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LAWFUL JUDGE AND EFFICIENCY IN CASE ASSIGNMENT

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Abstract: This paper explores the concept of the “natural judge” or “lawful judge” as a constitutional principle and its impact on efficient case assignment within the judiciary. Drawing on the German constitutional framework, the author examines how the principle requires that not only the competent court but also the specific judge be predetermined for any lawsuit at the time of filing, minimizing discretion in case assignment. The paper traces historical developments, highlighting how recent global challenges to judicial independence have reinforced the importance of this principle. The author analyzes the tension between the natural judge concept and efficiency in judicial administration, proposing solutions that achieve “practical concordance” between these competing interests. The paper concludes that the principle of the natural judge remains vital for maintaining public trust in the judiciary and protecting against both external and internal threats to judicial independence, while demonstrating that this principle can be upheld without sacrificing efficiency through specialized courts and well-designed case assignment plans.

Keywords: Natural judge, Lawful judge, Judicial independence, Case assignment, Efficiency

Summary: I. Introduction; II. Historical Remarks; III. The Contents of the Concept; IV. The “Natural Judge” and Other Concepts; 1”Natural Judge” and Access to Justice; 2 “Natural Judge” and Jurisdiction; 2”Natural Judge” and Judicial Independence; V. The Importance of the Concept; 1 Civil Law’s Difficulty with the Relevance of the Individual Judge; 2 The Beneficial Role of Comparative Law; 3 Growing Importance Due to Different Self-Conceptions in the Judiciary VI. The

Challenge for Efficient Case Assignment; 1 The Scope of the Concept as Basis; 2 The (Actual or Alleged) Clash with Efficiency; 3 Possible Solutions VII. Conclusion

I. INTRODUCTION

I first did research on the topic of the “lawful” judge, in English terminology often called the “natural” judge, for a presentation on the Conference of the distinguished German Association of Civil Procedure Academics, the *Zivilprozessrechtslehrervereinigung*, in Hannover 2016.¹ The title of this presentation was: “The ‘natural judge’ – constitutional principle or matter of discretion?”² As the title of my presentation at the time reveals, the concept of the “natural judge” in Germany is indeed enshrined in the Constitution.³ It has been very stringently interpreted by the German Federal Constitutional Court.⁴ As a matter of principle, the Constitutional Court requires that not only the competent court, but also the competent judge be certain and predetermined for any lawsuit in the moment of its filing, excluding as far as possible any discretion in case assignment.⁵ In the days of my presentation in Hannover, the concept of the ‘natural judge’ and its strict interpretation received some attention because it stood in the way of some reformers’ ideas on how to increase the efficiency of the judiciary. The title of this article, which is based on a paper given at the international congress “Revisiting the Fundamental Guarantees of Civil Litigation” in Vitória⁶ – “Lawful Judge and Efficiency in Case Assignment” – clearly wants me to address the same kind of questions, and it will be my pleasure to do so. But before I go into detail, please allow me to make a historical note.

II. HISTORICAL REMARKS

In my 2016 presentation, I took a rather strict position and endorsed the basic approach of the Federal Constitutional Court.⁷ At the time, this may have seemed overly restrictive and risk-averse. In 2016, more than 70 years had passed since the end of

1 For the full program, see <https://www.zivilprozessrechtslehrer.org/tagungen> (last visited 6 April 2025).

2 Christoph A. Kern, *Der gesetzliche Richter – Verfassungsprinzip oder Ermessensfrage?* Teil I, *Zeitschrift für Zivilprozess* [ZVP] 130 (2017), 91-120; Teil II, *ZVP* 130 (2017), 137-179.

3 Art. 101(1) 2nd sentence of the German Constitution (*Grundgesetz – GG*).

4 Federal Constitutional Court [Bundesverfassungsgericht, BVerfG], 2nd Senate, Decision of 24 March 1964 – 2 BvR 42, 83, 89/63, Collection of the Decisions of the Federal Constitutional Court [BVerfGE] 17, 294, 298 ff. with case note by Eduard Kern, *Juristenzeitung* [JZ] 1965, 58 f.; see also BVerfG, 2nd Senate, Decision of 2 June 1964 – 2 BvR 498/62, BVerfGE 18, 65; BVerfG, Plenum, Decision of 8 April 1997 – 1 PBvU 1/95, BVerfGE 95, 322; BVerfG, 1st Senate, Decision of 28 October 1997 – 1 BvR 1644/94, BVerfGE 97, 1.

5 *Id.*, at 299.

6 Congresso Internacional “Repensando as Garantias Fundamentais do Processo entre Eficiência Judiciária e Tutela dos Direitos”, organized by the Escola da Magistratura do Estado do Espírito Santo from 2 to 4 April 2025.

7 *Supra* note 2, at 173 ff.

the Second World War, and the German Constitution of 1949⁸ was considered a stable, incontrovertible basis for a democratic country. The German chancellor was Angela Merkel, who was named *Time Magazine's Person of the Year* in 2015.⁹ Barack Obama was the president of the United States, an intelligent, educated and well-mannered figure. Brazil was to host the Olympic Summer Games in Rio de Janeiro, and world economies were recovering from the financial crises. It would be wrong to say that in 2015, the world was in good shape. The optimism of the 1990s when Francis Fukuyama in 1989/¹⁰1992¹¹ proclaimed the end of history, and the still positive outlook of the 2000s, when Thomas L. Friedman in 2005 believed that the world was flat,¹² was already over. Russia had clearly shown its imperialistic face with the taking of the Crimea in March 2014 and the ensuing aggression in the eastern Ukraine in contravention of international law. But nevertheless, in most countries, there was not much reason for concern, and in particular concern about the fundamentals of democracy, among them, the independence and integrity of the judiciary and government's respect for judicial decisions and the personality of judges. In such a situation, the concept of the "natural judge" and in particular a strict interpretation of this principle appeared to be rather outdated and prone to be restricted or overthrown, even more so for the sake of efficiency.

Today's world is very different from the world a decade ago, and – unfortunately – proved me right in my fear that even such fundamental principles like the "natural judge" can come under attack sooner than one might believe. From 2015 on, in Poland, the PiS party started to dismantle judicial independence, the rules on judicial appointments and tenure.¹³ Hungary under Victor Orbán joined this path,¹⁴ and what is happening in Turkey these days does not come out of the blue. On 6 January 2021, a mob attacked the United States Capital Building in Washington D.C. in an attempt of a coup

8 The Grundgesetz was enacted on 23 May 1949, see Official Journal (Bundesgesetzblatt, BGBl.) p. 1 and entered into force on 24 May 1949.

9 See <https://time.com/time-person-of-the-year-2015-angela-merkel/> (last visited 6 April 2025).

10 Francis Fukuyama, *The End of History?*, *The National Interest*, No. 16, Summer 1989, 3-18.

11 Francis Fukuyama, *The End of History and the Last Man*, New York NY: The Free Press 1992/London: Penguin Books 1992.

12 Thomas L. Friedman, *The World is Flat. A Brief History of the Twenty-First Century*, New York: Farrar, Straus and Giroux 2005.

13 Cf. European Court of Justice, Grand Chamber, Judgment of 5 June 2023 – European Commission v. Republic of Poland, C-204/21, ECLI:EU:C:2023:442 = *Neue Juristische Wochenschrift [NJW]* 2023, 2837 with case note by Gabriele Britz, *Kontextabhängige Bewertung der Rechtsstaatlichkeit von Justizreformen*, *NJW* 2023, 2819; for an early Polish perspective, see Wojciech Piątek, *Die Herabsetzung des Ruhestandalters im Lichte des Grundsatzes der richterlichen Unabhängigkeit*, *Neue Justiz [NJ]* 2019, 423 with references to Polish literature in Fn. 8; for an ex post perspective, see Tina de Vries, *Die Wiederherstellung der Rechtsstaatlichkeit in Polen nach dem Ende der PiS-Regierung, einige Beispiele*, *Wirtschaft und Recht in Osteuropa [WiRO]* 2024, 65.

14 Cf. Christoph Möllers, *Reflexion über den Rechtsstaat*, *Zeitschrift für Rechtspolitik [ZRP]* 2020, 27, 29: "Umprogrammierung der Justiz in Ungarn und Polen" ["re-programming of the judiciary in Hungary and Poland"]; Hermann-Josef Blanke & Aimee Sander, *Die europäische Rechtsstaatlichkeit und ihre Widersacher – Anmerkungen zur Situation in Polen mit einem Seitenblick auf Ungarn*, *Europarecht [EuR]* 2023, 54, 79 f.

d'état. The current president of the United States not only criticizes judgments but takes individual judges as a target.¹⁵ The U.S. Supreme Court, in earlier times probably the most respected court in the free world, has lost much of its reputation. Its decisions seem to be motivated not by well-reflected and responsible arguments but by the political alignment of the Justices,¹⁶ one of whom, in addition, seems to be corrupt.¹⁷ And most recently in Germany, the rise of extremist political parties led to amendments of the Constitution¹⁸ and the Act on the Federal Constitutional Court¹⁹ aiming at a heightened protection of the Federal Constitutional Court from political influence, thereby illustrating that the German legislature no longer takes the continuing respect for fundamental principles of a democracy with an independent judiciary for granted.

It is true that, so far, the concept of the “natural judge” was not in the center of the attacks on the judiciary, and it is also true that the concept of the “natural judge” is not only, and maybe not even primarily, a concept that protects the judiciary against attempts to dismantle its integrity. Respect for the concept of the “natural judge” alone cannot and will not save a country from sliding into an undemocratic, autocratic system. It will, alone, not impede populism and polarization. But it is one piece of a puzzle that is necessary for a strong judiciary. Only a strong judiciary might succeed in calming down a situation in which a heated, shortsighted mob takes the power to the detriment of internal and external peace, human wellbeing and the future of our planet – always assuming the judges are intelligent, educated and responsible people who value the democratic constitution higher than their individual preferences with respect to public spending, ecological regulation, capital punishment and abortion, to name just a few highly debated issues.

III. THE CONTENTS OF THE CONCEPT

This being said, let us first of all remind us of a few aspects of the concept of the “natural”, the “lawful” judge. We know that its basic idea is to protect the assignment

15 See, e.g., Taiyler S. Mitchell, Trump Ramps Up Attacks On Judges, Calls Out Justice John Roberts, *Huffington Post*, 20 March 2025, https://www.huffpost.com/entry/trump-attacks-roberts-judges_n_67dc9e95e4b0f519c38c7501 (last visited 6 April 2025).

16 Cf. Michael Dreyer, *Der Supreme Court – dritte Gewalt unter drei Gleichen*, in: Lammert et al. (eds), *Handbuch Politik USA*, Wiesbaden: Springer VS 2023, sub 5.2, https://doi.org/10.1007/978-3-658-04125-0_11-3.

17 See, e.g., Noah Bookbinder & Dennis Atergut, Supreme Court Justice Clarence Thomas' corruption is intolerable. Here's what we can do about it, *Los Angeles Times*, 10 August 2023, <https://www.latimes.com/opinion/story/2023-08-10/supreme-court-justice-clarence-thomas-corruption-gifts-propublica-ethics-congress> (last visited 6 April 2025); Eric Lutz, Clarence Thomas Is On a Quest to Be the Most Corrupt Justice In the Court, *Vanity Fair*, 6 April 2023, <https://www.vanityfair.com/news/2023/04/clarence-thomas-ethics-violations-supreme-court> (last visited 6 April 2025).

18 Gesetz zur Änderung des Grundgesetzes (Artikel 93 und 94) of 20 December 2024, BGB. I Nr. 439.

19 Gesetz zur Änderung des Bundesverfassungsgerichtsgesetzes und des Untersuchungsausschussgesetzes of 20 December 2024, BGBl. I Nr. 440.

of individual cases to individual judges from undue influence. Such influence is “undue” if it allows outsiders to purposefully manipulate what will happen in individual proceedings. The primary goal of such an influence is, of course, the outcome of the case, i.e., the final judgment;²⁰ but it can also – exclusively or additionally – be the procedure as such, i.e., the way parties are treated by the judge, the amount of costs, the duration of proceedings and so on.²¹

If parties fear undue influence, they will no longer trust public courts as a neutral forum to resolve their disputes and either resort to other forms of dispute resolution or feel forced to accept what they deem unjust. It is needless to say that both alternatives have important downsides or are even unacceptable. Among the other forms of dispute resolution, arbitration is the preferable one, but it typically comes along with confidentiality of proceedings and awards, so that there is no public control and no development of the law.²² The lack of public control and development of the law also characterizes mediation, conciliation and other forms of ADR which do not even result in a decision. In brief, ADR may provide “dispute resolution”. However, it is by no means certain whether it leaves both parties better off, as the promoters of ADR promise, and it is a form of dispute resolution with a lot of shadow: not only does it take place “in the shadow of the law” which mostly has a positive connotation, but it also takes place in the shadow of public attention and control, so that the public is left in the dark whether the person who has a right can also enforce their right. A party who believes to be the victim of injustice might also resort to violence and revenge or blame the State and its institutions. This puts inner peace at risk. It follows that it is no good policy to deter parties from going to court by reducing public trust in the court system, but that, on the contrary, there is not only an individual, but also a general interest in the protection of case assignment from undue influence.

This leads to the question of determining which influence is undue and against whom the concept of the “natural judge” is directed. It needs no explanation that the influence of one of the parties to the litigation on the assignment of an individual case to an individual judge would be considered undue by the other party. But parties would also consider undue, and rightly so, if the government or state officials had the power to select the judge for “their” case.²³ More intricate is the question of whether the influence of a member of the judiciary, i.e., the president of the court or a court of-

20 BVerfGE 17, 294, 299.

21 So far, this aspect has not received sufficient attention.

22 Cf. Peter L. Murray, Privatization of Civil Justice, 15 *Willamette J. of Int'l L. & Disp. Res.* 133, 144-154 (2007) = 12 *ZZPInt* 283, 293-303 (2007); Peter L. Murray, The flight from public civil justice, in: 1 *Essays in honour of Konstantinos D. Kerameus* (2009), 847 = *Die Flucht aus der Ziviljustiz*, 11 *ZZPInt* 295 (2006); cf. also Laurie Kratky Doré, Public Courts versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution, 81 *Chi.-Kent L. Rev.* 463 (2006).

23 So-called “Kabinettsjustiz”, cf. BVerfG, 1st Senate, Decision of 20 March 1956 – 1 BvR 479/55, BVerfGE 4, 412, 416.

ficial, would and should be considered undue. Legal systems differ with respect to this aspect.²⁴ As already mentioned, the Federal Constitutional Court in Germany has taken the position that even a discretionary case assignment by a member of the judiciary infringes the constitutional guaranty of the “natural judge”. Thus, in Germany, the presidium of every court must develop and adopt a “case assignment plan” (“Geschäftsverteilungsplan”) for every calendar year in advance, based on abstract and general criteria according to which all cases can be assigned without discretion.²⁵ Apart from criteria based on the question of what the dispute is about, frequent criteria are the date of filing, the address of the defendant or the first character of its surname. Amendments to this plan are only allowed in exceptional circumstances and in an equally abstract and general form, which means that even the amendment may not, as a matter of principle, assign individual cases to an individual judge. This is a very strict interpretation of the concept, but the legislature did a remarkable job in codifying it in a way that is manageable,²⁶ courts have acquainted with it, and it works quite well in practice.

IV. THE “NATURAL JUDGE” AND OTHER CONCEPTS

After these observations on the contents of the concept, its relationship with other concepts deserves our attention. As the term “natural judge” suggests, the idea is that there is one “natural” judge for each and any lawsuit. The alternative term “lawful judge” is more telling in that it makes clear that this judge is determined by law. Thus, the keywords of our concept are the determination, the judge and the way of how the judge is to be determined. These keywords allow us to distinguish the “natural judge” from other procedural concepts that are equally enshrined in the constitution of many countries.

1. “Natural Judge” and Access to Justice

In its focus on the *determination* of the judge, the concept of the “natural judge” can be distinguished from the guarantee of a judge as such,²⁷ in other words, the guarantee of an access to justice. But of course, the concept of the “natural judge” presupposes that there is access to justice, access to a decision by a court. The concept of the

24 For a comparative overview, see Harald Koch, Rechtsvergleichende Fragen zum “Gesetzlichen Richter”, in: Andreas Heldrich & Takeyoshi Uchida (eds.), Festschrift für Hideo Nakamura, Tokyo: Seibundo 1996, 281, 288 ff.; Kern, *supra* note 2, at 97 ff.

25 See again BVerfG, *supra* note 4.

26 In particular, §§ 21e and 21g Act on Court Organization (Gerichtsverfassungsgesetz – GVG).

27 In German terminology “Justizgewährungsanspruch”, see recently BVerfG, 2nd Chamber of the 1st Senate, Decision of 3 June 2022 – 1 BvR 2103/16, NJW 2022, 2677 n. 38 (the famous “Claudia Pechstein”-decision of the Federal Constitutional Court) with numerous references to the jurisprudence of the Federal Constitutional Court.

“natural judge” is interested in the question of which court, and even more precisely the question of which individual judge or judges, is called on to take the case.

2. “Natural Judge” and Jurisdiction

It is the focus on the *individual judge or judges* and not only the court that distinguishes the concept of the “natural judge” from the delineation of the various courts’ jurisdiction. However, this distinction is not a distinction of two coexisting ideas, but a distinction in the degree of precision: In order to find the natural judge, the first step is to identify the competent court, as judges are all assigned to one (or more) courts and exert their function as a part of this court.²⁸ While jurisdiction is satisfied when the court was correctly identified, the concept of the “natural judge” goes further and looks into the court as such in order to find the individual judge who is responsible for a certain case.²⁹

3. “Natural Judge” and Judicial Independence

Finally, the *way of determining* the competent judge has some links to the concept of judicial independence.

At first glance, judicial independence and the concept of the natural judge seem to be completely juxtaposed. Judicial independence is the guarantee that the judge, in deciding a case in accordance with the law, be neutral and not influenced by anyone else. In the German tradition,³⁰ judicial independence is traditionally subdivided on the one hand in independence regarding the subject-matter of judicial activity, meaning independence from instructions and orders, be it by the government, the legislature, other members of the judiciary or the society and its members, and on the other in personal independence, meaning a protection of the judge in her personal position and status, i.e., a limitation on a transfer to another position within the judiciary or the state administration, a far-reaching exclusion from being dismissed and a protection from comparative encroachments in the judge’s status that might have the effect of a sanction, including financial sanctions.³¹

The concept of the “natural judge”, in the form of a “lawful judge” whose competence for an individual case is determined on a legal basis, does not seem to have much to do with judicial independence. Rather, it might be seen as limiting judicial

28 Kern, *supra* note 2, at 145 ff.

29 Kern, *supra* note 2, at 148 ff.

30 For a comparative overview, see Helmuth Schulze-Fielitz, in Dreier, *Grundgesetz-Kommentar*, vol. 3, 3rd ed., Tübingen: Mohr Siebeck 2018, Art. 97 Rn. 11 ff.

31 Art. 97 GG; see, e.g., Christian Hillgruber, in: Dürig/Herzog/Scholz, *Grundgesetz-Kommentar*, looseleaf, München: C.H. Beck, 105th delivery, August 2024, n. 75 ff.

independence if the legislature – and not exclusively the judges themselves – has a say on which individual judge is competent. However, this understanding would be misguided. The concept of the “natural” or “lawful judge” does not mean that the legislature could make a determination of the competence of a judge for an individual case.³² It only means that the determination is not open to discretion or influence once the case is filed. To the contrary, the concept of the “natural judge” enhances judicial independence and power in that nobody can take away a case from the competent judge and thereby try to influence its outcome.

V. THE IMPORTANCE OF THE CONCEPT

1. Civil Law’s Difficulty with the Relevance of the Individual Judge

In most civil law jurisdictions, parties and their lawyers for a long time did not pay much attention to the exact way how cases were assigned to individual judges or panels of judges within the court. This lack of interest had a number of reasons. First, plaintiffs are not required to address the complaint to an individual judge. While the selection of an incompetent forum results in a dismissal of the complaint or its transfer to another court at the expense of the plaintiff,³³ there is no need and even no possibility to select the competent judge. Second, parties and their lawyers are typically interested in the jurisdiction of a court in their proximity or an otherwise locally convenient court. With respect to this geographic interest, the individual judge makes no difference. Third, in the civil law world, the person and personality of the judge do not seem to matter much. The civil law tradition is rooted in the idea of preexisting law that only needs to be correctly found and applied by the judge. If the law is equated with the codification and the concepts underlying the codification, Montesquieu’s famous description of judges’ role as the mere “bouche de la loi” is consequential.³⁴ It means that every judge if not would, then at least should decide one and the same case identically.

There is good reason to assume that Montesquieu himself never believed in the actual possibility of a society in which judges could be reduced to the role of the law’s mouth. His writings were no description of the reality of his times but an idealistic model with which he wanted to spur change. However, the model and its formulation were so powerful that later generations, and in particular generations of academic scholars and a scholarly oriented elite of jurists tended to equate it with reality. This is

32 BVerfGE 95, 322. The legislature’s role is limited to mandating in abstract and general form that courts enact a case assignment plan, how it is enacted and which criteria it must meet; cf. again §§ 21e, 21g GVG.

33 For Germany, § 17a(2) GVG, § 281 Code of Civil Procedure (Zivilprozessordnung, ZPO).

34 Charles Louis de Secondat Montesquieu, *De l’esprit des loix*, Geneva 1748, p. 256 (“Mais les juges de la nation ne sont [...] que la bouche qui prononce les paroles de la Loi: des Etres inanimés qui n’en peuvent modérer ni la force ni la rigueur.”).

particularly true for the way judges themselves in many civil law countries understood their role and developed a habit of modesty and impersonality.

2. The Beneficial Role of Comparative Law

Of course, realistic judges and lawyers in civil law countries always knew that despite all doctrinal affirmations and the official façade of the judiciary, the personality of the judge is not irrelevant for the outcome of the case. However, academia and the legislature only accepted this knowledge in the last decades. It is probably no coincidence that this change occurred at a time when comparative law and in particular comparative civil procedure was on the rise and exposed civilians to the completely different approach of the common law world.³⁵

Without any doubt, Montesquieu's view of the judiciary is completely unsuitable for common law jurisdictions. In a case law system, the only preexisting law can be found in the ratio decidendi of earlier decisions. Not only will there always be numerous cases that are completely new, but also it is clearly open to debate what the ratio decidendi in an earlier case was. Therefore, the person and personality of the judge have always been considered decisive, and legal realism deserves credit for emphasizing – although sometimes overemphasizing – the importance of the personality of the judge.³⁶ It is, therefore, not very surprising that case assignment has since long been discussed in the U.S.,³⁷ and one of the preferred solutions is a random case assignment mechanism.³⁸

3. Growing Importance Due to Different Self-Conceptions in the Judiciary

The personality of the judge becomes even more important with the modern self-confidence of many judges also in the civil law world. In parallel with a society in which showing off is no longer a fallacy, but a must, more and more judges have developed a willingness to show their personality and take pleasure in stylizing themselves into an

35 Cf. generally Peter Gottwald, *Zum Stand der Prozessrechtsvergleichung*, in: Birgit Bachmann et al. (eds.), *Grenzüberschreitungen. Festschrift für Peter Schlosser*, Tübingen: Mohr Siebeck 2005, p. 227; Rolf Stürner & Christoph A. Kern, *Comparative Civil Procedure – Fundamentals and Recent Trends*, in: Osman B. Gürzumar et al. (eds.), *Halûk Konuralp Anısına Armağan/Gedächtnisschrift für Halûk Konuralp*, vol. 1, Ankara: Yetkin Yayınları 2009, p. 997, in particular p. 997-1000.

36 Karl N. Llewellyn, *Some Realism about Realism? Responding to Dean Pound*, 44 *Harv. L. Rev.* 1222, 1242 f. (1931); for a more recent and more refined approach, see Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 *U. Chi. L. Rev.* 831 (2008).

37 See, e.g., Susan Willett Bird, *The Assignment of Cases to Federal District Court Judges*, 27 *Stan. L. Rev.* 475, (1975); Jonathan L. Entin, *The Sign of "The Four": Judicial Assignment and the Rule of Law*, 68 *Miss. L.J.* 369 (1998); J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 *Tex. L. Rev.* 1037 (2000); Thomas Braun, *Die Rolle des Federal District Court Judge im Verhältnis zu den Parteien*, Berlin: Duncker & Humblot 1986, S. 26 f.

38 Cf. Adam M. Samaha, *Randomizing in Adjudication*, 51 *Wm. & Mary L. Rev.* 1 (2009).

important figure.³⁹ This is not only a matter of personal satisfaction and pride, but can also pay economically: Well-known judges are frequently invited to make presentations at conferences for practitioners for impressive remuneration; their contribution to commentaries and collective works is sought by editors and publishing houses and their manuscripts have high chances to be published in books or law reviews, which results in royalties; and, last but not least, prominent judges are invited to teach at the best universities and then are awarded the title of honorary professor, which further increases their reputation – and market value – and may incentivize them to take even more individualistic positions.

Of course, it would be wrong to criticize judges who teach practitioners, publish and teach at universities. All this is important to keep a link between the judiciary, academia and private practice, and the financial aspect should not be overemphasized, as it is impossible to get rich with serious legal research and writing. Only some, and fortunately few, have a tendency to exaggerate, at least in my home country. But these few are an impressive proof of the risks the “natural judge” wants to avoid: Lawyers know their judges and insofar as the law permits use maneuvers to bring a case before a certain judge or avoid this judge; I know from lawyer’s circles that, with respect to some judges, both parties’ counsel even cooperate in order to avoid them. In any event, judges should never place their personal reputation over the reputation of the democratic judiciary as a whole, as it is the judiciary – and thereby the general public which establishes courts to serve the litigants – from whom they derive their position and power.

VI. THE CHALLENGE FOR EFFICIENT CASE ASSIGNMENT

1. The Scope of the Concept as Basis

The concept of the “natural judge” cannot interfere with efficient case assignment if it is limited to a protection from undue influence that has its origins outside the judiciary. Such protection is better than nothing. It is not complete, though, but has an Achilles heel in the judiciary. This Achilles heel becomes more dangerous the more polarized the judiciary is. It is easy to imagine that a conservative court president who has discretion would assign abortion cases to a judge whose evangelical conviction she knows, would assign an asylum seeker case to a judge known for being xenophobe, would assign discrimination cases to a judge who considers discrimination law “woke”,

39 Cf. Christoph A. Kern, *Judicial Independence and Judicial Hubris*, in: Adrian Simons, Aluisio Gonçalves de Castro Mendes, Alvaro Pérez Ragoné, Paulo Henrique Dos Santos Lucon (eds.), *Estudos em Homenagem a Ada Pellegrini Grinover e José Carlos Barbosa Moreira*, São Paulo: Tirant lo Blanch Brasil 2020, p. 378.

and so on.⁴⁰ Therefore, there is good reason for a strict interpretation, excluding also discretion within the judiciary.

2. The (Actual or Alleged) Clash with Efficiency

However, such a strict interpretation might be an obstacle to efficient case assignment – at least, it is often considered as such. Who, the argument goes, might be in a better position to know the experience, the strengths and weaknesses and the preferences of individual judges, as well as their individual workload, than the court president? By using this knowledge she has anyway, the court president can assign, e.g., medical malpractice cases to a judge who has already dealt with many such cases, who is a good case manager and has had success in coordinating parties, lawyers and experts in the past, who has some medical background in her own professional life, her family or at least a personal interest in medicine, and who has a docket that allows for dealing with a new case without further delay. In this perspective, a strict interpretation of the concept of the “natural judge” that excludes any discretion within the judiciary stands in the way of an efficient case assignment.

3. Possible Solutions

It needs no explanation that efficient case assignment is important, as it contributes to keeping up the functioning of the judiciary, to reduce duration and, equally important, to achieve a high quality of the jurisprudence. At the same time, the risks of a discretionary case assignment within the judiciary must not be underestimated. We should therefore try to reconcile both aspects and seek what Konrad Hesse called “practical concordance”.⁴¹

At first glance, this may seem difficult, if not impossible. But I believe there is a chance to achieve such “practical concordance”. For the sake of simplicity, the concerns with efficiency can be boiled down to two issues: specialization and workload. Both issues cannot only be addressed by allowing the court president discretion in case assignment, but also by other means.

The first possibility to ensure specialization within the judiciary is the creation of specialized courts. This approach uses jurisdiction – which, as we have seen,⁴² provides the first layer of selection of the competent judge. The appeal of this solution is that it raises the issue into the parties’ sphere of interest and responsibility: The plaintiff then has the burden to select the right court, and the defendant has the burden to challenge

40 Cf. Kern, *supra* note 2, at 162 ff.

41 Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, reprint of the 20th ed., Heidelberg: C.F. Müller 1999, n. 72.

42 See above sub IV.2.

jurisdiction at an early moment within the proceedings in order to avoid being barred with a jurisdiction defense. The second possibility is to achieve specialization with the help of the “case assignment plan”. If certain types of cases always go to certain judges, this makes sure that these judges have or develop the necessary expertise. Of course, both solutions might not be as precise as discretion of a court president, as the type of cases will be described rather roughly in a “case assignment plan”. Nevertheless, they make an important step towards more efficiency if the baseline is a system of all-encompassing competence with random case selection.

With respect to workload, things are a little bit more difficult. No rule on jurisdiction and no “case assignment plan” can predict for sure the number and difficulty of cases in a certain area of the law. Thus, it might happen that in one year, there is a high number of medical malpractice cases while in another year there is none. Frequent amendments to the rules on jurisdiction and the creation and abolition of specialized courts depending on last year’s filings is no option. “Case assignment plans”, in turn, are a promising tool. Often, it will be sufficient to amend the “case assignment plan” for the next business year, as the period until the next regular amendment is never longer, but mostly shorter than one year. Moreover, “case assignment plans” can contain a detailed coding for numerous types of cases and with the help of these codes channel cases to individual judges in an abstract way. For example, in the current “case assignment plan” of the Court of Appeals of Karlsruhe, appeals against court orders (“Beschwerden”) are assigned 20 points, appeals against court orders in cases decided by the Commercial Court 40 points, regular appeals against judgments (“Berufungen”) 60 points, regular appeals against judgment in medical malpractice cases 90 points, regular appeals in IP law cases 120 points; and cases are assigned depending on the workload as expressed by the number of points of a Senate’s docket.⁴³ If the workload problem is acute, an exceptional amendment of the “case assignment plan” should be allowed, provided the court can show, and document, good cause. Again, amending the “case assignment plan” on a regular and even on an exceptional basis is less flexible than a court president’s discretion. Nevertheless, at least in the German experience, this approach has proven manageable and brought about satisfying results.

To sum up, ensuring specialization with the help of specialized courts or a “case assignment plan” using the subject matter of the lawsuits as assignment criteria, and ensuring a manageable workload with the help of a “case assignment plan” amended yearly or, in exceptional cases, during its regular period, seem to be good solutions to ensure “practical concordance” between the concept of the “natural judge”, in its strict interpretation encompassing the judiciary, and the goal of efficient case assignment.

43 See Geschäftsverteilungsplan für die Senate des Oberlandesgerichts Karlsruhe 2025, p. 52 ff., available at <https://oberlandesgericht-karlsruhe.justiz-bw.de/pb/,Lde/Startseite/Oberlandesgericht/Geschaeftsverteilungsplan> (last visited 6 April 2025).

VII. CONCLUSION

Let us conclude. We are living in times in which a strong, independent and responsible judiciary is more important than ever if we want to preserve our democratic culture. A strong and independent judiciary requires that courts and judges are trusted, that there are no doubts about the neutrality of the judiciary and its freedom from undue influence.⁴⁴ The concept of the “natural judge” is one piece of the puzzle that protects the judiciary against threats from outside, but also from inside, as threats from inside will easily transform into threats from outside. Therefore, the concept of the “natural judge” should be upheld. In particular, it should not be sacrificed in the interest of efficiency – even less so as there are possible solutions which allow for “practical concordance” between the concept and efficient case assignment.

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44 Cf. BVerfGE 95, 322, 327; most recently BVerfG, 3rd Chamber of the 1st Senate, Decision of 3 March 2025 – 1 BvR 750/23, 1 BvR 763/23, n. 96 (not yet published).

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