

## JUDICIAL SPECIALIZATION: IN SEARCH OF THE 'RIGHT' JUDGE FOR EACH CASE?

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*The issue of how much specialization is required of a modern judiciary is debated in many legal systems, some of which have a long tradition of generalist judges. The increasing complexity of contemporary society and the emergence of new legal fields, dominated by technical concepts, can be seen as the perfect rationale for the establishment of specialized courts. It is easy to think that a new array of complex cases, raising sophisticated issues of fact and law, deserves to be adjudicated by judges who are highly skilled in the subject matters at stake. New specialized courts could also contribute to the solution of the problem affecting various legal systems, that is, the huge caseloads burdening ordinary courts. And yet, judicial specialization may also have significant drawbacks: among others, the danger of the 'insularity' of specialized courts, a tendency to self-seclude inside the restricted boundaries of the matters falling within their expertise. After some brief remarks on the advantages and disadvantages of judicial specialization, this essay elaborates on the state of the issue in Italy, where recent reforms and others announced seem to indicate a new trend in favor of the establishment of more specialized divisions within ordinary courts.*

*Key words: judicial specialization; specialized courts and divisions; problem-solving courts; business courts; family courts.*

### 1. Introduction

Contemporary society seems to hold in high esteem specialization and, as a matter of fact, a good measure of specialization is required to understand many aspects of modern life. Certainly, every time we sit down in front of our personal computers, for example, we do not think that expertise in computer sciences is necessary to operate them, but – indubitably – we realize that we lack the specialized

knowledge that is often indispensable in resolving the highly technical problems sometimes raised by the wonders of IT.

Intuitively, we are inclined to think that specialization is necessary in order to face the complexity of our modern world. We experience this complexity in many fields affecting our everyday lives, and in our roles as legal professionals we realize that the law, too, is becoming more complex. As societal relationships and economic balances change, new legal subject matters arise and with them the need for new statutes governing novel issues. These statutes must be interpreted and applied in order to resolve new types of cases, but often these very statutes hide subtleties that only persons very familiar with the subject matter can see and understand: hence, instinctively one may be inclined to think that specialized judges, meaning judges with a specific knowledge in the subject matter at stake, would be in the best position to do justice in a competent, efficient and expedited way. But the situation of many legal systems shows that judicial organization is largely impervious to the arguments advanced in support of specialized adjudication: in these legal systems the prevailing model is still that of the so-called generalist judiciary.

After some general comments on the pros and cons of a specialized judiciary, this essay will expand on the particular state of the debate in Italy, where the issue of establishing specialized divisions within ordinary courts has witnessed a recent revival within the framework of upcoming reforms devised by the Government with the view to addressing a long-standing problem of Italian civil justice, that is, the excessive length of judicial proceedings.

## **2. Thoughts on the Pros and Cons of Judicial Specialization**

A generalist judge is a judge who is supposed to be able (and capable) to address all the issues (factual and legal) raised by the cases brought to the court in which he sits. The connection between the virtues of a generalist judiciary and the safeguard of an impartial decision-making is clear: moving from the assumption that all the judges are equally competent, it does not matter which judge decides a specific case, and therefore cases can be assigned randomly, since expertise in a given field not only is not required, but also is seen as a negative feature that could potentially impair impartiality. In principle that holds true, or maybe it held true in the past, when the 'era of hyper-specialization'<sup>1</sup> of this twenty-first century existed only in the reveries of science-fiction writers. But nowadays, to assume that judges are the repositories of a general knowledge, encompassing even notions that conventionally are considered as belonging exclusively to the competence of experts, sounds anachronistic, since it

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<sup>1</sup> The expression is borrowed from Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89(5) Wash. U. L. Rev. 847 (2012), available at <[http://papers.ssrn.com/abstract\\_id=1799568](http://papers.ssrn.com/abstract_id=1799568)> (accessed Sep. 27, 2014).

fosters the myth of a judiciary that is not simply generalist<sup>2</sup> but omniscient. Therefore, one may easily argue that since judges (like the rest of us) cannot be omniscient, it is necessary to establish specialized courts or divisions in charge of those types of cases that require specialist knowledge in order to be decided. But how can one identify these types of cases? Which criteria must be followed in the choice of the matters that are better left to the care of a specialized judiciary? In theory, every legal area – even taking into account only matters that conventionally fall within the realm of civil and commercial justice – corresponds to a certain measure of expertise, and thus a strict application of specialization to the assignment of cases could multiply the number of specialized courts beyond reason: business courts, labor courts, family courts, immigration courts, environmental courts, and many others, even going to the extreme of the so-called problem-solving courts, which seem to be the last frontier of judicial specialization, since their real purpose is not to resolve disputes but ‘to forge new responses to chronic social, human, and legal problems.’<sup>3</sup> But are we really persuaded that one of the many declensions of the right of access to the courts is the right to a judge who can guarantee a high level of expertise in the subject matter of each and every case?

It has been argued that among the ‘virtues’ of a specialized judiciary two stand out: the quality of decisions and the efficiency in the disposition of cases.<sup>4</sup> As far as the first is concerned, the assumption is that a judge highly skilled in a specific legal matter will produce better decisions than the ones his generalist peer will issue, or at least decisions that the parties will perceive as ‘better,’ and therefore be more inclined to accept. This is in fact an assumption in need of evidence supporting its

<sup>2</sup> It has been emphasized that often the official rhetoric praising the advantages of a generalist judiciary hides what actually happens in the normal practice of many courts, such as the U.S. federal courts, that tend to follow a pattern of specialization in the choice of the judge to whom the task of writing the opinion to be issued in a given case will be assigned: Edward K. Cheng, *The Myth of the Generalist Judge*, 61 Stan. L. Rev. 519 (2008).

<sup>3</sup> Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23(2) Law & Policy 126 (2001). Problem-solving courts (such as drug courts and mental health courts) seem on the rise not only in the United States, where they were first established, but also in Canada, Australia, and the United Kingdom: the evaluation of their operation runs the gamut from enthusiasm to strong criticism, which makes the subject fascinating, to the extent that one finds fascinating the concept of a ‘therapeutic jurisprudence’ that problem-solving courts support through the active role played by judges who ‘are concerned not merely with processing and resolving the court case, but in achieving a variety of tangible outcomes associated with avoiding reoccurrence of the problem’ (Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30(3) Fordham Urban L.J. 1060 (2002), available at <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1866&context=ulj>> (accessed Sep. 27, 2014)). The literature on problem-solving courts is extensive: see, e.g., Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73(4) Md. L. Rev. 1120 (2014), available at <<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3642&context=mlr>> (accessed Sep. 27, 2014); Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26(1) Just. Sys. J. 35 (2005); Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. Rev. 1459 (2004), available at <[http://papers.ssrn.com/abstract\\_id=711983](http://papers.ssrn.com/abstract_id=711983)> (accessed Sep. 27, 2014).

<sup>4</sup> See Lawrence Baum, *Specializing the Courts* 218 (University of Chicago Press 2011).

persuasiveness. And, at the level of postulates one can make for the sake of discussion, a different assumption can be interjected into the discourse on the pros and cons of specialization: specialization, most of all when it concerns a very narrow field, can bring about the inability to see 'the big picture.' Hyper-specialized professionals often cannot see beyond the ends of their noses, and are unable to incorporate their expertise into the larger framework that must be taken into account in order to arrive at the optimal solutions of problems.<sup>5</sup> That can hold true for a specialized judge, too: his judgment on issues falling within the range of his specialist knowledge may be flawless, but still his decision may be 'bad,' if other issues have been overlooked or the decision reveals, for instance, a lack of understanding of the scenario surrounding the case.

As far as judicial specialization in its value as a factor fostering efficiency in the allocation of cases and decision-making is concerned, it cannot be denied that when courts of general jurisdiction are overburdened by heavy caseloads, the possibility to divert part of their dockets to specialized divisions could inject efficiency into the justice system. Scholars have emphasized the connection between the difficulties caused by the growing caseload pressure that courts are experiencing in many legal systems and the trend toward the establishment of specialized courts or divisions, since 'specialization enables an indefinite increase in caseload to be more or less effortlessly accommodated.'<sup>6</sup> One may wonder, though, whether the problem of allocating a huge number of cases is enough to justify, by itself, the creation of specialized courts or divisions within ordinary courts. Other strategies could be less disruptive of the established judicial organization of a given legal system: a better geographical distribution of courts, a more efficient internal organization, the recruitment of law clerks and judicial assistants, and, most of all, an extensive use of case management, which is still a 'mysterious object' in many jurisdictions, Italy among them. Or maybe, while trying to solve the problem of the heavy caseloads (and backlogs) of the courts, it would also be wise to pin down the causes of the problem itself, so as to discover what makes people so inclined to resort to litigation.

In any event, in the background of a discussion on the pros and cons of judicial specialization lies a question that does not seem to have a straightforward answer: what exactly do we mean by judicial specialization? Scholars have discussed the topic to a great extent,<sup>7</sup> but, for the sake of simplicity, we can assume that the most common

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<sup>5</sup> On this point, *see in particular* Oldfather, *supra* n. 1, at 848.

<sup>6</sup> Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B. U. L. Rev. 1049, 1050 (2006), available at <<https://www.bu.edu/law/central/jd/organizations/journals/bulr/volume86n5/documents/POSNERv.2.pdf>> (accessed Sep. 27, 2014).

<sup>7</sup> *See, e.g.*, Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59(8) Duke L. J. 1501, 1671 (2010), available at <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1466&context=dlj>> (accessed Sep. 27, 2014); *idem*, *Probing the Effects of Judicial Specialization*, 58(7) Duke L. J. 1667 (2009), available at <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1412&context=dlj>> (accessed Sep. 27, 2014).

meaning of judicial specialization (or, at least, the first one that comes to one's mind) is subject matter specialization, that is, the fact that specialist judges are assigned and hear only certain types of cases, dealing with a specific matter in which they have gained and can claim an expert knowledge. But one question is unavoidable: who decides how specialized a judge is? This question can be insignificant for the legal systems whose judiciary essentially comes from the ranks of the legal profession: a lawyer who has a long and successful practice in a certain area of law could certainly make a good specialist judge. Things are different in the legal systems that recruit their judges through examinations of various kinds, examinations often taken by individuals who just came out of law school. In these legal systems (among which the Italian legal system can be counted) one can assume that judges specialize in a certain area of law 'on the field,' that is, dealing only with a certain type of case for a long time: the problem is that the rules governing the organization of the judiciary might not contemplate any screening procedures aimed at evaluating whether judges have actually acquired a special expertise in a certain matter. Again, this is the case in Italy, where once you are in (meaning, once you have become a judge) you advance in your judicial career without any further test of your performance, and, for what it is worth, without any evaluation of the specialization you may have gained, but only on the basis of seniority. In legal systems whose judiciary has a bureaucratic structure, even though glorified by an assortment of guarantees aimed at ensuring values such as impartiality and the independence of judicial officers, the establishment of specialized courts would make sense only insofar as it is supported by the will to assign to these courts only judges whose expertise is objectively tested and proven: this is the path that Spain, for instance, followed when new commercial courts (*Juzgados de lo mercantil*) were established in 2003 as specialized divisions of ordinary trial courts, and special panels staffed with judges experienced in commercial matters were inaugurated within appellate courts.<sup>8</sup> If no special ways to identify judges whose expertise in a particular field would give 'added value' to their general competence as decision-makers are devised, the establishment of specialized courts or divisions is simply a sham: it is only a technique of 'division of labor,' aimed at improving the 'mass production' of dispute resolution, and has nothing to do with specialization and the attempt at providing court users with decision-makers whose expertise could (at least in theory) make a difference.<sup>9</sup>

<sup>8</sup> For a recount of the Spanish experience, which involves the establishment of other specialized courts, such as the courts in charge of cases (both criminal and civil) arising out of acts of gender-based violence, see Elisabetta Silvestri, *Quale giudice per le controversie complesse?*, in *Patrimonio, persona e nuove tecniche di governo del diritto*: Incentivi, premi, sanzioni 705–22 (Pier G. Monateri & Alessandro Somma, eds.) (Edizioni Scientifiche Italiane 2009).

<sup>9</sup> Some authors even dispute whether it is possible to conceive in absolute terms an expertise in law or in some areas of law: this issue and the debate surrounding it are sketched by Oldfather, *supra* n. 1, at 862. Other authors emphasize a different point: specialist knowledge in a given legal field (such as patent law) can be important, but not fundamental, since the complexity of patent cases lies not

The list of the pros and cons of judicial specialization could be much longer, but probably to continue the effort of drawing the most exhaustive list possible would not help find a conclusive answer to the fundamental question, meaning the question whether it is better to rely on judges who are ‘jack(s) of all trades but master(s) of none’<sup>10</sup> or on a bunch of technocrats immersed deep inside the cocoons of their specializations. In this author’s opinion, the answer to this question cannot be conclusive, since it depends on many variables and, most of all, on the policy choices that each legal system is willing to make with regards to its judicial organization and, ultimately, with the view of offering its citizens an efficient and reliable justice system.

### 3. The Italian Approach to Judicial Specialization

According to the Italian Constitution, specialized courts cannot be established, but it is possible to institute ‘specialized sections for specific matters within the ordinary judicial bodies . . . and these sections may include the participation of qualified citizens who are not members of the Judiciary.’<sup>11</sup> Italian legislators have not made extensive use of this possibility whenever changes in the structure and organization of the judiciary have been implemented. For quite a long time, the only specialized sections established within ordinary civil courts have been the sections in charge of cases dealing with agricultural land (*Sezioni specializzate agrarie*) and the sections having jurisdiction over juvenile matters (*Tribunale per i minorenni*). While the former have a negligible relevance and limited caseloads, due to the decreasing impact of agriculture on the Italian economy, the latter are important within the structure of the Italian judiciary because of broad jurisdiction encompassing all cases, whether civil, criminal or administrative, concerning underage persons: the civil jurisdiction of these specialized sections include a wide variety of matters such as parental responsibility, custody and guardianship, and adoption, just to mention a few.

The common trait of both types of specialized sections is the composition of adjudicative panels: they are comprised of professional judges and lay members who are experts in the subject matters handled by the sections. Thus in the sections in charge of cases dealing with matters concerning agricultural land, surveyors,

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necessarily in the principles of patent law, but in the scientific fact-finding that is the precondition for the applications of these very principles. See Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17(2) Berkeley Tech. L.J. 877, 878 (2002), available at <[http://www.btlj.org/data/articles/17\\_02\\_07.pdf](http://www.btlj.org/data/articles/17_02_07.pdf)> (accessed Sep. 27, 2014).

<sup>10</sup> For this expression, see Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. Rev. 1755, 1756 (1997), available at <[http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3047&context=journal\\_articles](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3047&context=journal_articles)> (accessed Sep. 27, 2014).

<sup>11</sup> Article 102(2) of the Italian Constitution, available (in its official translation into English) at <[https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)> (accessed Sep. 27, 2014).

agronomists and the like sit, while psychologists and social workers assist the professional judges in charge of juvenile matters.

Until recently, the establishment of new specialized sections was not included in the official agenda for the improvement of the organization of the Italian judiciary and a more satisfactory management of the burgeoning caseload of civil courts. Occasionally, proposals for the institution of new family courts as specialized divisions of ordinary trial courts was advanced, as a step necessary both to keep up with the profound changes that have affected family law through the years, and to rationalize the jurisdiction of the specialized sections in charge of juvenile matters, since some of these matters have a bearing on family affairs. Only beginning in the early 2000<sup>5</sup> did the issue of more specialization in the Italian judiciary become a topic discussed by the legislators: the occasion was the reform of commercial law that, according to one of the many bills under consideration, should also include the establishment of new specialized sections whose jurisdiction would include commercial matters and, more generally, a vast array of private litigation dealing with economic issues.<sup>12</sup> Unlike from the other specialized sections already existing, the proposed commercial sections would not include any lay experts; only professional judges, highly qualified as specialists in commercial law, would be recruited as members of these new decision-making 'units,' and whose specialization was expected to guarantee a swift and efficient disposition of cases, with an improvement in the standing of Italy in the global competition among legal systems and, consequently, an enhancement of the country's attractiveness to foreign investors. The bill at issue never became law: commercial (substantive) law was reformed, and a new, special procedure was laid down for commercial cases,<sup>13</sup> but the idea of establishing specialized commercial sections within ordinary courts was abandoned. The main reason for this change of heart was the argument that public opinion could perceive the institution of specialized sections as a privilege granted to the 'guild' of the business community. Within the judiciary, too, voices of dissent had surfaced, claiming that the institution of 'preferential lanes' for commercial cases would be inconsistent with the guarantees of independence and impartiality that are associated with the role played by judicial bodies.

In light of all that, the establishment of specialized sections in charge of IP cases soon after the demise of the proposal for of commercial divisions within ordinary courts came as a surprise, even though Italians have become accustomed to a good measure of 'schizophrenia' in the choices made by the legislators every time (and this happens much too often) they adopt reforms proposed as the ones that once and for all will solve the problems of the justice system. In 2012, the specialized sections for

<sup>12</sup> See extensively Silvestri, *supra* n. 8, at 707–11.

<sup>13</sup> The special procedure devised for commercial cases was short-lived, since it went into force in 2003 and was repealed in 2009, because it had proved to be the source of unprecedented complications in the disposition of cases, due to a multiplicity of innovations that, although aimed at reducing the length of proceedings, turned out to be the cause of further delays.



IP cases were 'recycled' as 'business courts' (*Sezioni specializzate in materia d'impresa*),<sup>14</sup> adding to their jurisdiction a disparate variety of subject matters, some of which do fall within an academic notion of commercial law, but are not among the ones that really matter for the business community. For instance, all the cases concerning the payment of commercial credits are handled by ordinary trial courts, and not by the specialized 'business courts.' The number of these new specialized sections (originally twelve, located in the most important Italian cities) has recently been increased to twenty-one, with disputable choices as far as their venue is concerned. But the venue of the 'business courts' is not their major problem, neither is their jurisdiction, even though one may reasonably wonder whether a judicial body specialized in IP cases can magically transform itself into one that is equally specialized in business cases as well.

The real problem is a different one. It has been emphasized that the official denomination of these specialized sections is – unfortunately – just a deceptive label: the statute establishing them provides that they shall be staffed with judges who have a special expertise in business matters, but it is silent on the issue regarding how and by whom such expertise should be tested. Another critical point has to do with a chronic problem of Italian trial courts, namely the lack of an adequate number of judges: in many courts, judges will be forced to handle both ordinary cases and cases assigned to the specialized section, which obviously runs contrary to the aim of developing a serious specialist knowledge in particular legal fields. In conclusion, the establishment of the 'business courts' has turned out to be nothing but one of the many reforms attempted in the two last decades in which form prevails over substance: the umpteenth 'palingenesis' attempted by a country that seems unable to address seriously the many problems impairing its civil justice; a show staged for the benefit of EU institutions and international observers at large, both of which constantly remark how the inefficiency of the judicial system is the most serious 'deadly sin' of Italy, since it is one of the principal causes of Italy's poor economic growth.<sup>15</sup>

At the time of the writing of this essay (early September 2014), new winds of change are blowing across the landscape of Italian civil justice. While an extensive 'package' of procedural reforms has been announced (or threatened, one might say),

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<sup>14</sup> See the commentaries by Geremia Casaburi, *Storia prima felice, poi dolentissima e funesta, delle sezioni specializzate*, 2014(2) *Il diritto industriale* 172; Giovanni Cavani, *Sezioni specializzate: di male in peggio*, 2014(2) *Il diritto industriale* 182; Paolo Celentano, *La riforma del 'tribunale delle imprese'*, 2014(6) *Le società* 713; Marina Tavassi, *Dalle sezioni specializzate della proprietà industriale e intellettuale alle sezioni specializzate dell'impresa*, 2012(8–9) *Il corriere giuridico* 1115; Lanfranco Tenaglia, *L'istituzione del Tribunale delle imprese*, 2012(2) *Il corriere giuridico* 75.

<sup>15</sup> Among the various documents that note the connection between the stagnation of the Italian economy and the flaws of its justice system, see recently Gianluca Esposito et al., *Judicial System Reform in Italy – A Key to Growth 3* (International Monetary Fund Working Paper WP/14/32), available at <<http://www.imf.org/external/pubs/ft/wp/2014/wp1432.pdf>> (accessed Sep. 27, 2014).



the Ministry of Justice, on its website, offers a preview of a few forthcoming changes in the structure of the judiciary. The boundaries of the jurisdiction of the 'business courts' shall be defined in a clearer way, but – according to the Ministry – new matters will not be assigned to them, in order both to contain the risk of a loss in their specialization, and to avoid the criticism of paying too much attention to the needs of the business community, neglecting the demand for justice coming from ordinary citizens.<sup>16</sup> New specialized divisions of ordinary courts shall be established for family affairs and cases dealing with refugees, asylum-seekers and the like: needless to say, one might wonder how judges supposedly experts in family matters can, at the same time, be specialists in the complex legal rules governing the international protection of individuals.

Interesting enough, the program announced by the Ministry of Justice does not devote a single line to the issue of judicial specialization. Here and there one finds the statement according to which the new criteria for the distribution of cases based upon their subject matters will help judges develop their expertise in the areas of law under consideration: but should not specialization be a prerequisite for the judges assigned to a judicial body whose purpose is precisely to guarantee a specialized (and therefore more accurate, efficient and quick) decision-making?

Summing up, it seems that once again the Italian legislators are about to adopt innovations that are presented as a move toward a more specialized judiciary, but in reality are simply a different way of allocating cases: this looks more like 'playing musical chairs' at civil justice than a serious attempt at improving its operation.

#### 4. Conclusions

The issue of judicial specialization, like many issues concerning the administration of justice, is controversial and, at least in this author's opinion, does not allow for confident conclusions. Judicial specialization may have positive effects, but it also has drawbacks: both are difficult to evaluate *in vitro*, since they can be highly unpredictable and are likely to vary across different legal systems. Leaving aside the problems of institutional (and constitutional) 'engineering' that must be addressed when the possibility of establishing specialized courts is contemplated, no legal system should overlook the perspective of the court users: after all, if citizens trust their judges, it probably does not really matter so much whether the judges are specialist or generalist.

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<sup>16</sup> The text is an attempt to convey in English the exact content of the reform program posted by the Ministry of Justice, but it is not a literal translation of the Italian version, which is available at <[https://www.giustizia.it/giustizia/it/contentview.wp?previousPage=mg\\_2\\_7\\_3&contentId=ART1040209](https://www.giustizia.it/giustizia/it/contentview.wp?previousPage=mg_2_7_3&contentId=ART1040209)> (accessed Sep. 27, 2014).

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