Claiming cultural diversity in courts. Exploring judicial strategies to elude the "cultural question" in Italy and the UK•

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Abstract: Titolo in inglese (o in ita se titolo è già in inglese) – How do judges manage cases of cultural diversity? What are the outcomes of their judgments and what arguments are posited to justify them? Is there any recurrence among the main arguments used by judges in different legal systems? In order to answer these questions, the article draws 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, in Italian and English courtrooms. The article discusses the outputs of the empirical research, highlighting the differences in the approach towards diversity management in the Italian and English courtrooms. Italian judges reveal a limited awareness of the complexity of cultural diversity, while English judges show uneasiness and disorientation in managing the "cultural factor". The different approaches notwithstanding, results point to 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

Cultural diversity has become a key trait of contemporary European societies. According to EUROSTAT, third-country nationals have climbed from 3.4% of the EU-28 population in 2005 to 4.2% in 2016.[1] The growing presence of

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This article is dedicated to the memory of prof. Wibo van Rossum, a great man and professor, who I had the honour to meet and talk with about the complex and intertwining nexus between law and culture

[1] EUROSTAT, data on 'Migration and Citizenship', available at ec.europa.eu/eurostat/web/population-demography-migration-projections/migration-and-citizenship-data

foreigners coming from remote and very diverse countries leads to the juxtaposition of multiple patterns of diversity, such as linguistic, religious, social and ethnic ones. This "super-diversity"[2] calls into question the traditional structures of societies, and therefore it challenges the States' ability to manage such a multi-layered complexity.[3] At different levels and to different degrees, State institutions are called upon to revise and adjust common tools, practices and policies so as to govern diversity.

The legal framework is in the midst of this process. Indeed, ever more frequently courts at all levels worldwide are experiencing a new kind of legal argumentation, where claimants ask the court to acknowledge the particularity of their cultural backgrounds and, on this basis, to judge their cases differently from those of the rest of the community.[4]

This is typically the case of the phenomenon of "culturally motivated crimes", increasingly explored by practitioners and scholars. A "culturally motivated crime" is defined as an "act committed by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. Nevertheless, within the cultural group of the offender that same act is condoned or accepted as normal behavior and approved or even endorsed and promoted in the given situation".[5] On this basis, offenders plead for special treatment before the Court (their culture being cited as a motive, justification, excuse, or mitigating circumstance).

Until now, research has focused on trying to understand whether constitutional frameworks can allow for the "cultural exception", and, if so, on establishing the limits to that exception. Scholars have pointed to the courts as the institutional actors bearing the heaviest burden in managing the consequences generated by cultural diversity, stressing the difficulty of invoking a cultural argument in courts.[6] Nevertheless, thus far, rarely have authors undertaken a systematic analysis of the strategies actually used by judges to adjudicate cultural claims inside courtrooms.[7] The issues of what actually

[2] 'Super-diversity' is a term intended to underline a level and kind of complexity overcoming anything previously experienced in a particular society. See S. Vertovec, *Super-diversity and its implications*, in 29(6) *Ethnic and Racial Studies*, 1024-54 (2007)

[3] For a comprehensive analysis of the multiple interweaving aspects related to the management of cultural diversity, see G. Cerrina Feroni, V. Federico (eds.), *Strumenti, precorsi e strategie dell'integrazione nelle società multiculturali*, Napoli, 2018.

[4] A. Dundes Renteln, *The Cultural Defense: Challenging the Monocultural Paradigm*, in M. C. Foblets, J. F. Gaudreault-Desbiens, A. Dundes Renteln (eds.), *Cultural Diversity and the Law. State Responses from Around the World*, Bruxelles, 2010, 791 ff.; M. Nicolini, F. Palermo, *For a new semantic of difference: cultural exception and the Law*, in 8(1) *Pòlemos. Journal of Law, Literature and Culture* 95 (2014).

[5] J. Van Broeck, *Cultural defence and culturally motivated crimes*, in 9(1) *European Journal of Crime. Criminal Law and Criminal Justice*, 5 (2001).

[6] M. C. Foblets, A. Dundes Renteln (eds.), *Multicultural Jurisprudence. Comparative Perspectives on the Cultural Defense*, Oxford and Portland Oregon (2009); A. Phillips, *When culture means gender: issues of cultural defence in the English Courts*, in 66(4) *Modern Law Review* 510 (2003); L. Volpp, *(Mis)Identifying Culture: Asian Women and the 'Cultural Defence'*, 17 *Harv. Women's L.J.* 57 (1994).

[7] A. Shachar, *Demystifying culture*, in 10 *I-CON International Journal of Constitutional Law* 429 (2012); S. D'Hondt, *The Cultural Defense as Courtroom Drama: The Enactment of Identity, Sameness, and Difference in Criminal Trial Discourse*, in 35 *Law & Social Inquiry* 67 (2010).

happens when culture enters the courtroom, and more specifically how judges concretely deal with it, how they perceive, understand and shape their response to the "cultural question" in their daily decision-making, remains underanalysed.[8]

Adopting a strong 'law in context' perspective, the present research attempts to fill this gap. Indeed, by focusing on the "how" questions, this study aims to advance the understanding of the strategies adopted by judges to address the "cultural question" and, in doing so, it also suggests some hypotheses on the reasons why judges adopt a specific strategy. The main questions addressed in this article are the following: how do judges manage cases of cultural diversity? What are the outcomes of their judgments and what arguments are posited to justify them? Is there any recurrence among the main arguments used by judges in different legal systems? In order to answer these questions, the article draws 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, in Italian and English courtrooms.[9] The decision to compare these two countries is based on the logic of the "most different cases"[10]: the two countries are characterised by different social, political and historical contexts, as well as significantly different judicial systems. Italy and the UK currently represent the second and the third EU countries with the highest share of foreign population in absolute terms.[11] However, the UK has experienced significant and long-standing migratory movements, whereas in Italy immigration is a rather new phenomenon. In particular, the UK's long experience with the phenomenon of immigration can offer interesting insights into how "cultural arguments" have evolved in jurisprudence. In addition, the peculiar "judge-made law" system practiced in English courtrooms has produced ample literature and research on judicial decision-making[12], which, by contrast, is scarcely investigated in Italy. These differences may generate some fruitful causes for reflection.

The analysis of 68 judgments issued by Italian judges suggests *prima facie* a high regard for the cultural background of the offender. However, a more in-

[8] E. M. Maeder, S. Yamamoto, *Culture in the Courtroom: Ethnocentrism and Juror Decision-Making*, in 10(9) *PLoS ONE*, (2015)

[9] 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. In particular, the Scottish legal system "has its own courts, rules of procedure and evidence, and even punishment. And, perhaps most significantly of all, unlike the civil law it is completely self-contained, there being no appeal to the House of Lords on criminal questions." L. Farmer, *'The Genius of Our Law...': Criminal Law and the Scottish Legal Tradition*, in 55(1) *Modern Law Review* 25 (1992).

[10] R. Hirschl, *The question of case selection in Comparative Constitutional Law*, in *The American Journal of Comparative Law* 125 (2006).

[11] EUROSTAT, Migration and migrant population statistics, ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Migration_flows:_2_million_non-EU_immigrants

[12] See among the others, J. Vidal, C. Leaver, *Social Interactions and the Content of Legal Opinions*, in 29 *Journal of Law, Economics, and Organization* 78 (2013); C. Hanretty, *Political Preferment in English Judicial Appointments, 1880–2005*, in *APSA 2012 Annual Meeting Paper*, 2012.

depth analysis reveals that the relevance given to the culture of the foreign offender has never been properly examined by the judiciary. On the contrary, judicial reasoning tends to be accompanied by prejudices and stereotypes. The culture of the "other" is commonly depicted as "barbaric",[13] "contrary to fundamental rights" and irredeemably irreconcilable with the Italian culture and the Italian system of rights.[14] 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 Parliament, or redefine the "culture" as "violence", "abuse" or "control".

Embracing strategies of "cultural reductionism" and "cultural denial", Italian judges reveal a limited awareness of the complexity of cultural diversity, while English judges show uneasiness and disorientation in managing the "cultural factor". The different approaches notwithstanding, results point to an interesting convergence, supporting the central hypothesis of this work: 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". As a result, the lack of cultural sensitivity on the part of judges fuels cultural bias and stereotypes in cases where the offender belongs to a cultural minority. Ultimately, failing to understand the contextual specificities that may inform the crime risks undermining the right to a fair trial.

The discussion of the empirical findings is embedded in interesting research streams. First of all, recognising the cultural claim pleaded by the offender may convey the message that the offender's whole minority group is bound by the same culture, customs and traditions. Meanwhile, the cultural argument in some senses may promote the depiction of the minority in terms of "otherness".[15] Therefore, Volpp cautions about the stereotypical and essentialist effects tied to the use of culture in the courtroom. As a consequence, one could conclude that giving relevance to culture in the courtroom is detrimental and, ultimately, counterproductive for the recognition of cultural diversity in the legal system. In the same vein, Fournier also points out that "racism is so deeply embedded in culture that even when, and perhaps especially when, the court is attempting to be culturally sensitive, stereotypes of good and bad, white and black, us and them, superior and inferior, linger as the background of the decision".[16] The case law collected in Italy and the UK appears consistent with this consideration and seems to provide further evidence of it. It is true that "racial imagery is central to the application of the cultural defence"[17] and the recognition of cultural arguments in courtrooms may end up conveying

[13] Cassazione penale, n. 3398 del 20-10-1999.

[14] See paragraph 3.3.

[15] L. Volpp, *(Mis)Identifying Culture: Asian Women and the 'Cultural Defence'*, cit.; L. Volpp, *"Talking culture". Gender, race, nation and the politics of multiculturalism*, in *Columbia law review* 1573 (1996).

[16] P. Fournier, *The ghettoisation of the difference in Canada: "rape by culture" and the danger of a cultural defence*, in 29(1) *Manitoba Law Journal* 14 (2002).

[17] Ibidem, 8

stereotypes about the minority group which the offender belongs to. However, stereotypes have not been created by judges, but are rather a reproduction, a translation of what already exists in society, in the collective imagination. To put it another way, the flaws do not lie in the cultural argument itself, but rather in its troublesome applications in the courtroom. Stereotypes do not belong to the category of culture per se, but are rather a product of the way in which the judiciary (and the defence) portrays the minority culture as a monolithic and static whole, where the peculiarities of the specific case and the specific context vanish.

Following a concise methodological note, the article discusses the outputs of the empirical research, highlighting the differences in the approach towards diversity management in the Italian and English courtrooms. Bearing in mind the specificities of the Italian and English contexts, the central hypothesis of this work is that, in both legal systems, the cultural background of the offender could have a role to play in the trial and in the adjudication of the crime. In some cases, the interaction between culture and crime, if adequately proven, should enter the courtroom and be acknowledged by judges, through various criminal law instruments.[18] As pointed out by eminent authors, this argument is underpinned by the principle of (substantial) equality and the principle of individualised justice.[19] However, as this article attempts to demonstrate, judicial failure to properly deal with culture in courts has to do with the lack of recognition (as well as knowledge) of the symbolic networks of meanings, which can be a feature of a criminal behaviour.[20] In order to properly address the "cultural question" judges and jurists must be equipped with specific tools of anthropological knowledge, to be obtained through official guidelines, *ad hoc* programs of legal education and a more structured use of cultural experts.[21]

2. Methodological references

Before presenting the results of the empirical investigation, it is essential to briefly illustrate the methodology used to identify and collect the relevant judgments. Like other analyses, the study does not rely on an *a priori* definition of culture.[22] Instead, it compiles and examines all cases in which the cultural influence on the offender's criminal behaviour emerges from the judgment, either

[18] For a complete review of the main criminal law principles and instruments analysed by scholars to "bring culture into the criminal justice system" see C. Rigoni, *Crime, Diversity, Culture and Cultural Defense*, in *Oxford Research Encyclopedia of Criminology*, 2018, available at oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-409.

[19] W. Kymlicka, C. Lernestedt, M. Matravers, *Introduction: Criminal law and cultural diversity*, in W. Kymlicka, C. Lernestedt, M. Matravers (Eds.), *Criminal law and cultural diversity*, Oxford, 2014, 1-14.

[20] M. Ricca, *Culture interdette. Modernità, migrazioni, diritto interculturale*, Torino, 2013.

[21] L. Holden, *Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise*, in *Cultural Expertise and SocioLegal Studies*, 181-204, Published online: 12 Feb 2019.

[22] I. Ruggiu, *Il giudice antropologo*, Milano, 2018, 54; E. M. Chiu, *Culture as justification not excuse*, in 43(4) *American Criminal Law Review* 1317 (2006).

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", we shall seek to explore how judges manage the category of culture in practice, which is precisely the objective of the study.

Accordingly, the study has taken into account all judgments containing a reference to the cultural features of the crime. However, at the same time, in order to delimit and identify a specific field of study, it was necessary to exclude some behaviours that were presented as more directly related to "subcultural" conditioning, or to the ideology of the individual offender. Moreover, this study does not deal with cultural conditioning due to the mafia or terrorism.

More broadly, for the purpose of this study, the term "minority" has been understood according to a relational meaning of "marginality/exclusion" in relation to the "dominant culture", here understood as "the culture which provides the ideological basis of the criminal code and criminal laws according to which the offender is under trial".[23] Accordingly, the study does not exclude so-called "national minorities", that is, communities that, although not belonging to a different nationality, do not share the values and culture that inform the legal order in which they were born and live. This having been clarified, and bearing in mind the limitations illustrated above, the relevant case law was collected according to the following procedures.

Concerning the Italian cases, the study first started with 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 scope of the research the main legal journals were consulted.[24] In addition, the Association of Legal Studies on Immigration (ASGI) network was 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 was bolstered with data emerging from semi-structured interviews conducted with judges, lawyers, scholars and activists belonging to minority associations.[25] More than two thousand cases were analysed. The definition of "cultural crime" established as relevant for the purposes of this study (as illustrated above) required a narrowing of scope at the end of which 68[26] relevant cases were identified.

[23] J. Van Broeck, *Cultural defence and culturally motivated crime*, cit., 11.

[24] The online databases Italgiure 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; www.neldiritto.it; www.immigrazione.biz; www.immigrazione.it , www.stranieri.it . Finally the OLIR website was consulted (Osservatorio delle libertà e delle istituzioni religiose).

[25] In particular, in Italy these semi-structured interviews were 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.

[26] It must be highlighted that in Italy numerous judgments not only of the courts of first and

Like the research carried out on Italian case law, the collection of relevant English judgments began, first of all, from the major English legal databases (West Law and LexisNexis). Data was also collected from other sources, such as the relevant scholarship and the Crown Prosecution Service website.[27] The final step was to conduct semi-structured interviews with judges, lawyers, scholars, activists, and experts involved in some way with the issues surrounding "cultural crimes".[28]

The study only considers English cases which presented a clear and explicit account of the defence's use or the judge's consideration of a culture-based argument. Eighteen such judgments were identified. The large disparity between the numbers of Italian and English cases can be partly explained with the religious and cultural exemptions explicitly provided within the UK legal framework, that is, laws whereby certain traditional practices are decriminalised or excluded from the application of criminal provisions.[29] Indeed, whereas the Italian legal framework only provides for a few cultural exemptions (under the Ministerial Decree of 11 June 1980, which authorises Jewish and Islamic ritual slaughtering, and Law No. 130 of 30 March 2001 concerning cremation), the UK has a richer history of legislative derogations: the 1902 Cremation Act, which, under certain circumstances, allows cremation of the deceased, the 1967 Slaughter of Poultry Act and the 1974 Slaughterhouses Act, which allow Jewish and Muslim ritual slaughtering of animals, the 1979 Motor-Cycle Crash Helmets Act, which exempts Sikhs from wearing a helmet when riding a motorbike, the 1988 Criminal Justice Act, which prohibits the carrying of knives in public unless they are carried for religious reasons and the 1989 Employment Act, which allows Sikhs to wear turbans at work instead of a safety helmet.

However, these exemptions only address specific behaviors and specific groups (usually the most numerous and politically influential).[30] The politics of multiculturalism adopted in the UK could be regarded as a further explanation for the scant number of English decisions attributing relevance to the offender's culture. Indeed, the restrictive approach of the courts could be interpreted in the light of the politics of multiculturalism and openness towards minority demands for recognition. However, this argument as wells fails to provide a reliable

second instance, 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 trial, but is not mentioned in sentencing. That being said, it is important to emphasize that the underlying goal of this study 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 evidence, which can represent the basis for further research while increasing the awareness of these issues among legal practitioners.

[27] The Crown Prosecution Service is the principal public prosecuting agency for conducting criminal prosecutions in England and Wales.

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

[29] C. Rigoni, *Crime, Diversity, Culture and Cultural Defense*, cit., 15.

[30] A. Bradney, *Religions, Rights and Laws*, Leicester, 1993, 6-7; S.Poulter, *Ethnicity, Law and Human Rights. The English Experience*, Oxford, 1998, 277 ff.

explanation, also because multiculturalism can no longer be considered as the UK's response to cultural diversity, as declared by David Cameron in 2011.[31] The hypothesis put forward in this study is that the cultural uneasiness of English judges, along with their lack of tools and guidance to address these sensitive cases, should be regarded as the main reason explaining the infrequency of the "cultural argument" in English case law.

The paucity of English judgments on "cultural crimes" seems to be explained by two further circumstances. First, English scholars themselves note that, in the UK, the judiciary has always been reluctant to give recognition to the traditions and cultural practices of minorities.[32] Second, apart from the pioneering book by Sebastian Poulter "English Law and Ethnic Minority Customs", published in 1986, there are no further examples of scholarly works addressing the subject of "cultural crimes", "cultural defence" or their role in the legal system.[33] However, further verification is warranted, also because first-instance judgments are not reported in UK. In any case, insofar as this study is concerned, the scarcity of English case law on "cultural crimes" cannot be considered as a bias-inducing factor. Firstly, the study is mainly founded on a qualitative approach. Secondly, it can be argued that the 18 English judgments already led to "data saturation", considering that the 18 cases collected provide a complete "range of constructs" on which to build this study.[34]

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 study is based on.

As mentioned above, 68 relevant judgments were reviewed for the purposes of this study. However, given the high rate of unreported first- and second-instance judgments in Italy, it is likely that the cultural argument has

[31] BBC News, "State multiculturalism has failed, says David Cameron", 5 February 2011, www.bbc.co.uk/news/uk-politics-12371994.

[32] A. Phillips, *When culture means gender: issues of cultural defence in the English Courts*, cit., 510-531; H. Power, *Provocation and Culture*, in *Criminal Law Review* 881 (2006), points out that in the UK it is possible to identify only a few judgments which explicitly make reference to the cultural factor; C. Bakalis, *The religion of the offender and the concept of equality in the sentencing process*, in 2 *Oxford Journal of Law and Religion* 440-461 (2013) where she argues that "the recognition of such a defence (i.e. the cultural defence, editor's note) has never seriously been considered in the UK, and indeed has been the subject of a great deal of criticism here and elsewhere" (p. 444). The same author observes that "reported sentencing cases involving offenders and their religious beliefs are limited in numbers" (p. 443). See also G. R Woodman, *The cultural defence in English Common Law: the Potential for Development*, in M. C. Foblets, A. Dundes Renteln (eds.), *Multicultural Jurisprudence*, cit., 7-34.

[33] G. R Woodman, *The cultural defence in English Common Law: the Potential for Development*, cit., 18. With specific reference to all forms of honour-related violence, the author highlights that in the UK "there is no literature which discusses it in terms of a possible cultural defence".

[34] H. Starks, S. B., Trinidad, *Choose your method: a comparison of phenomenology, discourse analysis, and grounded theory*, in 17(10) *Qual. Health Res.* 1372, 1375 ff. (2007).

been made in many more judgments. Table No. 1 breaks down judgments in which the cultural argument was put forward according to outcome. There were 4 different outcomes: a) a 'pro reo' (i.e. in favour of the defendant) consideration of the cultural factor, that is, all cases in which the consideration of the cultural factor: 1) was given relevance (as a mitigating factor) at the sentencing stage, leading to a reduction of the sentence; 2) led to the ruling out of criminal liability (being considered a lawful justification); 3) affected the assessment of the conduct as a criminal offence; 4) led to the ruling out of criminal liability on subjective grounds (i.e. unavoidable ignorance of the criminal provision in question); b) a 'contra reum' (i.e. against the defendant) consideration of the cultural factor. This category includes all judgments in which the judge expressly considered the cultural argument as an aggravating factor; c) the cultural factor was not taken into consideration and was expressly rejected; d) the cultural factor was not taken into consideration by the judge, even though the defence expressly invoked it.

The cultural background of the offender was given weight in 36.7% of cases (considering both 'pro reo' and 'contra reum' decisions), while it was rejected in 44.1% of judgments, as shown in Table No. 1. The percentage of cases in which the judge failed to take into account the cultural argument, refraining even from mentioning it – these cases fall under category d) – is quite low at just 16.2%.

At first glance, it may seem plausible to assume that Italian judges are inclined to give weight to the defendant's culture (whatever the final verdict may be). However, if one looks closely at the figures and analyses the wording of these judgments, the majority seem to be characterised by a poverty of argumentation and vagueness of references, as this study will illustrate. The high number of judgments in which the cultural argument was introduced by the defence and taken into account by judges does not automatically imply a high cultural sensitivity of Italian judges and jurists. On the contrary, as this study will show, these judgments reveal a general tendency toward cultural stereotyping, suggesting that there is an urgent need to introduce and implement tools, practices and strategies aimed at reducing the recurrence of cultural bias in the courtroom.

In this regard, it is worth noting that in 15 out of the 25 cases in which a judge recognised the cultural argument put forward by a defendant in a '*pro reo*' manner, this was done at the sentencing stage and was invariably accompanied by very weak reasoning (due, *inter alia*, to the high level of discretion given to judges under paras. 132 and 133 of the Italian Criminal Code).

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

'Pro reo' (in favour of the defendant)	25/68	36.7 %
'Contra reum' (against the defendant)	2/68	2.9%
Rejected	30/68	44.1%
No reference	11/68	16.2%

3.1 Stereotyped concept of culture

With respect to the qualitative aspects that are the focus of this study, specific references to judicial reasoning will provide further evidence substantiating the argument put forward in this article.

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 "Islamic precepts",[35] while others refer to "ethical and social traditions of a customary nature"[36] or to "traditional practices".[37] However, sometimes, the confusion rises to higher levels, with judges presenting the offender's customs, religion, traditions, and legal system as equivalent. In one criminal case concerning the violation of family maintenance obligations, the judge argued that the offender was required by "his culture and religion (and therefore law) of origin to support the child until puberty".[38]

In addition to 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 manner. Proper and accurate analyses of the cultural background of the offender are sometimes substituted by considerations of conventional wisdom surrounding the minority culture of the offender. As will be illustrated, judges often accept the cultural factor as presented by the defence, without asking for the necessary documentation or submission of due evidence. In a few cases, the judge alone introduces considerations in respect of the

[35] Cassazione penale, n. 22700, 28-01-2009. All the judgments are mentioned here according to the following structure: dd-mm-yyyy.
[36] Cassazione penale, n. 22700, 28-01-2009.
[37] Trib. Reggio Emilia, n. 1417, 21-11-2012.
[38] Trib. Genova 7-11-2003.

cultural background of the offender, without due accuracy or completeness of information.[39]

The extent of the judiciary's inaccuracy in this area can be seen in the following extracts from cases of "involvement of children in begging" concerning Roma persons (emphasis added). According to Italian Criminal Court of Cassation judgment No. 29734, 04/05/2011 "… the defence has referred to the need not to criminalise "mangel" or begging traditionally practiced by Roma populations residing in Italy. You obviously need to pay attention to the actual situation in order not to criminalise *conduct that falls within the cultural tradition of people*, it being understood, however, that if certain practices, perhaps even customary and traditional, jeopardise fundamental rights guaranteed by our Constitution or conflict with criminal laws that seek to protect fundamental rights, punishment is inevitable. Practices which are contrary to our criminal law cannot be allowed". The same wording also recurs in Criminal Court of Cassation judgment No. 44516, 28/11/2008, while another decision reads: "… we cannot accept the defence's plea, according to which, *in consideration of the ancient cultural traditions of the Roma people, begging assumes the value of a real way of life*, the conduct of the appellant should be justified under paragraph 572, of the criminal code".[40]

These references notwithstanding, expert anthropologists strongly exclude that the practice of begging can be considered to be an inseparable element of the Roma culture.[41] Indeed, it is undeniable that the practice of begging may represent an important source of income for some Roma groups. However, it should also be borne in mind that not all Roma groups engage in *mangel*, and that within the same Roma community there are people who may not be at ease with the practice of begging.[42] These observations highlight another judicial tendency: the so-called "culturalist tendency", that is, the tendency to look at a case and to interpret it by using solely the cultural lens.[43] Furthermore, by neglecting the peculiarities of a case, such as the specific economic and social circumstances, the courts open the door to stereotypes and to the "reification of culture", where culture is presented as a static, immutable and closed system.[44]

In the absence of a contextualized approach – i.e. in a system marked by what we may label as "photocopy judgments" – Roma people are depicted as a

[39] See among others Cassazione penale n. 2653, 26-10-2011.
[40] Cassazione Penale, n. 37638, 15-06-2012.
[41] L. Piasere, *Antropologia sociale e storica della mendicità rom*, in 3 *Polis*, 367, see above all 369 (2000).
[42] I. Ruggiu, *La diversità come bene pubblico tra Europa e Stati costituzionali*, in Cherchi Roberto, Loy Gianni (eds.), *Rom e sinti in Italia. Tra stereotipi e diritti negati*, Roma, 2009, 93, see above all 106 ff.
[43] I. Ruggiu, *Il giudice antropologo*, cit., 156 ff.; A. Simoni, *La qualificazione giuridica della mendacità dei minori rom tra diritto e politica*, in *Diritto, Immigrazione e cittadinanza*, 2009, 99 ff.
[44] C. Geertz, *The interpretation of culture: selected essays*, New York, 1973; S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, Princetone, 2002; A. Phillips, *Multiculturalism without culture*, Princeton, 2007; U. Remotti, *Contro l'identità*, Roma-Bari, 1996.

homogeneous community, whose characteristics are defined by popular stereotypes rather than on the basis of a serious and specific anthropological analysis (Simoni 2002: 289).[45]

Furthermore, the alleged Roma tradition is presented as something dangerous and threatening to "our" fundamental rights. As seen above, judges warn that these practices may "jeopardise fundamental rights guaranteed by our Constitution or conflict with criminal laws". As paragraph 3.3. will further illustrate, the technique of portraying the "other" culture as being in opposition to "our" fundamental rights, among other things, and Roma people and the Roma culture as a minority and a culture impossible to reconcile with the rest of the society, reinforces the idea of a "culture clash".

3.2 Culture and "universal principles"

A particularly widespread tendency amongst Italian judges involved in dealing with cultural crimes is to make reference to "universal principles": the act committed by the defendant has a disvalue not only for the legal system, or for the majority culture. This disvalue is "universally perceived, regardless of membership in an ethnic group, because it contrasts with criteria – which are innate, natural rights antecedent even to legislation or case law – of peaceful coexistence among 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 M. and D.. The case is the result of the following accusation against the defendants: "having neglected to send M. and D. to school, having sent them to commit theft from the earliest age and having permitted them to perpetrate thefts in apartments, thus subjecting them to a degrading and wretched lifestyle, inspired by values contrary to civilian life, such as to negatively affect their personality and to place their future at stake".[46]

After the preliminary hearings and the testimony of the two children, the following circumstances emerged: a) the parents did not send them to commit theft and even reprimanded them when the charges were brought; b) those thefts were committed "for fun"; c) the stolen items were not brought home but resold by the two children to buy "clothes for themselves with the proceeds". Based on this testimony, it was submitted that it was difficult to infer responsibility on the part of the accused in respect of the offence of ill-treatment (the judgemade this observation in the judgment). Nevertheless – the judge went on to say – the defendants must be held liable for their omission, as they have done nothing to "deter minors from committing thefts, or oblige them to attend school".[47]

Thus having (supposedly) ascertained the objective element of the offence, the judge proceeded to examine the existence of the subjective element of the

[45] A. Simoni, *I giuristi e il "problema di una gente vagabonda"*, in S. Pontrandolfo, L. Piasere (eds.), *Italia Romanì*, Roma, 2002, 265-287.
[46] Tribunale di Torino, 21-10-2002, para. 3.
[47] Tribunale di Torino, 21-10-2002, para. 2.

offence, i.e. the level of awareness of the parents as to the consequences of their actions as parents, in particular the poor living standards their children were subjected to 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 unlawful consequences of her/his action as a concrete possibility and highly probable outcome, but continues regardless. However, this requirement was disregarded by the judge of the Tribunal of Turin, who established the blameworthiness of the Roma parents on the grounds of the "universal disvalue"[48] of the defendants' conduct. In particular, the judge noted that the offenders had already been convicted of theft. Furthermore, (s)he stated that they should have known the unlawful nature of their conduct because they had already been served with 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 on the minority; moreover, the minority group cannot demand the immediate acceptance of its culture in the "host" society, without making an evaluation beforehand of the principles characterising it [...] (the custom of not sending daughters to school and not imposing school attendance on minors, in any case, certainly conflicts with our fundamental principles)".

First, it is noteworthy that the judge spoke about a "host society" when talking about the Roma minority. However, Roma people may well be Italian citizens. Furthermore, these observations betray the stereotyping approach of the judiciary. Contrary to the wording of this judgment, which speaks about a "Roma custom", not sending children to school cannot be considered to be part of "Roma culture". In this regard, it can be particularly useful to report some of the evidence provided by the European Union Agency for Fundamental Rights in 2014.[49] According to these data, in Italy, only a percentage of between 0 and 4% of Roma children failed to attend school during the period of compulsory education.[50] Furthermore, the study also identifies some possible reasons for non-attendance. Among these reasons, the report points out some "financial reasons", such as the need to work, and some "circumstantial reasons", such as "long distance from school, marriage and childbirth or a lack of documents".[51] It is worth noting that the above-mentioned factors have more to do with social injustice and inequality than with Roma "cultural factors", which are never mentioned by the study among the possible reasons for non-attendance.

The judge also failed to take into account the particular context (in this case, not only cultural, but also social and economic) in which the crime had been committed. Such a context, if adequately examined, could have been extremely relevant in assessing whether the defendants foresaw and accepted the ill-

[48] Tribunale di Torino, 21-10-2002, para. 3.
[49] European Union Agency for Fundamental Rights, *Roma survey – Data in focus. Education: the situation of Roma in 11 EU Member States*, Luxembourg, 2014.
[50] Ibidem., pp. 9 and 39.
[51] Ibidem, p. 39.

treatment of their children as a highly probable consequence of their omissions.[52] By abstracting from any peculiarities of the case, and relying on a universalistic system of value, the judge failed to properly evaluate the individual blameworthiness of the offenders.

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. The issue concerning the inherent conflicts among "cultural crimes" and rights has been widely treated by the specialist literature and this study does not intend to underplay the question. However, in Italian case law, the use of the argument "culture vs fundamental rights" is often irrelevant to the solution of the case, while conveying the idea of "clashes of values".[53]

A good illustration of this reasoning is offered by the Court of Cassation in judgment No. 12089, 28/03/2012 where the judges ruled on an appeal presented by a foreign offender charged with abuse and injury of his twelve-year old daughter. The man forced his daughter to memorise 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 legitimised 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 made 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 different cultural and religious background of the accused. The Supreme Court did not dispute the framework of the defence's argument, did not question whether the offender's behaviour fell or did not fall within the "concept of family, coming from membership in his social group, which allows and even imposes such conduct". Instead, the appeal was rejected because "the offender, as

[52] Judges also used the argument of the "universal principles" in the following judgments: Cassazione Penale n. 37438, 13-7-2012; Corte d'Appello Venezia, 9-1-2006; Tribunale di Padova GUP, n. 446, 9-6-2005; Ufficio Indagini preliminari di Milano, 25-10-2000.

[53] E. Balibar, *Is there a "neo-racism"?*, in Etienne Balibar, Immanuel Wallerstein (eds.), *Race, nation, class Ambiguous identities*, London – New York, 1991, 17, see above all 21-22.

a citizen of Muslim religion, has a concept of family life and marital powers, [...] which is in stark contrast to the core standards underlying the Italian legal system and the concrete regulation of interpersonal relations".[54]

The judgments show the propensity of the judiciary to accept the claim by the defence 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. [55]

A reductionist approach on the part of the judiciary can be regarded as a possible explanation for this trend. The sharp opposition between "us" and "them" avoids seeking any insight into the culture of the offender, presented as a compact and homogeneous whole.[56] Identities are completely defined just by contraposition. Hence, any explanation and contextualization appear superfluous. Fundamental rights, too, are invoked as a compact body, without specifying which particular principles are at stake.[57] As a result, the "other culture", represented by the offender, appears to be irreconcilable and impossible to integrate. This irreconcilability, however, is simply presupposed and is not substantiated with any empirical evidence or elaborative reasoning.[58]

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

This judicial tendency may be seen as a further corroboration of the hypothesis of this study: as they lack tools for properly evaluating the role of the cultural factor and its relevance to the case in hand, judges rely on common wisdom and on what we may label as "argumentative shortcuts".

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[54] Cassazione Penale n. 46300, 26-11-2008. See the observation of Pedullà, 2009. The author points out that in a similar case (Cassazione Penale n. 34909, 26-06-2007) 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 point of reference not only for the Maghreb countries but also for Muslims in general".

[55] C. Geertz, *The interpretation of culture: selected essays*, cit.; S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, cit.

[56] See e.g. S. D'Hondt, *The Cultural Defense as Courtroom Drama: The Enactment of Identity, Sameness, and Difference in Criminal Trial Discourse*, cit.

[57] See, among others, Cassazione Penale n. 32436, 02-07-2008.

[58] S. Fish, (1997), *Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking about Hate Speech*, in 23(2) *Critical Inquiry*, 378, see above all 389 (1997).

3.4 A stereotyped alphabet

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

Apart from a few exceptions,[59] judges have made reference to the culture of the offender in a generic and vague manner. Hence, while the solution of the case often relies on a 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 with the traditions, religions, and cultures invoked. While a 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. For instance, 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 universality of certain values. So – employing a natural law argument – the negative value of the conduct is presented, as noted earlier, as "universally perceived, regardless of membership in a specific ethnic group, because it contrasts with criteria – which are innate, natural rights antecedent even to legislation or case law – of peaceful coexistence between human beings".[60] These judgments offer an example of the so-called "petitio principii", i.e. the "fallacy of assuming in a premise a statement which is taken to have the same meaning as the conclusion of the argument".[61] Another rhetorical technique is "tendentious presentation", which recurs where the judiciary doubt the offender's cultural background but omit to substantiate this doubt with any evidence. In this regard, judgment No. 446/2005of the Tribunal of Padova, offers an eloquent example. In this case, the offender, "who belongs to the Muslim culture", claimed to adhere to a way of life in which men and women do not have the same rights. The judge dismissed this claim, arguing that this non-egalitarian vision of the relationship between men and women "is more and more rare in moderate Muslim environments, such as in Morocco, due to a slow process of Westernisation, also promoted by mass media, with a tendency toward globalisation".[62]

In addition, judges speak about the "other's" culture making frequent reference to the sphere of emotions, using terms such as "sensitive", "repugnant",[63] "reprehensible",[64] and "aberrant".[65] Judges talk about "ancestral

[59] Tribunale di Cremona 19-02-2009.
[60] Tribunale di Torino, 21-10-2002 where Roma people were accused of abuse against their children for having failed to send them to school and to prohibit them from committing thefts. The judgment is analysed in para. 3.2.
[61] Petitio Principii or Begging the Question, definition in philosophy.lander.edu/logic/circular.html.
[62] Tribunale di Padova, n. 446/2005.
[63] Tribunale di Torino, sez riesame, ord. 3-11-1998.

cultural codes",[66] while elsewhere the offender's culture is described as being "barbaric"[67] or "anti-historical".[68] Moreover, the use of "figurative speech" is common. An example is the theory of the "insurmountable limit/barrier" (represented by "our" fundamental rights), where the lexical combination creates a pleonasm, used by judges to emphasize the distance between "our values" and "theirs" (viewed as negative).[69]

The above-mentioned aspects demonstrate a particular function of judgments: a persuasive one, aimed at creating a consensus around the verdict, rather than demonstrating its validity.[70] In other words, Italian judges dealing with "culturally motivated crimes" seem to draw on common wisdom and their (the dominant) socio-cultural and ethical heritage, rather than deciding the case by way of an accurate and correct analysis of the facts, on not only a legal, but also (anthropo-)logical level. However, it seems that the cultural insensitiveness of Italian judges cannot be explained with the unwillingness to give weight to the cultural background of the offender. If this were the case, judges would have ignored any cultural consideration or would have imposed a larger punishment based on the cultural argument. The evidence presented here seems to point toward another explanation: the frequent recourse to cultural stereotyping and reductionism rather suggest that judges lack the knowledge and awareness necessary in order to identify, recognise and properly address the "cultural argument". The complexity surrounding the "cultural question" fails to be addressed by the judiciary, as in other cases requiring technical inquiries, for example, when a judge must adjudicate on a case concerning medical issues. In the Italian case law on "culturally motivated crimes" reviewed for this study, an expert anthropologist was present in just two of the 68 cases analysed.[71]

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

In English case law, the first point to be analysed is the small 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

[64] Cassazione Penale, n. 35496, 23-04-2012.
[65] Cassazione Penale, n. 35496, 23-04-2012
[66] Tribunale di Trento, 19-02-2009
[67] Cassazione Penale, n. 3398, 20-10-1999, the so-called "Bayrami" case.
[68] Cassazione Penale, n. 12089, 28-03-2012
[69] See among others the Court of Appeal n. 3398, 20-10-1999.
[70] M. Taruffo, *La motivazione nella sentenza civile*, 1975, 440 ff.. Also in civil law systems, one should not overlook the fact that judgments have a communicative function, as they are addressed not only to the parties to the proceedings, but also to higher courts, as well as to civil society as a whole. On this subject see also F. Viola, G. Zaccaria, *Le ragioni del diritto*, Bologna, 2003, 228 ff.; P. Bellucci, *Tra lingua e diritto: appunti di sociolinguistica giudiziaria italiana*, in *Quaderni del dipartimento di linguistica*, Firenze, 1995, 1 ff.; L. Lanza, *La motivazione della sentenza penale: decidere, scrivere, argomentare*, in *Incontro di studio sul tema: "La motivazione della sentenza penale"*, Roma, 14-16 September 2009, 15.
[71] Corte d'Appello di Venezia 23-11-2012 and Corte d'Assise Pisa 15-03-2013. In the latter case, the judge observed that the opinion of the expert anthropologist was interesting but irrelevant for the adjudication of the case.

in theory, permeated by cultural factors (i.e. crimes such as circumcision or so-called "honour crimes")[72].

Some circumstantial inferences seem to confirm the conclusion of there being a low level of "cultural sensitivity" in English criminal courtrooms. A first indication of this comes from English law scholars, who observe that English judges have always been disinclined to give recognition to the right of minorities to follow their own traditions and cultural practices.[73] Furthermore, in the UK in general, little academic attention is given to so-called "cultural crimes". Apart from 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 defence against criminal charges, and the role of these phenomena within the legal system.[74]

Finally, it is important to highlight another issue: lawyers themselves prefer not to use the "cultural argument". It emerged from the cases surveyed that even where an offence is strongly imbued with cultural elements, the defence does not utilise the cultural argument at all, preferring to invoke different circumstances, such as the "clean criminal record" of the offender or his/her good character. This same attitude of the defence could be also seen as a sign of the reluctance of English judges to accept this kind of argument,[75] while contributing to explaining the exclusion of culture from the English courtroom.

An example of this attitude can be seen in the case of the young Kristy Bamu.[76] All the persons involved in this case hailed from the Democratic

[72] Honour killing is commonly defined in the literature "as a response to the belief that a woman or girl has violated her family's honour, usually because of perceptions of sexual impropriety", A. C. Korteweg and G. Yurdakul, *Religion, Culture and the Politicization of Honour-Related Violence. A Critical Analysis of Media and Policy Debates in Western Europe and North America*, United Nations Research Institute for Social Development, 2010, 2. Concerning "honour killing" cases, see Court of Appeal, criminal division, *Regina v Mohammed Mujibar Rahman*, 26 January 2007, [2007 EWCA Crim 237] while concerning the crime of circumcision, see Court of Appeal Criminal Division, *R v M.B*, 22 May 2013, [2013] EWCA Crim. 910.

[73] C. Bakalis, *The religion of the offender and the concept of equality in the sentencing process*, in *Oxford Journal of Law and Religion*, cit., 443; A. Phillips, *Multiculturalism without culture*, cit., 881; G. R Woodman, *The cultural defence in English Common Law: the Potential for Development*, cit., 18.

[74] G. R Woodman, *The cultural defence in English Common Law: the Potential for Development*, cit., 18.

[75] In this regard, it is worth taking into account the profound influence that the Bench has on the Bar (J. Bell, *Judiciaries within Europe. A comparative review*, Cambridge. 2006, 326). In particular, as highlighted by Rt. Hon. Sir Robert Megarry, *Barristers and Judges in England Today*, in 51 *Fordham L. Rev.* 387 (1982) "the influence of the Bench is twofold": first, it should consider that "most practising barristers-not all, but the great majority, hope that one day they will be offered a seat on the High Court Bench" (p. 395). Secondly, "every barrister realises that the judges play a large part in whatever standing and recognition he has, especially as the numbers of judges and practising barristers are so relatively small" (p. 396).

[76] It was not possible to find this judgment in the English legal database. The information provided is drawn from press reports. Concerning the argument of the defence, all press reports correspond. See in particular, BBC News, Witchcraft murder: Couple jailed for Kristy Bamu killing, 5 March 2012, www.bbc.co.uk/news/uk-england-london-17255470

Republic of the Congo. Kristy Bamu, 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. Kristy's parents were going to arrive at the house shortly after Christmas. During his short stay, however, Kristie was subjected to atrocious and eventually fatal torture by his sister and boyfriend, who were convinced that the child was "possessed" by a malignant spirit and deserved to die. According to Judge Paget, "belief in witchcraft, even if it is genuine, cannot excuse violence". Kristy Bamu's sister and her boyfriend were sentenced to life imprisonment. It is noteworthy that the main argument of the defence is only indirectly related to cultural data, being focused rather on Erik Bikubi's mental deficiency. Last but not the least, nobody requested a "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".[77] Yet, a statement released by the Victoria Climbié Foundation (VCF)[78] a few days after the trial suggested that it would have been important to have learnt more about the background of the perpetrators of Kristy's murder.[79] It would have been important to understand what might have influenced their belief in witchcraft, even more so given that the perpetrators grew up in England. In this respect, Mor De Dioum, co-founder of the VCF, highlighted that "considering the cultural background of the defendant does not mean to justify but to understand." It is noteworthy that this consideration came from the exponent of an association that had been attempting for years to protect the rights of children in a particularly complex and above all "culturally sensitive" field, that of satanic rituals and witchcraft.

Obviously, no religious or cultural consideration can override the protection of children. However, the reluctance to speak about culture risks obscuring an important part of this crime, in other words, an important part of the context in which the crime was committed. Nonetheless, the issues of the offenders' culture was put aside. It is a theme too complex and sensitive to be addressed in a courtroom.

4.1 Solving the "cultural dilemma" is the responsibility of Parliament

This tendency to avoid cultural explanations and the cultural perspective can also be directly discerned in judicial reasoning. If we analyse the wording of English case law on "cultural crimes", one topic emerges with a certain frequency: that is, judges show an inclination to defer the solution of the "cultural dilemma" raised by the offender to Parliament.

[77] For further details on the "serious case review", see GOV.UK, Department for Education, Policy paper. 2010 to 2015 government policy: children's social workers, 8 May 2015, available at www.gov.uk/government/policies/supporting-social-workers-to-provide-help-and-protection-to-children/supporting-pages/serious-case-reviews-scrs

[78] For further details on this association, visit the following webpage: vcf-uk.org/

[79] See the following position statements: vcf-uk.org/it-is-not-illegal-to-believe-in-witchcraft-for-many-it-has-its-roots-in-ancient-traditions/ ; vcf-uk.org/vcf-position-branding-children-as-witches-a-call-for-legislation/

In the case of *The Queen v D (R) - The Crown Court at Blackfriars*,[80] which concerned a woman accused of bribing a witness, the judge was called on to decide on a marginal matter in the context of that judgment: whether or not the defendant was entitled to wear the *niqaab* during the hearings. 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 were no rules governing the matter, affirmed the need for a law, stating that "the relegation of such important issues to the sphere of 'judge craft' or 'general guidance'[81] 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 *niqaab* has become the 'elephant in the courtroom.' Trial judges need, not only general guidance, however helpful, but a statement of the law". Having called for a parliamentary intervention, the judge then stated that he would attempt to adjudicate the case (para. 12).[82] Leaving aside the decision taken, it is important to emphasise the particular argument that was used: the judge justified his 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 (so-called "open justice"). As the judge affirmed, these principles could be waived only when expressly permitted by the law. Hence, in the absence of such a law, such principles had to take precedence over the principle of freedom of religion in any balancing equation (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, thereby "freeing" the judges from "anxiety and uncertainty" (para. 12). He makes it clear that his decision will apply to any defendant, regardless of his/her gender or his/her religious faith (para. 12). These words seem to betray the fear of a possible accusation of discrimination that could be made against the judgment. This concern appears even more clearly in another paragraph of the judgment

[80] The Crown Court at Blackfriars, *The Queen v D (R) - The Crown Court at Blackfriars* – September 16, 2013. The judgment is not reported. However it is mentioned in another case (whether the witness has the right to wear the *niqaab* in court): AAN (Anonymity Direction Made) v The Secretary of State for the Home Department, Upper Tribunal (Immigration and Asylum Chamber, 14 January 2014

[81] Judicial College, Equal Treatment Bench Book, recently updated in 2018. See in particular, chapter 9 on "Religion", which provides some guidelines on the religious dress that may be allowed in the courtroom.

[82] It is worth noting 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 source on which to draw. Interestingly, the English judge decided to skip the first passage of the Canadian text: the one relating to sincerity of the belief. This subjective element is therefore completely set aside in order to focus on the religious practice (paras. 14-18). At the end of a lengthy, complex ruling, the judge decided that the difficult balance between the right to practice 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 *niqaab* during the trial, she must remove it whenever "superior" reasons are at stake, such as the need for her face to be clearly observed at the moment of the deposition (para. 82).

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 should 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 derogation from the principle of open justice, he cannot introduce it through case law. Since there is no statutory provision regulating the use of a *niqaab* 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 Parliament: "it is a responsibility of Parliament".

The same observations made above are also applicable to another case, which is particularly relevant for our purposes: *R v Andrews* – Court of Appeal – 5 March 2004.[83]

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 importation of cannabis (section 170(2) Customs and Excise Management Act 1979)[84] is not compatible with Article 9(2) of the European Convention on Human Rights, which affirms the freedom to manifest one's religion or belief. Mr. Andrews affirmed to be a follower of the Rastafarian religion. Consequently, for him, cannabis use (as well as its importation) had a value strictly related to the freedom of religion. In particular, cannabis facilitated the attainment of a condition of "peace and purification"[85] requested by the Rastafarian religion.

The Court, however, rejected this claim, affirming that (this is the last of the three reasons given) freedom of religion is not an absolute right but a relative one, so it can be subjected to some limitations (para. 7).[86] However, the balance between this right and the interests of public health was 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"[87]. Thus, the Court did not conduct the balancing exercise itself. It did not set down the inadmissibility of the religious motivation or its subordination to other principles. Rather, the Court adopted another

[83] Court of Appeal Criminal Division, *R v Andrews*, 5 March 2004, [2004] EWCA Crim 947.
[84] 1979 Customs and Excise Management Act
[85] The judgment quotes 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".
[86] The Court referred to Art. 9 (2) CEDU, which 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".
[87] R v Andrews, cit., para. 21.

approach, preferring not to address the question. The case involved extremely important and sensitive issues – the Court said – so, it was appropriate to defer the question to Parliament, the only entity entitled to decide on such matters.

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, claimed in his defence that he was Rastafarian, and that his behavior "was part of his religion" (para. 5). More specifically, Mr. Taylor asserted that section 5 of the Misuse of Drugs Act 1971 (which prohibits the possession of cannabis with the intent to supply) did not meet the requirements of proportionality and necessity required by the second paragraph of Article 9[2] ECHR (proclaiming the freedom to manifest one' religious belief).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 was rather brief and unconvincing; the Court found that Section 5 of the Misuse of Drugs Act 1971 represented a "necessary restriction" on the freedom to manifest one's religion or belief. This necessity derived from the UK's adherence to the "Single Convention on Narcotic Drugs of 1961" and the "United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", which indeed provided evidence of an "international consensus" about the "necessity" of treating the possession of cannabis as an offence in order to fight the danger that drugs represented to health and public safety. However, it is clear that the adherence to these conventions is not sufficient, in itself, to justify either the decision to prosecute the possession and supply of cannabis or the decision not to include a specific exemption for Rastafarians (in this regard, a different decision was made by the Netherlands, which also 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 pointed out that "the consideration of what defences 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".

Against this backdrop, one may argue that deferring to Parliament in the decision-making process is correct: by doing this, judges are simply complying with their constitutional role. Judges cannot determine the law on cannabis use. Only Parliament can. It is not the judge's job to create a new defence. However, against this argument, two fundamental aspects need to be underlined. First, judges are required to abide by the principle of proportionality and balance in any case. When delivering a decision concerning the right to freedom of religion and the existence of a justifiable limitation of this right under Article 9(2) ECHR, judges have to grapple with the human rights framework and necessarily find a balance by deciding, for instance, in such cases, not to declare an incompatibility between Article 9 and the 1971 Act, leaving it up to Parliament to amend the

legislation accordingly. Second, as already pointed out by scholars,[88] in *Taylor* and *Andrews*, the judges also omitted to properly address the question of the relevance of the offender's religion at the sentencing stage, even though they were required to do so. Indeed, according to the ECHR decision in the case of *Okcuoglu v Turkey*,[89] "taking account of the religious context of the offending acts at the sentencing stage is imperative to legitimising any conviction where the defendant's behaviour could successfully claim to be a manifestation of religion".[90] What the Court in these cases should have done is to consider whether the defendant's religion could be used as evidence at the sentencing stage in relation to already existing mitigating factors, being "explicit in explaining what level of sentence is appropriate in order to ensure a sentence is proportionate".[91] However, the judges opted out of directly addressing all the complexities revolving around the "cultural question". Hence, they failed to clarify the extent to which the defendant's religious belief should be given weight at the sentencing stage in order to ensure proportionality and, obviously, greater consistency among similar decisions.

These judgments seem to reveal the unease of UK judges when it comes to decisions that have many consequences not only on a juridical level, but also on a social level. However, it should also be pointed out that no clear guidelines have been provided by the Court of Appeal or the Sentencing Guidance Council on this point (Edge and Bakalis, 2009: 4267). Hence, using the words of Judge Murphy, judges are left alone with an "elephant in the courtroom",[92] being aware of the issue retaining an enormous relevance within the English legal system. As highlighted by Lord Nolan:[93]

> "The powers and responsibility of an individual judge are immeasurably greater that 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 case 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 Culture has nothing to do with this case: the strategy of "culture redefinition"

This tendency towards "culture avoidance" amongst English judges can also arise in other forms, such as what can be termed "redefinition strategy".

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[88] C. Bakalis, *The religion of the offender and the concept of equality in the sentencing process*, in *Oxford Journal of Law and Religion*, cit.
[89] Okcuoglu v Turkey, application No. 24246/94, 9 July 1999.
[90] C. Bakalis, P. Edge, *Taking due account of religion in sentencing*, in 29(3) *Legal Studies* 421, 426 (2009).
[91] Ibidem, 427.
[92] The Crown Court at Blackfriars, *The Queen v D (R)*, September 16, 2013, para. 12.
[93] Lord Nolan & Sir Stephe Sedley, *The making and remaking of the British Constitution. The Radcliffe Lectures at the University of Warwick*, London, 1996, 71, Cfr. in J. Bell, *Judiciaries within Europe. A comparative review*, 334.

Here judges manage the cultural argument raised by an offender by giving it another name: it is not culture – as the offender claims – but something else. This "something else" is invoked to explain the circumstances surrounding the offence. Generally, this alternative explanation revolves around unequal power structures and relations, around "patriarchy"[94] and a gender-based approach used to advance an understanding of the case which is different from the one proposed by the defence. Hence, the culture claimed by the offender to explain the case is redefined by the judge as "control" or "honour" or "revenge". Whatever the label used by the judge, the logic underlying this operation is always the same: eliminating the "cultural explanation" and the "cultural argument" from the courtroom.

This practice of "redefinition" among 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 summarised 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.[95] 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 of this relationship. Hence, after having consulted with some of her relatives – she was a widow – she decided to organise an "arranged marriage" for her daughter. The wedding was celebrated some time later, according to the laws of tradition. However, two months after the wedding, the groom, over 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 her mother might decide to arrange a new marriage and confided these fears to the school staff.

B., the defendant, was from a rural village in Bangladesh. She was illiterate and at the age of 15 she had also entered an arranged marriage. In light of the circumstances of the case, and B.'s particular cultural background, the defence invited the jury and the judge to consider that the behavior of B. had to be regarded as normal, "natural, given her cultural background",[96] and an expression of pure affection. In other words, B. did what she did "out of love for

[94] Here patriarchy is understood as a "systems of sex- and age-related social inequality" (in which individuals have differing levels of access to power, capabilities, prestige, and autonomy). See S. Gruber and M. Szołtysek, *The Patriarchy Index: A Comparative Study of Power Relations across Historic Europe*, Max Planck Institute for Demographic Research, working paper, 2014, available at www.demogr.mpg.de/papers/working/wp-2014-007.pdf; the authors mention B. Niraula, S. P. Morgan, *Marriage formation, post-marital contact with natal kin and the autonomy of women: Evidence from two Nepali settings*, in 50(1) *Population Studies* 35 (1996).

[95] 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". The text of the Act is available here: www.legislation.gov.uk/ukpga/2003/42/contents.

[96] Court of Appeal, *R v B*, 12 February 2010, para. 11.

her daughter and in what she believed to be her best interest".[97] However, the judge referred to the report released by the Probation Office (which provides through-care (in prison) and after-care (post-release supervision) to those who have received custodial sentences) which contained a different explanation: it was not love, but control. "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."[98] Accordingly, the cultural background of B., which may well have conditioned the criminal behaviour – as the defence claimed – was obscured by another explanation: "the unlawful attempt to control her daughter". Through this strategy of "culture redefinition", the cultural background of the defendant's behaviour, was transformed and distorted in the judgments by giving it a different explanation: the conduct was just rooted in violence and control, which could justify the immediate custodial sentence.

In the case of "culture redefinition", the lens of gender-based violence is used to substitute a culture-oriented understanding of the facts, in line with a trend that has been observed elsewhere.[99] This approach brings a number of important advantages: a) it eliminates the narratives that only non-Western women suffer "death by culture";[100] b) it counteracts an essentialist view of culture and the consequent stereotyping; c) it enriches an understanding of the conduct, by unveiling the patriarchal structures which may have conditioned the offender. However, at the same time, substituting a cultural interpretation with a gendered one raises some concerns. As Purna Sen highlights, though it is incorrect to explain something only recurring in the cultural(ist) approach, "to deny specificity if it exists is also problematic".[101] Looking at an offence as the mere product of patriarchal structures is tantamount to offering another essentialist reading of the facts, of a gendered rather than cultural kind. As observed by Korteweg and Yurdakul, "This approach [the culture- blind approach] attempts to eradicate the cultural stigmatization of (Muslim) immigrant communities but at the price of marginalizing the complexities that structure women's (and men's) identities and practices. Ample literature has shown that people's identities and practices are constituted in the intersections of race, gender, religion, national origin, ethnicity, class, sexuality and other social

[97] Idem, para. 11.
[98] See para. 12 (the Probation Office's declaration) and para. 10 (the reference to the first instance Court).
[99] I. Ruggiu, *La risoluzione ONU del 2012 per l'eliminazione delle mutilazioni genitali femminili. Una lettura problematica*, in 7-8 *Studium Iuris*, 2014, 866.
[100] U. Narayan, *Dislocating cultures: Identities, traditions, and third-world feminism*, New York, 1997; Leti Volpp, *Feminism versus Multiculturalism*, in 101 *Colum. L. Rev.* 1181, 1185 (2001).
[101] S. Purna, *Crimes of honour: value and meaning*, in L. Welchman and S. Hossain (eds.) *Honour: Crimes, paradigms and violence against women*, London, 2005, 50.

divisions, but culturally blind approaches ignore all but the gender dimension".[102] Indeed, according to a more intersectional understanding,[103] there are multiple factors, circumstances and references to take into account when considering the motives of a crime, including the cultural background of Ms. B. which – according to the report of the Probation Office – acted "in keeping with her own background". The same Probation Office elsewhere observed that "when explaining why this offence occurred, it is difficult to point to one area of motivation".

However, when the time came to decide the case, all reference to culture disappeared both in the Probation Office report and in the judicial reasoning. The cultural explanation was eliminated. Only violence and the need to control remained to characterize the circumstances of the offence. To paraphrase the judge's reasoning: "when there is violence, any cultural reference disappears and cannot have recognition". However, in this way, judges have removed from the process an element that, if supported by an appropriate probationary basis, could provide important information about the defendant, which could contribute to assessing the circumstances of the offence and, consequently, to determining the appropriate sentence.

Even if, at first glance, this judicial approach may appear different from the one adopted in the cases of Andrews and Taylor mentioned earlier, the judges are similarly eradicating any cultural reference from the judicial discourse. As the scarcity of cases seem to demonstrate, as well as the judicial reasoning here analysed, in the UK judges do not allow the cultural explanation to enter the courtroom. As analysed above, when asked to adjudicate on culturally sensitive issues, UK judges tend to defer the question to Parliament even if they could have sought a balance between rights or declared the incompatibility between existing law and the rights under the Human Rights Act of 1998. Above all, as observed, judges refrain from mentioning the cultural argument even at the sentencing stage, where they would have more room for discretion. This culture-blind approach cannot be seen as the result of a clearly defined and coherent strategy adopted by the whole UK judiciary to address cases in which the cultural argument is put forward by the offender.

These cases seem rather to show that members of the judiciary feel anxious and uncomfortable when it comes to adjudicating on such a sensitive issue, as revealed by the judge in *The Queen v D (R) - The Crown Court at Blackfriars*, who talked about judges' "anxiety and uneasiness".[104] Further evidence of the

[102] A. C. Korteweg and G. Yurdakul, *Religion, Culture and the Politicization of Honour-Related Violence. A Critical Analysis of Media and Policy Debates in Western Europe and North America*, cit.

[103] K. W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, in 43 *Stanford Law Review* 1241 (1991). N. Ghanea, *Women and religious freedom. Synergies and opportunities. United States Commission on International Religious Freedom*, Washington, 2017; E. Halim Chowdury, *Rethinking patriarchy, culture and masculinity: transnational narratives of gender violence and human rights advocacy*, in 16 *Journal of International Women's Studies* 98 (2015).

[104] The Crown Court at Blackfriars, *The Queen v D (R)*, cit..

difficulty in addressing culture in the courtroom may also be found in a passage of the sentence commented on above, where the judge of first instance felt the need to justify his judicial activity. Indeed, interestingly enough, after having decided the case, the judge needs to clarify that he does not intend to sentence the "offender's culture", but solely her criminal behaviour: "I am not here to punish you for arranging the marriage to K. I am not here to condemn the practice of arranged marriages. My task is to sentence you for the unlawful sexual activity which followed and which you knew would follow the ceremony in your home"[105]. As previously observed in reference to Italy, in the UK as well judges do not show an ability to properly manage the "cultural argument". Without any guidance provided by the law, precedents or guidelines of the Sentencing Guidance Council, judges are left alone to decide on extremely sensitive cases. Culture is seen as a taboo, carrying with it the risk of being accused of racism. UK judges seem to be affected not only by the lack of clear guidelines and specific training on culture-related matters, but also by the extremely sensitive nature of the subject of culture. Therefore, they prefer to leave culture out of the courtroom.

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

Delivering justice in a multicultural society is a complex task. On the one hand, there are the ontological features of the law and its codes, both universal and general, which are juxtaposed to narratives produced by the very culture of the courtroom and the society in which the judge lives. On the other hand, there are the specificities of the context, which include the offender's cultural background, as well as his/her interactions with a given society and its set of cultural, religious or traditional features. All these complex and intertwining aspects need to be grasped by judges and to be taken seriously.

Nonetheless, as the case-law surveyed shows, culture is rarely given proper consideration in Italian and English courtrooms, where a correct and accurate culturally sensitive analysis is seldom applied by judges.

As seen, in Italy judges often resort to generalisations and stereotypes. Their reasoning is often grounded in common wisdom rather than in detailed analysis; they rely on repetitive formulae, and phrasing that is laden with emotive connotations. In English courtrooms, by contrast, judges keep cultural considerations out of the courtroom altogether by deferring the solution of "cultural dilemmas" to Parliament. It can be argued that in the English legal system, as already observed, the "judge-made law" system is likely to play an important role in the judicial attitude towards cases involving conduct that is alleged to be culturally motivated. In the absence of statutory provisions for dealing with cases of cultural diversity in the courtroom, it is hard for individual judges to set down rules which could serve as a guide to judges called on to

[105] *R v B*, Court of Appeal, 12 February 2010, cit., para. 11.

handle similar cases after them. Furthermore, it is necessary to bear in mind the constitutional limits surrounding the role of the judiciary, which cannot "create new law", but just interpret it. However, even in UK courtrooms, the few cases of cultural crimes identified were not exempt from stereotypes or from a lack of insight into the cultural claim made by the offender. Furthermore, the judges also generally refused to take into account the offender's culture and religion at the sentencing stage, though they could have done so in accordance with the general guidelines and principles in this area.

Hence, by embracing strategies of "cultural reductionism" or "cultural denial", English and Italian judges try to avoid having to directly address issues tied to the cultural background of the offender and decide on its legal relevance. Important differences notwithstanding – the background, contexts and legal systems underlying the case law collected in Italy and England are profoundly different – we may see an interesting convergence linking the Italian and English judicial cultures: the lack of cultural competence and sensitivity.

Nonetheless, blaming judges alone for these shortcomings would be an oversimplification. As seen, there are no laws or general guidelines to help judges with the complex task of managing such sensitive issues. Both Italian and English judges seem to lack the necessary tools for properly assessing the cultural explanation. What the evidence seems to suggest is that the failure to address the cultural argument is not the result of judicial unwillingness to give recognition to culture in the courtroom. The judicial approaches observed in Italy and the UK rather suggest that judges fail to properly deal with culture because of their lack of knowledge about culture and how and to what extent it can influence criminal behaviour. Clearly, the lack of specific knowledge is further exacerbated by the lack of guidance provided by laws or other instruments that could help judges to give due relevance to culture within the criminal justice system. In this regard, the present study seeks to lay the ground for further research into the role of legal education and the need for expert anthropologists who can support the complex activity of delivering justice in a multi-diverse society.[106]

Indeed, the culture of the offender is a factor that could provide important insight and enable judges to gain a thorough understanding of the subjective and objective elements of the offence and, therefore, result in a just outcome and a fair trial. Furthermore, as observed elsewhere, proper consideration of the "cultural question" by judges may end up benefitting not only the offender or his/her minority group, but society as a whole and, consequently "every one of us".[107]

The "canary in the coalmine" metaphor derives from the fact that miners used to carry a canary along with them into the dark underground caves. The

[106] M. Sagiv, *Cultural bias in judicial decision making*, in 35 *Boston College Journal of Law & Social Justice* 229 (2015). Holden L. (eds.), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*, London-New York, 2011

[107] E. Olivito, *Primi spunti di riflessione su multiculturalismo e identità culturali nella prospettiva della vulnerabilità*, in 1 *Politica del diritto*, 2007, 71, 76 ff.

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, being particularly fragile and sensitive, served to alert the miners that the air had become poisonous and that it was necessary to flee before the gases became potentially fatal. This story exemplifies how the dynamics and, above all, the gaps in the delivery of justice to minorities (and the recognition of their claims) inevitably involve the entire legal system, highlighting the critical issues and the failures in terms of protection.[108]

As said earlier, allowing due consideration of culture in the courtroom does not mean to justify, but rather to understand. This is crucial not only in order to comply with the principle of substantial equality, which calls for differences to be taken seriously, and the principle of individualised justice, whereby the offender's background must be taken into account (to a given degree). Indeed, a deeper understanding of the specificities of the context, including the cultural factors surrounding the events, is also essential for the victim(s), the fulfilment of whose demand for justice also involves a thorough comprehension of the circumstances surrounding the crime. Finally, a more culturally sensitive delivery of justice is also in the interest of the society affected by the crime, which is called upon to develop more effective instruments in order to better address the needs of victims and offenders, thereby improving justice for all.

[108] K. Thomas, G. Zanetti, *Legge, razza e diritti. La critical race theory negli Stati Uniti*, Reggio Emilia, 2005, 127.