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Cultural Expertise: Substantial and Procedural Framework

Gualtiero Michelini[1]

Abstract

Starting from the evolution of jurisdictions vis-à-vis European and international law, and the challenges of globalization and immigration, this contribution focuses on the concept and different declinations of multiculturalism, and on the role of social sciences, including anthropology, in treating and adjudicating judicial cases, in particular, from the perspective of the Italian judiciary. As the cultural issue is an aspect that is frequently at stake in judicial decisions, the use of cultural expertise in trials is addressed both through cases which have benefited from it and by examining the substantial and procedural aspects that need to be considered.

Introduction

Legal practitioners, including judges, public prosecutors, and lawyers are impacted by the evolution of the concept of legal system (or legal order), as developed in the 19th-20th centuries. The traditional scheme – territory, community, norms - as well as the coverage of the umbrella of national Constitutions, is no longer sufficient to describe the legal order as the expression of culture, values, and rules of living together in a given State. For judicial actors, the main factor of change is the re-elaboration of sources of law. The harmonization of rules in the EU, the overlapping of civil law and common law, the para-constitutional role of EU Treaties and of the Charter of Fundamental Rights of the European Union have gradually transformed national judges

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1 Gualtiero Michelini has served in the Criminal Law and Labour Tribunal in the Courts of Turin and Rome. Since 2012, he has been Judge at the Court of Appeals in Rome. During his professional career, he was detached to the Italian Ministry of Justice – International Relations Department (1998 - 2001) and to the European Commission – DG Justice (2008- 2012). He was a member of the Italian delegation at the Conference for the Statute of the International Criminal Court and the Ad-Hoc Committee for the UN Palermo Convention against Transnational Organized Crime. He has served as an expert in EU, UN, and CoE projects in Europe, Africa, and Latin America, as well as a lecturer on courses organized by the Scuola Superiore della Magistratura and by EU programmes in candidate countries. He was President (2014-2017) of MEDEL - Magistrats Européens pour la Démocratie et les Libertés. He is the author of scientific articles and reports on International Criminal Law and Labour Law.

into European judges (Piccone and Pollicino, 2019). A specific transnational legal order has been realized through the European Convention of Human Rights and the case law of the European Courts of Human Rights. International law and national ratification have turned UN conventions, as well as conventions adopted in the framework of other international organizations, into sources of directly applicable Law. Furthermore, globalization and immigration have changed the scenarios of legal conflicts and introduced new unexplored perspectives, leading post-modern jurists into uncharted territories, including the co- existence within a given territory of different cultural and social traditions (Rordorf, 2017, p. 4), not only in the field of Immigration Law, but also, inter alia, in criminal law, family law, labour and social law.

In Italy, the issue is relatively recent. Traditionally a country of emigration (to Northern Europe, North and South America, Australia) and of significant internal immigration from the South to the North in relation to post-WWII industrial development, only in the last 20 -30 years has Italy become a country of immigration with a foreign-born population now estimated at approximately 10%. Jurists face new challenges related not only to linguistic barriers and to the issue of interpretation (which remain crucial), but also in terms of the response of the justice system when conflicts arise between people's place of residence and their identification with communities with different traditions, values, cultural background, and cultural references (Bisogni, 2017, p. 118).

Legal order and multiculturalism

The relationships between these new challenges in a global perspective of protection of rights (Azzariti, 2017, p. 120) described as the issue of multiculturalism (MD, 2015), and the current legal order can be systemized in three hypothetical scenarios:

1. "Cosmopolitan multiculturalism", involving the possibility of recognizing everybody's rights and traditions: the limits of this approach derive from the needs of limiting individual freedoms, allowing the evolution of legally accepted balances of rights, setting in a given context;

2. cultural colonialism, involving the identification of universal rights, generally the ones established in that state: the limits of this perspective lie in a tendency towards the excessive defence of identities and cultural dominion;

3. new mixed constitutionalism, involving an attempt to discuss and identify how to achieve democracy, pluralism, and solidarity in the current context.

Social sciences and jurisdiction. The notion of cultural expertise

The question of "how to learn from and how to teach to" within different juridical cultures and traditions is not entirely new to the context of jurisdiction: judges and other actors in the justice system learn from and draw upon sciences, including social sciences, including anthropology, in handling and deciding cases before the courts.

The cultural issue is an aspect to be considered in judicial decisions, in particular, in a context of legal pluralism.

However, we must be aware of the dangers inherent to this approach, especially the one defined as the risk of the "anthropologist judge" (Ruggiu, 2017, p. 216), which could result in a cultural prejudgment, thereby blocking the evolution of case law on "open clauses" as well as of legislation. In order to avoid such risks, courts need to make appropriate use of cultural expertise during trials.

From this perspective, "cultural expertise" refers to the "form of expert opinions formulated by social scientists appointed as experts in court and out of court for dispute resolution and the claim of rights". Cultural expertise is scientifically defined as "special knowledge that enables socio-legal scholars, experts in laws and cultures, and cultural mediators—the so-called cultural brokers—to locate and describe relevant facts, in light of the particular background of the claimants/litigants/accused and for the use of conflict resolution or the decision-making authority" (Holden, 2019).

Some Italian problems and experiences

The relatively recent transformation of Italy from a country of emigration, and of internal immigration, to a multi-ethnic country welcoming new communities with very different origins (e.g. Eastern Europe, Western Balkans, North Africa, Sub-Saharan Africa, Latin America, India, Bangladesh, Pakistan, Sri Lanka, Philippines, China) has given rise to interesting legal cases of interaction between national laws and juridical notions with other origins.

To give just a few examples, Italian courts have delivered (sometimes controversial) judgments on:

- The Sikh *kirpan*, i.e. the ceremonial dagger worn by observant Sikhs, the carrying of which may result in violation of criminal laws restricting the use of weapons and knives (Simoni, 2017);

- the Islamic *kafalah*, i.e. the link between a minor and a person outside his/her family, quite different from the institution of adoption, which may be considered in the interest of minors in cases of family law or immigration law (Bisogni, 2016);

- the use of the Islamic veil in the workplace, leading to decisions, before employment tribunals, that have sometimes recognized the existence of discrimination for religious reasons, depending on the nature of the job and relations with the public and the customers (Tarquini, 2018).

A remarkable use of anthropological expertise occurred in the trial regarding the L'Aquila earthquake of 6 April 2009. The responsibility of the members of the National Commission for the Forecast and Prevention of Major Risk was under discussion, in relation to the information given to the local population regarding the severity of the risk in the wake of previous seismic events (ISC, 2015). The Prosecutor before the Tribunal of L'Aquila called upon a cultural anthropologist to give his scientific opinion on the social perception of the risk on the basis of information provided by the experts (Ciccozzi and Clemente, 2013). The Tribunal used this (cultural) expertise in order to assess the juridical link between the scientific communication and its impact in terms of the number of victims of the earthquake.

Other examples of the use of cultural expertise within trials can be found in cases involving members of the Roma community, e.g. in connection with under-age marriages or the tradition of giving money to the family of the bride on the occasion of a wedding. (Simoni, 2019, p. 147)

A difficult paradigmatic cultural issue in Labour Law. The Islamic veil and the workplace in the ECJ case law

The European Court of Justice has repeatedly intervened with regard to the use of the Islamic veil – a typical religious and cultural issue, with complex nuances – generally in the context of preliminary rulings with regard to EU anti-discrimination law, specifically Directive 2000/78 (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation).

It is interesting to quote two decisions on this issue that were pronounced on the same day (14 March 2017), coming to different conclusions regarding the balance between the right of workers to express their religious beliefs by wearing a veil (also a sign of belonging to a given community) in the workplace, and the interest of the employer to appear "neutral".

In the case C-157/15, (JOC, 2017) the Court stated that:

- Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive;

- By contrast, such an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and provided that the means of achieving that aim are appropriate and necessary, which is for the referring court to ascertain.

In the case C-188/15, (JOC, 2017) the Court stated that:

- Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

According to the ECJ, the balance between the rights of the worker and the rights of the employer, within the scope of the Anti-Discrimination Directive in employment and occupation, is to be found by assessing the employer's policies regarding its customers and the tasks to be carried out by workers. The reading of such decisions suggests that limitations to the use of the veil in the workplace may be held to be justified for a receptionist in constant contact with the public, and unjustified for a design engineer with occasional contacts with some customers (Tarquini, 2018).

In the reasoning of its decisions, the European Court of Justice does not deal expressly with cultural aspects (that could be considered to be linked to the specific public visibility of a given religious symbol), but with the meaning of "religion", which is not defined in the Anti-Discrimination Directives.

Nevertheless, the ECJ notes that (*Bougnaoui v Micropole SA*, 2016):

- EU legislature referred to fundamental rights, as guaranteed by the ECHR, provides, in Article 9, that everyone has the right to freedom of thought, conscience and religion, a right which includes, in particular, freedom, either alone or in community with others and in public or private, to manifest his/her religion or belief, in worship, teaching, practice and observance;

- EU legislature also refers to the constitutional traditions common to the Member States and known as general principles of EU law;

- among the rights resulting from those common traditions, which have been reaffirmed in the Charter of Fundamental Rights of the European Union, is the right to freedom of conscience and religion enshrined in Article 10(1) of the Charter;

- in accordance with that provision, that right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance;

- in so far as the ECHR and, subsequently, the Charter use the term "religion" in a broad sense, including in it the freedom of persons to manifest their religion, EU legislature must be considered to have taken the same approach when adopting Directive 2000/78;

- therefore, the concept of "religion" in Article 1 of that directive should be interpreted as covering both the forum internum, that is, the fact of having a belief, and the forum externum, that is, the manifestation of religious faith in public.

In general, on the issue of religion and anti-discrimination law, the Court of Justice of the European Union has developed an original proportionality assessment in order to strike a balance between the autonomy rights of religious organizations, and the right of workers of such institutions to be free of discrimination based on grounds of religion or beliefs (Gori, 2019).

In its judgment in the case C-414/16 of 17 April 2018, the Court ruled that:

- Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case;

- Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality[2].

Cultural expertise in the trial

The issue at stake in those decisions, within the apparently restricted or very specialized perspective of the implementation of the EU Anti-Discrimination Directive in the workplace, is the balance between identities and integration, or between cultural differences and market freedom.

Setting apart the merit of decision, the cases above clearly show the extent of the possible interaction among legal practitioners and social sciences.

Without proposing borders or limits, the knowledge of socio-legal experts in the trials requires some adaptations to procedural rules in order to be fully useful and appreciated.

The "urgent need to conceptualize and investigate cultural expertise as a field of research to comprehensively assess the contribution of sociocultural knowledge to the resolution of conflicts and governance" has been underlined by scholars (Holden, 2020).

Let's try to understand some of the issues that may be at stake in the interaction between jurists and cultural experts appointed by the Court (or by the Prosecutor in criminal cases or by defence lawyers in all cases), from the perspective of the authority in charge of making the decision.

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2 In the quoted ruling, the ECJ also states, where dealing with the duties of the national judge, that a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter of Fundamental Rights of the European Union and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

1. The first rule to be taken into account is the need to solve the case according to applicable laws, at least in civil law countries. This need is expressed through the traditional principle of prohibition of *non liquet* (deriving from Roman law). The principle means that a judicial demand cannot be dismissed on the grounds of the uncertainty of the solution. Conversely, a decision of non-admissibility of the case must be adopted on the grounds of applicable procedural rules. The decision is to be grounded on the rules of the burden of proof, meaning the evidence gathered following the contradictory (adversarial) principle, and the request of the defence, of the prosecutor, or *ex officio* according to Civil or Criminal Procedure applicable to the given case.

2. The responsibility for the decision, even in cases involving technical expertise, lies with the judge (or, in general, with the authority tasked with deciding the case). This concept is expressed with the wording of the judge as *peritus peritorum*. The meaning of this notion, of course, is not to refer to the so-called private science of the judge or to pursue the construction of the anthropologist-judge (or engineer-judge or physician-judge, etc.). On the contrary, this concept expresses the rule of motivating the reasoning underpinning a given decision based on the scientific data and information provided for by the experts acting in the trial, and/or on privileging a certain scientific option compared to an adverse one within the contradictory principle.

3. Each case has its specificities, sometimes peculiarities, and needs to be examined with a view to reaching a decision that assesses the concrete controversial issue. *Res iudicata* blocks the possibility of further discussing the case, while judicial precedents (in civil law) are relevant but not entirely binding, and do not necessarily obstruct the evolution of the jurisprudence on a given subject matter.

4. The judicial exercise of balancing the rights at stake requires the identification of the stakeholders in the given case, and therefore the identification of appropriate expertise.

It is a very common practice in courts to call upon the scientific expertise provided by medical doctors, engineers, accountants or psychologists. It is less frequent to find them calling on anthropologists or sociologists. Is there a sort of conflict between the hard sciences versus social sciences? Is there a problem of registration before the courts? Is this

due to the conservative approach of judges, prosecutors and lawyers? Is there a problem of costs? None of these reasons can fully explain the motives for cautious use of cultural expertise, but it is likely that they all play a role. This is further confirmation of the need to refine the conceptualization of cultural expertise.

Jurists are making increasing use of the concepts of multiculturalism and interlegality, with the aim of involving cultural expertise in both court and out-of-court procedures of dispute resolution. Pragmatically, the use of cultural expertise in trials results in a comparative approach, in an exercise of confrontation, which cannot refrain from a diachronic perspective and an accurate description of the context.

For this reason, scholars like Ruggiu (2019) proposes the "cultural test" as a legal test for dealing with culture and means to improve the use of cultural expertise by academics, judges, and lawyers. The proposed cultural test consists of a set of pre-established questions that a judge has to answer in order to decide whether to accept a cultural claim made by a migrant or by a person belonging to a minority community. Some questions in the cultural test refer to typical legal balancing between rights while other questions incorporate anthropological knowledge within the trial, requiring the judge to analyse the cultural practice at issue, its historical origin, the importance it has within the community, and other information about which the judge would not be sufficiently knowledgeable without resorting to anthropology.

The cultural test proposed by Ruggiu (2019), in an effort to bring about the standardization of cultural expertise, thereby helping both the judge and the cultural expert in their tasks, focuses on: description of the cultural practice and of the group; relation and link of the practice with the broader cultural system/web of significances; establishing whether the practice is essential, compulsory or optional; whether the practice is shared or contested within the group; whether the group is vulnerable or discriminated; sincerity and consistency of the cultural practice claimed; existence of a cultural equivalent or of a similar or comparable practice in the majority culture; harm caused by the practice; impact of the practice on the culture and value system of the majority and of the minority.

Ruggiu also replies to the criticisms against the cultural test, mainly related to: its common law origin, not easily transferable into civil law systems; risks of crystallization and distortion; risk of ethnocentrism (2019).

Paths and schemes of cultural reasoning in immigration law and in labour law

The cultural test is proposed as a guideline, subject to adaptation through the observation of judicial practice and dissemination of best practices. A scheme of this kind has the merit of highlighting key issues that must be taken into account where a cultural argument is under discussion in a legal conflict: identification of the cultural issue, alternatives, damage and compensation, gender issue, transformation and evolution (or overcoming) of traditions.

A procedural assessment of cultural issues has been established (in the sense that it has been elaborated and accepted by the relevant jurisprudence) in the field of immigration law.

In fact, "country experts" with various professional backgrounds and roles (cultural mediator, *amicus curiae*, expert witness, assistant to the defence lawyer, etc.) occupy a privileged place in immigration proceedings and in the contemporary management of migration flows (Holden, 2019).

In Italy, proceedings dealing with requests for international protection are civil proceedings where the administrative authorities grant or deny a form of protection. They are characterized by two procedural specificities with respect to general civil procedure rules:

1. The duty of cooperation of the judge in gathering evidence;
2. the attenuation of the burden of proof.

In such trials, the assessment of the credibility of the person seeking asylum or other forms of protection and of so-called COI (Country of Origin Information) plays an essential role and represents the usual scheme of several relevant decisions in this area of law.

In this respect, the Italian Supreme Court has clarified that:

- The assessment of the credibility of the declarations of the person seeking international protection is not merely entrusted to the opinion of the judge but is the result of a legal procedure;

- the rules governing decisions shall not be limited to the lack of objective verifications but shall be based on the criteria established by the law;
- moreover, the administrative authority tasked with making the decision in response to the request, or the judge, in those cases where a negative decision is disputed before the Court, shall fully consider the individual situation and personal circumstances of the applicant;
- secondary contradictions or inconsistencies should not lead to a negative pre-judgment of the request where the substance of the events is considered credible;
- therefore, the judge plays an active role in the relevant trial and may use ex officio investigative powers, namely through acquiring updated information on the country of origin of the applicant, in order to ascertain his/her personal situation (CC 26921/2017).

In addition, returning to labour law (which is in practice not unfrequently connected to immigration law), a scheme of balancing cultural issues may also be found, by analogy, in the principle of reasonable accommodation. The United Nations Convention on the Rights of Persons with Disabilities (United Nations, 2006) regulates work and employment rights (Art. 27). In relation to such rights, States parties undertake (Art. 27.1, i) to: Ensure that reasonable accommodation is provided to persons with disabilities in the workplace. The meaning of this concept is explained, within the EU, by Art. 5 of the (previously quoted) EU Directive 2000/78/EC, which states: "Reasonable accommodation for disabled persons. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned" (CC 27243/2018).

The reasonable accommodation principle may be applicable to the resolution of disputes involving cultural issues, as it allows sufficient flexibility for the assessment of the issues at stake, applying the proportionality principle while protecting fundamental rights. An

added value of such a juridical scheme is the possibility of introducing intermediate or agreed solutions.

Conclusions

In this paper, I have noted, from a practitioner's perspective, how globalization and immigration have changed the scenarios of legal conflicts, introducing new unexplored perspectives.

The co-existence within a given territory of different cultural and social traditions has also raised juridical challenges in countries, like Italy, which have witnessed a relatively recent transformation from a country of emigration to a country of destination of immigration flows.

Most constitutionalists therefore systematize the relationships between the new challenges and the global perspective of the protection of human rights, using the concept of multiculturalism, and promoting a new mixed constitutionalism, with a view to identifying and achieving democracy, pluralism, solidarity, while safeguarding the rule of law, in the current context.

In a scenario of legal pluralism, there is a need to avoid the risk of cultural pre-judgment and of blocking the evolution of case law and legislation; one possible approach involves the emergent concept of cultural expertise, shared by civil law and common law justice systems. In the Italian courts, we can find examples of interaction between national laws and juridical notions of other origins in judgments ruling on the Sikh *kirpan*, on the Islamic *kafalah*, and on the use of veil or headscarf in the working place.

A remarkable example of use of anthropological expertise occurred in the trial on the L'Aquila earthquake of 6 April 2009. Cultural expertise has also been used in trials involving members of the Roma community.

A difficult paradigmatic cultural issue in labour law – i.e. the wearing of the Islamic veil in the workplace –has been the subject of complex and debated decisions by the European Court of Justice, requested for preliminary rulings concerning EU anti-discrimination law, specifically Directive 2000/78, establishing a general framework for equal treatment in employment and occupation.

National and European case law shows the extensive interaction possible among legal practitioners and social sciences, the need to adapt the knowledge of socio-legal experts to procedural rules in trials in order to amplify its use, and the pressing need to conceptualize and investigate cultural expertise as a field of research.

The procedural rules and principles that must be taken into account whenever there is interaction between jurists and cultural experts in trials include: a) the principle of prohibition of non liquet; b) the role of *peritus peritorum* of the judicial organ in charge of the decision; c) the concrete specificities of each case; d) the identification of the stakeholders in the given case, as well as the identification of appropriate expertise.

While it is a common practice for courts to call upon the expertise of medical doctors, engineers, and accountants, it is less frequent to find them calling on anthropologists or sociologists. This is a confirmation of the need to refine the conceptualization of cultural expertise. The "cultural test", as a legal test for dealing with culture, is proposed by scholars as a means to improve the use of cultural expertise by judges and lawyers, in an effort to bring about the standardization of cultural expertise, with a view to helping both judges and cultural experts in their tasks.

Possible paths, schemes, and guidelines for the use of cultural expertise in the justice system may be derived from forms of procedural assessment of cultural issues, as in Immigration Law, or from forms of balancing cultural issues in the light of the principle of reasonable accommodation, as in some areas of labour law.

The first step, as far as the decision-making authority is concerned, regards the identification of a reliable expert; to this extent Academy should play a major role, as well as dissemination and compilation of experiences, possibly through an accessible database.

Secondly, once linguistic barriers are resolved via the implementation of the right to interpretation, the trial will require the description of the context by the cultural expert to be translated into an element of assessment of the merits of the case, as specific illuminating evidence. In more mixed and multi-faceted societies, intercultural dialogue is the way to deliver a democratic justice service in a multi-level legal order where each actor has something to learn from others and something to teach.

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