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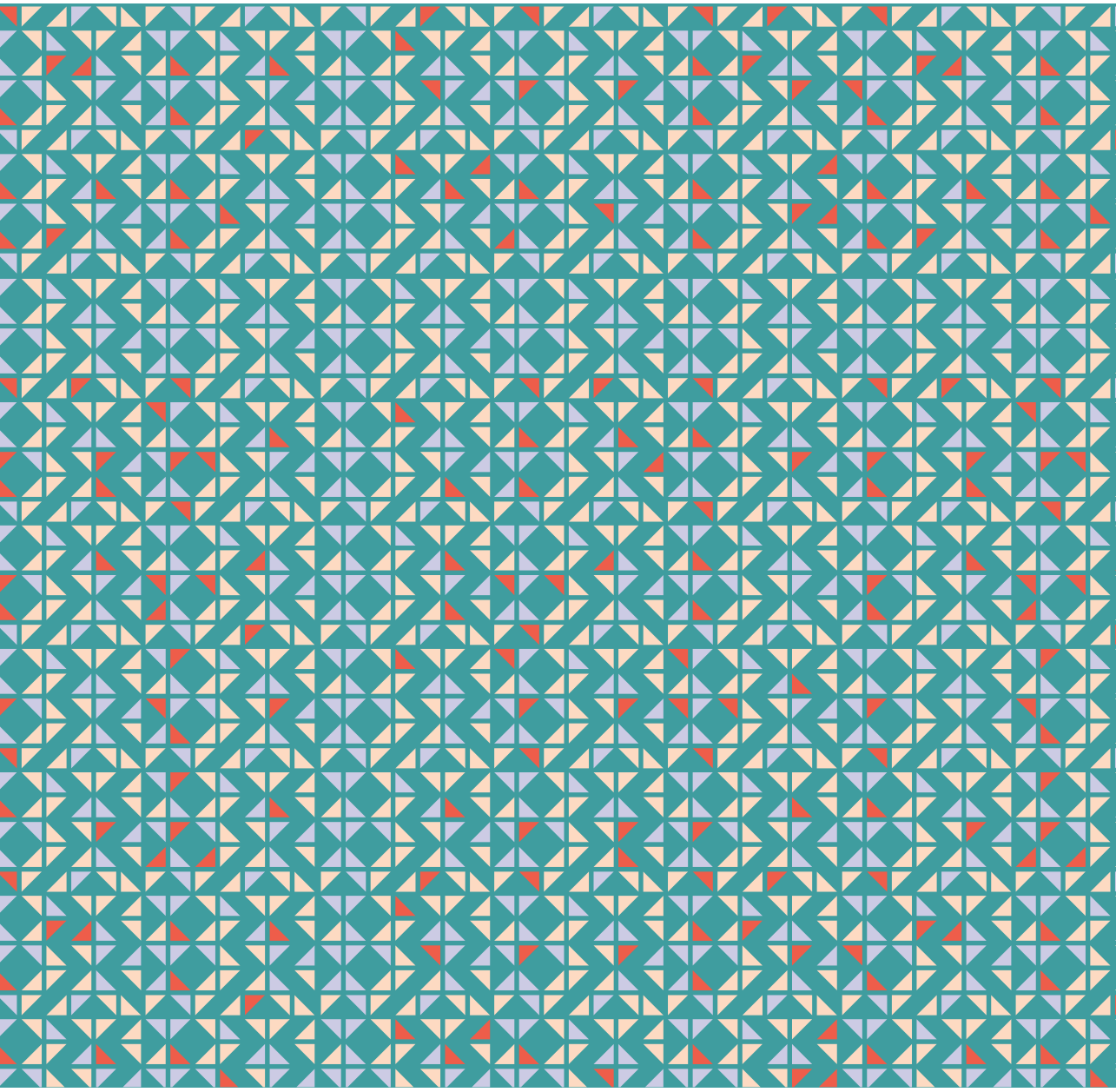

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ARTICLES

NOTES

MEETINGS & READINGS

JIE LUO[*], PENG GUO[**]

CERTAIN REFORMS OF CHINA'S ARBITRATION LAW AND THE IMPACT ON FOREIGN PARTIES

ABSTRACT. *This article examines the limitations of China's Arbitration Law of 1994 and the proposed reforms to the system set out in the Exposure Draft, which aim to modernize the system, particularly for foreign parties. The article addresses the absence of the term 'place of arbitration' and the non-recognition of ad hoc arbitration in China's Arbitration Law, which contrasts with global norms such as the New York Convention and UNCITRAL Model Law. The Exposure Draft introduces pivotal changes, including the specification of the place of arbitration and the formal recognition of ad hoc arbitration. Furthermore, the draft enhances the role of interim measures, extending beyond the preservation of property and evidence to encompass the preservation of conduct. It also permits the implementation of pre- and post-arbitration measures by both courts and arbitral tribunals. In conclusion, the revisions proposed in the Exposure Draft represent a substantial step towards the internationalization of China's arbitration system. They hold the potential to facilitate a more efficient, cost-effective and confidential process for foreign parties. The amendments are designed to enhance the attractiveness of China as a venue for cross-border dispute resolution, while also providing a robust, flexible, and equitable legal mechanism that reflects China's commitment to align with international arbitration practices.*

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1. Introduction

The Arbitration Law of the People's Republic of China, passed in 1994, has faced criticism for its outdated practices. After extensive debate, the revision of the Arbitration Law has been prioritized by the Standing Committee of the National People's Congress and the State Council.[1]

On 30 July 2021, the Ministry of Justice released the Arbitration Law of the People's Republic of China (Revision) (Exposure Draft) for public consultation.[2] This draft introduces major changes, making a significant step towards formal revision. This article focuses on the main dilemmas related to the foreign-related arbitration system under the current Arbitration Law and briefly analyzes the responses of the Exposure Draft to relevant issues and its impact on foreign parties.[3]

2. The main dilemmas faced by foreign parties under the current arbitration system

2.1. Lack of clarity on the concept of the place of arbitration

Currently, the Arbitration Law does not define the concept of the 'place of arbitration'. In Chinese arbitration practice, the location of an arbitration institution is considered the place, which determines the applicable law and the jurisdiction of the court.[4]

However, the place of arbitration is crucial in arbitration cases. The

[1] The Arbitration Law of the People's Republic of China was adopted at the ninth meeting of the Standing Committee of the Eighth National People's Congress on 31 August 1994 and came into force on 1 September 1995. It has been amended twice, in 2009 and 2017. *See* <www.npc.gov.cn/zgrdw/npc/xinwen/2017-09/12/content_2028692.html> accessed 17 December 2024.

[2] *See* <www.moj.gov.cn/pub/sfbgwapp/lfyjzjapp/202205/t20220511_454820.html> accessed 17 December 2024.

[3] China does not have a dual system for domestic and international arbitration. Besides general rules in the Arbitration Law of China, Chapter 7 provides some special provisions for arbitration involving foreign elements.

[4] He Jingjing, 'Some Thoughts on the Introduction of Ad Hoc Arbitration System in China under the Background of the Revision of the Arbitration Law' (2021) 12 Guangxi Social Sciences 114.

determination of the place of arbitration will have an impact on the arbitrability of the arbitration case, the procedural and substantive laws applicable to the arbitration case, the effectiveness of the arbitration agreement, as well as issues such as the revocation, non-recognition, or non-enforcement of the arbitration award.[5] In other words, the selection of the place of arbitration not only affects the arbitration proceedings conducted there, but may also affect the subsequent arbitral awards.

Normally, in commercial arbitration, concepts such as the seat of arbitration, the location of arbitration institution, and the place of arbitral award can be confusing. In Chinese arbitration practice,

the place of arbitration usually refers to the location of the arbitration institution. For example, if the parties agree to settle the dispute by arbitration at the Beijing Arbitration Commission, then the place of arbitration is Beijing, China. In some cases, the agreed seat of arbitration, the location of the arbitration institution, the place of the hearings, the place of arbitral tribunal and the place of the award are different. In such cases, due to the domestic regulations on the place of arbitration, it is likely that the foreign party will face a lot of uncertainties, which will ultimately result in significant losses.

For example, in the case concerning the *Application by Duferco S.A. for the Recognition and Enforcement of ICC Arbitral Award No.14006/MS/JB/JEM*,[6] the dispute between Swiss Duferco and Ningbo Arts & Crafts Import & Export Co., Ltd. had been submitted to the ICC Court of Arbitration. The award was rendered by the arbitral tribunal of ICC International Court of Arbitration in Beijing on 21 September 2007. Later, DUFERCO S.A. filed an application with the Ningbo Intermediate People's Court for the recognition and enforcement of the arbitral award. The Court ruled that the award was a French award (and thus non-domestic) according to Article 1 of the New York Convention, on the basis that the ICC International Court of Arbitration was headquartered in France.[7]

In the case of *TH&T International Corp. and Chengdu Hualong Auto Parts Co.,*

[5] Jiang Daiping, 'Research on the rules of the seat of international commercial arbitration' (2017) Guizhou University.

[6] (2008) Yong Zhong Jian Zi No.4.

[7] Article I.1 of Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Ltd. Application for Recognition and Enforcement of Arbitration Award of ICC International Court of Arbitration,[8] the dispute resolution clauses in the sales contract signed by the parties stipulated: 'the dispute shall be submitted to arbitration in Los Angeles in accordance with the ICC Arbitration Rules.' Chengdu Intermediate People's Court ruled that the award in question was a French award rather than a US award (despite the fact that the arbitration took place in Los Angeles) for the same reason.

However, in the case *Application for Enforcement of a Hong Kong Arbitration Award by the Applicant Ennead Architects International LLP of the United States*,[9] the result turned to a quite different way. On 29 March and 15 May 2013, Ennead Architects International LLP (hereinafter referred to as 'Ennead') of the United States and R&F Nanjing Real Estate Development Co. Ltd. signed a land lot design contract and agreed on the arbitration clauses stipulating that any disputes shall be submitted to the China International Economic and Trade Arbitration Commission (hereinafter referred to as 'CIETAC') for arbitration in accordance with its prevailing arbitration rules at the time of application for arbitration, and that the place of arbitration shall be the Hong Kong Special Administrative Region. In the wake of a dispute over contract performance, Ennead applied to the CIETAC Hong Kong Arbitration Center for arbitration. The Intermediate People's Court of Nanjing City, Jiangsu Province held that an arbitration award made by a Hong Kong branch of a Mainland arbitration institution was an arbitration seated in Hong Kong SAR. Therefore, the place of arbitration in this case is Hong Kong rather than Beijing, which is the seat of the headquarters of CIETAC.

It can be seen that the lack of clarity on the concept of the place of arbitration in China has led to a certain discrepancy between China's determination of the place of arbitration and international arbitration practice in some cases. As a result, the arbitration process deviates from the parties' expectations and undermines the principle of party autonomy. With the practice and development of arbitration in China, relevant laws and judicial interpretations have introduced the internationally accepted concept of the seat of arbitration, which could be found in various judicial interpretations.

[8] (2002) Cheng Min Chu Zi No. 531.

[9] (2016) Su 01 Ren Gang No. 1.

Article 16 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China states that the validity of foreign-related arbitration agreements should be evaluated using the law agreed upon by the parties. If no law is agreed upon but the seat of arbitration is specified, then the law of the country of the seat applies. If there is no agreement on either the applicable law or the seat of arbitration, or if the seat of arbitration is unclear, then the law of the forum applies. It is also the first time that the concept of the seat of arbitration has been addressed in domestic case law and practice. Article 18 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships enacted by the Standing Committee of the National People's Congress stipulates that the parties may choose the law applicable to the arbitration agreement by agreement. If the parties do not choose, the law of the location of the arbitration institution or the law of the seat of arbitration shall apply. This article is a provision on the applicable law for confirming the validity of foreign-related arbitration agreements. In addition, in recent years, courts in mainland China have gradually realized the importance of the concept of the place of arbitration and have tried to apply it in practice. For example, the *Longlide* case,[10] *Beilun Licheng* case,[11] and *Ennead Architects* case[12] involve the recognition of the concept of the seat of arbitration by mainland courts when confirming the validity of the arbitration agreements, determining the nationality of the award or the application of law.

However, there is no doubt that the understanding and application of the concept of the seat of arbitration in the above-mentioned judicial interpretations and cases have not yet been formally recognized by law, and there is still a lack of clear definition and sufficient basis at the legislative level, and the systematic construction of the normative level, so it cannot fully play its due role in arbitration. The uncertainty caused by the foreign party's ambiguity as to the domestic seat of arbitration is still unavoidable.

[10] (2013) Min Si Ta Zi No. 13.

[11] (2013) Min Si Ta Zi No. 74.

[12] (2016) Su 01 Ren Gang No. 1.

2.2. No recognition of the validity of ad hoc arbitration

Arbitration can be divided into institutional arbitration and ad hoc arbitration. Ad hoc arbitration has a long history and is a common arbitration method in the international community, recognized by national laws and international conventions. Germany, the United States, Italy and other countries and regions have adopted the dual regulation model to clarify the validity of ad hoc arbitration under their national and regional arbitration systems.[13]

Ad hoc arbitration has a long history, and it plays an important role in the field of arbitration. Compared with institutional arbitration, ad hoc arbitration is marked by lower costs and procedural flexibility. It gives more respect to the autonomy of the parties, so it has been recognized by many international arbitration rules. For example, Article 1, paragraph 2, of the New York Convention also confirmed that the scope of the convention includes ad hoc arbitration by saying 'the term arbitral award shall include not only award made by the arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the parties have submitted.'[14] UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as 'the Model Law') also stipulates that 'arbitration means any arbitration, whether or not administered by a permanent arbitral institution.'[15] This indicates its recognition of both institutional and ad hoc arbitration.

However, the Arbitration Law of China has never adopted ad hoc arbitration.

Article 16 of the Arbitration Law of China stipulates that an arbitration agreement must contain the element of a designated arbitration commission. However, an ad hoc arbitration is not an arbitration administered by a permanent arbitration institution, so it cannot be recognized under Article 16 of the Arbitration Law, and the Chinese court will not recognize this agreement of ad hoc arbitration.[16]

[13] Yan Xingjian, 'Research on Extrateritorial Experience and Enlightenment of Ad Hoc Arbitration' (2017) Graduate School of Chinese Academy of Social Sciences.

[14] Article I.2 of Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[15] Article 2(a) of UNCITRAL Model Law on International Commercial Arbitration.

[16] Zhang Chunliang and others, 'Legal Practice of Foreign-related Commercial Arbitration in China' [2019] Xiamen University Press 410.

Apart from this, the Arbitration Law also obviously favors the exclusion of ad hoc arbitration in other provisions, such as the selection of arbitrators, the rules of arbitration procedure etc.[17]

Such negative attitudes are also reflected in judicial practice. On 18 November 2014, Ruifu Ship Management Co., LTD. and Shandong Zhenhong Energy Co., Ltd. signed the Fixture Note No. RFF1411. Article 23 of this Fixture Note clearly stated: Arbitration in Xiamen, Fujian, China. As a typical ad hoc arbitration clause, the validity of this clause has been rejected by the court. The court ruled as follows: According to Articles 16 and 18, an arbitration agreement shall contain a designated arbitration commission. If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void. In this case, the parties only agreed that the place of arbitration would be Xiamen, without agreeing on an Arbitration Institution, and there was no evidence that the parties had entered into an additional agreement on the choice of an Arbitration Institution. Therefore, the arbitration clause in this case was invalid.[18]

In the initial stages, ad hoc arbitration was not entirely compatible with the national conditions of China to a certain extent. The establishment of ad hoc arbitration is contingent upon the existence of a well-developed market economy. As a consequence of the advanced development of the market economy, it can only be established in a legal environment where the market credit system and social credit system are relatively perfected, specific rules have been formed in various fields of social and economic life, and some professionals with high credibility have emerged.[19] The legal foundation of the society in China was nascent, and the public continued to exhibit a strong inclination towards dependence on a specific institution or authority. It appears that

[17] Li Jianzhong, 'China's Attempt at Ad Hoc Arbitration: Institutional Dilemma and Realistic Path – From the Perspective of China's Pilot Free Trade Zone' (2020) Rule of Law Research, No. 2, 39.

[18] (2016) Lu 72 Min Te 466.

[19] Liu Maoliang, "'Ad hoc arbitration should be slowed down' (2005) 1 Beijing Arbitration.

domestic parties would encounter significant challenges in adapting to the practice of arbitration in the absence of institutional support. Conversely, ad hoc arbitration, due to its greater degree of arbitrariness and reliance on the self-determination of the arbitration tribunal, places higher demands on the professional level and professional ethics of the arbitrators. Given the immaturity of the arbitration market in China and the absence of a professional team of arbitrators, the hasty introduction of ad hoc arbitration is likely to result in a number of problems.[20]

Nevertheless, ad hoc arbitration is a dispute resolution method that has been long and widely recognized, particularly in the field of international commercial activities. In such circumstances, the flexibility and autonomy of ad hoc arbitration are more prominently advantageous compared to institutional arbitration. The laws of numerous countries and international treaties recognize this form of arbitration. As the only contracting state of the New York Convention that does not recognize ad hoc arbitration, China is obliged to recognize and enforce ad hoc arbitration awards in accordance with the provisions of the international convention. This is also the due meaning of Article 545 of the Supreme People's Court's Interpretation on the Application of the Civil Procedure Law of the People's Republic of China.[21] To deny the effectiveness of ad hoc arbitration, as in the aforementioned case, is manifestly unreasonable, contravenes international common practice, and may give rise to confusion in judicial practice. To illustrate, when the parties in dispute select China as the venue for arbitration (with Chinese law designated as the applicable law of the arbitration agreement) and consent to the use of ad hoc arbitration, the arbitration agreement is likely to be deemed invalid due to non-compliance with Article 16 of the Arbitration Law. However, an ad hoc arbitration award from another state party to the New York Convention may be recognized and enforced by the Chinese courts.

[20] Liu Xiaohong and Zhou Qi, 'Analysis of the advantages and disadvantages of the establishment of ad hoc arbitration in China and the choice of timing' (2012) 9 Nanjing Social Science.

[2121] Article 545 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China stipulates that if a party applies to a People's Court for recognition and enforcement of an arbitral award rendered by a temporary arbitral tribunal outside the territory of the People's Republic of China, the People's Court shall handle the award in accordance with Article 283 of the Civil Procedure Law. *See*, <www.court.gov.cn/fabu/xiangqing/353651.html> accessed 17 December 2024.

2.3. Interim measures suffer from many constraints

(1) The power to decide on interim measures rests exclusively with the courts

At present, there are three main legislative models for the attribution of the power to issue interim measures: (i) exercised only by the court; (ii) exercised only by the arbitral tribunal; and (iii) exercised by both the arbitral tribunal and the court.[22]

According to the provisions of China's current Arbitration Law, China adopts the first model, that is, only the court has the power to issue conservative relief. In addition, the parties shall apply directly to the relevant court for conservatory measure before arbitration, and the conservatory measure during arbitration shall be submitted by the arbitration commission to the relevant court. In other words, the arbitration commission and the arbitration tribunal have no power to award interim relief, but only play the role of transferring the relevant formalities to the court, and the power to award conservatory measures is still exercised by the court. And this kind of distribution of power has brought many challenges to arbitration practice. On the one hand, the legitimacy of arbitration is based on the autonomy of the parties. The choice of arbitration not only means that both parties have reached an agreement on the way of dispute settlement, but also reflects the trust of both parties that the arbitrator or the arbitral tribunal renders the necessary measures in support of arbitration. If the court exercises the power to decide on interim measures on behalf of the arbitral tribunal, it is essentially a violation of the autonomy of the parties. On the other hand, the high efficiency of arbitration is one of the main reasons for its wide popularity. However, this kind of system design for interim measures will precisely detract from the high efficiency of arbitration.

(2) Non-recognition and non-enforcement of interim measures issued by foreign courts

In practice, it is up to the domestic law to determine whether a foreign court will issue an interim measure that needs to be enforced extraterritorially, but if it issues interim measures, can the measures be recognized and enforced by Chinese courts? The answer is uncertain. Although according to Article 289 of the Civil Procedure Law of the People's Republic of China (hereinafter referred to as the Civil Procedure Law),

[22] Shi Yuping, 'Research on the Legal Issues of Interim Measures of International Commercial Arbitration' (2005) East China University of Political Science and Law.

China is required to recognize and enforce judgments and rulings of foreign courts in accordance with relevant treaties or the principle of reciprocity, there are no such relevant cases at present. The foreign party is faced with the dilemma that the interim measures applied for abroad may not be recognized and enforced by the Chinese side.

(3) Refuse to accept or permit applications for conservatory measures by the parties of overseas arbitration

As for overseas arbitration parties applying for an interim measure in Chinese courts, Chinese courts have not developed a uniform judicial practice. Some courts hold that overseas arbitration parties' applications for interim relief should not be accepted, the main reason being that there is no legal basis. For example, the claimant DONGWONF&B submitted an application for property preservation to the Shanghai No.1 Intermediate People's Court, stating that it and the respondent, Shanghai Lehan Commercial Co., Ltd., had filed an arbitration application to the Korean Commercial Arbitration Court for a contract dispute over the sale of goods, and the Korean Commercial Arbitration Court had officially accepted the application. In view of the respondent's failure to perform the contract as agreed after the delivery of the goods by the applicant, the claimant had every reason to believe that the respondent's solvency was in serious question. Therefore, the applicant applied for the preservation of the respondent's property. However, the Shanghai No.1 Intermediate People's Court held that, according to Article 272 of the Civil Procedure Law, the claimant did not apply for arbitration in China, so it ruled that the application should not be accepted.[23] It can be seen that, when the foreign party applies for conservatory measures in China, it faces the risk of its application not being accepted or approved.

[23] Civil Ruling No. 2, Shanghai First Intermediate, Initial Ruling, 2014 Civil Ruling No. 21, Shanghai Higher, Final Ruling, 2014.

3. Important Changes in the Foreign-Related Arbitration Regime in the Exposure Draft and the Impact on the Parties

3.1. Specifying the seat of arbitration

Article 27 of the Exposure Draft allows parties to specify the seat of arbitration within the arbitration agreement. If the parties do not designate a seat or if the agreement is unclear, the seat of arbitration defaults to the location of the administering arbitration institution. The arbitral award is then considered to have been made at this seat. The determination of the seat of arbitration shall not affect the agreement or choice of the parties or the arbitral tribunal to conduct arbitration activities such as collegiate deliberations and hearings at a suitable place different from the place of arbitration according to the circumstances of the case. This article establishes the concept of the place of arbitration at the legislative level, enabling parties to a foreign-related arbitration to confirm, on the basis of their autonomy, under which legal system the parties wish to conduct the arbitration, and to decide on the law applicable to the arbitration. As a result, the parties will be able to assess in advance the validity of the arbitration agreement, the nationality of the award, the jurisdiction for judicial review of the award and the validity of the award, thereby reducing the uncertainty of arbitration. Allowing the parties to foreign-related arbitration to agree on a specific place of arbitration, rather than arbitrarily using the seat of the arbitral institution as a criterion, is more in line with international practice and meets the needs of foreign-related parties. Article 27 of the Exposure Draft allows the parties to negotiate the place of arbitration on their own, in accordance with the principle of autonomy, which has made up for the legislative gap in the provisions on the place of arbitration in the Chinese Arbitration Law and has brought the Chinese arbitration law more in line with the international commercial arbitration law.

Incorporating and clarifying the concept of the place of arbitration makes China adopt the international standard of the seat of arbitration when determining the nationality of the award, that is, the nationality of the award is characterized based on the location of arbitration agreed upon by the parties. In practice, the phenomenon of recognition of the nationality of overseas arbitrations on the basis of the location of the arbitration institution and thus determining the determination of foreign nationality

will be eliminated, and foreign parties will not again face the adverse impact of recognition and enforcement of awards due to the difference in the determination of nationality in arbitration.

Secondly, the clarity of the place of arbitration also affects the question of judicial supervision, namely which national court can revoke an award or whether a domestic court has the power to revoke an award. Generally speaking, the court only has the power to revoke the arbitral award in their own country, but not in the case of overseas arbitrations. Article 27 of the Exposure Draft will effectively avoid the ambiguity of the nature of overseas arbitration institutions in China caused by the unclear concept of the seat of arbitration, thereby determining the judicial supervision power of Chinese courts over arbitration awards and providing foreign parties with a clear risk expectation and reducing uncertainties.

3.2. Allowing ad hoc arbitration

Over the past few years, a number of ad hoc arbitrations 'pilot projects' have been initiated in several specific regions of China. For instance, the 'Opinions on Providing Judicial Guarantees for the Construction of Pilot Free Trade Zones',[24] issued by the Supreme People's Court in 2016, for the first time allowed companies registered in pilot free trade zones to use ad hoc arbitration to resolve listing disputes, provided they meet the requirements of a specific location, specific arbitration rules and specific personnel. Later in 2017, the Zhuhai Arbitration Commission issued the 'Ad Hoc Arbitration Rules for the Hengqin Pilot Free Trade Zone',[25] which further improved the relevant provisions of the ad hoc arbitration regime and enhanced its applicability. On 27 December 2019, the Supreme People's Court published the 'Opinions of the Supreme People's Court on Provision Regarding the Judicial Services and Guarantees Provided by the People's Courts for the Construction of China (Shanghai) Pilot Free

[24] Article 9, para.3: 'If two enterprises registered in FTZ agree that relevant disputes shall be submitted to arbitration at a particular place in Chinese mainland, according to particular arbitration rules, or by particular personnel, the arbitration agreement may be determined as valid.' FaFa[2016] No. 34, *see* <www.chinacourt.org/law/detail/2016/12/id/149055.html> accessed 17 December 2024.

[25] *See* <www.zcia.pro/info/693.html> accessed 17 December 2024.

Trade Zone Lin-Gang Special Area'.[26] This document emphasized that the principle of the 'Three Specifics' of arbitration can also be adopted in the Shanghai FTZ, thereby demonstrating the court's continued support for ad hoc arbitration.

However, it is undeniable that the application circumstances and regional specificity of the above documents undermined the general applicability of ad hoc arbitration in China, and it is still unclear to what extent ad hoc arbitration cases outside the free trade zone can refer to its provisions. Similarly, the compatibility of the above-mentioned documents with the Arbitration Law is also controversial.[27] Currently, China's Arbitration Law does not recognize the legality of ad hoc arbitration. The aforementioned ad hoc arbitration rules, as formulated by the FTZ, are a legal adjustment of special administrative matters in accordance with the needs of reform, as authorized by Article 13 of the Legislative Law. However, their legal effect remains open to question. Therefore, the issue of the lack of legislative recognition of ad hoc arbitration remains unresolved in China. In contrast, the Exposure Draft aligns with Article 7[28] of the Model Law by discarding the requirement for an arbitration commission's appointment to validate arbitration agreements. Articles 91 and 92 of the Exposure Draft permit parties in foreign-related arbitrations to bring disputes before an ad hoc arbitration tribunal. This change allows parties to bypass traditional arbitration institutions, select their own arbitral tribunal, and set the arbitration rules, thus granting ad hoc arbitral awards the same legal standing as those from institutional arbitrations, reflecting the protection and respect for party autonomy. At the same time, new provisions are proposed on the composition of the arbitral tribunal and the withdrawal of arbitrators and other matters, providing necessary support and guarantee for the ad hoc arbitration system. This can be regarded as one of the most important achievements in the revision of the Arbitration Law. It can be seen that the Exposure

[26] FaFa[2019] No.31, *see* <http://gongbao.court.gov.cn/Details/523fed527b53ea1d4f4fe73b79b720.html> accessed 17 December 2024.

[27] See Zhang Shengcui and Fu Zhijun, 'Research on the Innovation of the Ad Hoc Arbitration System in China's Free Trade Zone' (2019) 2 Journal of Shanghai University of Finance and Economics.

[28] Article 7 (1) of the UNCITRAL Model Law on International Commercial Arbitration provides that arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Draft now not only paves the way for the legality of ad hoc arbitration in foreign-related commercial cases conducted by foreign parties in China, but also officially confirms the legality of ad hoc arbitration.

With the recognition and introduction of the ad hoc arbitration system, China's arbitration system aligned with the international community, eliminated the differences in the arbitration procedure for foreign parties, reduced the arbitration cost and risks, and greatly promoted the development of China's international arbitration center and enhanced China's arbitration international competitiveness. At the same time, both the New York Convention and the Model Law recognize the system of ad hoc arbitration, in which the parties freely choose to refer disputes to an ad hoc arbitral tribunal, regardless of the type of case, and follow the principle of party autonomy to the greatest extent. China's recognition of ad hoc arbitration is also the respect for further autonomy for the foreign parties. Furthermore, the advantages of the ad hoc arbitration system itself will bring many benefits to foreign parties.[29] China's recognition of ad hoc arbitration means that foreign parties will have a more convenient, efficient and feasible choice of arbitration method. Unlike traditional institution arbitration, the more flexible provisions on limitation and procedure in ad hoc arbitration have the potential to reduce the burden on foreign parties and save time and costs. The convenience and efficiency of ad hoc arbitration is particularly evident in instances where a speedy award is required to prevent further losses for the parties involved.

Secondly, the establishment of the ad hoc arbitration system also provides foreign parties with a confidentiality guarantee of trade secrets. In most commercial trade arbitration disputes, the parties are usually reluctant to disclose the relevant information of the case due to various considerations. While in institutional arbitration, the arbitral documents are frequently presented in a written format, which leads to the possibility of information leakage. Compared with this, ad hoc arbitration can be agreed by the parties in a private way, to better protect the arbitration information of the parties. In addition, in terms of costs, the parties can save a lot by choosing ad hoc arbitration. In the practice of international arbitration, there is often such a situation

[29] Gordon Blanke, 'Institutional versus Ad Hoc Arbitration: A European Perspective' (2008) 9 ERA Forum 275 <https://doi.org/10.1007/s12027-008-0055-6> accessed 17 December 2024.

where the subject amount of commercial arbitration disputes is very high, but the legal relationship involved, that is, the focus of the dispute between the two parties, is very clear and not complicated. For such arbitration cases, ad hoc arbitration does not need too much workload input, and the arbitration can even be completed within one day. If, in this case, the parties have to settle the dispute through institutional arbitration, it is obviously unreasonable, according to the relevant provisions, to charge expensive arbitration fees according to the proportion of the subject amount of the arbitration. For the parties, the cost of institutional arbitration is too high, which will discourage the parties from arbitration to a certain extent, thus affecting the legitimacy of the entire arbitration system in resolving transnational commercial disputes.

In conclusion, the ad hoc arbitration system is recognized and established in China, which has great practical significance to the foreign parties. On the one hand, it temporarily offers another choice for foreign parties, providing a more convenient dispute settlement mechanism, and giving foreign parties a more friendly arbitration environment in terms of cost, confidentiality and flexibility. On the other hand, the ad hoc arbitration system means that China's arbitration system is gradually in line with the international arbitration system, preventing foreign parties from facing the contradiction between the Chinese arbitration system and the international arbitration system in the entire international arbitration system, thus suffering additional losses. At the same time, the ad hoc arbitration system in China is faced with increasing commercial disputes year by year, under the circumstances of urgent judicial resources, it would also relieve some of the pressure on the judicial system as a whole.

3.3. Improvement of interim measures

According to the current provisions of the Arbitration Law, interim measures only include property preservation under Article 28 and evidence preservation under Article 46. The two kinds of preservation must be submitted to the People's Court by the arbitration tribunal upon the application of the parties. The Exposure Draft reflects the great importance attached to ad hoc measures and sets up a separate chapter to regulate them. It can be seen from articles 43 to 49 that the Exposure Draft for Comments opens up the types of interim measures, including not only property preservation and evidence preservation, but also conduct preservation (similar to the

concept of injunction in the common law system) and other necessary interim measures. The procedure for filing preservation is more reasonable – according to the time when the preservation is filed, it is divided into pre-arbitration preservation and post-arbitration preservation. An application for interim relief before arbitration shall be filed directly by the parties to the court, and an application for preservation after filing the arbitration, the parties shall have the right to choose to submit it to the people's court or to the arbitral tribunal.

In addition, Article 49 confirms that interim measures may be taken by emergency arbitrators pending the establishment of the arbitration tribunal. The inclusion of these clauses provides further protection for parties participating in arbitration proceedings in China.

The changes to the relevant provisions on interim measures in the Exposure Draft have greatly shaken the phenomenon that China has prioritized litigation over arbitration. The parties can directly apply for necessary interim measures through arbitration, instead of leaving the arbitral proceedings to make a request to the court, which enhances the authority and systematization of arbitration, and at the same time brings great convenience to the foreign parties in the application procedure. It avoids the situation in which one party intends to delay the other party's injunction or seizure request in the arbitration procedure, and the other party can only seek the aid of the national court, which greatly improves the efficiency of the arbitration procedure.

The Model Law already provided for the enforceability of interim measures in 2006, and the Exposure Draft gives the arbitral tribunal the power to review preservation measures (except pre-litigation preservation), and reflects the concept of integrating with the mature international arbitration system and practice in many aspects, allowing parties to take other preservation measures in addition to evidence preservation and property preservation, broadening the scope of preservation measures, which is undoubtedly a major measure to integrate with the international arbitration system, reflecting the practical exploration of China's arbitration, and absorbing useful experience from international rules.

4. Prospects for the revision of the Arbitration Law

Currently, nations worldwide are working to develop advanced, scientifically-based arbitration systems for international commercial disputes to enhance their competitiveness. Arbitration is favored for its respect for party autonomy, finality of decisions, high efficiency, low cost, and convenience in transnational dispute resolution, making it the preferred method for resolving international disputes. Therefore, optimizing the arbitration mechanism and developing a cutting-edge arbitration system are of great significance to China's further opening up in the context of economic globalization.

The Exposure Draft is only the first step in amending the Arbitration Law. It has incorporated the modifications to international arbitration regulations and procedures that have occurred in recent years in a more comprehensive manner, implementing numerous fundamental alterations and endeavors to align with international arbitration standards. It is evident, however, that there is still scope for further debate and analysis regarding future developments in China's arbitration law.

CARLOS IVÁN MORENO MACHADO*

CONSTITUTIONAL COURT AND "TUTELA" LEGAL ACTION[1] IN COLOMBIA

ABSTRACT. *The historical background of the control of constitutionality in Colombia, the 1991 Political Constitution and the proximity of individuals and judges through the tutela action, gave life to a well-defined constitutional jurisdiction, with virtues and defects, which endanger the stability of decisions and the security of res judicata. This panorama, whose protagonist is the Constitutional Court, with its tutela rulings on the fundamental right*[2] *to due process, together with the effects of its decisions, constitute the real key to deciphering the real autonomy and independence of the other High Courts, or, in other words, their practical subordination to the constitutional court, with a full nomophilactic duty.*

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[1] Translator's note. In Colombia, tutela is the name of an injunction that was added to the 1991 Constitution in order to make it easier for people to access the justice system. It then allows the people to seek immediate protection of their constitutional rights (medical care, education, among other rights otherwise considered civil rights other countries such as the United States, for example). Tutela can be used when someone's rights are violated by a public authority or private individual and can be employed at any time without legal representation. In sum, the *tutela* action is what in the U.S. we would label as a *bill of rights legal action* (if it were possible as described above in the case of Colombia).

[2] Translator's note. Modern theory, mainly of German origin, has opted for the term 'fundamental rights' when it comes to codify human rights, i.e., enshrined as positive law by the Constitution. In Colombia, a "fundamental right" may then be considered something alike a right stemming from the United States "Bill of Rights", for there is, explicitly, a Chapter labelled "On Fundamental Rights" in the Constitution and is commonly referred to as the "catalogue of fundamental rights".

1. Introduction

The modern prominence of the Colombian Constitutional Court, when it comes to the *tutela* action against judicial decisions, invites legal scholars to examine the complexities of *res judicata*, the effect of judgments, and the true nomophilactic duty.

In order to delve deeper into the proposed topic, this research paper examines the historical background of the control of constitutionality in Colombia, thereby classifying it by periods and placing the Political Constitution of 1991 at the centre. In this way, it identifies what the control of constitutionality was like before and after this *magna carta*, with the creation of the Constitutional Court, which has within its list of tasks, the eventual review of tutela actions.

After explaining the birth of the Constitutional Court in Colombia, research then brings its analysis down to earth, delving into the tutela action for the protection of the fundamental right to due process, the complexities regarding *res judicata*, and the effects of its rulings. This opens the door to discovery, that is, who truly carries out a nomophilactic duty.

The methodological components of this paper are marked by the history of the control of constitutionality in Colombia, constitutional and legal norms, jurisprudence, and national and foreign doctrinal contributions which allow us to answer the question, with real and unmasked support, as to whether the Constitutional Court currently carries out a nomophilactic duty.

2. Historical background on the control of constitutionality in Colombia

In Colombia, the birth of the Constitutional Court dates back to 1991. The constituent assembly was aware, since 1990, of the need to create a jurisdictional body in charge of ensuring the prevalence of the Political Constitution. However, in order to understand the birth of the Constitutional Court, it is useful to understand the background of the control of the validity of laws in this country. For this reason, a brief and precise historical reference will be made to the control of constitutionality from

the period after independence (1810) to the period prior to the Political Constitution of 1991.

2.A. Period before the 1991 Political Constitution

Explaining the existence of a Constitutional Court and the exercise of control requires differentiating historic concepts related to political control, mixed control, and legal control.[3] Likewise, distinguishing events within the historical account.

2.A.i. Political Control of Constitutionality from 1811 to 1853

At first, after the cry for independence in 1810, the control of the constitutionality of laws, between 1811 and 1853, was based on political control.

The Cundinamarca Constitution of 1811, which followed the orientation of the French Constitution of 1789, stipulated in Section 9 that it was the Senate that had the duty of suspending, until a new legislature, a law to which the executive had objected on the grounds of unconstitutionality.[4] This was also enshrined in other constitutions, such as that of Tunja in 1811 (Chapter II), Cartagena in 1812 (Section 20) and Antioquia in 1815 (Section 10).

Subsequently, in 1830, with the new Political Constitution of Colombia, Section 110 provided that the body in charge of administering justice, the High Court, would be responsible for hearing the hesitations or uncertainties of the High Courts on the understanding and application of a given law, which allowed Congress to be consulted, but through the Executive Branch of public power.[5]

In 1843, with the Neo Grenadian Political Constitution, Section 169 established that any uncertainty about the true understanding of any of its provisions could be resolved by a special and express law. To this end, Congress was provided with the power to interpret laws or legislative acts.

[3] Cf. Luz Zoraida Rozo Barragán, 'Origen y evolución del régimen de control constitucional en Colombia' (1997) 3 *Revista Derecho del Estado*, 45.

[4] Cf. María Teresa Garcés Lloreda and José María Velasco Guerrero, 'Ponencia sobre control de constitucionalidad, Corte Suprema de Justicia y Consejo de Estado (1991), 18. Retrieved from: <https://babel.banrepcultural.org/digital/collection/p17054coll28/id/266>. Last accessed: 11 July 2024.

[5] *Ibid.*

2.A.ii. Political-Judicial Control, Political-Legal Control or Control of a Mixed Nature from 1853 to 1886

Initially, the Constitution of 1853 was pioneer in establishing judicial control of regulations that were considered unconstitutional, and for this reason, in paragraph 6 of Section 42, this duty is conferred to the Supreme Court, entrusting it with decisions over nullity claims of municipal ordinances issued contrary to the provisions of the Constitution and the laws.

In 1858, the Constitution of the Grenadian Confederation established for the first time[6] judicial control over the laws of the States. To this end, according to Section 50, the Supreme Court was vested with a special power to suspend the acts of the State legislatures if such acts were contrary to the Constitution, or if they were contrary to the laws of the confederation. However, the decision as to the validity or invalidity of such acts was to be taken exclusively by the Senate. However, Section 51 of also established that the Court would examine queries from judges and from courts on the application of national laws to later send them to Congress with its opinion, thereby indicating how to deliberate.

Five years later, 1863, Federal Constitution provided, Section 72, on the one hand, for the power of the Federal Supreme Court to suspend unconstitutional laws of legislators, and on the other hand, for the power of the Senate to annul such laws. Should a national law be in contravention of individual rights or state sovereignty, such a law could be nullified by a majority of the state legislatures, but it was for the Court to declare when a particular law was nullified by a majority of the legislatures.

2.A.iii. Exclusively Legal or Judicial Review from 1886 to 1991

Section 151 of the 1886 Constitution established an exclusive jurisdictional clause regarding control of constitutionality. It exclusively attributed the Supreme Court of Justice jurisdiction over the constitutionality of bills having been questioned by the President, in which case they were to be considered unconstitutional; and also jurisdiction over validity or nullity of departmental ordinances that had been suspended by the Government or denounced before the courts by the interested parties, on the

[6] *Ibid.*

grounds that they were harmful to civil rights.

Subsequently, in accordance with Section 2 of Law 2 of 1904, the control of constitutionality over the Decrees issued during a State of Siege was established. This control was entrusted to the Supreme Court of Justice, which was to be activated at the request of any citizen and required a prior hearing by the Attorney General.

As for constitutional control over regulatory decrees, there was discussion as to who possessed said jurisdiction, the Supreme Court of Justice according to Legislative Act 3 of 1910 (Section 41), or the Council of State, taking into account that the latter could be formed under provisions of the 1886 Constitution. Said possibility, however, was abolished in 1905 and reestablished in 1914. This discussion came to an end thanks to Legislative Act 1 of 1945 (Sections 41 and 42), which granted the Council of State with jurisdiction, and would then be the judicial body responsible for hearing complaints and ruling on the constitutionality or unconstitutionality of decrees issued by the President of the Republic, and for provisionally suspending administrative acts.[7]

In 1960, under Section 1 of Legislative Act 1, Congress was granted the power to submit State of Siege Decrees to the Supreme Court of Justice, so that this High Court could decide on their constitutionality.

Eight years later, in 1968, with Legislative Act 1, Section 71, the Constitutional Chamber of the Supreme Court of Justice was created, which would be made up of experts in Public Law and was to give its opinion on constitutional matters to be decided by the Full Chamber. In this sense, the acts issued by the Government in development of the State of Economic and Social Emergency or public calamity would be subject to constitutionality control.

Additionally, in the paragraphs of Sections 42 and 43 of Legislative Act 1 of 1968, the Supreme Court of Justice was assigned the automatic or informal review of Decrees issued during a State of Siege.

As can be seen, prior to the issuance of the Constitution of Colombia, the task

[7] Alberto Montaña Plata, *Fundamentos de Derecho administrative* (Universidad Externado de Colombia, 2010) 265: "In 1945 (Legislative Act 1) a new reform was carried out (in this case structural to the Council of State) whereby the appointment of the councillors was modified and some duties were attributed to the ministers, but mainly jurisdiction over the unconstitutionality of the decrees issued by the President over which the Supreme Court of Justice did not have jurisdiction, and the capacity to provisionally suspend administrative acts were attributed to it".

of judging the constitutionality of laws was in the hands of the Supreme Court of Justice, which, in various reforms and periods of history, records the antecedent of a Chamber specialised in Public Law. Evolution prior to the 1991 Constitution is summarised by Diego Younes Moreno as follows:

In the past, this responsibility was entrusted to the Supreme Court of Justice, but let us remember how, in the constitutional reform of 1968, a chamber specialised in public law was created within the Court to prepare projects for decision by the Full Chamber. Later, in the 1979 reform, this Chamber was increased to eight judges. Since the 1991 Constitution, the protection of the integrity of the Political Charter has been entrusted to the Constitutional Court.[8]

Now, let us analyse how to consolidate an iron control of constitutionality entrusted to a negative legislator, i.e. a Constitutional Court.

2.B. Period after the 1991 Political Constitution

Section 241 of the Colombian Constitution entrusts the Constitutional Court with the power of safeguarding both the integrity and the supremacy of the Constitution. That is, mainly, deciding over claims of unconstitutionality brought by citizens, thereby carrying out prior control of constitutionality of statutory laws, and reviewing judicial decisions made by others on *tutelas*, whereby the protection of fundamental rights is sought.

The action of unconstitutionality can be presented by any citizen due to the fact that this action constitutes one of the exceptions to the right of nomination or *ius postulandi* in Colombia. An action of unconstitutionality is defined as follows:

The public action of unconstitutionality is a procedural mechanism by which a legal norm of lower than constitutional rank is sought to be declared unconstitutional because it contradicts the Constitution, and thus such a provision is expelled from the legal system.

This action of unconstitutionality can be brought by any citizen, either by himself or through someone acting as his proxy or on his behalf. In the latter case, if he grants power of attorney for another to act as his proxy, this power of attorney must

[8] Diego Younes Moreno, *Derecho constitucional colombiano* (Legis, 2014) 376.

also meet the requirements of the law, otherwise the person who claims to be the representative of another cannot be recognised as such, as he has not accredited his capacity as proxy, and in this sense the action of unconstitutionality must be inadmissible.[9]

3. Constitutional jurisdiction

Constitutional justice dispensed by the Constitutional Court is based on the duty to ensure the prevalence of the Constitution of Colombia, when another norm is incompatible with it, and likewise, ensuring the integrity of the *magna carta* by protecting the fundamental rights of individuals. To this effect, recalling the provisions of Section 4, which provide that in any case of incompatibility between a norm and the Constitution, the latter prevails. This is the backbone of the philosophical foundation, the normative basis and the reason for the existence of constitutional jurisdiction.[10]

Based on the above, the Constitutional Court was created as the body located at the apex of the constitutional jurisdiction,[11] pursuant to Chapter 4 of Title VIII of the Constitution, Sections 239 to 245. It should be noted that this constitutional "jurisdiction" includes also all other judges of the Republic, as all judges in Colombia have the duty to apply the Constitution, but, in addition, a large number of them have jurisdiction over the *tutela* action, in accordance with Decree 2591 (1991) and Decree 1983 (2017).

The nature of the Constitutional Court in Colombia goes beyond the original Kelsenian duty of the negative legislator, because, beyond declaring the

[9] Carlos Iván Moreno Machado, 'Right to nomination in Colombia, legal representatives, and termination of power in the General Procedural Code' (2022) Revista de la Facultad de Derecho y Ciencias Políticas, 46.

[10] In this sense, Carlos Bernal Pulido, *El derecho de los derechos* (Universidad Externado de Colombia, 2008) 29: "Control of constitutionality of laws constitutes the very jurisdiction of the Constitutional Court, that is, to establish whether a given law is compatible with the Constitution. It is a guarantee of the Constitution, but above all, of fundamental rights. It is a counter-majoritarian mechanism that aims to prevent the freedoms of individuals (minorities, above all) from being left to the whims of daily politics. In Colombia, the constitutionality control is exercised by the procedural means described in Section 241, and by the exception of unconstitutionality, Section 4".

[11] For general ideas on Constitutional jurisdiction, see Robert Alexy, 'Tres escritos sobre los derechos fundamentales y la teoría de los principios' (2003) Serie de teoría jurídica y filosofía del derecho, 41-49.

unconstitutionality of a norm that contradicts the Constitution, it has other dutys related to prior control of constitutionality, such as those regarding *fundamental* rights. That being said, it carries out duties that have given rise to the name of another contentious scenario that we have baptised as "constitutional litigation".

4. Composition of the Constitutional Court

With regard to the composition of the Constitutional Court, Section 44 of Law 270 of 1996 provides that it shall be composed of nine (9) magistrates, elected by the Senate of the Republic. This election is made from three (3) shortlists presented by the President of the Republic, three (3) shortlists presented by the Supreme Court of Justice and three (3) shortlists presented by the Council of State. The Senate of the Republic shall elect one magistrate for each slate, thereby ensuring that the composition of the Constitutional Court is diverse in terms of the specialities of its members.

The duration of the individual judgeship, or rather, the term for which a magistrate of the Constitutional Court is elected, is eight (8) years. However, in the event of an absolute absence among the magistrates that make up the Court, the body in charge of the corresponding shortlist, from which the incumbent was elected, must once again present a shortlist for the Senate of the Republic to make the corresponding election. To this end, the Constitutional Court shall communicate the vacancy to the nominating body so that, within a period of fifteen (15) days, it may submit the list of three candidates to the Senate of the Republic. The latter, once it has received the list of three candidates, has a period of thirty (30) days from the date of filing of the list of three candidates, or from the beginning of the ordinary period of sessions in the event of a recess in Congress.

It is to be noted that while the position of magistrate of the Constitutional Court is being filled, either because of an absolute or temporary absence of its members, the Constitutional Court will directly fill the vacancy.

5. Constitutional Court Rules of Procedure

Upon the appearance of the Constitution, the Constitutional Court began to set forth its own rules of procedure under Paragraph 12 of Section 241 of the Constitution. This duty not only applies to the Constitutional Court, but also to the other High Courts.[12]

Currently, the original Rules of Procedure are those adopted by Agreement 01 of 1992, recodified, in turn, by Agreement 05 of 1992 (also, amended and added to by Agreements 01 of 1995, 01 of 1996, 01 of 1997, 01 of 1999, 01 of 2000, 01 of 2001, 01 of 2004, 01 of 2007, 02 of 2007, 01 of 2008, 01 of 2010, 01 of 2015, 02 of 2015 and 01 of 2020).

Said regulation of the Court constitutes an administrative act as an independent regulation or *praeter legem*, whose existence and issuance is authorised by the constituent. Therefore, it does not depend on a previous authorising law, so that it regulates particular matters that have not been recognised by law. They are specific matters, which, as one moves down from the top to the bottom of the system, are found to be self-regulated in numerous scenarios.[13] It is not an executive or *secundum legem* regulation that requires the existence of a prior law or that is issued by the likes of a preexisting law in order to develop, complement, or otherwise execute it.

[12] This is recognised in the Council of State, Third Section, Judgement of 14 August 2008, File: 11001032600019990001201(16230), C.P.: Mauricio Fajardo Gómez, referring to the autonomous constitutional regulations issued by constitutional bodies not located in the Executive Branch, but in the Judicial Branch, such as the Supreme Court of Justice, the Council of State, the Constitutional Court, and the Superior Council of the Judiciary, in accordance with the norms of the Constitution, Paragraph 9 of Section 235, Paragraph 6 of Section 237, Paragraph 12 of Section 241, and Paragraph 3 of Section 257, respectively. On the nature of these regulations: "In line with what has just been stated, both national jurisprudence and the most authoritative scholars on the matter have coincided in pointing out that the word regulation refers to the normative set of rules that generate or regulate general, impersonal, or abstract legal situations, issued by those State bodies that do not carry out a legislative duty, but which, on the contrary, are constitutionally assigned, primarily, jurisdictional or administrative duties (whether they are bodies located within the Executive Branch of Public Power, or autonomous and independent bodies within the structure of the three 'classic branches': legislative, executive and judicial).

[13] Norberto Bobbio, *Teoría general del derecho* (Temis, 2016) 149: "The same relationship exists between constitutional norms and ordinary laws, which can sometimes be considered as the executive regulations of the principled orientations contained in the Constitution. As one moves up the hierarchy, the rules become fewer and more generic; conversely, if one moves down, the rules become more numerous and specific".

The rules of procedure of the Constitutional Court, when deliberating over specific situations not regulated by law, focus on the meetings of the Constitutional Court, sessions, quorum, majorities, the presidency and vice presidency of the Constitutional Court, the duties of the president and vice president, the duties of the Full Chamber of the Constitutional Court, its seat, its sessions, the non-attendance of judges at sessions, the appointment, requirements and dutys of auxiliary judges, the General Secretariat and their duties, the Administrative Coordination, the Systems Area, the Press Office, the Work and Distribution Programme, the addition of claims and accumulation of proceedings, the citizen's appeal, the selection process and possible review of *tutela* judgements, decrees and evidence, public hearings and concepts, rectifiable formal defects, decisions on excuses to appear before Congress, the electoral powers of the Constitutional Court, the participation of the president of the Constitutional Court in the election of the National Registrar of the Civil Status, the participation of the president of the Constitutional Court in the appointment of the manager of the judicial branch, decisions regarding internal dutying, impediments and recusals, and miscellaneous provisions regarding the duties of employees, working hours, and public service, calls for attention, prohibitions of judges, officials and employees of the Constitutional Court, applications for nullity, clarifications, appointment, and possession of co-judges, vehicles assigned to judges, reduction of distribution to the president of the Constitutional Court, working days according to the rules, reform of the rules, the Complaints and Grievances Committee, and transitory provisions related to the validity of the rules of procedure.

6. Tutela [bill of rights legal] action

This legal action is a public action of constitutional rank brought for the protection of *fundamental* rights of individuals, whether naturally or legally recognised, pursuant to Section 86 of the Political Constitution of Colombia, Decree 2591 of 1991 and Decree 1983 of 2017. However, as it is a public action to protect the constitutional guarantees of the individual, it requires that the protective essence or condition of the *fundamental* right is interpreted and expanded thereby taking into account the human

rights[14] enshrined in the American Convention on Human Rights or in other international treaties ratified by Colombia.

It is an action that can be brought directly by the citizen, devised by the constituent to materialise a direct relationship between the citizen and the Constitution.[15] Therefore, constitutes another exception to the right of nomination or *ius postulandi*,[16] which does not prevent this action from being brought through a legal representative, if needed.

It is now appropriate to study two variables of such a legal action that will be differentiated in this paper. First, the *tutela* legal action for the protection of *fundamental* rights other than due process. Second, the *tutela* action when the protection of the *fundamental* right to due process is invoked.

6.A. Protection of fundamental rights other than due process

Generally speaking, the *tutela* legal action claims the protection of each and every one of the fundamental rights, either those enshrined in the Political Constitution

[14] For an explanation of this concept, see Luis Villar Borda, 'Derechos humanos: responsabilidad y multiculturalismo' (2004) Serie de teoría jurídica y filosofía del derecho, 46-47: "Faced with the countless problems that arise from the versatility of the concept of human rights and the diversity of definitions that have been tried and tested around it, whether as an ethical-philosophical principle or a legal norm of international law, modern theory, mainly of German origin, has opted for the term 'fundamental rights' when it comes to codify human rights, i.e., enshrined as positive law by the Constitution. Most of the new constitutions have followed this trend, including Colombia's 1991 Constitution".

[15] Manuel Fernand Quinche Ramírez, *La acción de tutela* (Temis, 2017) 22-23: "The tutela action, like no other, favours the direct contact of the citizen with the administration of justice, insofar as it does not require the mediation of a "scholar" or attorney, as is the case with the actions provided for in the codes and laws. In this sense, and in accordance with Section 86 of the Charter, the action can be brought by 'anyone', i.e. by minors, persons with some degree of disability, legal persons, unofficial agents, public defenders, representatives of associations, etc. This feature is very important because, in addition to trying to ensure that the action belongs more to the people than to the lawyers, it encourages changes in the understanding of judicial practice and in the relationship between the citizen and his or her Constitution".

[16] Moreno Machado (n. 9) 44: "This action can be brought by any citizen, without the need for a lawyer. However, in those cases in which a citizen grants power of attorney to a lawyer, the power must comply with each and every one of the requirements of the law; in the event that a tutela action is initiated and the power of attorney does not comply with the requirements, then this constitutional action must be inadmissible or decided as such, because the person acting as the legal representative of the plaintiff has not accredited his or her capacity as an attorney-at-fact for this purpose. Likewise, it is necessary to indicate that a power of attorney granted to process an action other than the tutela action is not valid for filing this action".

or in statutory laws, or those contemplated in the American Convention on Human Rights or in other international treaties ratified by Colombia.

Generally, the *tutela* action must comply with two requirements: ***immediacy*** [i.e. timing], and ***subsidiarity*** [i.e. no other mechanisms available]. **The first requirement of *immediacy*** refers to the fact that the tutela action should only be filed when there is a current violation of fundamental rights, or also, when there is a real risk or specific threat of violation of fundamental rights. It should focus on a current and not a past violation, due to the fact that its purpose is to avoid irremediable damage, imminent damage, and therefore, it has a sense of urgency, which is why the seriousness of the facts does not allow waiting in time, otherwise, the violation of *fundamental rights* will be realised, and damage will be suffered. **The second requirement of *subsidiarity*** refers to the unavailability of other ordinary procedural actions or mechanisms, or that, if these actions or mechanisms do exist, these mechanisms are inoperative or ineffective to achieve immediate protection of fundamental rights. The requirement of subsidiarity which, in principle and not absolutely, imposes certain limits on the constitutional judge, such as the fact that the tutela action cannot be used to recognise economic obligations or compensation.

The observance of the requirement of subsidiarity and the prohibition to recognise financial obligations or compensation, I reiterate, is in principle a limit. A limit that ceases to be present, and therefore is not absolute, if the claimant has no other judicial mechanism or, if in the case of having one, it is not effective and the gravity of the circumstances warrant for an immediate filing of a *tutela* legal action, because in such circumstances, the tutela judge may recognise financial obligations or compensation. This occurs, for example, with the recognition and payment of a pension, as decided by the Constitutional Court in *Ruling T421 of 2013, M. P.: Gabriel Eduardo Mendoza Martelo*, a case in which the plaintiff, who had worked as a soldier in the Armed Forces and had lost his right eye, was granted a disability pension, protecting his *fundamental* rights to life dignity, health, social security, and the minimum wage. The same happened in the case decided by the Constitutional Court in *Ruling T-282 of 2016, M. P.: Gloria Stella Ortiz Delgado*, whereby an insurer was ordered to pay a life insurance debtor within forty-eight (48) hours, protecting the *fundamental* rights to due process in a relationship between individuals (insured and insurer) and the right to the minimum wage.

On the other hand, when the protection of the *fundamental* right to due process is sought, the tutela action must comply with general requirements indicated above as well as with specific grounds indicated below.

6.B. Protection of the fundamental right to due process

The tutela action can also be brought exceptionally against judicial decisions (orders or sentences) of judges or against arbitration awards issued by arbitration tribunals to obtain and achieve the protection of the fundamental right to due process under Section 29 of the Constitution, this being an undeniable achievement of the constitutionalisation of procedural guarantees in the 20th century[17] for any type of process (e.g. civil, commercial, family, administrative, contentious-administrative, criminal, disciplinary, labour).

The filing of a tutela action against judicial rulings or arbitration awards must meet, on the one hand, some general requirements, and on the other, specific grounds. The general requirements that must be met are the following: i) constitutional relevance; ii) subsidiarity; iii) immediacy; iv) defect or irregularity with a decisive effect on the ruling; v) identification of the facts that violated fundamental rights, the identification of such rights, and that these have been alleged timely; and vi) that, in principle, it is not a tutela action against a tutela ruling (which is all the more exceptional in order to annul a fraudulent tutela ruling[18]). Likewise, specific grounds must be met: i) material or substantial defect; ii) factual defect; iii) procedural defect; iv) decision without reasoning; v) disregard of precedent; vi) organic defect; vii) induced error; and/or viii)

[17] For a comprehensive study on how procedural guarantees are intertwined in constitutional law, Angelo Dondi, Vicenzo Ansanelli and Paolo Comoglio, *Procesos civiles en evolución. Una perspectiva comparada* (Marcial Pons, 2017) 64-65: "The notion of principle, referring to the process, is compared to that of *garanzia*, referring to the constitutional context or, in any case, to the fundamental laws of each legal system. In truth, the constitutionalisation of the basic fundamental guarantees constitutes a reality for a large part of the Western civil procedural systems or those of close Western derivation, such as the Latin American ones. This circumstance has characterised the second half of the 20th century as a distinctive sign of a vision of the civil process and as emblematic of its substantial democratisation".

[18] For the sake of understanding the exceptional applicability of the tutela action against tutela judgments, analyse Ruling SU - 627 of 2015, Constitutional Court, Full Chamber, M. P.: Mauricio González Cuervo and Ruling T - 073 of 2019, M. P.: Carlos Bernal Pulido.

direct violation of the Constitution.[19]

To conclude this section, it is necessary to indicate that, in order to comply with the requirement of immediacy, the tutela action against a judicial decision or arbitration award is brought within a reasonable period of time, six (6) months, starting from the notification or execution of the judicial decision or arbitration award against which it is filed. This is not a time limit, nor is it a legal term, but a "jurisprudential" term, but it must be complied with, unless there is a reason justifying the plaintiff's inactivity.[20]

6.B.i. Judgment

Res judicata is the phenomenon of stability and legal immutability of the decisions handed down by the judges, that is, they prevent a new ruling regarding cause, object, and subjects involved to come about. For this reason, *res judicata*, once its meaning is known,[21] is analysed from two angles: i) from the process, with *res judicata* being a guarantee for the parties; and ii) from the judicial branch of the public power, as a determining factor for its effectiveness (i.e. fulfilment of justice administration).

When a *tutela* is brought against a judicial decision or an arbitration award, and as a consequence the decision under attack is rendered ineffective, a major problem arises pertaining the stability of the decision provided by the judge or the court of the jurisdiction and speciality in question. Because *res judicatas* exist in civil, commercial, family, agrarian, contentious-administrative, arbitration, labour or criminal matters, a constitutional *res judicata* in matters of *tutela* would render the former ineffective

[19] For a detailed examination of the specific grounds for tutela action against judicial rulings, see Quinche Ramírez (n. 15).

[20] This has been indicated by the Constitutional Court in multiple pronouncements, for example, in Ruling T - 466 of 2022, M. P.: Jorge Enrique Ibáñez Najar. Also, Council of State, Fourth Section, Judgment of 8 June 2016, File: 11001031500020150148001, C.P.: Hugo Fernando Bastidas.

[21] To delve deeper into the millenary phenomenon of *res judicata*, its history, concept, requirements, and complexities, study Carlos Iván Moreno Machado, 'Cosa juzgada: entre el Código General del Proceso y la Constitución Política', in Ramiro Bejarano Guzmán and Diego Fernando Rojas (ed.), *Lecciones constitucionales del Código General del Proceso. Tomo I* (Universidad Externado de Colombia, 2022) 111: "Res judicata can be defined as the legal stability of the decisions issued by the jurisdiction that prevents a new ruling regarding cause, object, and subjects involved in the decision, because should a new pronouncement come to be issued, it could be useless. If talking about terms, there are multiple that can be used to fill in the meaning of res judicata of a judicial decision, such as: inalterability, binding, immutability, unchangeability, firmness, enforceability, definitiveness, stability, unassailability, among others that exist or that may exist in the future".

thereby. That is to say, a previous and known ruling in, say, civil matters, considered to be standard is now left in doubt and gives way to said *res judicata* provided by that judge in fundamental rights matters regarding due process to be rendered no longer effective. In addition to the fact that, once a judgment or an order has been handed down and has become *res judicata* in its respective speciality, the *tutela* action can be brought in legitimate pursuit of the objective of protecting the fundamental right to due process. However, on the contrary, in some cases it happens that the tutela action is brought with the illegitimate and twisted aim of preventing the application of the definitive effects of a ruling by placing obstacles in the way of its full compliance.

Despite the challenges that can be filed against the judgments deliberating over *tutelas*, as indicated in Sections 31 and 32 of Decree 2591 of 1991, all judgments that resolve tutela actions must be sent to the Constitutional Court for possible review, under Paragraph 9 of Section 241 of the Constitution and Clause 2 of Section 31 and Section 33 of Decree 2591 (1991). This indicates that, should the Constitutional Court decide not to review, it becomes *res judicata*, whereas if it decides to review it, judgment issued by the Constitutional Court shall be the one considered *res judicata*, which definitively closes the study of the violation.

With regard to the body of constitutional jurisdiction, provision of the *norma normamarum* in Paragraph 1 of Section 243 establishes that, like judgments on constitutionality, tutela judgments set forth by Constitutional Court are *res judicata*, which obviously means that the controversy concerning the violation of fundamental rights cannot be subject to re-examination or decision, either by the Constitutional Court or by any other collegiate or single judge.

The central complexity of the tutela action against judicial decisions for the protection of the fundamental right to due process lies in a panorama full of uncertainty regarding the definitive closure of the trial and its verdict. This action, although it is true that it is a democratic mechanism that serves and will serve to remedy injustices and legal errors, it is equally irrefutable that it creates insecurity and uneasiness, mainly for the parties involved in the litigation decided and which is reactivated to be reviewed in the tutela venue, as well as for their representatives, and also for the judges and arbitrators who issued the decisions of instance in their respective speciality or in the tutela grades or scenarios before the file is sent to the Constitutional Court for possible review.

The injustices and legal errors that have been remedied through tutela actions against judicial rulings do not exclude the errors of the High Courts. For example, the Constitutional Court, in rendering ineffective ruling provided by the Council of State in a case of direct compensation in medical civil liability, Sent*ence SU - 155 of 2023, M.P.: Diana Fajardo Rivera*. In this pronouncement, the Constitutional Court, after finding a factual defect due to improper evidentiary assessment whereby the medical history was analysed without observing testimonies and a delay overseen as well as the responsibility of carrying out an abdominal ultrasound, among other factors, highlighted:

The approach above is arbitrary as to the study on the delay in the practice of the abdominal ultrasound and its implications. What created questions about the care provided by the E.S.E. Hospital San Jorge de Pereira was not whether the abdominal ultrasound should have been performed before the bilateral thoracostomy, as both procedures had been ordered at the same time, or whether it was not possible to carry out the abdominal ultrasound – due to emphysema – and a CAT scan had been ordered quickly; but whether the delay of more than 17 hours in carrying out the ultrasound scan from the time it was ordered constituted negligence on the part of the defendant that could give rise to liability, especially when the abdominal ultrasound or CT scan were the appropriate means of diagnosis to establish the true situation of the patient. This is the issue raised by the plaintiffs based on the patient's medical history and the testimonies referred to above, and which the Judgment of 25 February 2021 misses.

The Constitutional Court has also corrected in tutela judgments the errors of the Civil Cassation Chamber of the Supreme Court of Justice, pronouncement *SU - 573 of 2017, M. P.: Antonio José Lizarazo Ocampo*, wherein it is declared that there was procedural defect due to manifest ritual excess, substantive defect, and factual defect. The Court examined the lack of acknowledgement of the applicant's status as heir and her corresponding right to obtain part of an inheritance due to a failure to assess an ecclesiastical certificate, a baptismal certificate, and a public deed, which reliably accredited the acknowledgement of paternity. These documents, moreover, had not been found to be false. The Constitutional Court then stated that *"the objective legal truth was consciously renounced despite the facts proven"*, emphasising that judicial autonomy is not a licence to circumvent the rule of law.

For these reasons, while I do think being possible to file a tutela action against judicial decisions issued by judges, tribunals, or High Courts may yield fruits, I also express my disagreement with this being so against arbitral awards (private or state), as anything emanating from the will of the parties to an arbitration agreement conducted, therefore, before judges, should not return to said servants. In other words, what leaves the jurisdictional apparatus should not return to it, except if it returns because the parties to the agreements so chose, as happens when the appeal for annulment of the arbitral award is filed. For this reason, it is not logical that, in addition to the existence of an appeal for annulment of arbitral awards (exclusively for errors *in procedendo* according to the exhaustive grounds contained in Section 41 of Law 1563 of 2012) and an appeal for review (only for grounds established in Section 355 of the General Code of Procedure), the parties, their representatives and the arbitrators have to go through the tunnel of uncertainty created by the filing of a *tutela* against the award that settled the dispute, to which the parties themselves agreed.

This has been a visible cause of two current difficulties, on the one hand, the increase in litigation, and on the other hand, the lack of definition of the trial, as it is not clear when the litigation should end, that is, which is the final decision.

Understanding the approach described herein, what should be done in Colombia is to broaden or extend the grounds for the extraordinary appeal for annulment of arbitral awards, these being either substantial or procedural grounds. This was proposed to the drafting commission of the arbitration law, but the commission did not accept it, which resulted in more *tutela* actions for protection against arbitral awards for substantial or procedural errors.[22]

[22] Ramiro Bejarano Guzmán, *Procesos declarativos, arbitrales y ejecutivos* (Temis, 2023) 470-471: "[…] the extraordinary appeal for annulment imposes on the appellant the burden of asserting the specific grounds provided by law. Such grounds seek to remedy a procedural defect, i.e., in annulment proceedings no controversies can be raised that attack the substantive aspects of the appealed award, but only procedural defects. In our opinion, this restriction in the scope of the grounds for annulment has been detrimental and has multiplied litigiousness. In effect, given that grounds for annulment appeals that allow the substantive aspects of an award to be challenged are prohibited, this has ended up being done by means of tutela, which, therefore, is today a reiterated instrument for challenging said rulings. For this reason, within the commission that prepared the draft law on the arbitration statute, we proposed, unsuccessfully, that a ground for annulment similar to the first ground for cassation, at least that of direct violation of substantive law, be enshrined as a ground for annulment, a proposal on which no one joined us, as the majority considered that this would delay the process. Today it is clear that the failure to authorise a ground

Continuing to allude to the difficulties, it is entirely useful to note the following:

[…] But the issue of the tutela action against arbitral awards does not end here, so I will allow myself to waste some ink to highlight an inconsistency in the judicial system in relation to this legal action against arbitral awards, a matter that involves the phenomenon of res judicata. Let us start with this example: in a private arbitration proceeding, between Z and Y, an arbitral award was rendered condemning Y, for which the latter filed an appeal for annulment against the award, obviously on the grounds that it incurred in procedural errors. The Civil Chamber of the Court of the place wherein the arbitration tribunal operated declared the award valid. However, subject Y argues that the award did not apply the substantive rules that regulate the matter, for which reason he files a tutela action supporting the generic grounds for proceeding and invoking the specific ground of material or substantial defect, or other; but the **jurisdiction of the tutela judge is only limited to whether the arbitral award incurred in the defects indicated**. If his conclusion is negative, he will stay or maintain the award. On the other hand, if its conclusion is affirmative, it must exclude said defect or defects, rendering the award without ineffective thereby, but it can never resolve the controversy that was submitted to the arbitrators by means of the legal business of the arbitration agreement (arbitration clause or compromise); said question of substance cannot be the object of constitutional justice,[23] for the plain and simple reason that it

that allows awards to be challenged on substantive grounds is the reason that justifies the filing and processing of tutela actions, which have notoriously congested the judicial offices, and incidentally exposed the awards to the uncertainties of the tutela actions". An aspect on which Professor Bejarano has insisted, including in previous editions of his work, such as Ramiro Bejarano Guzmán, *Procesos declarativos, arbitrales y ejecutivos* (Temis, 2017) 445.

[23] I refer to the decision of the Constitutional Court in Ruling SU - 556 of 2016, M.P.: María Victoria Calle Correa, in the process of the tutela action filed by Banco de la República against the Third Section - Subsection C- of the Council of State and the Arbitration Court convened to resolve the differences between Banco de la República, on the one hand, and Seguros Generales Suramericana S. A. and Allianz Seguros S.A. On this case, the Full Chamber of the Constitutional Court protected the fundamental right to due process of Banco de la República and annulled the arbitration award issued by the Court of Arbitration. A. and Allianz Seguros S.A. In this case, the Full Chamber of the Constitutional Court protected the fundamental right to due process of Banco de la República and annulled the arbitration award issued on 12 November 2014 by the Arbitration Tribunal convened. In its considerations, it held: "[...] in this case, the Court deliberates over a tutela against an award and a judgment of annulment is produced thereby, which is why its jurisdiction is limited to deciding whether they were flawed and, if so, to exclude them. The definition of the scope of the protection and other issues initially submitted to litigation are not the object of constitutional justice. This does not prevent it from declaring that, given the claims, the decisions to revoke the tutela

cannot go beyond the will of the parties, who sought that the controversy be resolved by arbitrators, not by judges. This will surely lead to a new arbitration tribunal having to be convened, a new arbitration process being processed, and another arbitration award being rendered, in respect of which – again and again – an appeal for annulment or an action for protection may be filed, as it is a new award.

This constitutes an additional reason for which I reiterate my disagreement with the tutela action against arbitral awards. The sum of these complexities surrounding the tutela action are what today in Colombia lead us to maintain that the res judicata in any specific matter (including constitutional res judicata over tutelas whereby ruling is passed by a judge or court other than the Constitutional Court), is going through moments of uncertainty and it is not easy to determine when the judicial debate will end. For this reason, the legal community proposes solutions for the tutela legal action against judicial rulings.[24]

Having studied *res judicata*, with its complexities, sharp aspects, and doctrinal proposals for resolving inconveniences,[25] let us now examine the legal effects of the Constitutional Court's rulings on *tutelas*.

6.C. Effects of tutela judgments from the Constitutional Court

The *tutela* judgements passed by the Constitutional Court are known by the acronyms "T" which stands for *tutela*, and "SU", which stands for unified ruling [from the Spanish "sentencia unificada"], both with binding *inter partes* effects, that is, for the parties to the dispute, as they apply and only affect the procedural ends formed in the process of the legal action. These acronyms differ from "C" rulings, which are those of constitutionality and therefore have *erga omnes* effects, that is, for everyone, as they deal with the stay or expulsion of a law.

judgment of 26 November 2015 and to vacate the arbitration award of 12 November 2014 do not exhaust the jurisdiction to settle the differences between the parties to the legal transaction that gave rise to the arbitration dispute".

[24] Moreno Machado (n. 21).

[25] The analysis of jurist Rodrigo Uprimny, "Una sola corte?", in our national newspaper *El Espectador*, 7 April 2018, cannot escape this essay: "What would a single court solve? It is not clear. The "choque de trenes" [conflicts between branches]? There is a much simpler solution, which is to clarify the cases in which the Constitutional Court, by *tutela*, can review the rulings of other high courts, as is done in Germany, where that issue is practically resolved". Retrieved from: <https://www.elespectador.com/opinion/una-sola-corte-columna-748683/>.

Normative foresight regarding the effects of the tutela "T" and the "SU" judgments passed by the Court is found in Section 36 of Decree 2591 of 1991 and in Paragraph 2 of Section 48 of Law 270 of 1996. These two Sections precisely establish the *inter partes* effects of these decisions. The Constitutional Court, however, expressing the mission entrusted to it by the constituent assembly in Section 241 of the Constitution, developed two mechanisms to **broaden the effects** of its decisions in **tutela-matter jurisdiction**, which are the effects *inter pares*[26] and the effects *inter comunis*,[27] which are applied exceptionally and when the Constitutional Court itself so indicates in the operative part of the judgment in order to preserve the integrity of the higher order or the constitutional norm. The *inter pares* effects indicate that the Constitutional Court's decision must be applied to similar cases without exception, and on the other hand, the *inter comunis* effects indicate that the Constitutional Court's decision will benefit third parties who, although they are not parties to the *tutela*, are part of a group of affected persons with common factual circumstances with the plaintiffs in the case decided upon.

It is these *inter pares* and *inter comunis* effects of the Constitutional Court's tutela judgements that have led the scholars to ask themselves the following question: Is there a nomophilactic duty of the Constitutional Court? This question will be answered below.

7. Nomophilactic duty of the Constitutional Court?

The nomophilactic duty is that which is divided, on the one hand, into the surveillance and observance of the law, and on the other hand, into the uniform interpretation of it.[28] Its meaning (whose etymological root derives from the Greek word

[26] Constitutional Court, Order 071 of 2001, M. P.: Manuel José Cepeda Espinosa; Sentencia T - 697 of 2011, M. P.: Humberto Antonio Sierra Porto; and Sentencia T - 100 of 2017, M. P.: Alberto Rojas Ríos.

[27] Constitutional Court, Ruling SU - 1023 of 2001, M. P.: Jaime Córdoba Triviño; Ruling SU - 587 of 2016, M. P.: Luis Guillermo Guerrero Pérez.

[28] In relation to this dual nature of the nomophilactic duty, Bruno Nicola Sassani, *Lineamenti del processo civile italiano. Impugnazioni, esecuzione forzata, procedimenti speciali, arbitrato*, Vol. II (Giuffrè, 2021) 107: "Today we tend to speak generically of the nomophilactic duty in relation to both purposes, but the origin of the term observes

nomophýlax) is composed of the words *nómos*, which means law, and *phýlaxis*, which means vigilance: surveillance of the norm or protection of the norm.

Although it is not the only duty of the Supreme Court of Justice,[29] the nomophylactic duty falls upon it and constitutes one of the main purposes of the cassation appeal, the natural remedy through which we hear its judgments. The word cassation comes from the verb "cass", which means to break, annihilate, or destroy, as in breaking, annihilating, destroying, or breaking down the decision of a high court of a judicial district, thus achieving the other aim of cassation, which is the uniformity of jurisprudence.[30]

Section 333 of the General Code of Procedure (on purposes of the extraordinary appeal of cassation) provides:

Goals of the Cassation Appeal. The purpose of the extraordinary appeal of cassation is to defend the unity and integrity of the legal system, ensure the effectiveness of the international instruments signed by Colombia in domestic law, protect constitutional rights, control the legitimacy of the judgements, unify national jurisprudence, and redress the grievances of the parties due to the ruling against which they appealed.[31]

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the former rather than the latter. The current use of the term seems to favour the prospective ('normative' one might say) duty of the Courts' pronouncements over the duty of control and repression of the violation of the law".

[29] Humberto Murcia Ballén, *Civil Cassation* (Ibáñez, 2005) 77, is right when points out: "However, the nomophilaquia, that is, the protection of the law, is not the only purpose attributed to cassation: this remedy was also established to achieve jurisprudential unity. No less important for monitoring the application of the rule of law is the need to unify its interpretation, to such an extent that, in many cases, this becomes the obligatory path to arrive at the rule of law. It is necessary, in order to honour the principle of equality of the parties before the law, to give certainty to the interpretation that judges make of it, as a means to ensure that rights are not violated when different solutions are simultaneously applied to identical situations on the basis of the same legal texts".

[30] In this sense, the German scholars on civil procedure or *Zivilprozessrecht*, Burkhard Hess and Othmar Jauernig, *Manual de derecho procesal civil* (Marcial Pons, 2015) 430-431: "The *guarantee of the uniformity of case law* is in any case the *fundamental duty* of cassation and, consequently, the most relevant ground for admission in practice among those provided for in § 543 ZPO. Essentially only the legal aspect of the judgement under appeal is examined, and by a court on which all appeals are concentrated. In order to ensure uniformity of case law also within the court of cassation itself, measures have been taken to ensure that all organs of the BGH (the sections) answer the same questions of law in the same way (*see infra* § 74, marg. 19)".

[31] From this rule, six (6) purposes of the cassation appeal in Colombia can be extracted, five of which are of a public nature and one, that of "redressing the grievances of the parties", is of a private nature.

From the reading of this norm and the daily work of the Supreme Court of Justice resolving cassation appeals[32] it is evident that this high court is the one that historically carries out a nomophilactic duty. However, when the Constitutional Court, in *tutela* proceedings, issues "T" or "SU" judgements and assigns them *inter pares* or *inter comunis* effects, it is undeniable that it is too carrying out a nomophilactic duty.

Even in the case of "SU" tutela rulings, the Constitutional Court unifies internal positions and sees that lower-level judges apply them. Additionally, when the "SU" judgment is passed, it comes from the Full Chamber, reason for which this type of judgment becomes a decision with a broad and nondifferentiated effect.[33] Observed in practice and in theory, this is no different from the exercise of a nomophilactic duty, because when the Constitutional Court ensures the integrity of the Constitution,[34] it

[32] Important is the synthetic and classic explanation of Carlo Lessona, *Procedura civile* (Società Editrice Libraria, 1932) 339: "[...] the institute of cassation guarantees only the correct application of the law for the fact that was submitted to the judge of merit. The Court of Cassation is precisely instituted to maintain the exact observance of the laws [...], hearing appeals against judgments handed down at the appellate level in civil and commercial matters".

[33] For a reflection on the extension of jurisdiction in the extension of the effects of the tutela judgment and a 'non-express norm', Pablo Moreno Cruz, 'Efectos inter comunis: una acción de tutela colectiva y obligatoria', in Ramiro Bejarano Guzmán, Pablo Moreno Cruz and Marcela Rodríguez Mejía (ed.), *Aspectos procesales de la acción de tutela* (Universidad Externado de Colombia, 2017) 74-76: "The jurisprudential creation of the non-express rule that extends the jurisdiction of the Court as to extend the effects of the judgment to absent subjects is done through a customary reasoning of the Court. [...] Finally, on the basis of this non-express rule (which I have wanted to express in these terms, but which in reality has had various formulations, more or less, of this tenor) the Court, through subsequent interpretative exercises, proceeds to consolidate its content in different decisions, thus opening up space for the different forms or techniques of extending the effects of the judgement to absent subjects, in light of the complexity deriving from the pluri-subjective violation of fundamental rights".

[34] In this sense, H.F. Arévalo, 'Jurisdicción constitucional, sus competencias en el ámbito legal colombiano', in Eduardo Andrés Velandia Canosa (ed.), *Derecho Procesal Constitucional. Litigio ante la Jurisdicción Constitucional* (Universidad La Gran Colombia, 2019) 436, who refers to the nomophylactic duty of the Constitutional Court, but goes beyond its meaning, stating: "The nomophylactic duty includes the defence of the legal norm, both constitutional and legal. The former are called upon to fulfil this duty with the high courts, including the Constitutional Court, in terms of superior norms with their prevailing and binding nature in relation to other norms. With regard to the legal norm, this unifying duty of criteria, interpretation and normative scope in terms of the factual assumption that contains it and the legal consequence that it entails, is exercised by both the Supreme Court and the Council of State. Now, we consider that the Superior Council of the Judiciary has the same duty with regard to the regulations governing the disciplinary duty. The Public Prosecutor's Office, the Office of the Attorney General of the Nation, has an extensive scope in disciplinary matters concerning public officials". Terminological imprecision, together with other references made by the author H. F. Arévalo, which I obviously do not agree with, as it ignores the birth of the nomophylactic duty and what it means to monitor the law in order to preserve legal integrity and

also ensures the integrity of the law and the uniformity of jurisprudence, especially when it annuls and renders ineffective a judgement of another high court or judge with a different subject-matter jurisdiction. The Constitutional Court, in numerous judgements, replaces other closing bodies, thereby undermining both judicial independence and the supremacy of other high courts, sometimes causing what we know as "choque de trenes" [clash of judicial organisms].[35]

If we were to assert that all the high courts in Colombia (Supreme Court of Justice, Council of State, Superior Council of the Judiciary and Constitutional Court) fulfil a nomophilactic duty, we would produce a careless and somewhat bittersweet statement insofar as we understand that the nomophilactic duty, because it focuses on monitoring the law to ensure its integrity, seeks in the same way to unify jurisprudence. Therefore, although these courts create jurisprudence, only one of them closes the debate and interpretation, namely, the Constitutional Court, as it renders ineffective *tutela* judgements passed by the Supreme Court of Justice, the Council of State, and

the uniformity of jurisprudence. Although there are high courts, each one at the top of its jurisdiction, it cannot be said that they all carry out a nomophylactic duty, especially when the Constitutional Court in tutela proceedings has rendered the judgments of the other high courts ineffective. This is not to say that the Public Prosecutor's Office carries out a nomophylactic duty, since the decisions it issues are not judgements, but administrative acts, which can be challenged through the means of control of nullity and restoration of the law before the administrative jurisdiction, and in this case, if it is a matter of nomophylactics, it is exercised by the Council of State in the matter, and in the last instance, by the Constitutional Court.

[35] See Iván Daniel Otero Suárez, *La migración de las ideas constitucionales en la jurisprudencia de la Corte Constitucional colombiana* (Universidad Externado de Colombia, 2023) 294, when analysing the point of judicial independence and the office of the Constitutional Court. The author does not hesitate to state: "On the other hand, it is considered that in order for there to be greater respect for the principles of judicial autonomy and independence within the Judicial Branch itself, and legal security in the application of the law, as well as the unification of judicial interpretations, the Constitutional Court should use the DDV in all the judgements of constitutionality it makes, with the aim of not constructing a hypothetical norm based on the analysis of isolated precedents. This would avoid so-called 'choque de trenes' [conflicts] between high courts and make it possible to know for certain whether judges are interpreting contrary to the Constitution. While it is true that guaranteeing the effective application of the Constitution includes, under certain parameters, verifying that judges and other authorities interpret and apply laws harmoniously with higher prescriptions, what can be observed in case law analysed is that the Court uses a large part of its discretion to apply the DDV and identify the existing law in each specific case. This is without taking into account what has already been referred to regarding the application of the principle of interpretation in accordance with the law. In this sense, the constitutional judge, as a result of the control of constitutionality over existing law, has also become the highest interpreter of the law, without consideration for the other judges and their jurisdictions".

the Higher Council of the Judiciary. Therefore, if it is held that all the high courts carry out a nomophilactic duty, it is necessary to affirm too that the Constitutional Court is the only one that, protecting the fundamental right to due process, annuls the validity and effects of judgements passed by other courts, which does not happen the other way around, nor among the other judicial bodies.

8. Conclusions

8.1. The history of constitutional control in Colombia can be classified into two main periods: before and after the 1991 Constitution, grouping together the periods that embrace a historical evolution and later demanded the existence of a Constitutional Court.

8.2. The appearance on stage of the constitutional jurisdiction with the 1991 Constitution places the Constitutional Court at the cusp of all courts, and so carries out constitutional control and can hear claims regarding *tutela* judgements produced by other judges, that is, review them.

8.3. The protection of *fundamental* rights in Colombia has two forms. One can file a *tutela* to claim the protection of fundamental rights different from the right to due process and also to claim the protection of the fundamental right to due process. Both are clearly differentiated by general requirements and specific grounds.

8.4. The tutela action against judicial rulings creates instability as for *res judicata*, putting this legal figure at risk, particularly when it comes to *tutela* actions against arbitration awards. This spreads uncertainty, thereby stimulating the appearance of proposals to improve it, among other vicissitudes of the justice system.

8.5. The judgments of the Constitutional Court, in the case of a constitutionality trial, have *erga omnes* effects, whereas the effects of tutela judgments are *inter partes*. Through case law, however, this organ can assign *inter pares* or *inter comunis* effects to its tutela decisions in order to extend the consequences of its rulings and measures regarding the protection of *fundamental rights* to other parties that were not parties to the dispute from which they originated.

8.6. The reality of the Colombian Constitutional Court's decisions in the

processing of *tutela* actions against judicial decisions teaches us, from a practical and theoretical perspective, that this organ fully carries out what has been known for a long time as a nomophilactic duty, displacing the Supreme Court of Justice thereby, and similarly, the Council of State and the Higher Council of the Judiciary each time it renders their decisions null and void.

MICHAŁ SZUDROWICZ*

SYMBOLISM IN JUDICIAL ARCHITECTURE

ABSTRACT. *The symbols that surround us from many sides play an important role in our perceptionof reality. Experiencing the world through different senses allows us to use a variety of means to manifest specific values or principles. Symbolism understood in this way also finds its place in legal sciences. Its most visible and substantial form is the symbolism hidden in judicial architecture. This paper is an analysis of the changing symbolism in judicial architecture over the centuries, taking into account current trends and indications in the design of court houses. Through a historical view ofthe evolution of symbolism, contemporary symbols and their relevance to the administration of justice have been interpreted, making it possible to identify specific symbols present in judicial architecture.*

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1. Introduction

Symbolism was a direction in poetry and fine arts, formed in France and Belgium in the second half of the 19th century, assuming that the world cognized by the senses (material) is an illusion hiding the real, ideal world, which cannot be interpreted by reason.[1] Concepts from the real world cannot be described by ordinary language, only a symbol can do so. But are symbols only reserved for poetry, literature, or art?[2] Don't we also find them in other sciences, such as law? Can we not also find in the 'legal field' illusions hiding the real, ideal world, which cannot be interpreted by the senses and reason? To find answers to the above questions, one would first need to consider a more representative physical representation of law, in which symbolism can be freely smuggled, which is judicial architecture.

However, it is crucial to ask yourself also another question, from the law perspective: does the symbolism present in judicial architecture, understood as the place in which justice is rendered, have a purpose in the process of delivering justice, and to what extent?[3] Is there any place at all for symbolism in court architecture, or is utilitarianism and the usefulness of specific pieces of court equipment for the effective administration of justice more important? At the same time, it would seem that symbolism in modern court architecture may be somewhat forgotten, or overlooked – but is this really the case?

Lawyers, especially academics, both from civil and common law jurisdictions, have recognized the communicative importance of the physical manifestations of justice.[4] To put it another way, it is significantly important *where* justice is delivered, as it communicates in and of itself certain messages to its audience.

[1] Karl Ruhrberg and others, *Art of the 20th Century* (Taschen 2005) 22-23.

[2] About symbols of power and their influence on politics and trust, see Gustavo Zagrebelsky, *Simboli al potere. Politica, fiducia, speranza* (Einaudi 2012); see also Frank Covey, *The symbols of justice*, (The Student Lawyer Journal 1959) 14-17.

[3] Fabien Gelinas and others,(, *Judicial Architecture and Rituals;* in: *Foundations of Civil Justice* (Springer Link 2015) 2.

[4] *Ibid*.

Judicial architecture addresses many issues, including court openness, building trust in the judiciary, or ensuring equal rights of the parties to the proceedings but judicial architecture is also about symbolism, which is contained in the architectural elements of courthouses. Many of these symbols date back to ancient and medieval times, when they also served important functions in the administration of justice. At that time, however, they took different forms than they do today – so it is reasonable to analyze the symbolism contained in court architecture over the years – to find ancient symbols in modern judicial architecture.

This paper is an attempt to present selected symbols found in modern court architecture, detailing their history and the transformations they have undergone over time. In order to do so, it will be necessary to show the historical visions of the judiciary and courthouses, as well as to look at modern trends in contemporary judicial architecture. The author would like to mention only that these will not be obvious symbols such as scales or judges' robes – following the example of the 19th-century symbolists, an analysis of less obvious symbols will be made.[5] These symbols are still present in courts` architecture and offer an opportunity to combine it with the basic principles of judicial proceedings.

[5] See notable publications in the field of judicial architecture by Judith Resnik – Judith Resnik, Dennis E Curtis and Allison A Tait, 'Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere' in Richard Sherwin and Anne Wagner (eds), *Law, Culture & Visual Studies* (Springer Publishing Company 2013) 515; Judith Resnik and Dennis E Curtis, 'Representing Justice: From Renaissance Iconography to Twenty-First Century Courthouses' (2007) 151 Proc Am Philos Soc 139.
About judicial architecture see also: Association française pour l'histoire de la Justice, *La Justice en ses temples. Regards sur l'architecture judiciaire en France* (Errance 1992); Georges Martyn, 'Painted exempla iustitiae in the Southern Netherlands' in Reiner Schulze (ed), *Symbolische Kommunikation voor Gericht in der Frühen Neuzeit* (Duncker & Humblot 2006) 335-56.
About Lady Justice and her attributes see: Adriano Prosperi, *Giustizia bendata. Percorsi storici di un'immagine* (Einaudi 2008); as well as: Bradly Knox, 'The Visual Rhetoric of Lady Justice: Understanding Jurisprudence Through "Metonymic Tokens"' (2014) 6 Inq J <www.inquiriesjournal.com/articles/896/the-visual-rhetoric-of-lady-justice-understanding-jurisprudence-through-metonymic-tokens> accessed 17 December 2024.
About judges' robes see: Georges Watt, *Dress, Law and naked truth: a cultural study of fashion and form* (Bloomsbury 2013).

2. From outdoor to indoor: historical perspective on courts and symbols

Nowadays we usually speak about court buildings or court houses, but courts have not always been located in enclosed, indoor spaces. In most European cultures the administration of justice is inextricably linked to court buildings. However, in fact, the emergence of the first court buildings in Europe dates to the late Middle Ages and beginning of Renaissance.[6] This does not mean, of course, that there were no courts earlier – there were, but they were located first in the open air and then in premises that were not necessarily intended for the administration of justice.

2.1. Circles

In ancient Greece, courts were located in open spaces, usually taking the physical form of stone circles at which sat a council of senior citizens of Athens. A similar vision of courts in early medieval England was advocated by H. Bellot, who argued that the countless stone circles scattered across the British Isles served not only for tribal gatherings and religious worship, but also for the administration of justice.[7] Some even believe that the famous Stonehenge, which in Cornish dialect is called 'Merddin Embys' (meaning: the fence of judgment) was also the place where the tribal court sat.[8] In various parts of ancient and medieval Europe, tribes gathered and sat in circles to agree on important matters for their future, and – to dispense justice (sitting in a circle does not remain incidental).

People from different parts of medieval Europe were eager to take advantage of the terrain when choosing a place where a tribal court could sit. Germanic peoples, but also the Slavs, took hills that were clearly visible from afar, as the place of deliberation.[9] This gave justice a special dimension – metaphorically lofty and important. Local tribes

[6] Fabien Gelinas and others, *Foundations of Civil Justice. Toward a Value-Based Framework for Reform* (Springer Link 2015) 8

[7] Hugh Bellot, 'Some early courts and the English Bar' (1922) 38 LQ Rev 168.

[8] Linda Mulcahy, *Legal architecture: Justice, due process and the place of the law* (Routledge 2011) 15.

[9] Witold Hensel, *Polska Starożytna* (Ossolineum 1988) 460.

needed to climb up those hills, and from the top of them the whole area was usually visible, which also gave them a metaphysical significance. Architectural elegance or even solemnity is still the basic feature of judicial proceedings.

2.2. Trees

Trees were another important element of nature willingly used in the choice of court site. King Louis IX, who ruled France in the 13th century, always passed his judgments under a tree.[10] Germanic, Slavic, and Anglo-Saxon peoples did the same, choosing a hill or the largest and oldest tree in the area as their court site, depending on the terrain. It might sound surprising, but in some places in the United States, courts were still sitting under trees in 1841.[11] In medieval Europe, trees, or more precisely, oaks, were personifications of various gods. For the Scandinavians, the oak was a personification of Thor, for the Germans the oak was associated with the god Donar, while the Slavs worshipped oaks in the name of the god Perun.[12] Therefore, no one should be surprised by the choice of these trees as the site of courts in various areas of medieval Europe. Some also note that many modern English courthouses often feature wooden paneling on the walls, which is identified with the English people's historical attachment to the tree as the place under which justice is administered.[13] Nowadays, in democratic states based on the rule of law, judgments are announced not in the name of gods, but in nations. Courts do not deliver justice in their own names.

2.3. From outdoor space…

The outdoor courts had also another very important aspect – the space, which

[10] Clare Graham. 'The history of law court architecture in England and Wales; The institutionalization of the law' in SAVE Britain's Heritage (ed), *Silence in court: The future of the UK's historic law courts*, (SAVE Britain's Heritage 2004) 36.

[11] Mulcahy (n 8) 17.

[12] See: Hugh Fife, *Warriors and Guardians: Native Highland Trees* (Agryll Publishing 1994).

[13] Robert Jacob, 'The historical development of courthouse architecture / La formazione storica dell'architectura giudiziaria' (1995) 14 Zodiac 30.

was not restricted by a roof or walls, allowed to create real ceremonies or spectacles. Anyone could come and watch the trial with their own eyes, without fear of running out of space. A large gathering of people (the audience), often surrounded by magical nature (trees, hills) gave these ancient courts a metaphysical dimension. The formation of a circle of people around a tree or at the top of a hill was also of considerable importance – in a circle everyone is equal, everyone can see each other, and there is complete transparency. The presence of circles in the modern judiciary is still quite popular. In some courts, courtrooms are designed so that the parties and the judge sit at round tables or on a circle plan.[14] Visibility and openness were and still are basic features for judicial proceedings.

The concept of justice without walls is still an important issue among lawyers. These days however, no one is thinking about courts on hills or under trees, but about virtual courts, which do not necessarily have to be located in buildings.[15] Mohr also notes that, in fact, the judicial process has never been and cannot be constrained by any walls, because even a witness who testifies while standing before a court in a courtroom directs his thoughts to the past and the relevant events of the case, far beyond the walls of the court building.[16] This metaphorical vision of a court without limitations seems even fitter when we think about the broadcasting of hearings on the Internet and the phenomenon of open justice. The live streaming of court hearings has made it possible for the people to become fully involved in the judicial process, without having to leave their own homes. Usually, the OJ Simpson trial[17] is readily invoked on this occasion, but in recent months we have also experienced an analogous phenomenon in the United States – the case of Johnny Depp and Amber Heard focused the attention of millions

[14] The author will refer to this issue later in the paper.

[15] Piątek Wojciech, 'A right to a public hearing in times of emergency – online or physical?' (2023) 14(2) Int'l J Courts Admin 6.

[16] Richard Mohr, 'In between power and procedure: where the court meets the public sphere' (1999)1 JOSCCI.

[17] Julia Zorthian, 'How the O.J. Simpson Verdict Changed the Way We All Watch TV' (Time, 2 October 2015) <time.com/4059067/oj-simpson-verdict/> accessed 3 February 2024.

of people around the world, and the viewing of live broadcasts of their trial broke records on the Internet. Unintentionally, modern courts are referring to their medieval and ancient predecessors, reaching out to the public and creating a space without walls.

2.4. … To indoor space

Judicial spaces were evolving over a long period of time.[18] The first courts under trees evolved into courts in enclosed spaces, which, however, were dedicated to various social activities. Over time, court buildings began to be built to fit the pattern of 'temples of justice'. In the late Middle Ages, churches, the interiors of castles or town squares were used as places for administering justice.[19] During the Renaissance, the first buildings dedicated exclusively to the judiciary were already being erected.[20] At the same time, there was a marked shift in the previous openness and accessibility of the courts. Closed court buildings did not fit in with the surrounding architecture, nor were they connected in any way to other spheres of public life, and in fact remained closed and inaccessible to the outside world. Watching a court trial was something extraordinary that most people could not experience. Justice began to recede and fence off with symbols incomprehensible to the people.

An interesting analysis of the transition from outdoor courts to indoor courts was made by Linda Mulcahy, who pointed out the strong relationship of this change with the written text and the rise of legal awareness:

'For some writers the enclosure of courts within buildings reflects broader shifts in attitudes towards adjudication and the nature of the authority on which adjudicators sought to draw. Graham (2004) has argued that the trend towards holding courts indoors (...) reflected the increasing association of legal procedure with the written word. (...) Douzinas and Warrington (1991) draw attention to the move from speech to writ-

[18] Resnik, Curtis and Tait (n 5).

[19] Gelinas and others (n 6) 7.

[20] One of the oldest courthouses in UK, The Central Criminal Court of England and Wales, commonly referred to as the Old Bailey after the street on which it stands, was built in 1585; Another example from France: justice-halle built in 1535, in the city of La Ferte'-Bernard. On first courthouses built during the Renaissance period see: Gelinas and others (n 6).

ing in the English trial prompted by the slow transfer of religion from the public to the private sphere and the growth of literacy. Such transformations were by no means rapid but the growth of a "legal science" with its emphasis on the legal text rather than divine revelation has been traced back to the twelfth century when the first law schools were established specifically for the purposes of studying ancient manuscripts. From a position in which it was expected that the will of God would reveal itself, through for instance an ordeal by fire, Goodrich (1987) argues that in time it was the text which revealed the wisdom of the deity or their disciples and was treated as a sacred source. It can be surmised that once it was the text which was seen to contain a complete and integrated body of doctrine from which all deductions could be made (…) natural elements became less important in the process of adjudication and a new type of priest emerged in the form of the lawyer.'[21]

It is difficult to disagree with the above ideas – there is certainly a clear analogy between the spread of written text (and reading skills) and the move of courts from open spaces to buildings.[22] Just as compelling is the argument about the emergence of the first law schools, which were located in enclosed spaces – usually at the universities. In the past, activities such as reading or writing were better performed in enclosed spaces, i.e. in buildings. Nowadays, however, due to the use of technology, text communication does not experience any limitations, including those associated with outdoor or indoor spaces.

3. Evolution of symbols in judicial architecture

Since the transition from outdoor courts to indoor courts, we remain in the era of indoor courts and designing court buildings. A significant role is played in them by symbols and rituals, which often have a strong impact on the parties to the trial, or

[21] Mulcahy (n 8) 21-22.

[22] See: Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern jurisprudence: the law of text in the texts of law* (Routledge 1991).

more broadly, the entire society that comes into contact with the judiciary.

With this transition, new symbols have emerged that owe their appearance to the enclosed spaces in which they can function freely. The presence of courtrooms, walls, or corridors created the possibility of adapting new metaphors and allegories of equality, transparency, or power of state. Most of these symbols are also present in contemporary judicial architecture, which makes it all the more worthwhile to take a closer look at them.

3.1. Religion

The aforementioned spiritualistic connections between the gods (God) and the court are still present in modern court buildings, albeit in a slightly more discreet form.[23] The connection between spiritualism and justice has always been strong, and the administration of justice has had an element of divinity in it. Chase wrote about religious symbolism in the modern courthouse, noting the altar-like bench, the choir-like jury box, the lectern-like witness stand and the rood screen separating the inner and outer segments of the room.[24] Religious symbolism is sometimes also attributed to the very masses of courthouses, which resemble cathedrals or churches. Soaring towers, spacious main lobbies or stained-glass windows – all of them bring to mind religious buildings.

3.2. Glass

Skipping the religious themes, one can say that a frequent example of the presence of symbolism in court buildings is the use of glass to express the transparency of justice. This is why glass walls or glass staircases, doors and passageways are so common in courts. Judith Resnik and Dennis Curtis write about the symbolism of glass in courthouses:

'In short, while an ancient practice, adjudication has been reconstituted and ac-

[23] The previous paragraph, which discussed the connections between the tree – the place where justice was administered and the tree – the personification of the gods. From the perspective of Christianity, however, the connections between religious symbolism and court buildings looked a little different, as I discuss in more detail in this paragraph.

[24] See: Oscar Chase, *Law, Culture, and Ritual : Disputing Systems in Cross-Cultural Context* (NYUP 2005).

quired four attributes – independent decisionmakers, requirements of public processes, a new ideal of fairness, and equal access for and equal treatment of all. A tour of the many new courthouses, serving as the new icons of justice, captures adjudication's centrality. Governments explain their decisions to case their courts in glass and to bathe them in light as representing the values – transparency, accessibility, and accountability – that undergird the exercise of force. These facilities often marry old Renaissance forms with newer technologies and aesthetics as they embrace the iconography of the Virtue Justice, augmented by an eclectic array of objects created through materials ranging from cloth and clay to bronze and steel.'[25]

It's hard to ignore this noticeable trend in contemporary court architecture. Most courthouses abound in glass, and its use is usually indeed identified with the transparency of the judiciary. At the same time, the glass as an allegory of transparency corresponds well with the circles[26] present in modern court buildings, together creating a contemporary new symbol of transparency and equality.

At this point, however, it is impossible not to criticize the excessive use of glass, which sometimes negatively affects the quality of work in the courts. A negative example of the use of glass, for example, is the increase in temperature in specific rooms at the court – it often happens that the glass interiors of the courts on hot days turn into almost 'greenhouses', forcing the frequent use of air conditioning to lower the temperature.

3.3. Monumentalism

Another example of the symbolism present in court buildings is the representation of the state as the entity in whose name judgments are given. Court buildings are often monumental, meant to make the citizen crossing their threshold feel small and subservient to the laws enacted by the legislature.[27] At the same time, monumentalism

[25] Judith Resnik and Dennis Curtis, *Representing Justice. Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (2nd edn, OctoberWorks 2022) 15.

[26] More about use of circles in courts in paragraph 4 – oval tables in the courtrooms, especially in different European countries.

[27] Resnik, Curtis and Tait (n 5).

indicates the extraordinary importance the state attaches to the judiciary – in other words, the state seeks to provide as much funding as possible to show the public the dignity of the administration of justice. The Federal Administrative Court in Leipzig can serve as a good example here. It was built between 1888 and 1895 in a typical monumental style for the reign of Kaiser Wilhelm II, however, it has only served as the seat of the Federal Administrative Court since 2002,[28] which may also lead one to reflect on the importance of the symbolism of monumentality and power in modern times. Another good example is the Palace of Justice of Brussels, whose construction was completed in 1883. For many years, it was the largest courthouse in the world. This incredibly monumental courthouse served as a model for the Palace of Justice in Lima, however, it lacks the dome of its Belgian counterpart.[29]

It is necessary to admit that monumentalism is justified from the point of view of creating the seriousness of the administration of justice. Doubts may arise when we begin to consider the relationship between building trust in the judiciary and the opening of the courts to the public. Personally, I am not convinced that 'scaring' people with powerful buildings and large piles is a good idea for bringing the society and creating friendly relations with people.

3.4. Power of state

The presence of the state emblem in court buildings is naturally connected with 'state symbolism'. The emblem usually appears not only in the courtrooms but also in the main halls or administrative rooms. Other symbols that are often used are the scales and the sword. The scales symbolize impartiality, and the sword symbolizes power. Finally, a really commonly used symbol in court buildings – Lady Justice, who is customarily depicted as a woman wielding a sword (sometimes also a scale in her other hand) with a blindfold covering her eyes.[30] An interesting example is the depiction of Lady

[28] See: Official webpage of The Federal Administrative Court in Leipzig, 'History of the building' <www.bverwg.de/en/gebaeude/geschichte-des-gebaeudes> accessed 3 February 2024.

[29] See: Jan Van Win, *Bruxelles maçonnique. Faux mystères et vrais symboles* (Télélivre 2012).

[30] About symbolism of Lady Justice see: Prosperi (n 5); as well as: Knox (n 5).

Justice in one of the courtrooms at the Supreme Court of the United States. The woman is not blindfolded – she frowns and wields a sword, being in full willingness to fight the forces of evil (the representation of which is a group of people entwined with snakes).

Not only physical symbols

Equally important as symbols are the court rituals that unite society with the judiciary and introduce interaction between them. The court is theatre – this thesis should not surprise anyone, since for centuries societies have perpetuated this belief. For some, judicial rituals that take on a theatrical form are almost a condition *sine qua non* for law to exist in practice. In a paper entitled 'Judicial architecture and rituals', Antoine Garapon's concept on the various functions of judicial rituals is cited:

'Antoine Garapon, a French magistrate and author, argues that judicial rituals are a condition sine qua non for law to exist in practice. Garapon highlights three functions of judicial rituals at trial: breaking out of ordinary experience, purifying the experience of crimes that are re-enacted during trial, and representing and commemorating legitimate authority. Rituals put tensions at ease and defuse violence by transforming real fights into symbolic struggles. Moreover, the actual person of the judge does not count as much as his or her symbolic figure. The judge is a fictitious entity, just as the legislator is. He or she carries out an act of speech, which gains, by virtue of the surrounding ritual, a performative function. In other words, with the ritual and the robe, a judge renders justice whenever he or she utters the law.'[31]

Symbolism and rituals thus form a close relationship in which they complement each other. Symbols are part of rituals, while rituals cannot function properly without symbols. Thus, when conceptually analyzing the symbols contained in judicial architecture, we should always keep in mind the importance of rituals and allegory of the court as a theatre. In doing so, the symbols are, so to speak, the props necessary to play out specific scenes in a theatrical performance. So it would be good to write the script prudently and cast capable actors in the main roles.

[31] Gelinas and others (n 6) 24.

4. Old symbols in contemporary judicial architecture

The symbols described in Paragraph 3 have been present in court architecture since the transition from outdoor courts to indoor courts. But what happened to the symbols which were present when court buildings were not erected? Can we find the trees or circles mentioned in Paragraph 2 in contemporary judicial architecture? It turns out that the trees – under an altered form – have been cleverly smuggled into modern courthouses.

Nowadays, a really popular trend in contemporary judicial architecture is the use of wood. As mentioned earlier, wood historically can be identified with the trees under which local courts convened in medieval times. Thus, the tree once symbolized the gods and power, while nowadays (wood) can be identified with the supreme authority of the state and the passing of judgments on its behalf.

A good example of the use of wood is the courtroom at the Supreme Court of Canada in Ottawa. Almost the entire room is made of wood, and particularly impressive are the high walls paneled with Australian Blackwood, punctuated with zebrawood pilasters trimmed with Honduras mahogany.[32] Extremely solemn against their backdrop is Canada's coat of arms, which also reinforces the sense of state power. A similar use of wood was made at the Supreme Court of United Kingdom in London, where it was also decided to use wooden panels on the walls.

The use of wood as a symbol of the supreme authority of the state and the passing of judgments on its behalf is not a complete coincidence dependent on the discretion of individual architects. In some countries, special guidelines for judicial architecture are being created that explicitly indicate the need for wood elements in court buildings.

In the Court and Tribunal Design Guide (United Kingdom), it is justified in this way: 'Timber panelling – can give a space more presence, offering an enhanced look. Wall paneling can also provide a degree of wall protection as well as having acoustic benefits.'[33] The U.S. Courts Design Guide (2021) also overemphasizes the need to use

[32] Official website of Supreme Court of Canada: < www.scc-csc.ca/court-cour/buil-edi-eng.aspx> accessed 3 February 2024.

[33] HM Courts and Tribunal Service, 'Court and Tribunal Design Guide' (2019)<www.gov.uk/

wood, and stresses its seriousness:

'Courtrooms. Finishes in the courtroom should reflect the seriousness and promote the dignity of court proceedings. Finishes are an integral part of the courtroom's architectural design. Courtroom millwork should be equivalent to the Architectural Woodwork Institute's (AWI) Quality Standard for Premium Millwork.'[34]

I wonder if intuitively most of those in the courtroom would have indicated that the use of wood is related to reflecting the seriousness and promoting the dignity of court proceedings. Nevertheless, this was the intention of the Guide's authors.

Another symbol that is frequently used in judicial architecture is the circle, or semicircle. Following the example of medieval gatherings on hilltops and under old trees, modern courts also try to smuggle in the symbolism of the circle. Mulcahy, analyzing the meaning of the circle, notes that:

'Circles were commonly used to symbolise the fact that justice was administered in the name of the whole community. The presence of inner and outer circles tended to denote that in tribal communities groups of wise men were acknowledged as guardians of the customary traditions transmitted orally from one generation to another. As law makers, they identified the appropriate rule and proposed judgment to the popular assembly but it was the assembly as a whole that gave judgment and took responsibility for it.'[35]

A good example of the use of oval tables in court is the courtroom at the Supreme Court of the United Kingdom in London. Not only do the judges sit at a semi-circular table, but the parties to the proceedings sit at a semi-circular table facing the judges in such a way that the two tables give the impression of a merging circle. Another example of the use of a semicircle in court is the main courtroom at the European Court of Justice in Luxembourg. There, the judges sit at a huge table shaped like a semicircle, which facilitates visibility and mutual communication. Yet another example

government/publications/court-and-tribunal-design-guide> accessed 3 February 2024.

[34] Administrative Office of the U.S. Courts, 'U.S. Court Design Guide' (2021) <www.uscourts.gov/rules-policies/judiciary-policies/us-courts-design-guide> accessed 3 February 2024.

[35] Mulcahy (n 8) 15.

of the use of circles in courthouses is the frequent use of round tables in judges' deliberation rooms, for example, it is in the Supreme Court of Estonia in Tartu, where judges have the opportunity to sit at a round table and discuss in an atmosphere of equality and lack of division.

I rejoice at the frequent use of round tables in courts. Thanks to them, the distance is shortened, and a sense of friendly atmosphere is created. Round tables are also a manifesto of equality – of the parties to the proceedings and of the judges. Finally, there is another prosaic reason why round tables become useful – it is easier to discuss and exchange views at them, since everyone can look at each other freely and communicate without any barriers.

4.1. Special remarks on glass

When analyzing contemporary design guidelines for court spaces, it is impossible to ignore the use of glass. Although glass itself did not appear in the days of 'outdoor courts' (if only for the reason that glass had to be 'fitted' into an enclosed space), it has appeared in court buildings since the Renaissance.[36]

Modern court buildings abound in glass, which symbolizes transparency and clarity. Thus, glass walls, glass staircases, glass floors – everything is being designed to achieve the impression of transparency. A good example is the building of the Polish Supreme Court in Warsaw (built in 1999), where glass is the compositional dominant of the entire building. Not only are the exterior walls made of glass, but also a large number of walls inside the buildings – in spaces accessible to all. Another good example of the use of glass is the courthouse in Frederiksberg, Denmark, built in 2013 and awarded many prizes in prestigious architectural competitions. In this courthouse, glass was used by fitting a large number of windows into the facade, but also by building a majestic, long glass ceiling in the main corridor. When people visit this courthouse, they can look up and see the sky above them, which also adds symbolic meaning. Yet another example of the widespread use of glass is the Queen Elizabeth II Courts of Law in Brisbane (Australia), built in 2012. The monumental and soaring facade of this court-

[36] See: Paragraph 3.2 of this paper. Glass appeared in court buildings as early as the first courts were placed in religious buildings (churches) or castles, abounding in glass stained-glass windows.

house is entirely made of glass, while its interiors also abound with glass walls or glass staircases.

Just as in the case of wood – the court design guides explicitly point to the need for using glass in the courtrooms. The U.S. Courts Design Guide (2021) indicates that in public waiting areas, walls should be built using glass panel systems.[37] Similarly, the Court and Tribunal Design Guide (United Kingdom) indicates that the design of entrance doors to most rooms must include 'Safety glass vision panels where needed with stainless steel ironmongery.'[38] Such architectural solutions aim to strengthen the judiciary's sense of transparency and fairness. At the same time, as the authors of the Guide point out, their vision is to 'create a justice system which is affordable, intelligible and available for use by all, convenient for those who cannot easily attend in person, and supportive of those not comfortable with the law or technology. In order to achieve this, the justice system should follow three guiding principles: just, proportionate and accessible.'[39] It would thus have to be considered that the use of glass reflects at least two of the three principles mentioned above, i.e. just and accessible. This is because glass is a manifestation of transparency, while at the same time reinforcing a sense of fairness and transparency in the dispensation of justice.

5. Conclusions

Contemporary judicial architecture remains ambiguous. The symbolism it contains is the result of traditions developed over several centuries, which have had a significant impact on the formation of courts around the world. Seemingly indistinguishable elements that fit into everyone's everyday life – such as glass, wood and a circle – are highly significant from the perspective of court symbolism and are used in judicial architecture for good reason. Those symbols can be analyzed from a historical perspective (as has been done in this paper), but one can also consider their future –

[37] Administrative Office of the U.S. Courts (n 34).

[38] HM Courts and Tribunal Service (n 33).

[39] *Ibid.*

what transformations might they have in the coming decades, and will we attribute their current meanings to other objects? Time will tell...

However, symbolism should be used reasonably, as long as its intention is to create a fair and transparent court. This is because symbols are often misread, and non-obviousness leads to misinterpretations by their recipients, i.e. the public (society).

With symbolism in judicial architecture, it is a bit like 19th-century symbolism, about which Jean Moréas in 'Symbolist Manifesto' wrote as follows:

'Thus, in this art movement, representations of nature, human activities and all real life events don't stand on their own; they are rather veiled reflections of the senses pointing to archetypal meanings through their esoteric connections.'[40]

Therefore, whenever we undertake an analysis of a particular symbol found in the court space, we should keep in mind its historical significance and contemporary context, but we should not give up entirely on our personal impressions, which may not always be in line with the feelings of other people. After all, symbols like to be re-discovered.

To conclude, answering the questions mentioned in the introduction of this paper: there is no doubt that symbolism in modern court architecture should play a significant role. However, it remains on the sideline, is not often analyzed, and the significance of many of the original symbols has been forgotten. There is, however, a noticeable trend of referring to symbolism in guidelines on judicial architecture, which are being created in some countries. Perhaps through an increase in legal awareness among the public, as well as better promotion of legal education, modern symbols will become more clear and obvious to most of us.

[40] Jean Moréas, 'Un Manifeste littéraire, Le Symbolisme' *Le Figaro. Supplément Littéraire* (Paris, 18 September 1886) 150.

ILARIA BOIANO*

THE PERSONAL IS NOT YET POLITICAL NOR JURIDICAL FOR WOMEN SEEKING ASYLUM IN THE EUROPEAN UNION. CRITICAL ISSUES ARISING FROM THE CJEU JUDGMENT OF 16 JANUARY 2024, C-621/21.

ABSTRACT. *This note critically examines a recent judgment by the European Court of Justice regarding the recognition of gender-based violence as a ground for asylum for women. The analysis begins with a discussion on the neglect of international legal feminism in refugee law and highlights the importance of considering the binding provisions of the CEDAW and the Istanbul Convention. The judgment acknowledges women facing gender-based violence as members of a particular social group eligible for refugee status, but it falls short in recognizing the political dimension of their persecution. Additionally, it addresses the issue of non-state actors as perpetrators of persecution and emphasizes the need for detailed assessments considering various factors.*

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1. Introduction

The judgment issued by the Grand Chamber of the Court of Justice of the European Union on 16 January 2024 in the case stemming from the request for a preliminary ruling under Article 267 TFEU by the *Administrativen sad Sofia-grad* (Sofia Administrative Court, Bulgaria) has been widely welcomed as a historical decision about women's requests for asylum in EU Member States in case of gender-based violence. It has been stated, *inter alia*, that this judgment would enable for the very first time the recognition of refugee status for women victims of gender-based violence; today judgment would thus be pivotal in the advancement of a gender perspective in human rights, similarly to the decision rendered by the European Court of Human Rights in the case *Opuz v. Turkey* in 2009, which recognized that the respondent State's failure to protect women from domestic violence amounted to a violation of articles 2, 3 and 14 ECHR, thereby representing an important step towards an EU-wide protection of refugee women who are victims of gender-based violence.[1] However, a closer examination of the EU Court of Justice judgment and its annexes reveals a significant critique. It not only demonstrates the legal systems' solid resistance to recognizing the *acquis* of well-established norms and principles of international and European law on gender-based violence against women but also seems to ignore the vast and solid *corpus* of feminist research and analysis that produced relevant advancements for women's rights in the context of international refugee law and international human rights law. This critique challenges the perceived jurisprudential advancement, which practitioners and scholars have so far often emphasized mentioning this judgment.

[1] For first comments, see Silvia Steininger, 'The CJEU's Feminist Turn? Gender-based Persecution as a Ground for Protect' (2024) <https://verfassungsblog.de/>, accessed 30 April 2024. The case files are available at <https://eur-lex.europa.eu/legal-content/EN/CASE/?uri=CELEX:62021CJ0621>.

2. The Judgment of the Court of Justice of the European Union (Grand Chamber) of 16 January 2024, C-621/21

2.1. The facts of the case

The request for a preliminary ruling was made in the context of proceedings between WS and the Bulgarian Interviewing Body of the State Agency for Refugees at the Council of Ministers (hereinafter the DAB).[2] In that context, the competent authority decided to refuse to open a procedure for granting international protection further to a subsequent application made by WS, a Kurdish woman from Turkey.

WS arrived legally in Bulgaria in June 2018. Thereafter, she joined a family member in Berlin (Germany), where she applied for international protection.

By a decision of the DAB of 28 February 2019, adopted following a request from the German authorities, WS was taken back by the Bulgarian authorities to examine her application for international protection.

During three interviews conducted by the DAB in October 2019, WS stated that she had been forcibly married at the age of sixteen and had three daughters. Her husband allegedly beat her during their married life, but her biological family, who was aware of the situation, gave her no assistance. WS fled the marital home in September 2016, entered a religious marriage in 2017, and had a son from that marriage in May 2018. After leaving Turkey, she officially divorced her first husband in September 2018, despite his objections. She stated that, for those reasons, she fears that his family would kill her if she were to return to Turkey.

Before the DAB, WS produced the decision, which had become final, of the Turkish civil court, which granted her divorce, together with the complaint that she had lodged against her husband, her biological family, and her former husband's family in January 2017 with the Public Prosecutor's Office in Torbali (Turkey), the minutes of which, drawn up on 9 January 2017, refer to the threatening telephone messages which her husband had sent her.

She also produced a decision from a Turkish court on 30 June 2017 placing her in a house for women who are victims of violence, in which she claimed not to feel safe.

[2] Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet.

By a decision of 21 May 2020, the President of the DAB rejected WS's application for international protection, taking the view, first, that the reasons relied on by WS for leaving Turkey, in particular acts of domestic violence or death threats by her husband and by members of her biological family, were not relevant for the purpose of granting that status, since they could not be linked to any of the reasons for persecution set out in Article 8(1) of the ZUB. Furthermore, WS did not claim to be the victim of acts of persecution based on her gender.

Second, the President of the DAB refused to grant WS subsidiary protection status because she did not satisfy the conditions required for that purpose since 'neither the official authorities nor certain groups had taken action against the applicant that the State is not in a position to control' and she 'had been subject to criminal assaults of which she had not even informed the police and in respect of which she had not lodged a complaint and … had left Turkey legally'.

By judgment of 15 October 2020, upheld on 9 March 2021 by the Supreme Administrative Court of Bulgaria, and now finally, the Sofia Administrative Court, Bulgaria, dismissed the action brought by WS against the denial.

On 13 April 2021, WS made a subsequent application for international protection based on new evidence, claiming a well-founded fear of persecution by non-State actors on account of her membership of a 'particular social group,' namely women who are victims of domestic violence and women who are potential victims of 'honour killings'.

She asserted that the Turkish State was not able to defend her against those non-State actors. She argued that her return to Turkey would expose her to an 'honour killing' or a forced marriage and, therefore, to an infringement of Articles 2 and 3 ECHR.

In support of that application, WS adduced, as new evidence, a decision of a Turkish criminal court imposing on her former husband a five-month custodial sentence for committing the offense of threatening behavior against her in September 2016. That sentence was suspended, and he was placed on probation for five years, given the absence of previous convictions, his personal character, and his acceptance of that sentence.

WS annexed to that application articles from the Deutsche Welle newspaper from 2021, which referred to violent murders of women in Turkey. Furthermore, WS

relied on the withdrawing by the Republic of Turkey from the Council of Europe Convention on the Prevention of Violence against Women and Domestic Violence (hereinafter Istanbul Convention) in March 2021 as a new circumstance.

By a decision of 5 May 2021, the DAB refused to reopen the procedure for granting international protection following WS's subsequent application on the ground that WS had not referred to any significant new evidence relating to her personal situation or her country of origin. The DAB pointed out that the Turkish authorities had assisted her several times and indicated that they were prepared to help her by all lawful means.

2.2. The request for a preliminary ruling about substantive preconditions for granting international protection in case of gender-based violence

The referring Bulgarian Court states that, while WS's application for international protection was rejected as inadmissible, the Court of Justice of the European Union has never ruled on gender-based violence against women in the form of domestic violence and the threat of honor killings, as a ground for granting international protection. In that context, the referring court asks the Court of Justice whether to classify gender-based violence against women as a ground for granting international protection under the 1951 Geneva Convention on the Status of Refugees and Directive 2011/95. The Bulgarian Court also asks whether the CEDAW (UN Convention on the Elimination of All Forms of Discrimination against Women) and the Council of Europe Istanbul Convention Against Violence Against Women and Domestic Violence apply in accordance with recital 17 of Directive 2011/95 gender-based violence against women, as a ground for granting international protection under Directive 2011/95, has an autonomous meaning which differs from that in the abovementioned instruments of international law. Furthermore, the Bulgarian Court asks to determine the conditions in which a third-country national woman who faces the risk of being the victim of an honour crime or a forced marriage and of being exposed to acts of domestic violence if she returns to her country of origin, might be considered to have a well-founded fear of being persecuted by reason of her membership to a 'particular social group' and be granted refugee status (Article 10(1)(d) of Directive 2011/95).

The Court is required to clarify the conditions under which the competent national authority must ascertain, in a case where the violence is committed by a non-State actor, that there is a causal link between the reasons for the persecution, namely membership of a particular social group, and the absence of protection in the country of origin (Article 9(3) of that directive).

Finally, it has to clarify the extent to which subsidiary protection status might be granted to such a person. In that context, it has to determine the conditions in which the acts of violence described above might be classified as 'serious harm' within the meaning of Article 15 of that directive, either in so far as they constitute a severe threat against that person's life or in so far as they constitute inhuman or degrading treatment.

2.3. The opinion of the Advocate General

The Advocate General Richard De La Tour delivered his opinion on the Bulgarian Court's request for a preliminary ruling on 20 April 2023, introducing his arguments by acknowledging that

> The issue of acts of violence against women in the family context has become a major concern of our societies after the gravity and the consequences of such acts had long been underestimated by the authorities. Killings of women in the family circle, now called 'femicide' in everyday language, have been publicly denounced. The public authorities have become aware of the need to provide better protection for women victims of violence in their family setting and to take a stricter approach towards the authors of such violence. (§1)

The Advocate General also pointed out as introductory remark, that the referred questions reflect

> the concerns … of those who consider that refugee status cannot be granted to all women who are victims of domestic violence, since it is a problem common to all States, and those who, on the other hand, deplore the fact that subsidiary protection is only protection granted 'by default' to those women, thus leading to non-recognition of the reasons for gender-related persecution, including those based on sexual orientation and gender identity. (§3)

The Advocate General firstly examines the extent to which the terms laid down by the CEDAW and the Istanbul Convention must be taken into account for the purposes of the implementation of Directive 2011/95, recalling that under Article 78(1) TFEU, the Common European Asylum System, to which Directive 2011/95 belongs, must be in accordance with the Geneva Convention and the 1967 Protocol relating to the Status of Refugees, and with other relevant treaties.

Thus, the primary purpose of Directive 2011/95, as stated in Article 1 thereof and in the Court's case law, is to establish a system of rules, including concepts and criteria common to the Member States for the identification of persons in need of international protection which are therefore specific to the European Union, while ensuring that Article 1 of the Geneva Convention is complied with in total, but without any possibility to extend the scope of that directive beyond that covered by the Convention,[3] where there no reference to 'gender' in the definition of the concept of 'refugee,' nor provide that 'gender-based violence against women' may constitute in itself a reason for granting international protection.

In the context of Directive 2011/95, as the Advocate General notes, the applicant's gender is therefore taken into consideration in the assessment of the nature of the acts of persecution to which a person is or could be exposed in their country of origin (Article 9(2)(f) of that directive) and when the reasons for persecution are examined, in particular when determining the applicant's membership of a particular social group (second indent, *in fine*, of Article 10(1)(d) of that directive).

Furthermore, although Article 9(2)(f) of Directive 2011/95 does not specify the scope of acts of a gender-specific or child-specific nature, the Advocate General refers to Directive 2012/29/EU on victims' rights that at Recital 17 defines 'gender-based violence' as covering

> violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately … It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim

[3] CJEU, judgment 19 November 2020, Bundesamt für Migration und Flüchtlinge (Military service and asylum).

> and includes violence in close relationships, sexual violence (including rape, sexual assault, and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation, and so-called "honour crimes". Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.

The Advocate General, therefore, concludes stressing that

> it is common ground that the European Union has not ratified the CEDAW and that, while it signed the Istanbul Convention on 13 June 2017, it has not yet acceded to it. Nor has that convention been ratified by all Member States. Pending such accession or ratification, the Istanbul Convention constitutes above all a multidisciplinary convention to ensure, holistically and on the basis of an integrated approach involving all members of society, the prevention of violence against women, the protection and support of victims and the prosecution of the actors of violence" (§59), however that neither the Istanbul Convention nor the CEDAW is a 'relevant treaty', within the meaning of Article 78(1) TFEU, by reference to which Directive 2011/95 must be interpreted (§60).

He admits that, considering that Recital 17 states that 'with respect to the treatment of persons falling within the scope of [that] Directive, Member States are bound by obligations under instruments of international law to which they are a party, including, in particular, those that prohibit discrimination', it derives that the EU legislature laid down the requirement that Member States are to ensure equal treatment between the beneficiaries of international protection and their nationals about access to procedures for recognition of qualifications (Article 28(1)) and, also, access to healthcare (Article 30).

Consequently, and only in that context, under the opinion of the Advocate General, the Member States must comply with the obligations arising under the international instruments to which they are party, such as the CEDAW and the Istanbul Convention (§§61-62).

On the contrary, the conditions for granting refugee status to a person who fears being the victim of acts of gender-based violence in the event of being returned to their country of origin must be examined by reference to the provisions laid down for that purpose only by the directive 2011/95, interpreted in the light of the general scheme

and the purpose of that directive, in conformity with the Geneva Convention, in accordance with Article 78(1) TFEU, but not on the basis of the definitions set out in the CEDAW and the Istanbul Convention, which, according the Advocate General, 'are not "relevant treaties" for the purposes of that article' (§63).

Concerning the second and third referred questions, the Advocate General considers that Article 10(1)(d) of Directive 2011/95 must be interpreted as meaning that a third-country national may be deemed to belong to a 'particular social group' because of her gender provided that it is established, based on an assessment of the facts and circumstances, that, in addition to her gender alone, that is to say, her identity and her status as a woman, she has a distinct identity in her country of origin because she is perceived differently by the surrounding society because of the social, legal or religious norms or the rites or customs of her country or of the community to which she belongs.

In the context of that assessment, the nature of the acts to which that national fears being exposed if she is returned to her country of origin is a relevant element that the competent national authority must consider.

With regard to the fourth question, the Advocate General states that Article 9(3) of Directive 2011/95 must be interpreted as meaning that, in the event of acts of persecution committed by a non-State actor, the competent national authority is required to determine, following an assessment of the application for international protection carried out on an individual basis that takes into account all relevant facts as they relate to the country of origin, including laws and regulations of that country and how they are applied, whether there is a causal link between, on the one hand, the reasons on which those acts of violence are based, namely the third-country national's membership of a particular social group, and, on the other hand, the absence of protection on the part of the authorities of the country of origin, for the purposes of Article 7 of that directive.

Finally, with regard to the assessment of the conditions for granting subsidiary protection, Article 2(f) and Article 15 of Directive 2011/95 must be interpreted as meaning that in a situation in which the competent national authority establishes, following a global assessment of the specific circumstances of the particular case, that, if the woman is returned to her country of origin, she will face the risk not only of being executed in the name of the honour of her family or her community but also of being

the victim of acts of torture or of inhuman or degrading treatment or punishment resulting from acts of domestic violence or any other act of gender-based violence, that authority is required to classify those acts as constituting 'serious harm'. To determine whether that risk is well founded, the competent national authority must establish whether the State or parties or organizations controlling it offer protection against that serious harm that meets the requirements set out in Article 7 of that directive.

2.4. The decision

In the first place, the Court rejects the opinion of the Advocate General whereby the CEDAW would not be relevant to interpret EU law provisions on international protection.

In particular, the Judges of Luxembourg pointed out that all the Member States ratified the CEDAW, thus it is one of the relevant treaties referred to in Article 78(1) TFEU, in accordance with which the directive 2011/95, in particular, Article 10(1)(d) thereof, must be interpreted (§45).

In addition, as per recital 17 of the aforementioned directive, Member States must comply with international law and treaties, including those prohibiting discrimination against individuals falling within its purview, like CEDAW.

The Court of Justice recalls that the Committee on the Elimination of Discrimination against Women, which is responsible for monitoring the implementation of the CEDAW, stated that said convention reinforces and complements the international legal protection regime applicable to women and girls, including in the context of refugee law (§46).

Secondly, as regards the Istanbul Convention, which has been binding on the European Union since 1 October 2023, it must be pointed out that that convention lays down obligations coming within the scope of Article 78(2) TFEU, which empowers the EU legislature to adopt measures relating to a common European asylum system, such as Directive 2011/95.[4] Thus, that convention, in so far as it relates to asylum and non-refoulement, is also one of the relevant treaties referred to in Article 78(1) TFEU.

[4] See, to that effect, Opinion 1/19 (Istanbul Convention) of 6 October 2021, EU:C:2021:832, paragraphs 294, 302 and 303.

In those circumstances, the Court of Justice clarifies that the provisions of that directive, in particular, Article 10(1)(d) thereof, must be interpreted consistently with the Istanbul Convention, even though some Member States, including the Republic of Bulgaria, has not ratified that convention (§48).

In that regard, the Court of Justice firstly underlines that Article 60(1) of the Istanbul Convention provides that gender-based violence against women is to be recognized as a form of persecution within the meaning of Article 1A(2) of the Geneva Convention.

Secondly, Article 60(2) of that convention requires parties to ensure that a gender-sensitive interpretation is given to each of the reasons for persecution prescribed by the Geneva Convention and that where it is established that the persecution feared is for one or more of those reasons, applicants are to be granted refugee status.

The Court of Justice, therefore, discusses the conditions required for the identification of a 'particular social group' as defined in the first paragraph of Article 10(1)(d) of Directive 2011/95.

The provision requires sharing at least one of three identifying features: group members share an innate characteristic, have a common background that cannot be changed, or share a fundamental characteristic or belief that defines their identity or conscience and that they should not be forced to renounce. Additionally, the group must have a distinct identity in the relevant country, perceived as different by the surrounding society.

The Court of Justice has determined that being female is an innate characteristic and is sufficient to meet the criteria of belonging to a particular social group (§49). Additionally, women who have a shared common feature, such as another innate characteristic, a common background that cannot be altered, such as a unique family situation, or a characteristic or belief that is so fundamental to their identity or conscience that it should not be renounced may also be included in this group (§50).

In cases where women have been forced into marriage or have left their homes due to marriage-related issues, they may be viewed as having a fixed background that cannot be changed based on the circumstances of the case.

The second condition pertains to the group's unique identity in their country of origin. The Court believes that women can be seen as distinct by the surrounding society

and recognized as having their own identity in that society. This recognition is mainly due to social, moral, or legal norms in their country of origin. Additionally, that second condition will be satisfied if women share an additional common characteristic, where the social, moral, or legal norms in their country of origin result in those women being perceived as different by the surrounding society because of that common characteristic. The country in question must ascertain individually and carefully whether the person who is relying on their membership of a particular social group as a reason for persecution genuinely has a 'well-founded fear' of being persecuted in their country of origin, keeping in mind the specific facts and circumstances of the individual's situation.

To properly examine women's applications for refugee status, it is essential to collect country of origin information that is relevant to their situation. This information should include the status of women in the country before the law, their political rights, social and economic rights, and the cultural and social norms of the country. Additionally, it should detail the consequences for non-adherence to these norms, the prevalence of harmful traditional practices, and the incidence and forms of violence against women. It should also provide information on the protection available to women, any penalties imposed on those who perpetrate violence, and the risks that a woman might face if she returns to her country of origin after making a claim.

The Court states that, depending on the situation in the country of origin, women in that country, either as a group or as more specific subgroups, may be considered as belonging to a 'particular social group' and may be subjected to persecution that can justify their status as refugees.

The Court, therefore, answers the question whether, in case of fear of being persecuted by non-State actors, a link must be established, in all cases, between the acts of persecution and at least one of the reasons for persecution set out in Article 10(1) of that directive.

The Court of Justice clarifies that non-State actors can be classified as 'actors of persecution or serious harm' when the 'actors of protection', which include the State, are unable or unwilling to protect against those acts. Such actors must not only be able but also willing to defend the applicant concerned from the persecution or severe harm to which they are exposed (§64), by ensuring effective and a non-temporary protection measures and taking reasonable steps to prevent the persecution or suffering of serious

harm, *inter alia*, by operating an effective legal system to which the applicant for international protection has access, enabling such acts to be detected, prosecuted and punished (§65).

In the case of an act of persecution perpetrated by a non-State actor, the condition laid down in Article 9(3) of Directive 2011/95 is satisfied, according to the Court of Justice, where that act is based on one of the reasons for persecution mentioned in Article 10(1) of that directive, even if the absence of protection is not based on those reasons. That condition must also be regarded as being satisfied where the lack of protection is based on one of the reasons for persecution set out in the latter provision, even if the act of persecution perpetrated by a non-State actor is not based on those reasons.

By its fifth question, the referring court asks whether the concept of serious harm covers the real threat to the applicant of being killed or subjected to acts of violence inflicted by a member of her family or community due to the alleged transgression of cultural, religious or traditional norms, and that that concept is therefore capable of leading to the recognition of subsidiary protection status, within the meaning of Article 2(g) of that directive, when a person is not eligible for subsidiary protection but he/she, if returned to his or her country of origin, would face a real risk of suffering serious harm and is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Article 15(a) and (b) of Directive 2011/95, read in the light of recital 34 of that directive, defines 'serious harm' as 'the death penalty or execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin': according to the judges of Luxembourg, where a woman runs a real risk of being killed by a member of her family or community because of the alleged transgression of cultural, religious, or traditional norms, severe such harm must be classified as 'execution' within the meaning of that provision. Furthermore, the acts of violence to which a woman risks being exposed because of the alleged transgression of cultural, religious, or traditional norms are not likely to result in her death; those acts must be classified as torture or inhuman or degrading treatment or punishment within the meaning of Article 15(b) of Directive 2011/95.

Article 15(a) and (b) of Directive 2011/95 must be interpreted as meaning that the concept of 'serious harm' covers the real threat to the applicant of being killed or

subjected to acts of violence inflicted by a member of their family or community due to the alleged transgression of cultural, religious or traditional norms and that that concept is, therefore, capable of leading to the recognition of subsidiary protection status, within the meaning of Article 2(g) of that directive.

3. Refugee women in international law

It is true that, as the Advocate General writes, the issue of gender-based violence against women is structural and concerns every country, but rather than fearing the prospect of a generalized recognition of the right to asylum for women, which would perhaps be in some way a desirable restorative measure in the face of a history of systemic abuse and persecution, the issue of gender-based violence would have deserved a more careful and general in-depth examination, in the light of the binding provisions of the CEDAW and the Istanbul Convention.

It is crucial to start the critical analysis of the arguments of the questions referred to the Court, of the opinion of the Advocate general, and of the decision of the Court of Justice from the issue of the relevance of the CEDAW and the Istanbul Convention to outline the criticisms related to the decision at hand, which involve both EU asylum law and feminist legal analysis of international refugee law and policies.

Next, I will discuss the issue of recognizing women seeking refugee status as members of a particular social group and the problematic notion of "actors of protection" emphasized by the European Court of Justice.

My reflections stem from observing a general neglect for the influence of international legal feminism in refugee law. This is apparent as early as the questions formulated by the referring court, then it is reinforced structurally in the opinion of the Advocate General and is only partially included by the decision of the Court of Justice. It is important to note that the latter certainly could not deviate from the legal issues submitted by the court of the Member State; however, it could have delved into international jurisprudence and recalled the CEDAW Committee's binding recommendations on refugee women, including relevant analysis and development of

the international refugee law from a feminist and gender-based perspective.[5]

3.1. Women's experience of persecution and the recognition of international protection

The feminist reinterpretation of the elements of the legal definition of a refugee was deemed necessary for the legal recognition of the persecutions suffered by women not only to be concretely framed within the definition of persecution provided by the 1951 Geneva Convention but also to overcome the main argumentative obstacle that is often found denials, namely that what women suffered, although constituting specific human rights violations, were committed in a context of personal relationships by private individuals and for this reason could not be attributed to State authorities and therefore to public persecuting agents.[6]

The asylum seeker must demonstrate a well-founded fear of persecution by State authorities or by persons whom the State is unwilling or unable to control: the examination of the application for international protection also concerns the ability and willingness of the State of origin to provide protection. Where concrete and effective protection from the reported persecution is found, the conditions for refugee status cannot be met.

The CEDAW Committee intervened on the issue of proof of protection and its effectiveness and effectiveness, pointing out that

> harm perpetrated against women and girls is often at the hands of non-State actors, including family members, neighbours or society more generally. In such cases, article 2 (e) of the Convention requires that States parties assume their due diligence obligation and ensure that women are effectively protected from harm that may be inflicted by non-State actors. It does not suffice to strive for vertical gender equality of the individual woman vis-à-vis public authorities; States must also work to secure non-discrimination at the horizontal level, even within the family.[7]

[5] Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001); Jane Freedman, 'Engendering security at the borders of Europe: Women migrants and the Mediterranean "crisis" in JRS, [2016] 29, 568–582; Heaven Crawley, 'Gender, persecution and the concept of politics in the *asylum* determination process', in FMR [2000] 9, 17–20. B.arbara Pinelli, *Migranti e rifugiate. Antropologia, genere e politica* (Raffaello Cortina Editore, Milano, 2019).

[6] Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001), 37; Jane Freedman, *Gendering the International Asylum and Refugee Debate,* (Palgrave Macmillan, Basingstoke, 2015), 45.

[7] CEDAW Committee, General recommendation No. 32 on the gender-related dimensions of refugee status, asylum,

Accordingly, the CEDAW Committee clarified that harm perpetrated by non-State actors must also be qualified as persecution relevant in the context of the Geneva Convention 'where the State is unable or unwilling to prevent such harm or protect the claimant because of discriminatory governmental policies or practice.'[8]

A significant impetus for the qualification in terms of persecutory acts of all forms of gender-based violence to which women are exposed as well as for the determination of the extent of State responsibility in case of violations suffered by women by non-State actors has been given by the European Court of Human Rights, which has provided relevant guidance to State authorities not only to adapt the domestic legal system to the conventional parameters of protection of women's fundamental rights and freedoms but also to provide adequate instruments to protect women claiming asylum for persecution suffered on account of their sex and gender.

In particular, the Strasbourg Court has clarified that States, pursuant to Articles 2, 3, 6, 8, and 14 ECHR, are responsible if they have failed to provide women, victims of gender-based violence, with adequate measures to punish, prevent, protect from the psychological and physical safety violation against women exposed to violence, including their children. Firstly, States' responsibility for violations of the rights and freedoms protected by the European Convention on Human Rights (ECHR) has been identified in cases of gender-based violence committed by private individuals where the domestic legal system has not adopted adequate legislative measures to punish acts of sexual violence and domestic violence in all its forms, including psychological violence.[9]

States are also required to ensure the conduct of effective investigations[10] and the holding of timely trials that guarantee the rights of all parties,[11] including victims of violence, who must be concretely protected from further violence.[12] This includes

nationality and statelessness of women, 2014, §27.

[8] CEDAW Committee, 2014, §27.

[9] *M.C. v Bulgaria* App no 39272/98 (ECtHR,4 December 2003), paras 148 ss.; *Opuz v Turchia* App no 33401/02 (ECtHR, 9 June 2009), paras §§132; *A.C. v Croatia* App no 55164/08 (ECtHR, 14 October 2010), para 60.

[10] B.*S. v Spain* App no 47159/08 (ECtHR, 24 July 2012), paras 40 ss.

[11] *Y. v Slovenia* App no 41107/10 (ECtHR, 28 May 2015), paras 23 ss.

[12] *Maiorano and others v Italy* App no 28634/06 (ECtHR, 15 December 2009); *Kontrova v Slovakia* App no 7510/04 (ECtHR, 13 June 2006*); Hajduova v Slovakia* App no 2660/03 (ECtHR, 30 November 2010); *Valiulené v Lithuania*

adopting temporary measures to protect women and their children exposed to violence.[13]

Throughout the criminal and civil proceedings, from the first contact with law enforcement, the victim's integrity must be respected to avoid further trauma from the process itself. This is meant to ensure the exercise of fundamental rights that comprise access to justice.[14]

The adoption of adequate and effective measures, meaning not merely formal but with concrete outcomes in terms of protection and prevention, constitutes a positive obligation deriving not only from Articles 2, 3, and 8 of the ECHR but also from the prohibition of discrimination established by Article 14 of the ECHR. As stated since the Opuz v. Turkey judgment (2009), the domestic violence suffered by the applicant 'can be considered gender-based violence, which is a form of discrimination against women' (§200), not based 'on the legislation per se, but rather the result of a general attitude of the local authorities, such as the treatment by law enforcement officers towards women when they report domestic violence and judicial inertia in ensuring effective protection for the victim' (§192).[15]

The principles developed by the European Court of Human Rights on gender-based violence have been codified by the Istanbul Convention, which, on the subject of the recognition of international protection, states in Article 60 that the State shall take the necessary legislative or other measures to ensure that gender-based violence against women can be recognized as a form of persecution within the meaning of Article

App no 33234/07 (ECtHR, 26 March 2013; *Eremia v Moldovia* App no 3564/11 (ECtHR, 28 May 2013).

[13] *O.C.I. and others v Romania* App no 49450/17 (ECtHR, 21 May 2019); *D.M.D. v Romania* App no 23022/13 (ECtHR, 3 October 2017).

[14] *Y. v Slovenia* App no 41107/10 (ECtHR, 28 May 2015).

[15] The approach of the Strasbourg Court in *Opuz v Turkey* has also guided subsequent jurisprudence. The Court has consistently emphasized the responsibility of States to adopt effective legislative and operational measures to protect victims of violence, ensuring timely investigations and fair trials. Additionally, the Court has reiterated the importance of addressing domestic violence as a form of gender-based discrimination, compelling States to prevent and adequately punish such acts in line with Articles 2, 3, 8, and 14 of the ECHR in the cases *Eremia and others v Moldova* App no 3564/11 (ECtHR, 28 May 2013); *Mudric v Moldova* App no 74839/10 (ECtHR, 16 July 2013); *B. v Moldova* App no 61382/09 (ECtHR 16 July 2013; *N.A. v Moldova* App no 61382/09 (ECtHR, 16 July 2013); *Talpis v Italy* App no 41237/14 (ECtHR 2 March 2017); *Volodina v Russia* App no 41261/17 (ECtHR, 1 June 2017).

1A(2) of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection, and shall ensure that a gender-sensitive interpretation is applied to each of the Convention grounds.

The situation where the referring Bulgarian Court and authorities of many Member States remain unaware or dismissive of the applicability of instruments like CEDAW and the Istanbul Convention highlights a significant issue in the marginalization of specific international instruments concerning women's rights. This marginalization occurs despite their historical and transformative significance and requires reflection on several key aspects. Firstly, there is a considerable gap between substantive and formal law. Substantive law embodies the rights and protections available, whereas formal law pertains to the codified legal texts and frameworks. In many cases, the rights guaranteed by international instruments are not effectively translated into national legal systems, leading to a disparity between what is theoretically promised and what is practically delivered.[16]

Secondly, the legal culture itself is a substantial barrier. This culture, even though it originates from prestigious law schools that train numerous legal experts in European Member States and European institutions, often remains gender blind. These institutions frequently fail to adequately transmit critical portions of domestic and international legislation that pertain to women's rights. Moreover, they overlook innovative analyses, studies, and research, relegating them to the periphery of legal education and training. Such materials are often dismissed as 'too feminist' and not given the necessary attention or importance.

Additionally, the reluctance to fully embrace and implement these international instruments is symptomatic of deeper societal and institutional resistance to changing patriarchal structures. The principle of State sovereignty has often been invoked to limit the impact of international treaties like CEDAW and the Istanbul Convention, and many states have made reservations to these treaties, modifying or excluding the legal effects of certain provisions to avoid substantial changes in their domestic legal systems,[17]

[16] Dubravka Šimonović, 'Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions', in HRQ [2014] 36, 3, 590-606.

[17] The principle of State sovereignty has limited the ability of the CEDAW and other specialistic treaties, including

while Turkey's withdrawal from the Istanbul Convention is a clear indication of this resistance.

International law scholars such as Hilary Charlesworth, Christine Chinkin, and Shelley Wright argue that while the international community formally acknowledges the problems of inequality women face, this acknowledgment is often superficial. It is acceptable only if it does not require states to alter deeply entrenched patriarchal practices that subordinate women. This stance results in a legal environment where the formal recognition of women's rights does not translate into substantive change.[18]

3.2. Persecution by non-State actors and the notion of non-State actors of protection

When persecution is perpetrated by non-State actors, destination States often still reject women's applications for protection based on the possibility of benefiting from internal flight routes as an alternative to leaving the country of origin:[19] a person is not considered to be at risk of persecution by non-State actors if he/she has the possibility to transfer to a safe place within the State of origin.

The CEDAW Committee recalled on this point that Article 2(d)(e) of the CEDAW Convention requires States parties to ensure that women are protected against discrimination generated by non-State actors and, concerning women as asylum seekers, emphasized that denials of international protection based on the availability of an alternative internal flight route to departure do not take into account that the alternative internal flight is an option generally precluded to women, who lack the resources and autonomy to move freely, which they are often specifically prohibited from doing, even criminally sanctioned, in their country of origin or to flee abroad, a rare opportunity

the Istanbul Convention (or the Belèm do Parà Convention, the Maputo Protocol, or UNSC Resolution 1325), to affect the situation of women concretely. Article 16 CEDAW, concerning women's equality in marriage and family life, is subject to over 20 reservations. See Amnesty International, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: Weakening the protection of women from violence in the Middle East and North Africa region", November 2004, URL: <https://www.amnesty.org/en/wp-content/uploads/2021/09/ior510092004en.pdf>, accessed 30 April 2024.

[18] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law', TAJIL [1991] 85, 4, 633.

[19] CEDAW Committee, 2014, §28.

that women often have only by resorting to migration channels that expose them to the risk of further violence:

> Difficulties faced by women in relocating to other parts of their countries of origin can include legal, cultural and/or social restrictions or prohibitions on women travelling or living alone, practical realities such as problems of securing accommodation, childcare and economic survival without family or community support, and risk of harassment and exploitation, including sexual exploitation and violence[20] .

Consequently, State authorities must check on a case-by-case basis whether 'gender' risks can be relocated internally.[21]

The Court of Justice of the European Union's judgment in Case C-621/2021 made it clear that a lack of protection based on one of the grounds for persecution is relevant even if the act of persecution perpetrated by a non-State actor is not based on such grounds.

While the recognition of the persecutory nature of conduct perpetrated by non-State actors represented a breakthrough for the protection of refugee women at risk of being harmed by their family or community, the concept of non-State actors has expanded over time, whereby non-State actors can now be considered to be not only actors of persecution but also 'actors of protection',[22] starting with the provisions of Article 7 of Directive 2011/95/EU, which identifies the actors that can offer protection against persecution or serious harm, namely the State; parties or organizations, including international organizations, controlling the State or a substantial part of its territory, provided they are willing and able to offer protection.

In this way, the EU Qualification Directive ensured that all EU member States recognize non-state actors of persecution, and, at the same time, it also codified the concept of non-state actors of protection in Article 7.

[20] CEDAW Committee, 2014, §28.

[21] CEDAW Committee, 2014, §26.

[22] Deborah E. Anker, 'Refugee Status and Violence against Women in the Domestic Sphere: The Non-State Actor Question,' GILJ [2001] 15, 393. Maria O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?' IJRL [2012]24, 87.

Recently, among non-State actors recognized as capable of protecting, Swedish courts have included tribes and clans, a position also shared by the European Commission during the revision of the Qualification Directive, noting that some Member States have identified protection agents in clans and tribes, or NGOs for women at risk of FGM and honour killings, 'although such organizations can only provide temporary safety or even only shelter to victims of persecution'.[23]

Despite the strict limits of the notion of actors of protection, also reaffirmed by the Court of Justice of the European Union,[24] there are fears of the spread of practices that unduly broaden the notion to include family members and male networks, in a way that is particularly detrimental to the protection of refugee women and already reverberates in the jurisprudence of the European Court of Human Rights. Indeed, against the advanced framework of States' obligations to prevent and protect women from gender-based and domestic violence, in cases concerning the denial of protection and deportation of women as asylum seekers, the European Court of Human Rights assumes that support from family members and male networks is sufficient to fulfill the responsibility of States to protect against serious harm, even when deportation occurs in countries where discrimination against women is institutionalized by law and delegated to the private agents of the family.

The grounds for these decisions mainly consist of a 'formalistic, summary, vague or simply non-existent assessment of the home state's ability to protect women'.[25] Moreover, the Court's assessment of violence against women in deportation cases is not only inconsistent with similar cases where ill-treatment occurs within the territory of the Member States, but also with its case law on deportation more generally. In its first jurisprudence on the recognition of ill-treatment at the hands of non-State actors, the Court established as a general principle in cases of expulsion under Article 3 ECHR that when there is a real risk of harm from non-State actors, it must be shown that 'the

[23] European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final, 6-7.

[24] CJEU, Secretary of State for the Home Department v. OA, Judgment, Case C-255/19, 20 Jan. 2021, para. 27.

[25] Lourdes Peroni, 'The protection of women asylum seekers under the European Convention on Human Rights: unearthing the gendered roots of harm', HRLR [2018] 18 (2), 347-370.

authorities of the receiving State are unable to obviate the risk by providing adequate protection'.[26]

A case that provides insight into the trap behind the notion of actors of protection is *AA and Others v Sweden*:[27] AA was a Yemeni citizen who had been married at the age of fourteen and had suffered severe domestic violence. While filing for divorce through courts, she was told to resolve her private problems with her husband. One of her daughters had also been married off at fourteen year old. When her husband wanted to marry off his youngest daughter, AA fled Yemen to Sweden. However, by six votes to one, the European Court for Human Rights held that AA and her daughters could turn to AA's brother and his adult children for protection. Similarly, the Court concluded that AA's daughters would be accompanied back by their two brothers and would have a male network that would allow them to live away from the husband of AA's eldest daughter and their father.

The principles developed by the Court regarding a State's positive obligations to protect the applicant from her husband, as set out above, have not been applied by the majority here.

The dissenting judge Power-Forde noted that the case raised not only Yemen's failure to protect the plaintiffs but also the complete absence of protection mechanisms against gender-based violence in a country where domestic violence, marital rape, forced early marriages, and restrictions on women's freedom of movement are not prohibited by law.[28]

In the case of *N v. Sweden*, which concerned N's deportation to Afghanistan, N was separated from her husband and attempted to divorce him. She argued that she would risk serious harm upon her return to Kabul as a separated/divorced woman whose family had repudiated her and consequently risked being accused of adultery. Although the European Court of Human Rights recognized the violation in the case of repatriation, the conclusion was based on the fact that N no longer had contact with her family and therefore no longer had 'an adequate social network or protection in Afghanistan'.

[26] ECtHR, H.L.R. v. France, Application No. 24573/94, 29 April 1997, § 40.

[27] ECtHR, A. and Others v. Sweden, Application No 14499/09, 28 June 2012.

[28] ECtHR, A. and Others v Sweden, §10.

In another case in which the applicant risked being forcibly remarried if she was deported back to Iraq, the Court stated that it first had to 'determine whether she would be alone without male protection on her return to Iraq',[29] thus confirming that the Court is guided by the notion of male family members and networks as actors of protection, now elevated to a general principle[30] and at risk of harming the prospects of full protection for refugee women, further contributing to the 'sliding scale' of international protection for women.[31]

3.3. The reasons for persecution: belonging to a particular social group

The refugee definition contained in Article 1(A) no. 2 para.1 Geneva Convention of 1951 identifies five grounds to which, alternatively or jointly, persecution must be causally related: race, religion, nationality, membership of a particular social group and political opinion.

At the institutional level, the indication to consider women as belonging to a particular social group, incorporated in the UNHCR guidelines[32] and taken up by the Qualification Directive 2011/95/EU in Article 10(1)(d), which mentions gender and gender identity among the relevant factors for determining membership of a particular social group or the identification of characteristics specific to that group, has been consolidated by the practice of Member States' authorities.

The CEDAW Committee, however, has criticized this orientation, following remarks already made by feminist scholars and activists. Overall, it has slowed down women's progress towards the full enjoyment of the right to international protection and reinforced the perception of refugee women as subjects determined in kind primarily by society and culture.

It has also proved problematic both given the frequent ineffectiveness of the same request for international protection thus made at the individual level and in legal

[29] ECtHR, W.H. v. Sweden, Application No. 49341/10, 27 March 2014, §63.

[30] ECtHR, N. v. Sweden, Application No. 23505/09, 20 October 2010, §10.

[31] Moira Dustin, Christel Querton, 'Women in Refugee Law, Policy and Practice: An Introduction to The Refugee Survey', RSQ [2022] 41, 347-354.

[32] UNHCR, Guidelines On International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2002.

policy. Concerning this last profile, the recognition of refugee *status* to women as 'belonging to a particular social group' is based, in fact, on assumptions that are incorrect both at the level of political strategy and at the strictly legal and, in general, theoretical level: on the one hand, as Heaven Crawley pointed out, there has been a replication and reinforcement of the marginalization of women as asylum seekers, who see their experiences as asylum seekers generalized, regardless of an in-depth individual examination of their individual biographies, determined and qualified exclusively in the light of sex and gender.

This has led to confusion over the meaning of *gender-related persecution* and has strengthened the legal application and interpretation of the Geneva Convention by the spread of homogeneous parameters for verifying behavior which, in turn, are attributed to women as a monolithic body, i.e. without an authentic understanding of the relationship between the form of harm suffered or feared by the individual asylum seeker and the grounds for protection enumerated in Article 1A no. 2, para. 1 Geneva Convention.

Thus we have witnessed, albeit within the framework of initiatives aimed at emancipating the experiences of women asylum seekers from the silence that has long concealed them in the context of international refugee law, a reaffirmation of the stark contrast between the experience of persecution lamented by male asylum seekers and that of women, once again imprisoned in a model that generalizes and emphasizes persecution that takes the form of sexual aggression, while limiting the image of the asylum seeker to that of a poor, powerless and vulnerable woman, not infrequently contrasted with the western model of a free, even sexually, educated and independent woman, emptying the narratives of asylum seekers of political content, estranged moreover from the overall political and social context of the country of origin.

Invoking Article 5 CEDAW, the Committee alerted States of the limitations of evaluating women's asylum applications by limiting the assessment to their membership to a particular social group, pointing out that this approach fuels prejudice and stereotypical notions of women

> that are based on the inferiority or superiority of either sex. Gender stereotypes affect women's right to a fair and just asylum procedure and asylum authorities must take precautions not to create standards based on preconceived notions of gender-based violence and persecution.[33]

It cannot be forgotten, moreover, from the perspective of the CEDAW Committee's interpretation of the Geneva Convention that

> women are active agents playing important roles as political *leaders*, members of governments or opposition groups, journalists, human rights defenders and activists, lawyers and judges, among others. [Women] are targeted because of their political views and/or activities, including the exercise of their rights as women. Accordingly, Article 7 of the [CEDAW] Convention requires State Parties to take action to realise the equality of women in political and public life. It may therefore be appropriate for women to apply for asylum on the grounds of gender-related persecution or on political, religious, racial and ethnic grounds, including in situations where they have been forced to flee their country of origin due to external aggression, occupation, foreign domination or serious civil conflict.[34]

With regard to the effectiveness of the formulation of an application for international protection claiming that women deserve international protection because they belong to a particular social group, it cannot be overlooked that recognizing on a case-by-case basis the concrete existence in the country of origin of individual asylum seekers of a particular social group to which each of them belongs is not a straightforward and obvious assessment: the expression 'social group' has been formulated openly and must be interpreted broadly, including members who share an innate characteristic or a common history that cannot be changed or share a characteristic or belief that is so fundamental to identity or consciousness that a person should not be forced to renounce it, i.e. the one who possesses a distinct identity in the country of origin because he or she is perceived there as different from the surrounding society.

It is, therefore, a question of objective characteristics, which cannot be changed or renounced without serious sacrifice of the group members themselves or of the way

[33] CEDAW Committee, 2014, § 31.

[34] CEDAW Committee, 2014, §§31-32.

the group itself is perceived by the outside society.

Women's claims based on persecution suffered as a member of the women's group in a particular region are often rejected because they are too general, but even narrower definitions of the group (e.g. 'women victims of domestic violence in Ecuador') have been not accepted as evidence of persecution, since the indicated group members are not considered to share immutable characteristics.[35]

Moreover, it is overlooked that the reference in cases of female asylum seekers belonging to a particular social group constitutes a problematic interpretative choice not only for women seeking protection but also, more generally, for the interpretative coherence of the social group category.

The orientation that tends to attribute the persecution of women to this motive also overlooks the fact that sex and gender is a fundamental and performative feature of social life that marks a deep division on which the social inequality of women is built, often manifested in violence and against which protection as members of the group 'women' is neither adequate nor consistent with the system of the Refugee *Status* Convention, as it would exclude the protection of women from persecution for reasons other than sex and gender.

The assessment of women's applications for international protection, therefore, needs a radical rethinking: women asylum seekers should not be included in the scope of the Geneva Convention as 'special cases' that deviate from the codified parameters, but rather as part of the varied panorama of subjects eligible for refugee *status* as defined by said treaty, in which there are already those useful references to ensure adequate protection for women as well.

The problematic issue, therefore, is in recognizing the political, religious, social,

[35] There is, however, the interpretation of the social group of belonging in an increasingly inclusive sense of women's experiences of gender persecution: specifically, a social group is defined with reference to "an immutable or fundamental characteristic that individual members of the group have no power to change or that is so fundamental to their identity or consciousness that they should not be required to be changed" (Acosta, *United* States *board of immigration Appeals*, El Salvador/USA, 1 March 1985); the members of the social group "intend their affiliation to the group as well as all other subjects within a given society" and the harm suffered is in itself an important social attribute (RA - United States board of immigration Appeals, Guatemala/USA, 19 January 2001); in the absence of other characteristics of the group, gender may be the central element in the definition of the social group (Kasinga - United States board of immigration Appeals, Togo/USA, 13 June 1993).

racist or nationalist nature of the persecution of women's choices:

> *Gender-specific* claims for refugee status are no different from any other asylum claim. There is no need for a new definition. There is no need to manipulate the current definition. Claims for gender-specific refugee status must be assessed under exactly the same conditions as any other claim for refugee *status* under the [Geneva] Convention.[36]

Taking up this warning, Heaven Crawley makes it clear that this is an issue that does not necessarily entail a literal alteration of the content of the normative text of reference, but one that invites a work of interpretation (*content versus interpretation*), since the legal basis for recognizing refugee *status* for women can be found precisely in the Geneva Convention, if all the terms of the definition in Article 1, from persecution to serious harm, from well-founded fear to no alternative internal escape route, were re-interpreted to cover women as well, starting from their individual and concrete experiences, overcoming the monolithic representations that have become entrenched in practice.[37]

4. Concluding remarks

In sum, according to the rendered judgment, Member States are bound by the CEDAW and the Istanbul Convention. As such, women who face gender-based violence due to their sex and gender and are exposed to discrimination in their country of origin are recognized as members of a particular social group. After an individual assessment, they are entitled to refugee status. Additionally, persecution by non-State actors is also a valid reason for refugee status, especially when there are no protective actors to ensure safety. This applies if the persecution or lack of protection is based on any reasons for persecution outlined in Article 10(1) of Directive 2011/95. Furthermore, gender-based violence is considered 'serious harm' and 'torture or inhuman or degrading treatment

[36] James C. Hathaway, *Law of Refugee Status*, (Butterworths Limited 1991).

[37] Heaven Crawley, 2001, 35; CEDAW Committee, 2014, §30.

or punishment'. This means that if the requirements for refugee status are not met, subsidiary protection can still be granted. All assessments shall be done taking into consideration detailed information including the status of women in the country before the law, their political rights, social and economic rights, and the cultural and social norms of the country, the consequences for non-adherence to these norms, the prevalence of harmful traditional practices, and the incidence and forms of violence against women. Assessments should also be based on information on the protection available to women, any penalties imposed on those who perpetrate violence, and the risks that a woman might face if she returns to her country of origin after making a claim.

The statements mentioned above are certainly crucial for ensuring that women seeking asylum in European Member States have access to international protection in case they face gender-based discrimination and persecution in their origin countries. However, these statements are not new and have resulted from over three decades of research and activism by women asylum seekers, feminist scholars, and international legal feminism authors.

These statements, furthermore, have crystallized the issue of granting refugee status to women who are victims of gender-based violence on the grounds of belonging to a particular social group. However, this concept is problematic as it fails to recognize the political dimension of women's rebellion against the gendered regimes that exist in their countries of origin and the political nature of the persecution that women are exposed to for opposing them and looking to escape.

This judgment, hence, represents a missed opportunity for further reflection on the specific issues faced by women who are moving from one country to another and are or have been exposed to sexual and gender-based discrimination and persecution in origin and transit countries, but also further discrimination and victimization in the destination country, where their request for protection and support is disregarded by the law and the policy.

At the end of this contribution, it is worth giving space to WS, the asylum-seeking woman whose story is summarized in the few introductory lines of the annotated judgment: this Kurdish woman, escaping from Turkey, asylum seeker for the domestic violence she suffered and at the risk of being killed for reasons of honour, from the lines of the decision is telling us another part of the serious violations that

usually women asylum seekers suffer, this time in destination countries.

Her asylum request should have been decided promptly in Germany, where the woman moved, but a formalistic and blind application of the Dublin Regulation[38] started a lengthy procedure that victimized the asylum seeker two times, removed to Bulgaria, as country of first arrival, and exposed her to a permanent condition of fear of being put in danger for her life, limiting any life planning despite her displayed strong agency.

The violation, therefore, begins in Germany and continues in Bulgaria where the authorities still denied her international protection, despite the consolidated body of legal principles developed by international and European acts and jurisprudence in the face of clear and unequivocal indicators: gender-based violence, in the forms of domestic violence, identified non-State agents of persecution towards which Turkey is known to have a deliberate discriminatory indifference, as pointed out since 2009 by the European Court of Human Rights.

The personal is not yet political nor juridical for women seeking asylum in the European Union and no country is safe for women escaping all forms of sexism and patriarchy, so the asylum seeker WS, through this judgment, calls to strengthen the efforts for tearing apart the still pervasive blindness on women's rights, including those involved in international mobility flows, regardless of the labels one may wish to attach to them (as economic migrants, forced migrants or asylum seekers, etc).[39]

[38] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[39] Heaven Crawley, Dimitris Skleparis, *Refugees, migrants, neither, both: Categorical fetishism and the politics of bounding in Europe's "migration crisis"*, JERS [2018] 44(1) 48-64.

BIAGIO MONZILLO*

ABUSE OF FUNCTIONS: A NECESSARY CRIME?

ABSTRACT. *Abuse of office remains a topic of ongoing debate even after its abolition. The Constitutional Court was promptly called upon to decide on the legitimacy of the reform. The primary objection raised by the referring judges is that the repeal of Article 323 of the Criminal Code conflicts with specific prohibitions established under supranational law. The author thus aims to examine whether there exist binding obligations to criminalize such conduct, and to what extent the Constitutional Court can intervene to ensure compliance by Parliament. In this context, the supranational norms invoked as the foundation for the constitutional issues are analyzed, and the solutions adopted in several European legal systems are briefly surveyed. The author concludes that while the decriminalization of abuse of office is not inherently objectionable, such a significant intervention should be part of a broader, comprehensive reform of the penal framework addressing offenses committed by disloyal public officials.*

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1. An endless dispute

The issue is longstanding: it concerns ensuring that the activity of public administration is subject to the law (and, therefore, to judicial oversight), while preserving the decision-making autonomy of administrators.[1]

The difficulty of finding a satisfactory solution to such a puzzle, from a criminal law perspective, is well represented by the troubled history of abuse of office, a 'tension area' between legislators and judges.[2]

The offense has been abolished,[3] after being reformed three times in thirty years.[4] The latest legislative intervention is certainly more drastic than the previous ones, but the underlying spirit remains the same: to limit judicial review of decisions – particularly discretionary ones – made by public administration, which the criminal judiciary has always contested by developing interpretations that conflict with the purpose of each 'adjustment'.

A clear example of the protracted conflict between jurisprudence and the legislator regarding the scope of the repealed Article 323 of the Criminal Code is the reaction of judges to the 2020 Reform. Parliament excluded from the list of punishable behaviors the violation of provisions contained in regulations, limiting the criminal

[1] Flaminio Franchini, 'Aspetti del sindacato del giudice penale sugli atti amministrativi' (1957) Riv Trim Dir Pub 337; Gaetano Contento, *Giudice penale e pubblica amministrazione: il problema del sindacato giudiziale sugli atti amministrativi in materia penale* (Laterza 1979); Adalberto Albamonte, 'Atti amministrativi illegittimi e fattispecie penale: poteri del giudice nella tutela penale del territorio' (1983) Cass pen 1861; Giuseppe Gallenca, *Indipendenza della pubblica amministrazione e giudice penale nel sistema della giustizia amministrativa* (Giuffrè 1990); Pier Matteo Lucibello, *Il giudice penale e la pubblica amministrazione* (Maggioli 1994); Claudio Franchini, *Il controllo del giudice penale sulla pubblica amministrazione* (CEDAM 1998); Pietro Aimo, *La giustizia nell'amministrazione dall'Ottocento a oggi* (Laterza 2000); Marco Gambardella, *Il controllo del giudice penale sulla legalità amministrativa* (Giuffrè 2002).

[2] Chiara Silva, 'Il sindacato del giudice penale nei reati contro la pubblica amministrazione: una verifica alla luce del delitto di abuso d'ufficio' (DPhil thesis, Università degli studi di Padova 2011); Antonella Merli, *Sindacato penale sull'attività amministrativa e abuso d'ufficio. Il difficile equilibrio tra controllo di legalità e riserva di amministrazione* (Editoriale Scientifica 2012).

[3] Art 1, co 1, lett b, legge 9 agosto 2024, n. 114 Gazzetta Ufficiale (187) 10 August 2024.

[4] The first in 1990, the second in 1997, the third in 2020. For a concise reconstruction of the legislative evolution of Article 323, see C cost, 25 November 2021 (dep 2022), n 8. See also Bruno Giangiacomo, 'L'abuso d'ufficio dalle riforme all'abrogazione' (2025) Quest giust <www.questionegiustizia.it/articolo/l-abuso-d-ufficio-dalle-riforme-all-abrogazione> accessed 11 January 2025.

relevance to the non-compliance with 'specific rules of conduct expressly provided by law or acts having the force of law, from which no discretionary margins remain'. Despite such an explicit expression of the legislator's intent, the Court of Cassation neutralized the reform by affirming that abuse of office could still be committed through the violation of regulations, if they were technical specifications of legal provisions that, in turn, had to comply with the principles of legality and precision, inherent to criminal law.[5]

The same 'reactionary' stance can be attributed to the decisions where the Supreme Court ruled that the 2020 amendment, even though it narrowed the scope of Article 323 of the Criminal Code, did not entail the *abolitio criminis* of discriminatory or retaliatory conduct, which are still contrary to the impartiality principle set out in Article 97 of the Constitution, a 'constitutional principle of immediate prescriptive scope, which requires no adaptation or specification'.[6]

Evidently, the Government believed it could put an end to the long-standing dispute by addressing the root of the problem. However, abuse of office continues to be a topic of debate even after its abolition.

2. The limits of constitutional review in criminal law

While some judges have considered that the act previously classified as abuse of office continues to have criminal relevance under the 'guise' of a different offense,[7] others have suspended their judgments and asked the Constitutional Court to declare the unconstitutionality of the repeal of Article 323 of the Criminal Code.[8]

[5] Eg Cass, 16 February 2021, n 33240, CED Cass, 281843-01.

[6] Cass, 6 December 2021, n 2080, CED Cass, 282720-01. In other decisions, moreover, the Court of Cassation has excluded the relevance of the violation of Article 97 of the Constitution. Cf Cass, 10 June 2022, n 28402, CED Cass, 283359.

[7] Eg Trib Milano (Gup Iannelli) 11 September 2024. See Maria Chiara Ubiali, 'Concorso pubblico truccato anticipando i temi delle prove: non potendo più ricorrere alla turbativa d'asta e all'abuso d'ufficio, il Tribunale di Milano condanna per rivelazione di segreti d'ufficio' (2024) 12 Sist pen 83 < www.sistemapenale.it/it/scheda/concorso-pubblico-truccato-anticipando-i-temi-delle-prove-non-potendo-piu-ricorrere-alla-turbativa-dasta-e-allabuso-dufficio-il-tribunale-di-milano-condanna-per-rivelazione-di-segreto-dufficio> accessed 30 December 2024.

[8] Trib Firenze ord 24 September 2024, 3 October 2024, 28 October 2024; Trib Locri ord 30 September 2024; Trib

The requests are primarily based on the alleged violation of asserted obligations to criminalize actions under international law, and therefore, of Articles 11 and 117 of the Constitution.[9] In some rulings, the conflict with Articles 3 and 97 of the Constitution is also highlighted. In any case, the aim is to revive the offense of abuse of office.

Such an outcome would, evidently, have *in malam partem* effects. The Constitutional Court has clarified that it is not entirely precluded from making rulings with such an effect. In fact, according to a well-established principle, the Court's review may concern provisions that «establish, for certain subjects or situations, a preferential criminal treatment»[10] (so-called '*norme penali di favore*').[11] This is because, strictly speaking, the *in malam partem* effect does not result from a possible declaration of unconstitutionality – which therefore does not violate the legislator's monopoly on criminalization choices, as established by Article 25 of the Constitution – but rather from the subsequent re-expansion of the scope of application of the general norm, still present in the legal system, which was set by the same legislator, also with regard to the case subject to the illegitimate derogatory provision.

The repeal belongs to the different category of favorable criminal laws ('*norme penali favorevoli*'). As a rule, the Court's review of provisions of this type is excluded:

Busto Arsizio ord 21 October 2024; Trib Bolzano ord 11 November 2024; Trib Teramo ord 22 November 2024; Trib Catania ord 26 November 2024. All available at <www.sistemapenale.it>.

[9] On the subsequent non-performance of (alleged) supranational criminalization obligations cf Vittorio Manes, *Il giudice nel labirinto. Profili delle intersezioni tra diritto penale e fonti sovranazionali* (DIKE Giuridica Editrice 2012) 112.

[10] C cost, 18 January 2022, n 8, point 7 of the Conclusions on points of law.

[11] Emilio Dolcini, 'Leggi penali "ad personam", riserva di legge e principio costituzionale di eguaglianza' (2004) Riv it dir proc pen 50; Domenico Pulitanò, *Diritto penale* (Giappichelli 2005) 15; Giuliano Vassalli, 'Giurisprudenza costituzionale e diritto penale sostanziale' in Alessandro Pace (ed), *Corte costituzionale e processo costituzionale* (Giuffrè 2006) 1021; Greta De Martino, 'Brevi osservazioni in tema di norme penali di favore e di reati strumentali' (2006) Giur cost 4170; Ombretta Di Giovine, 'Opinioni a confronto. Norme penali di favore e controllo di costituzionalità' (2007) Criminalia 224; Gaetano Insolera, 'Controlli di ragionevolezza e riserva di legge in materia penale: una svolta sulla sindacabilità delle norme di favore?' (2007) Dir pen proc 671; Domenico Pulitanò, 'Principio d'eguaglianza e norme penali di favore' (2007) Corr Merito 209; Costanza Nardocci, 'Norme penali di favore fra tutela dell'unità della famiglia "tradizionale" e diritti individuali. All'incrocio tra "tempo" della norma e "tempi" del legislatore. A margine di corte cost. Sent. n. 223 del 2015' (2016) 2 Riv AIC 14; Rossi Bernardino, 'Gli effetti della dichiarazione di illegittimità costituzionale di una norma penale di "favore"' (2017) Cass pen 199; Gino Scaccia, 'Rilevanza della questione di legittimità costituzionale e norme penali di favore: una proposta' (2020) Giur cost 1537.

otherwise, a possible declaration of unconstitutionality would restore the repealed norm, which is the expression of a criminalization choice revoked by the legislator as no longer deemed relevant.[12] However, this prohibition does encounter some exceptions; and among these, challenges based on Articles 3 and 97 of the Constitution cannot be included.

The Constitutional Court has indeed already declared inadmissible challenges raised, in light of the parameters just mentioned, specifically concerning the previous reforms of Article 323 of the Criminal Code. In this regard, the constitutional judges, in line with their traditional approach, reiterated that Article 3 of the Constitution can only be invoked against preferential criminal laws: outside of this case, constitutional review is inadmissible unless it is intended to produce favorable effects; and this is true even if the challenged incriminating provision were to, hypothetically, result in unequal treatment or unreasonable outcomes (a situation that the Court could only remedy through a 'reparative' ruling with *in bonam partem* effects).[13]

As for the allegations of violation of Article 97 of the Constitution, the Constitutional Court has justified their inadmissibility by stating that the abolition, even if partial, of a crime is not in itself a choice subject to censure. Indeed, criminalization is not the only means of protecting values of constitutional relevance (in this case, impartiality and the proper functioning of the public administration); on the contrary, criminal law should be considered the *extrema ratio*, which the legislator should resort to only when – based on a discretionary assessment, generally immune from constitutional review – he believes that constitutional protection needs cannot be adequately fulfilled by other rules and sanctions.[14]

However, the Constitutional Court is also the guardian of the compliance of Italian laws with obligations arising from international law. In this role, it is permitted to cross the gates of the 'forbidden garden' where Parliament exercises a monopoly over

[12] C cost (n 10). Cf also C cost, ord 23 May 2001, n 175; sent 23 January 2019, n 37; ord 6 November 2019, n 282.

[13] C cost, sent 20 July 1995, n 411; ord 6 December 2006 n 437; sent 15 December 2000 n 580.

[14] C cost, sent 23 January 2019, n 37. Cf also C cost, sent 18 July 1996, n 317; 15 December 1998 n 447; 7 July 2010 n 237. For more on the topic see, among other, Caterina Paonessa, *Gli obblighi di tutela penale. La discrezionalità legislativa nella cornice dei vincoli costituzionali e comunitari* (Edizioni ETS 2009); Manes (n 10).

criminal law choices, so that it can verify the legislator's adherence to the commitments Italy is bound to respect under Articles 11 and 117 of the Constitution. Constitutional legitimacy review with potential *in malam partem* effects is, therefore, admissible when the challenged provision is alleged to be in conflict with international obligations.[15]

3. Do international obligations to criminalize really exist?

According to the referring judges, the repeal of abuse of office would make Italy non-compliant with the commitments undertaken through the ratification of the United Nations Convention against Corruption (UNCAC, Mérida Convention).

More precisely, it is acknowledged that the Treaty, far from imposing a true obligation to criminalize, merely requires the contracting States to consider criminalizing abuse of office[16]; however, if the legislator were to choose criminalization, such a decision would no longer be reversible, due to a supposed obligation to 'keep things as they are'[17] (the so-called *stand-still* obligation).

The Court of Reggio Emilia, in rejecting the constitutional challenge raised by the Prosecutor based also on the interpretation of the Mérida Convention briefly mentioned[18], argued that if there is no obligation to criminalize, then there cannot be a prohibition on regression.[19] However, this statement is too *tranchant*, as it relies on a

[15] C cost, sent 12 February 2014, n 32. The Court justified the admissibility of the *in malam partem* effects resulting from the declaration of unconstitutionality by also referring to the need to avoid leaving 'certain types of conduct unpunished for which there is a supranational obligation to criminalize. This would constitute a violation of European Union law, which Italy is required to respect under Articles 11 and 117, first paragraph, of the Constitution". cf Manes, *Il giudice nel labirinto* (n 10).

[16] Art 19 ('Abuse of functions'): 'Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity'.

[17] Trib Firenze, ord 24 September 2024.

[18] The Prosecutor had also raised the objection that the repeal was contrary to the Proposal for a Directive on combating corruption; the Court had asserted that a proposal, as such, cannot be considered binding.

[19] Trib Reggio Emilia, ord 7 October 2024.

reading of Article 19 detached from its context. It does not take into account other parameters, which, in fact, have also been invoked in some referral rulings.

The reference is, in general, to Article 65 of the Convention, which commits the contracting States to adopt 'the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention'; and, more specifically, to Article 7, paragraph 4, under which 'each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.'

Placed within the framework just outlined, the question of whether there is an obligation of stand-still appears more complex. Indeed, the Italian legal system had already provided for the crime of abuse of office long before the ratification of the Mérida Convention: therefore, it seems more appropriate to discuss the existence, rather than a generic obligation of criminalization (which, as seen, does not seem to exist), of a prohibition on regression.

Regarding abuse of office, Italy would have, in fact, committed itself to maintaining its criminal relevance; however, whether this is a strict obligation that could eliminate Parliament's discretion is doubtful. The aforementioned provisions of the Convention seem to impose on States the adoption of an effective anti-corruption system, while still leaving them free in their choice of further implementation measures beyond those deemed essential. In this regard, consider that while Article 19, dedicated to abuse of functions, commits the Parties to 'consider adopting', other provisions, such as Article 15, which deals with the 'Bribery of national public officials', express the related obligation using the more peremptory phrasing 'shall adopt'.

Ultimately, the criticism of the repeal of Article 323 of the Criminal Code being in contrast with the relevant commitments undertaken at Mérida does not seem well-founded; however, there are other sources that allow for a more plausible doubt regarding the legitimacy of the outright abolition of abuse of office from a supranational perspective.

For example, consider Directive 2017/1371 ('PIF Directive').[20] As is known,

[20] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198/29.

the introduction of Article 314-*bis* of the Criminal Code – just before the repeal of Article 323 – became necessary in order to comply with Article 4 of the aforementioned Directive, whose third paragraph states that 'Member States shall take the necessary measures to ensure that misappropriation, when committed intentionally, constitutes a criminal offence.' The provision does not prescribe the specific introduction of the crime of abuse of office, but case law had already classified the misappropriative and embezzling conduct that the supranational provision required to be criminalized[21] under the scope of Article 323 of the Criminal Code.[22]

The formulation of the 'new' Article 314-*bis* of the Criminal Code still leaves, albeit partially, the non-fulfillment of obligations deriving from the aforementioned EU provision, since today the criminal code punishes 'misappropriation' only in relation to movable property, not immovable property.[23]

The constitutional challenges proposed so far based on this criticism have not been accepted and, therefore, will not be reviewed by the Constitutional Court.[24] In any case, it should be noted that the conduct relevant to the PIF Directive does not exhaust the varied range of behaviors that, according to international definitions, can be classified as abuse of functions.

Ultimately, even European Union law does not provide for specific obligations to criminalize abuse of functions: this is evident from the fact that the Proposal for a Directive on combating corruption presented by the European Commission in 2023 included the criminalization of abuse of functions as mandatory;[25] however, under an

[21] Art 4 cited also specifies that «'misappropriation' means the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests».

[22] Eg Cass, sent 30 September 2020, n 36496, CED Cass, rv. 280295-02; sent 23 January 2018, n 19484, CED Cass, Rv. 273783-01.

[23] Cf Gian Luigi Gatta, 'Morte dell'abuso d'ufficio, recupero in zona Cesarini del 'peculato per distrazione' (art. 314-bis c.p.) e obblighi (non pienamente soddisfatti) di attuazione della Direttiva UE 2017/1371' (2024) 7-8 Sist pen 135 <https://www.sistemapenale.it/pdf_contenuti/1725290460_gatta-1-fasc-7-82024.pdf>.

[24] The Court of Reggio Emilia rejected the issue as it was deemed irrelevant to the decision: more precisely, due to the lack, in this case, 'of elements from which to infer that the alleged diversion of the property could be considered, even in a reflected manner, harmful to the financial interests of the European Union'.

[25] Commission, 'Proposal for a Directive of the European Parliament and of the Council on combating corruption,

agreement reached in June 2024 within the European Council, the text was modified to provide, among other things, for the criminalization of abuse of functions not as an obligation, but as an option, in line with the UNCAC, to which the European Union is also a party.[26]

4. Common problem, different solutions

Although the European Union does not mandate the criminalization of abuse of functions, the phenomenon is punished almost everywhere within Europe.[27]

Nonetheless, the definitions adopted by national legislators exhibit many variations, and this proves that it is not possible to challenge the illegitimacy of the repeal of Article 323 of the Criminal Code by asserting the existence of specific and binding international obligations.[28]

Further confirmation can be found by taking a look at the German legal system, where, since the Prussian Code of 1851, there has been no general provision for abuse of office, in accordance with the clear intention to avoid the risk, inherent in a provision formulated in an imprecise manner, of excessive judicial interference in the activities of the public administration. Any liability of disloyal officials is sanctioned on a disciplinary level, as well as through the invalidation of measures adopted by abusing their powers.

replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council' COM (2023) 234 final.

[26] Council, 'Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council - General approach' ST (2024) 11272, Annex, 38.

[27] As can be read in the explanatory memorandum of the Commission Proposal for a Directive on combating corruption, according to a Commission's analysis of the 2023, 'Member States have in their national legislation offences on […] abuse of functions'. The sample analyzed included not only Bulgaria and Denmark, which had not responded to the questionnaire. The text of the explanatory memorandum is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0234>.

[28] Cf Vittorio Manes, 'Contestazioni in eccesso e la fine dell'abuso d'ufficio' *Il Sole 24 Ore* (24 June 2023) <ntplus diritto.ilsole24ore.com/art/contestazioni-eccesso-e-fine-abuso-d-ufficio-AEyZKzoD> accessed 6 January 2025.

Criminal repression applies in truly marginal cases, as outlined in §§ 339 and 344 of the Strafgesetzbuch (StGB), which are rarely applied. The first of the two provisions mentioned, more specifically, punishes abuses committed by judges and arbitrators through the deliberate adoption, to the benefit or detriment of one of the parties, of decisions characterized by objective violations of the law (*Rechtsbeugung*, i.e., 'perversion of the law'), or by the falsification of facts.

§ 344 is essentially the equivalent of § 339, which applies to prosecuting authorities, who are guilty of the persecution of innocent individuals (*Verfolgung Unschuldiger*)[29].

The regulation established by the Spanish Criminal Code is completely different, where a general figure of abuse of functions is provided.[30] Very similar to the offense previously established by Article 323 of the Italian Criminal Code, now repealed, the crime of *prevaricación administrativa*, punished by Article 404 of the Spanish Code, is committed by an authority or public official who, knowingly, adopts an administrative measure that is clearly contrary to the law and lacks any rational basis.

La prevaricación also has a judicial variant, which occurs when a judge, even if only negligently, adopts an unjust decision (Articles 446 and 447).

The general figure of abuse of functions coexists with other more specific offenses, similar to crimes punished in our legal system, such as, for example: trafficking in influences by public officials (Article 428), embezzlement to the detriment of public administration assets (Article 432), abuses committed in the negotiation of contracts or other business (Article 439). In the face of such a varied constellation, it is very common for a conflict of provisions to arise in relation to the same fact; and, in case of doubt, the general provision, less defined, is often applied.

Even in France, there is a very controversial hypothesis of abuse of functions, perhaps more so than its Italian and Spanish 'sisters'.[31] The conduct incriminated by Articles 432-1 and 432-2 of the *code pénal* is described in the terms, both evocative and nebulous, of an '*échec à l'exécution de la loi*' (literally: 'checkmate to the enforcement of

[29] Cf Adelmo Manna, 'Profili storico-comparatistici dell'abuso d'ufficio' (2001) Riv it dir proc pen 1201.

[30] Cf Vittorio Manes, 'L'abuso d'ufficio nel nuovo codice penale spagnolo' (1998) Dir pen proc 1441.

[31] Sophie Corioland, *Responsabilité pénale des personnes publiques* (Dalloz 2019) 34.

the law'), to designate any abuse committed to the detriment of the administration ('*Des abus d'autorité dirigés contre l'administration*' is the title of the relevant section of Chapter Two, which covers crimes committed by public officials).[32]

Equally problematic is Article 432-12, which punishes the '*prise illégale d'intérêts*' and is also criticized for its lack of precision, from which derives its limited application. Indeed, there can be no doubt about the vagueness of a phrase such as 'to take, receive, or maintain, directly or indirectly, an interest that could compromise one's impartiality, independence, or objectivity in a matter or transaction in which the public official, at the time of the act, has the duty to ensure supervision, administration, settlement, or payment.'

Certainly, the aim is to punish the disloyal public official who exploits the opportunity to participate in the completion of a public interest act for personal gain, but such a provision is not able to specify when this occurs. From this perspective, the 2021 reform, which replaced the previous reference to '*un intérêt quelconque*', has resulted in only a slight reduction in the scope of application of Article 432-12.

5. Conclusive remarks

It seems inappropriate to make a prediction about the judgment of the Constitutional Court; at most, it can be observed that the path towards a declaration of unconstitutionality based on the incompatibility of the repeal of Article 323 of the Criminal Code with supranational obligations appears an uphill struggle.

A diagnosis, on the other hand, is allowed. The troubled life of abuse of office – as seen, not very different from its European counterparts – is an expression of the 'genetic' resistance of this phenomenon to being typified as a well-defined criminal offense. The repeal seems to presuppose exactly this awareness, developed as a result of the long series of experiments carried out through progressive restrictions on the scope of application of Article 323 of the Criminal Code.

[32] The penalty of five years' imprisonment and a 75,000 euro fine provided for the danger offense is doubled if the purpose of the 'checkmate to the enforcement of the law' is achieved.

It is, in any case, a political choice, which, as such, should be assessed according to criteria of appropriateness. From this point of view, the reform promoted by the Minister of Justice reveals the flaws of a hasty decision, implemented without prior consideration of the consequences.

First of all, as authoritative commentators have already pointed out, it must be taken into account that, similarly to the past, the judiciary (in particular, public prosecutors) will likely resort to substitute crimes, which are more severely punished, based on dangerous interpretative distortions.[33] If, therefore, the legislator aimed to curb the interventions of magistrates on the actions of administrators, it is likely that the promise of a future free from the 'fear of signing' will remain *flatus vocis*.

Meanwhile, the repeal will inspire courage in the many honest members of the Public Administration, but will leave citizens exposed to favoritism and abuse of power by the less loyal public servants. The traditional principle that disciplinary justice is, by nature, 'domestic' indeed leads one to doubt that the threat of disciplinary action has the deterrent effect invoked by the proponents of the repeal.[34] Similar doubts apply to accounting liability, which, by definition, presupposes account damages, and thus disregards acts that, while constituting offenses, have not caused similar repercussions.

After all, there is no action completely free of side effects. The decriminalization of abuse of office is no exception, and in any case, it is not, in itself, a solution to be criticized. However, such a disruptive intervention deserved to be part of a comprehensive reform of the sanctioning system for offenses committed by disloyal public officials. Alongside an enhancement of non-criminal tools, a revision of the

[33] David Brunelli, 'Eliminare l'abuso d'ufficio: l'uovo di Colombo o un ennesimo passaggio a vuoto?' (2023) 3 Archivio penale <https://archiviopenale.it/eliminare-labuso-dufficio-luovo-di-colombo-o-un-ennesimo-passaggio-a-vuoto/articoli/43652> accessed 11 January 2025. The Author mentions the falsity in public documents (Art. 479, extended by Art. 48), the revelation and exploitation of confidential information (Art. 326, paragraphs 1 and 3), and the omission and refusal of acts of office (Art. 328). He also refers to bid rigging (Art. 353 and 353-*bis*), noting that public prosecutors had charged this offense even in relation to hiring competitions, until the Court of Cassation [eg Cass (26225) 10 May 2023, CED Cass, 285528] restricted its application to public tenders only. Cf also Vittorio Manes (n 28).

[34] For this reason the establishment of independent authorities with inspection powers has been proposed. Cf Francesco Cingari, *Repressione e prevenzione della corruzione pubblica: verso un modello di contrasto integrato* (Giappichelli 2012).

criminal law apparatus targeting the sectors most sensitive to the risk of favoritism and abuse of power, such as public competitions and procedures for selecting contractors, and more generally, the issuance of favorable decisions, would have been appropriate.[35] But there is still tomorrow.

[35] Brunelli (n 26) 9.

LUCILLA TEMPESTA[*]

FAILURE TO VALIDATE DETENTIONS IN ALBANIA: TOWARDS A CLARIFICATION BY THE CJEU

ABSTRACT. *The article examines the Italy-Albania Protocol in light of the concept of a "safe third country" and the legal issues arising in its implementation. It traces an analysis of Regulation 2024/1348 and the recent case law of the Court of Justice of the European Union (CJEU), highlighting the tensions between Italian and European law.*

The contribution delves into the practical impact of the designation of safe third countries on the Italian system, dwelling, too, on the newly enacted Decree-Law 158/2024 (and its subsequent updates) and the regulatory developments that will culminate in the New Pact on Migration and Asylum.

Finally, the limits and opportunities of the disapplication of administrative acts conflicting with European criteria are discussed, along with the role of the CJEU in resolving regulatory conflicts.

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1. Introduction

Managing migration and asylum claims continues to be a terrain of legal and political tension in Italy, as evidenced by events related to the recent agreement with Albania.

The Italy-Albania agreement explores the application of border procedures in a non-EU country, where national and European law both apply. On November 6, 2023, Prime Minister Giorgia Meloni and Edi Rama signed the Protocol for Strengthening Cooperation on Migration. This agreement stems from the need to strengthen bilateral cooperation between the two countries in the field of migration and the prospect of the Republic of Albania's accession to the European Union.

The purpose of the agreement (art. 2), consisting of 14 articles and two annexes, is the relocation of asylum seekers rescued at sea by Italian ships to centers on Albanian territory (art. 4) that will be able to accommodate up to 3,000 people. The duration of the agreement will be five years with automatic renewal unless one country decides to withdraw (Art. 13). Minors, pregnant women, and other vulnerable individuals are excluded from these centers and returned to Italy. Jurisdiction remains Italian in Albanian territory (Art. 5-8). Entry and stay in Albanian territory is granted "*for the sole purpose of carrying out border or repatriation procedures provided for by Italian and European legislation and for the time strictly necessary for the same*" (Art. 4, co.3). Two state-owned areas (Art. 3) identified in Annex 1 are granted free of charge for the duration of the protocol. The first center is located near the port of Shengjin: the disembarkation and identification process will be carried out there, where there will also be a reception center for asylum seekers (hotspots). The second center for repatriation (CPR) of those who do not qualify for refugee status or asylum was built in Gjadër. The expenses for the procedures and construction of the facilities are entirely borne by the Italian side, which is also responsible for ensuring that there are health facilities to provide the necessary health services. The Albanian authorities cooperate with the Italian authorities to safeguard essential and unavoidable medical care for detained migrants. According to Article 6 of the protocol, the Italian side ensures the maintenance of order and security within the Designated Areas, while the Albanian side takes care of it in outer space and during transfers. A unit responsible for the smooth running, coordination, and

supervision of security issues is established for both Parties. The Italian authorities are in charge of preventing the unauthorized exit of migrants from Albanian territory during and after the completion of administrative procedures. On this point, it is stressed that from the wording of Art. 6 (5) of the protocol, an intent of blanket detention could be inferred in that the migrant's presence in designated areas of Albanian territory would authorize his or her automatic detention. The period of detention in the centers, according to the letter of Art. 9, operates following Italian law, that is, foreigners must be detained "*only for the time strictly necessary*," which may not exceed 18 months in the case of the execution of expulsion (Art. 14 TUI), while on the other hand, in the case of applying the asylum procedure at the border, equal to 28 days[1]. The categories to which the protocol applies are asylum seekers from safe countries of origin during the procedure of examining the international application to whom the accelerated procedure applies (i.e., non-vulnerable subjects), to those who have already applied and obtained a denial, and finally to persons awaiting repatriation in the absence of the requirements for residence in Italy[2]. In the case of persons rescued at sea, Article 14 TUI co. 1 stipulates that they are to be taken "to the nearest detention center for repatriation": the protocol, as initially arranged, would derogate from this rule.

Interestingly, the European asylum and migration pact is based on the fiction of non-entry, a characteristic element of the border procedure, while the Italy-Albania pact is based on the fiction of entry into Italian territory[3]. This fiction of entry does not solve the problem of the application of common European asylum norms in Albania, which are inextricably linked to the territory. The territorial limitation for European norms has been upheld by the ECHR and the Court of Justice of the European Union. The Italian government has clarified that only migrants rescued in international waters may be transported to Albania. The clarification follows the discussion in 2018 when the EU Commission ruled out extraterritorial asylum

[1] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione Europea: una relazione complicata' (2024) 1 Diritto, Immigrazione e Cittadinanza.

[2] Lorenzo Piccoli, 'No Model for Others to Follow' (Verfassungsblog, 14 November 2023).

[3] Gli Stati Generali sulla detenzione amministrativa, Intervento Silvia Albano (Video, [Milano], Prima giornata 17-18 May 2024)

procedures by arguing that the application of extraterritorial EU rules was neither possible nor desirable, pointing out that only migrants rescued in international waters would be allowed to disembark in safe third countries because then the ships would not be considered to be on EU territory. The same document states that sending an asylum seeker back to a third country without processing his or her asylum claim would constitute refoulement, which is not permitted under either EU or international law. Admitting the possibility of seeking asylum outside the territory of the Union would require an extraterritorial application of European law, which, as pointed out, is not desirable or possible at present. Article 9 of the Procedures Directive guarantees the asylum seeker the right to remain in the territory of the European Union for the duration of the asylum procedure. In addition, the Procedures Directive excludes the application of the asylum procedure as regulated by the same regulations outside the territory, border areas, and territorial waters. The proposal to transfer to Albania only migrants rescued in international waters does not resolve the legal issue, since according to the ratification law and protocol, EU law should apply. Moreover, the European Commission's discourse, which considered ships in extraterritorial waters not as EU territory, does not consider that, according to EU law, the determination of a state's territory is subject to national law. In Italy, Art. 4 of the Navigation Code states that Italian ships in international waters are considered Italian territory[4]. Therefore, Italian and EU regulations must be applied to such ships. Consequently, rescued migrants should be transported to Italy, not Albania, as their transfer elsewhere could amount to collective refoulement, which international and EU law prohibit. An operational problem, on the other hand, concerns the Italian police who would have to deal with identification, possibly repatriation, and asylum procedures by having to act in foreign territory. The coast guard and finance guard are the two authorities legitimized to rescue migrants at sea and transfer them to Albania, either from the coast of Sicily or, having to make an even longer journey, from Lampedusa. The inadequate capacity of the boats would result in continuous long journeys. This circumstance could result in further

[4] Mario Savino and Flavio Valerio Virzì, 'Il protocollo tra Italia e Albania in materia migratoria: prime riflessioni sui profili dell'extraterritorialità' (ADiM Blog, November 2023).

aggravation of overcrowding in reception centers, with particular reference to locations such as Lampedusa. In addition, operations in Albania require the presence of Italian officials who will have to make the trip from Italy several times to complete all procedures.

The agreement ensures that the most fragile people will be landed in Italy and not in Albania by enacting selective landings, in violation of Article 3 of the Italian Constitution as by admitting an assumption of discrimination based on a personal condition involving vulnerability or otherwise, this was also confirmed by the Council of Europe Commissioner for Human Rights, Dunja Mijatović. The issue of detention of persons transported to Albania who apply for asylum raises serious legal questions. Access to the procedure and screening is not possible on the ships, where it is instead mandatory to provide information to people about the possibility of applying for international protection[5]. The European Court of Human Rights in 2013[6] had expressed itself by explaining that "no assessment of the condition of persons rescued at sea can be conducted on board of Italian ships before their land transportation and should be carried out with appropriate personnel and with all guarantees." The registration and formalization of the application must take place in front of the border authorities (border police or police headquarters), and if it is deemed appropriate to apply in Albania, applications will be registered there. Union law does not allow for automatism in any case: an assessment of the least afflictive measures is always required, thus excluding detention. In contrast, only detention is conceived in Albania[7], representing a second profile of non-compliance. There can be no automatism regarding who can or should remain in Albanian territory or return to Italy, not even in the case of coming from a country of origin deemed safe. Immediacy at this stage is not feasible, since situations of violence, persecution, or people from vulnerable groups are not always immediately identifiable. Consider, for example, minors for whom age verification is

[5] Mario Savino, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania: tre problemi di sostenibilità giuridica e amministrativa' (ADiM Blog, January 2024).

[6] Hirsi Jamaa case for the collective rejections implemented in 2009 to Libya.

[7] Fatima Zahra El Harch, 'Il protocollo Italia-Albania è legge: tra (nuovi) vuoti normativi e (vecchie) violazioni di diritti' (Melting Pot, 21 February 2024).

necessary. Moreover, it is not possible to order detention and subsequently seek supporting evidence.

Notwithstanding the several doubts regarding the agreement, on February 15, 2024, the Italian Senate of the Republic approved the text ratifying and executing the Italy-Albania Protocol. Criticisms raised in both territories concerned issues of unconstitutionality. In Italy, the criticism stemmed from a failure to comply with Article 80 of the Constitution, which states that "*The Chambers shall authorize by law the ratification of international treaties that are political, or provide for arbitration or judicial regulations, or import variations of territory or burdens to the finances or modifications of laws*." The protocol, given its content, prescribes the application of the aforementioned Article 80. In Albania, the President of the Republic's prior and necessary authorization involved a Constitutional Court hearing. The law was published in the Official Gazette on February 22 and entered into force on February 23.

2. The Italy-Albania Protocol and the Safe Countries Decree: First Applications and Impacts

Delving to the core of the topic addressed in this article, this section introduces the events that have triggered the significant debate over the practical application of the protocol. Between October 13 and 14, an Italian military ship transferred 16 migrants-all non-vulnerable men from countries considered "safe," such as Egypt and Bangladesh, to the detention center in Shengjin. In light of the agreement, the first of its kind in Europe, the three centers have been built: the hotspot detention center (for asylum seekers waiting for their expedited asylum claim to be considered), the repatriation detention center (for so-called irregular migrants ready for repatriation), and a small 20-seat penitentiary.

As previously outlined, the pact has, from a practical standpoint, raised several critical legal and economic issues. On the one hand, the concept of "safe country," a central element of the accelerated asylum procedures under the Cutro Decree, has already been challenged by Italian courts, which have not upheld the detention of asylum seekers in the Pozzallo and Porto Empedocle centers because they have

challenged the very concept of a safe country of origin. In addition, the Court of Justice of the European Union (CJEU) intervened, which, as will be discussed in more detail below, in the ruling on October 4, reiterated that to consider a country "safe," no human rights violations must occur on any person or in any part of the territory. On the other hand, doubts are emerging about the agreement's compatibility with the principle of non-refoulement enshrined in Article 33 of the Geneva Convention and already violated by Italy in Hirsi Jamaa v. Italy in 2012.

The critical issues also extend to the economic plan: the estimated costs for the project, amounting to 670 million euros over five years, have been described as disproportionate to the small number of people being transferred, leading to the opening of a file by the Court of Auditors. In addition, the use of military ships, such as the Libra, to transport migrants – lacking adequate facilities and with sailing times of three to four days – has sparked further controversy over the excessively onerous conditions of the system.

The application of the accelerated asylum procedure had already found serious impediments in its attempts to apply in Italy[8]. Even before the Rome Court's intervention, the border procedure had remained essentially unimplemented even on Italian soil where detentions had not been validated by the Sicilian courts first because the financial guarantee's decree conflicted with European law, and again by disapplying the safe countries decree[9].

The Italy-Albania agreement raised numerous criticisms especially regarding its compatibility with the principle of non-refoulment under the 1951 Refugee Convention, which states that no person may be sent back to a country where he or she may be subjected to torture, inhumane, or degrading treatment – «Article 33. – Prohibition of expulsion or return ("refoulement") *1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where*

[8] First, by disapplying the first financial guarantee decree, then rewriting it by the government, and again by disapplying the Safe Third Countries decree. In both cases, the conflict with EU law rests on the problematic application of the border procedure or the accelerated procedure with the detention of asylum seekers.

[9] Mario Savino, 'La mancata convalida dei trattenimenti in Albania: alcuni dubbi sulla decisione del Tribunale di Roma' (October 2024), ADiM Blog.

his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country». Critics of the agreement point out that migrants transferred to Albania could be subjected to treatment in violation of this principle. They also raise the risk of collective refoulement, which could occur if, once in Albania, migrants were to be sent back to their countries of origin without proper individual assessment of their asylum claims. This scenario is reminiscent of the aforementioned Italian conviction in Hirsi Jamaa v. Italy, where the European Court of Human Rights ruled that the collective refoulement of migrants without proper assessment of their claims violates fundamental rights.

Criticism has been emphasized regarding Albanian authorities' involvement in managing the system. Although Albanian forces are responsible for the centers' external security, the work of Italian authorities remains central. The allocation of responsibility between the Italian and Albanian forces raises questions about how effective the system can be in ensuring respect for human rights, especially considering that Albanian police forces may be called upon to intervene if migrants decide to leave the centers.

The agreement, while conceived as a pragmatic solution to ease the burden of the Italian reception system, is therefore at the center of a heated legal and political debate, which has resulted in a heated confrontation between the judiciary and the government.

On Oct. 18, the first group of applicants, previously transferred to Albania in light of the aforementioned protocol, had been released, as the Court of Rome had deemed their detention non-validate. In particular, in an Oct. 18 press release, the Ordinary Court of Rome, Specialized Section on Immigration, reviewed requests to validate detentions ordered by the Rome Police Headquarters under the Italy-Albania Protocol. Based on the October 4, 2024 ruling of the Court of Justice of the European Union (CJEU), which followed a preliminary reference by the court of the Czech Republic, the detentions were not validated. The reason lies in the impossibility of

considering the states of origin of the detained migrants as "safe," making the border procedure inapplicable. Therefore, as stipulated in the Protocol, the persons involved have the right to be transferred to Italy and cannot be returned to Albania. Yet again, on Nov. 11, seven asylum seekers detained in Albania were returned to Italy, following the suspension of the validation of their detention by the Court of Rome, which referred the matter to the Court of Justice of the European Union. Pending the Court's opinion, the applicants were transferred to Italy and released, as required by the Protocol. This decision, again, was due to the assessment that the asylum seekers' countries of origin could not be considered "safe," preventing the application of an expedited border procedure. In response, the Italian government approved the so-called "Safe Countries" decree identifying, this time with a primary-ranking source, a new list of 19 countries defined as safe, which still include the countries of origin of asylum seekers transferred to Italy, namely Egypt and Bangladesh. The courts in Bologna, Palermo, and Rome pointed out a potential conflict between the definition of "safe countries" contained in European legislation and that provided by the Italian government decree, raising precisely the issue before the CJEU. In the case of a conflict between national and European law, national judges have three options: not applying Italian law, seeking an opinion from the CJEU through a preliminary reference, or referring the matter to the Constitutional Court for an assessment of constitutional legitimacy. Under European law, all asylum seekers arriving on Italian territory enjoy the constitutionally protected right to apply ordinarily. The exception is for applicants from countries defined as "safe," in respect of which an expedited procedure may be applied, as provided for by European law. The notion of a "safe country" at the European level implies that in such a country, without exception, safe conditions are guaranteed for all persons, without discrimination or persecution based on race, ethnicity, sexual orientation, or other vulnerable groups. This definition was confirmed by the CJEU ruling of October 4, 2024.

Indeed, the Court of Justice of the European Union has ruled on the preliminary reference made by the Brno Regional Court (Czech Republic) concerning three key issues: the notion of a safe country of origin, the legitimacy of the designation of such countries, especially when it exclusively concerns parts of their territory and the possibility for the court to assess ex officio the legitimacy of the designation.

Starting with the notion of safe country of origin, and thus with the second

question for a preliminary ruling, the Court clarifies (paras. 68 and 69) that Article 37 of Directive 2013/32 must be interpreted meaning that a country cannot be designated as a "safe country of origin" if even only part of its territory does not meet the criteria outlined in Directive 2013/32, thus, to be considered "safe," the entire territory of the country must meet the required conditions, without exception. These conditions include the general and continued absence of persecution (as defined in Article 9 of Directive 2011/95), torture or inhuman or degrading treatment, and threats of indiscriminate violence related to internal or international armed conflict. Article 37 of Directive 2013/32 must be interpreted narrowly, excluding the possibility of designating a third country as a safe country of origin if such designation is limited only to certain parts of its territory. A different interpretation, allowing partial designation, would have the effect of broadening the scope of the special examination regime in the directive in the absence of clear textual support in that provision. Moreover, the interpretation that excludes partial designation is supported by the regulatory development of Article 37. Before the introduction of Directive 2013/32, Directive 2005/85 regulated the designation of third countries as safe countries of origin in Article 30. This provision explicitly allowed member states to designate even only part of the territory of a third country as safe, provided that the conditions set out in Annex II of Directive 2005/85 were met for that specific part of the territory. These conditions, broadly similar to those set out in Annex I of Directive 2013/32, required a demonstration that there was "generally and consistently" no persecution, torture, or other forms of inhuman or degrading treatment. However, with the entry into force of Directive 2013/32, the former regulation was repealed under Article 53, replacing Article 30 of Directive 2005/85 with Article 37 of the new directive. So, the new wording, unlike the repealed rule, no longer provides any option for member states to designate only part of a third country's territory as safe (paras. 71-74). The CJEU decided not to join the proceedings on the "Czech" issue concerning territorial exceptions, which was resolved on October 4, and the "Italian" issue on personal exceptions. This represents an aspect worthy of attention, since, on the contrary, the Rome Tribunal applied the conclusions that emerged from the Oct. 4 judgment in the

context of personal exceptions as well, without adopting a cautious approach[10]. In conclusion, as already noted by others[11], the reasoning of the CJEU rests on a rigidly oppositional approach: a country is either safe in its entirety or it is not at all.

The Court of Rome, Immigration Section, following the validation hearing on 11/11/2024, decided by order to refer the case to the Court of Justice of the European Union, under Articles 267 TFEU, 105 et seq. of the Rules of Procedure, and Article 23a of the Statute of the Court. In the meantime, it suspended the validation judgment, maintaining the legal effects related to the effectiveness of the detention (48 hours), which automatically triggered the expiration of the period provided by law, i.e., in the end, the Bengali and Egyptian migrants will have to be returned to Italian territory and released by necessary termination of the restrictive measure. According to Article 6 bis of Legislative Decree No. 142/2015, the fact that the asylum seeker comes from a third state designated as a safe country of origin justifies detention during the border procedure, as provided for in Article 28 bis, paragraph 2, letter b-bis) of Legislative Decree No. 25/2008. Moreover, the designation of the country of origin as a "safe country of origin", in this case, Egypt and Bangladesh, attached to the Ministerial Decree of May 7, 2024, must still be considered valid, unless other sources of information indicate otherwise while excluding certain categories of persons from the presumption of safety. The Tribunal raised doubts about the compatibility of this designation with European Union law, also in light of the recent ruling of the Court of Justice of the European Union on October 4, 2024. Following the legislative amendment adapting national legislation to the Court's decision, the reference to the possibility of designating a third state as a safe country for certain parts of its territory was removed, but the option to exclude specific categories of persons from the presumption of safety remained.

As for the preliminary questions, the first one proposed by the Tribunal of Rome concerns the compatibility of the recent amendment introduced by Decree-Law No. 158 of October 23, 2024, with European Union law. In particular, the Tribunal asks

[10] Mario Savino, 'La mancata convalida dei trattenimenti in Albania: alcuni dubbi sulla decisione del Tribunale di Roma' (October 2024), ADiM Blog.

[11] *Ibid.*

the CJEU to rule on the legality of the designation of safe countries of origin, which is now directly entrusted to ordinary law. The amendment abolished the two-phase structure of the designation procedure, which previously required that there be a preliminary assessment based on criteria defined by law in compliance with Article Art. 2-bis of Legislative Decree No. 25/2008 Paragraph 1 and then a specific designation of countries as safe through a lower-ranking act, i.e., the interministerial decree to be updated periodically, most recently on May 7, 2024. The second preliminary question raised by the Tribunal of Rome concerns the conformity of the current method of determining the list of safe countries of origin, as established by Decree-Law No. 158/2024, with European Union law, specifically compliance with the principles of transparency and legality. In particular, the Tribunal questions the Court of Justice as to whether the national legislation is incompatible if it does not require that the national legislature, when designating a third country as a safe country of origin, clearly explicate the assessment criteria adopted, the method used, and the information sources from which the data regarding the designated country were derived. The third preliminary question raised concerns the obligation of Member States to give judges the power and duty to make an independent and timely assessment of whether a third state qualifies as a safe country of origin. Indeed, the Tribunal questions the CJEU to clarify whether EU law requires member states to allow judges to use all relevant information from qualified sources to verify the correctness of the designation of a third country as safe. The fourth preliminary question wonders about the conformity of EU law with Italian legislation that allows a third country to be designated as a "safe country of origin" while excluding only certain categories of persons. The question emerges following the amendments introduced by Decree-Law No. 158/2024, which eliminated the possibility of excluding parts of the territory from such designation but retained the possibility of excluding specific categories of persons, in contrast, according to the interpretation of the Tribunal of Rome with the principle affirmed by the Court of Justice in the above-mentioned judgment of October 4, 2024, in Case C-406/22. The judges of the Tribunal of Rome continue to hold that the correct reading of EU law requires that a third country cannot be considered safe if it is not so for groups of individuals, whether this depends on the portion of the territory in which they are or could be, as examined by the Czech court, or on the "category" of individuals to which they belong. The Tribunal

considers that definitive clarification is needed on this interpretation's compatibility with the Union's law. In light of these considerations, the Tribunal considered it appropriate to refer to the Court of Justice for a ruling on the compatibility with Union law on the option of designating a third state as a safe country of origin, with the exclusion of certain categories of persons from the presumption of a safe country. Pending such a ruling, the Tribunal suspended the judgment, as provided for in Article 267 of the TFEU. It is interesting to highlight the Rome Tribunal's divergent approach to decisions on the second group of detentions in Albania[12]. Specifically, on October 18, the Tribunal had disapplied the rules designating Bangladesh and Egypt as safe countries of origin for the first applicants transferred to Albania, denying the validation of the detentions. Instead, on November 11 it chose a less "intrusive" approach. On this second occasion, the judges decided no longer to deny the validation of the detentions but rather to suspend them and refer the matter to the Court of Justice by way of a preliminary reference, thus choosing a path that leaves the final assessment open pending the European pronouncement.

3. The Intricate Judicial Disputes in Italy

Before analyzing the provisions under review, it is pertinent to consider the basic notions regarding the precedence of European Union law over national law that conflicts with it. In light of the principle of loyal cooperation (or *sincere cooperation*), outlined in Article 5 of the EEC Treaty (now Article 4(3) TEU), «*the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*.». Member states must ensure the judicial protection of individuals' rights arising from EU law having a direct effect. According to the jurisprudence of the Court of Justice, it is up to national courts to ensure that European rules are applied effectively without States being able to hinder the full exercise of those rights. Recalling the

[12] Mario Savino, 'Se i giudici tornassero a occuparsi del caso concreto? L'impasse sui Paesi terzi sicuri e una possibile via di uscita' (November 2024), ADiM Blog.

supremacy of European law over national law makes it clear that European Union law directly affects the Italian legal system. When there is a conflict between an EU norm and a national norm, the Italian court is obliged to give preference to the application of the European norm, to the exclusion of the national norm, after ascertaining that the European norm is sufficiently clear, precise, and unconditional.

Directive 2005/85/EC on minimum standards for procedures applied in Member States for granting and withdrawing refugee status was transposed into Italian law by Legislative Decree No. 25 of January 28, 2008, which provides, in Article 28 bis (introduced by Legislative Decree No. 142/2015), the possibility, under certain conditions, to follow an accelerated procedure. Directive 2013/32/EU intervened regarding the discretion of the member state when drawing up the list of countries considered to be safe. It, too, was transposed into Italian law by Legislative Decree Aug. 8, 2015, no. 1 42. Particular reference is made here to Article 37*, "National designation of third countries as safe countries of origin."* As can be seen from the aforementioned European law, the member state can only exercise constrained and technical discretion at the stage of designating a country as a "safe country." It should be noted that Article 37 of Directive 32/2013 does not impose any specific constraints on the national legislative source to be used for drafting the list of safe countries. Instead, it identifies the parameters to be observed[13], the reference sources, and the obligation for continuous updates. Because of the latter point, a point of contrast (or rather tightening) is observed between the decree-law[14] (which amended Legislative Decree 25/2008) and European legislation. Specifically, the (now amended) Article 2-bis, paragraph 4-bis, of the decree-law only allows for updating the list of safe countries once a year through an act with the force of law (to be reported to the European Commission), based on a report

[13] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (2013) *OJ L 180, 29.6.2013, article 38.*

[14] Decree-Law No. 158 of October 23, 2024, on urgent provisions on procedures for the recognition of international protection, is repealed and now contained in Law No. 187 of December 9, 2024, which converted into law, with amendments, Decree-Law No. 145 of October 11, 2024, on urgent provisions on the entry into Italy of foreign workers, protection and assistance to victims of caporalato, management of migration flows and international protection, as well as related judicial proceedings.

approved by the Council of Ministers by January 15[15]. This last point raises a conflict with the requirement for continuous updating outlined in Article 37(2) of Directive 32/2013[16]. As a preliminary remark, it should be reiterated that due to the primacy of European law, the scrutiny of the list of safe countries remains incumbent regardless of the source that encloses the list[17].

In the cases that will be analyzed below, reference is made in particular to the "accelerated border procedure". As further recalled by the Court of Justice of the European Union, countries in which the rights and freedoms outlined in the European Convention on Human Rights are not respected and in which there is a danger of persecution, torture, or other forms of inhuman or degrading punishment or treatment, cannot be designated as "safe"[18].

In response to the impasse created in the centers in Albania, as already mentioned, the Italian government, on October 23, approved a new decree, in this case, a decree law, 158/2024, containing the new list of countries considered safe. It is necessary to dwell now on the scope of this primary-level act and what impact it has on asylum procedures.

First of all, Decree-Law 158/2024 has been repealed and transposed into the new "Decreto Flussi" Decree-Law 145/2024 which concerns regulations for labor entry flows into Italy. From 22 countries that were present in the last interministerial decree updated in May 2024, the new decree-law, following the ruling of the European Court

[15] Paragraph 4-bis. «The list of safe countries of origin referred to in Paragraph 1 shall be updated periodically by an act having the force of law and shall be notified to the European Commission. To update the list, the Council of Ministers, by January 15 of each year, shall deliberate a report, which, consistent with the preeminent needs of security and continuity of international relations and taking into account the information referred to in paragraph 4, it shall report on the situation of the countries included in the current list and those whose inclusion it intends to promote. The Government shall forward the report to the relevant parliamentary committees.»

[16] «Member States shall regularly review the situation in third countries designated as safe countries of origin in accordance with this Article.»

[17] Chiara Cudia, 'Osservazioni sul decreto legge in materia di individuazione dei paesi di origine sicuri nelle procedure per il riconoscimento della protezione internazionale: quando il fine non giustifica il mezzo (e il mezzo è inidoneo a perseguire il fine)' (November 6, 2024), *Federalismi.it: Rivista di diritto pubblico italiano, comparato, europeo*.

[18] Andrea Natale and Fabrizio Filice, 'Nota ai provvedimenti di rigetto delle richieste di convalida dei trattenimenti disposti dalla Questura di Roma ai sensi del Protocollo Italia-Albania, emessi dal Tribunale di Roma, sezione specializzata nella protezione internazionale, il 18 ottobre 2024' (October 22, 2024), *Questione giustizia*.

of Justice, has eliminated three countries for which there was a territorial security exception while confirming countries where it is documented that there are exceptions regarding security for certain categories of people, such as those belonging to the LGBTIQ+ community. Today, the list of safe countries includes 19 states: Albania, Algeria, Bangladesh, Bosnia and Herzegovina, Cape Verde, Ivory Coast, Egypt, Gambia, Georgia, Ghana, Kosovo, North Macedonia, Morocco, Montenegro, Peru, Senegal, Serbia, Sri Lanka, and Tunisia. Already, the interministerial decree of May 7, 2024, had been challenged before the Lazio Regional Administrative Court (TAR Lazio), the new decree-law has only exacerbated the critical issues already highlighted, prompting the Court of Bologna to question the Court of Justice again on the correctness of the procedure adopted to define the list of countries considered safe and the Court of Catania to disapply Decree Law 158/2024 by invalidating the detention of a person subjected to the accelerated examination of the asylum application because he came from a "safe" country[19].

Article 2a of Legislative Decree No. 25 of January 28, 2008, was reformed by the previously mentioned Decree-Law No. 145 of October 11, 2024, now converted by Law No. 187 of December 9, 2024. In the first paragraph, the list of so-called safe countries has been updated, and in paragraph 4a, it is stipulated that it will be an act having the force of law and no longer an interministerial decree to amend and update this list of safe countries. How the list will be updated is also innovative in that the Council of Ministers will submit a report by January 15 of each year that will elucidate the current situation of the countries on the list and be useful for possible innovation of the list.

A safe country of origin, as defined by Article 2bis of Legislative Decree 25/2008, is a non-EU state that, based on its legal system, the application of laws in a democratic context, and the general political situation, is shown to be able to stably and consistently guarantee the absence of acts of persecution, torture, inhuman or degrading treatment, as well as dangers arising from indiscriminate violence in situations of internal or international armed conflict. This assessment also considers respect for

[19] 'La nuova "lista dei paesi sicuri" e lo svuotamento del diritto di asilo' Press release, (November 5, 2024) ASGI.

fundamental rights enshrined in international treaties, in particular, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the United Nations Convention against Torture. Compliance with the principle of non-refoulement under the Geneva Convention and the effective presence of redress mechanisms against possible rights violations are also checked. In light of the recent EU Court of Justice ruling and stringent requirements for the definition of a "safe country", the possibility of excluding parts of the territory has been eliminated, but it is still possible for *certain groups or categories of people* to be excluded from the country's security designation, as the CJEU has not deemed personal exceptions incompatible with the notion of a 'safe country'[20]. The definition provided by the European Directive 2013/32, Annex 1, substantially coincides with that provided by the Italian legislation in Legislative Decree 25/2008. Both are based on similar criteria for the designation of a safe country of origin, such as the general and consistent absence of persecution, torture, inhuman or degrading treatment, and dangers from indiscriminate violence. It is noted that European legislation does not contemplate the possibility of any exclusion of parts of the territory or categories of people in the definition of a safe country, unlike the previous 85/2005 directive. Article 37 - *National Designation of Third Countries as Safe Countries of Origin* is the legal basis for member states to introduce an internal rule designating at the national level which countries are safe countries of origin.

The designation of a safe country of origin assumes relevant procedural significance, directly affecting the asylum seeker. From the automatic presumption of the safety of a designated country comes an increased evidentiary burden on the applicant, who must provide concrete and specific evidence to show that, concerning his or her circumstances, the government cannot be considered safe, to obtain recognition of international protection[21]. In addition, under Article 32, para. 1(b-bis) of Legislative Decree 25/2008, the application can be rejected as manifestly unfounded,

[20] Italian Supreme Court of Cassation, First Civil Section, 30 December 2024, Ordinanza No. 22146/2024.

[21] The Supreme Court again emphasized this point in an interlocutory order published on December 30. The applicant must provide the personal reasons that make his or her country unsafe in the specific case, and these grounds can be invoked both at the stage of appealing the decision to deny international protection and at the validation stage. In the latter, if these reasons are deemed well-founded, the applicant may not be detained.

and the time limit for filing an appeal is reduced by half.

Article 92-bis of Legislative Decree 25/2008 stipulates that in the case of rejection of an application submitted by an applicant from a safe country of origin, the decision must be motivated only by noting that the applicant has not demonstrated the existence of serious reasons for considering the country unsafe concerning his or her particular situation. A further consequence is that the filing of the appeal does not automatically suspend the enforceability of the rejection order. However, under Article 35-bis, paragraph four of Legislative Decree 25/2008, the applicant may apply for suspension of the decision adopted by the Territorial Commission. Such a suspension may be granted by the judge by reasoned decree pronounced within five days of the submission of the petition and without convening the other party in advance if serious and circumstantial reasons emerge[22]. In conclusion, the designation of a safe country of origin results in a compression of procedural guarantees for the applicant. Expedited procedures apply for the consideration of the application, and in case of rejection, removal from the national territory is also possible despite the pendency of the appeal. Qualifying the country of origin as a safe country of origin simplifies the task of the administrative authority in charge of examining applications by exempting it from the obligation to demonstrate, on a case-by-case basis, that the country provides the applicant with effective and adequate protection from persecution or other serious harm[23]. In the case of the Italy-Albania protocol for persons coming from a safe country of origin and rescued at sea, the accelerated border procedure will be applied, by equating the Albanian territory with the Italian border.

It is, therefore, necessary to question the institution and the reasons for its use, considering that as of 2026, with the entry into force of the New Pact on Migration and Asylum, border detention will become the "ordinary" procedure for applicants from safe countries of origin who are considered less eligible for international protection[24].

[22] Marcella Cometti, '*The preliminary reference to the Italian Court of Cassation and the one to the Court of Justice and disapplication of an administrative act infringing EU Law. The case of the Ministerial Decree on Safe Countries of origin*' (2024) 3 *Review of European litigation.*

[23] *G.A. v M.I.* (Supreme Court of Cassation, First Civil Section, Dec. 4, 2024) R.G. 14533/2024.

[24] «In the interest of swift and fair procedures for all applicants, whilst also ensuring that the stay of applicants who

Based on objective principle[25], the new approach represents a significant departure from the current safe country of origin designation mechanism, which is not homogeneous among different member states, showing significant differences in the evaluation criteria and application methods adopted at the national level[26]. As outlined in EU Regulation 2024/1348, the border procedure is designed to quickly assess, in principle, whether an asylum claim is unfounded or inadmissible at the external border. The aim is to enable the immediate return of those with no right to stay while ensuring that well-founded applications are directed to the regular procedure, allowing rapid access to international protection while fully respecting the principle of nonrefoulement. The accelerated procedure will become mandatory in several cases. The provisions of the new Regulation assume that the applicant's claim is considered less legitimate since it falls into specific categories, such as being from a 'safe country of origin'. The Asylum Procedures Regulation introduces a potential bias by assuming lower credibility for applicants from countries with a protection rate of 20% or less, despite considerable variation in recognition rates between Member States.

do not qualify for international protection in the Union is not unduly prolonged, including those who are nationals of third countries exempt from the requirement to be in a possession of a visa pursuant to Regulation (EU) 2018/1806, Member States should accelerate the examination of applications of applicants who are nationals or, in the case of stateless persons, formerly habitual residents of a third country for which the share of decisions granting international protection is 20 % or lower of the total number of decisions for that third country, taking into account, inter alia, the significant differences between first instance and final decisions. Where a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data and taking into account the guidance note pursuant to Article 11 of Regulation (EU) 2021/2303, or where the applicant belongs to a specific category of persons for whom the low recognition rate cannot be considered to be representative of their protection needs due to a specific persecution ground, examination of the application should not be accelerated. Cases where a third country may be considered to be a safe country of origin or a safe third country for the applicant within the meaning of this Regulation should remain applicable as a separate ground for respectively the accelerated examination procedure or the admissibility procedure.» (Regulation (EU) 2024/1348, recital 56.)

[25] Mario Savino, 'Se i giudici tornassero a occuparsi del caso concreto? L'impasse sui Paesi terzi sicuri e una possibile via di uscita' (November 2024), ADiM Blog.

[26] Gianpiero Cassola, 'Il controllo giurisdizionale sulla designazione dei paesi di origine sicuri: l'istruttiva esperienza della Francia' (November 2024), ADiM Blog.

4. The Ordinary Judge and the Review of Legitimacy on Safe Countries: Limits and Potential of Disapplication

The logic of the New Pact on Migration and Asylum is based on an assumption: there is a distinction between migrants deserving of full protection and others who, with less chance of having their applications for international protection recognized, will be treated with fewer guarantees, shorter timeframes for procedures and lodging appeals, and may be subject to detention to be returned more quickly without incurring in secondary movements. The Rome Court, in remanding the matter to the CJEU, shows clear opposition to this distinction: a country must be considered safe in all its parts, as already stated in the October 4 CJEU ruling, and for all categories of people. On this point, the Italian Supreme Court ruled in an interlocutory order of Dec. 30, 2024, reiterating that the Court of Justice's ruling of Oct. 4, 2024, intervened only on the territorial exceptions but did not dictate an incompatibility with the notion of safe country in the presence of personal exceptions since the two exceptions have a "different degree of objectivity of ascertainment" not resulting, therefore, in a "perfect symmetry."

Dwelling on the role of the ordinary court concerning the extent of its review of the designation of a country of origin as safe, on July 1, 2024, the Court of Rome proposed to the Court of Cassation, according to Article 363a Code of Civil Procedure, the following preliminary question: should the ordinary court abide by the official list of safe countries of origin established by interministerial decree[27], or does it have an obligation, because of its duty of investigative cooperation, to verify, through updated information (COI), whether the country on the list meets, the security criteria required by European and national regulations[28]?

The First Civil Section of the Supreme Court ruled in chambers on December

[27] Reference is made to the decree of the Minister of Foreign Affairs and International Cooperation, in consultation with the Ministers of the Interior and Justice, May 7, 2024 (*Update of the list of safe countries of origin provided for in Article 2-bis of Legislative Decree No. 25 of January 28, 2008*), published in the *Official Gazette of* the Republic, General Series, No. 105 of May 7, 2024.

[28] Marcella Cometti, '*The preliminary reference to the Italian Court of Cassation and the one to the Court of Justice and disapplication of an administrative act infringing EU Law. The case of the Ministerial Decree on Safe Countries of origin*' (2024) 3 *Review of European litigation.*

4, 2024[29]. As the Court notes, the question is posed in a general way, that is, it does not only concern the case in which it was the applicant with an appeal against the order rejecting the application for international protection on the grounds of manifest groundlessness according to Article *28-ter* of Legislative Decree No. 25 of 2008 issued by the Territorial Commission but also the case in which the challenge was lacking. In the matter at hand, the applicant, a Tunisian citizen, had, even if not raising "*well-founded reasons to believe that the country of origin is not safe due to the particular situation in which he finds himself,*" reported that Tunisia could not be considered a safe country for the generality of people due to recent developments. As the Court unequivocally holds, the ordinary judge cannot and should not replace what is enshrined in the law and by the Minister of Foreign Affairs and International Cooperation since his jurisdictional ascertainment cannot extend beyond the concrete case in which he must assess that the exercise of power was not arbitrary, exercising instead a review of legitimacy on the ministerial decree "*where it clearly contrasts with the European and national legislation in force on the subject, also taking into account information on the countries of origin updated at the time of the decision, according to the principles on the subject of investigative cooperation*." The Supreme Court suggests only one path, namely the non-application of the act[30] if the judge exercises his cognition on the administrative act, not being able instead to annul or revoke it. It is compelling to clarify that the obligation incumbent upon the ordinary judge to carry out an updated assessment extends not only to the merits of the application for international protection but also to the applicability of the procedural framework established for migrants originating from safe countries. Therefore, the principle of law enunciated by the Supreme Court reiterates that the ordinary judge, in the regulatory context before Decree-Law No. 158 of October 23, 2024, and Law No. 187 of December 9, 2024, cannot replace the executive power or annul the ministerial decree with general effects. However, it can

[29] Italian Court of Cassation, First Civil Section, Sentenza No. 14533/2024, 19 December 2024.

[30] "*The power of disapplication of administrative acts can be exercised in the presence of any defect of legitimacy and for the violation of any legal norm, including of the European Union".*
Case law (Cass., Sez. Un., 25 Maggio 2018, n. 13193) has clarified that the power of disapplication can also be exercised in disputes in which the public administration is a party and not merely in those between private parties." G.A. v M.I. (Supreme Court of Cassation, First Civil Section, Dec. 4, 2024) R.G. 14533/2024 (para. 20).

(and should) assess, as part of its examination, whether the designation of a country as "safe" is legitimate[31], incidentally disapplying the ministerial decree, as an administrative act, if such designation manifestly contravenes European or national criteria, according to the official sources referred to in Article 37 of Directive 2013/32/EU, and thus whether the ministerial decree on Safe Countries is unlawful for violation of law[32].

5. Conclusion

While waiting for the ruling of the Court of Justice of the European Union, which will have to clarify the questions raised by the Italian courts[33], it is worth drawing attention to Regulation 2024/1348, which will introduce, as of 2026, a strengthening of cooperation between the European Union and member states regarding the designation of safe third countries. Specifically, the regulation gives the Union the power to designate safe third countries and to establish the criteria for such designation, as well as for the suspension or revocation of this designation[34].

Of particular relevance is Article 61 of the Regulation, which defines the "*Safe country of origin concept*". Paragraph 2 states that the designation of a third country as safe, whether at the European or national level, may provide exceptions for certain parts of the territory or identified categories of persons. This provision contrasts Article 2-

[31] « The judge, according to the European sources, must, keep unaltered his right-duty to acquire by all means all the elements useful to investigate the existence of the prerequisites of international protection, according to the attached personal conditions of the applicant and according to the general situation of the country of origin considered relevant when he decides on the appeal.
This means that the aforementioned dutiful power (on which the system peacefully converges) cannot be limited, in the possibilities of its explication by the mere fact that a state has been included in a list of countries to be considered safe based on information (admittedly qualified but) screened only in the governmental (or lato sensu administrative).» Supreme Court of Cassation (Civil Division, Section I), November 11, 2020, no 25311.

[32] 'Paesi Sicuri: Le bugie sulla pronuncia della Corte di Cassazione' Press release (December 23, 2024), ASGI.

[33] Reference is made to the preliminary references proposed by the courts of Florence (June 2024), Bologna (October 2024), Rome and Palermo (November 2024).

[34] Art. 60 *et seq*.

bis of Legislative Decree 25/2008, which, following the ruling of the Court of Justice[35], eliminated the possibility of exceptions for specific territorial areas, retaining only those for categories of persons.

As a final reflection on the points discussed, as stated in the December 30 Supreme Court ruling in case of a conflict between national and European rules, the former can be disapplied by ordinary courts. The principle that emerges is that «the ordinary court has the power-duty to exercise a review of the legitimacy of the designation by the government authority of a certain country of origin among the safe ones, where such designation 'manifestly conflicts with the European legislation in force on the subject'.»

[35] *M.-A.A. v Direcţia de Evidenţă a Persoanelor Cluj and Others* (Case C-123/24) [2024, ECLI:EU:C:2024:845].

SIMONE BENVENUTI[*], FIONA ELIZABETH MACMILLAN[**], SIRIO ZOLEA[***]

INTELLECTUAL PROPERTY IN THE DIGITAL AGE (ISLAMBEK RUSTAMBEKOV, SAID GULYAMOV, ANNA UBAYDULLAEVA, ROMA TRE PRESS, 2024)

The digital era has revolutionized the realm of intellectual property, bringing both unprecedented opportunities and significant challenges. "Intellectual Property in the Digital Era" delves into the intricacies of this transformation, exploring the impact of digital technologies on intellectual property (IP) law and practice. The book covers a wide range of topics, including the protection of digital content, the enforcement of IP rights online, and the role of emerging technologies like artificial intelligence and blockchain in IP management. Through a blend of theoretical analysis and practical case studies, this book provides a thorough understanding of how digitalization is influencing intellectual property, offering valuable insights for legal professionals, academics, and policymakers.

"Intellectual Property in the Digital Age" offers a comprehensive examination of the evolving landscape of IP in the context of digital technologies. This book provides an analysis of how digital advancements, such as the internet, social media, and blockchain, are reshaping the way intellectual property is created, protected, and enforced. It explores the challenges and opportunities these changes present for creators, businesses, and policymakers.

This book is one of the outcomes of two years of academic collaboration between the University of Roma Tre and Tashkent State University of Law (TSUL). It is

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part of a dialogue between the two institutions, which aims to broaden cooperation and collaboration between academic institutions in Italy and Uzbekistan. In particular, it is our hope that it will form part of broad programme of educational, cultural and economic exchanges between our two countries.

The first memorandum of understanding between Roma Tre and TSUL was signed in September 2022. Subsequently, scholars from each institution have participated in joint conferences on topics such as predictive justice, the law of the outer space, and the digitalization of legal studies. The mobility agreement between the two institutions ensures that exchanges are not, however, limited to members of academic staff. There is a regular exchange of students between Rome and Tashkent and current negotiations between the two universities are paving the way for the establishment of a joint double degree.

The list of collaborative activities between our two institutions is too long to be included in full. However, the following important highlights give some flavour of our joint activities. In the last couple of years, three professors and two members of TSUL administrative staff visited Roma Tre, taking part in lectures and other activities. Professor and current acting TSUL vice-rector Islambek Rustambekov also attended a scholarly meeting organized by Roma Tre on "European Lawyers and Innovative Teaching Rome" in January 2023. In turn, professors from Roma Tre have made academic visits to TSUL. Professor Giacomo Rojas Elgueta attended a Conference on "Development of Private International Law in Uzbekistan" in November 2022. Professor and current pro-Rector for internationalization Giorgio Resta took part in the Third International Legal Forum "Tashkent Law Spring" organized by the Uzbek Ministry of Justice in May 2023. Professor Sirio Zolea took part in the Conference on "Legal Tech, Education and Digital Transformation of Law" in February 2023. Events jointly organized by Roma Tre and TSUL have included the following: a seminar on "Digitalisation of Justice and Predictive Justice" organized at Roma Tre Law Department in May 2023; the meeting "A Bridge Between Italy and Uzbekistan. Academic Collaboration in the Age of Reforms", with the participation of the Ambassador of Uzbekistan in Italy Abat Fayzullaev; and a Summer School on "Cyber Law. Exploring the Legal Landscape of Cyberspace" organized at TSUL in June 2024. With respect to student mobility, the first four TSUL students joined the Department of Law of University Roma Tre in the second semester

of academic year 2023-2024, while ten are expected to come for the first semester of academic year 2024-2025. Generous EU funding within the framework of Erasmus KA171 program, which Roma Tre gained thanks to the essential contribution of TSUL International Department, will support and facilitate these exchanges.

The regulation of cyberspace, which was the focus of the first joint Roma Tre/TSUL Summer School, is a particular strategic interest underpinning the cooperation between the two universities. Scholars from Roma Tre Law School have developed an important profile in this area. For some years they have worked at a comparative level on the complex issues raised by data privacy, data governance, and artificial intelligence, in the context of the European and international regulatory frameworks. Intellectual property law, which has also been a focus of European and international regulatory attention, is also a critical part of the regulation of cyberspace. Overall, the constant expansion of intellectual property rights at national, regional and global levels raises questions about the coherence of legal regulation in relation to new technologies. In particular, intellectual property rights appear to be in structural tension with multilevel regulatory approaches to data sharing and socialization of data governance. A focus on intellectual property issues is, therefore, an important part of our joint research focusing on the need to improve legal coherence and balance the relationship between legal rights in the information economy.

As Uzbekistan and the other countries of Central Asia enter the global economy, there is an increasing interest in intellectual property law, and its transnational impact. Intellectual property rights are regarded as forming part of the process of transition from a socialist legal model to a system of law that supports the integration of local economies into the global market and is capable of regulating the domestic information and data economy. Eurasian experiences of regional integration, such as the Shanghai Cooperation Organization, also enhance comparative legal responses to the technical and political challenges of the global information and data economy. The collaboration that underpins this book is not only aimed at supporting the teaching of intellectual property law to undergraduates, it is also an attempt to describe and assess – in a style accessible to law students in the developing world – the particular challenges in the transnational regulation of intellectual property. It sheds light on the way in which intellectual property rights, as a global phenomenon, influence local and regional legal

cultures, producing a multidirectional hybridization of legal models.

This book is published by Roma Tre Press for the series "Concorrenza & Mercato". It demonstrates the commitment of the Department of Law at the University Roma Tre to contribute to a dialogue that supports the challenges that the Uzbek higher education system and Tashkent State University of Law are facing in this phase of the modernization process. It finds its place in the context of the varied range of collaborative activities between the two institutions that aim to broaden the horizons of the next generation of lawyers in Europe and Central Asia.

ALESSANDRA CAMPIGLIA*

THE FUTURE OF PHARMACEUTICALS: ANTITRUST, IP AND REGULATORY CHALLENGES
(Roma Tre University, Department of Law, 21st November 2024)

On 21st November 2024, the Department of Law at Roma Tre University hosted the conference titled 'The Future of Pharmaceuticals: Antitrust, IP, and Regulatory Challenges'. The event was organised by Margherita Colangelo, Associate Professor of Comparative Law at Roma Tre University, who introduced the conference. The conference is part of a long-standing tradition at Roma Tre University, where annual conferences have been held since 2015, focusing on the most discussed issues in competition law enforcement. This year's conference was devoted to the pharmaceutical sector, a field of particular relevance in the context of the application of competition law. Colangelo outlined the conference's aim to adopt a multidisciplinary approach to addressing some of the most recent issues in the pharmaceutical sector, taking into account the sector's unique intersection of intellectual property law, regulation, and competition law. She highlighted the inherent tension between concurring objectives in this sector, particularly the objective to promote innovation alongside the need to maintain contestable and affordable markets. In accordance with the intended multidisciplinary approach, the conference brought together a group of speakers from various backgrounds and with various expertise, ranging from legal scholars and economists to representatives of regulatory agencies and of the pharmaceutical industry. The first session, chaired by Andrea Guaccero, Professor of Commercial Law at Roma Tre University, focused on antitrust issues in the pharmaceutical sector. The second session, chaired by Elena Granaglia, Professor of Public Economics at Roma Tre University, was devoted to issues relating to intellectual property law and regulation.

The first speaker was Rieke Kaup from the European Commission, DG

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Competition. In her presentation, she provided an overview of recent EU antitrust enforcement in the pharmaceutical sector, highlighting key developments, such as the recent disparagement decision in *Vifor*[1]. She began by emphasising the societal importance of the pharmaceutical sector, noting how the recent pandemic underscored the importance of having well-functioning pharmaceutical markets. Kaup also stressed the challenge of balancing innovation with affordability. While the high costs of drug development often prevent the guarantee of affordable, cheaper products, these costs must be recouped through a limited number of successful drugs. She pointed out that if prices are set too low, innovation suffers; however, if prices are too high, national health systems may be unable to afford new medicines, rendering these innovations useless as inaccessible to patients. Given these challenges, Kaup highlighted the active antitrust enforcement under both Articles 101 and 102 of the TFEU in the pharmaceutical sector. However, she noted that enforcement under Article 102 TFEU has been more prevalent in recent years. Turning to enforcement under Article 101 TFEU, Kaup focused on cases involving pay-for-delay agreements. These are arrangements where an originator pharmaceutical company pays a generic producer to delay market entry, thereby maintaining high drug prices and harming health systems, which end up bearing the costs. Kaup pointed out that while such cases dominated recent years, they may be nearing their end, with the latest EU courts decisions in the *Servier*[2] and *Cephalon*[3] cases rendered earlier this year and one year ago, respectively. Kaup also briefly mentioned traditional cartel cases before moving on to discuss the current focus on unilateral conduct under Article 102 TFEU. She explained that the European Commission's enforcement with respect to unilateral conduct targets both 'classic' anti-competitive behaviours (eg, rebate abuse and predatory practices) and, most notably, more atypical abuses, for which normally the key test is merely whether the behaviour constitutes competition on the merits. Among the atypical abuses Kaup

[1] *Vifor (IV iron products)* (Case AT.40577) Commission Decision [2024].

[2] Case C-176/19 P *European Commission v Servier SAS and Others* [2024] OJ C/2024/4825; Case C-201/19 P *Servier SAS and Others v European Commission* [2024] OJ C/2024/4828.

[3] Case T-74/21 *Teva Pharmaceutical Industries Ltd and Cephalon Inc v European Commission* [2023] OJ C/2023/1139.

highlighted were disparagement, as seen in the *Vifor* and *Teva Copaxone*[4] cases, boycotts, vexatious litigation by originator companies, the misuse of divisional patents (also seen in the *Teva Copaxone* case), abusive acquisitions of intellectual property rights, and the exploitation of regulatory or patent systems, citing the *AstraZeneca* case as a prominent example. She noted that these latter cases are becoming increasingly common. Kaup then delved into some of the atypical abuses. First, she focused on a particularly atypical case, which is at issue in the ongoing *Zoetis*[5] case, where the alleged anti-competitive behaviour involved the termination of a pipeline project and the refusal to transfer the project to a third party. Specifically, the company may have used its power over the development of an alternative product project to terminate it and refuse its transfer to a third party which had exclusive commercialisation rights. She further addressed two other abuses: the misuse of the patent system and exclusionary disparagement. In the *Teva Copaxone* case, Teva was found to have abused its dominant position by exploiting loopholes in the European divisional patent procedures to extend the protection of its blockbuster drug, Copaxone. This allowed the company to withdraw patents and make it harder for competitors to challenge its patents. The second abuse involved disparagement. Teva spread misleading information about the safety, efficacy, and therapeutic equivalence of a competing generic version of Copaxone, information which, although not scientifically disproven, led to misleading conclusions about the generic product. The final part of Kaup's speech focused on the recent *Vifor* case, which was concluded with a commitment decision in July 2024. Vifor was found to have potentially abused its dominant position by spreading misleading information about the safety of a rival drug to its own product, Ferinject. Kaup emphasised the scale of the communication campaign Vifor must now undertake to remedy the harm caused. This includes issuing clarifying communications to healthcare professionals, publishing the corrections on Vifor's website and in medical journals, and allowing third parties to use this communication to provide accurate information.

[4] *Teva Copaxone* (Case AT.40588) Commission Decision [2024].

[5] European Commission, Press Release 'Commission Opens Investigation into Possible Anticompetitive Conduct by Zoetis over Novel Pain Medicine for Dogs' (26 March 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1687>.

The second speaker to take the floor was Wolf Sauter, Professor of Law, Markets and Behavior at Vrije Universiteit of Amsterdam and coordinating specialist enforcement official at the Dutch Authority for Consumers and Markets (ACM). His presentation focused on the Dutch *Laediant*[6] case, a national case concerning excessive pricing which has already been decided by the Dutch Competition Authority and is awaiting the judgment of the court hearing it. The case concerns an exploitative abuse of a dominant position, namely excessive pricing. Sauter provided context for this case by describing the Dutch private health insurance system, which is built on mandatory affiliation and competition among private insurance companies which compete to secure favourable contracts with healthcare providers. A unique aspect of the Dutch healthcare system is the concentration of specialised care for rare diseases, despite the fully private nature of the system. In the *Laediant* case, the pharmaceutical company is accused of setting excessively high prices for an orphan drug, a medicine designed to treat rare diseases which receives regulatory exclusivity for an additional 10 years as a reward for the investment in developing a treatment for these specific needs. A series of price increases for Leadiant's drug led to the excessive pricing case. In July 2021, the Dutch Competition Authority fined Laediant based on the *United Brands* principles, which assess whether high prices are justified by costs. Specifically, the Authority found that Laediant's prices were unfair based on the following considerations: the lack of innovation or therapeutic added value, since the drug had only been repurposed from an existing treatment that had been used off-label since the 1970s; the lack of alternatives on the market; and the exorbitantly high level of prices. The Dutch Competition Authority also rejected Laediant's objections and its proposed commitments in 2023, taking a strong stance to clarify that excessive pricing in the pharmaceutical sector can be applied even to orphan drugs, not just off-patent pharmaceuticals serving large markets. Sauter also referred to the appeal concerning the pharmaceutical preparation, the case about the lack of transparency of Laediant's communications and statements, and the alleged boycott of health insurers in the Dutch context. He also mentioned

[6] ACM, Case No ACM/20/041239 (2021).

cases in other countries, including one in Italy[7], where, in March 2024, the Council of State upheld the fines imposed on Laediant for excessive pricing, and one in Spain[8], where Laediant was fined in 2022. Sauter observed that excessive pricing cases are generally rare, largely due to the significant time and resources required by competition authorities to prosecute them. One challenge in these cases is that the price-cost differentials are often not large enough to justify prosecution. As an alternative approach, he suggested considering excessive pricing cases as unfair trade practices, which might be easier to prosecute due to the lower standard of proof required, greater flexibility, and more options for addressing the issue. He also pointed out that these cases are typically of greater interest to national competition authorities than to the European Commission. In his opinion, this highlights the need for clear guidance from the European Commission on exploitative abuses. In his concluding remarks, Sauter emphasised the importance of finding a balance between competition and regulation in fostering innovation. He questioned whether the newly-proposed EU pharmaceutical legislation[9] adequately strikes that balance.

While the previous presentations focused on antitrust issues that have emerged in past and more recent years, Luca Arnaudo, senior officer at the Italian Competition Authority (AGCM) and distinguished lecturer at Syracuse University, turned the discussion towards potential future scenarios in pharmaceutical antitrust enforcement, particularly cases that have yet to emerge but could become relevant in the coming years. Arnaudo focused on combination therapies, which he defined as the use of two or more therapeutic agents together (not necessarily active pharmaceutical ingredients,

[7] Italian Council of State, Judgment No 2967 of 29 March 2024.

[8] CNMC, Case No S/0028/20 (2022).

[9] The 'Pharmaceutical Package' put forward by the European Commission to revise the EU's pharmaceutical legislation includes the following: Commission, 'Proposal for a Regulation of the European Parliament and of the Council laying down Union procedures for the authorisation and supervision of medicinal products for human use and establishing rules governing the European Medicines Agency, amending Regulation (EC) No 1394/2007 and Regulation (EU) No 536/2014 and repealing Regulation (EC) No 726/2004, Regulation (EC) No 141/2000 and Regulation (EC) No 1901/2006' COM(2023) 193 final; Commission, 'Proposal for a Directive of the European Parliament and of the Council on the Union code relating to medicinal products for human use, and repealing Directive 2001/83/EC and Directive 2009/35/EC' COM(2023) 192 final; Commission, 'Proposal for a Council Recommendation on stepping up EU actions to combat antimicrobial resistance in a One Health approach' COM(2023) 191 final.

but also different drugs) to enhance treatment efficacy. He provided historical examples, starting with combination therapies for tuberculosis in the 1950s, followed by the highly effective combinations for HIV treatment in the 1990s. Today, combination therapies are also used for treating certain types of cancer and have recently been used for the treatment of COVID-19 cases. From a competition law perspective, Arnaudo explained that combination therapies present unique challenges due to the peculiar nature of these products, that is, the fact that they mix products. He raised concerns about potential abuses of dominant position, such as tying (when a company with significant market power in one market requires customers to purchase also a second product) and bundling (the practice of selling multiple products together as a package). These practices, while potentially beneficial to consumers in terms of lower prices and greater ease of use, can also be strategically employed to leverage market power. In the case of combination therapies, they can allow the implementation of complex strategies that may lead to higher prices and delayed market entry of more affordable treatment options. Although no case law has yet emerged in Europe regarding combination therapies, Arnaudo referred to two recent developments in the United States and the United Kingdom. In the US, he highlighted a stream of antitrust litigation involving major pharmaceutical companies and the antiretroviral fixed-dose combinations (FDC) for HIV treatment. The companies were accused of collusive behaviour aimed at maintaining high drug prices and blocking generic competition by preventing the combination of originator and generic components in FDC drugs. This case was eventually settled. Arnaudo also highlighted important questions raised by combination therapies in terms of market definition, asking, for instance, whether the relevant market should be defined by the disease being treated or as a single product market. He also referenced an Amicus Curiae Brief by the Federal Trade Commission on the issue. Turning to the UK, Arnaudo discussed the 2023 *Prioritisation statement on combination therapies*[10] issued by the Competition and Markets Authority (CMA). This *Statement* reflects a cooperative solution, largely pushed by UK pharmaceutical producers. According to the *Statement*, antitrust investigations into the development of combi-

[10] CMA, *Prioritisation Statement on Combination Therapies* (17 November 2023) <https://assets.publishing.service.gov.uk/media/6554fd97d03a8d001207f9f9/Prioritisation_statement_on_combination_therapies.pdf>.

nation therapies would not be prioritised, provided pharmaceutical companies do not cross certain 'red lines'. This approach recognises the public policy value of incentivising innovation in this field, while also acknowledging concerns over the limited availability and high prices of such therapies. Arnaudo also raised concerns about consumers' aversion to complexity, which may encourage pharmaceutical companies to use bundling strategies. These strategies could confuse consumers, causing them to pay higher prices for treatments, and to lack clarity on what they are paying for. As a final consideration, Arnaudo praised initiatives like the CMA's *Statement* as an example of effective collaboration between stakeholders, ie, industry, competition authorities, and medicine agencies. He emphasised that this kind of cooperative approach is essential for supporting innovation while addressing the challenges posed by combination therapies. He also noted that such a collaborative framework may be more effective than pricing schemes, like the one used in Germany, in addressing these issues.

The session on antitrust law concluded with a speech by Patrick Actis Perinetto, counsel at Chiomenti law firm. Perinetto's presentation centred on the assessment of innovation in competition law, using pharmaceutical mergers as a case study. He began by emphasising the growing significance of innovation in recent years, noting that it has become an essential factor across all industries and sectors. Innovation, he argued, has shifted from being one of many competitive parameters to the dominant parameter of competition. It has become a game-changer, influencing which companies can compete in the market and reshaping the concept of the relevant market by interconnecting areas that were once distinct. Perinetto then examined the dual impact of mergers on innovation. Mergers can enhance innovation by creating efficiencies and synergies, but they can also stifle it. He explained that mergers might lead to the discontinuation, delay or redirection of a merging party's innovation efforts, as well as the elimination of competition between the merging companies. This, in turn, can have broader spillover effects on the entire market, diminishing overall market incentives to innovate. Acknowledging the unique characteristics of the pharmaceutical sector – such as the high cost, lengthy process, and inherent uncertainty of research and development (R&D) – Perinetto argued that the pharmaceutical industry provides an ideal case study for assessing innovation in competition law. The challenges of innovation are particularly pronounced in this sector, making it a critical area for understanding how competition

law can address innovation. He concluded that resolving innovation-related issues in the pharmaceutical sector could help address similar challenges in other sectors. Perinetto also recognised that assessing innovation poses challenges because it lacks some of the traditional features of competition law analysis. Innovation is dynamic, difficult to measure, often lacks sufficient data, and is characterised by uncertainty and a lengthy assessment process. However, he contended that many of these issues are not new to competition law. The criticisms surrounding the application of competition law to innovation are, in his view, misplaced. He further pointed out that, in the pharmaceutical sector, the issue of the lack of data is somewhat alleviated by the structured R&D process, which generates more data than in many other sectors. This, in turn, helps mitigate some of the challenges involved in evaluating innovation. Perinetto concluded that the European Commission's decisional practice in pharmaceutical mergers, where most innovation-related cases in competition law arise, demonstrates that competition authorities are well-equipped to handle innovation-related issues effectively. He highlighted the European Commission's clear, structured, and effective framework for assessing innovation, which he believes could serve as a model for developing a broader approach to innovation in competition law. In his concluding remarks, Perinetto warned that competition law is ultimately about protecting competition, not innovation for its own sake. While innovation and competition often go hand in hand, they can sometimes lead to opposing conclusions, and it is important to balance the two in antitrust assessments.

The first speaker in the second session was Fiona Macmillan, Professor of Commercial and Intellectual Property Law at Roma Tre University, who presented a revised perspective on the traditional patent bargain. The pharmaceutical sector, she noted, is one of the most profitable industries in the world, and the patent system plays a critical role in its business model (ie, its profitability). This can be seen in the pharmaceutical industry's active involvement in patent-related negotiations and lobbying efforts, such as the influence exerted during the TRIPS Agreement negotiations, lobbying at the EU level for patent term extensions, and significant involvement in debates over the efficacy of the patent system. Two notable incidents illustrating these efforts are the controversies surrounding access to anti-AIDS retrovirals in sub-Saharan Africa and the COVID-19 vaccines, both of which prompted lobbying,

for patent waivers and an extension of such waivers, respectively. Macmillan outlined the traditional patent bargain: pharmaceutical companies invest in research and innovation, publicly disclose their findings, and, in return, receive a monopoly over the innovation for at least 20 years. While this system benefits the pharmaceutical industry, she questioned whether these benefits align with societal needs. She argued that under this version of the patent bargain, the focus is more on supporting the business model of pharmaceutical companies rather than delivering social benefits. This imbalance is evident in the sector's very substantial returns, in the innovation quality and efficacy, as well as in the nature of the knowledge produced, which often originates from previously public domain knowledge or from non-Western communities. Macmillan further argued that the patent system functions not only as a business model but also as a social model, capable of delivering broad societal benefits such as encouraging innovation, improving public health outcomes, and ensuring affordability and access. However, she discussed various critical aspects of the patent-based pharmaceutical system, highlighting several issues. For instance, the pricing and distribution of patented medicines came under scrutiny during the humanitarian crisis surrounding access to anti-AIDS retrovirals in sub-Saharan Africa. Additionally, the system distorts research priorities by driving pharmaceutical companies to focus on lucrative markets, primarily in the West, while neglecting diseases that affect developing countries. Similarly, COVID-19 vaccines revealed disparities in access, especially in the developing world, highlighting issues of availability. As further distortions arising from the patent system, she mentioned the following: the enclosure of publicly available knowledge once a patent is granted, which can limit further research; a focus on research aimed at avoiding patent infringement rather than addressing genuine medical needs; the risk that research may not target new medical threats but merely replicate existing studies; the spending of significant portions of pharmaceutical profits on marketing to reduce demand elasticity, rather than on funding new research; the high transaction costs associated with the patent system that further divert resources away from innovation. Using the example of COVID-19 vaccines, Macmillan explained how their development and distribution in Western countries were largely the result of public funding. Much of the foundational research was conducted in publicly funded institutions and transferred to pharmaceutical companies, which then produced the vaccines rapidly. In return, the only benefit to the

public was preferential access to the vaccines. This resulted in costs to the public purse and profits in the form of dividends for the shareholders of pharmaceutical companies. Macmillan raised concerns that this situation, whereby much of the research resulting in innovation is made in public institutions and subsequently transferred to the private sector, might lead to public research starting mimicking the priorities and distortions of pharmaceutical companies. Macmillan also discussed how the pharmaceutical industry has responded to criticisms in the post-COVID era. The industry has increasingly aligned itself with the pro-science discourse, particularly in opposition to the anti-science, anti-knowledge no-vax movement. This shift has allowed pharmaceutical companies to frame their interests, and the patent system, as aligned with broader scientific and societal goals. By doing so, the industry has distanced itself from traditional justifications for patents and instead argued that profits derived from patents enable further research that could address future health crises, such as pandemics. In her concluding remarks, Macmillan, while acknowledging that patents remain crucial for funding research, argued that their role in the system of innovation should be reconsidered.

The next speaker was Daria Kim, Senior Research Fellow at Max Planck Institute for Innovation and Competition, who addressed the role that artificial intelligence (AI) could play in shaping the future of the pharmaceutical industry. Her talk covered both AI's potential impact on drug discovery and development, as well as how AI could lead to a rethinking and restructuring of the innovation incentives system and the patent bargain. Kim began by exploring the potential of AI in drug discovery. While some perspectives highlight AI's revolutionary potential, promising substantial benefits, more cautious views temper such optimism. Kim shared a balanced position, acknowledging that AI could indeed improve the efficiency of drug research. However, she pointed out that quantifying the extent of these efficiencies, such as how much AI could reduce the cost of drug R&D, remains challenging. She also suggested that the development of personalised medicines, while a promising prospect, is still more of a future possibility than a current reality. Turning to the implications of AI on innovation incentives, Kim addressed diverging opinions, including the extreme view that AI could lead to the abolition of the patent system. In contrast, she argued that AI is unlikely to result in revolutionary changes to the incentive system. At best, it might bring about

some changes to the patent system. In her view, AI primarily helps to highlight and address the inherent tensions within it. Kim identified several key tensions within the current patent system, starting with its insensitivity to efficiencies. She explained that the patent system does not correlate R&D investment with the reward granted, meaning that reduced R&D costs through AI are unlikely to result in lower prices for consumers. Making also reference to the recent EU pharmaceutical reform, she concluded that the intellectual property system only becomes sensitive to the costs of innovation when there is a perceived lack of incentives. The second tension she discussed was the patent system's insensitivity to exclusivity alone. While patents do improve the competitive advantage of innovators, Kim noted that true innovation arises from a combination of technological and market opportunities and pointed out that many recent advancements were not driven solely by patents. With regard to the EU pharmaceutical reform, she noted that it targets cases where innovation incentives are lacking, but still primarily relies on exclusivity, while, in her view, there is a need to also address technological opportunities as factors behind patent system failures. Next, Kim discussed the insensitivity of the patent system to social value. The system, she argued, is based on a rational actor theory, where innovators seek to maximise their own utility, which does not always align with the maximisation of collective utility. This misalignment means that innovators may prioritise patentable inventions over those that offer greater social or public health value. In this context, AI's potential lies in its ability to drive personalised medicine, which could better meet societal needs. Connected to this is the insensitivity of the patent system to the social cost it generates. Kim noted that the patent system not only prioritises market value over social value but also leads to social costs, particularly in the form of supra-competitive pricing derived from restricted competition, irrespective of the efficiencies generated. In conclusion, Kim argued that while the patent system purports to balance social costs and benefits, in practice, finding a workable balance is difficult. Moreover, the insensitivities and imbalances inherent in the current patent system could be exacerbated by disruptive AI technologies in innovation. She expressed concern that the new EU pharmaceutical reform is unlikely to address these issues effectively.

The discussion continued with a presentation by Enrico Costa, Head of International Affairs Department of the Italian Medicines Agency, who discussed the

new proposed reform of the EU pharmaceutical legislation. He provided an overview of the main elements of the reform, as well as the challenges and concerns that may arise from them. The proposed reform consists of a new Regulation, a new Directive, and a Council Recommendation on antimicrobial resistance (AMR). Costa began by outlining the objectives of the European Commission's proposal, which include ensuring timely and equitable access to medicines for EU patients, attracting R&D investments in an innovation-friendly environment, enhancing the security of the supply chain (the importance of which was highlighted by the COVID-19 pandemic), and improving the environmental sustainability of medicines. The first point Costa addressed was market protection. He noted that the EU is among the global leaders in data and market protection, with a standard period of 8+2 years. However, the European Commission's proposal aims to shift to a more flexible approach, reducing the base period of protection to 6 years. This period could be extended if certain outcomes are met by the applicant, such as the marketing of the new medicinal product in each EU Member State (though this provision was later removed by the European Parliament). Next, Costa discussed the proposed amendments to regulatory protection in the orphan drug space. The European Commission's proposal involves a reduction and modulation of market exclusivity protection, with adjustments based on meeting specified goals. He expressed concerns regarding the vagueness of certain terms, such as 'high unmet medical need', which could complicate their interpretation and potentially hinder price negotiations at the national level. Costa also mentioned the introduction of transferable data exclusivity vouchers, designed to incentivise R&D in antibiotics. While he acknowledged their potential, he highlighted the challenges posed by the unpredictability in their use and of when a medicine would enter the market, making these vouchers a less reliable form of funding. A further (indirect) way of prolonging exclusivity, Costa suggested, could be to streamline the approval process for medicinal products. This could help accelerate market access and extend the exclusivity period for innovators. He then turned to other aspects of the proposal, particularly those concerning generics and biosimilars. He noted that the Bolar exemption (ie, the provision which permits the use of patented medicinal products to conduct the necessary studies and trials required for obtaining market authorisation for generic and biosimilar drugs prior to the expiration of the patent or supplementary protection certificate, exempting such

otherwise infringing activities from patent infringement liability) would be both broadened and more clearly defined in order to align the behaviour of all EU Member States in this area. Additionally, the proposal eliminates the requirement for risk management plans for generics and extends regulatory data protection for off-patent medicines repurposed for new uses. In his concluding remarks, Costa emphasised that, despite the pharmaceutical market being the most regulated in the world, regulation alone is not the solution to all the challenges in the sector. He noted that, while additional protection for the most effective drugs may be beneficial, it is ultimately the market that will determine the return on investment for game-changing innovations.

The next speaker was Carlo Riccini, Deputy Director General, Research Center Directorate of Farmindustria, who provided valuable insights from the perspective of the pharmaceutical industry on the role of regulation and policy. Riccini began by emphasising that regulation should not only focus on competition but also on competitiveness, which he defined as the ability to attract and retain investments. He noted that pharmaceutical innovation today, and increasingly in the future, reflects a blend of scientific progress, technological advancements, and societal needs. He presented the pharmaceutical industry as Europe's leading high-tech sector in terms of R&D, exports, and imports. However, he highlighted a significant concern: compared to countries like the US, the EU lags behind in investment and innovation. Riccini pointed out that the US is investing considerably more than the EU, with innovation advancing more rapidly, partly due to the simpler regulatory environment in the US. Over the past five years, the US has been actively implementing policies to attract investments, while China has also seen rapid growth as both an R&D user and producer. This, he argued, places the US and China ahead of the EU in pharmaceutical sector innovation. Using clinical trials as an example to explain the point, Riccini stressed that if the EU loses its competitiveness, this will negatively impact public health, leading to reduced care and fewer resources. He also pointed out a strategic mistake made by both the EU and the US, namely their dependency on China and India for pharmaceutical active ingredients. Given these challenges, Riccini emphasised the urgent need for the EU to become more competitive. He argued that good rules are essential to increasing competitiveness and, without them, the EU risks becoming merely a market for pharmaceuticals rather than an industry. This, he warned, would lead to significant

weaknesses with serious repercussions. Turning to the proposed reform of the pharmaceutical legislation, Riccini expressed concerns about its potential impact on EU competitiveness. He argued that the new rules could actually undermine competitiveness rather than enhance it. Specifically, he criticised the European Commission's proposal on data protection, which he felt imposes excessive conditionality on the increase in such protection. According to Riccini, investments thrive on certainty, not uncertainty, and complexity often deters investment. In his closing remarks, Riccini reiterated that competition cannot be considered without also focusing on competitiveness. He emphasised that the attractiveness of investments primarily depends on intellectual property rights, which he believes are non-negotiable for investors, at least for now. Instead of focusing on making expenditures more efficient through regulatory changes impacting on such elements, he suggested that efficiency could be achieved through policies based on honest and comparable data derived from industrial analysis.

The concluding speech of the second session was delivered by Flaminia Aperio Bella, Associate Professor of Administrative Law at Roma Tre University, who presented the implications of applying the so-called One Health approach to pharmaceutical regulation. She began by introducing the concept of One Health, which values the interrelationship between human, animal, and environmental dimensions in addressing health. She traced its historical evolution, noting that the idea originated in the early 20th century. However, the formal shift from One Medicine to One Health occurred in 2004, following a conference held after the SARS epidemic, which led to the development of the '*Manhattan Principles*', a scientific manifesto for the One Health approach. This concept was further consolidated in 2010 with the creation of a tripartite partnership between the World Health Organisation, Food and Agriculture Organisation, and World Organisation for Animal Health. In 2021, the United Nations Environment Programme joined the partnership, which became a quadripartite alliance, and the One Health High-Level Expert Panel was established to unify the concept. After the COVID-19 pandemic, One Health expanded its scope to address climate change and increasingly involved social sciences and legal disciplines, thus becoming part of the broader public, political, and legal discourse. Aperio Bella emphasised that One Health is more of a methodology than a mere concept. Key elements, as outlined

by the Expert Panel, include the equal importance of the three dimensions (human, animal, and environmental health), the shift from focusing solely on disease to a broader understanding of well-being, the expansion of the scope of application, and its clear connection to sustainable development. She highlighted that One Health is widely recognised at both the international level, particularly in pandemic prevention, and within the EU, where it is increasingly integrated into legislative frameworks, not just policy documents. Focusing on the EU pharmaceutical reform, Aperio Bella illustrated how One Health plays a central role in the proposed Directive and Regulation. One Health is one of the six main pillars of the EU Pharmaceutical Strategy, particularly in the fight against AMR and in making medicines more environmentally sustainable. She noted that all three dimensions of One Health are involved in addressing AMR, with the environment playing a crucial role in the development and spread of AMR. This necessitates action to address pharmaceutical waste and the entire lifecycle of medicines. Accordingly, as part of the reform, the environmental risk assessment of pharmaceuticals has been strengthened. Aperio Bella then compared the EU4Health Regulation[11], which is one of the most advanced examples of the One Health approach, with the EU Pharmaceutical Strategy. She pointed out that while the Pharmaceutical Strategy acknowledges One Health, it lacks a clear definition of the approach and does not explicitly link it to the accessibility and affordability of medicines or the organisational aspects of One Health. However, she highlighted the creation of a cross-agency One Health Task Force, which brings together the technical expertise of five EU regulatory agencies, including the European Medicines Agency, to implement the One Health approach. She concluded by noting that while there are multiple ways to implement One Health within the EU, two key approaches, namely using One Health as a guiding principle and as an organisational method, are already present in the EU Pharmaceutical Strategy. She also suggested that further implementation of the One Health approach in pharmaceutical regulation is possible, but it will depend on the seriousness with which the concept of sustainability, particularly its social dimension, is embraced, as equity lies at the heart of One Health. In conclusion, Aperio Bella provided a brief

[11] Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021-2027, and repealing Regulation (EU) No 282/2014 [2021] OJ L107/1.

presentation of a draft convention on pandemics, developed by a group of lawyers formed within the framework of the International Center for Comparative Environmental Law (CIDCE), of which she was a member, emphasising the application of the One Health approach to advance the innovative concept of 'vaccine equity'.

Vincenzo Zeno-Zencovich, Professor of Comparative Law at Roma Tre University, concluded the conference by emphasising the interconnectedness of antitrust, intellectual property, and regulation. He argued that these three areas should not be viewed in isolation but as different paths leading toward the same goal: regulating something, here the pharmaceutical sector. Given the interrelated nature of these aspects, Zeno-Zencovich advocated for a comprehensive, holistic approach to regulation, one that integrates all these components. He asserted that such an approach is necessary to simplify the complexity and bring order to the often-chaotic landscape of regulation at various levels. Without this, he warned, regulation risks becoming a source of bureaucracy rather than fostering efficiency and innovation.

ARTICLES

NOTES

MEETINGS & READINGS

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