

**Is There a Right Judge for Each Case? A Comparative Study of Case
Assignment in Six European Countries**

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I. Introduction

Case assignment is the core-business of court organisations, because it touches upon some of the essential aspects of rendering justice: judicial independence and impartiality, organisational flexibility and efficiency. Organising case assignment properly is a necessary, but in itself insufficient precondition for public trust in the absence of bias in the courts, and it is also essential for a timely delivery of justice. The actual organisation has to make certain that cases are not allocated to judges who have, or appear to have, an interest in a case, or who may appear prejudiced otherwise; if a wrongful allocation happens accidentally, the court organisation must have a way to reallocate a case to another judge. This illustrates that case assignment practices touch upon both essential principles of adjudication and the practicability of everyday work in the courts. Would courts not organize case allocation properly, the general public could maintain the vision that judges are not impartial, inclined to favour parties they have a personal interest with or even may be bribed. Media exposure on judicial impartiality in the courts may have far reaching consequences for public trust. If the general public is of opinion that judges are not integer, it will be likely to hold the judiciary in low regard, and may not accept the authority of judgments. It therefore is essential that case allocation processes are well organized and transparent. Furthermore, under the rule of law, parties should have the possibility to disqualify a judge, as an external check on the case allocation process. Nonetheless, there may be different ways of organizing case allocation processes within these normative margins.

We started this research on an assignment from the Council for the Judiciary of the Netherlands. The interest of the Dutch Council in this information is related to the expansion and implementation of the Quality System ‘RechtspraakQ’ in the Dutch courts, which is also

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intended to prevent judicial bias and to make the measures that protect and enhance judicial integrity transparent.¹ This can be seen as part of the process of organisational development in which the courts and the judicial organisation have been involved since 1998. This research is therefore related to the concept of courts as learning organisations² and to the aim of maintaining and enhancing the general public's trust in the courts. Within this context, Dutch courts are preparing measures to make the method of distributing cases within the courts transparent and to explain to the general public the principles they apply when doing this.³ The goal of the research assignment was to check if rules and practices in other countries existed that were not yet present in the Netherlands. It therefore should be acknowledged, that this comparative research was policy driven.

Our main task was to make an inventory of applicable rules and practices concerning case distribution among judges within courts in different European countries. We were aware of the fact that this question not only refers to the actual organisation of distribution of cases within the courts. It also refers to the normative side of internal case distribution within the courts; in other words, to the ways in which values such as judicial independence, impartiality and integrity are safeguarded in the case assignment process. This may happen with or without detailed legal norms. We approached these aspects in our research from a comparative perspective, and postponed our judgement in the process, in order to be able to describe not only the applicable rules, but also the self-evident experience of persons working in the courts.

In this article we will first explain our research methodology. Next, we will summarize our research using a comparative perspective, first focusing on the actual organisation of case distribution and second on the values connected to the allocation process as we found them. Then, we will show our analysis of the multiple relations between the practices and values we found. Finally, we will make a reflection on the usefulness of the traditional classification of legal systems for the explanation of the ways cases are assigned to judges in courts.

¹ **A. HOL and M. LOTH**, *Reshaping Justice*, Maastricht, Shaker, 2004, pp. 67-89.

² **C. ARGYRIS**, *Reasoning, Learning and Action: Individual and Organisational*, San Francisco, Jossey Bass, 1982; **C. ARGYRIS**, *On Organisational Learning*, Cambridge, Blackwell, 1993; **P. SENGE**, *The Fifth Discipline: The Art and Practice of the Learning Organisation*, New York, Doubleday Currency, 1993.

³ The advice for developing and evaluating case allocation policies based on our comparative research was reported to the Dutch council for the judiciary in November 2005. This report was not published. This article has a broader scope.

II. Methodology

This research was of a qualitative, empirical nature. The outcome is indicative of processes in the countries within our sample. Starting from a possible classification of legal systems from comparative law,⁴ we selected countries with a French (France, the Netherlands, and Italy), a Scandinavian (Denmark), an Anglo-Saxon (England and Wales), and a German Law System (North Rhine-Westphalia). This study is mainly based on the information provided by the national researchers who wrote the six case studies.⁵ They selected at least three courts and interviewed judges and court clerks. The courts should be of small, middle and large size. They also should imply an administrative court or tribunal.

In order to collect the information to be compared, we made a common research format. This was discussed and amended in the first research meeting among the partners to the project.⁶ The outcome of this meeting was that the original research format was adapted to the explanations of the researchers of the systems of case assignment in their countries, in order to obtain questions which were answerable and comparable. It involved explanations of terms and instructions on what kind of and how many interviews were to be conducted.

Subsequently, the researchers prepared a first case study, the concept of which was discussed during a second research meeting. This allowed us to ask and provide further clarification of some issues and to eventually amend and complete their case studies. Part of the research process was also that researchers filled out a comparative matrix, in order to have an effective comparative tool. Interaction between researchers appeared to be a most powerful research tool, also after they had filled out the comparative matrix. The research questions are:

⁴ **K. ZWEIGERT and H. KÖTZ**, *Introduction to comparative Law*, Oxford, Clarendon Press, 1998; **W. PINTENS**, *Inleiding tot de rechtsvergelijking*, Leuven, Leuven University Press, 1998.

⁵ The researchers were: Reza Banakar, John Flood, Julian Webb and Avis Whyte of the Westminster University for England and Wales, Peter Dyrchs, Walter Frey, Peter Metzen, Reiner Napierala and Hans Rausch of the Hochschule für Rechtspfleger for North Rhine Westphalia, Loïc Cadiët and Emmanuel Jeuland, of the University of Paris, Francesco Contini and Marco Fabri of the Research Institute of Judicial Systems, National Research Council for Italy, Philip Langbroek of the University of Utrecht for the Netherlands, Eva Smith of the University of Copenhagen, for Denmark. Their papers were published in **P. LANGBROEK and M. FABRI**, *The Right Judge for Each Case: A Study of Case Assignment and Impartiality in Six European Judiciaries*, Antwerp, Intersentia, 2007. This paper is based on their empirical work.

⁶ The meeting was held at the Institute of Constitutional and Administrative Law of the University of Utrecht, the Netherlands, 18-19 February 2005.

- Which are the rules to enhance and protect judicial integrity and impartiality in relation to case allocation?
- How are the rules concerning internal case allocation applied in practice?
- How do judges value these rules and practices?
- Next, we asked researchers for their opinion on the case allocation process in the courts researched.

We present here the answers to those research questions comparing three main issues, leaving out the subject of the *institutional court settings* of the nations considered in this study, for the sake of length of this paper.⁷ The first issue deals with the *principles and general rules* applicable to internal case assignment in the judicial systems included in this examination. We describe the rules and practices concerning the allocation of judges and the rules and practices to enforce judicial impartiality. The second issue concerns the main topic of this research: the *internal case assignment* systems used in the six judiciaries considered. It explores in some detail the information provided by the national case studies about the practice and opinions of interviewees and researchers on case assignment in the courts. The last issue deals with some aspects of the *internal court organisation* related to case assignment. Case assignment rules, practices and instruments, the main point of interest in this research project, are connected to several other aspects of court organisations that may affect the case assignment process like judicial specialisation.

Field research on judicial administration is scarce in Europe, and this also applies to the subject of this research project.⁸ We were therefore unable to rely on a broad ‘body of literature’ on this subject. However, thanks to the quality of the researchers and to the interactive approach used for this study, we believe the information provided is accurate and reliable. Therefore we consider the outcomes of this research as hypotheses that can be tested on a wider scale.

⁷ This issue was reported on elsewhere, see footnote 5.

⁸ **M. FABRI and P. LANGBROEK**, *The Challenge of Change for Judicial Systems: Developing a Public Administration Perspective*, Amsterdam, IOS Press, 2000; **M. FABRI, J.P. JEAN, P. LANGBROEK and H. PAULIAT**, *L’administration de la justice en Europe et l’évaluation de sa qualité*, Paris, Montchrestien, 2005.

The research findings are based on a heuristic interpretation of the data. As this is a description of facts primarily, on which we have based our analyses in the following paragraphs, readers not interested in these facts can skip the following paragraph.

III. Case assignment: Rules and practices

A. Principles and general rules: Legal judge, immovability, disqualifying judges, sideline jobs

1. The legal judge

We explored the ‘principles and general rules’ related to the case assignment process adopted in each country. Some of them may also be embedded in the Constitution, such as the *ius de non evocando*, meaning that no one may be denied the court to which he is legally or ‘naturally’ entitled, and which also comprises the prohibition to establish special courts to meet a single situation. As a consequence, special tribunals may not be set up to try a special subject; neither may a case be transferred to a court other than the competent court, unless prescribed by law. This civil right is not known as such everywhere. It is non-existent in Denmark, England and Wales, and France. In the Netherlands, the principle is laid down in the constitution, but it has no meaning in the context of internal case assignment. It merely refers to the civil right that a case cannot be given to another court than the court indicated by statutory rules of jurisdiction against the will of the parties.⁹ In Germany, the principle is called the right to one’s *legal judge*; in Italy it is called the right to one’s *natural judge*. Both constitutions state that the establishment of an exceptional court is prohibited and no one may be removed from the *legal* or *natural judge* provided by law.

Summarising the case studies, the principle strengthens the perception of the impartiality of the courts as also stated in Article 6 of the European Convention on Human Rights which provides for an ‘independent and impartial tribunal’.

2. The immovability of judges

⁹ L.F.M. BESSELINK, “Comments on Case C-7/94, Landesamt für Ausbildungsförderung NordRhein-Westfalen/ Lubor Gaal, 4 May 1995”, *SEW tijdschrift voor economisch recht*, 1997, No 4, pp. 56-60.

Another significant principle for the study of case assignment is the principle of the *immovability of judges* and its practical application, which can be found in all the constitutions of the countries considered except in England and Wales, as they do not have a formal constitution. The assignment of judges to another court than the one they were originally appointed to may have reasons other than the normal functioning of the courts, *e.g.* relating to their aptitude, the content of their judgements or other reasons preferred by the office which appoints the judges – either the Minister of Justice, another executive public office or the head of the court. Moving judges for wrong reasons can impair judicial impartiality and therefore it is most important to safeguard judges against appointments to courts without their consent – that is the meaning of this principle.

It is a logical possibility that where cases can be moved from one judge to another we can also move judges to where they are needed most. The possibility of having a certain flexibility in moving judges from one court to another, is an issue of some importance. Such flexibility may add to the efficient deployment of judges in courts at different locations and to the timeliness of judgements within the area of those locations.

Procedures to move judges from a fixed position at a court to another court are cumbersome and formalised in most countries. Generally speaking, the transfer of a judge is only possible with the judge's consent, but exceptions may occur related to court reorganisations or disciplinary proceedings. The process is guided by the Judicial Councils in France and Italy, by the Court Administration in Denmark, by the Ministry of Justice in North Rhine-Westphalia, and by an informal negotiation between judges and the heads of courts in England and Wales. But there, the context is different, because apart from the magistrates' courts, the bench is still only open to qualified barristers and solicitors and hence the judiciary is an exclusive professional group. Appointment as a judge involves the obligation to sit in a number of different courts. The so-called *ticketing system* somehow limits the possibility of being transferred. In the Netherlands judges can be transferred to another court only with the consent of the management boards of the courts involved in the transfer.

The legal protection of the immovability of judges for the sake of their impartiality may create tensions concerning an efficient deployment of judges in courts where they are

(temporarily) needed most. Based on our research we can conclude that in most countries of our sample, except England and Wales and the Netherlands, the appointment of judges to a court fixes them in that position and makes a temporary transfer of a judge to another court quite difficult. Of course England and Wales do recognise the security of position of their judges, once appointed, as do the Netherlands.

3. Disqualifying judges and judges resigning from cases

The country studies also provide information about the possibility to *disqualify a judge* and the possibility for *judges to resign* from a case. All the countries, except England and Wales, have a list of detailed circumstances in which judges are supposed to resign or to may be disqualified by the parties. Nonetheless, English judges must also resign themselves from a case when there is a conflict of interest. These cases mainly deal with the issue of putting their impartiality at risk and therefore may involve personal interests or being related to the parties. In Denmark, judges who ruled against the defendant revealing a *particular confirmed suspicion* during the preliminary hearing, cannot serve at the trial.¹⁰ A similar situation exists in France with the examining judge. For examining judges, in civil cases it depends on the scheduling order of the head of court if the examining judge will be involved in the final judgement of the court.

A special rule exists in France concerning judges dealing with summary proceedings in civil cases. The Court of Cassation ruled that judges delivering judgements in summary proceedings should not take part in the final proceedings in the same case.¹¹ But in practice it is up to the heads of court to adjust the assignment of cases to this rule and certain heads of court do not want to do this because it makes the case management process more complicated. Because their decisions do not constitute an administrative act, such decisions cannot be challenged before an administrative court judge. But in Italy decisions concerning case assignment are considered an administrative act, and therefore may be challenged before an administrative court by the judges.

¹⁰ E.C.H.R., *Hauschildt v. Denmark*, 24 May 1989.

¹¹ Court of Cassation, *Bord Na Mona*, 6 Nov. 1998, *Bulletin d'information*, No 486, 1 Feb. 1999, http://www.courdecassation.fr/jurisprudence_publications_documentation_2/bulletin_information_cour_cassation_n_27/bulletins_information_1999_1131/no_486_1138/jurisprudence_1139/cour_cassation_1141/arret_public_integralement_2857.html.

In Italy, the rules about the incompatibility of a judge and a case, particularly in criminal proceedings, are extremely detailed and create several problems for the functioning of the smaller criminal courts. This principle does not play a similar role in the administrative courts. In France and Italy judicial involvement in preliminary proceedings in a case does not exclude them from participation in proceedings later in the same case. In the Netherlands these issues are regulated by the Codes of Criminal and Civil Procedure, and in the General Administrative Law Act.

Especially in Denmark and the Netherlands, judges are used to deal informally with appearances of bias. Instead of starting formal resignation proceedings, they will exchange the case in which they might appear biased with a colleague. In order to make better visible for the general public how judicial integrity is enhanced, the courts, with the help of the Dutch Council for the judiciary, have developed guidelines judges should adhere to in order to preserve their (appearances) of impartiality.

In all countries, it is primarily up to the judges themselves to prevent any suspicion of bias arising, and there are no explicit rules on this other than the indication that judges may do this. This means that judges are expected to scrutinise their assigned cases themselves for any appearance of bias, and if bias is likely or there may be an appearance thereof, they should ask for the case to be assigned to another judge. Hence, the prevention of (any appearance of) bias is primarily an individual judicial responsibility and only at second instance a possibility of disqualification is given to the parties to a case. Only if judges do not maintain these values by themselves, other such mechanisms can be used.

4. Sideline jobs

We also collected some information about sideline jobs of judges. These may cause (appearances of) bias and therefore may relate to their resigning or disqualification from a case. Interestingly enough, only in France sideline jobs are completely prohibited both for ordinary and administrative judges. Such activities are allowed in Denmark, but only as far as they do not interfere with judicial impartiality. Professional judges can earn quite a lot of money from sideline jobs, especially Danish High Court judges. There, judges should nonetheless have the consent of the board of presidents of the higher courts. Some activities, such as teaching or being part of a governmental commission or international organisation, do

not seem to be considered as an impairment to judicial independence – albeit that this is discussed in England and Wales. However, lucrative arbitrations are clearly seen as a potential problem. In England and Wales, judges do not even need to be authorised to function as arbitrators. In North Rhine-Westphalia they have to be authorised by the Ministry of Justice, in Italy they must be authorised by the Judicial Council. In Italy, judges have been progressively limited by the Council’s policy not to consent too often to judges engaging in extrajudicial activities but teaching. Administrative judges are wanted for consultation functions and are still granted authorisation by their specific Council. When permission is denied, they can appeal to the administrative court of Rome, which very often reverses the Council’s negative decisions. The extrajudicial activities and the related income are published each year in Denmark, and recently also in Italy.¹² In the Netherlands extrajudicial activities should be communicated to the management board and are published on the website of the courts. But it is not known if the judges really inform the management board of their court about all the extrajudicial activities that they perform.¹³ A bill has been presented to Parliament in order to ensure that judges ask their management board explicit permission for extrajudicial activities, thus expanding the boards’ control over judges.

B. Internal court organisation: Specialisation, allocation of judges, task forces

1. Specialisation

The kind of compartmentalisation in the courts may differ from country to country and also depends on the size of a court. Together with judicial *specialisation*, and the case assignment system adopted, this may affect the case assignment process. In order to compare information we introduced a distinction between courts, court divisions (*e.g.*, civil law, criminal law, family law and administrative law), and court units (often called *chambers*) within a division. Units may be specialised parts within a division, for example within a civil law division there may be units for movables, children’s cases, succession cases and real estate cases.

¹² Extrajudicial activities haven been published on the web site of the Italian Judicial Council only recently.

¹³ M. VELICOGNA and G.Y. NG, “Legitimacy and Internet in the Judiciary: A Lesson from the Italian Courts’ Websites Experience”, *International Journal of Law and Information Technology*, 2006, pp. 370-389.

As throughout this study, the simpler situation is found in Denmark where all the judges are *generalists* and they deal with all kinds of cases. All the other countries work with some kind of internal specialisation, which is quite evident in England and Wales as well as in Italy, where there are less specialised full courts than in France and North Rhine-Westphalia. It is a common feature of all courts that they have more distinct divisions when they are of larger size. In the Netherlands decisions on the internal organisation of the courts are taken by the management board, within the statutory limits of maximum four court divisions. In all the countries the number of specialised units depends on the law, on the size of the courts, on the decision taken by the heads of the courts (*e.g.*, heads of the courts in France, Germany and Italy, but in the two last-mentioned with consent of the local and national Judicial Councils in Germany and Italy respectively). It is intuitive that a larger court may have an internal organisation divided into several divisions or units. A remarkable exception is Denmark, where neither in the Copenhagen court nor at the appeal court level has any formal specialisation been organised. In all the countries in our sample the specialisation in the courts of appeal follows the specialisation of the courts at first instance.

The court units in North Rhine-Westphalia are quite specialised, *e.g.* in the civil sector: legal aid, cases related to ownership of houses, international family affairs (children), real estate, movables, insolvency cases, *etc.* As a consequence, judges sit in such a unit for at least one year. It is possible, however, for a judge to be assigned to more than one unit. In England and Wales, the number of specialised administrative tribunals of first instance is quite large. Appeals from these tribunals go before a specialised division of the High Court. In this way, decisions of such tribunals may be subject to review by the ordinary judiciary.

2. Allocation of judges

In principle it is possible to move judges from one specialised division or unit of a court to another, but the levels of discretion of the heads of court differ from country to country. In England and Wales the decision as to the *allocation of judges* is made once and for all by the Lord Chancellor, along with the head of court. In Denmark, judges of first instance courts, as generalists, deal with all judicial matters without differentiation. In the High Courts, judges can be transferred to another division at their request and with the consent of the head of court. In France, it is the competence of the head of court to allocate judges within the

organisation by a scheduling order. An exception concerns the examining criminal judges who are appointed by the President of the Republic on the advice of the Minister of Justice and after consultation with the Judicial Council. The scheduling competence is used quite differently, *e.g.* in one court (Avignon) the head of court (*i.e.*, the president of the court) insists that all judges sit in the (criminal) misdemeanour unit, in other courts specialisation in criminal law is possible. In Italy, in the ordinary courts, the head makes a proposal that must be approved by the national Judicial Council, after consultation with the local Judicial Board, the head of the court of appeal and the Bar. In the administrative courts, it is formally the head that makes the decision, but in practice it is based on seniority. In North Rhine-Westphalia, judges are allocated to court units according to the annual regulatory case assignment plan (*Geschäftsverteilungsplan*), which may be adapted to changing circumstances several times a year and which has to be approved by the local council of judges. In the Netherlands the management board takes decisions about the internal organisation of the court, and allocates judges to the different court divisions.

In the countries considered, judges perform their services primarily in the courts to which they have been allocated, but there are exceptions to this practice. In Italian courts, in order to gain some flexibility in the allocation of judges, the law provides for so called *district judges*, who may serve in all the offices of the judicial district when needed. However, this initiative has not provided the expected benefits in terms of flexibility. The same possibility has also recently been introduced in France. There, judges may be moved from one court to another within every district of a court of appeal by the head of a court of appeal. In the Netherlands, judges are appointed to a specific court, but by legal provision they are also substitute judges in all the other courts at the same level. Hence, they may be asked to hear cases in another court than the one they have been appointed to. This is usually arranged between the head of a court with a low caseload and a court with a high caseload; sometimes it is also arranged because of the special expertise of a judge, or in order to prevent appearances of bias. Several courts have signed agreements for such exchange of judges. In England and Wales, the so-called *ticketing system* allows judges to hear cases on some specific subjects on a certain court level, if they have been trained or if they have experience in that subject. Accordingly, there are judges who serve at a certain level who may hear a particular kind of case, if they have the appropriate *ticket* or qualification. This allows the judges to hear specific kinds of cases in several courts within their assigned geographic area.

Accordingly in England and Wales it seems as if there is a specialisation of courts, but there is also a specific qualification of judges which goes beyond the single unit.

3. Task forces

The increasing caseload has pushed courts to establish *task forces* in order to address peaks or backlogs. This may bring some problems in the case assignment process. In France, task forces of judges have been used, on rare occasions, mainly for immigration cases. In Italy, task forces have been used to try to clean up the oldest civil cases dating back to 1995. For this purpose, a specific law has defined the kind of cases that these temporarily assigned judges are supposed to deal with and they are coordinated by a full-time judge of the first instance court. Also in the Netherlands, task forces have been deployed in order to help courts deal with backlogs. The flexibility of England and Wales allows the temporary appointment of judges from a reservations list when the caseload is overwhelming in a particular court.

Task forces may be a solution for a bulk of pending cases, especially in countries where the strict application of the principle of immovability of judges makes the process of transferring judges very cumbersome and formal. Generally speaking, it is possible only with the judge's consent, but a few exceptions may occur related to court reorganisations or disciplinary proceedings. The process of temporarily assignment of judges is often guided by a central instance: the Judicial Councils in France, Italy, by the Court Administration in Denmark, by the Ministry of Justice in North Rhine-Westphalia, and by an informal negotiation between judges and the heads of courts in England and Wales on the basis of the ticketing system.

C. Case assignment: Who does it and how

1. Case assignment and the responsibility of the head of court

In Denmark, formally the head of court carries out the assignment, but in practice the assignment to the generalist judges is done randomly by a computer or by the clerk of court. The head of court intervenes only exceptionally, if the computer malfunctions or if there is a very intricate case that needs special attention. In England and Wales, the head of court and

the top of the judicial system, such as the Lord Chancellor or the Master of the Rolls, have a formal role, but in practice the assignment is done by the court clerk. It is this functionary's task to identify the judge who has the time available to deal with the case. France, Germany and Italy work, in principle, with a similar system in the ordinary courts, but they differ in some aspects, which affects the day-to-day operation of the courts. The most important feature of German and Italian case assignment is that they have embedded in their Constitution the principle of *the legal and natural judge* respectively. They have both adopted a system in which the heads of court make proposals for case assignment (and also for the allocation of judges within the court). But the actual decision is made by others. In Germany, the decision is made by the local Judicial Council every year after a process that takes a few weeks. Neither Germany nor North Rhine-Westphalia has a Judicial Council such as France and Italy. In Italy, the decision to approve the session schedule for every court is made by the National Judicial Council, which concerns about 1200 offices (it includes courts and offices of the public prosecutor and justices of the peace); it is a process that takes years and the approved court schedules therefore do not always reflect the actual situation in the courts. In France, where the principle of the natural judge has no legal status, the case assignment schedule is made every year by the head of court without any apparent supervision. In the Netherlands the assignment to the various divisions (so-called 'sectors') is a responsibility of the management board, but within each division the sector chair is responsible. In practice cases are assigned by a coordinating judge, with the assistance of a court clerk.

When the heads of court in Italy and Germany do not follow the case assignment system they may, in principle, be subject to disciplinary measures, since the criteria are established by the judicial council and are considered binding. In the other countries the heads of court do not have to follow instructions to assign cases in their courts issued by a superior authority. In England and Wales, the assignment is made by a *listing officer*, who is supposed to follow the listing policies set up by the judges. Any dispute is supposed to be solved by a senior judge. The Ministries of Justice of the countries considered here do not play any role in the case assignment process. The Bar may be informed about the court assignment process, but can only make suggestions in England and Wales as well as in Italy, and only in the ordinary courts.

Some differences have been noted in the French and Italian administrative courts, where the heads of courts, or of the heads of units within the largest courts, still play a major role in the assignment process. This role has only recently been diminished in Italy, with the introduction of a more automated case assignment system. In both countries, the head of the unit assigns the cases, while the head of court, or the clerk in France, carries out the first assignment to every unit on a subject-matter basis.

2. The heads of court may also allocate judges to cases

The discretion of the head of court to move judges is a point of attention. Moving judges easily from one unit to another, may have a great effect on the case flow of the court (Di Federico, 2005). In the countries considered, only in Denmark the head of court is responsible for the appointment of the heads of a division or unit and for the allocation of the judges to them. In England and Wales, it is the Lord Chancellor, in consultation with the existing heads of divisions, who appoints the new heads, while the local presiding judge, along with the court manager, decides on the allocation of the judges to the various units. In France, the heads of division are appointed by a *promotion committee* (mainly consisting of heads of courts), and they are responsible for the allocation of judges within the divisions of the court that they preside over. In North Rhine-Westphalia, it is the local council of judges that decides on the allocation of judges within the units. In Italy, it is the national judicial council that must supervise and approve the proposal for the allocation of the judges made by the heads of court after a very long and time-consuming process that involves the head of the court of appeal, the local judicial council and the local Bar. In the Netherlands, the head of court in practice does not play a significant role in case allocation, but the management board is responsible for the internal court organisation. The actual case allocation is often carried out by a court clerk under the supervision of a coordinating judge.

3. Judges' specialisation comes before randomization

Assignment of cases generally follows the specialisation of judges. Randomisation is not applied everywhere. Particularly in France, case assignment is a supervisory task of the head of court. In the German administrative courts, cases are allocated according to the case allocation plan; specialisation within the administrative courts is a leading principle for case

allocation (*e.g.*, election law, urban and regional planning law, aliens' law, tax law, economic administrative criminal law). In the Dutch administrative appeal courts, cases are assigned in the same informal way as in the ordinary courts.

All the court systems do have some kind of specialisation by jurisdictions (territory) or within the single court organisation (subject related). Once the case has first been assigned on the basis of the subject-matter, there is a *random case assignment* that can be handled in several ways. In Denmark, where the assignment is not even made by subject-matter because the judges deal with all kinds of cases without any differentiation, the assignment is in practice fully random by computer. In the smaller courts it is done by the clerk. In England and Wales, the assignment made by the listing officer assigns the case to the first judge who has the professional qualification (the so-called *ticket*) to hear the case and who has the necessary time. In France, North Rhine-Westphalia and Italy the assignment is randomized using the plaintiff's or defendant's name, or it may be based on judges' weekly or daily shifts. This happens in particular in some criminal courts in Italy. In the Netherlands, within a division, cases are assigned on the basis of the following criteria: the kind of procedure, specialisation and skill of the judge, judicial continuity and then randomness.

In the French administrative courts, the case is assigned according to subject-matter and then at random or according to geographical criteria. In the Italian administrative courts, recently a new *case assignment system* has been introduced. In order to balance the distribution of cases among the administrative judges, the head of court assigns the case to the various units, if present, by subject-matter, then the head of the unit prepares a number of balanced sets of cases equal to the number of judges of the unit and subsequently draws lots to assign them. Exceptions may occur and they have been managed in different ways from court to court, depending on the role played by the head of court.

4. Balancing caseloads amongst judges has the highest priority

According to the research findings, there is just one priority concerning the case assignment systems in use that seems to be shared by all the six countries: balancing the caseload amongst judges. Other aspects are relevant, such as the appreciation of a judge's specialisation or judicial continuity in dealing with a case, but they are specific for each

country and are related to the way in which local case assignment processes work. In Denmark the assignment is made by computer in some courts, but in the other countries the randomisation is done manually. A weighted caseload which is fundamental for a well-balanced caseload per judge is used in Denmark only in the Copenhagen city court. This is also a point of attention in the case allocation plans in North Rhine-Westphalia which are internally completely transparent. In England and Wales, the case is given to the judge who has the time to deal with it and cases are not weighted. In the Netherlands cases are not weighted either, but coordinating judges of divisions (*i.e.*, sectors) and units take the pending workload of judges into account when assigning cases.

5. Informal exchange of cases between judges is not allowed everywhere

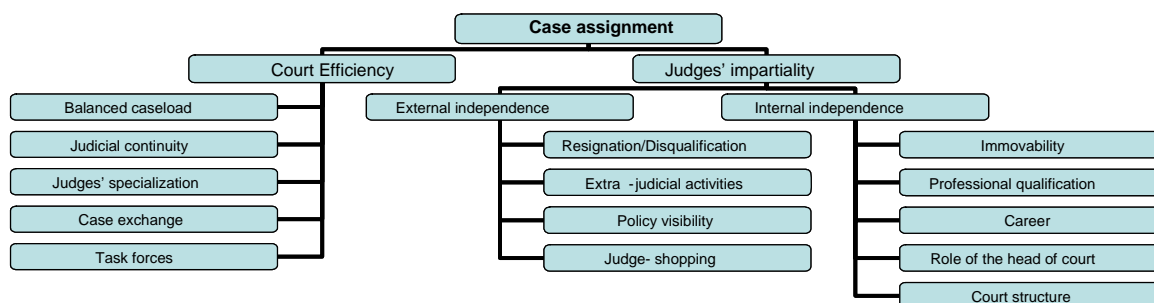
An *informal exchange* of cases between judges is possible in Denmark, England and Wales, and in the Netherlands; but it is considered something absolutely unacceptable in Germany and Italy. In these two countries the possibility of changing judge must be strictly provided by the law, by a judicial council order, or exceptionally by a reasoned decision by the head of court. No informal exchanges whatsoever are allowed due to the *natural* or *legal judge* principle. In France, exchanging cases is possible with the consent of the head of court only. The consistency between the case assignment rules and their use in practice is considered quite low in England and Wales, and in Denmark, and fairly high in France, Italy and the Netherlands. In Germany this consistency is indicated as *stringent*.

IV. Values and factors that affect case assignment: A comparative analysis

In the former paragraph, we have provided a description of rules and practices concerning assignment of cases to units and judges to courts in six judicial organisations. An apparent function of case assignment processes is to balance two sets of values: judges' impartiality and courts' organisational efficiency. The case assignment process must balance these factors. This balancing process leaves a number of choices open for those who develop and carry out policies regarding case assignment, due to the different *weights* that each justice system gives to the different factors and values. In this paragraph we explain these factors and values, but we also show how these factors and values may be balanced differently. Figure 1

graphically summarises the main values and related factors that affect, and are affected by the case assignment system.

Figure 1: Case Assignment Values and Factors



A. Judges' impartiality

Judges' impartiality is pursued through the means of judges' independence, which can be further divided into *external independence* and *internal independence*.¹⁴ *External independence* refers to the mechanisms established to preserve the judge's independence - therefore impartiality- from all the possible influence coming from the parties and the other State authorities such as the Government and the Legislative. *Internal independence* refers to the mechanisms established to preserve the judges' independence from pressure that may come from the judiciary itself, such as: pressure from a superior judge or from the judicial council. We would like to point out that when judges' impartiality, and independence, are involved, the matter is not only if *they are impartial*, but also if *they appear* to be so before the parties and the public in general. Therefore the way in which independence and impartiality policies are implemented, communicated and perceived are a point of attention.

¹⁴ It has to be clear that in this work we are not considering all the variables that may affect judicial impartiality and independence, but only those that are related to the case assignment system based on the empirical research. See. **N. BROWNE-WILKINSON**, "The Independence of the Judiciary in the 1980s", *Public Law*, 1988, pp. 53-57; **C. GUARNIERI and P. PEDERZOLI**, *The Power of Judges*, Oxford, Oxford University Press, 2002; **K. MALLESON**, "Safeguarding Judicial Impartiality", *Journal of Legal Studies*, 2002, pp. 53-70; **S. SHETREET and J. DESCHÊNES**, *Judicial Independence: The Contemporary Debate*, Dordrecht, Nijhoff, 1988; **J.C. VILE**, *Constitutionalism and the Separation of Powers*, Oxford, Oxford University Press, 1967; **M.B. ZIMMER**, "Judicial Independence in Central and East Europe: The Institutional Context", *Tulsa Journal of Comparative and International Law*, 2006, pp. 53-65.

1. External independence

External independence, according to our study, is related to the case assignment system through the four factors listed in figure 1: resignation and disqualification of judges, judge- shopping, extra-judicial activities, visibility of policies.

The regulation and practices concerning the way through which the *self-resignation* and the parties' *disqualification* of a judge may be effectuated are among the strongest mechanisms to enhance and enforce the external independence of the judges. Resignation and disqualification rules are, generally speaking, carefully listed in the procedural rules or codes and they look quite similar in all the judiciaries considered here. Our study shows that the self-regulating mechanisms work out quite well. Among the countries considered, we notice a high level of sensitiveness, sometimes, as in Denmark due also to a specific case that has changed the judges' behaviour on this issue.

The *extra-judicial activities* (sideline jobs of judges) are another factor affecting the judges' external independence and therefore the case assignment process. It is intuitive that the number and the kind of activity (*e.g.*, member of the executive board of a corporation, member of a Ministerial cabinet, *etc.*) may jeopardize the substance and appearance of the judges' independence and then their impartiality. As our research shows only in France extra-judicial activities are not allowed, in Denmark, the Netherlands and in Italy -but with the exceptions of the numerous positions within the Government and International organisations- they are supposed to be clearly published on the web. The case assignment process may consider these extra judicial activities and avoid the assignment of the cases to judges who may have developed connections with one of the party due to these 'extras'.

The publicity of these activities brings us to the other factor listed, which is the *policy visibility*. We think that the visibility of court policies helps to enhance the external independence of judges, or better, the appearance of impartiality. However, generally speaking, the practices to make the court policies transparent, including the case assignment criteria, are not really that well developed in the case studies considered here. Information about court policies, in particular about case assignment, seems hard to find – except for North Rhine-Westphalia. A point of attention for future research is the discretion given to

each court to implement local practices for its functioning. This is, of course also relevant for the courts' policies on publicity. This possibility seems to be quite relevant in Denmark, England and Wales, the Netherlands and a little more limited in the countries of Continental Europe, even though, particularly in this matter, the leadership role of the head of the court may be more significant than the general rules and customs.

Judge shopping is the last issue that we considered within the area of *external independence*. If the case assignment system allows some kind of judge's picking (judge-shopping), it goes without saying that there may be a serious problem of *external independence*. The phenomenon has been mentioned only in the criminal court in France and Italy, while it has been not acknowledged in the other judiciaries considered in the study. Notwithstanding the apparent non-existence of the problem, we think, this is an issue to be empirically and constantly monitored, particularly in small courts.

2. Internal independence

After having considered the *external factors* that affect and are affected by the case assignment system, we will now exploit those that deal with the judges' *internal independence*. More in detail, the way through which the principle of judges' immovability is pursued is certainly a point of interest.

Immovability is a principle shared in all the judiciaries considered in our study, even though it has been constitutionalised only in Germany and Italy. The constitutionalisation of the principle has created a certain rigidity of the case assignment process, which is particularly evident in Italy. However, since the immovability concept is founded in all the judiciaries, every country has established mechanisms to 'overcome' the judges' fixation in a court and give some flexibility to the court organisation, both within the same court or between courts. These mechanisms are not formalized at all in countries such as Denmark and England and Wales, where cases can be exchanged informally between judges, average formalized in countries such as France and the Netherlands, where decisions are taken by the head of courts or by the so called management board, highly formalized in Germany and, above all, in Italy, where changes are allowed only after a specific written decision by the head of court supported by the local (Germany) or national (Italy) Judicial Council. This is a strong limit to

court flexibility in case management, which will affect court performance in terms of efficiency.

Partly connected to immovability is the *professional specialisation* of judges, and the way in which courts are structured. In this context, professional specialisation means that judges have acquired a qualification to deal with specific matters, so they can be considered specialized. Actually, if the court structure is highly specialized in division, sections and subsections that deal with specific matters, and the judges are highly qualified to deal specifically with these matters in a specific section, it is intuitive that where the immovability principle is applied more stringent, this limits organisation flexibility in case assignment. This seems to be the case of Germany and Italy, even though in this latter the rigidity is given more by the stiff court structure rather than the specialisation of the judges. On the contrary, in Denmark, because of the generalist character of judges, and in England and Wales, due to the so called *ticketing system*, the case assignment system is quite flexible. The Netherlands and France are in between, with a moderate specialisation of both judges and court structure.

The judges' *career path* is another point of attention for the case assignment system. This is related to the common practice to give judges a balanced caseload. In countries where the judges' career advancement is connected to their performance, for example measured through the 'quality' and the number of judgements, the case assignment system used is of paramount importance. For example, 'quality' decisions can be more easily performed if there is the opportunity to deal with difficult cases in point of law, while big numbers can be pursued processing massive similar cases such as injunctive orders or simple social security cases. For this reason, we expected to find in the judiciaries, which have a so called *bureaucratic setting*,¹⁵ the adoption of a weighted caseload system, in order to have a more balanced distribution of cases among judges. On the contrary, a weighted caseload system seems to be used only in North Rhine-Westphalia and in the Copenhagen city court. This

¹⁵ Typical feature of *bureaucratic judiciaries* is that the recruitment and the career are those used for other positions within the public sector. Generally speaking, judges do not have a previous specific professional experience and they have a quite rigid career ladder mainly related to seniority and performance; see **G. DI FEDERICO**, "The Italian Judicial Profession and its Bureaucratic Setting", *Juridical Review*, 1976, pp. 40-57. In our sample, judiciaries that can be classified as *bureaucratic* are France, Germany and Italy. England and Wales, and Denmark can be classified as *professional judiciaries*, since, generally speaking, judges are selected among lawyers who have been practising law, and there is not a rigid career ladder strictly related to seniority and performance. The Netherlands take a middle position because judges are selected both from law school graduates and experienced lawyers.

leads to the need of other balancing mechanisms in particular in the other two *bureaucratic judiciaries*, such as France and Italy, and a different role played by the heads of courts.

In this research we also pointed out the importance of the *role of the head of court* in the case assignment system, which is related to the internal independence of the judges. Automatism in case assignment, a low discretion in the assignment process by the head, such as the cases of Germany, Italy and Denmark, increases the level of internal independence, but it may decrease the capacity of the courts to deal with the case in an effective way. A more managerial role of the head, or of the management board, should call for the assignment of cases in a more effective and efficient way rather than a simple randomization. Theoretically, there is an “efficient allocation” of a mix of cases, which should help the judges’ and court’s productivity.

B. Efficiency of court organisations

This leads us to the second ‘pillar’ of the case assignment system which is the search for *court organisation efficiency*.¹⁶ Judges’ specialisation, like division of labour in general, is assumed to be a major precondition for efficient functioning of courts. Case complexity and the existing caseload of judges call for a better specialisation of judges, and maybe also of courts, to increase, at least in theory, the average case processing speed. Judges have a professional interest in having assigned to them a fair mix of interesting and simple cases in comparison with their colleagues. Therefore the internal transparency of case assignment and caseloads is a major issue in courts in all the countries studied. In Italy, for example, judges perceive themselves to be entitled to a balanced caseload and therefore mix it up with the value of internal judicial independence. And this mix is protected by the constitutionally fixed way of case assignment in Italian courts. We think, therefore the professional interest of judges in a balanced caseload may conflict with the court-organisations’ interest in efficiency by enhancing different kinds of specialisation.

The case assignment system also affects the court efficiency through choosing for or against *judicial continuity* in dealing with the same case. In England and Wales judicial

¹⁶ L. CADIET, “Efficiency versus équité?”, in *Mélanges Jacques van Compernelle*, Brussels, Bruylant, 2004, pp. 24-47; H. FIX-FIERRO, *Courts, Justice and Efficiency*, Oxford, Hart, 2004.

continuity is considered a ‘privilege’ for parties in the actual overwhelming situation and cases are assigned not considering judicial continuity, but selecting the judge who has some time available for the case. On the contrary, we think that a case assignment system that also acknowledges the importance of judicial continuity can give a better service to the parties and increase the overall efficiency of courts, since the judges do not need to study too many new cases from the beginning.

We have already mentioned that the *informal exchange of cases* between judges has been recognized as an informal but effective mechanism of coordination by mutual adjustment. As shown in our research this is not allowed in the judiciaries (*i.e.*, Germany, Italy and France) where the assignment process is more formalized and based on a legalistic approach. In the Netherlands, Denmark and England and Wales if the judges do have reasons to resign or to be disqualified by the parties, cases can be informally exchanged, preserving both the judge’s impartiality and court efficiency.

C. Balancing values and factors

One of the most striking conclusions from this study is the strong contrast between the formal approaches in Germany and Italy versus the informal approaches in Denmark and England – where the actual internal case assignment process typically is not prescribed by law. As a consequence, it is easier for the German and Italian courts to live up to formal requirements of accountability for the internal case allocation than for the Danish courts, while the French take a middle position with a dominant function of the head of court; this middle position has recently also been taken in the Netherlands, where the courts have started to develop internal guidelines for case allocation within the frameworks of internal court regulations.

Whereas in Germany and Italy the law seeks to support the professional values of the judges and the heads of courts, by preventing judicial bias and unequal treatment of judges by the head of court, in Denmark and England the professional values are apparently considered to be self-evident and internalised by the judicial services – and do not seem to have the need to lay down these values in rules. We consider the self-evidence of strong professional values like impartiality an asset for every court. However, when moving from an informal

arrangement of internal case allocation to a more formal arrangement, it may seem as if the responsible state institutions give the message that there are no longer sufficient grounds for such self-evident trust in the judicial professionals – in other words, that they cannot be trusted anymore. This is to be avoided. Even so, the increased external transparency of courts as a result of modern means of communications and the increased interest of the press in the courts makes it advisable that the courts develop clear policies on the assignment of cases, so that they can explain the way they apply and achieve a balance between their organisational and professional values and acceptable court performance. Thus, judges can share their professional responsibility in preventing bias from occurring.

Related to the informal or formal approach in dealing with case assignment, we also observed a potential tension between organisation and management on the one hand, and the juridical, normative approach on the other. Formal steering competences, striving for efficiency, flexibility and, to a certain extent, transparency are inevitable in modern organisations. We have shown however, how dominant traditional juridical and judicial values still are in courts, also supported by traditional judicial professional values. These values have been partly summarized in article 6 of the European Convention for Human Rights and are also concerned with case management; they concern judicial impartiality, judicial expertise, equality of arms, timeliness and judicial continuity in a case.

It is an outcome of this study that in Denmark and England and Wales¹⁷ court organisation seems to be able to put a greater interest in efficiency because the organisational rules do not stress juridical and judicial values as explicitly as those rules in Italy and Germany do. France and the Netherlands have made their interest in an efficient court organisation very clear by introducing out-put based financing systems. Nonetheless, they take a middle position in the way they try to reconcile juridical and organisational values. In the Netherlands the organisational demands have been made explicit by Statutory Act, and the juridical values are in a process of juridification; they are operated explicitly, partly in a Statutory Act and partly in court internal regulations and guidelines. In France, the juridical and judicial values are guarded by the courts' presidents.

¹⁷ **J. PLOTNIKOFF and R. WOOLFSON**, *Judges Case Management Perspectives: The Views of Opinion Formers and Case Managers*, London, DCA Research Series, 2002, No 3.

These organisational and juridical values must be balanced in modern case assignment, but a minimum of human rights and juridical quality must remain unchallenged. In this respect, a firm constitutional and/or supranational legal basis of juridical values remains a necessity; the countries in our sample show that this can be achieved in different ways.

The method of case assignment in France, Italy and Denmark suggests that judges can manage all juridical fields. Also the Dutch way of having judges in first instance courts change court division every four years is an exponent of that thought. But with the current complexity of law and society the professional demand that a judge knows and masters all fields of law is no longer reasonable. Courts with only generalists seem more flexible from an organisational perspective, but judges who appear not to be able to handle and judge cases adequately would also risk to harm the public trust in the courts.

In England and Wales an effort to solve this problem has been made with the ticketing system, meaning that judges must have a certificate in order to be allowed to handle specific kinds of cases. In Germany a far-reaching juridical specialisation within the courts is considered normal. This reduces organisational flexibility, whereas it will reduce the risk of judicial mistakes. Therefore judicial specialisation may be expected to contribute to the public trust in the courts.

In conclusion, the values and the instruments emphasised in this study show that they must be balanced keeping human rights and juridical quality unchallenged. In this respect, a firm constitutional and/or supranational legal basis of juridical values remains a necessity; the countries in our sample show that this can be achieved in different ways. We think that it is a challenge for all judicial organisations to manage their cases not only from the perspective of judicial values, but from efficiency as well. This may need a constant rethinking of working processes within the court organisations – and also the functioning of judicial organisations as a whole. This is a matter of the public accountability of the courts as organisations and a matter of judges avoiding delays in deciding cases.

V. A final word on the relation between the classification of legal systems and the organisation of case assignment

We started this study by selecting countries with different legal traditions, assuming that we would have found some relations and consistency between the main feature of the legal system and its case assignment. We distinguish between legalistic legal systems (the Latin or French ones) where reference to codes is predominant in adjudication, and jurisprudential legal systems where reference to jurisprudential precedent is predominant (the Anglo-Saxon ones). The role of legal rules in case assignment (formal/informal) is also a point of attention, as we expect the informal rules to lead to more flexibility than the formal ones.¹⁸

From our research we can conclude that the most rigid system of case assignment can be found in Italy, followed by Germany, whereas the French system, although formal, is quite flexible. The Danish, Dutch, and English case assignment processes are also quite flexible. England and Wales and Italy fully confirm the hypothesis, whereas it should be rejected for France altogether. German case assignment confirms the hypothesis in part, but is quite adaptable and contradicts it for that part. The Netherlands has an informal case internal case assignment: but is originally a French legal system, which is operated with quite some room for judicial precedent. Therefore, we positioned it with Denmark between legalistic and jurisprudential legal systems. We would expect both countries to be less formal than Germany and Italy and more formal than England and Wales in case assignment; and we would expect both countries to be more flexible than France and Italy, and less flexible than England and Wales. It appears that they are just as flexible and informal as England and Wales in their case assignment. So, also the Dutch and Danish cases do not fit the hypothesis entirely. An explanation for these finds could be that the distinction between legalistic and jurisprudential legal systems is not absolute at all, because also courts in civil law countries may contribute to the development of law, as Merryman asserts.¹⁹

Based on this outcome, we question whether a typology of legal systems can contribute to the explanation of the role of law in society and in organisations like courts. As far as case assignment is concerned, the typology explains very little. The exchange between researchers from the countries in our sample gave us more insight into the actual methods of

¹⁸ **K. ZWEIGERT and H. KÖTZ**, *Introduction to Comparative Law*, Oxford, Clarendon, 1998.

¹⁹ **J.H. MERRYMAN**, "The French Deviation", *American Journal of Comparative Law*, 1996, pp. 117-118.

case allocation than only a legal comparative study based on this classical typology would have done. From our research we derived that comparison on the basis of interaction between scholars who studied the functioning of the legal rules that govern court organisations and their application is more fruitful than a juridical comparison on the basis of a traditional typology of legal systems. It is probably about time to abandon this typology as a starting point for comparative work in the field of judicial administration and court administration.