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The elephant in the courtroom: a socio-legal study on how judges manage cultural diversity in criminal law cases in Italy and the UK

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**Robert Schuman Centre for Advanced Studies**  
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## **Abstract**

How do judges manage cases in which offenders belonging to a minority group invoke their cultural background to obtain special legal treatment? What are the outcomes of their judgments and what arguments posited to justify them? This paper attempts to answer these questions, by drawing on the results of socio-legal research aimed at identifying and analysing judicial reasoning (and decisions) in cases from 1993 to 2013 where “cultural arguments” were pleaded by the offender or raised by the judge (i.e. as a motive, justification, excuse, or mitigating or aggravating circumstance), in Italian and English courtrooms. The research reveals a different approach towards diversity management in the Italian and English courtrooms. Embracing strategies of “cultural reductionism” and “cultural denial”, respectively, Italian judges reveal a limited awareness of the complex issues surrounding cultural diversity, while English judges show uneasiness and disorientation in managing the “cultural factor”. The different approaches notwithstanding, results point an interesting convergence: in the absence of policies and tools for managing cultural diversity in the courtroom, Italian and English judges try avoid directly addressing the “cultural question”.

## **Keywords**

Judicial reasoning – cultural diversity – cultural defence – socio-legal research – judicial stereotyping.



## 1. Introduction

Delivering justice in a multicultural society is a complex task. The ontological features of the law, both universal and generic, interweave multiple grids of interpretation which (sub)consciously affect the parties who adjudicate and the parties who are the subject of those judgments. The traditional legal, but even social, ethical, and cultural structures are sometimes called into question by offenders belonging to a minority culture who claim a different legal treatment, in the name of the recognition of their specific cultural background.

This is the particular topic of the so-called “culturally motivated crimes”, ever more frequently explored by practitioners and scholarship in Italy (Bernardi 2010; Basile 2010; De Maglie 2010; Ruggiu 2012; Parisi 2010) and worldwide (Foblets & Dundes Renteln 2009; Phillips 2007; Dundes Renteln 2004). In this context, the “culturally motivated crime” has been characterized as an “act committed by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behavior and approved or even endorsed and promoted in the given situation” (Van Broeck 2001: 5).

In deciding cases where this phenomenon is present, the judiciary is left, particularly where there is no guidance provided by statute, to deal alone with an “elephant in the courtroom”. Adopting a strong empirical and ‘law in context’ perspective, this paper aims to understand what actually happens when culture enters the criminal courtroom.

How do judges manage cases in which offenders belonging to a minority group invoke their cultural background to obtain special legal treatment? What are the outcomes of their judgments and what arguments posited to justify them? This paper attempts to answer these questions, by drawing on the results of socio-legal research aimed at identifying and analysing judicial reasoning (and decisions) in cases from 1993 to 2013 where “cultural arguments” were pleaded by the offender or raised by the judge (i.e. as a motive, justification, excuse, or mitigating or aggravating circumstance), in Italian and English courtrooms.<sup>1</sup> The decision to compare these two countries is based on the similarities and differences characterizing their respective social, political, juridical, and historical contexts. On the one hand, the UK has experienced significant and long-standing migratory movement, while, on the contrary, this has only recently been experienced in Italy. Furthermore, the chosen countries present significantly different judicial systems. These differences, nevertheless, may generate some fruitful causes for reflections. In particular, the UK’s long experience with the phenomenon of immigration can offer insight in how “cultural arguments” have evolved in the jurisprudence. In addition, the peculiar “judge made law” legal system practiced in English courtrooms has produced ample literature and research on judicial decision-making, which is scarcely investigated in Italy. On the other hand, both Italy and the UK are European countries which present an interesting symmetry: the credence given, respectively, to the Church of England<sup>2</sup> and the Catholic Church.

After a concise summary of the methods used to collect and select the relevant judgements, this paper analyses some of the evidence which has emerged. The research reveals a different approach towards diversity management in the Italian and English courtrooms. Analysis of 68 judgments passed by Italian judges apparently indicate a high regard for the cultural background of the offender. However, the relevance given to the culture of the foreign offender has never been examined in depth by the judiciary. Instead, judicial reasoning tends to be accompanied by prejudices and stereotypes.

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<sup>1</sup> The reference to “English courtrooms” here includes the legal jurisdiction of England and Wales, but does not include the Scottish legal jurisdiction, given its distinct specificities and peculiarities.

<sup>2</sup> For this purpose it is worth to point out that the Church of England has a relevant political impact, which concerns, among the others, the fact that the bishops of the Church of England are sit in the Parliament and have the right to vote.

The culture of the “other” is commonly depicted as “barbaric”<sup>3</sup>, “contrary to fundamental rights” and irremediably irreconcilable with Italian culture and the Italian system of rights.<sup>4</sup> By contrast, English case law (18 judgments) reveals that, in English criminal courtrooms, the cultural argument is rarely used by the offender and, when used, it is rejected by judges. The judicial response, however, is often unclear. In fact, English judges do not directly address the issue, preferring to defer the question to the legislator, or redefine the “culture” as “violence”, “abuse” or “control”. In this context, reference to the peculiar phenomenon of the “religious jurisdiction” and to the “Minority Committees” in the UK will be made in order to substantiate the claim here presented.

Embracing strategies of “cultural reductionism” and “cultural denial”, respectively, Italian judges reveal a limited awareness of the complex issues surrounding cultural diversity, while English judges show uneasiness and disorientation in managing the “cultural factor”. The different approaches notwithstanding, results point an interesting convergence: in the absence of policies and tools for managing cultural diversity in the courtroom, Italian and English judges try avoid directly addressing the “cultural question”.

## 2. Methodological references

Prior to presenting the results of the empirical investigation, it is essential to briefly illustrate the methodology used to identify and collect the relevant judgments. Similar to other analyses, the study does not rely on an *a priori* definition of culture (Ruggiu 2012: 54; Chiu 2006: 1317). Instead, it compiles and examines all cases in which the cultural influence on the offender’s criminal behaviour emerges from the judgment, either because it is claimed by the offender or is mentioned by the judge. Rather than conducting a theoretical analysis on the multi-layered concept of “culture”, this decision seeks to explore how judges manage the category of culture in practice, which is the objective of the study.

As such, the research has taken into account all judgments containing a reference to the cultural features of the crime. However, at the same time, the necessity to delimit and identify a specific field of study has necessitated the exclusion of some behaviours that were presented as more directly related to “subcultural” conditioning, or to the ideology of the individual offender. Moreover, this research does not deal with cultural conditioning due to mafia or terrorism.

More broadly, for the purpose of this paper, the term “minority” has been understood according to a relational meaning of “marginality/exclusion” in relation to the “dominant culture”, here intended as “the culture which provide the ideological basis of the criminal code and criminal laws according to which the offender is under trial” (Van Broeck 2001: 11). Accordingly, the study does not exclude the so-called “national minorities”, that is, those communities that, although not presenting a different nationality, do not share the values and culture that informs the legal order in which they have been born and live. Following this clarification and bearing in mind the limitations illustrated above, the relevant case law has been collected according to the following procedures.

Concerning the Italian cases, the study first started from the main legal databases which were searched using keywords and articles of the criminal code traditionally associated with cultural crimes. Subsequently, in order to broaden the research strategies, the main legal journals were consulted.<sup>5</sup> In

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<sup>3</sup> Criminal Cassation 20.10.1999 no. 3398.

<sup>4</sup> See paragraph 3.3.

<sup>5</sup> The on line databases Italgire and De Jure were used. The main legal journals, “Diritto, Immigrazione e Cittadinanza”, “Questione giustizia”, “Cassazione penale”, “Famiglia e diritto” were also consulted. The most reliable online legal journals were also consulted, in particular [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it); [www.neldiritto.it](http://www.neldiritto.it); [www.immigrazione.biz](http://www.immigrazione.biz); [www.immigrazione.it](http://www.immigrazione.it) , [www.stranieri.it](http://www.stranieri.it) . Finally the OLIR website was consulted (Osservatorio delle libertà e delle istituzioni religiose).

addition, the Association of Legal Studies on Immigration (ASGI) network has been consulted by way of a public appeal addressed to all members (including professors, lawyers, magistrates), asking for judgments and cases related to cultural crimes from 1993 to 2013. Finally, in line with the interdisciplinary methodology adopted, the analysis of the judicial reasoning and outcomes of the decisions has been bolstered with data emerged from semi-structured interviews conducted with judges, lawyers, scholars and minority associations' activists<sup>6</sup>. Thousands of cases have been analysed. The definition of "cultural crime" established as relevant for the purposes of this research (as illustrated above) required a skimming exercise at the end of which 68<sup>7</sup> relevant cases were identified.

On the back of the research carried out on Italian case-law, the collation of relevant English judgments began, first of all, from the major English legal databases (West Law and LexisNexis). The data collection has benefited also from other sources, such as the relevant scholarship and the Crown Prosecution Service website.<sup>8</sup> The final step was to conduct semi-structured interviews with judges, lawyers, scholars, activists, and experts involved with respect to the issues surrounding "cultural crimes".<sup>9</sup>

The research only considered English cases which presented a clear and explicit account of the defense's use or judge's consideration of a culture based argument. 18 such judgments were identified.

### **3. The cultural claim in Italian criminal law cases: the strategy of "cultural reductionism"**

In order to understand how Italian judges manage cases in which offenders belonging to a minority group invoke their cultural background, it is necessary to first present the data this research has been based on.

As mentioned above, 68 relevant judgments have been collected for the purposes of this research. However, given the high rate of unreported judgments of first and second instance in Italy, it is likely that the cultural argument has been made in many more judgments.

The cultural background of the offender was given weight in 36.7% of cases, while it was rejected in 44.1% of judgments. The percentage of cases in which the judge fails to take into account the cultural argument, avoiding even mentioning it, is quite low at just 16.2%.

At first glance, it is plausible to assume that Italian judges are inclined to give weight to the culture of the defendant (whatever the final verdict is). However, on delving into these figures and analysing the wording of these judgments, poverty of argumentation and vagueness of reference seem to bind the majority of these judgment, as this paper will show. In this regard, it is worth noting that in 15 out of

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<sup>6</sup> In particular, in Italy these semi-structured interviews have been conducted with 3 lawyers, 3 judges and 5 experts from Italian Universities and from associations working for the protection of minorities' rights. Due to the sensitive nature of the topic, this research has taken into account all issues pertaining to research ethics, including data protection and informed consent.

<sup>7</sup> It must be highlighted that in Italy numerous judgments of the first and second degree but also of the Supreme Court are not published. Therefore, the collection of cases is not complete. In addition to this, it is necessary to point out a further limit: it is very possible that the cultural subject finds room within the process, but is not mentioned in sentencing. That being said, it is important to emphasize that the underlying goal of this work is not to offer a complete list of cases concerning cultural crimes adjudicated in Italy. The aim, rather, is to provide a reliable database and empirical evidences, which can represent the basis for further research and increase the awareness of these issues among legal practitioners.

<sup>8</sup> The Crown Prosecution Service is the principal public prosecuting agency for conducting criminal prosecutions in England and Wales.

<sup>9</sup> In particular, in the UK, the semi-structured interviews have been conducted with a lawyer, a judge, 7 experts from English Universities and from associations working for the protection of minorities' rights, and an important anthropologist expert prof. Roger Ballard, called to testify as an expert anthropologist in more than 400 judgments.

the 25 cases in which a judge recognised the cultural argument put forward by a defendant in a '*pro reo*' manner, this was done in the sentencing phase and was invariably accompanied by very poor reasoning (due, *inter alia*, to the high level of discretion that para. 132 and 133 of the Italian criminal code gives to judges).

**Table No. 1: the judicial decision with reference to the cultural argument**

Considered in a 'pro reo' way	25/68	36.7 %
Considered in a 'contra reum' way	2/68	2.9%
Rejected	30/68	44.1%
No reference	11/68	16.2%

**Table No.2: legal instruments used by judges to considerate the cultural argument in a 'pro reo' way**

Sentencing phase	15/25	60%
<i>Ignorantia legis</i>	3/25	12%
Excuse	1/25	4%
The act did not occur	3/25	12%
The act does not constitute a criminal offence	3/25	12%

### 3.1 A stereotyped concept of culture

Moving now to the qualitative aspects of the research, specific reference to judicial reasoning will provide further evidences substantiating the argument proposed by this paper.

First, it is possible to observe that there is no judicial consensus on how to conceptually address the cultural background of the offender: some judges make reference to the "Islamic precepts" (Criminal Cassation, 28/01/2009 no. 22700)<sup>10</sup>, while others refer rather to "ethical and social traditions of customary nature" (Criminal Cassation, 28/01/2009 no. 22700) or to "traditional practices" (Trib. Reggio Emilia, 21/11/2012 no. 1417). However, sometimes, the confusion is raised to higher levels, with judges presenting the offender's customs, religions, traditions, and legal system as equivalent. In a case concerning the crime of violation of the obligations of family assistance, the judge argued that the offender is required by "its culture and religion (and therefore law) of origin to provide assistance for the child until puberty" (Trib. Genova 7/11/2003).

Beyond the convoluted conceptualization of cultural crimes employed by judges (often only implicitly), another common practice should be noted: the tendency to talk about "other" legal/religious/cultural systems in a superficial and incorrect fashion. Proper and accurate analyses of the cultural background of the offender are sometimes substituted for considerations of conventional wisdom surrounding the minority culture of the offender. Often, judges accept the cultural factor as presented by the defence, without asking for the necessary documentation or submission of due evidence. Sometimes, the judge alone introduces considerations in respect of the cultural background of the offender, without due accuracy and completeness of information, in a rough and incorrect way.

The degree the judiciary's inaccuracy in this area is illustrated by the following extracts from cases of "involvement of children in begging" concerning Roma persons (emphasis added). According to the Italian Criminal Court of Cassation No. 29734, 04/05/2011 "... the defense has referred to the need not to criminalize "mangel" or begging traditionally practiced by Roma populations residing in Italy.

<sup>10</sup> All the judgments are here mentioned according to the following structure: gg/mm/yyyy.

Obviously you need to pay attention to the actual situation in order not to criminalize *conduct that falls within the cultural tradition of people*, it being understood, however, that if certain practices, perhaps even customary and traditional, jeopardize fundamental rights guaranteed by our Constitution or conflict with criminal laws that seek to protect their own such rights, the punishment is inevitable. Practices which are contrary to our criminal law cannot be allowed". The same wording also recurs in the judgment of the Criminal Court of Cassation No. 44516, 28/11/2008, while another decision reads: "... we cannot accept the defensive relief, according to which, *in consideration of the ancient cultural traditions of the Roma people, begging assumes the value of a real life system*, the conduct of the appellant should be justified under para. 572, of the criminal code". (Criminal Cassation, No. 37638, 15/06/2012).

These references notwithstanding, expert anthropologists strongly deny that the practice of begging can be considered to be an inseparable element of the Roma culture (Boschetti 2008: 100; Piasere 2000:369).

In the absence of a contextualized approach – marked by the practice of “photocopy judgments” – Roma people are depicted as homogeneous body, whose characters derive from popular stereotypes rather than from a serious and specific anthropological analysis (Simoni 2002: 98). Furthermore, the alleged Roma tradition is presented as something remote, dangerous, and threatening in respect to fundamental rights.

### **3.2 The culture and the “universal principles”**

A particularly widespread tendency amongst the judges involved in dealing with cultural crimes is to make reference to "universal principles": the act of the defendant has a disvalue not only for the juridical order, or for the majority culture. This disvalue is “universally perceived, regardless of the ethnicity membership, because it contrasts with criteria – which are innate, natural rights antecedent even to legislation or case law – of peaceful coexistence between human beings”. These are the words used by a judge of the Tribunal of Turin, in a judgment concerning the criminal liability of two Roma parents for the offence of ill-treatment against their children Mira and Daniel. The case is the result of the following accusation against the defendants: "having neglected to send Mira and Daniel to school, having sent them to theft from the earliest age and having permitted them to perpetrate thefts in apartments, thus subjecting them to a degrading and degraded life-style, inspired by values contrary to civilian life, such as to negatively affect their personality and to mortgage their future".<sup>11</sup>

After the preliminary hearings and the testimony of the two children, the following circumstances emerged: a) the parents did not address them to the theft and even reprimanded them upon the arrival of the charges; b) those thefts were committed “for fun”; c) the loot was not brought home but was resold by the two children to buy “with the proceeds, clothes for themselves”. From this testimony, it is submitted that it is difficult to infer responsibility on the part of the accused in respect of the offence of ill-treatment (the judge herself makes this observation in the judgment). Nevertheless – the judge goes on – the defendants must be condemned for their omission, as they have done nothing to “deter minors from committing thefts, and to impose on them the attendance of the school”.

Thus having (arguably) proved the objective element of the offence, the judge proceeded to examine the existence of the subjective element of the offence i.e. the level of awareness of the parents as to the consequences of their actions as parents, in particular the degraded lives that their children were living as a result of their parental actions. In this case, the judge made reference to the so-called “*dolus eventualis*”, which entails proving that the defendant foresees and accepts the illicit consequences of her/his action as a concrete and highly probable possibility, but continues regardless. However, this requirement was disregarded by the judge of the Tribunal of Turin, who established the

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<sup>11</sup> Tribunal of Torino, 21 October 2002.

subjective element of the crime of ill-treatment by referring to the “universal disvalue” of the defendants’ conduct. In particular, the judge noted that the defendants had already been convicted of theft. Furthermore, (s)he stated that they should have known the illicit nature of their conduct by considering the charges of thefts against their children. Finally, the judge stressed that schooling falls within constitutional principles and therefore “as such, it cannot be seen as an expression of a mere cultural orientation imposed by the majority to the minority; moreover, the minority group cannot invoke the immediate acceptance of its culture in the society of “arrival”, without a preventive evaluation of the principles characterizing it [...] (the custom not to send female daughters to school and not to impose school attendance for minors, however, certainly conflicts with our fundamental principles)”.

These observations betray a stereotyping approach by the judiciary as the “custom” of not sending children to school cannot be considered to be part of “Roma culture”<sup>12</sup>. These considerations also fail to consider the particular context (in this case, not only cultural, but also social and economic) in which the crime has been committed. Such context, if adequately proved, could have been extremely relevant in assessing whether the defendants foresaw and accepted the ill-treatment of their children as a highly probable consequence of their omissions.<sup>13</sup>

### **3.3 The “other’s” culture vs “our” fundamental rights**

This reference to fundamental rights allows us to introduce one of the most common lines of argumentation recurring in the Italian cases on “culturally motivated crimes”: the culture of the “other” is often rejected by Italian judges because it is contrary to “our” fundamental rights.

A good illustration of this reasoning is offered by the Court of Cassation in the judgment No. 12089, 28/03/2012 where the judges ruled on the appeal presented by a foreign offender charged with abuse and injury against his twelve-year old daughter. The man forced his daughter to memorize the verses of the Koran, with beatings and ill-treatment. However, this behaviour, according to the offender, was meant to respond to his religious code, to his idea of education, the role of “father-master”, fully legitimized by his cultural context. The Court rejected the arguments of the defence, by referring to the “theory of the insurmountable barrier which impedes the introduction into civil society [...] of customs, practices and costumes which are “anti-historical compared to the results obtained in the affirmation and protection of the inviolable rights of the person”. At the end of its reasoning, the Court gave only a short reference to the fact that, although he shared the same cultural roots, the brother of the offender, protected his niece from her father’s abuses, calling the police to prevent further violence.

In another case, the offender, accused of crimes including threats, beatings, injuries, abuse, kidnapping, and sexual assault, argued that the judgment of the Court of Appeal had a strong ethnocentric flaw: the court used conceptual and evaluative patterns coming from the Western culture, without taking into account the cultural and religious diversity of the accused. The Supreme Court did not dispute the defensive framework, did not question whether the offender’s behaviour fell or did not fall within the “concept of family, coming from his social group membership, which allows and even impose such conducts, as in the case of the wife refusing the debt marriage”. Instead, the appeal was rejected because “the offender, as a citizen of Muslim religion, has a concept of family life and marital

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<sup>12</sup> See the eloquent data of the European Union Agency for Fundamental Rights, Roma survey – Data in focus. Education: the situation of Roma in 11 EU Member States, Luxembourg: Publications Office of the European Union, 2014.

<sup>13</sup> Judges use this argument of the “universal principles” also in the following judgments: Criminal Cassation no. 37438, 13.7.2012; Corte d’Appello Venezia, 9.1.2006; Trib. Padova – GUP – no. 446, 9.6.2005; Ufficio Indagini preliminari di Milano, 25.10.2000.

powers, [...] which is in stark contrast to the core standards that inform the Italian legal system and the concrete regulation of interpersonal relations” (Criminal Cassation 26/11/2008, no. 46300)<sup>14</sup>.

The judgments show the propensity of the judiciary to accept the claim by the defense that the crime is culturally motivated, in the absence of any evidence substantiating these claims and without ascertaining what the actual requirements of the Muslim religion are. Thus, while in many of these cases the cultural claims of the defence could be rejected on the basis of a lack of evidence, in this case, as well as in other judgments, “culture vs fundamental rights” is the line of argumentation used to solve the case, at the cost of reinforcing existing ethnic and cultural prejudices, which flow from an essentialist conception of culture (Geertz 1973; Benhabib 2002; Remotti 1996).

So why, despite this, does this argument recur so frequently?

A possible explanation is the reductionist approach of the judiciary. The sharp opposition between “us” and “them” avoids any insight into the culture of the offender, presented as a compact and homogeneous whole (D’Hondt 2010). Identities are completely explored just by contraposition. Hence, any explanation and contextualization appear superfluous. Even the fundamental rights are invoked as a compact body, without specifying which particular principles are at stake<sup>15</sup>. As result, the “other culture”, represented by the offender, appears as irreconcilable and impossible to integrate. This irreconcilability, however, is simply presupposed and is not substantiated with any empirical evidence or elaborative reasoning (Fish 1997:389).

Furthermore, by taking advantage of the consensus already existing around the category of “our fundamental rights”, the judge may easily attribute the necessary persuasiveness to the verdict, without any further argumentative efforts.

### **3.4 A stereotyped alphabet**

The Italian judges’ reductionist approach to culture is also mirrored in the logic and the linguistic structure of the judgments collected.

Apart from a few exceptions<sup>16</sup>, judges made reference to the culture of the offender in a generic and vague manner. Hence, while the solution of the case often relies on decontextualized “clash of values”, the subjective profiles, related to the offender’s culpability, have rarely been taken into account: the cultural background and the extent of its influence on the offender’s behaviour are seldom addressed. Judges do not verify the degree of compliance of the offender to the traditions, religions, and cultures invoked. While the verification of the so-called “sincerity of belief” represents a necessary step within some jurisprudential traditions (such as the Canadian one), in Italy judges tend to assume it, or to reject it without providing any explanation.

Another interesting recurrence is represented by the use of rhetorical and para-logical reasoning, including the “petitions of principle” that is a sophism that “consists in putting at the basis of a reasoning what is instead its conclusion”.<sup>17</sup> In some judgments, the judge reached a conclusion on the offender’s culpability and on his/her awareness of having committed a crime, by assuming the

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<sup>14</sup> See the observation of L. Pedullà, *Principi fondamentali e reati culturali: il criterio d’imparzialità versus le soggettive convinzioni religiose*, [www.forumdiquadernicostituzionali.it](http://www.forumdiquadernicostituzionali.it). The author points out that in a similar case (Criminal Cassation 26.06.2007 no. 34909) concerning a Moroccan citizen accused of the offence of sexual assault against his wife, all considerations of the conception of the family currently extant in Morocco are missing. More specifically, no mention is made of the reform of family law in 2004 that made Morocco “a reference point not only for the Maghreb countries but also for the Muslims in general”.

<sup>15</sup> See, amongst the others, Criminal Cassation 02.07.2008, no. 32436.

<sup>16</sup> Tribunal of Cremona 19.02.2009.

<sup>17</sup> See *Enciclopedia italiana Treccani*, 1935, voce “petizione di principio”.

universality of certain values. So – employing a natural law argument– the negative value of what realized is presented, as reported before, as “universally perceived, regardless of the ethnicity membership, because it contrasts with criteria – which are innate, natural rights antecedent even to legislation or case law – of peaceful coexistence between human beings”<sup>18</sup>. Another technique is the so-called “tendentious presentation” which recurs where the judiciary doubt the cultural belonging of the offender but omit to substantiate this claim with any evidences<sup>19</sup>.

Besides this, judges speak about the “other’s” culture by frequently referring to the sphere of emotions, such as “sensitive”, “repugnant”<sup>20</sup>, “reprehensible”<sup>21</sup>, “aberrant”<sup>22</sup>. Judges talk about “ancestral cultural codes”<sup>23</sup> while elsewhere the offender’s culture is marked as being that of “barbarians”<sup>24</sup> or being “anti-historical”<sup>25</sup>. Also, the use of “figurative speech” is common. An example is the theory of “insurmountable limit/barrier” (represented by “our” fundamental rights), where the lexical combination creates a pleonasm, which is used by judges to emphasize the distance between “our values” and “their disvalue”<sup>26</sup>.

The aspects above-mentioned demonstrate a particular function of the judgment: the persuasive one, aimed at creating consensus around the verdict, rather than demonstrating its validity (Taruffo 1975:440). In other words, Italian judges dealing with “culturally motivated crimes” seem to draw on their common sense and their (the dominant) socio-cultural and ethics heritage rather than deciding the case by way of an accurate and correct analysis of the facts on a legal but also (anthropo-)logical level. The complexity surrounding the “cultural question” fails to be addressed by the judiciary, as it does with other cases requiring technical inquiries, for example, when the judge must adjudicate on a case concerning medical issues<sup>27</sup>.

#### 4. The cultural claim in UK criminal law cases: the denial of culture

In the English law cases, the first issue to analyse is the number of English judgments referring to the culture of the offender (a mere 18 cases). It is noteworthy that the cultural argument is absent even in cases which are, at least in theory, permeated by cultural factors (i.e. crimes such as circumcision or the so-called “honour crime”)<sup>28</sup>.

Some circumstantial inferences seem to confirm the conclusion of there being a poor level of “cultural sensibility” in English criminal courtrooms. A first indication comes from English law scholars, who observe how English judges have always been disinclined to give recognition to the right of minorities to exercise their own traditions and cultural practices (Phillips 2007: 881; Bakalis

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<sup>18</sup> Tribunal of Torino, 21.10.2002 where Roma people were accused of abuse against their children for having failed to send them to school and prohibit them from committing thefts.

<sup>19</sup> On this purpose, see amongst the others, Tribunal of Padova, no. 446/2005.

<sup>20</sup> Tribunal of Torino, sez riesame, ordinanza 3.11.1998

<sup>21</sup> Criminal Cassation 23/04/2012, no. 35496

<sup>22</sup> Criminal Cassation, 23/04/2012, no. 35496

<sup>23</sup> Tribunal of Trento, 19 February 2009

<sup>24</sup> Criminal Cassation 20/10/1999 no. 3398

<sup>25</sup> Criminal Cassation 28/03/2012, no. 12089

<sup>26</sup> See amongst others the Court of Appeal at no. 3398, 1999, the so-called “Bayrami” case.

<sup>27</sup> The empirical evidence informing this study shows that in Italy the expert anthropologist is present in just one of the 68 analyzed cases.

<sup>28</sup> Concerning “hounour killing” cases see *Regina v Mohammed Mujibar Rahman*, Court of Appeal, criminal division, 26 January 2007, [2007 EWCA Crim 237] while concerning the crime of circumcision, see *R v M.B.*, Court of Appeal Criminal Division, 22 May 2013, [2013] EWCA Crim. 910.

2013: 443; Woodman 2009: 18). Furthermore, in the UK, in general, there is little academic attention given to so-called “cultural crimes”. Except for the book “English law and ethnic minority customs” published by Sebastian Poulter in 1986, it is hard to find other examples of studies or scholars that explicitly focus on the issue of cultural crimes, or of a cultural defense to crimes, and the role of these phenomena within the legal system (Woodman 2009: 18).

Finally, it is important to highlight another issue: lawyers themselves prefer not to use the “cultural argument”. It emerged from the interviews that even where an offence is strongly imbued with cultural elements, the defense prefers to invoke different circumstances, such as the “clean criminal record” of the offender or his good character. This specific attitude of the defense can be seen as a sign of the reluctance of English judges to accept this kind of argument, as well as a manifestation of the profound influence that Bench has on Bar (Bell 2006: 326). English lawyers, therefore, and those who are close to being promoted in particular, prefer not to utilize the cultural argument at all.

An example of this attitude can be seen in the case of the young Kristie Bamu<sup>29</sup>. The boy, aged only 15, decided to spend Christmas in London together with his sister who had lived there for some time with her boyfriend, Erik Bikubi. Their parents were going to arrive at the house shortly after Christmas. During his short stay, however, Kristie was subjected to atrocious and deadly torture by his sister and boyfriend, convinced that the child was “possessed” by a malignant spirit and deserved death. According to Judge Paget, “belief in witchcraft, even if it is genuine, cannot excuse violence”. Kristie Bamu’s sister and her boyfriend were sentenced to life imprisonment. However, in this case as well as in other cases, the rejection of the cultural argument does not have a thorough and clear justification. The judge refuses to consider the cultural background of the defendant, without any detailed analysis. Moreover, the main argument of the defense is only indirectly related to cultural data, being focused on Erik Bikubi’s mental deficiency. Last but not the least, nobody requested the so-called “serious case review”, i.e. the report that is drafted by the local body responsible for the protection of minors when a child dies as a result of ill-treatment in order to “identify what professionals and local organizations can do”<sup>30</sup>. Yet, a statement released by the Victoria Climbié Foundation a few days after the trial, suggested that it would have been important to have learnt more about the background of the perpetrators of Kristie’s murder. It would have been important to understand what might have influenced their belief in witchcraft, even more so given the perpetrators grew up in England. In this respect, Mor De Dioum, co-founder of VCF, highlights that “considering the cultural background of the defendant does not mean to justify but to understand.” It is noteworthy that this consideration comes from the exponent of an association that has been attempting for years to protect the rights of children in a particularly complex and above all “culturally sensitive” field, such as that of satanic rituals and witchcraft.

#### **4.1 Solving the “cultural dilemma” is the responsibility of the Parliament**

Analysing the wording of the English case-law on “cultural crimes”, a topic emerges with a certain frequency, whereby judges defer the solution of the “cultural dilemma” raised by the offender to Parliament.

The case of *The Queen v D (R) - The Crown Court at Blackfriars*<sup>31</sup>, which concerned a woman accused of bribing a witness, called on the judge to decide on a marginal matter in the context of that

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<sup>29</sup> It was not possible to find this judgment on the English legal database. The information provided are drawn upon the newspaper. See in particular, the following web page: <http://www.bbc.co.uk/news/uk-england-london-17255470>

<sup>30</sup> See the following web page: <https://www.gov.uk/government/policies/supporting-social-workers-to-provide-help-and-protection-to-children/supporting-pages/serious-case-reviews-scrs>

<sup>31</sup> *The Queen v D (R) - The Crown Court at Blackfriars* – September 16, 2013. The judgments is not reported. However it is mentioned in another case (whether the witness has the right to wear the *nikaab* in court): AAN (Anonymity Direction)

judgment: whether or not the defendant was entitled to wear the *nikaab* during the process. Of particular interest, for our purposes, is the paragraph immediately following the description of the event, eloquently titled "the need for legal principle." Here the judge, noting that there are no prescriptions regulating the matter, affirms the need for a law, stating that "the relegation of such important issues to the sphere of 'judge craft' or 'general guidance'<sup>32</sup> has resulted in widespread judicial anxiety and uncertainty and to a reluctance to address the issue. To borrow and adapt slightly a phrase currently in vogue, the *nikaab* has become the 'elephant in the courtroom.' Trial judges need, not only general guidance, however helpful, but a statement of the law". Having advocated a Parliamentary intervention, the judge then stated that he would attempt to adjudicate the case (para. 12)<sup>33</sup>. Beyond the decision taken, it is important to emphasize the particular argument that was used: the judge justified the decision on the basis of the highly adversarial character of the English law procedural model and on the principle of transparency in the administration of justice (the so-called "open justice"). As the judge affirms, these principles can be waived only when expressly permitted by the law. Hence, in the absence of such a law, these principles have to take precedence in any balancing equation with the principle of freedom of religion (para. 72).

Two issues should be highlighted with regard to the judge's reasoning. First, there is an explicit appeal to Parliament to intervene to settle the question, "freeing" the judges from "anxiety and uncertainty" (para. 12). He makes clear that his decision will apply to any defendant, regardless of his gender or his religious faith (para. 12). These words seem to betray the shadow of a possible accusation of discrimination that could be made against the judgment. This shadow appears even more clearly in another paragraph of the judgment where the judge says: "...the Court must be conscious that it cannot apply the law differently on the basis of religion. [...] If D is entitled to keep her face covered, it becomes impossible for the Court to refuse the same privilege to others, whether or not they hold the same or another religious belief, or none at all" (para. 60).

Finally, another aspect of the judgment has to be highlighted: the decision was carefully placed under the protective and authoritative "umbrella" of the law: the judge decided the case affirming that, in the absence of an explicit normative exemption to the principle of open justice, he cannot introduce it through case law. Since there is no normative prescription regulating the use of *nikaab* in the court, the judge cannot allow it (para. 72). Through this line of argumentation, the judge defers the solution of the question to the legislator: "it is a Parliament responsibility".

The same observations made above are also applicable to another case, which is particularly relevant to our aims: *R v Andrews* – Court of Appeal – 5 March 2004.<sup>34</sup>

Mr. Andrews, sentenced to 30 months in prison for importing cannabis, brought an appeal based *inter alia* on the claim that the statute which prohibits the cannabis importation (section 170(2) Customs and Excise Management Act 1979)<sup>35</sup> is not compatible with art. 9, para. 2 of the European

(Contd.) \_\_\_\_\_

Made) v The Secretary of State for the Home Department, Upper Tribunal (Immigration and Asylum Chamber, 14 January 2014

<sup>32</sup> See the "Equal Treatment Bench Book" (JSB 2004, Chapter3.3, 2007) which provides some guidelines on the allowance of religious clothes in the courtroom.

<sup>33</sup> It is noteworthy the reference made by the judge to a judgment of the Supreme Court of Canada, (*R v NS*, 2012 SCC 72, [2012] 3 S.C.R. 726) which is openly used as a support on which to draw. Interestingly, the English judge decides to skip the first passage of the Canadian test: that of the sincerity of the belief. This subjective element is therefore completely set aside to focus on the religious practice (paras. 14-18). At the end of a lengthy, articulated ruling, the judge decides that the difficult balance between the right to manifest one's religion on the one hand and the principle of a "fair trial" and the good administration of criminal justice on the other hand must end see the assignment of a greater weight to the latter considerations than the former. Consequently, if the defendant is free to wear the *nikaab* during the trial, he must remove it whenever "superior" reasons are at stake, such as the need for his face to be clearly observed at the moment of the deposition (para. 82).

<sup>34</sup> *R v Andrews*, Court of Appeal Criminal Division, 5 March 2004, [2004] EWCA Crim 947.

<sup>35</sup> Customs and Excise Management Act del 1979

Convention on Human Rights, which affirms the freedom to manifest one's religion or belief. Mr. Andrews is a follower of the Rastafarian religion. Consequently, for him, cannabis use (as well as its importation) has a value strictly related to the freedom of religion. In particular, cannabis facilitates the attainment a condition of "peace and purification"<sup>36</sup> requested by the Rastafarian religion.

The Court, however, rejected this claim, affirming that (this is the last of the three reasoning given) freedom of religion is not an absolute right but a relative one, so it can be subjected to some limitations<sup>37</sup>. However, the balance between this right and the right to the public health is a question for Parliament: "Government authorities are in a much better position than this court to form an accurate assessment of the complex web of factors that would necessarily be relevant"<sup>38</sup>. Thus, the Court does not conduct the balancing exercise itself. It does not set down the inadmissibility of the religious motivation or its subordination to other principles. Rather, the Court adopts another approach, preferring not to address the question. The case involves extremely important and sensitive issues – the Court says – so, it is appropriate to defer to another entity in the decision making process, which it presents as the only entitled to do it: the Parliament.

The following case presents a similar line of reasoning: *R v Taylor*, Court of Appeal (Criminal Division), 23 October 2001, [2001] EWCA Crim 2263. Mr. Taylor, prosecuted at first instance for the possession of a considerable amount of cannabis, with the intent to supply, claims in his defense that he is Rastafarian, and that, his behavior "is part of his religion" (para. 5). More specifically, Mr. Taylor asserts that section 5 of the Misuse of Drugs Act 1971 (which prohibits the possession of cannabis with the intent to supply) does not meet the requirements of proportionality and necessity required by the second paragraph of art. 9<sup>2</sup> ECHR (proclaiming the freedom to manifest one's religious belief). However, the Court of Appeal rejected this ground for appeal (while ruling for a reduced sentence because of the religious motivation). However, the reasoning justifying the decision of rejection is rather brief and unconvincing, finding that section 5 of the Misuse of Drugs Act 1971 represents a "necessary restriction" on the freedom to manifest one's religion or belief. This necessity derives from the subscription by the UK of the "Single International Conventions of drugs of 1961" and the "United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances". This would indeed be proof of an "international consensus" about the "necessity" of an offence of this type in order to fight the danger that drugs represent to health and public safety. However, it is clear that the adherence to these conventions is not sufficient, in itself, to justify neither the decision to prosecute the possession and supply of cannabis nor the decision not to include a specific exemption for Rastafarians (on this purpose, a different decision has been made by the Netherlands, which signed these international Conventions). At the same time, the Court observed that "it is a complex issue, not easy for a Crown Court judge to resolve" (para. 14). Meanwhile, the prosecution lawyer points out that "the consideration of what defenses may be appropriate, in relation to conduct which otherwise gives rise to a criminal offence, where the burden lies in relation to such defences and as to the nature of the burden, are all matters which are properly the province of the Parliament not the courts".

These judgments seem to reveal the judges' unease with decisions that have a lot of consequences on a juridical, but also on a social and media level. Deferring to Parliament in the decision-making

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<sup>36</sup> The judgment reports the words of the defendant on the use of cannabis "the herb itself is referred to in the Scriptures in Genesis and has been put on earth for use and food for man. It has mystical qualities. It is used for purifying and for peace. American Indians use it in their peace pipes. It gets the skin clean and soft. I use it to cook, to season and flavouring. It is a good cleanser of your colon and it has a good flavour. There is also a spiritual aspect and it is called the leaf of life and clothes are made of the hemp material".

<sup>37</sup> Art 9 (2) CEDU states "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" para. 7.

<sup>38</sup> *R v Andrews*, cit., para. 21.

process, judges avoid directly addressing the “cultural question”. After all, these observations recall the enormous relevance of the judiciary within the English legal system. As highlighted by Lord Nolan (1997:71)<sup>39</sup>:

“The powers and responsibility of an individual judge are immeasurably greater than those of an individual member of the executive or of the legislature. The judge may be overruled by three other judges in the Court of Appeal, and in rare cases they in turn may be overruled by five judges in the House of Lords, but the power wielded by the judges over those involved in the cases before them and over the development of the law remains out of all proportion to the number of people exercising it.”

#### **4.2 The culture has nothing to do with this case: the strategy of “culture redefinition”**

Another strategy observed in the English judgments on “cultural crimes” can be termed the “redefinition strategy”. Here the judges manage the cultural argument raised by the offender by giving it another name: it is not culture – as the offender claims – but something else. Generally, this “something else” is based on patriarchy. Hence, it is not culture but “control” or “honour” or “revenge”. Whatever the label used by the judge, the logic underlying this operation is always the same: eliminating “cultural explanation” and the “cultural argument” from the courtroom.

The cultural background to the defendant's behaviour, is transformed and distorted in the judgments by giving it a different explanation. Hence, the cultural element, as “redefined” by the judge, becomes a double-edged sword for the accused. “There is no culture in violence” judges repeat, eliminating such culture from the judicial discourse. In this way, judges remove from the process an element that, if supported by an appropriate probationary basis, could provide important information about the defendant and the subjective and objective circumstances of the offence.

This operation of “redefinition” by the English judiciary is well illustrated by the judgment given in *R v B*, Court of Appeal, 12 February 2010. The facts of the case can be summarized as follows: B., the appellant, was convicted for an offence under Section 10 (1) of the Sexual Offences Act of 2003, for having induced her daughter, not yet sixteen, to have sexual intercourse<sup>40</sup>. The reason is clearly explained in the body of the sentence: B. learned that her daughter had a relationship with a boy at school. She disapproved this relationship. Hence, after having consulted with some of her relatives - she is a widow - she decided to organize an “arranged marriage” for her daughter. The marriage was celebrated some time later, according to the laws of tradition. However, two months after marriage, the groom, more than thirty, began to abuse V. The relationship between the two ended shortly afterwards. The case was brought to the attention of the police in the following months, when V., involved in another relationship, feared that the mother may decide to arrange a new marriage and confided these fears to the school staff.

B., the defendant, comes from a rural village in Bangladesh. She is illiterate and at the age of 15 she also entered an arranged marriage. In light of the circumstances of the case, and of B.'s particular cultural background, the defense invited the jury and the judge to consider that the behavior of B. has to be regarded as normal, “natural”<sup>41</sup>, expression of pure affection. In other words, B. did what she did “out of love for her daughter and in what she believed to be her best interest”<sup>42</sup>. However, the report released by the Probation Office (which provides through-care (in prison) and after-care (post-release

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<sup>39</sup> Cfr. Bell, 2006: 334

<sup>40</sup> In particular, section 10 (1) of the Sexual Offences Act 2003, “Causing or inciting a child to engage in sexual activity” states: “A person aged 18 or over (A) commits an offence if a) he intentionally causes or incites another person (B) to engage in an activity b) the activity is sexual, and c) B is under 16 and A does not reasonably believe that B is 16 or over, or B is under 13” <http://www.legislation.gov.uk/ukpga/2003/42/contents>

<sup>41</sup> *R v B*, Court of Appeal, 12 February 2010, para. 11.

<sup>42</sup> *Idem*, para. 11.

supervision) to those who have received custodial sentences) contains a different explanation: it is not love, but control. The judge chooses to fully adhere to it: "Mrs. B. was motivated by the need to control her daughter and felt that allowing her to get married and, therefore to engage in a sexual relationship as would be expected, was the best course of action for her". Thus, "the need to 'keep up appearances' and to control her children generally in a traditional and draconian manner has led to this offence occurring". The same consideration had already been made by the court at first instance, where the judge said that the marriage had been used by B. as a "means to control her child."<sup>43</sup>

#### **4.3 The externalization of the management of the minority culture**

The peculiar attitude of "culture-dismissal" shown by the English judges finds an interesting correspondence with the English institutional approach to the phenomenon of so-called "Minority Committees" and the "religious jurisdictions", and their jurisdictional role in England. "Minority Committees" can be defined as courts that settle disputes in accordance with the secular rules and principles of a particular ethnic and cultural community (Tas 2012; Mensky 1993; Ballard 1994; Shah 2013). For the purpose of this research, in the absence of a common or universal definition (Douglas & Doe & Gilliat-Ray & Sandberg & Khan 2011) the term "religious jurisdictions" refers to the various bodies that settle disputes on the basis of religious law. The term covers not only the "Islamic Courts" (the Shari'a Councils) and the Muslim Arbitration Tribunal (henceforth also MAT), but also, by way of example, the Beth Din (or Jewish courts) and the Court of the Church of England. With the exception of the latter, the other courts mentioned are outside the English judicial system and there is no relationship between the religious and the "official"/"ordinary" jurisdictions. Except for disputes which fall under the rules of the "Arbitration Act" (essentially contract law),<sup>44</sup> the rest of the decisions issued in religious jurisdictions have no legal effect under the English and Welsh legal system. These decisions are neither recognized nor are subjected to any explicit regulation. Failure to regulate also implies that very little is known about these bodies, their number, their skills and how they work. In addition, very few empirical studies have been conducted on the issue.

On the other hand, it must be emphasized that while the activity of these courts is neither recognized nor regulated, they have not been banned. Numerous sections of civil society and associations sought the abolition of such courts<sup>45</sup> and in 2012 a bill was drafted "Arbitration and Mediation (Equality) Services" (proposed also in the following years) aimed at reducing the scope and the activity of the religious jurisdictions. However, this proposal was not approved (Cumper 2014). In June 2016, an inquiry into Sharia councils operating in the UK was launched by the Home Affairs Committee aimed at examining "how Sharia councils operate in practice, their work resolving family and divorce disputes and their relationship with the British legal system".<sup>46</sup> However, after having gathered some evidences,<sup>47</sup> the inquiry has been closed due to the general election on 8 June 2017.

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<sup>43</sup> See para. 12 (the Probation Office's declaration) e 10 (the reference to the first instance Court).

<sup>44</sup> The "Arbitration Act" is an Act of Parliament which regulates arbitration proceedings within the jurisdiction of England and Wales and Northern Ireland. See <http://www.legislation.gov.uk/ukpga/1996/23/contents> .

<sup>45</sup> For a summary of the main criticalities raised against the Sharia Courts phenomenon see the report "One Law for all" e IKWRO Iranian and Kurdish Women's Rights Organization, Sharia law and Child protection in Britain, su <http://ikwro.org.uk/campaigns/sharia-law-in-the-uk/> .

<sup>46</sup> See for more insights <https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news-parliament-2015/160623-new-inquiry-sharia-councils/>

<sup>47</sup> The oral and written evidences gathered by the Home Affairs Committee are available here: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/inquiry6/>

Meanwhile, in the UK there are in excess of 85 Sharia Courts and the Islamic Sharia Council based in London in the Leyton district seem to handle about 200-300 cases per month.<sup>48</sup> In addition, it has been alleged that a considerable number of the cases coming before these courts concern criminal matters.<sup>49</sup> Also in respect of the Minority Committee, empirical studies have shown that, contrary to what has been officially stated, the scope of action of these bodies goes far beyond commercial matters, often extending also to cases of family law and criminal law (Tas 2012: 1122). These circumstances notwithstanding, these jurisdictions are far from obtaining an official recognition. Rather, ethnic and religious jurisdictions in the United Kingdom operate in a parallel dimension to the domestic legal system, representing a sort of “distinct legal world” (Botsford 2008). Such a situation, moreover, also corresponds to the will of the same Islamic Courts, intending to offer a distinct service to that provided by the state, and not at all eager for formal recognition (Bano 2012).

In this situation, the Sharia Courts and the Minority Committee may be seen as the expression of the choice to devolve or leave the settlement of “minority” disputes to appropriate jurisdictions managed by the minority itself. This, moreover, would explain, together with the other factors previously identified, the lack of judgments that take into account cultural factors: there are bodies for this that live and work in parallel with the state. If the latter cannot officially acknowledge them, it is pragmatically aware of the benefits provided: not only the reduction of costs and the considerable “decongestion” thus ensured to the domestic judicial system but also the fact that judges are relieved of the issues connected with the direct management of the “cultural question”. Hence, the minority communities are called on to handle their issues themselves, in special places imbued with their culture, separate from those in which ordinary justice is handled.

## **5. The judiciary and the(ir) culture: the need to improve cultural competence and sensitivity**

As anthropologists teach, the study of a particular culture reveals something not only about the object of that study, but also about the party conducting the analysis (Balagangadhara 2012: 33). Thus, at the end of any such analysis, we will know more about the party who carried it out, and how his/her cultural matrices dictated the contents, perspectives, and outcomes of it.

This observation also pertains to judges. Hence, the evidences collected from judgments on cultural crimes occurring in English and Italian courtrooms can reveal something about the particular culture and vision of the world hiding behind the apparently aseptic ink of a judgment (Parisi 2010: 39). The aim of these last lines is to present some reflections on the “judicial culture”, emerging from the case-law collected (with the important caveat that this remains an exploratory, empirical study, aimed at describing a phenomenon rather than explaining it).

In this context, by way of example, in the English legal system, as already observed, it is likely that the “judge made law” system plays an important role in the judicial attitude to culturally motivated cases. In the absence of statutory provision for dealing with the handling of cases of cultural diversity in the courtroom, it is hard for individual judges to set down rules which could be attributed

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<sup>48</sup> The reference to the 85 Sharia Courts in the United Kingdom is made by D. MacEoin, *Sharia Law or “One Law for All?”*, CIVITAS, cit., 2009. However, as already said, the lack of empirical studies makes the matter highly uncertain. Instead, the number of controversies handled monthly by the Islamic Sharia Council of Leyton in East London, United Kingdom's largest Sharia Court, is reported by the BBC and dates back to January 2012. See the following webpage <http://www.bbc.com/news/uk-16522447>

<sup>49</sup> The reference goes to an article on “London Evening Standard” on February 8, 2008, titled “Sharia Court frees London knife youths”. Here, the author, Martin Bentham, reports that after some Somali children were arrested on charges of having hurted another Somali boy with a knife, their parents have asked and obtained from the police to resolve the matter at the local Somali community court. At the hearing, therefore, the defendants were ordered to pay the victim a sum of money for damages.

considerable weight by those judges called to handle similar cases after him/her. However, bearing in mind the multi-causality of every phenomenon, some further conclusions can be made. In fact, important differences notwithstanding – background, contexts and legal system underlying the case-law collected in Italy and England are profoundly different – an interesting convergence links Italian and English judicial culture: the lack of cultural competence and sensitivity. As the case-law collected shows, the cultural element rarely makes an appropriate entrance in the Italian and English courtrooms where a correct and accurate analysis of the cultural element is seldom applied.

As seen, in Italy, judges often resort to generalizations and stereotypes. Their reasoning is often grounded in common sense rather than detailed analysis, in repetitive formulae, and phrasing that is laden with emotive connotations. Conversely, in the English courtrooms, judges keep cultural considerations out of the courtroom by deferring the solution of “cultural dilemmas” to the Parliament. However, the few cases on cultural crimes which have been identified are not exempt from stereotypes or from a lack of insights into the cultural claim made by the offender. In both cases, embracing strategies of “cultural reductionism” or “cultural denial”, English and Italian judges try to avoid having to directly address the cultural background of the offender and decide on its legal relevance. The culture of the offender is overlooked and fails to be considered as a factor that could provide important insights for a thorough understanding of the subjective and objective elements of the offence and, therefore, for a just outcome.

At this point it should be noted that the question remains as to why this is the case?

While it is not the purpose of this paper to provide answers to this question, some observations can be advanced by drawing on the field of anthropology, in order to provide some food for thought, with the aim of setting out a grounding for further research in the field.

The study of the management of cultural diversity in the courtroom cannot be limited to the analysis of the offender and his or her culture, but must also consider the culture of the courtroom and the society in which the judge is situated. To put it another way, in order to analyse how the cultural reality of individuals belonging to minority groups is understood, conceptualized and given a legal relevance by the courts necessitates analysis of the judiciary and its culture. We are required to consider the “justice system” as a whole.

To this end, a first observation pertains to “systemic” variables, such as the composition of the Courts. On this subject, it has been highlighted that:

“The judiciary needs to be reflective of the diversity of the society it serves. Increasing the diversity of the bench, so that it better represents society, will increase the confidence of all stakeholders, whether court users, the legal professionals or the general public, in the judicial process and in the end of justice as a whole.”<sup>50</sup>

The above conclusion by the Commission for Judicial Appointments was echoed by the judgment given in the aforementioned case of *R v D(R)*, in which the judge acknowledged that he was: “*a male judge dealing with an issue which mainly affects female Muslim defendants, and does so in an intimate way*”. In 2016, the judicial system in England and Wales registered improvements in the number of female judges (28% in Courts and 40% in Tribunals). However, the percentage of judges from a Black, Asian and Minority Ethnic background (BAME) is a cause for serious concern (Bell, 2006: 315): there are 6% BAME judges in courts, and in tribunals 10%, as highlighted by the Lord Chief Justice.<sup>51</sup> In the same year, in Italy, while the number of female judges (50.6 %) outnumbered male

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<sup>50</sup> Commission for Judicial Appointments, Annual Report 2004 (London 2005), para. 2.14. Cfr. Bell 2004: 318.

<sup>51</sup> See the 2016 statistic bulletin on judicial diversity, available here.

counterparts (49.4%)<sup>52</sup>, it is noteworthy that data concerning the number of judges with a minority background are not available.

Another issue which warrants reflection is the role of legal education, which currently has a very small number of lessons relating to anthropology, differences, and the rights of minorities (Sagiv 2015). In this regard, authors have highlighted that “*instead of placing the foundation stones for the promotion of culture and behaviour enabling equal opportunities, has instead passed down to them an abstract and ‘aseptic’ concept of law and justice*”(Catelani & Stradella 2014: 164). A more interdisciplinary education and training could orient and assist judges in the extremely complicated task of managing cultural diversity in the courtroom, allowing them, to some extent, to share the enormous responsibilities associated with their function, in a field which as has been seen, is incredibly complex and sensitive (Massa 1993).

To conclude, the above observations – which require further analysis and research – suggest that any reflection on diversity and minorities will inevitably entail consideration of both society as a whole and the legal system as a whole. It is an example of the “canary in the coalmine” metaphor, in which it is said that miners used to carry with them a canary in the black caverns of the subsoil. The custom was of vital importance: when the canary began to breathe badly, it was a sign that the miners had to leave the mine. The respiratory system of the bird, in fact, particularly fragile and sensitive, served to alert the miners that the air had become poisonous and that it was necessary to flee before the gasses could become fatal. This story exemplifies the dynamics between the delivering of justice to minorities and the health of the entire legal system: making the experience of minority defenses more equitable will benefit not just the group who the offender belongs to, but society as a whole (Thomas & Zanetti 2005: 127).

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<sup>52</sup> Data shown are available at [http://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/2016\\_int.pdf](http://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/2016_int.pdf)

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