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Asylum adjudication system: A new frontier of legal culture

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Abstract

Over the last 15 years, Italy has faced an exceptional migratory surge which brought the Italian asylum system into the limelight. Previously, asylum applications were rare, and the control of irregular migration dominated the political and legal debate. The growing number of applications for international protection put the asylum system under pressure and it was reformed in 2017 and in 2018. This article aims to understand the asylum adjudication system in Italy through the lens of the concept of legal culture. In particular, the concept is used as an approach (Nelken 2004) that focuses on reconstructing and analysing the changes that have taken place in the area of the international protection in Italy and the institutionalization process affecting the asylum adjudication procedures. Migration as a phenomenon, and in particular the system of recognition of international protection, has a deep impact on legal rules and specifically on judges, who are obliged to face the limits of their knowledge and of a formalistic approach to law. The article reports the results of a research conducted in an Italian tribunal and will try to answer some key questions on how asylum cases have impacted on the legal system, making this topic one of the new frontiers of the legal culture.

Key words

Asylum adjudication system; legal culture; judicial system; knowledge

Resumen

En los últimos 15 años, Italia se ha enfrentado a una oleada migratoria excepcional que ha puesto el sistema de asilo italiano en el punto de mira. Anteriormente, las solicitudes de asilo eran escasas y el control de la migración irregular dominaba el debate político y jurídico. El creciente número de solicitudes de protección internacional puso el sistema de asilo bajo presión y fue reformado en 2017 y en 2018. Este artículo pretende comprender el sistema de adjudicación de asilo en Italia a través

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de la lente del concepto de cultura jurídica. En particular, el concepto se utiliza como un enfoque (Nelken 2004) que se centra en la reconstrucción y el análisis de los cambios que han tenido lugar en el ámbito de la protección internacional en Italia y el proceso de institucionalización que afecta a los procedimientos de adjudicación de asilo. La migración como fenómeno, y en particular el sistema de reconocimiento de la protección internacional, tiene un profundo impacto en las normas jurídicas y, concretamente, en los jueces, que se ven obligados a enfrentarse a los límites de sus conocimientos y de un enfoque formalista del derecho. El artículo informa de los resultados de una investigación realizada en un tribunal italiano e intentará responder a algunas preguntas clave sobre cómo los casos de asilo han impactado en el sistema jurídico, convirtiendo este tema en una de las nuevas fronteras de la cultura jurídica.

Palabras clave

Sistema de adjudicación de asilo; cultura jurídica; sistema judicial; conocimiento

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1. Introduction

The Italian asylum adjudication system is of paramount importance to reflect upon the transformation of legal culture in Italy. However, the reasoning of the judges in the judicial adjudication system has not yet been studied in Italy, whereas at the international level most of the attention is focused on administrative bodies and their independence from the government (Taylor 2007, Bohmer and Shuman 2008, Ramji-Nogales *et al.* 2009, Hamlin 2014, Schoenholtz *et al.* 2014, Chand *et al.* 2017, Dahlvick 2018). There is a limited number of studies on asylum judicial adjudication systems (Thomas 2011, Rehaag 2012), but none of them related to the Common European Asylum System and the judicial reasoning in one country of Continental Europe.

This article aims to shed light on how the judicial system has been affected and therefore how it has reacted both internally and externally (Friedman 1975) to the transformation of Italy into a country of asylum since 2011. In the following paragraphs we attempt to delineate the changes in the legal system and to understand these changes focusing on the decisions made within the asylum judicial process. We identify these changes first of all as irritations for the legal system (Luhmann 1984) and in the paper we analyse both the internal organizational changes and the external elements influencing the assessment of asylum application. The concept of legal culture is therefore used as an approach that aims to reconstruct and analyse the changes in the area of international protection in Italy and the institutionalization process affecting the asylum adjudication procedures. In reference to legal culture as an approach, we attempt to describe "relatively stable patterns of legally oriented social behaviours and attitudes" (Nelken 2004) and specifically we attempt to reconstruct these patterns along the international protection decisional process.

Migration as a phenomenon, and in particular the system of recognition of international protection, has a deep impact on legal rules and in particular on judges, who are obliged to face the limits of their knowledge and of a formalistic approach to law. Decisions on migration therefore reveal some fundamental changes of the legal system and according to our approach can be considered as a "frontier" of the legal culture.

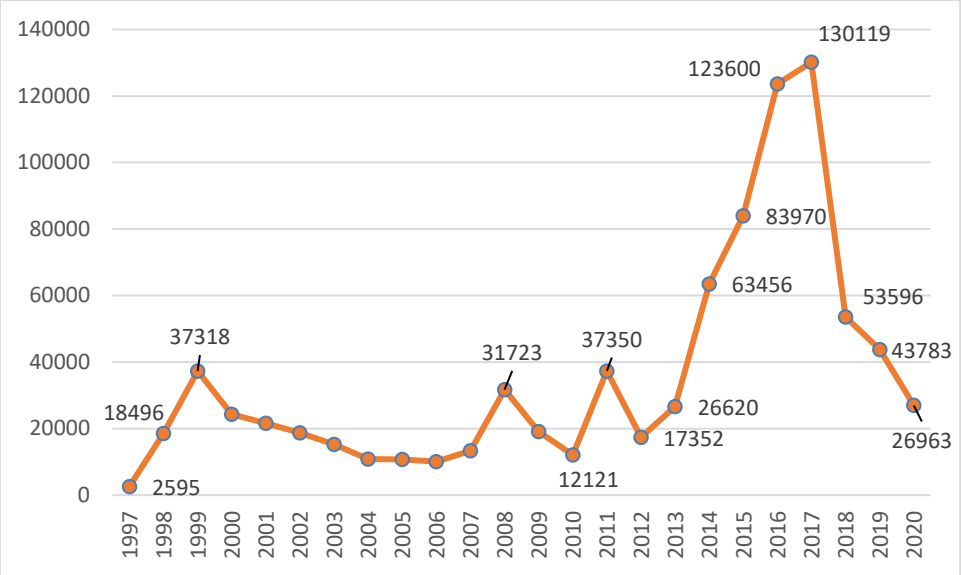
The article starts with a brief outline of the trends in asylum requests and the changes implemented in the asylum adjudication system, as forms of protection, organisational features and procedures.

Section three explains the methodology adopted and the analysis conducted. In the fourth section we explain how we use the concept of legal culture in our empirical research. In the fifth and the sixth sections we present the main results of our analysis. Section five focuses on the external elements that influence the decisional process identified in the organisational features of the tribunal. Then in Section six the key *internal* elements of the judges' decisions are identified in the analysis of the geo-political situation, in the assessment of applicants' credibility and in their social integration in the country of arrival. The final section draws some conclusions on the tensions and challenges of the judicial asylum adjudication system in Italy.

2. Italy as asylum country: legal transformations in a changing context.

Italy is a new country of asylum. Before 2011, asylum claims were in fact presented in a limited number per year. From 1997 to 2007, the average was about 18,000 claims, with a sharp increase between 1998 and 2001 due to the crisis in Albania and the war in former Yugoslavia. In 2008 and in 2011 the crisis in Africa and the role of Libya became elements that directly and heavily influenced the numbers of claims in Italy. From 2012 to 2017, Italy experienced a considerable increase connected with the situation in Libya and Syria.

GRAPH 1



Graph 1. Asylum seekers in Italy (1997- 2020).

These changes in number led to the transformation of a previously neglected topic into a highly sensitive political issue and a subject that attracted the attention of the national legislator. The Italian legislation on international protection mainly stems from international law and in particular EU law (for a detailed analysis, see Peers *et al.* 2015). However, the Italian legislator maintains the possibility to establish a national form of protection in addition to those of the EU and, within the limits defined by the EU framework, can choose the procedure to follow and in particular the role of the administrative and judicial bodies.

2.1. The forms of protection in the Italian legal system: between EU law and the national legal framework.

As already underlined, international and EU legislations have a central role in defining Italian migration law. As regards the form of protection, the 1951 Refugee Convention defines a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group[1] or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is

[1] The definition of a social group is more complex. It is a group consisting of members who share a characteristic that is so fundamental to identity or conscience that a person should not be forced to renounce it. People sharing a sexual orientation, specific links (a religious belief or family ties), a shared situation (orphans), or a disease (people living with HIV/AIDS) are deemed to belong to a social group.

unwilling to avail himself of the protection of that country" (Article 1(a)(2)). Therefore, there are several elements which must be proved in court to grant refugee status: well-founded fear, individual persecution for one of the reasons specified, impossibility or unwillingness to find protection in the country of one's own nationality, and the presence of the person outside their country of nationality or habitual residence.

EU Law has defined the other form of international protection: subsidiary protection. It is a status granted to persons who are in a condition in which there are substantial grounds to believe that, if returned to their country of origin or habitual residence, they would face a real risk of suffering serious harm and cannot find protection in their country. The risk of serious harm refers to: a) death penalty or execution; b) torture, or inhuman or degrading treatment, or punishment; or c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. To qualify for subsidiary protection, persecution or serious harm must be perpetrated by the State, or by organisations controlling at least part of the national territory, as well as by non-State actors, in the case that the State is unable to provide protection.

An EU Directive[2] is also the base of a national measure - named temporary protection (Article 20 of Legislative Decree 286/1998) – adopted in case of significant inflows of people due to exceptional situations that cause displacement.

Beyond international protection and temporary protection, there is a national measure of protection, named humanitarian protection (Article 5(6) of Legislative Decree 286/1998) (Zorzella 2018). The granting of humanitarian protection shall be based on the existence of "serious grounds" of a humanitarian nature; the legislator, however, does not provide a list of such grounds, which are instead entirely elaborated in case law. Therefore, humanitarian protection within the Italian system has been implemented as an open formula that across the years provided protection to a significant percentage of applicants (See Table no. 2).

In 2018 (Law Decree no. 113/2018), in a climate of growing hostility fuelled by the new anti-establishment right-wing government, humanitarian protection, which hinges solely on national legislation, was abolished, leaving thousands of people without the possibility to receive protection, after waiting years for their asylum claims to be examined. In return, new forms of protection related to narrow and specific situations such as health needs were introduced. In 2019 the fall of the right-wing government brought a new legislative change that re-introduced large-scale humanitarian protection, though not equal to the one previously abolished. This new form of humanitarian protection, called "special protection" came into effect only from 2021 onwards. It is therefore too early to understand whether this new form of protection will replace the previous humanitarian protection. However, today, the applicable legislation envisages two forms of international protection (refugee status and subsidiary protection), based on international and EU sources of law, and special protection, based on national legislation.

[2] Council Directive 2001/55/EC of 20 July 2001 on "minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof".

2.2. Organisation of the asylum adjudication system and recognition of international protection

The procedure for submitting an international protection application consists of an administrative stage followed by a first-instance stage, if the administrative decision is challenged before the ordinary court. Until the legal changes regarding entry came about in 2017 (Law Decree no.13/2017), applicants could file an appeal against the first-instance decision, whereas now they can only resort to the Court of Cassation.

In the nineties, asylum claims were decided by only one National Commission (*Commissione Nazionale per il diritto di asilo*), an administrative body whose decision could be challenged through redress procedures by a Court based in Rome. Then, in 2004, the National Commission was supported by seven new administrative bodies, named Territorial Commissions for the Granting of International Protection (*Commissioni territoriali per il riconoscimento della protezione internazionale*, hereinafter "Territorial Commissions"). This new system quickly found itself at the centre of a political crisis due to the increasing number of claims. On two occasions, in 2011 and 2013, the Italian Government endeavoured to lighten the workload of the asylum system by granting humanitarian residence permits to those who arrived on, or who had been present in Italy before, a specific date. More recently, to deal with the growing number of asylum claims, legislators tried different approaches. In 2017 (Law Decree no. 13/2017), firstly, they reorganised the administrative asylum system by multiplying the bodies who decide on asylum claims (from seven to twenty Territorial Commissions), and partially changed the selection procedure of members of the Territorial Commissions. Then the legislator established a specialised section of the Ordinary Tribunal, a sort of Immigration Court[3] which decides all the international protection cases and other immigration matters. In addition, the legislator also modified the judicial procedure, limiting the possibility to use judicial redress mechanisms. To understand the relevance of the intervention on the judicial redress, it is worth looking at the actual functioning of the procedure.

The procedure for granting international protection starts with the submission of the application by the asylum seeker. The Territorial Commissions is the first body that assesses the asylum applications (Article 4 of Legislative Decree 25/2008). From the moment the application is submitted, the asylum seeker is entitled to remain in the country until the procedure comes to an end.

At the core of the administrative procedure is the hearing of the international protection applicants, during which they can explain their reasons (if necessary, with the help of an interpreter), and the Territorial Commission can assess their credibility. The procedure may end either with the granting of refugee status or subsidiary protection, or humanitarian protection or with the denial of any form of protection.

As clearly shown in table no.1, from 2015 to 2020 the number of accepted applications were rather stable, starting to decrease from 2018. Since then, only 3 out of 10 applications have been accepted.

[3] In Italian it is named "Sezione specializzata in materia di immigrazione, protezione internazionale e libera circolazione dei cittadini dell'unione europea" (Section for immigration, international protection and freedom of movement for European Union citizens).

TABLE 1

	Applications	Decisions	Refused*	Accepted
2015	83,970	71,117	58.4%	41.6%
2016	123,600	91,102	59.6%	40.4%
2017	130,119	81,527	57.7%	42.3%
2018	53,596	95,576	66.7%	33.3%
2019	43,783	95,060	73.8%	26.2%
2020	26,963	41,753	76%	24%

Table 1. Number of asylum applications and results of the administrative procedure.
***Data include the negative results due to the unavailability of the asylum seeker.**
(Source: our elaboration of data from the Ministry of Interior.)

The flow of decisions shows a steady increase in the recognition of humanitarian protection up to its cancellation. The refugee status and the subsidiary protection in 2017 show a very similar percentage of recognition, because of the decrease in subsidiary protection and the growth of refugee status.

In 2018 humanitarian protection reached its peak and, after its cancellation, the new forms of national protection designed by the centre-right government never reached the previous numbers.

TABLE 2

	Refugee status	Subsidiary protection	Humanitarian protection	New forms of humanitarian protection
2015	12.03%	34.60%	53.36%	--
2016	13.12%	35.11%	51.77%	--
2017	20.15%	20.31%	59.53%	--
2018	22.58%	13.74%	63.68%	--
2019	58.65%	37.98%	--	3.37%
2020	49.17%	43.04%	--	7.79%

Table 2. Outcome of the accepted applications.
(Source: our elaboration of data from the Ministry of Interior.)

The applicant can resort to ordinary civil courts to apply for redress of the Territorial Commission's decision. The lodging of an appeal has also a delaying effect on the enforceability of the rejection of the international protection application. In other words, the asylum seekers cannot be expelled from the country.

The elements to be assessed to decide the application are the same for the administrative and judicial bodies (Article 3 of Legislative Decree 251/2007).

First of all, the applicants must submit all elements and documents needed to substantiate their application. Such elements include statements and any documentation concerning their age, social status, identity, citizenship, countries and places in which they have previously resided, previous asylum applications, travel routes, documents, as well as the grounds on which their international protection application is based.

The international protection application is assessed on a case-by-case basis, taking into account the following:

a) the facts relating to the country of origin at the time of deciding on the application, including laws and regulations of the country of origin and the manner in which they are applied
b) the statements and documentation presented by the applicant
c) the individual position and personal circumstances of the applicant
d) whether the applicant's activities since leaving the country will expose him/her to persecution or serious harm if returned to the country of origin
e) whether the applicant could reasonably be expected to claim citizenship and therefore protection in another country (Article 3(3) of Legislative Decree 251/2007).

Should any elements or aspects of the international protection applicant's statements not be supported by evidence, they shall be deemed to be truthful if the authority responsible for assessing the application considers that:

a) the applicant has made a genuine effort to substantiate their application
b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements
c) the applicant's statements are found to be coherent and plausible, and do not contradict available general and specific information relevant to their case
d) the applicant has applied for international protection at the earliest possible time
e) the applicant is credible (Article 3(5) of Legislative Decree 251/2007).

For our analysis another important aspect of this assessment is the obligation upon the authority to cooperate. In general, in a civil case the party that asks for the recognition of a right has the burden of proof. In international protection cases, this burden of proof is strongly limited: the Territorial commission in the administrative judgement and the civil judge in the judicial proceedings have to search for any evidence that can substantiate the request of the applicant and the decision can also be made only on the elements found by the authority. As we will see further on (par. 7.2), the evidence collected and presented by the authorities refers in particular to the geo-political situation of the country of origin.

Now it may be worth looking at the two major legal reforms in 2017 concerning the procedure in front of the judge. First, the possibility for judges to hear asylum seekers was strongly limited by introducing the video-recording of the hearing before the administrative body, which was expected to replace the hearing in future judicial proceedings. Then, it also limited the right to redress. The Territorial Commission determination could be challenged only once by a judge. On the decision of this judge only the Court of Cassation could intervene in the case of wrong interpretation of the law. Before the reform, a right to appeal the judicial first instance decision was guaranteed through filing a claim to the Court of Appeal. For the legislator, as stated in the official parliamentary report of the 2017 law decree, this reform "aimed at empowering the system's capacity and its efficiency to decide on the legal status of foreign citizens". In other words, the objective was a quicker and more efficient resolution of the cases. Those changes to the judicial redress mechanism were immediately and unanimously criticised by legal scholars (Benvenuti 2019, De Santis

2018) and practitioners (Savio 2017, Albano 2018). They appeared as a punitive intervention of the legislator, aiming to reduce the numbers of the appealed cases (the data show that more than 90% of the negative decisions were appealed, see Giovannetti 2021) and reducing the average of the acceptance in the judicial grade.

3. Methodology

In order to analytically investigate the changes in the legal system and to define the appropriate methodological instruments for conducting the research, we first had to profile the unit of the analysis and the variables describing possible decisional alternatives in the field of international protection in Italy. As unit of the analysis we chose the decision finally made by the judge (the decree) and, as alternatives, we focused on and analytically reconstructed how these decisions are made, which criteria have been used and which final results have been achieved. Results in terms of total numbers of denials and acceptances are therefore relevant when analysing the general issue of asylum, but in our approach these numbers are relevant *only* as an expression of these processes and not as *facts* in themselves, as usually considered in the Italian debate (Giovannetti 2021). In other words, the focus is not on the acceptance/denial rate but on the criteria and reasoning of the judge that gave rise to a certain result.

We chose to analyse the final judicial decision, the so-called "decree" issued by the Judge, when the administrative decision of the Territorial Commission is challenged by the applicant. This judicial decision is the one issued after the political and legislative storm in 2017. The analysis benefits from the results of a previous exploratory research on judicial decisions taken in Italy in 2017, before the latest normative changes (reference omitted). At that time, we studied 149 court decisions issued by 12 Courts and the analysis presented a highly diverse picture: the units of the analysis, the final legal texts, were very different in terms of length, content, sources cited, the way of constructing the judicial arguments, across the courts but also within the same Courthouse. After this previous step, the analysis focused on the new decisions enacted after the 2017 reform.

In order to better focus on this process, we chose one Tribunal, the Court of Turin, and we analysed 100 decisions made by all the judges working in the section from 2017 to 2019, after the described changes in the asylum adjudication system.

The choice of Turin is related to three main aspects. First of all, Turin is distant from the disembarkment areas along the Italian coast and consequently is not directly influenced by dynamics of the management of the border, such as the opening or closure of reception centres next to the border. The second reason is the significant number of centres based in the region that makes the Turin Tribunal competent for the asylum applications. The third reason is the presence of the historical headquarters of the Association for Legal Studies on Immigration (Associazione per gli studi giuridici sull'immigrazione, ASGI)[4] that has a strategic role in sharing legal information about migration, whose lawyers guarantee a generally accurate legal assistance and who therefore were easily able to provide the legal texts to analyse.

[4] Association for Legal Studies on Immigration is an association mainly composed of lawyers working on the protection of migrants' rights involved in administrative and judicial proceedings, but also of academics and social workers in the immigration field.

It is not our intention to define how this tribunal works but to compare the previous experimental phase with what occurred after the legislative reform.

We therefore carried out qualitative research, analysing and organising the decrees, and the final legal texts, according to some specific variables related to the following:

1) the actors involved (lawyers and judges)
2) the characteristics of the claimant (gender and nationality)
3) the decision of hearing the claimant (yes or no)
4) the recalling of the decisions of the Territorial Commission
5) the type of the documentary sources analysed (International organisation or EU Agencies reports, Ngo reports)
6) the decision on the credibility of the applicant
7) if and how the credibility was a determining variable for the final decision
8) the final decision taken (denial or recognition of which type of status).

After defining the unit of the analysis and the connected variables, we need to specify the context in which these changes can be observed and whether they effectively affect (and if so, in which ways), the legal system and the decisional process with regard to recognition of international protection in Italy. It is not therefore an issue related only to the judge and to his/her way of judging or sentencing (Kritzer 2007, Tata 2007), but it is analytically connected to the changes in the legal system and specifically to the asylum adjudication system.

4. Legal culture in the asylum adjudication system

Focusing on the asylum adjudication system from a socio-legal perspective implies a specific hypothesis on what type of legal changes are considered sociologically relevant and how they can be analytically investigated.

First of all, and as already underlined, the regulation, government and control of migration can be considered as a fundamental frontier of the socio-legal system as these actions and legal decisions express the content of "citizenship", the profile of the inclusion and the exclusion mechanisms of a society.

These processes are culturally and historically embedded and it is possible to observe some relevant trends: first of all, Italy has never managed migration with a clear political strategy. Irregular migration in the 90's, and more recently asylum seeker inflows, have been represented as unforeseen emergencies, therefore as not really governable and usually politically instrumentalized. As normally happens in these cases, cultural and political weakness puts the legal system under high pressure to *solve* the problem efficiently and, according to our approach, the system elaborates some of these requests as irritations or, better self-irritations (Luhmann and De Giorgi 1993) and determines the institutional change that we are attempting to analyse.

Luhmann developed the concept of irritations following Parsons's approach to the system theory and as an attempt to analyse how social changes occurred while placing a strong emphasis on self-referential mechanisms and structural coupling (Luhmann and De Giorgi 1993, 66–67).

As a matter of fact, irritations can be identified as the reasons for change that are usually represented as social pressures on the legal system coming from the civil society or the

political parties while they should firstly be considered as a result of the legal system itself, originating from an internal comparison with its own possibilities. Irritations can therefore be qualified as self-irritations because these reasons are not social requests coming from outside, from the environment, but rather are the limits that the legal system perceives as its own, compared to the expectations and to the established decisional processes and structures.

In this scenario, by focusing on the specific area of migration law and the asylum adjudication system, through a methodological analysis of the changes arising in the legal culture, we can further delineate the procedures and characteristics that have already been described in the previous pages. To determine how this area of law has elaborated the changes and the fore-mentioned irritations we refer to the concept of legal culture as an approach. This way of defining the concept of legal culture fundamentally aims to capture some essential intervening variables which influence the legal change (Friedman 1969), and some identifying elements concerning both the institutions and the behaviours (Nelken 2004), with a view to understanding the institutionalization process ensuing in a specific area of the legal decisional process (Pennisi 2018, 7–9).

To analytically define the irritations that the legal system is progressively institutionalising and elaborating as objects of its decisions, we refer to *internal* and *external* elements of the decisions made, and we reconstruct the reference to these elements to anchor the decisional process.

The approach used is therefore focused on reconstructing these elements and providing the connected variables that can be used in the analysis of the legal texts. The external elements are expressed by the organisational changes that outline the possibilities of the decisions and are implemented in the organization of the specialised sections within the ordinary courts and the judges selected or nominated to work in these sections. The internal elements are concerned with the procedural changes and can be targeted as the alternatives and the contents of the different decisions that can be made during the process.

5. External changes: Court organisation and the territorial workload

The organisational aspect of the Tribunal is a key element to be considered, given that, as introduced in par. 2.2., the legislator in 2017 established the new Immigration Specialised section within the civil court. The legal reform established 26 specialized sections of the Tribunal to respond to a need to increase the efficiency and reduce the length of procedures. This choice must be considered in the framework of the Italian judicial system featuring chronic shortcomings, lack of personnel, backlog and the international protection procedure that has to be concluded in a limited amount of time to guarantee the protection of the asylum seeker. The Directive 2013/32/UE underlines that "a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out" (Preamble 18), giving the possibility to the Member States to shorten the overall duration of the procedure by prioritising the examination of any application (Preamble 19). The Italian legislator follows this suggestion from the EU legislator and places a time limit on the international protection procedure of four months for the tribunals and six

months for the Court of Cassation, introducing the need to consider these procedures as urgent without any suspension of the time-limit during the summer months.

To materialise these legal prescriptions, the Superior Council of the Judiciary (hereafter SCJ) in 2017 enacted a resolution[5] to suggest organisational measures for the territorial offices dealing with international protection. The suggested measures refer to: 1) the priority of these procedures, due to the time-limit and the fundamental rights involved; 2) the commensurate number of judges and resources to guarantee quality and speed of the jurisdictional response; 3) additional special measures to intervene on the backlog. Due to the different situations on the territory, the Council – while affirming the need for a specialised judge – also provided the possibility to refer the international protection cases to other judges or to allow the specialised section to work on other subjects, according to the number of pending cases.

The SCJ clearly identified the organisational measures needed to respond to the growing number of cases. Unfortunately, the data[6] show that the measures have not been followed by the Italian Tribunals, at least not by all of them. The pending cases steadily increased, reaching a peak in 2019 with a slight decline in 2020, mainly related to the measures adopted during the COVID-19 pandemic that blocked the activity of the Territorial Commissions for two months, therefore reducing the number of potential judicial claims, and the terms to present them. The clearance rate shows the extent to which the judicial international protection system is unable to deal with the number of cases. In addition, the time indicators show that the estimated amount of time needed to resolve all the pending cases reached more than three years in 2020, 10 times more than the time-limit defined by the law.

TABLE 3

Year	Incoming cases	Resolved cases	Pending cases	Clearance rate*	Disposition time**
2016	48,087	14,839	49,502	--	--
2017	43,592	36,450	57,213	84	573
2018	53,521	43,362	67,376	81	567
2019	73,527	39,258	101,595	53	945
2020	29,017	30,486	99,586	105	1,192

Table 3. Case flow of international protection.
***The clearance rate, obtained when the number of resolved cases is divided by the number of incoming cases, is one of the most used indicators to monitor the case flow. A rate of 100 means that the court manages to handle all the incoming cases. A number over 100 means that the court manages also to clear the backlog of cases.**
**** The disposition time, comparing the number of resolved cases of the year with the number of unresolved cases at the end of the year, shows how long, on average, it takes to solve a case.**
(Source: Supreme Council of the Judiciary.)

Across Italy the situation is highly differentiated, as shown by table n. 4. The average number of incoming cases and resolved cases between 2018 and 2020 shows that some

[5] High Judicial Council: Resolution on guidelines regarding the reorganization and best practice for handling of procedures relating to international protection (15 March 2017).
[6] Data are taken from High Judicial Council, Pratica 535/VV/2020. Resolution on guidelines regarding immigration, international protection and free circulation of European citizens (13 October 2021).

tribunals deal with a huge number of cases and the pending cases are growing. However, the Courts, in particular the small and medium ones, with the same number of incoming cases do not have the same number of resolved cases. This difference is related to a number of factors that are difficult to single out: the units of staff and their performance, the decisions made by the territorial Commission and the dialogue between them and the judiciary that influence the number of claims and also the lawyers' strategies.

TABLE 4

	Average of yearly incoming cases (2018-2020)	**Average of yearly resolved cases (2018-2020)**	**Clearance rate**
Potenza	195	398	204
Messina	230	185	80
Reggio Calabria	341	343	101
Perugia	465	662	142
Caltanissetta	489	811	166
Campobasso	546	747	137
Trento	561	405	72
L'Aquila	899	927	103
Salerno	957	641	67
Lecce	1,232	1,043	85
Cagliari	1,233	1,073	87
Catania	1,368	862	63
Catanzaro	1,435	1,192	83
Ancona	1,651	1,423	86
Genoa	1,700	882	52
Bari	1,715	1,924	112
Palermo	1,780	1,898	107
Brescia	1,813	1,440	79
Trieste	1,961	845	43
Florence	2,507	2,419	96
Venice	3,120	2,502	80
Turin	3,139	1,948	62
Naples	3,466	2,084	60
Bologna	4,046	2,242	55
Milan	5,005	2,360	47
Rome	10,167	6,446	63

Table 4. Average Case flow of the specialised sections on immigration and international protection.
(Source: High Judicial Council.)
*** The figure includes all the immigration cases and not only those of international protection. The number of immigration cases that differ from international protection are very few, except for Rome that deals with a huge number of cases on citizenship and statelessness.**

This variety confirms the need for more flexibility in organization in order to better respond to the workload. The lack of application of the measures suggested by the High Judicial Council is clear if we look at the units of staff and the competence. For example, the Specialised section of the Court of Turin has only 8 judges (and 3 honorary judges) but its competence includes the activity of the tutelary judge and hereditary succession, that according to the estimation carried out by the SCJ covers 50% of their work time. The city of Bari has 8 judges and 8 honorary judges with exclusive competence in international protection and immigration. The judges also deal with other subjects, but the weight of international protection cases seem to have been properly considered. As a result, Turin registered a high level of cases and a huge backlog, while Bari is, together with Palermo, one of the courts with a medium level of incoming cases that successfully manage the workload. Obviously, the cause-effect ratio is not so straightforward and simplistic, but the picture confirms the need to carry out a further comparison across courts.

The relevance of the subject of "international protection" is indisputable. Compared to the total amount of civil cases, according to the data of the Ministry of Justice, in the 26 courts with a specialised section for international protection, these cases cover 20% of the entire civil case flow. It emerges clearly that there is an urgent need for organisational changes and innovations to resolve the pending cases and avoid an ever-increasing backlog with dramatic consequences on the time required to resolve new cases. The activism of the CSJ shows that the system has progressively understood the relevance of the international protection cases and underlines the need to institutionalise this subject as one of the key responsibilities of the contemporary civil jurisdiction.

6. Internal changes: the form and the content of the decision

6.1. The form of the decision: a first step toward institutionalisation

Since 2017, the final form of the decision has been the decree. In ten years, the recognition of international protection has changed its legal form three times. In 2008 it was the sentence, then in 2011, due to the legal reform on the simplification of civil procedure, it was replaced by the court ruling. The 2017 reform changed yet again the procedure and its final act is now the decree.

The sentence is the ordinary formula used to decide on the merit of the case, because it is always motivated and allows the best scrutiny from the parties. The court ruling is a simplified act with a very short motivation. The decree is the simplest act that can be used when there is no need for adversary proceedings. In general, there is no motivation.

The 2017 reform certainly opted for the decree to speed up the decision, but it has to be a motivated decree. This change should be read in connection with the introduction of the video recording of the territorial commission hearing. In the intention of the legislator, the judge was supposed to decide on this fundamental right alone, watching a video recording but without hearing either the asylum seekers or the lawyer. In addition, no right to appeal was guaranteed.

Criticism against this procedure induced the legislator to maintain the form of the decision while introducing the competence of a panel of judges instead of one single

judge. The result is bizarre: the guarantee of a panel of judges and the simplest form of the decision.

The decisions we have analysed are therefore the result of an incomplete reform. The absence of video-recording has meant that the decision on the hearing of the asylum seeker is at the discretion of the panel of judges. Therefore, the decision on international protection is made with the formula usually applied for simple issues that do not require any adversarial hearing, but this can occur in a fully adversarial proceeding.

The analysed decrees do not present major differences. Compared to our previous exploratory research, these judicial texts are more homogeneous. With the obvious differences due to the specificities of the cases, the decrees are similar in length and also in the way the judge constructs the act. When the decision refers to the refugee status or the subsidiary protection, the judge briefly recaps the applicant's claim and story, then refers to the sources that may substantiate or not the claim. The legal reasoning therefore emerges, and we can easily affirm that a minimum common standard is reached by almost all the investigated decrees. Decisions without clear identification of the sources or the same decisions issued to resolve a variety of cases, as we have seen in the previous years, seem to be a memory of the past.

In addition, it is worth underlining that the decree can finally be assumed as the ultimate form of the decision of the international protection procedures.

A further comparative analysis across different courts may confirm whether or not the judicial text on international protection is the result of a common understanding among judges and which steps of the final decision on international protection are finally institutionalized and taken for granted in the decision-making process.

6.2. The key elements of the decision: the socio-political and economic situation of the country of origin and the personal conditions.

The judge bases the final decision on several elements that are mainly related to social facts and not legal interpretations.

For the decision on refugee status and subsidiary protections, the need to substantiate the allegations related to individual fear of persecution, or the risk of suffering serious harm, requires an appraisal of the credibility of the applicant's story and implementation of information on the socio-political situations of the country of origin. All these are facts that the judge does not necessarily know as they are not included in the training to become an expert of the law.

For the decision on humanitarian protection, in the face of the impossibility to recognize one of the international protection statuses, the judge has the chance to finally assess the vulnerability of the claimant and comparatively recognize the right to stay in the territory, and therefore award protection from the risk of being expelled.

The elements currently used in formalising the decision are as follows:

a) The socio-political and economic situation of the country of origin

As to the socio-political and economic situation, the ruling should assess political situations, armed conflict patterns, and potential violations of fundamental rights. Since

the ordinary training of judges does not include these matters, information must be drawn from external information.

In 2017, the legislator introduced the art. 25 bis that at paragraph 9 clearly affirmed that

> For the decision, the judge makes also use of the information on the socio-political and economic situation of the countries of origin issued and updated by the Asylum National Commission on the data given by the United Nations High Commissioner for Refugees (UNHCR), the European Asylum Support Office (EASO) and the Foreign Affair Ministry.

The article ratifies that the UNCHR provides a privileged source of information together with EASO that publishes Country of Origin Information (COI) documents, i.e. information reports on non-EU countries, both of a general nature and focused on specific aspects of the situation of the countries considered. This information is provided by the National Commission also in Italian, thus filling the language gap of those judges who do not have language knowledge.

In addition, judges can make use of the publications prepared by international NGOs, such as Amnesty International and Human Rights Watch.

Information used to justify the decision is also gleaned from national and foreign media websites – to a limited extent, from those of the applicant's country of origin, and more often from those of other EU Member States or the USA, due to their coverage of foreign news.

The assessment of the socio-political and economic situation raises two issues.

First, such knowledge, which is non-legal in nature, is not irrefutable; this entails a substantial difference compared with the cases in which other scientific knowledge is involved in court proceedings. Moreover, as geo-political situations tend, by nature, to change, the passage of time may randomly change the content of the decision. Since the judge is expected to make a decision based on the situation at the time of the proceedings, if for instance the geo-political scenario in a country stabilizes, this could lead to the rejection of an application, or to the granting of milder forms of protection, even if the situation was actually much worse when the applicant left his/her country of origin.

As an example, in the case of an appeal from a seeker who left Gambia in 2016, the judge in 2019 argues as follows:

> Accredited sources report, in fact, how the country enjoys at present a state of relative stability and, following the end of the dictatorial regime of Yayah Jammeh and the election of the new President Adama Barrow, the political and social climate has improved, thanks also to the launch of a constitutional reform process.[7] (Court of Turin, 9th Civil Division, n.1280/2019)

In other words, the end of Jammeh's dictatorship is interpreted by the judge as an element that justifies the rejection of the application, without any further consideration on the practical situation of the person who left the countries several years before.

[7] Translation from Italian done by the authors.

The second issue is related to the attitude of the judge towards this knowledge. Since it is difficult to ascertain the facts autonomously once and for all, judges must rely on assessments carried out by external bodies (almost always from foreign countries), be they governmental bodies (such as EASO, UNHCR, or the US Department of State) or NGOs (such as Amnesty International or Human Rights Watch). Most of the judges of the Turin court do not seem to draw on these sources for the decision. We did not find quotes of long passages from these reports as in our first exploratory research (see Consoli and Ferraris 2018, p. 321).

In most of the decisions, these sources are incorporated into the judge's reasoning and, compared to the court orders analysed in the exploratory research, sources are more selected, their quoting in the decrees is recurrent, clearly used as motivation for the decision and they finally concur to define the assessment of the case.

In a case of an asylum seeker from Mali but with double citizenship (also from the Central African Republic), the judge explains the situation in the Central African Republic through several references to different sources that substantiate the decision of recognizing the widespread and indiscriminate violence and the worsening of the instability of the country:

> From the numerous sources consulted it appears that the Central African Republic is still characterized by a situation of strong instability (...). According to a July 2020 report of the United Nations Security Council, the whole country continues to be affected by phenomena of fighting and violations of human rights (...). A United Nations peacekeeping mission began in 2014 and is still ongoing, given the extreme instability of the country (...). There are also a series of attacks against (...) A worsening of the situation is also expected with the next elections in December 2020.[8] (Court of Turin, 9th Civil Division , n. 2754/2019)

Similarly, the situation in Mali is analysed through multiple sources:

> As reported in the UNHCR document: the boundaries of the conflict are not well defined (...). Also, the EASO report stated that there is no stable and defined front line (...). Furthermore, following multiple visits to the country between the end of 2019 and the beginning of 2020, Alioune Tine, independent UN expert on the situation of human rights in Mali stated that the security situation has reached a critical level (…). The focus on Mali of the World Report 2020 by Human Rights Watch refers to a situation in progressive deterioration (...)[9] (Court of Turin, 9th Civil Division , n. 2754/2019).

We can therefore identify the selection of documents used and the ways of referring to and citing these documents as one relevant change in the legal culture concerning these adjudication procedures, as reference to the socio-political and economic situation becomes increasingly relevant in the final decision on the status of the claimant and constitutes a strategic step in the decisional process.

b) The applicant's credibility

In this case, the judge's assessment once again involves non-legal knowledge. The judge is used to assessing the inconsistency, inaccuracy or falsehood of the witnesses in a hearing, but in a claim for asylum there are major and unusual difficulties (Coffey 2003).

[8] Translation from Italian done by the authors.

[9] Translation from Italian done by the authors.

First, the statements of the applicant are often the only proof available for the judge, at least of the specific circumstances of the case. In many cases, there is a lack of external evidence that can corroborate the story of the applicant, and consequently, the assessment of credibility is crucial. In addition, consistency and accuracy can be affected by experiences of distress, violence and trauma, the consequences of which can be hard to judge for the assessment of the application. The judge has not been trained to cope with this kind of situation and the risk of compassion fatigue (Figley 1995) is high. Then, when it comes to the asylum seeker's private sphere, the weakness of the judge in assessing credibility is at its highest. An eloquent example is provided by the rulings concerning the granting of international protection based on the applicant's homosexuality (Magardie 2003).

In the light of a leading judgment by the CJEU,[10] as well as of the consolidated case law of the Italian Court of Cassation, according to which a country's legislation that punishes homosexuality or homosexual acts with imprisonment is deemed persecutory, and therefore this constitutes a decisive factor for granting refugee status, the proceedings will hinge upon the credibility of asylum seekers' statements concerning their homosexuality. Once again, here, judges face some problems when conducting their assessments. Quite surprisingly the Turin court does not opt to request the hearing of the applicant when there is a claim related to the sexual orientation, but this intimate and personal element is assessed by the judge through the delegation to external actors, such as LGBT organisations, to somehow certify the sexual orientation.

In one case of an asylum seeker from Gambia, the judge affirms:

> The credibility of the applicant regarding his sexual orientation is definitively supported by the documentation filed by the president of the ArciGay of Turin which shows that – despite his extremely reserved attitude – the applicant had engaged contacts with LGTB (Lesbian, Gay, Transsexual and Bisexual) boys and girls, progressively allowing him to become aware of his homosexuality and overcome the discomfort that his orientation had caused him in the home country. (Court of Turin, 9th Civil Division, n. 2565/2018)[11]

Similarly in another case of an applicant from Gambia:

> The panel highlights how the applicant's credibility with regard to his sexual orientation is definitively supported by the documentation (...) In the report of the operator we read: 'he approached the ArciGay association and is participating in the Group meetings (...). He is slowly gaining confidence in himself and beginning to become aware of his sexual orientation, until recently kept hidden out of embarrassment and fear after the discomfort he experienced in his country of origin'. (Court of Turin, 9th Civil Division, n. 4134/2018) [12]

In practice, this results in the acknowledgment that the applicant is participating in the social life of the LGBT organisation as this could represent proof of his sexual orientation.

[10] CJEU, 7 November 2013, C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, in which it is stated that homosexuals can be deemed to belong to a "particular social group" since homosexuality appears to be a fundamental characteristic of a person's identity, which they cannot renounce, and thus qualifies them for refugee status provided that persecution targets homosexuals.

[11] Translation from Italian done by the authors.

[12] Translation from Italian done by the authors.

In the coming years we expect that these social actors will have a more structured role in the trial proceedings (see De Felice 2020).

From the analysed decrees published by the Court of Turin, it emerges that the credibility is not as strategic as the legal text suggests. In several cases, even though the applicant is not considered credible, he/she has been granted the protection due to the country's situation or the level of social integration reached. Somehow the judge pays more attention to tangible elements that can support his/her decision, avoiding slippery areas, when it is not needed. Credibility is then crucial only when it is essential to assess a personal condition such as homosexuality or the condition of a trafficked person. But as we have said, the judge seems to step back and ask other actors, external to the judgement for confirmation of this personal condition. A comparison among different courts will confirm whether the different assessment of credibility and the seeking of external actors can be described as a common way of motivating the decisions assumed by international protection judges.

c) The social integration of the applicants

The condition of vulnerability of the applicant refers to personal situations, (physical or mental health, pregnancy, old age), natural disasters, and to the social integration of the applicant.

The social integration of the applicant has gained the attention of the Court of Cassation that in the making of several decisions has discussed what social integration means and what kind of assessment the judge should carry out. After some divergent opinions, the joint session[13] of the Court of Cassation in 2019 (Joint session no. 29459, 29460, 29461, 13 November) underlined that the judge should comparatively assess the situation in Italy with the situation in the country of origin. The level of social integration reached in Italy should not be considered in itself but always in terms of comparison with the country of origin.

For example, a decree on a Nigerian asylum seeker reports that:

> The activities carried out and the overall conduct held by the applicant are the expression of a positive integration in the national context. (...) This condition of integration and current economic stability reached by the applicant, in case of return, would be nullified, placing him in a situation of extreme vulnerability. (…) He would have to start from scratch – in a context certainly less favourable than the Italian one – to procure the means of support and reach an economic level that allows him to live in a decorous way. And indeed, proceeding to the comparative evaluation between the integration in Italy and the situation he had before departure, and in which he would find himself living in case of return, there is an effective and unbridgeable disproportion between the two contexts of life in the enjoyment of fundamental rights which are an indispensable prerequisite for his dignity[14] (Court of Turin, 9th Civil Division, n. 7065/2018).

Nevertheless, despite the jurisprudential evolution of the Court of Cassation, the analyzed decrees reveal a more ambiguous picture. The assessment of social integration

[13] The joint session is the session that is called to intervene when there are divergent opinions among the different divisions of the Court.

[14] Translation from Italian done by the authors.

is not so often conducted in comparison with what the applicant may have found in the country of origin, and in practice is reduced to two straightforward elements: the knowledge of the language and the integration in the labour market. Having a job (better if with a long-term or permanent contract) and knowing the language are key elements, regardless of anything else.

Indeed, in the case of an asylum seeker from Bangladesh, despite a negative assessment of the credibility of his story, the humanitarian protection is recognized with a straightforward motivation:

> The applicant has been attending the CPIA[15] for two years to learn the Italian language; he is working as an assistant cook in an Italian restaurant with a fixed-term contract and excellent possibilities of an extension. The activities carried out and the overall conduct held by the applicant are the expression of a positive inclusion in Italy.[16] (Court of Turin, 9th Civil Division n. 12620/2018)

Considering that this form of protection was first abolished and then re-introduced into the system, it is hard to say that the decision-making process of the judge has found stability. From the conducted analysis we can underline that the judge looks for self-evident and irrefutable elements, leaving aside any more complex considerations on the meaning of social integration in contemporary societies. However, the challenges posed by the assessment of the social integration are still unclear and only further analysis carried out under the new legal framework will shed light on decision-making processes on this aspect.

7. Conclusive remarks

During the last years the treatment of foreigners has emerged more and more as a frontier in which the balances of power, fundamental rights, legal principles and legal arrangements are thoroughly reconsidered. International protection and the asylum adjudication system are one of the fields that have been interested by changes, in legislative, organisational and procedural terms.

The lens of legal culture as an approach allows us to identify external elements (i.e. the organisational choices) of the judicial decision which are crucial in understanding the institutionalisation of the asylum system, as well as the internal elements of the decision (the geo-political situation, the credibility of the asylum seekers and their level of social integration in the country). How these elements can be combined to then substantiate the granting or not of international protection emerges from the analysis and progressively shows the institutionalization of the asylum adjudication process.

Starting from the internal elements, the judges, as law experts, are in a weak position in facing their duties in the international protection cases. Their training is not enough to decide: they need to draw on different fields of knowledge, such as the geo-political situations of other States, analysis conducted by international organisations or NGOs or written, in a foreign language, in the international press. They also face difficulties in assessing credibility or social integration, elements difficult to operationalise that the

[15] A center for the education of adults who do not know Italian or had no possibility to study before.
[16] Translation from Italian done by the authors.

judges try to materialise in facts (contracts, certificates, reports) that could provide a factual basis for their decisions.

These difficulties are common to all the decisions analysed. However, compared to the decisions made in 2016–2017 (see Consoli, Ferraris), decrees are more homogeneous, similar in length and in the way the judges re-construct the story of the claimant, or the way in which they refer to the international sources to substantiate the claim and express a shared institutionalization.

We are aware that we cannot generalise, but it is a fact that the variability in terms of quality of the decisions has been significantly curtailed in comparison with the past.

The ways in which these elements are combined and structured represent, in our approach, the analytical manifestation of changes manifesting in the legal culture. Moreover, the comments made by the judges of immigration courts on the support that the judge needs (cfr. Minniti 2021, 212–214) suggest that, at least among the most attentive judges, the insufficiency of the juridical knowledge and the impossibility for the judge to assess elements beyond his technical knowledge without external support has been clearly understood.

The organizational choices within the single immigration court are an element that today tells us that once again the immigration matters have been considered an ancillary topic in the civil justice. There is no doubt that the judicial asylum procedure does not seem to perform well in terms of timing, quality and fairness of the decision-making, and several biases can be identified. Looking through the lenses of the procedural justice (Tyler 2003, Solum 2004) much needs to be done. However, our analysis underlines that not only *just* outcome can be obtained, notwithstanding the loopholes of the system, but also the establishment of the immigration courts certainly represents a first step for further improvement.

The establishment of the immigration courts and the further reform connected with the funds of the Next Generation EU requires more investigation to understand whether the shortcomings identified by the SCJ will be taken into consideration and whether Italy will finally adopt the organizational choices that the topic requires.

The future resources are the last opportunity for a transparent, just and efficient institutionalization of the asylum adjudication system that is highly relevant, not only for the number of cases but also for the human right violations involved.

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