

Research Article

Illegal Clauses on Allocation of Cases in German Courts – As an Example of Judicial Arbitrariness

Magdalena Katz* 

Independent Scholar, Berlin, Germany

Abstract

Any court acting in a country must follow the principles on the rule of law. The courts as well as judges are bound on the constitutional principles. These are laid down in the constitution and are being interpreted by the Constitutional Court and higher courts. Regional and district courts must respect it. However not all of them do. The present research is original. It is the first of its kind in the literature, analyzing the plans on allocation of cases of several courts. No one has ever dealt with topics it does and on this scale. It deals with loopholes left in German laws that German courts (ab)use. Moreover, the loopholes left allow the offices of public prosecutor to influence the proceedings of the courts and thus – as part of executive power – influence the judicial powers. This is a phenomenon unknown until now in the states that claim to follow basic constitutional principles. The conducted study and analyzes deal with several German courts all over the country (West and East, regional as well as Constitutional and Highest Courts). It thus presents that the phenomenon does not affect one specific court, but constitutes rather a phenomenon of an abuse of judicial powers laid on courts. The present research shows specific examples of illegal clauses conducting a proof of common breaches of law of institutions that are set up in order to execute the laws by the citizens. However, it seems that German courts as well as judges are placed above the law they expect citizens to follow.

Keywords

The Rule of Law, Plans on Distribution of Duties in Courts, Judicial Arbitrariness, Non-Abstract-General Provisions, Delegations to Chambers or Prosecutors, Discriminatory Allocation Methods, Constitutional Rules, Separation of Powers

1. Introduction

Actual cases gave reasons to analyze plans of distribution of duties in different German courts, regional, district as well as higher regional courts (respective: Amtsgericht, Landgericht and Oberlandesgericht). A thorough analyze of plans of eight courts has proven enormous deficits, that run to violations of the constitutional principle of the rule of law, what runs to breaks of German constitution and makes both the plans on allocation of duties and the decisions taken by German courts unconstitutional.

The current article presents the principles developed by the German Federal Constitutional Court as well as higher courts that deal with constitutional requirements on the plans of distribution of duties in courts. Further the present paper conducts an analysis of the plans on allocation of duties, comparing them with these requirements, as set up by higher courts. I also provide chosen clauses, that do not fulfill the requirements, introduced for instance by the German Federal Constitutional Court.

*Correspondence: Magdalena Katz (contact@legislative-procedure-consulting.eu)

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2. General Rules for Plans of Distribution of Cases in Courts

Art. 101 of the German Constitution (German: Grundgesetz) [1] requires that everyone can determine the constitutional judge based on general-abstract rules of law. This provision is supposed to prevent the danger, that the judicial power will be influenced by manipulations, especially that some will be able to determine the “constitutional judge” for every certain case *ad hoc*, that may have impact on the particular decision. That is why, the regulations on plans regarding the distribution of cases between judges must contain abstract-general provisions that help the citizens to determine their constitutional judge ahead (and not after the case has been filed).

2.1. Few remarks Extracted from the Jurisprudence of the Federal Constitutional Court

The general provisions of Federal laws must be filled up with provisions respecting every single German court. It happens by plans of distribution of duties between judges and chambers of a certain court. A plan this kind may be issued once a year, according to Federal laws.

2.1.1. Abstract-General Character of Provisions Regarding Allocation of Cases in Courts

The allocation of cases must contain abstract-general provisions on which judge and which chamber will rule on a certain case. It also must contain definite regulations. The aim is to exclude any possibility of manipulation.

The guarantee of the “constitutional judge” will prevent situations, in which the choice of a certain judge will have impact on the outcome of the case. It should serve judicial autonomy, support public trust in the rule of law and in impartiality of judges.

The regulations on distribution of cases and determination of the constitutional judge must contain solely abstract-general criteria and allow the determination of respected judge ahead.

The mentioned regulations must contain provisions, characteristic for the rules of law: abstract-general. The constitutional right of access to court suffers from breaks when abstract-general regulations are missing and it is impossible to determine the constitutional judge for certain case, based on abstract-general provisions laid down in a constitutional plan on allocation of cases.

2.1.2. Subsequent Changes in the Distribution of Duties (Pending Proceedings)

However, the requirement of abstract-general character of allocation of cases is not everything. There are also criteria

regarding pending proceedings. The re-distribution of pending cases fulfills the criteria on constitutional judge when the new plan (re-distribution of duties) follows from the plan on distribution of duties itself. It is not abstract-general when it transfers the power to determine the constitutional judge on further bodies that can determine the “constitutional judge” for example by procedural factors as, or instance, oral hearings.

Clauses that allow the chambers to determine the “constitutional judge” by scheduling, constitute a delegation of power on further entities and do not fulfill the criteria of abstract-general provision. Moreover, the chamber or even a single judge may decide – through the back door – on its own competence in certain case.

Subsequent changes are legitimate, under some conditions. But they may not contain a delegation of power to establish the constitutional judge in a certain case.

2.1.3. Materials and Methods

In order to conduct the research I have studied several plans on distribution of duties of German courts. Due to the occupation zones after World War II, I was wondering if there would be any difference between plans on allocation of cases of Eastern and Western Germany. That is why, in order to conduct a thorough analysis, I have picked courts in Western as well in Eastern Germany. And I dealt with few tens of plans of German courts.

The plans of courts and the laws and the jurisprudence of higher courts on the interpretation of the laws and the constitutions were the materials I have used.

In order to conduct the study I have compared the valid Federal laws, the German Constitution and the jurisprudence of Higher Courts interpreting it on the one hand with clauses that are laid down in respected plans on distribution of duties of some courts I list below on the other.

Thus I have conducted a comparative research. However I have compared solely the plans on allocation of cases, as the lowest rule of law with Federal and constitutional laws, as higher provisions of law. The comparative analysis the present paper contains is of a national nature.

An international comparison would require the existence of a similar human-based “system” of distribution of duties (allocation of cases) in courts in different countries.

In order to conduct an international analysis the author was trying to obtain plans on allocation of cases of Polish courts.

In Poland, however, an electronic system exists. Polish system of random allocation of cases (Polish: System Losowego Przydziału Spraw) is computer-based and it thus excludes the possibility of manipulations to a large dimension. An exact study on possibility of manipulations in the Polish system of allocation of cases would require an insight in programming of the system. Most importantly, the Polish system excludes human influence to a large scale and minimizes the possibility of arbitrariness.¹

¹ However, in some cases one resigned on this system of random allocation of

cases. Those, whose rights have been violated, sued against the decision issued in

2.2. Some Remarks on Unconstitutional Practice of Courts – Chosen Clauses

Analyzed plans of distribution of duties of eight German courts proved constitutional deficits. Since they violate the principle on the rule of law and the independent constitutional judge, they break constitutional law and – especially human rights.

2.2.1. German Federal Constitutional Court (German: Bundesverfassungsgericht)

I was wondering, if the Federal Constitutional Court follows the rules and principles for plans on distributions of competencies within courts, that it has established in this jurisprudence on its own.

The result of the analysis of the plan on allocation of cases in Federal Constitutional Court [2] is that the German Federal Constitutional Court does not follow rules that it has established.

The plan on allocation of cases does not fulfill the criterion that it must be abstract-general. It contains under Point 2 a clause according to which, a certain procedure stays within the competency of a concrete judge.² It is not abstract-general, but concrete – or better – double concrete (certain case by certain judge).

Under Point 3 it contains similar clause.³ Also this clause does not match the criteria of abstract-general deviation of duties, since a judge named by name is responsible for a certain procedure in front of respected court.

Moreover it contains clauses which demand interpretations in order to determine the competent judge. For instance it rules under clause II, I.1. that a judge is responsible if cases respecting article 19, 101 and 103 of the German constitution supersede. It however does not say what “supersede” means and who decides if something supersedes. This way a certain judge decides if he wants to stay competent or not.

Similar procedures are not covered by the rules that the German Federal Constitutional Court has established on its own [compare 3]. Clauses do not fit into the understanding of the

„constitutional judge”, that the Federal Constitutional Court established itself.

2.2.2. Federal Highest Court (German: Bundesgerichtshof)

The plan on allocation of cases of the Federal Highest Court [4] contains several clauses that do not fit into the common understanding of the “constitutional judge”.

For instance, the competency of a court can depend on the fact, if a hearing took place.⁴ However, the chamber decides if a hearing takes place. Since a certain chamber decides when a hearing takes place, this clause allows manipulations. Concrete competencies depend on decisions taken by certain Chambers, was exceeds the criteria of „constitutional Judge” [2].

According to the rules established by the German Federal Constitutional Court [5] the deviations or redistribution of existing or registered cases must occur in an abstract-general way. Since it foresees the distribution according to a certain decision of a certain chamber, is does not meet the criterion of abstract-general distribution of duties.

Moreover, this plan contains further clauses that are not allowed and allow manipulations.

For example the change of responsibility of a chamber for a case may depend – according to this plan – on the „special competency”.⁵ However, the plan does not rule what is a „special competency” and who decides what it should be.

Further, some clauses demand interpretation.⁶ A chamber may resign on the work on a case if this would be “inexpedient”. Also here the plan does not rule what would be “inexpedient” (German: unzweckmaessig) or who would decide on it. Moreover, it is clear that someone must take a decision on what would that be.

Further clause allows a new deviation of duties if this would be “expedient from special reasons”.⁷ Here, the term “special reasons” is indefinite.

It means that a certain judge or a chamber must interpret the rule of law that is not sufficiently concrete. Thus, clauses this kind are not abstract-general.

such an illegal process. The plaintiff applied by the European Court of Human Rights. The case is pending under No. 23712/24.

² „ Die bis zum 31. Dezember 2024 eingegangenen Verfahren des Sachgebiets Regulierungsrecht (Telekommunikation, Post, Eisenbahnen und EnWG) verbleiben im Dezernat des Bundesverfassungsrichters Wolff und werden in die 3. Kammer gegeben.“

³ „Auch nach Übergang des Sachgebiets Hochschulrecht auf das Dezernat des Bundesverfassungsrichters Christ bzw. dessen Nachfolgerin/Nachfolger bleibt Bundesverfassungsrichter Eifert für das Verfahren 1 BvR 1141/19 zuständig.“

⁴ Clause I, page 2: „VI. Schlussbestimmungen zur Geschäftsverteilung 1. a) Erachtet ein Strafsenat in einer bei ihm anhängigen Sache einstimmig, dass sie nach den Bestimmungen dieses Geschäftsverteilungsplans vor einen anderen bestimmten Strafsenat gehöre, so ist sie dorthin abzugeben. Der Abgabebeschluss ist für den Strafsenat, an den die Sache verwiesen ist, nur bindend, wenn dieser vorher angehört worden ist und zwischen dem Eingang der Antragsschrift des Generalbundesanwalts bei dem abgebenden Strafsenat und dem Eingang von dessen Übernahmeersuchen bei dem ersuchten Senat nicht mehr als drei Monate vergangen sind, jedenfalls aber nicht mehr nach Beginn der Hauptverhandlung in dieser Sache.“

⁵ Klausel VI. Schlussbestimmungen zur Geschäftsverteilung, 1. a), Satz: „In Strafsachen findet eine Abgabe nicht statt, wenn nach Eingang der Sache beim Senat dessen Spezialzuständigkeit durch eine Prozesshandlung nachträglich entfällt.“

⁶ Klausel 1 b), sentence: „Soweit kein Fall des Buchst. a) vorliegt, gilt folgende Regelung: Erachtet ein Senat vor Anberaumung eines Termins zur mündlichen Verhandlung einer bei ihm anhängig gemachten Sache einstimmig, dass sie nach der Art des anzuwendenden Rechts vor einen anderen bestimmten Senat gehöre, so ist sie dorthin abzugeben, falls nicht die Abgabe aus besonderen Gründen unzweckmäßig erscheint. Der Abgabebeschluss ist für den Senat, an den die Sache verwiesen ist, nur bindend, wenn dieser vorher angehört worden ist und zwischen dem Eingang der Rechtsmittelbegründung und dem Übernahmeersuchen nicht mehr als sechs Monate vergangen sind.“

⁷ Klausel 2. a), „Kommen für den in der Revisionsinstanz noch streitigen Teil eines Rechtsstreits überwiegend Fragen aus einem Rechtsgebiet in Betracht, für das nicht der Senat, bei dem die Sache anhängig ist und vor den sie nach dem Geschäftsverteilungsplan gehört, sondern ein anderer Senat zuständig ist, so kann, wenn das aus besonderen Gründen zweckmäßig erscheint, die Sache an diesen Senat mit dessen Zustimmung abgegeben werden.“

At the same time it decides about the competency of a chamber for a certain case. The Federal Constitutional Court does not allow this or similar procedures [3]. It demands abstract-general deviations of duties. Above-mentioned clauses allow judicial arbitrariness.

2.2.3. Higher District Court in Munich (German: Oberlandesgericht Muenchen)

The plan of distribution of cases of the Higher District Court of Munich [6] is unconstitutional.

Already on the second page (sentences 2 and 3) it states that “I” decides on several issues. Another clause states that the distribution of rooms has been done “by me”. The question arises, who is this “I” or “me” in a context of a plan of distribution of cases between judges in a state Bavarian court?

By this lecture I had to think of Louis XIV and his well known words „L’État c’est moi” (English: “The state, it is me”). After that I realized that this saying attributed to the king of France symbolized his belief in absolute monarchy and the idea that royal power was above any state institutions and that the king would possess unquestioned authority.

After I was back in the XXI century, I was trying to understand how one could understand “I” in the light of democracy, that everyone – at least officially – would like to implement and follow.

Similar the acceptance of an application for a check of the file depends on the decision of an “I”.⁸ This way a private “I” decides for instance if newspapers or researchers may see and review a certain file, case dealt in front of the court in Munich. It is not constitutional that a decision with respect of the freedom of press depends on a decision of a private person in a state that claims to follow constitutional rules, to which the freedom of speech belongs to.

This particular “I” refers directly to the person that assigned the plan and not “every” or “each” president of the court. Wording this kind, like “every” or “each” president, would be abstract-general. According to this phrasing, the citizen could determine the public officer responsible for a certain duty, according to the plan of allocation of duties. However, “I” is neither abstract nor general. It rather means the private person himself – an individual.

This plan contains also regulations that are not covered by German laws.⁹ At the same time, plans on distribution of duties between judges in state courts must follow and respect higher rules of law, as the hierarchy of laws in a democratic country foresees. They are bound on laws and on the Constitution. Plans on allocation of cases serve the concretization of (Federal) laws that are abstract-general. This concretization of

abstract-general laws must occur in an abstract-general way in order to minimize the danger of judicial arbitrariness. According to principles of precedence of laws and parliamentary reservation laid down in German constitution, a law of lower hierarchy is invalid, if it breaks higher laws. This means that if a clause in a plan of a court breaches the higher laws it is invalid. It is invalid if there is no legal base for a certain clause in higher laws or in the constitution.

Further clause¹⁰ foresees the application of rules if “a specially designed representative” may act. However, who is this “a specially designed representative” and who takes the decision on this matter. The plan contains a loophole in so far.

Another provision of the plan on allocation of cases in the Bavarian court rules on „special competency”.¹¹ However, the plan of this tribunal does not rule on what is the “special competency”. It contains no definition of this undetermined legal term. Thus, it demands interpretation in order to determine the legal body responsible for deciding on a “special competency” matter. However, the question arises, who may interpret it. Clearly, the plan does not rule on who may interpret this provision. It means that this could be anyone. Since the body responsible for interpretation is unknown, one usurps the competency.

This clause contains also further undefined legal term “focus” of a legal procedure. Here one can find no definition in the German legal order what would “focus” mean. Moreover, the plan on allocation of cases – as a law of lower rank – does not contain a definition of it. One thus must assume that this loophole exists on purpose in the plan in order to allow judicial arbitrariness and decision on “the constitutional judge” on a case-by-case basis. This is a ~~clear~~ breach of constitutional principles of the rule of law and legal certainty.

Further clause¹² rules on the competency of a court’s chamber if a certain case fulfills the criteria of a bank law case and a credit case. According to this clause, a legal file containing aspects of bank law and a credit case, belongs to the chamber for bank cases of the Munich court and it gets the file. This is a further example of judicial arbitrariness. Because none German law of higher rank foresees that cases on bank law would be able to constitute a competency on decision making. Citizens that have pending cases on credit law are deprived of their constitutional judge due to the lack of a legal base on the higher importance of bank law cases in comparison with credit law cases.

Another example for judicial arbitrariness is a further clause according to which the competency of a chamber depends on

⁸ Clause III, page 2: „Die Erteilung einer allgemeinen Genehmigung zur Akteneinsicht (z. B. zu Forschungszwecken u. a.) ist mir vorbehalten.“

⁹ Clause III, page 2: „Nach Abschluss des Güterichterverfahrens ist die Verbescheidung von entsprechenden Anträgen dem Vorsitzenden des Senats übertragen, der für das Herkunftsverfahren zuständig ist.“

¹⁰ Clause, page 7: „6. Soweit die weitere Vertretung anders geregelt ist, gelten die Bestimmungen der Nr. 4 dann, wenn die besonders bestimmten weiteren Vertreter

zur Vertretung nicht ausreichen.“

¹¹ Clause II, A., page 8: „Im Verhältnis zwischen Sonderzuständigkeiten, deren Zuweisung auf einer gesetzlichen Regelung beruht, kommt es auf den Schwerpunkt an.“

¹² Clause 9, page 11: „Trifft eine Kapitalanlagesache mit einer Bank- oder Kreditsache (s.o. Nr. II.A.1) zusammen, so geht die Zuständigkeit für Banksachen vor.“

“special competency”.¹³ The plan does not contain a definition what this special competency would be or who would decide on it.

Some clauses¹⁴ foresee the allocation of cases according to an established system of a turns (German: Turnussystem). A system of turns may be – according to the jurisprudence of the German Constitutional Court – constitutional, if it is free from possibilities of manipulations. Clauses contained in the plan on the allocation of cases of the Bavarian District Court however do allow manipulations. Clauses rule on the system of turns. They however exclude some chambers from the participation in this system.

Another clause¹⁵ rules on the competency of a chamber in a certain case, if a hearing took place. This clause is invalid since it breaches constitutional law. It foresees a concrete decision on the convening of a “hearing” of parties, instead of ruling on an abstract-general basis. Moreover, this clause allows the chamber itself to decide on its competency in a case, since its responsibility depends on the fact if it convened a hearing. This is unconstitutional since it is the chamber itself that decides if to convene and conduct a hearing. This clause thus contains a constitutionally invalid delegation of duties on the court’s chamber that deals with a specific case, instead of ruling in an abstract-general way in the plan of the Bavarian tribunal.

According to the jurisprudence of the Federal Constitutional Court, plans on allocation of cases may not contain delegations to the chambers of the courts. Because the chambers are addressees of provisions of each plan. They may not supersede its regulations through the backdoor. Delegations of this decision-making powers on specific chambers do not fulfill the criteria of constitutional judge according to article 101 of the German Constitution [3, 5].

Further clause¹⁶ contains the following provision “if cases get into the court at the same time, a raffle decides“. This clause is unconstitutional, since it does not define when and how different legal files can reach to a court at the same time. This issue deals with unreality. It completely ignores the development of informatics and the systems that courts possess which allow applications both in paper and electronic. Who

and how can determine that a file reached the court in paper and electronically at the same time?

In the plan on allocation of cases of the Higher District Court of Bavaria I could find more than 30 clauses that run to unconstitutionality of this plan. It means its invalidity – in the light of constitutional provisions.

2.2.4. District Court of Munich I (German: Landgericht Muenchen I)

The plan on allocation of cases of District Court of Munich I [7] contains few tens of clauses that are unconstitutional.

This plan provides a clause according to which the cases are divided according to legal issues (German: Sachgebiet) or to turns (German: Turnus) and that the deviation according to legal issues supersedes the deviation of duties according to the system of turns.¹⁷ The German Federal Constitutional Court ruled that solely the deviation of duties according the system of turns would be constitutional. In the light of its jurisprudence deviation of duties according to “legal issues” is not constitutional. This means that the whole system of allocation of cases in the Court of Munich I was illegal, as it opened room for judicial arbitrariness.

Further clause 10 foresees¹⁸ that cases may reach the court both electronically and in paper. For electronically provided issues it states that these files are forwarded immediately. At the same time the special body of the court collects the issues in paper and deviates it only next day. This constitutes a discrimination due to the fact the citizens do now have access to electronically established sources and they may reach the court solely in paper. Their files are divided later on, comparing the files brought to court by attorneys-at-law who have access to electronic system.

Further clause foresees¹⁹ that files that reach the court in paper are collected by the registration office and divided on the next day. This regulation allows arbitrariness, since the files do not get the numbers immediately but are first collected on a “pile” and one may simply change the order and thus the competency of a chamber (system of turns).

For criminal chambers there is a clause in the plan that fore-

¹³ „B. Regelungen für die Zivilsenate mit Ausnahme der Familiensenate
„Sofern keine Sonderzuständigkeit gegeben ist, deren Zuweisung auf einer gesetzlichen Regelung beruht, gilt folgendes:...“

¹⁴ Clause C. Regelungen für die Familiensenate
1. Verteilung im Turnus (Amtsgericht München)
... Für die Verteilung im Turnus gelten die unter Nr. II.D.1 genannten Grundsätze entsprechend, wobei die Regelung unter Nr. II.D.1.b)...

Page 14:
Nicht unter die Turnusverteilung fallen Verfahren im Sinne von Nr. II.C.2, 3, 4, 5 und 7. Erhält ein Familiensenate auf der Grundlage von Nr. II.C.3 oder 4 ein Verfahren, das eine Entscheidung des Amtsgerichts München betrifft, erfolgt eine Anrechnung auf den Turnus.“

Clause c 1): „Der 2., 12. und 16. Senat nehmen am 17. und 18. Turnus nicht teil.“

¹⁵ Clause C 8: „Hat vor einem Senat die mündliche Verhandlung zur Hauptsache oder eine mündliche Anhörung von Beteiligten oder betroffenen Kindern zur Hauptsache begonnen, so bleibt der Senat zuständig.“

¹⁶ Clause B, 7, page 32: „Bei gleichzeitigem Eingang entscheidet das Los.“

¹⁷ Für die Zivilkammern und Kammern für Handelssachen
Clause 6: „Die Geschäfte der Zivilkammern und der Kammern für Handelssachen werden nach Sachgebieten oder nach einem Turnus verteilt. Die Verteilung nach Sachgebieten geht - unabhängig vom Schwergewicht der geltend gemachten Ansprüche - der Verteilung im Turnus vor.“

¹⁸ Clause 10: „Turnus ...
Die per ELA, von den zentralen Mahngerichten und über den Austauschordner mit dem AG München eingehenden einzutragenden elektronischen Eingängen werden unmittelbar an das Zentralregister weitergeleitet; dies gilt auch für per elektronischem Integrationsportal weiterzuleitende interne Abgaben. Körperliche Eingänge werden in der Einlaufstelle I am Tag des Eingangs gesammelt, zusammengefasst und vor ihrer Weitergabe an die Zentralregistratur mit einer laufenden Nummer versehen „

¹⁹ Clause: „Die im Laufe des Tages gesammelten und nummerierten Eingänge werden am Morgen des darauffolgenden Werktages (außer Samstag) dem Zentralregister vorgelegt und bei Dienstbeginn als erstes eingetragen.“

sees the deviation of duties according to the name of the accused person.²⁰ This does not constitute an abstract-general deviation of duties between judges that would be based on the system of turns [7], since it may run to an uneven deviation of workload. Some court's chambers may get more files than others. It is thus unconstitutional, in the light of the jurisprudence of the Federal Constitutional Court.

Moreover, it contains a delegation of powers to public prosecutors, who can – by a tricky – preparation of the claim reach to a certain judge. It is possible that a public prosecutor must accuse few people and by listing them in a certain order, arbitrarily starting with the last name of A instead of B, it may reach a judge it wants to. A delegation of power to determine the competent judge is unconstitutional. The plan of allocation of cases must rule on the competency of judges in an abstract-general way and it may not leave it open for arbitrarily acts of others.

Further clause 22, b foresees that cases reach the court in paper. In this case the central registration office collects the paper sheets and it distributes them solely next day, by the worker of the central registration office.

This clause is incomplete since it does not rule on the possibility to reach the court electronically. At the same time, the German legal order has ruled on electronic access to courts. Attorneys-at-law as well as public prosecutors do use the electronic system. Moreover, this provision does not rule on reaching the chamber, the court, but the central registration office. It is unconstitutional since it is misleading [9, 10]. The citizen may not know what is the “entrance”. This clause thus raises legal problems.

Further example constitutes the clause, according to which the president of this court may apply the rules of law analogue²¹, in order to issue concrete decisions. It means that the president of this court may imply German abstract-general laws in order to extend the competencies. This situation thus hurts the guarantees of constitutional judge as laid down in Art. 101 of the German constitution. An analogue interpretation of laws may not run to establishing of new competencies. However here, it does.

The plan on allocation of cases in this court thus allows manipulations. I could determine at least 22 invalid clauses. Further example is the possibility for public prosecutors to determine the judge to which the file will reach, be tricky editing of the bill of indictment. At the same time it deprives the citi-

zens the access to the constitutional judge, what means unconstitutionality of the plan and the decisions that the judges have issued over 2025.

2.2.5. Higher District Court Berlin (German: Kammergericht Berlin)

Unique analyzes of the plan of distribution of Power of German Higher District Court of Berlin [11] has shown further violations of the principle of the rule of law. The plans has 97 pages and contains at least 51 illegal clauses. Every one of them means that the plan is unconstitutional.

For example the plan of Higher District Court for the land Berlin contains a clause²² according to which one divides first correspondence that reached the court electronically, according to the moment in time it reached the court. Subsequently one divides the files that reach the court through drive L. The rest of the files that access this court is divided according to the moment in time it reaches the court.

This clause contains arbitrary rules on division of legal files in this district court according to the way that the applicant uses to reach the constitutional judge. Private persons who cannot afford an attorney-at-law usually use the paper form and not the electronically available source that are solely open for attorneys-at-law (or public prosecutor). Thus, if the clause foresees that the division of files that reach the court in paper occurs as the last one and the court divides files electronically first, this clause discriminates private citizens. At the same time, private citizens are weaker party anyway.

A further clause foresees that the letters reception (court's registration office) divides the files, according to the moment in time the legal file reaches the court.²³ This clause contains a division of competencies according to the “receipt of the application”. The rule object refers to impossibility, due to the fact that it does not rule when the files reach the court at the same time. The citizen may not know, when do files reach the court at the same moment in time if one file can reach the court electronically and the other in paper. This clause is invalid because it does not possess the rule object [12].

The Highest German Federal Court ruled that the plan on allocation of cases may be invalid if it is sure that no one can follow its rules [13, 14]. The citizen that tries to reach his constitutional judge may not be sure that this file will reach to “his” judge.

Another clause²⁴ foresees the division of files according to

²⁰ Für die Strafkammern, clause, page 28, „Hinsichtlich der Verteilung nach Buchstaben gilt Folgendes:

Maßgebend ist der erste groß geschriebene Buchstabe des Familiennamens des Beteiligten (Beschuldigten, Angeschuldigten, Angeklagten). Beteiligter im Sinne von Satz 1 ist auch der ehemals Beschuldigte, Angeschuldigte oder Angeklagte, wenn sich eine angefochtene strafprozessuale Maßnahme nach Abschluss dieses Verfahrens gegen ihn richtet.

²¹ Clause „4. Zuständigkeitsstreit

Wenn sich bei Zweifeln über die Auslegung der Geschäftsverteilungsbestimmungen die beteiligten Kammern nicht einigen, entscheidet das Präsidium des Landgerichts, in dringenden Fällen die Präsidentin des Landgerichts in entsprechender Anwendung des § 21 i Abs. 2 GVG.“

²² Clause No 100 „Zunächst werden elektronische Eingänge über das EGVP in der zeitlichen Reihenfolge des elektronisch erfassten Eingangs im EGVP verteilt. Anschließend werden die über das Laufwerk L eingegangenen Verfahren in der zeitlichen Reihenfolge des elektronisch erfassten Eingangs auf diesem Laufwerk verteilt. Die übrigen Eingänge werden in der zeitlichen Reihenfolge ihres Eingangs bei der Briefannahmestelle verteilt.“

²³ Clause No 100: „Die übrigen Eingänge werden in der zeitlichen Reihenfolge ihres Eingangs bei der Briefannahmestelle verteilt.“

²⁴ Klausel 3.1.2., No. 152: „3.12. Maßgeblich für die Zuteilung eingehender Sachen ist allein die Reihenfolge ihres Eingangs auf der Geschäftsstelle, bei gleichzeitigem Eingang erfolgt die Zuteilung nach dem Namen des Inhaftierten,

the moment in time and if one cannot determine it, according to the last name of the accused person. This is not the division of files and duties according to abstract-general criteria. The division of competencies according to the last name of the person accused, may run to overload of some chambers [8]. This clause is thus arbitrary and allows judges illegal manipulations.

Many clauses are simply indefinite and thus allow manipulations. It looks like the president has left some questions open, in order to be able to decide on the spot – and not ahead, in an abstract-general plan.

However, the plan contains many clauses that allow the president taking decision *ad hoc* on which judge will deal with certain case. Solely 2025 the president has issued few tens of decisions regarding the allocation of certain case to the judge of his/her choice.

2.2.6. District Court Berlin II (German: Landgericht Berlin II)

The plan on allocation of cases between judges of District Court of Berlin [15] contains at least 37 unlawful clauses – what I could determine.

For instance according to a clause, a redistribution of points takes place, that a chamber may get for a certain file (legal case).²⁵ This means that the registration office receives the file for a further time and makes a new decision on the points that a chamber can get. During this time the file rests in the registration office, what allows further manipulations.

Another example of lawlessness and free ticket for manipulations constitutes clause 12.

According to clause 12, the presidency of the court may conduct “compensation of burdens” during the year, on a “certain day”.²⁶ According to that, the presidency of the court takes points (received for the work on a certain legal file) from one chamber to another. Above we could see that during this time of redistribution of points the file rests in the court’s registration office.

This means that the Presidency, while redistributing or – as the hidden secret wording – compensating the burdens between chambers, makes a decision in a concrete case on certain files, through the backdoor.

By the hidden regulation regarding the “compensation of burdens” the plan of this court allows the presidency to decide on each case, to which chamber and thus to which constitutional judge the file gets. This is exactly, what the German constitution forbids, since it requires abstract-general rules on the allocation of legal files between chambers and judges.

According to the same clause, the change of divided points

occurs at the beginning of the day.²⁷ This opens the possibility for the Presidency to manipulate the responsibilities of judges through the backdoor, since the legal file rests in the court’s registration office waiting for the final of the “compensation of burdens”, made by the President of this court.

According to clause 11²⁸, the division of responsibilities and thus allocation of cases occurs according to points. The Presidency may thus, through the redistribution of points on a certain day (!), move concrete files from one chamber to another, and pretend this would happen in order to compensate the “burdens”. This procedure is highly questionable, since this is supposed to occur on a certain day and thus spontaneously. Can the “compensation of burdens” be required that spontaneously, on a certain day of the year, that has 365 days? Read the clauses: they foresee the “compensation of burdens” within the whole year and on a certain day. Can that be? Is this possible, that in the past, some files of certain attorneys-at-law got on these days to certain judges? Is there a track, a path one can determine?

At my point of view, there is no factual reason for decisions of the presidency on a certain day this kind. If one needs the compensation of burdens, this constitutes a bigger problem than a decision *ad hoc* on a certain day. This regulation in the plan on allocation of cases of Berlin District Court II allows manipulations on a high scale. The redistribution of cases occurs at the “beginning of the day” und “before the first file gets registered”.

Through the backdoor, the presidency may secure, that a certain chamber gets a relief from points (read: legal files/case) and it thus may receive a new-coming case!

Further manipulation is foreseen by the plan itself. The decision on the plan of deviation of duties for year 2025 was made on 18th December 2024. Above one can see that the plan was valid from 1st January 2025. Can it be that the decision of 18th December 2024 is based on a clause 11 of a plan that will be in force from 1st January 2025? Since the clause is valid from 1st January 2025, there was no legal base on 18th December 2024 for the decision. This clause 11 makes the plan unconstitutional.

Read the clause 13 at the end.²⁹ It states that „only after the redistribution of duties occurs, the registration of new cases may take place“. This means that new-coming cases rest for so long, as long no one decided arbitrarily on the redistribution of points.

The problem here is, that when the new-coming cases reach the registration office, the presidency of the court may already

Untergebrachten oder Antragstellers in alphabetischer Reihenfolge“.

²⁵ Clause, page 7: No. 4 Redistribution of files (German: Abgaben von Verfahren), „Verfahren, die von einer Kammer abgegeben oder an eine Kammer für Handelssachen oder an eine Zivilkammer verwiesen werden, weist die Eingangsregistratur am Tag nach dem Eingang bei ihr nach Übertragung der Punkte und nach Durchführung der Punktstandkorrektur gem. Rn. 12, 13, 19 - 23 vor anderen Verfahren in der zeitlichen Reihenfolge ihres Eingangs der zuständigen Kammer zu.“

²⁶ Clause 12, page 12: „Dem Präsidium bleibt es vorbehalten, in nicht

vorhersehbaren begründeten Einzelfällen zum Belastungsausgleich während des Jahres zu beschließen, dass an einem zu bestimmenden Tag einer Kammer Punkte abzuziehen oder hinzuzufügen sind.“

²⁷ Clause 12, page 13: „Die Punktstandveränderung ist jeweils zu Beginn des Tages, zu dem die Punkteveränderung erfolgen soll, vor Eintragung der ersten Sache im betroffenen Turnus vorzunehmen.“

²⁸ Clause 11 „Zuweisung innerhalb der Turnusringe nach Punktständen“.

²⁹ „Erst nach Durchführung der Gutschriften darf die Eintragung der ersten Sache im jeweils betroffenen Turnus des jeweiligen Arbeitstages erfolgen.“

know, which cases came in and it thus can manipulate the responsibility of a chamber by deviation of points.

This plan for Berlin District Court II for 2025 contains clauses that – read together – allow manipulations by distribution of cases among the chambers of this court. It means that the president manipulates the allocation of legal files, since he/she has filed few tens of decisions on certain cases during 2025.

The citizen does not know and may not know ahead which constitutional judge will decide in his case. However, the office of public prosecutor may determine the judge for his bill of indictment. This may secure that the process will be finished quickly, so neither the judge nor the public prosecutor will have a lot to do. Similarly, also attorneys-at-law, once they know the loopholes, may provide their clients with access to certain judges. For random citizens who do not have access to legal or constitutional judges this process means legal uncertainty and thus lawlessness.

2.2.7. Smaller Regional Courts

Actual cases gave me the opportunity to analyze the plans of Regional Court of Berlin Pankow (Amtsgericht Pankow) and Wedding. The plan of the Regional Court of Berlin Pankow court contains about 18 unconstitutional cases. The actual problem here is, however, that this court cooperates in certain cases with other regional courts of Berlin, like Mitte, Lichtenberg and Koepenick, making all of their plans unconstitutional as well. All decisions taken 2025 are unconstitutional, since there was no constitutional judge acting. The reason for this is that Federal laws (§ 22c sentence 3 of the Federal Law on the Constitution of Courts) [16] enable ruling on laws for Regional Courts, but not for District courts. Since judges of District courts of Berlin took part in proceedings run by regional courts, their participation was illegal, lacking legal base established in laws of a higher hierarchy.

Another example constitutes the plan on allocation of cases of the Regional Court of Frankfurt (Oder), land Brandenburg. Here, one can see on the website, there would exist a so called “hotline” for fathers (German: Vaeternotruf). At the same time, there is no “hotline” established for mothers, what means an independent discrimination of women, who are usually “mothers”. Moreover, this information exists on the Homepage and the plan on allocation of cases does not rule on the judge responsible for receiving the phone calls of the “hotline”. One must ask on the legal base, on which the judges could base their participation in the “hotline” procedure. Since neither the German constitution nor Federal laws foresee a “hotline” for fathers, this seems to constitute an illegal discrimination of women. The main legal problem here is that this procedure was established by the Presidency of the Regional Court of land Brandenburg and thus created the highly misleading impression towards citizens, as if the judges would act for the state. Further matter is the question regarding the reason why would judges like to act this way creating the impression they would be competent.

3. Results

Conducted analyzes have proven enormous deficits, that show the scale of judicial arbitrariness. Each of the eight plans on allocation of cases contains tens of unconstitutional clauses. The highest number of unconstitutional clauses contains the plan of the Higher District Court of Berlin (German: Kammergericht Berlin). On proud 97 pages it achieves the number of 51 unconstitutional clauses, that are not only indefinite but also brake the Human Rights, like an equal access to courts, legal certainty. It means that these provisions ~~also~~ break the German constitution.

Reviewed and discussed plans on allocation of legal files in different German courts contain clauses that – simply – may be failed. For instance, the turns system may be a complicated issue to rule on. And it is surely a challenge to divide the legal files among the judges in a justice way, so that the workload will be divided equally.

However, the amount of clauses in plans on allocation of cases, which do not fulfill the criteria established by the Federal laws, the German constitution and the jurisprudence of courts (interpreting these laws), raises the question on the real background of this procedure. Clearly, in case of some clauses one may not assume, each Presidency of a court, would simply not succeed to rule on a plan on allocation of files in a legal way. One must gain the impression, loopholes are left in plans by purpose.

Indefinite legal terms, delegation of powers on chambers as addressees of plans on allocation of cases (convening of a hearing) or the possibilities opened for public prosecutors to reach a certain judge, create legal uncertainty, instead of implementing the Federal laws in a definite and understandable way. The use of legal terms such as “special competency” causes the impression by the citizens, the judges would rule on plans for themselves and would have no interest that citizens will understand the plan on allocation of files in question. At the same time, these plans are expression of the principle of constitutional judge and must be easily accessible for the citizens. Surely, there is no room for judges to act without any legal competency, like in case of “hotline” for fathers.

Further result of the current paper is a strong interdependence between courts (judicial power) and offices of public prosecutors (executive power). The German Constitution foresees the separation of powers, according to legal theory developed by John Locke und Charles Montesquieu during Enlightenment. An influence of the Executive on Judicative violates this principle, as laid down in the Constitution.

4. Discussion

The present research provides a thorough analysis of the arbitrariness of the judicial system in Germany. It clearly exists in spite of the fact that every court must adhere to the principles of the rule of law. The main principle of the continental rule of law system in Germany is “a state based on law and

constitution.” It thus requires a legal system in complying with and implementing the valid law – as set up by the Parliament in a democratic process. Otherwise the citizens must gain the impression, the judges or – more generally – state officers would be above the law. With other words, that laws made by the Parliament would not affect the judges or public officers, that laws are made and executed solely for and towards ordinary people, seeking justice.

As a result, the proven arbitrariness of judges in Germany creates legal uncertainty for citizens. The consequence is that the arbitrariness eliminates the sense of justice for those seeking justice – ordinary people. Maybe this is the background of the saying: in court and on a high seas, we are in God’s hands (German: Vor Gericht und auf hoher See ist man in Gottes Hand).

The present paper shows an enormous need for action. The Federal Ministry of Justice must act and prepare solid criteria that will allow control of presidents and presidencies of courts. Each presidency of a court established a plan on allocation of cases. The procedure of validation of the German constitution and the rules of law must be well-known. The Federal government must establish a working system of compliance with constitutional requirements. The current system allows the public officers to work above the existing and valid laws. Otherwise, the citizens will be deprived of the constitutional judge and will lose the trust in judicial system.

A constitutionally valid system on allocation of cases could exclude the “human-factor” in decision-making process. A computer-based distribution of duties among judges could constitute a first step on the way towards more legal certainty, one of the most important principles in a democratic state.

Further changes of the legal order should exclude the strong interdependence between courts (judicial power) and offices of public prosecutors (executive power). As seen above, public prosecutor may determine the Constitutional judge through the backdoor. However, the principle of separation of powers does not allow any influence of the Executive on Judicative. The process to be implemented must introduce allocation of cases due to objective criteria in order to secure the separation of powers.

5. Conclusions

Summing up I draw your attention to some courts. There may also be further courts and other examples for invalid cases all over the country. Since the plans of eight courts contain few tens of unconstitutional clauses, this may be the tip of the iceberg. There exists a clear need for action on the part of the German government. The Federal government must improve the judicial system.

But this will not be “all of it”.

The German law does not foresee any consequences for judges who act arbitrary. Since the judges interpret the provisions of law, they have also interpreted the provisions of criminal codex dealing with the crimes of judges in a restrictive way. As a result, the responsibility of judges has been narrowed (by judges themselves!) to “enormous” violations of

law. This practice goes clearly against the valid law of criminal codex. Once one notices the office of the public prosecutor about violation of law conducted by a judge, one always gets one and the same answer: this action is covered by the law, since the violations is not an extensive one. The office of the public prosecutor provides this answer in every case one notices a breach of law. Since the reader has seen above that public prosecutor offices may influence the courts and decide on allocation of cases, one has no reason to astonish that public prosecutor have their own interest in protecting judges. Moreover, as it seems they break the law in cahoots.

Thus, the Federal government must take action and enforce the law against judges who commit arbitrariness as well as public prosecutors who allow the judicial arbitrariness. Moreover, the Federal government must support the Presidencies of courts and judges on the way to enforce legal and constitutional plans on allocation of cases.

The present research has an extraordinary importance due to the cases pending in front of the European Court of Human Rights, i.e. case No. 23712/24 against Poland. This procedure deals with Polish system, that is computer-based (system of random allocation of cases). However, in some cases the court did not apply the rules of it and the cases were allocated manually. Since the German cases are allocated human-based, the legitimate question of the (il)legality of all allocation in German courts arises.

Abbreviations

BeckRS	Beck-Rechtsprechung, Beck’sche Rechtsprechungssammlung (English: case-law collection, reports of cases)
Beschl.	Beschluss (English: decision)
BvR	Verfassungsbeschwerde (English: constitutional complaint)

Author Contributions

Magdalena Katz: Conceptualization, Resources, Methodology.

Conflicts of Interest

The author declares no conflicts of interest.

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