is possible to claim that the Kúria has a Case Allocation Scheme without there actually being a mathematically precise order for the allocation of cases. The difference between the two is that the Case Allocation Scheme as a document does not establish a pure, fixed and automatable allocation order, but a system in which the allocation of cases is subject to individual variation in essentially all its elements on the basis of competing parallel rules, main rules and exception rules.⁸ Ultimately, this means that although the judge should be assigned by law and under the OAC, the judge assigned by law should be designated by the Case Allocation Scheme, after all, the Case Allocation Scheme allows for a wide variety of possibilities to determine on an individual basis which judges should be assigned to a certain case. In other words, the judge assigned by law may ultimately be an individually designated judge, and even though – unlike in the past – there are clear ground rules, it may still be the case that the judge assigned by law is, in fact, a judge who was individually designated by an administrative court leader. For the same reasons, the pre-established nature of the Case Allocation Scheme does not provide a real guarantee either, because, although the allocation of cases in the Kúria is based on a pre-established Case Allocation Scheme, its pre-established nature does not apply with respect to a specific case, since it allows for variations in essentially all its elements (there

⁶ See: https://helsinki.hu/wp-content/uploads/2023/09/OBH_adatkeres_20230830.pdf

⁷ Article 8 (2) of the OAC provides that the right to a lawful judge is guaranteed by the fact that the case is heard by a judge appointed on the basis of a pre-established case allocation scheme. According to Article 8 (2) of the OAC "A judge assigned by the law shall be a judge of a court having jurisdiction and competence according to the rules of procedure, designated on the basis of a pre-established case allocation scheme."

⁸ The case allocation scheme refers to this when it refers to "the principle of variability of case allocation techniques".

is a possibility of derogation as to which chamber will hear the case, in what composition, with how many members, which chamber may replace the chamber, who may replace the members of the designated chamber, who will be the presiding judge and who will be the judge-rapporteur of the case).

- (2) Similarly, in the case of the Kúria, the concept of the “chamber” under the provisions of the OAC is an empty notion, with purely formal content.⁹ The Case Allocation Scheme of the Kúria establishes so-called chambers of five or six members each, despite the fact that, according to the procedural laws, both in the civil and criminal section of adjudication, as a rule, three-member chambers should hear the case. In the administrative section of adjudication, where procedural rules prescribe a five-member chamber to hear the case, as a general rule, the same problem arises in politically sensitive electoral cases¹⁰ and in cases concerning the approval of referendum questions, where the law provides for a three-member chamber to hear the case. The fact that the Case Allocation Scheme artificially creates chambers that do not cover the number of judges required by the procedural laws, leaves room for manoeuvre for the final composition of the adjudicating chambers. The practical consequence of the problem is that the chamber indicated in the logs as designated by the Case Allocation Scheme does not provide accurate information on the final composition of the adjudicating chamber hearing the case.
- (3) According to the Case Allocation Scheme, “*the members of the chamber hearing the case shall be determined by the Case Allocation Scheme, in accordance with the objective criteria laid down in it*”.¹¹ In reality, however, the Case Allocation Scheme does not always allow for a clear designation of the members of the adjudicating chamber, which means that it is not the Case Allocation Scheme, but an administrative leader who determines the final composition of the adjudicating chamber. Similarly, the requirement of a predetermined objective criterion does not apply, on the basis of which the designation could be clearly made. For example, under the general rules applicable to proceedings in a three-member chamber,¹² the chamber should be composed of two chamber presidents and a judge-rapporteur, but this is only the general rule, from which derogation is allowed. Additionally, if there are more than two chamber presidents in the designated chamber, the experience of the chamber presidents is decisive, for which there is no predetermined objective criterion in the Case Allocation Scheme. In cases where there is indeed an objective criterion – for example, in civil cases, where the members of the chamber participate in a certain proportion of the allocated cases (e.g. every fifth case that is designated to the chamber) – the application of the algorithm cannot be verified by the parties from the logs generated. In other cases, the objective criterion appears as a requirement, but it is not clear what exactly it means (e.g. in assembly cases “*in order to ensure an even workload, the person entitled to allocate cases may allocate them to other chambers exclusively on the basis of objective criteria*” but the Case Allocation Scheme does not provide for more information about what these objective criteria are).

⁹ Article 10 (1) of the OAC states that “In order to enforce the right to a judge in accordance with the law, the order of assignment of cases shall be drawn up in such a way that it can be ascertained in advance which chamber will act in the case in question, including who will act in its place if the chamber or a member of the chamber is prevented from acting.”

¹⁰ Proceedings under Article 229(2) of Act XXXVI of 2013 on Electoral Procedure, in which “The court shall decide on the application for judicial review in a non-judicial procedure, in a chamber of three professional judges.”

¹¹ Section II.4.1. of the Case Allocation Scheme.

¹² Section II.4.1. of the Case Allocation Scheme.

- (4) The logs generated by the case allocation system do not reveal in any way,
- (i) the exact time of arrival of the case (hour and minute), even though the case number is determined by the order of arrival;
 - (ii) the exact number of members of the chamber hearing the case and the individual judges who will adjudicate the case (information on this can be found in a note of the case file, the content of which is not detailed by the Case Allocation Scheme);
 - (iii) the procedural provision under which the number and composition of the members of the chamber is determined and whether there has been any deviation from the main rule;
 - (iv) if there is a deviation from the main rule (e.g. a five-member chamber instead of a three-member chamber, or a judge of a different section of adjudication is involved in the hearing of an administrative case), the reason for the deviation;
 - (v) who will act as presiding judge and as judge-rapporteur in the case, even though these should be fixed and permanent from the first moment of the assignment of the case.
- (5) The number of the members of the adjudicating chamber hearing the case may vary until the final decision is taken, in accordance with the procedural laws and the Presidential Order. Bearing in mind that in all cases the presiding judge decides on any deviation from the main rule laid down in the procedural laws (i.e. whether to proceed with a three-member chamber instead of a five-member chamber or a five-member chamber instead of a three-member chamber), it may be that the composition of the chamber is changed in the course of the proceedings, thus affecting the decision of the case (e.g. by reducing the chamber to three judges by excluding two judges and thus reducing the former majority to a minority or, conversely, if the opinion of the presiding judge forms a minority within a three-member chamber, this minority opinion may even be turned to a majority by converting it into a five-member chamber). According to the Case Allocation Scheme of the Kúria: *"Where the case is particularly complex and is to be heard by a chamber of three members in accordance with the respective procedural laws, the presiding judge may, taking into account the criteria set out in the Presidential Order No 20/2020 on the Rules for the constitution of a chamber of five members, order the case to be heard by a chamber of five members."*¹³

According to the applicable procedural laws:

- (a) **In civil cases, the general rule is a three-member chamber**, but the law allows for a derogation and a five-member chamber may be appointed in cases of particular complexity or major social importance.¹⁴

¹³ Section II.4.1.2. of the Case Allocation Scheme.

¹⁴ "In the review procedure, the Kúria acts as a chamber of three professional judges. If the case is particularly complex or of major importance for society, the Kúria may order that the case be heard by a chamber of five professional judges." [Article 9 (5) of the Code of Civil Proceedings].

- (b) **In administrative cases, the general rule is a five-member chamber**, but the law allows for deviations and, exceptionally, a three-member chamber may hear the case. By way of exception, two judges who are not designated as administrative judges may be assigned to hear the case. The law does not specify which cases should be considered as exceptions.¹⁵
- (c) **In criminal cases, the general rule is a three-member chamber**, but the law allows for deviations.¹⁶

The problem with the rules in the procedural laws is that it is not clear at what point in the procedure the number of members of the council can be changed. Most likely, the case is already assigned when the decision is taken, since the requirement of *“particular complexity of the case”* presupposes that the chamber is already familiar with the case and the problem it raises. This also means that the composition of the chamber can be altered (it can be enlarged by two additional members) even during the proceedings, in the absence of a specific rule, until the moment before the final decision is taken. This gives the presiding judge the opportunity to influence the outcome of the decision by involving additional members.

In the administrative section of adjudication, the legal provision on the composition of five-member chambers also allows for the transfer of members to the chamber, as up to two judges who originally sit in a different section may be assigned to the administrative chamber. This makes the accountability of the system of allocation of cases completely unstable. The text of the procedural law omits the subject from the sentence, which means that it remains unclear who decides, and on the basis of what criteria, which judge from another section may sit as a member of which chamber in which case.

- (6) Each of the chambers established in the Case Allocation Scheme has several presiding judges¹⁷ who *“shall alternate in the duties of the presiding judge according to the subject matter of the case, and the presiding judge selects the judge-rapporteur in the same order”*. The rule is difficult to interpret and its application cannot be traced back in any way, either from the logs or from any other guarantee rule.

¹⁵ “The Kúria proceeds in a chamber of five professional judges. Where the nature of the case so warrants, no more than two members of the chamber of five professional judges may be professional judges who are not designated as administrative judges. The presiding judge may exceptionally refer the case to a chamber composed of three professional judges.” [Article 8 (6) of the Code of Administrative Proceedings]. “Where a conflict of jurisdiction arises between the court hearing the administrative case and another court, the Kúria shall decide on the designation of the competent court in a chamber of five judges. The presiding judge and two members of the chamber shall be administrative judges, and the other two members shall be judges of the branch of the law in dispute. The composition of the chamber and the order of substitution shall be determined annually in advance in the case allocation order.”

¹⁶ “The courts of second and third instance sit in a chamber of three professional judges. The court of second and third instance may, in the case of a major offence relating to economy, refer the case to a panel of five professional judges, if it considers it necessary in view of the complexity of the case, the volume of the case file, the number of persons involved in the criminal proceedings or for any other reason.” [Article 13 (4)-(5) of the Code on Criminal Proceedings]. “The petition for review shall, with the exception provided for in this act, be heard by a panel of three professional judges of the Kúria [...]. If the review is directed against a decision of the Kúria, the petition shall be heard by a chamber of five professional judges, except for petitions excluded by law, petitions from persons not entitled to file such petitions or petitions out of time.” [Article 655 (1) and (2) of the Code of Criminal Proceeding].

¹⁷ According to the effective Case Allocation Scheme, most chambers have two presiding judges, and some chambers, such as B.I. and P.IV., have three.

- (7) The general substitution order for chambers allows for substitution not only between judges within the same chamber and the same department (in Hungarian '*kollégium*'), but also outside the department "*if substitution cannot be effected within the chamber or the department*".¹⁸ For the latter case, the Case Allocation Scheme does not provide for any rules and the choice of a substitute becomes entirely optional.
- (8) Problems with the possibilities to derogate from the Case Allocation Scheme:
- (i) Based on the new provisions of the OAC, the general rules on the allocation of cases [as set out in Article 10 (4) (a) to (d) of the OAC] shall also be applicable in case of derogation from the Case Allocation Scheme.¹⁹ According to Article 10 (4) (d) of the OAC, the parties to the proceedings must be able to monitor compliance with the rules on the allocation of cases. However, certain cases of deviation from the case allocation order (e.g. the decision to appoint a substitute judge from another chamber or department) need neither be recorded in a log nor communicated to the parties in an order of the court.²⁰ Thus, the parties are not necessarily informed if a judge in their case is replaced by another judge in accordance with the Case Allocation Scheme (in particular, if the replacement takes place in a three-member chamber hearing the case by the designation of another member of the same chamber).
 - (ii) The reallocation of the case to a new chamber is registered in a separate logbook, which does not provide any explanation as to the reasons for the reallocation of the case.²¹ The procedural rules do not ensure that the parties are in any case informed of the fact of the reallocation, it rather requires them to check the logbook, which is displayed as a fully separate document. The parties have to find out to which chamber the case originally belonged to by comparing the entry with the previous entries in the logbook, instead of the logbook indicating the reallocation.
 - (iii) The justification for the application of the exception rules that are contained in the logbook is not verifiable by the parties either. In case of a derogation from the Case Allocation Scheme, the logbook indicates that there was a derogation, also containing the legal basis of it, but it is not possible to know from the logbook which chamber should have heard the case in question originally, and therefore it is not possible to check whether the applied legal basis is relevant, e.g. if there is an actual overload in the chamber to which the case should have been assigned.
 - (iv) In criminal cases, the rules governing the composition of the chamber in some cases make the number of members of the chamber depend on the *outcome* of the decision²² (and not the type of the criminal case). In practice, this means that the content of the decision

¹⁸ Section II.4.2. p. 3. of the Case Allocation Scheme.

¹⁹ Article 10 (6) of the OAC.

²⁰ This is not required by law or by the case allocation order, unlike, for example, the decision to move to a five-member chamber, which must be communicated to the parties by order under the Presidential Order.

²¹ See for example:

https://kuria-birosag.hu/sites/default/files/ugyelosztasi_rendszer/2023_25_heten_atosztott_ugyek_kozigazgatasi_kollegium.pdf.

²² Section IV.6., p. 4. of the Case Allocation Scheme.

on the merits determines the number of members of the panel and the parties to the proceedings can deduce the content of the decision to be delivered in their case from the number of members of the chamber at the hearing.

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