

## MIXED BLESSING OF JUDICIAL SPECIALISATION: THE DEVIL IS IN THE DETAIL

ALAN UZELAC,  
University of Zagreb  
(Zagreb, Croatia)

*This article discusses from a critical perspective the issue of judicial specialisation. While accepting the assessment that judicial specialisation is a growing trend in a number of contemporary states, the author sets forth different perspectives and viewpoints on judicial specialisation which clearly show that the excessive enthusiasm should be subdued and that any attempt to specialise judges, court structures and procedures should be carefully balanced against the possible negative impact specialisation could have, both at the general level, and at the level of concrete gains related to administration of justice. The starting point of the analysis is the presentation of multiple forms that judicial specialisation can have. Aspects that are distinguished are judicial specialisation in narrow sense (jurisdictional specialisation) and broader sense (internal, personal and procedural specialisation). Based on the data of the European Commission for the Efficiency of Justice (CEPEJ), it is concluded that there is no coherent or consistent approach to judicial and jurisdictional specialisation in Europe, both in respect to the level of specialisation, and in respect to the forms of specialisation. A discussion of the Opinion no. 15 of the Consultative Council of European Judges (CCJE) shows that the viewpoint of judges and their professional organisations is also sceptical on certain aspects of specialisation, and that specialisation is considered to be potentially harmful for the unity of judicial profession and its main professional and ethical foundations. From the perspective of judicial administration, as demonstrated on the examples of international expert assistance to judiciaries of the Netherlands and Croatia, judicial specialisation is attractive, but often for wrong reasons. There is so far little comparative research on judicial specialisation, and the methodology of assessing its concrete benefits and detriments is not developed. Most importantly, the excessive specialisation may have negative impact on the fundamental values of contemporary judicial systems. Therefore, judicial specialisation should be approached with extreme caution, always assessing its implementation from various angles and in the light of all possible side effects that it may have to good administration of justice and core judicial goals and values.*

*Key words: judicial specialisation; jurisdictional specialisation; internal specialisation; personal specialisation; procedural specialisation; good administration of justice; CEPEJ; CCJE; European Union; Council of Europe; core judicial goals and values; comparative civil procedure.*

## 1. Introduction

The European Commission for the Efficiency of Justice [hereinafter CEPEJ] Report on European judicial systems in its 2008 edition states that 'specialisation in courts is a growing trend among European countries.'<sup>1</sup> Interestingly, in this Report of the Council of Europe, that is otherwise supposed to give a neutral, objective description of facts and figures, the reporters felt it necessary to insert a comment stating:

The CEPEJ is aware of the importance that specialised courts can play in improving the efficiency of justice as well as adapting it to the society's evolutions *but at the same time this should not generate confusion, conflicts of jurisdiction or even have consequence on costs of justice for users* [emphasis added].

The attitude expressed by the CEPEJ experts seems to be typical of the current trends and tendencies related to judicial specialisation. There is always a specific mix of, on one side, enthusiasm, fascination and approval, and, on the other side, of cautious remarks and admonitions aimed to warn against hasty solutions that may cause more harm than benefits.

In this paper, I will outline some premises for appropriate understanding of the notion of judicial specialisation, while, at the same time, joining the 'other side' camp: the side of those who are not too thrilled by the wave of applause that judicial specialisation is occasionally receiving from judges, ministries of justice and, last but not least, legal scholars. It seems that, in the desperate attempts to find a solution for the continuing crisis of civil justice in a number of contemporary states, judicial specialisation is among the potential *panaceas*; it has become another captive phrase that sounds well in the ears of public and populist politicians, offering much at very little expense. Moreover, judicial specialisation, while it may not bring what is originally proclaimed (most often: effectiveness and quality), it may bring hidden gains and benefits for specific professional groups and target audiences. Such gains and benefits will generally not be instrumental for handling the difficult problems

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<sup>1</sup> European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems. Edition 2008 (data 2006): Efficiency and quality of justice* 76 (Council of Europe 2008), available at <<http://www.just.ro/Portals/0/Comunicate/Noiembrie%202008/Report%20on%20European%20judicial%20systems%20-%20Edition%202008.pdf>> (accessed Sep. 27, 2014) [hereinafter *European judicial systems*].

that civil justice systems face today, but will be sufficient to attract an influential circle of those who will continue to advocate judicial specialisation, even against empirical evidence that it does not help to cure the main problem.

## 2. What is Judicial Specialisation?

The idea of 'specialisation' implies the division of work into several distinct areas and fields, which should be entrusted to different institutions and actors, based on the idea that each special field or area requires special expertise possessed only by those who have special skills or knowledge required to handle specific matters. In a judicial context, however, the issue of specialisation may take different organisational forms, which have rather different impact and results.

The most customary form of specialisation is division of work among *courts*, which operate as several *branches of jurisdiction* that have separate appellate instances and form a separate pyramid of hierarchical institutions, eventually meeting (or not) with other branches of jurisdiction at the top level (the level of 'supreme' court). The separate branches may be divided into 'more' or 'less' specialised branches of jurisdiction, typically distinguishing the courts of 'general jurisdiction' and the 'specialised' court structures. However, the 'generalist' courts are again to a certain level specialised, as they handle specific matters that were not expressly given to specialised courts. Thereby, the 'generalist' designation in the notion of 'courts of general jurisdictions' only means that a certain branch of jurisdiction is a *default branch*, meaning the one that will take into its jurisdiction all 'remaining' matters, not given by law to 'specialised' courts. Specialisation into several branches of jurisdiction also assumes that the users of the courts know about it, and that they are required to address the appropriate court (structure), facing risks that their case will otherwise be dismissed due to the lack of jurisdiction. I will call this type of judicial specialisation *the jurisdictional specialisation*. As this form of specialisation is most typical, I will also call it *judicial specialisation in narrow sense*.

However, the specialisation of court structures (*jurisdictional specialisation*) is not the only form of judicial specialisation. Typically, the essence of specialisation is in the engagement of 'specialists', meaning judges and their assisting staff. Such 'specialist' judges may work within a 'specialised' court, but they can also operate as a separate division or unit within the 'generalist' courts. The division of labour in the particular court may be invisible for the court users, as they will only be required to approach the (territorially) competent court, while the distribution of the cases to 'specialised' unit or division within the court will be done internally, as a matter of administrative assignment or internal routine within that court. This is why I will call this type of judicial specialisation *the internal specialisation*.

The specialisation, however, does not stop at the level of internal division of labour. Every organisational unit within the court is ultimately composed of

individuals who possess different skills and competences. No matter how much the system of education and professional training of judges strives to provide for judges in particular courts and their units a uniform framework for formation and continuing professional work under same standards, the result is still that the judges differ in their skills and approaches. As stated by Langbroek and Fabri, 'dealing with a large number of simple cases asks for different skills than dealing with juridically complex cases,' but 'it is not self-evident that all judges in a court combine these skills, and hence it seems only rational that modern courts need a further stratification of judicial functions . . .'<sup>2</sup> Every head of court and court manager knows that some of 'their' judges are better for some cases than other judges who are, technically, their peers. Indeed, the judicial systems differ as to whether such personal qualities may or may not be taken into account when assigning cases to judges and their chambers, but either as a real or virtual means, it is a special aspect of judicial specialisation, the one that I will call *the personal specialisation*.

Another phenomenon that can be taken as a borderline form or specialisation deals with the *special procedures* that may or should be applied when dealing with 'special' type of cases. The idea of specialisation, namely, does not only suggest that there is a special institution or individual that is best suited to deal with a special type of case, but also that there may be special methods and ways how different cases should be treated. If these methods are regulated and prescribed by law, they may grow into *special procedural codes* that will have to be applied in different sorts of cases (preferably: by different specialised courts, or by different specialised judges). This is a type of specialisation that I will call *the procedural specialisation*. Internal specialisation, personal specialisation and procedural specialisation will also be addressed, together with jurisdictional specialisation, as *judicial specialisation in broad sense*.

This short survey of different forms of judicial specialisation shows how complex the issue of finding 'appropriate' special treatment for cases with special characteristics may be. All of this complexity is usually hidden and over-simplified. Experience from my country, but also from other countries, shows that the notion of 'judicial specialisation' in the general and professional public most often is equated with the first type of specialisation, the jurisdictional specialisation. In other words, in nine out of ten cases, when 'judicial specialisation' is put on the agenda, the next thing to talk about is formation of new 'specialised' courts, for which there will be appointments of new, 'specialised' judges.

Indeed, this is not the only way to address the need for specific skills and specific personal and technical qualities required to handle a particular matter. Different combinations are possible, sometimes with better results. For instance, entrusting a case to a special court, where the case will be distributed by random methods to

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<sup>2</sup> Philip M. Langbroek & Marco Fabri, *Internal Case Assignment: Comparative Analysis*, in *The Right Judge for Each Case: A Study of Case Assignment and Impartiality in Six European Judiciaries* (= 57 *Ius Commune Europaeum*) 22 (Philip M. Langbroek & Marco Fabri, eds.) (Intersentia 2007).

the first available judge, may result in less special expertise than entrusting the same case to a 'generalist' court, where the case will be internally distributed to the judge with best personal and professional qualities and experience needed to process that matter. The same goes for the special procedures (procedural specialisation). If, under the general rules of court procedure, the judges have sufficient latitude to adjust the procedural rules – in particular, those related to case management and deadlines – to the particulars of the case, the result may be a better-suited, custom-made procedure. A forced application of a whole different procedural code that is 'on average' designed to be better adjusted to supposed characteristics of the whole genus of cases may, namely, be good for the majority of cases, but not for the concrete case. However, the premise that needs to realize, is that a particular judicial system does allow (and encourages) tailor-made solutions, both in the area of case assignments, and in the area of adjustment of procedural rules to requirements of the concrete case. This premise, of course, is to a very different level realized in different national justice systems, not only globally, but also from one European jurisdiction to another.

These examples show that attitudes towards judicial specialisation are not value-free and independent from influence of legal and procedural traditions that influence the functioning of the national justice systems. They are inevitably bound to further fundamental features of those systems, and to the goals that these systems assign to their judiciaries. I will come back to this issue in the final paragraphs of this paper, but before that, we have to compare the concrete features of judicial specialisation (in narrow sense) across Europe (*see infra*, at ch. 3), and explore the various attitudes towards specialisation among the *insiders*, the judges (*see infra*, at ch. 4) and the court administrators (*see infra*, at ch. 5).

### **3. Comparative Survey: The Forms of Jurisdictional Specialisation in Europe**

It may be interesting to inquire into existing forms of jurisdictional specialisation in European justice system. Taking into account that, currently, 28 European countries belong to European Union, that 6 countries have the status of EU candidates, and 2 may be potential EU candidates (Bosnia and Herzegovina and Kosovo), it may be expected that a significant part of Europe has a coherent approach to judicial specialisation. Also, practically all European countries (with exception of Belarus, Kosovo and Vatican) belong to the Council of Europe and thereby adhere to the European Convention on Human Rights [hereinafter ECHR], which contains common fundamental procedural guarantees of fair trial in judicial proceedings (Art. 6 of the ECHR). However, in spite of these common foundations and allegiances, the following survey will show that the attitude to jurisdictional specialisation in Europe is very divergent.

Comparative research suggests that a division of court work into three main areas of law is broadly accepted, the areas being civil, criminal and administrative.<sup>3</sup> Still, even such a basic division does not find its parallel in a broadly accepted specialisations in the European judicial space. A specialisation among 'civil' and 'criminal' judges is quite customary, but the differentiation between 'civil' and 'criminal' courts is less frequent. However, it does exist, sometimes in respect of particular segments of 'criminal,' sometimes at the level of certain territorial units.<sup>4</sup>

According to the CEPEJ reports, the density, number and types of specialised courts in the Council of Europe states varies greatly. There are countries with a very low level of judicial specialisation. Among the countries that do not have any specialised first instance courts the CEPEJ Report lists *Andorra, Bosnia and Herzegovina* and *Czech Republic*.<sup>5</sup> Very few specialised courts (fewer than five) are to be found in *Denmark, Estonia, Ireland, the Netherlands, Lithuania, Malta, Moldova, Montenegro, Macedonia, Romania, Slovakia, and Slovenia*. Just a little bit more specialised courts (but still on the low side) can be encountered in countries like *Austria* and *Norway*.<sup>6</sup>

Among the countries that have a relatively high number of specialised courts, the most numerous specialised courts are also different in nature. For instance, most of the specialised courts in *Belgium* are the justices of the peace; *Croatia* has misdemeanour courts; and several countries have a whole range of 'specialised' jurisdictions. *Cyprus* has specialised criminal courts, family courts, military courts, rent control tribunals and industrial dispute tribunal; *Finland* has administrative courts, market courts, labour courts and insurance courts; France has *conseils des prud'hommes*, commercial courts, minor courts, social courts, *tribunaux paritaires des baux ruraux*; *Germany* has specialised courts at the level of its federal units, and they are dealing with administrative, tax, labour and social fields; *Spain* has labour courts, administrative courts, juvenile courts, commercial courts, family courts, mortgage courts, warship courts, and violence against women courts; *Switzerland* has *tribunal des baux et loyer, tribunal de prud'hommes*, administrative courts, social courts, minor courts, economic courts, a specialised federal criminal court, and a specialised federal

<sup>3</sup> Langbroek & Fabri, *supra* n. 2, at 18.

<sup>4</sup> My home jurisdiction shows a good illustration of how complex (or even messy) a very basic distinction between 'generalist' and 'specialised' can be even if we focus only on civil-criminal divide. In Croatia, for instance, criminal and civil components are both exercised by the courts of general jurisdiction, but at the different level. More serious offences are processed in the first instance by the higher courts (county courts), while less serious offences will be handled by the first-tier courts of general jurisdiction (municipal courts). But, the least important violations of mandatory rules of criminal or quasi-criminal nature (petty offenses, administrative violations) again have a whole independent branch of jurisdiction (misdemeanor courts). In the recent times, the 'specialised' criminal courts are opened only in the national capital, so that only in Zagreb municipal courts as 'generalist' courts are split into civil and criminal court. This precedent was later followed by forming – only in Zagreb – of a special Municipal Labor Court.

<sup>5</sup> *European judicial systems, supra* n. 1, at 76.

<sup>6</sup> *See id.* at 77 (data from Table 28).

administrative court. The champion of jurisdictional specialisation seems to be *Turkey*, which has peace criminal courts, land registry courts, enforcement courts, labour courts, family courts, commercial courts, consumer courts, intellectual property civil courts, juvenile courts, maritime court, a intellectual property criminal court, a specialised high criminal court, and a juvenile high criminal court.<sup>7</sup>

In an attempt to draw some general conclusions from this agglomerate of different specialised court structures, the CEPEJ reporters suggested the following:

When considering, at a general level, the type of disputes, most specialised courts can be found in the area of: labour disputes, disputes concerning the renting of houses, social affairs or welfare disputes, commercial disputes and administrative law disputes. Specific 'target groups' for specialised courts are: children, juveniles, companies, military officers, welfare clients, victims of domestic violence (Spain), citizens (to initiate an administrative law proceeding) and citizens who committed small (criminal) offences (car offence or other minor criminal offences).<sup>8</sup>

As we can see from the above citation, the CEPEJ distinguishes specialisation according to the type of disputes (the one that we can call *specialisation according to a causal criterion*), and according to the 'target groups' (the one that we can call *specialisation according to a personal criterion*). While this may be a useful distinction, the listing of examples for one and the other types of specialised courts, the only inference from the rather long enumeration of 'typical' specialised courts can be that it is almost impossible to find – even if we opt for a 'specialist,' and not 'generalist' approach (and in this respect Europe is pretty evenly split) – a single common, generally acceptable scheme of jurisdictional specialisation.

#### **4. Judicial Attitude towards the Specialisation: The Viewpoint of Judges and Their Professional Organizations**

The issue of judicial specialisation was regarded to be sufficiently important for the judicial profession so that it was put on the agenda of the Consultative Council of European Judges [hereinafter CCJE], which is another body of the Council of Europe, which has an advisory function on general questions relating to independence, impartiality and competence of judges. The main documents issued by the CCJE are its opinions. In 2012, the CCJE issued its Opinion No. 15 on the specialisation of judges.<sup>9</sup>

<sup>7</sup> *European judicial systems*, *supra* n. 1, at 75–76.

<sup>8</sup> *Id.* at 76.

<sup>9</sup> Consultative Council of European Judges (CCEJ), *Opinion (2012) No. 15 on the Specialisation of Judges*, Doc. CCJE(2012)4 (Nov. 13, 2012), at <[http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis\\_en.asp](http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp)> (accessed Sep. 27, 2014) [hereinafter *Opinion (2012) No. 15*].

The organisation of European judges started with the finding that judicial specialisation is a trend that has spread throughout Europe: '[S]pecialist judges and/or specialist courts are common in member States. Such specialisation is a reality, and it takes a wide variety of forms, involving either setting up specialist chambers within existing courts or creating separate specialist courts.'<sup>10</sup> The purpose of the Opinion (2012) No. 15 was to 'examine the main problems relating to specialisation, given the overriding need to secure the protection of fundamental rights and the quality of justice as well as the status of judges.'<sup>11</sup> In a relatively lengthy document on 12 pages and 67 paragraphs, the CCJE tried to carve out its own stance on judicial specialisation, which was in the discussions and in the comments of some members described as more 'generalist' than 'specialist.'

The reason for this description may be the fact that the Opinion (2012) No. 15 tries to outline both the advantages and disadvantages of judicial specialisation, and to highlight that, with specialisation or without it, the main principles and standards pertaining to the judicial profession have to be equally protected and secured. The CCJE also takes a more analytical approach to specialisation, and deals with both specialisation in narrow sense, but also with aspects of judicial specialisation in broader sense (e.g., with internal specialisation, i.e. specialisation via creation of special chambers or departments, that is described as 'the most widespread means of achieving specialisation').<sup>12</sup> Ultimately, the Opinion (2012) No. 15 stresses that all judges, whether generalist or specialist, 'must be expert in the art of judging' and 'have a broad knowledge of legal institutions and principles.'<sup>13</sup> Some other statements from the Opinion (2012) No. 15 also show a certain sympathy towards 'generalist' judges, whose 'role can never be underestimated,' rather than unconditional support for specialisation.<sup>14</sup>

The Opinion (2012) No. 15 recognizes the usual arguments in favour of specialisation, but, to an even more detailed level, presents possible limits and dangers of specialisation. On the *positive* side, the Opinion (2012) No. 15 mentions the following advantages of specialisation:

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<sup>10</sup> *Opinion (2012) No. 15, supra* n. 9, at para. 4.

<sup>11</sup> *Id.* at para. 7.

<sup>12</sup> *Id.* at para. 42.

<sup>13</sup> *Id.* at para. 24.

<sup>14</sup> *See, e.g., id.* at paras. 25–26:

25. The member States' replies and the expert's report demonstrate that most cases submitted to courts are dealt with by generalist judges, highlighting the predominant role played by such judges.

26. In principle, judges should be capable of deciding cases in all fields. Their general knowledge of the law and its underlying principles, their common sense and knowledge of the realities of life give them an ability to apply the law in all fields, including specialist areas, with expert assistance if necessary.



- potential to *deal with the ever-increasing complexity* of new legislation, jurisprudence and doctrine;
- ability to *increase quality and consistency* of decisions, and open chance for multidisciplinary approach that is better suited to particular technical, social or economic realities; and
- the probability that better expertise will improve the *court's efficiency and case management*.<sup>15</sup>

On the *negative* side, the Opinion (2012) No. 15 starts with highlighting 'the main risk in judicial specialisation,' which is '*to be found in the possible separation of specialist judges from the general body of judges* [emphasis added].'<sup>16</sup> The meaning of this statement is explained by several possible dangers that may affect the fundamental issues of legal reasoning and its underlying social purpose, create inequality and incoherence in status among judges, and stimulate improper pressures and biases:

- *the risk of hampering the evolution of case-law in line with society's needs*. A select group of specialised judges may simply tend to reproduce their previous decisions, instead of constantly questioning the appropriateness of legal reactions to social problems;
- *compartmentalisation of the law and procedure*. Specialists may be prone to esoteric concepts, unknown to other legal professionals. As the Opinion (2012) No. 15 states, it can lead to 'cutting specialist judges off from legal realities in other fields, and potentially isolating them from general principles and fundamental rights',<sup>17</sup> also with a negative impact on legal certainty;
- *undermining necessary versatility of judicial work*. Excessive individual specialisation can hamper versatility that is in particular necessary in smaller courts;
- *spirit of elitism, which is detrimental to the unity of the judiciary*. 'Specialists' judges may be tempted to see themselves as being different, more valuable than other judges. The public can also see 'specialist' judges as 'super-judges,' while losing confidence in 'generalists;'
- *potential exposure of judges to increased pressure from the parties, interest groups and the state authorities*. Being separated from the rest of the judiciary, highly specialised judicial professionals become more vulnerable to outside pressures;
- *excessive proximity between judges, lawyers and prosecutors*. Within the special branches of jurisdiction, frequent formal and informal contacts (also during joint training courses, conferences and meetings) create bonds that may seem to be improper, and also expose the judges to real risks of secret influences;
- *impeding access to justice due to concentration of jurisdiction on one or very few courts*. If only one court is competent for a very restricted field, this can 'create too great a distance between the judge and the litigant;'

<sup>15</sup> *Opinion (2012) No. 15, supra* n. 9, at paras. 8–13.

<sup>16</sup> *Id.* at para. 14.

<sup>17</sup> *Id.* at para. 16.

– *potential violations of the right to be heard*. Specialist judges may tend to consult with their colleagues or advise them on technical matters without having such matters presented to the parties;

– *inequality among courts and judges in material and human resources*. Some specialised court structures which enjoy political priorities (e.g., anti-terrorist courts) can enjoy more financial, human and material support than the other courts.<sup>18</sup>

Despite the caveats, the CCJE acknowledges the trends of specialisation as reality, which may be in some judicial systems inevitable. In the context of justified cases of specialisation that promote administration of justice, it especially pointed to the link between the specialised courts and the possible special composition of their chambers, e.g. the ability to include lay (non-jurist) judges with special (non-legal) competences, or part-time judges with special expertise.<sup>19</sup> But also in such cases, the outlined negative by-products of specialisation can occur.

Therefore, a significant portion of the Opinion (2012) No. 15 is devoted to the suggestions for application of judicial standards and principles in connection with specialised courts and judges. Those suggestions, if implemented, were meant to mitigate some negative potentials of specialisation outlined above.

The overarching approach of the CCJE is that specialist judges should be treated, wherever possible, in no way differently than other judges.<sup>20</sup> It is also suggested that specialist judges should not become *Fachidiots* who are only bound to one field in which they have their (only) expertise. For instance, specialist judges should also have a general training and broad experience of a variety of legal fields. The same strict standards of impartiality and independence should apply to them as well, in particular those developed in the case-law of the European Court of Human Rights in the context of the right to a fair trial from Art. 6. Most importantly, the CCJE emphasises the importance of *judicial mobility*. The specialisation should not deprive the ‘specialists’ of their right (and ethical obligation) to change fields and experiences, as this is one of the most important safeguards against the disadvantages of specialisation:

Judges should be entitled to change court or specialisation in the course of their career, or even move from specialist to generalist duties or vice-versa. Mobility and flexibility not only provide judges with more varied and diversified career opportunities but also allow them to take stock and move into other legal disciplines, which necessarily fosters the development of case-law and law in general.<sup>21</sup>

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<sup>18</sup> *Opinion (2012) No. 15, supra* n. 9, at paras. 14–23.

<sup>19</sup> *Id.* at para. 43.

<sup>20</sup> *Id.* at para. 53. It is stated that ‘laws and rules governing appointment, tenure, promotion, irremovability and discipline should . . . be the same for specialist as for generalist judges.’

<sup>21</sup> *Id.* at para. 36.

The CCJE also expressed a sceptical (and in principle negative) stance on procedural specialisation. The specialised courts, so CCJE, should in principle apply the same general procedural rules as the other courts. The introduction of specific procedure for each specialised court may lead to proliferation of different procedural rules, which creates risks for access to justice and certainty of law. The only permissible 'specialised' rules are those which respond to special needs that led to establishment of specialised court structures, *e.g.* special rules on examination of children to safeguard their best interest in the context of family law proceedings.<sup>22</sup>

From the perspective of the CCJE as a professional organisation, an especially important point was to avoid the possibility that specialisation results in formation of distinct and mutually separated judicial hierarchies that also have mutually separated bodies of judges. Separate hierarchies 'may complicate the administration and access to justice,' and therefore the CCJE's preference is clearly for a single corpus of judges, 'one constituent body of both generalist and specialist judges,' with equal status, ethical rules and remuneration.<sup>23</sup>

### **5. Administrative Attitude towards the Specialisation: The Viewpoint of Judicial Administration and Ministries of Justice**

The Opinion (2012) No. 15 does not contain any criteria for establishing the desirability of creation (or abolishing) of specialised judicial structures. It simply observes *in passim* that some specialised structures are given and existent, and that they may be a result of the demand, but also a result of history. In conclusion, it is stated that 'specialist judges and courts should only be introduced when necessary because of the complexity or specificity of the law'<sup>24</sup> but it was obviously not perceived to be the task of the CCJE to explore how it can be established whether such necessity exists or not. The decision to undertake reforms and include more 'specialist' or 'generalist' judicial structures is in principle a decision made at the level of judicial administration, and, as it is often done nationally, through legislative or executive reforms, it is customarily an object of interest of the ministries of justice.

But, how should the competent bodies make a decision 'to specialise or not to specialise?' When discussing the issues of specialisation (or generalisation) of judges' competences as an instrument related to professional values, Langbroek and Fabri made a cursory remark that some forms of division of court work are broadly accepted, but 'it is not self-evident everywhere that our society has become so complex that some specialisation within a jurisdiction is inevitable.'<sup>25</sup> Whether to

<sup>22</sup> *Opinion (2012) No. 15, supra* n. 9, at para. 32.

<sup>23</sup> *Id.* at paras. 54–55.

<sup>24</sup> *Id.* at para. 67 (Conclusions, iii).

<sup>25</sup> Langbroek & Fabri, *supra* n. 2, at 18.

engage or not in some experiments with judicial specialisation seems therefore to be an issue that in most jurisdictions lies within the ambit of (more or less) educated guess, decided based on full discretion which can be decisively affected by the demands of daily politics. This may be, from the political perspective, a welcome opportunity to exercise power and achieve certain political goals by announcing 'necessary' changes (or refusing to undertake them). Therefore, it should not surprise us that a few countries have made steps to put the decisions whether to specialise or generalize their judiciaries on a solid, empirical fundament.

Among the rare attempts to find whether, from the viewpoint of judicial administration, structural reshaping of judiciary by, *inter alia*, specialising, is beneficial (and according to which criteria), one case can be singled out due to a unique request by a national authority to request international assistance. Namely, in 2003, the delegation of the Netherlands in the European Commission for the Efficiency of Justice requested from the CEPEJ, in accordance with Art. 2(1)(d) of its Statute, the elaboration of the four questions:

- 1) which mechanisms can be identified to allocate cases between courts;
- 2) what is the optimal size of a court (for handling cases efficiently);
- 3) what are the arguments in favour of and against creating specialised courts;
- 4) what are the effects of selective forum shopping by parties on the functioning of the judicial system?

One of these questions, above at 3), required the study of the advantages and disadvantages of court specialisation. Based on this request, the CEPEJ appointed three experts who composed a report, which was subsequently adopted at the CEPEJ plenary.<sup>26</sup> Unfortunately, instead of coming to a common position on the issues that had to be commented, the report contained three different national perspectives, depending on the nationality of the experts (French, German, Swedish). Still, it is interesting to note some of the experts' comments, as they reveal different perspectives on specialisation.

The French expert pointed to the fact that 'the multiplication of specialised courts creates numerous difficulties,' and added that 'the emergence of autonomous quasi-judicial bodies [may be] a way to exclude the traditional court system from important areas of economic law.' In his view, 'the members of these specialised body are felt to be not always as independent as judges.' Therefore, he suggested that, rather than creating more specialised court structures, specialised sections with specially trained judges should be created if the need for that occurs.<sup>27</sup>

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<sup>26</sup> See European Commission for the Efficiency of Justice (CEPEJ), *Territorial jurisdiction*, Doc. CEPEJ(2003)18(D3) (Dec. 5, 2003) [hereinafter *Territorial jurisdiction*]. The report was prepared by Denis Chemla, Lawyer at the Paris and New York Bars; Professor Burkhard Hess from University of Heidelberg, Germany; and Anders Lindgren, Deputy Director at the Ministry of Justice of Sweden, Department for Procedural Law and Court Issues.

<sup>27</sup> *Id.* at 9.

In the view of the German expert, 'specialisation in the judiciary seems to be adequate, in order to guarantee the efficiency and good functioning of the judicial system as a whole' but 'the danger of specialisation is a loss of knowledge about the legal system as a whole.' The latter may be counter-balanced by 'a broad legal education at the university level covering all fields of law.' Still, he noted that Germany lacks, 'a comprehensive structural reform of the organisation of its court system.'<sup>28</sup>

Finally, the Swedish expert concluded that special courts should generally be avoided, and pointed to the need, if they are formed, to secure a sufficient numbers of cases within a specific identified area of law, assessing that for a self-standing specialised court the expected workload should be sufficient for at least ten judges.<sup>29</sup>

It is hard to assess whether the CEPEJ report had any decisive impact on the reforms in the Netherlands. Still, in the discussions that followed after the report, it was concluded that, specialised courts may continue to be a trend (in particular in view of Europeanisation of law and the need to cope with increasingly complex cases). However, at the same time, it was considered that the number of courts generally should be reduced, which later happened in the Netherlands, which is currently among the countries with the lowest number of courts per capita in Europe, with one court serving more than one million inhabitants.<sup>30</sup>

The connection between the overall number of courts and the jurisdictional specialisation was also one of the most important factors in the (so far unsuccessful) reform of the misdemeanour courts in Croatia, which bears a strong similarity to court reforms in several other post-Yugoslav states. The background of the issue reaches into times of transition from socialist law and court system. In former SFRY, the petty crime cases were handled by the bodies called 'misdemeanour courts,' which, though entitled 'courts,' were regarded to be administrative, and not judicial bodies. In the past times, it was not thought to be important, as the doctrine of separation of powers was not constitutionally accepted, and therefore it seemed to be only a terminological point. However, in the 1990<sup>5</sup>, the status of the misdemeanour courts became an issue, in particular after the accession to the Council of Europe. The misdemeanour courts were, for the most part, authorised to issue administrative fines, but in certain cases, they could also pronounce short prison sentences – up to 60 days imprisonment. As they were technically a part of administrative authorities, and subject to lesser protection of their independence in status and decision-making, it seemed that their powers were incompatible with Art. 6 ECHR requirement that anyone charged with criminal offense has the right to have this charge determined by 'an independent and impartial tribunal.' Rather than reshaping the authorities of the misdemeanour courts, they were soon proclaimed to

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<sup>28</sup> *Territorial jurisdiction, supra* n. 26, at 20.

<sup>29</sup> *Id.* at 32.

<sup>30</sup> *Id.* at p. 35–36.

be 'full-fledged courts.' Their integration into court structures of national judiciaries was slow, but eventually, the national judicial structures were enlarged by over 100 misdemeanour courts. In turn, Croatia became a country with one of the largest number of courts in Europe, which resulted in a number of problems related to efficiency and timeliness of adjudication.

In 2004–05, in one of the first twinning programs within the framework of co-operation with the European Union, the issue of misdemeanour courts emerged again. The CARDS project, initiated shortly after commencement of Croatia – EU accession negotiations, had as its focus 'support to a more efficient, effective and modern operation and functioning of the Croatian court system.'<sup>31</sup> One of the four components of the project dealt with the organisation and structure of the Croatian court system. The purpose of this component was to review the distribution and size of courts, and advise on possible future reforms. The implementation of the project was entrusted to the Ministry of Justice of Finland.

After a thorough examination, accompanied with empirical analysis and study of views of all stakeholders, the Finish experts came up with a list of tools and criteria for the opening or closure of courts, such as the caseload index, number of judges criteria, population criteria and distance criteria. Applying all these criteria, modified by some further considerations, the project concluded that 'Croatia has too many and too small municipal courts,' and suggested not only their merger, but also the questioning of the necessity of the misdemeanour courts as independent structures. The final recommendation was 'to merge all the misdemeanour courts with municipal courts,' what can be done 'without jeopardising access to justice.'<sup>32</sup>

The suggestions of the CARDS 2002 project were initially ignored by the Croatian authorities, but when that became a political issue in the EU accession process, the Government announced unwillingly that it was going to test the conclusions, including the merger of municipal and misdemeanour courts. A pilot-project of merger of misdemeanour and municipal courts was hastily organised in eight courts in the second half of 2006, in spite of objections from the Supreme Court, which pointed to the fact that the Ministry of Justice failed to introduce legislation that would enable the judges of one branch (who were still formally regarded as 'specialist' or 'generalist') to handle cases of the other branch. Unsurprisingly, after only a few months, the pilot-project was discontinued, and, in February 2007, it was officially announced that 'merger did not reached the desired results.'<sup>33</sup> Instead, the

<sup>31</sup> See EU CARDS 2002 Twinning project, Mission Report of February 3, 2005, Component B, Activity B.1.1 and B.2.1.

<sup>32</sup> *Id.* at 11 (10).

<sup>33</sup> Pregled aktivnosti na reorganizaciji pravosudnog sustava [A Survey of Activities on the Reorganization of the Judicial System] – Reorganizacija pravosudnog sustava i racionalizacija mreže pravosudnih tijela u Republici Hrvatskoj, Ministarstvo pravosuđa Republike Hrvatske [Croatian Ministry of Justice] (July 28, 2014), <<http://www.mprh.hr/lgs.axd?t=16&id=4677>> (accessed Sep. 27, 2014).

Croatian Ministry of Justice decided to merge only the courts within the same branch of jurisdiction. Consequently, misdemeanour courts survived so far in Croatia (just as in Serbia), as opposed to the situation in Slovenia and Bosnia and Herzegovina, which faced the same issues, but succeeded in dismantling their petty crime courts or merging them with the courts of general jurisdiction.

These two very different examples from the Netherlands and Croatia allow us to draw some important general conclusions. Firstly, it seems that it is very hard to assess and measure the benefits of specialised judicial structures and formations, as solid and reliable instruments for that do not exist. The less reliable the criteria, the stronger may be the temptation of the competent authorities to use specialisation as a tool for promotion of their special interests that regularly do not concern (only) good administration of justice. Even when a particular government shows intention to gain in-depth knowledge of effects of specialisation, the expertise is either not available, or it is tinted with very distinctive national perspectives.

But, in a very paradoxical fashion, from the viewpoint of the authorities responsible for the reforms of national justice systems, this can only make specialisation more attractive. Reorganization of the court network creates the impression of proactive administration. Separating or merging court structures, however, is still easier than undertaking some other necessary reforms that are difficult or even impossible (*e.g.*, reduction of the number of judges, their reappointment or profound changes in judicial training and methods of work). In addition, the restructuring of competences also mean repositioning, and this can serve in fostering positions of political allies, while isolating those who are perceived as opponents. Ultimately, the whole project cannot fail: as the reforms of this kind can only be assessed after several years or decades (and the evaluation criteria are uncertain), the final judgment may always be postponed or relativized. The powerful populist flair of the phrases like 'ever-increasing complexity of contemporary life' and 'the need to specialise' is *prima facie* sufficient, no matter that we still cannot come to any concrete proof that any specialisation of structures, persons or procedures has resulted in significant improvement in quality and efficiency of judicial work.

## **6. Conclusion:**

### **The Mixed Blessing of Specialisation and the Fundamental Judicial Values**

Short of being able to put the discussion about judicial specialisation on the solid ground of scientific evidence, the only remaining option is to focus on the relationship between the specialisation and the fundamental values of judicial systems. Judicial systems, naturally, may have different fundamental values, in spite of the global convergences and some common concepts that are valid everywhere (*e.g.*, right to be heard). Such differences in fundamental values can have their impact on the different position and reach of judicial specialisation.

It seems that today there are few if any judicial systems that would unconditionally accept the position of Martin Shapiro that 'to the extent that [courts] specialize, they lose the one quality that clearly distinguishes them from administrative lawmakers.'<sup>34</sup> Even if, in comparison with Europeans, the Americans typically think of judges as generalists, and partly think that generalist powers are inherent in the role of judge, the specialisation is increasing even in the US judiciary.<sup>35</sup> Still, Shapiro's comments can make us think about the limits of the specialisation, and press us to explore the point where a 'super-specialised' judiciary ceases to be compatible with the contemporary role and function that judges and courts play in the society.

Indeed, in contemporary societies everyone wishes that his or her problem is treated by a 'specialist,' and therefore we witness a proliferation of 'specialists' not only in legal, but in many other areas. However, similar to the USA, many European countries, despite a higher degree of specialisation in judiciary, also share some concepts that indicate a preference for a certain degree of generalization. Either as a concept of 'natural judge' (*gesetzlicher Richter*), or as a concept of *ius de non evocando*, the right to have one's cases treated by a judge that is not specially selected for this duty, but selected or assigned randomly, exists sometimes even at the constitutional level.

The contrast of generalization and specialisation becomes even more pronounced if we *compare court adjudication to arbitration*. At the dogmatic level, the virtues of the two systems of dispute resolution are contrary – and the both systems of dispute resolution are generally proud to keep them as the token of their quality and special services offered to the litigants. Arbitration is often praised and advertised for its ability to provide custom-made solutions, which include the parties' right to agree on the arbitrators with special qualities, experience and expertise; their right to influence the appointment of arbitrators, or directly appoint 'their' arbitrators is an indispensable part of the modern concept of commercial arbitration. In this sense, arbitration fosters and encourages 'super-specialisation' in all senses: formation of a special *ad hoc* tribunal (= jurisdictional specialisation), distribution of duties among arbitrators according to their expertise (= internal specialisation), appointment of individuals with very particular sub-specialisation(s) (= personal specialisation), and formation of the special set of rules of procedure designed exclusively for a particular case (= procedural specialisation). All these characteristics are in arbitration doctrine regarded as superior and desirable qualities. But, the same positive attitude, sense of appropriateness and belonging to the core values (or even fundamental procedural rights), is assigned in judicial context to prohibit formation of 'special' tribunals (those formed *ad hoc* and not established by law); to the idea that all

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<sup>34</sup> Martin M. Shapiro, *The Supreme Court and Administrative Agencies* 53 (Free Press 1968).

<sup>35</sup> See Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58(7) *Duke Law Journal* 1667 (2009), available at <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1412&context=dlj>> (accessed Sep. 27, 2014); see also *idem*, *Specializing the Courts* (University of Chicago Press 2011).



judges of the same court / division / chamber are equal, and equally capable to handle each cases entrusted to the court; to the rule that cases are not distributed to judges that are, for whatever reason, personally selected by the party / parties; and, to the idea that, in principle, there should be only one set of procedural rules and principles, that will be applied by the courts and judges irrespective of whether the litigants wish to depart from them or not. Is it likely that court structures will convert over time, and start to apply the principles associated with arbitration (or *vice versa*)? It is not probable – not because the one or the other set of principles is unacceptable or less adjusted to daily demands, but because these sets of principles are deeply and intrinsically associated with particular methods of dispute resolution (court litigation / arbitration). They have become their ‘trademarks,’ and trademarks are not being sold or exchanged easily, because giving it away may mean losing your own identity. This is why ‘judicial specialisation’ (no matter whether it brings benefits and whether it becomes a fashionable trend in judicial reforms) does and should have limits. Otherwise, specialisation may hamper the very core goals and values of contemporary civil procedure.<sup>36</sup> In particular, when former socialist countries are concerned, specialisation has to be considered with utmost caution. Due to the persistent and ongoing influence of the ‘socialist’ or ‘third’ legal tradition, specialisation can easily become a tool in the context of its core features, such as political instrumentalism, inclination to ‘bounce’ cases from one court to another in an attempt to avoid final decision-making, and ultra-formalism (‘hyperpositivism’).<sup>37</sup>

It is true that in the contemporary world, full of complexities, special knowledge and special expertise is desirable. Judges in Europe, just as in the other parts of the world, should not be immune to the requirements posed by growing uncertainties and complexities in social and economic relations. But, for very special issues and very special demands, the procedural codes always had a concrete solution, and this solution was not a specialist judge, but the specialist expert. Employing specialist judges instead of specialist experts (an expression that sounds like *contradictio in adiecto*) may bring some short-term raise in efficiency, but it is a mixed blessing. As Shapiro observed in 1960<sup>6</sup>, the ‘expert-judge’ is in his appearance and fundamental features closer to expert bureaucrats of the executive power, than to the traditional

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<sup>36</sup> For a recent discussion about the goals of civil procedure in various global legal systems see *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (= 34 *Ius Gentium: Comparative Perspectives on Law and Justice*) (Alan Uzelac, ed.) (Springer 2014).

<sup>37</sup> See Rafał Mańko, *Survival of the Socialist Legal Tradition? A Polish Perspective*, 4(2) *Comparative Law Review* 1 (2013), available at <[http://papers.ssrn.com/abstract\\_id=2332219](http://papers.ssrn.com/abstract_id=2332219)> (accessed Sep. 27, 2014) (also published in Russian as: Манько Р. Выжила ли социалистическая правовая традиция? Взгляд из Польши // Вестник гражданского права. 2014. Т. 14. № 2. С. 238–266 [Mańko R. *Vyzhila li sotsialisticheskaya pravovaya traditsiya? Vzglyad iz Pol'shi // Vestnik grazhdanskogo prava*. 2014. T. 14. No. 2. S. 238–266 [14(2) *Civil Law Review* 238–66 (2014)]]; Alan Uzelac, *Survival of the Third Legal Tradition?*, 49(2d) *Supreme Court Law Review* 377 (2010), available at <[http://www.alanuzelac.com/hr/pubs/B43-Third\\_Supreme%20Court%20Canada.pdf](http://www.alanuzelac.com/hr/pubs/B43-Third_Supreme%20Court%20Canada.pdf)> (accessed Sep. 27, 2014).

cultural figure of a judge as a prudent decision-maker in all issues that are brought under his jurisdiction. In the European context, when juries are generally absent, the 'generalist' judge (at least in the cases where no lay participation in adjudication is provided) may be as close as it can get to 'democratic,' 'peer' insight in moral and individual particularities of the case.

A final word about judicial specialisation: after all, every judge ultimately is and should be a 'specialist' – a specialist for resolving difficult matters regarding (often) new and unexpected issues, in fair proceedings and according to (ever-changing) legal norms. Additional judicial (sub)specialisation will always have to be carefully balanced against the core goals and values of good administration of justice. A good mix of generalism and special knowledge is not impossible, but we always have to keep in mind a *caveat*: keep faithful to the fundamental values, and beware: *the devil is in the detail*. At the current state of research, it will be hard to measure objectively whether the desired increase in quality and efficiency has been reached, and to compare the achieved benefits with its inescapable (or hardly escapable) disadvantages. In any case, judicial specialisation deserves more academic and professional attention from everyone interested in comparative research and study of civil procedure and national justice systems.

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### Information about the author

**Alan Uzelac (Zagreb, Croatia)** – Full Professor, Head of the Department of Civil Procedure, University of Zagreb, Member of the State Judicial Council of the Republic of Croatia (14 Marshal Tito sq., Zagreb, 10000, Croatia; e-mail: [auzelac@pravo.hr](mailto:auzelac@pravo.hr)).

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