Stato, Chiese
e pluralismo confessionale

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Culturally Motivated Crimes: the Cultural Test in the Italian Jurisprudence. A Comparative Study *

SUMMARY: 1. Key terms and definitions - 2. Two ways to look at culturally motivated crimes: the case of the *kirpan* in the Italian and in the Canadian jurisprudence - 3. Moving forward: the Italian Court of Cassation n. 29613/2018 - 3.1. Cultural tests: a comparative insight - 3.2. The cultural test in the Italian judgment of 2018 - 4. Final remarks.

1 - Key terms and definitions

The intersection between justice and culture lies at the heart of many debates in criminal law.

In primis, a clarification is required, as "culture" is a broad concept with several meanings. A legal definition that might be taken into account is the one given in the UNESCO Universal Declaration on Cultural Diversity of 2001: «[…] culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, values systems, traditions and beliefs».[1]

Keeping in mind this legal definition of culture, a culturally motivated crime consists in a conduct or act of a minority member, which is considered an offence by the majority group, but which is, nevertheless, approved or authorized by the minority because of its cultural significance.[2]

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* Article peer evaluated.

[1] **UNESCO**, *Universal Declaration on Cultural Diversity*, 2001 (*http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html*).

For a detailed review on this topic, see **F. BASILE**, *Immigrazione e reati culturalmente motivati. Il diritto penale nelle società multiculturali*, Milano, 2010, p. 15 *et seq*.

[2] See **J. VAN BROECK**, *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, in *European Journal of Crime, Criminal Law and Criminal Justice*, IX, 2001, p. 5; **A. BERNARDI**, *Il "fattore culturale" nel sistema penale*, Giappichelli, Torino, 2010, p. 139 *et seq*.

In light of these definitions, scholars[3] have labelled some sub-categories of culturally motivated crimes, based on case-laws. Domestic violence, honour killings, child rights violations, sex crimes, female genital mutilations and male circumcisions, drug related crimes and crimes concerning ritual clothing are the main instances of cultural crimes that have occurred in recent years.

Given these initial definitions, the main question addressed here is whether cultural factors should or should not have relevance in criminal law.

2 - Two ways to look at culturally motivated crimes: the case of the *kirpan* in the Italian and in the Canadian jurisprudence

The Italian criminal law system has never taken into account the cultural factor as a general rule.

The complex and tricky task of finding a legal framework for culturally motivated crimes is, therefore, left to the courts.

In Italy, in one of the most known and debated decisions on culturally motivated crimes, the Court[4] expressed a clear opinion on the intersection between culture and law.

A faithful Sikh was convicted because he was carrying a so-called *kirpan*[5], a small knife that the Court considered a weapon according to art. 4, paragraph 2 of Law n. 110/1975. The defendant appealed to the Court of Cassation on grounds that the *kirpan* had to be considered a religious symbol protected by article 19 of the Italian Constitution.

Nevertheless, the Italian Court of Cassation confirmed the judgment issued by the Court of Mantua and the man was convicted for the crime of carrying weapons.

What is interesting for the purpose of this article is the reasoning of the Italian Court of Cassation. Referring to a former jurisprudential

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[3] See **C. DE MAGLIE**, *I reati culturalmente motivati. Ideologie e modelli penali*, ETS, Pisa, 2010; **A. BERNARDI**, *Il "fattore culturale"*, cit.; **F. BASILE**, *Immigrazione e reati*, cit.; **A. PROVERA**, *Tra frontiere e confini. Il diritto penale dell'età multiculturale*, Napoli, 2018; **G. CAVAGGION**, *Diritti culturali e modello costituzionale di integrazione*, Giappichelli, Torino, 2018.

[4] Court of Cassation, 31st March 2017, n. 24048.

[5] The defendant was stopped by the police carrying a knife of 18.5 cm length and he refused to surrender it to the police officer since it was a religious symbol. See Court of Cassation, 31st March 2017, n. 24048.

guideline[6] [7], the Court restated that freedom of religion may not justify the conduct. According to the Court, immigrants must comply with Western values and they are obligated to respect the cultural and legal context in which they live.

The reasoning of the judgment has been criticized by several Italian scholars because the expression "Western values" is vague, misleading and without any specific legal meaning.[8]

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[6] See Court of Cassation, 14th July 2016, n. 24739; Court of Cassation, 16th July 2016, n. 25163: according to the Court, the symbolic and religious meaning of the *kirpan* could not be considered a justifiable reason for wearing a weapon in public places according to article 4, paragraph 2 of Law n. 100/1975 and, therefore, the religious reason could not justify the conduct.

The Italian Court of Cassation confirmes this former jurisprudential guideline in a very recent ruling, which also partially restates what affirmed by the Court in 2017. See Court of Cassation, 18th April 2019, n. 16917.

[7] For the sake of completeness and to briefly point out the jurisprudencial development, it is also worth referring to previous Italian case-law dealing with the *kirpan* issue: see Cremona Court of Law, n. 15, 19th February 2009; Piacenza Court of Law, 24th November 2014; Modena Court of Law, 9th August 2003; Vicenza Court of Law, 28th January 2009 mentioned by **G. CAVAGGION**, *Diritto alla libertà religiosa, pubblica sicurezza e "valori occidentali". Le implicazioni della sentenza della Cassazione nel "caso* kirpan*" per il modello di integrazione italiano*, in *federalismi.it* (online journal), n. 12, 2017, pp. 1-24, p. 6. In all these sentences, judges stated that wearing the *kirpan* in public places could not be considered a crime, since this conduct has to be regarded as a justifiable reason connected to the constitutional right of religious freedom. On the other hand, banning the carrying of *kirpan* constitutes a violation of a constitutional right. From this brief analysis, it is clear that this former jurisprudencial guideline aimed at balancing religious freedom and security concerns, acknowledging prevalence to the first one.

See **A. LICASTRO**, *Il motivo religioso non giustifica il porto fuori dall'abitazione del kirpan da parte del fedele sikh (considerazioni in margine alle sentenze n. 24739 e n. 25163 del 2016 della Cassazione penale)*, in *Stato, Chiese e pluralismo confessionale*, online journal (*https://www.statoechiese.it*), I, 2017, pp. 1-29; **A. LICASTRO**, *La "sfida" del "kirpan"ai valori occidentali"nelle relazioni della dottrina alla pronunzia della Cassazione penale, Sez. I, 15 maggio 2017, n.24084,* in *Quaderni di diritto e politica ecclesiastica*, 2016, pp. 371-383; **G. GIORGIO**, *In tema di autorizzazione del porto in luogo pubblico di un coltello, c.d. "Kirpan", quale simbolo religioso*, in *Foro Italiano*, n. 4, 2010, pp. 228-231; **A. PROVERA**, *Il "giustificato motivo": la fede religiosa come limite intrinseco alla tipicità*, in *Rivista italiana di diritto processuale penale*, n. 78, 2010, pp. 964-979; **G.L. GATTA**, *Nota a Tribunale di Vicenza decr. 28 gennaio 2009*, in *Il corriere del merito*, 2009; **S. CARMIGNANI CARIDI**, *Ostentazione di simboli religiosi e porto di armi od oggetti atti ad offendere. Il problema del kirpan dei fedeli Sikh*, in *Diritto ecclesiastico*, 2009, pp. 739-766.

[8] See **F. BASILE**, *Ultimissime della giurisprudenza in materia di reati culturalmente motivati*, in *Stato, Chiese e pluralismo confessionale*, cit., 2018/30, pp. 1-13; A. BERNARDI, *Populismo giudiziario? L'evoluzione della giurisprudenza penale sul* kirpan, in *Rivista Italiana di Diritto e Procedura Penale*, 2017, pp. 673-689; **C.M. PETTINATO**, *La libertà dell'educazione religiosa davanti ai giudici canadesi (prendendo spunto dalla sentenza Loyola High School vs.*

What is clear is that the Court of Cassation made a choice – a political choice[9]- in favor of security and safety to the detriment of religious freedom and pluralism.[10] The Supreme Court restated the principle based on the idea that the "justifiable reason" shall be taken to occur when the conduct is lawful in accordance with the context and the ordinary use of the object: according to the Court reasoning, the *kirpan* is a knife considered a weapon *ex* article 4, paragraph 2 of Law n. 110/1975 and, therefore, the wearing of the *kirpan* does not fall with the "justifiable reason" in defence of public security.[11]

As pointed out by some scholars[12], public security and safety are abstract concepts and they might easily undermine other constitutional

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Québec), in *Stato, Chiese e pluralismo confessionale*, cit., 2017/22, pp. 1-37; **A. NEGRI**, *Religious freedom and inviolable lines in pluralistic societies: the case of cultural crimes*, in *Stato, Chiese e pluralismo confessionale*, cit., 2019/30, pp. 175-189.

[9] **A. BERNARDI**, *Populismo giudiziario?*, cit., p. 684, qualifies the judgment as «ideologically influenced».

[10] The so called "right to security" is a debated issue: see **Y.M. CITINO**, *Sicurezza e stato di diritto nella minaccia dei foreign terrorist fighters*, in *DirittiFondamentali.it* (online journal), n. 2, 2019, pp. 1-44; **T.E. FROSINI**, *Il diritto costituzionale alla sicurezza*, in *forumcostituionale.it* (online journal), 2006; **T.F. GIUPPONI**, *La sicurezza e le sue "dimensioni costituzionali"*, in *forumcostituzionale.it* (online journal), 2008.

Interesting to notice is that the prevalence granted to public safety also recurs in other judgments related to cultural and religious rights: see Milano Court of Law, 20th April 2017 analysed by **G. CAVAGGION**, *Diritto alla libertà religiosa*, cit., p. 21-22. The author criticizes the judgement because no actual and concrete danger is linked to the cultural and religious conduct.

On this same topic, see A. TORRE (edited by), *Costituzioni e sicurezza dello Stato*, Maggioli, Rimini, 2014; **T.F. GIUPPONI**, *Sicurezza personale, sicurezza collettiva e misure di prevenzione. La tutela dei diritti fondamentali e l'attività di intelligence*, in LORENZON S., VACCARI G., ZANETTI V. (edited by), *Sicurezza collettiva e diritti fondamentali*, Aracne, Roma, 2008.

[11] As suggested by **A. LICASTRO**, *Simboli religiosi e "valori occidentali": diritto, religione, integrazione*, in *Ordines. Per un sapere unterdisciplinare sulle istituzioni europee*, n. 1, 2019, pp. 113-138, p. 123, the Court does not contextualize the conduct: the kirpan is used only as a simbolic and religiuos object, without any other purposes and, strictly speaking, the conduct should fall within the "justifiable reason".

[12] See **G. CAVAGGION**, *Diritto alla libertà religiosa*, cit., p. 24; **G. CASUSCELLI**, *Una disciplina-quadro delle libertà di religione: perchè, oggi più di prima, urge "provare e riprovare" a mettere al sicuro la pace religiosa*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 26, 2017, pp. 1-26; **A. PACE**, *La sicurezza pubblica nella legalità costituzionale*, in *Rivista AIC*, n. 1, 2015, pp. 1-9; **T.F. GIUPPONI**, *La sicurezza e le sue "dimensioni" costituzionali*, in S. VIDA S. (a cura di), *Diritti umani. Teorie, analisi, applicazioni,* Bononia University Press, Bologna, 2008, pp. 275-301.

Of a different opinion **A. LICASTRO**, *Simboli religiosi e "valori occidentali"*, cit., p. 134-138.

rights, such as freedom of religion. The so called "right to security" should be linked with a concrete and material danger to restrict and limit religious freedom: it is questionable if the *kirpan* represents a concrete and effective danger to public safety[13].

It is inspiring to notice that other Western countries have found completely different solutions toward the *kirpan* issue.

Generally speaking, the Western case-law approach toward the *kirpan* topic points out that the *kirpan* should not be considered as a weapon and, anyway, its religious and spiritual significance has to prevail over other constitutional values such as public safety[14] [15].

A prime example may be found in Canada. The Supreme Court of Canada[16] issued a similar legal case dealing with a Sikh carrying a *kirpan* to school, but the final judgment was completely opposite of the Italian one: the *Multani* case is an inspiring example of multiculturalism, cultural and legal tolerance in Canada.

In *Multani*[17] the Supreme Court of Canada ruled that Sikh students are entitled to wear their *kirpan* to school, since this conduct would not undermine school safety. In fact, there were no evidence that the *kirpan* had ever been used for violent purposes.

The Canadian Supreme Court applied the principle of reasonable accommodation[18] to sentence in accordance with multicultural values[19].

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[13] See **G. DE MINICO**, *Costituzione. Emergenza e terrorismo*, Jovene, Napoli, 2016.

[14] It is inspiring to notice that in the Indian legal system the wearing of *kirpan* is protected as a constitutional right. See *explanation I*, article 25 of the Indian Constitution: «The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion».

See **A. RINELLA**, *Famiglie, sistemi giuridici, fonti del diritto*, in *Diritto pubblico comparato*, (edited by) G. MORBIDELLI, L. PEGORARO, A. RINELLA, M. VOLPI, Giappichelli, Torino, 2016.

[15] **G. CAVAGGION**, *Diritto alla libertà religiosa*, cit., pp. 4-5 provides a comparative case-law analysis of *kirpan* cases. **A. NEGRI**, *Religious freedom and inviolable lines*, cit., p. 183 analyses the United Kingdom and the United States models both authorising Sikh to wear *kirpan*.

[16] *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

[17] *Multani*, cit., for the facts see *https://www.cdn-hr-reporter.ca/hr_topics/religion-and-creed/barring-kirpan-violates-freedom-religion*.

[18] See **A. EISENBERG**, *Rights in the Age of Identity Politics*, in *Osgoode Hall Law Journal*, L, 2013, pp. 609-636, p. 621: «The requirement of reasonable accommodation entered Canadian law in the mid-1980s through human rights cases about religious discrimination in the workplace». See *Ontario (Human Rights Commission) v Simpson Sears*, [1985] 2 SCR 536; *Bhinder v CN*, [1985] 2 SCR 561.

[19] See **A. EISENBERG**, *Rights in the Age*, cit., pp. 609-636.

The basic idea behind the Court reasoning was that when dealing with a minority culture or religion, judges have to consider and balance these differences to get an appropriate sentence for minorities. [20]

In other words, these rights have to be considered in order to acknowledge and respect minorities and to achieve a positive outcome in light of multiculturalism and legal pluralism.[21]

Quoting the Court: «A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities».[22]

3 - Moving forward: the Italian Court of Cassation n. 29613/2018

The main questions arising from the former analysis are the following: how can a balance between criminal law and pluralism be achieved? Is there a method or a legal process applicable to such conflicts arising from the intersection of law and culture?

The latest Italian Court of Cassation[23] judgment on culturally motivated crimes comes in handy to partially answer these questions.

Despite the 2017 ruling of the Italian Court of Cassation, the latest judgment of the Court on cultural crimes shows a more positive and open-minded approach to the cultural topic: the Court develops a "cultural test" that may help judges in dealing with cultural issues on trial.

Before analyzing the model developed by the Italian Court of Cassation, a brief *excursus* on cultural tests is essential.

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[20] See **B. BERGER**, *The Cultural Limits of Legal Tolerance*, in *Canadian Journal of Law and Jurisprudence*, XXI, 2008, pp. 245-277, p. 256: «In *Multani*, as well as the *Same Sex Marriage Reference*, the Court explained that the most appropriate means of dealing with such conflict is to balance religious freedom against these other rights and interests under the rubric of s. 1 of the *Charter*, which asks whether a limit on a right can be "demonstrably justified in a free and democratic society"».

[21] **A. EISENBERG**, *Introduction: New Approaches to Freedom in Canada*, in A. EISENBERG (edited by), *Diversity and Equality. The Changing Framework of Freedom in Canada*, UBC Press, Toronto, 2006, pp. 1-14, p. 7.

[22] *Multani*, cit., para. 79.

[23] Court of Cassation, 2nd July 2018, n. 29613.

3.1 - Cultural tests: a comparative insight

Cultural tests are legal tools that were developed and introduced for the first time in Canada and in the United States during the '90s.

The first cultural test was adopted in Canada by the Supreme Court in 1996 to treat Aboriginal claims. [24]

Dorothy Van der Peet member of the Sto:lo First Nation claimed her right to fish and trade salmon on the ground of her cultural background as protected by section 35 of Canada's Constitution Act 1982.

The Supreme Court of Canada developed a "distinctive culture test" to solve this case. The test is divided into ten questions[25] that should help judges to fully understand and to better solve Aboriginal right claims.

Even if this test has been criticized by Canadian doctrine and by Aboriginal communities because it does not answer Aboriginal claims in a

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[24] See *R. v. Van der Peet*, [1996] 2 S.C.R. 507. See **A. EISENBERG**, *Reasoning about Identity: Canada's Distinctive Culture Test*, in A. EISENBERG, *Reasons of Identity. A Normative Guide to the Political & Legal Assessment of Identity Claims*, Oxford University Press, New York, 2009, pp.34-53.

[25] For the sake of completeness, the ten questions are the following:

1. Courts must take into account the perspective of Aboriginal peoples themselves;
2. Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right;
3. In order to be integral a practice, custom or tradition must be of central significance to the Aboriginal society in question;
4. The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact;
5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims;
6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis;
7. For a practice, custom or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists;
8. The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct;
9. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence;
10. Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.

See *R. v. Van der Peet*, cit.

satisfactory way[26], the idea behind the test deserves our attention: it is seen as a scientific and legal instrument to equally address cultural claims at trial. A logical path that guides judges in dealing with cultural issues is definitely a worthwhile starting point: «Although […] the test does not provide a satisfactory way of reasoning about identity, it does provide some insights into how a successful guide to the assessment of such claims might be developed».[27]

American doctrine has likewise developed a cultural test in the '90s to better apply cultural defence during trials. One of the most complete and broad studies on this topic was suggested by Alison Dundes Renteln[28].

This test is based on three main questions:

«1. Is the litigant a member of the ethic group?; 2. Does the group have such a tradition?; 3. Was the litigant influenced by the tradition when he or she acted?».[29]

If all these questions have a positive answer, the judge might take into consideration the cultural background of the defendant, trying to balance it with the right offended by the conduct.

An American case-law example in which the cultural test is used by a court is the *Krasniqi* case[30]: an Albanian father was prosecuted for child sexual abuse, but the defendant claimed that the conduct had a strong cultural meaning and no criminal intent. The Court stated that all the requirements set by the cultural test were met: « […] the father was Albanian, Albanians had a custom of touching children that was not erotic, and the father was motivated by the custom when he touched his daughter»[31] and the man was therefore acquitted by the criminal law court.

3.2 - The cultural test in the Italian judgment of 2018

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[26] See **J. BORROWS**, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, in *American Indian Law Review*, XXII, 1997, pp. 37-64.

[27] See **A. EISENBERG**, *Reasoning about Identity*, cit., p. 35.

[28] See **A.D. RENTELN**, *The Cultural Defence*, 2004, New York; **A.D. RENTELN**, *The Use and Abuse of the Cultural Defense,* in *Canadian Journal of Law and Society*, XX, pp. 47-67, p. 49 *et seq.*

[29] *Ibidem*.

[30] *Krasniqui v. Dallas County Child Protective Services Unit of the Texas Department of Human Services*, [1996] 809 S.W.2d 927. See **A.D. RENTELN**, *The Use and Abuse,* cit., p. 50.

[31] **A.D. RENTELN**, *The Use and Abuse,* cit., p. 51.

The facts behind the Court of Cassation judgment of 2018 are known[32]: an Albanian father was accused of child sexual abuse because he was seen touching, kissing and licking his son's genitals. The defendant argued that the conduct was based on Albanian cultural heritage and is not considered a crime in his culture.

The defendant was not found guilty either at first instance nor on appeal. The first instance Court stated that the conduct was not based on willful misconduct because it had a peculiar relevance in Albanian culture[33].

In the Court of Appeal reasoning, instead, the conduct did not consist of sexual acts.[34]

Called upon to rule on this case, for the first time the Court of Cassation granted scientific relevance to culturally motivated crimes and acknowledged the importance of the intersection between criminal law and culture in today's society; it moreover dealt with these crimes with a systematic approach.

Last but not least, what was really remarkable in the ruling is the cultural test proposed by the Court[35]. It involves three key steps to reach a fitting sentence by taking into account the cultural factor.[36]

First of all, judges have to balance and compare the cultural and religious right with the one offended by the cultural or religious conduct. It is also relevant to explore the degree of the offence. On this point, the Court restated that there are some limits to legal tolerance that cannot be overcome and exceeded in any criminal system: cultural and religious tolerance must not undermine fundamental human rights.

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[32] See **F. BASILE**, *Quanto conta la "cultura? La Cassazione torna sui reati cd. Culturalmente motivati*, in *Giurisprudenza italiana*, 2018, pp. 2244-2251.

[33] See **I. RUGGIU**, Omnia munda mundis. *La pratica culturale dell'„omaggio al pene" del bambino: uno studio per la* cultural defense, in *Stato, Chiese e pluralismo confessionale*, cit., 27/2019, pp. 1-29, for a complete analysis of the cultural practice.

[34] See. **A. PROVERA**, *Carezze o violenze? La Cassazione affronta il problema dei reati sessuali a presunto orientamento culturale*, in *Diritto penale e processo*, XI, 2018, pp. 1432-1438, p. 1436 *et seq*.

[35] The Italian doctrine had already suggested a cultural test to be adopted in courtrooms. See **I. RUGGIU**, *Il giudice antropologo*, FrancoAngeli, Milano, 2012; **I. RUGGIU** *Il giudice antropologo e il test culturale*, in *Questione Giustizia* (online journal), I, 2017, pp. 226-232 for a more articulated test. The Court of Cassation endorses the test suggested by **F. BASILE**, *I reati cd. «culturalmente motivati» commessi dagli immigrati: (possibili) soluzioni giurisprudenziali*, in *Questione Giustizia*, I, 2017, pp. 126-135.

[36] See **F. BASILE**, *Quanto conta la "cultura"*, cit., pp. 2244-2251; **F. BASILE**, *Ultimissime della giurisprudenza*, cit., p. 11; **A. PROVERA**, *Carezze o violenze*, cit., pp. 1432-1438; **I. RUGGIU**, Omnia munda mundis., cit., pp. 1-29.

Secondly, judges have to explore the nature of the cultural or religious practice and its obligatoriness in the minority group.

Lastly, it is important to assess the standard of integration into the dominant culture: the more the offender is integrated in mainstream culture, the less a cultural defence has effect.

At the very end of its reasoning, the Court briefly analyzed evidentiary aspects based on cultural factors and difficulties proving existence of a specific cultural practice.[37]

Even so, in the decision to set aside and refer back, the Court of Cassation argued that in the case at trial: first of all, cultural defence was bounded by human rights that should not be violated because of cultural belief; secondly, sex organs kissing harmed the sexual freedom of the child, regardless father's intention; lastly, the defendant did not provide proper evidence on the cultural practice in Albanian community. In light of those reasons, the Court dismissed the cultural defence claim.

On May 16th, 2019, the Bologna Court of Appeal - in reasoning the case - issued a new sentence: the defendant was convicted for sexual offences against children to 2 years and 8 months in prison and compensation for damages *ex* art. 609 *quarter* of the Italian Criminal Code.

It is worth mentioning that the defendant's family and the Albanian group Illyria have always supported the cultural defence claimed by the Albanian father.[38]

4 - Final remarks

What clearly emerges from the comparative approach[39] is that it is necessary to find a balance between the demands of the majority and the minority group: how this cultural and religious mediation can be achieved represents the focal point of the present article.

The Italian legal system has to be ready to deal with different culture and this requires flexibility and capacity to adapt. As shown by the Canadian legal model, it is necessary to meet halfway according to the supreme principle of *laicità* defined in its democratic and positive

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[37] See **B. PASTORE**, *Multiculturalismo e processo penale*, in *Cassazione penale*, IX, 2006, pp. 3030-3046; **A. BIGIARINI**, *La prova culturale nel processo penale*, in *Cassazione penale*, I, 2018, pp. 411-420.

[38] **I. RUGGIU**, Omnia munda mundis, cit., p. 18.

[39] See M.A. FODDAI (a cura di), *Il Canada come laboratorio giuridico. Spunti di riflessione per l'Italia*, Jovene, Napoli, 2013.

meaning. *Laicità* stands for impartiality, knowledge of the other and dialogue[40]. As stated by the Italian Constitutional Court[41], *laicità* « does not imply indifference to religion but the State guarantee for the protection of freedom of religion, under the religious and cultural pluralism».[42]

In light of that, the main and key focus should be discerned in the values of human dignity and individual's identity as guiding principles to develop the best possible solutions to fit the needs of a laico-pluralistic State[43]: these values might represent the insurmountable ethical minimum[44] that can not be ignored by judges to avoid «old errors of anthropologists (from) becoming new errors of judges».[45]

In particular with regard to criminal law – keeping in mind these general principles acquired through the comparative approach-, the challenging goal is how a «legal-institutional mechanism of multiculturalism»[46] through which the cultural factor acquires a full legal relevance in criminal law might be developed.

The latest Italian Court of Cassation seems to head in this direction, as also suggested by scholars: both Court and doctrine grasp the urgent need to develop a legal method - such as the cultural test - to solve these conflicts, likewise to when done by common law countries.

Having said that, it has to be acknowledged that when culturally motivated crimes undermine fundamental human rights that must be protected in any cultural context:

« […] courts might still wish to reject the cultural defense. Where cultural traditions involve irreparable harm to individuals belonging to

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[40] See **C.M. PETTINATO**, *La libertà dell'educazione religiosa*, cit., p 36, and **J. PASQUALI CERIOLI**, *La laicità nella giurisprudenza amministrativa: da principio supremo a "simbolo religioso"*, in *Stato, Chiese e pluralismo confessionale*, cit., March 2009, pp. 1-24.

[41] Constitutional Court, n. 203/1989.

[42] Constitutional Court, n. 203/1989.

[43] See **A. EISENBERG**, *Rights in the Age*, cit., p. 616; **N. COLAIANNI**, *Eguaglianza e diversità culturali e religiose. Un percorso costituzionale*, il Mulino, Bologna, 2006, p. 50; **N. COLAIANNI**, *La lotta per la laicità. Stato e Chiesa nell'età dei diritti*, Cacucci, Bari, 2017, p. 58.

[44] **J. PASQUALI CERIOLI**, *Propaganda religiosa: la libertà silente*, Giappichelli, Torino, 2018, p. 162

[45] **I. RUGGIU**, *Test e argomenti culturali nella giurisprudenza italiana e comparata*, in *Quaderni costituzionali*, 2011, pp. 531-549, p. 532.

[46] **A. SHACHAR**, *Multicultural Jurisdictions. Cultural Differences and Women's Rights*, Cambridge University Press, Cambridge, 2001, p. 1. **G. DI COSIMO**, *Giudici e politica alle prese con i conflitti multiculturali*, in *Rivista AIC*, n. 4, 2019, pp.133-134, draws up an overview of different cultural and religious conflict resolution models besed on both legislative and jurisprudential approaches.

vulnerable groups, the defense should not influence the disposition of cases»[47].

Besides a cultural test that helps criminal judges in establishing whether the cultural background has influenced the conduct, are there any other legal instruments that should be applied to culturally motivated crimes when the cultural belief cannot be accommodated in the legal system, but at the same time has a strong relevance in the offender's conduct?

This is still an open question[48] that needs to be further investigated to embrace multiculturalism as a guiding policy and to promote a constructive relationship between criminal law and culture aimed to create «a site of meaningful pluralism»[49] in the criminal system.

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[47] **A.D. RENTELN**, *The Use and Abuse,* cit., p. 50.

[48] One possible answer can be found in the Restorative justice model: it could be complementary to the criminal process and might be experimentally applied to cultural crimes. Once the offender has fulfilled the restorative program, a specific mitigating circumstance based on cultural factor might be applied. That requires a deep rethinking and reflection on the legal experience on the whole, as suggested by **L. PICOTTI**, *La mediazione nel sistema penale minorile: spunti per una sintesi*, in L. PICOTTI (edited by), *La mediazione nel sistema penale minorile*, Cedam, Padova, 1998., pp. 283-312, p. 285. See **A. PROVERA**, *Tra frontiere e confini*, cit., p. 315; **M. DONINI**, *Il diritto riparato. Una disequazione che può trasformare il sistema sanzionatorio*, in *Diritto Penale Contemporaneo*, II, 2015, pp. 236-250; **B. SRICIGO**, *La giustizia riparativa nel sistema penale e penitenziario in Nuova Zelanda e in Australia: ipotesi di complementarietà*, in *Rivista Italiana di Diritto e Procedura Penale*, 2015, pp. 1923-1942.

[49] **M. BRIGG**, *Rebalancing Power and Culture? The Case of Alternative Dispute Resolution*, in R. PROVOST (edited by), *Culture in the Domains of Law*, Cambridge University Press, Cambridge, 2017, pp. 247-265, p. 249.