CULTURAL EXPERTISE AGAINST THE DANGER OF JUDICIAL POPULISM IN ITALY: CASSAZIONE PENALE 12.11.2009

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1. Cultural expertise and cultural defence.

This article revolving around a so-called honour killing dating back to 2009 in Italy, interrogates the potential role of cultural expertise, had the court availed the use of an expert. In order to proceed to this scrutiny a short theoretical outline of the emergent concept of cultural expertise is necessary. In the second section, I will recall the facts of the case and the reaction of the public as well as of the academic scholarship in Italy. In the third section, I will explore the role of cultural expertise and the potential risks attached to it. I will conclude with considerations about the potential value of anthropological knowledge in court, especially within the current political scenario of rise of populism in Italy.

Cultural expertise in the form of expert opinions formulated by social scientists appointed as experts in legal proceedings is not different from any other kind of expertise in court. In specialised fields of law, such as native land titles in North America and in Australia the appointment of social scientists as experts, especially anthropologists, dates back to the 19th century. In the contemporary management of migration fluxes the appointment of anthropologists as country experts has become increasingly frequent especially in common law countries.

An early definition of cultural expertise was formulated in 2009 and underlines "the special knowledge that enables socio-legal scholars, or, more generally speaking, cultural mediators - the so-called cultural brokers-, to locate and describe relevant facts in light of the particular background of the claimants and litigants and for the use of the court". [1] At the same time, the concept of cultural expertise was also theoretically positioned with regard to the well-known concept of cultural defence. [2]

Even though linked mong them, the concepts of cultural expertise and cultural defence are different epistemologically and procedurally. Cultural expertise as expert knowledge that can be used in a variety of fields for dispute resolution, offers a theoretical umbrella to cultural defence, which I propose to reformulate as the use of cultural expertise for the purpose of the defence, most often for pursuing mitigating circumstances in criminal cases. Cultural expertise instead, as deployed by social

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[1] L. Holden (ed.), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*, London: Routledge, 2011, 2.

[2] A. D. Renteln, *The Cultural Defence*, New York: Oxford University Press, 2004.

scientists appointed as experts in court, owes to be procedurally neutral, meaning that the expert should not advocate explicitly or implicitly for a specific legal outcome. The duty of the cultural expert is to the court in explaining facts and circumstances and their socio-legal background within the scope of specific instructions or questions, often done in the form of a written report or during cross-examination. The procedural neutrality of the expert, which should not be confused with an absolute objectivity and impartiality from a socio-anthropological perspective, is the component that better highlights the epistemological difference between cultural expertise and cultural defence.

From a theoretical point of view cultural defence, much more consolidated in the United States than in Europe, could be seen a specific form of cultural expertise. In fact, cultural defence, a better-known concept than cultural expertise, has developed in a very specific area of penal law and in connection with the concept of culturally motivated crimes by the Dutch legal anthropologist Strijbosch.[3] Strijbosch pointed at the potential conflict between principles of majority and minority groups but after him various definitions of cultural motivated crimes have been proposed by the socio-legal literature. Hence for Van Broek culturally motivated crime is “an act by a member of a minority group or culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation.”[4] From this definition, the socio-legal scholarship has generated articulated classifications that have never completely convinced continental jurisprudence,[5] the most important being perhaps the extreme incertitude of this concept. To overcome the difficult application of cultural defence in Europe, Ruggiu has also proposed the use of the cultural test for the Italian judiciary, an instrument that would help the judges to assess the cultural features of each particular matter.[6] The cultural test seems to attract some interest by Italian judges, yet Federico Basile has also highlighted that cultural defence applies to a very specific set of crimes.[7] Hence, I argue that cultural expertise responds to the need for a broader and encompassing instrument that include but is not limited to cultural defence and cultural test.

My current research indicates that cultural expertise, with or without the appointment of experts is routinely used in Europe, America, and Australia for an increasing range of cases from criminal to civil law, including also labour law, banking law, immigration laws and many others: asylum, entry permits, family reunions, adoptions, transnational business disputes, citizenship, child custody, extradition, deportation, validity of marriage and divorce, customary financial

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[3] F. Strijbosch, ‘Culturele delicten in de Molukse gemeenschap’, *Nederlands Juristenblad* (1991) p. 670.

[4] J. van, Broeck. 2001. "Cultural Defence and Culturally Motivated Crimes (Cultural Offences)." *European Journal of Crime, Criminal Law and Criminal Justice* 9 (1):1-32.

[5] Basile, Fabio. 2011. "Il diritto penale nelle società multiculturali: i reati culturalmente motivati." *Política Criminal: Revista Electrónica Semestral de Políticas Públicas en Materias Penales* (12):.

[6] See for ex. the cultural test in Ruggiu, Ilenia. 2018. *Culture and the judiciary : the anthropologist judge*. London: Routledge.

[7] See Fabio, Basile. 2018. "Ultimissime dalla giurisprudenza in materia di reati culturalmente motivati." *Stato, Chiese e Pluralismo Confessionale*.

transaction, insurance, employers-employee relationships, and many others.[8] Cultural expertise plays a role not only in new forms of cultural diversity but also in what could be termed as autochthone diversity including First Nations and linguistic minorities that enjoy semi-autonomous rights sanctioned by treaties and constitutions. In spite of the fact that cultural expertise belongs to the everyday management of diversity, it started to be acknowledged only recently. This long time socio-legal blindness means there is a need for greater reflection on cultural expertise today in order to assess its explicit and sometimes implicit role in legal proceedings and out-of-court as well.

2. So-called honour killing: the law and the feminist critique

Before delving into the facts of the case *Cassazione Penale 12.11.2009* and the scrutiny of the potential role of cultural expertise, it is also necessary to position the concept of "honour" killing. I will do so by mentioning the international and national legislation that seek to eradicate "honour" killing and the available socio-legal knowledge relevant to the Pakistani context, especially for what concerns the feminist critique.

In accordance with the *Qisas and Diyat Ordinance* 1990, murder is a compoundable crime in Pakistan which means that if the heirs of the victim agree to receive some form of compensation (*diyat*) from the perpetrator, the court can waive the punishment (*qisas*). In five out of the six cases of "honour" killing that I followed in Lahore and provided in-depth qualitative studies on between 2009 and 2013, the parties reached an out-of-court settlement and the accused was acquitted. Warraich argues that in spite of the pressure on courts by human rights organizations, NGOs, and academic scholarship not to consider compensation as automatically waiving punishment "the general presumption both in the courts and in the popular imagination has been that the court's job is over as soon as a compromise is effected."[9] However, in 2013 the Senate passed the *Anti-Honour Killings Laws (Criminal Laws Amendment) Bill* 2015 which aims at preventing the killing of women in the name of honour by making the crime a non-compoundable offence. In October 2016, the *Anti-Honour Killing Laws (Criminal Amendment Bill)* 2015 was eventually passed by parliament. The new law stipulates that individuals found guilty of murder in the name of "honour" will be liable to a life term, i.e. 25 years, even if they are 'forgiven' by the victim's family. However, it must be pointed out that lawyers already foresee that since simple murder is still a compoundable crime, the new law will be easily circumvented by arguing that it was *not* an "honour" killing but rather an "ordinary" murder so that a monetary compensation can still be agreed upon in lieu of punishment.

Sources show that the enactment of the new law against "honour" killing has failed to curb the incidence thereof.[10] Data from the Refugee Documentation Centre (Ireland) show that the number of "honour" killings remains high despite the new law

[8] See Cultural Expertise in Europe: What is it useful for? European Research Council funded project based at the University of Oxford https://www.law.ox.ac.uk/research-and-subject-groups/cultural-expertise-europe-what-useful (consulted on the 13 February 2019).
[9] S. A. Warraich, *"Honour" killing and the Law in Pakistan*, in L. Welchman and S. Hossain (eds.) *'Honour'. Crimes, Paradigms and Violence Against Women*, Karachi: Oxford University Press, 2007, 78-100.
[10] https://www.hrw.org/news/2017/09/25/honor-killings-continue-pakistan-despite-new-law

and describe how difficult it is to effectively enforce change.[11] It is, for example, possible at the early stage of an enquiry for the police to register an "honour" killing as an ordinary murder and in such cases the crime is still compoundable. In addition, the *Qanoon-i-Shahadat* (law of evidence) gives more importance to direct witnesses, who, especially in the case of "honour" killing are often related to the accused or easily influenced by them. Eventually, the decision about the nature of the crime will rest on the judge but according to my research in Pakistan, the prevalent opinion among lawyers is that the majority of "honour" killings do not even reach the courts. It is inferable that to date "honour" related issues are not systematically settled by the state even in spite of the recent reforms.

In 2009, the European Parliament on the request of UN Women adopted Resolution 1861 in which all European countries were requested to make laws against all forms of violence against women, including so-called honour killings. The same resolution also requested to relativize the notion of "honour" in the definition of honour killings and to use the expression "so-called honour killing" instead.

My field observations on "honour" killings in Pakistan indicate that they are very often linked to sexuality, such as out-of-wedlock relationships and non-heterosexual sexuality, but generally speaking they follow any kind of action that brings about a perceived loss of honour: a spouse who is considered unsuitable, or perhaps the involvement of social workers, police and legal authorities for the resolution of family issues. Loss of honour is caused by the disregard of family decisions or challenging male authority within the family (most typically that of a father and uncles, but also that of elder brother/s). The patriarchal framework of arranged marriages expects that children (and especially females) are obedient and conform to the wishes of the elders. After marriage, husband and wife are expected to conform to the directives of the husband's parents, and the wife is expected to conform to her husband's directives. By refusing to follow the instructions of one's own parents, in-laws, and husband, women can be labelled as disobedient or having a "bad character" or being "shameless." To be declared a disobedient woman is often considered a form of dishonour for the family to the point that murder is regarded a potential solution by their fathers or other male relatives.

"Honour" killings, most often but not exclusively against women, is deemed to remove the perpetrator of the offence and restore the social order. The logic of so-called honour killing is so stringent for the perpetrators that even with the passage of time the feeling of shame does not fade away. During my fieldwork study in Pakistan, I observed that the most undervalued pattern in so-called honour crimes is that they often happen at the very time of presumed reconciliations or return to the family home.

The following extract from *Honor Killing* provide texture to what I noted above and points at another factor that is very often undermined by Western courts: even when reconciliation seems to be in progress, the potential victims of so-called honour killing remain at high risk:[12]

[11] https://www.ecoi.net/en/file/local/1419286/4792_1512550734_143158.pdf
[12] A. H. Jafri, *Honor Killing*, Karachi: Oxford University Press, 2008

> On 6 April 1999, twenty-nine-year-old Samia Sarwar was summarily executed in her lawyer's office located in a bustling business centre of Lahore, Pakistan. Samia had reluctantly agreed to a meeting with her mother and her attorney, Hina Jilani. Mrs Sarwar, Samia's mother, a Western trained gynecologist, had brought with her a gunman who accomplished the task without much fuss. Samia's father and her maternal uncle were also accomplices to the murder. In spite of the relentless press attention nobody was arrested. At the time of the murder, Samia's father was the president of his hometown chamber of commerce and a model citizen. Samia was killed because she was alleged to have brought shame to her family and tradition. A mother of two sons, Samia had been seeking a divorce from her husband Imran, a medical doctor, on grounds of alleged domestic violence and his habitual drug abuse. Having failed to get the divorce through family deliberations, she had sought help from lawyers Hina Jilani and Asma Jahangir, sisters and well-known human rights advocates, who also ran a shelter for battered women. It was during the preparation of the legal proceedings by Samia's lawyer for her divorce that the gory drama took place. (pp. 1-2)

Yet, as Jafri himself says an "honour" killing should not be understood in isolation from the wider context of the society in which it occurs. In connection with case of *Cassazione Penale 12.11.2009* I delve here into the particulars concerning "honour" killing in Pakistan and among the Pakistani diasporas. Jafri includes an analysis of the discourse of different agents affecting the phenomenon under study: feminists, social activists, political and religious leaders, and members of the judiciary. As representatives of the hegemonic discourses in Pakistan, he considers all of them an integral part of the subject of his study. Jafri adopts a basic bipolar configuration: on the one side the mythical attitude reinforcing tradition and collectivism, and on the other, the rational attitude supporting universalism and individualism.

A series of features are defined by Jafri: the clear distinction between "honour" killing and the crime of passion, the role of women in actively defying the norms of their society which elicits a violent response from their communities, the notion of agency and disruption which takes a different meaning for educated feminist activists and uneducated women who are the victims of patriarchal oppression, and the rhetoric of political agendas either in favour or against the traditional values supporting the practice of "honour" killing. [13]

The murder of Samia Sarwar, which took place in public and at a "protected" space and in the presence of her lawyer, generated an intense reaction by the public and politicians in Pakistan alike. Jafri analyses the political discourse of Senator Ajmal Khattak, who belongs to the secular Awami National Party (ANP) in reaction to the resolution condemning Samia Sarwar's murder, presented by Senator Iqbal Haider of the Pakistan People Party (PPP). Surprisingly, given his reputation as a progressive leftist and his previous fights against feudal and tribal forces, Khattak pleaded in favour of tradition and for the concept of honour, considered to be central to Pakhtun society. Islam was evocated both by Iqbal and Khattak for opposite purposes, which

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[13] https://www.unikore.it/media/k2/attachments/2._Borile_IL_QUADRO_INTERNAZIONALE_NEI_DELITTI.pdf (consulted on 06 March 2019).
T. Khan, *Beyond Honour*, Karachi: Oxford University Press, 2006, 39-48.
A. S. Zia, *Can Rescue Narratives Save Lives? Honor Killing in Pakistan*, in *Signs: Journal of Women in Culture and Society*, vol. 44, n. 2, Chicago: University of Chicago Press, 2019, 361.

saw the latter's argument eventually winning and thus the resolution failed. According to Jafri, the shifting of loyalties is part of institutional hegemonic discourse whose purpose is political domination therefore unexpected alliances can be nurtured by common advantages.

Jafri underlines the active role of women in the disruption created by their disobedience to ancestral rules. According to Jafri it is important to understand the gravity of disobedience in order to dissipate the frequent explanations that connect "honour" killing to domestic conflicts, feuds and property disputes thereby declassifying them as common or domestic crimes.[14]

For Jafri human right activists in Pakistan represent rational thinking as most of them express condemnation against all explaination of "honour" killings, categorically associate tradition with backward medieval practices, and propose education and robust state intervention for fighting 'honiur' killing. Human rights activists also envisage the spreading of global franchises as cultural stabilizers that will lead to progress and change. For Jafri their strong criticism of the tradition "embodies the missionary zeal of the progressive rational";[15] antithetical to regressive agents represented by some political forces and, in part, by the judiciary.[16] The disconnection between agents of change, feminists and activists, and the reality of the rural context is furthermore underlined by Jafri when he illustrates the notion of "agency" by feminist human right activists and uneducated women. Women rights activists can employ strategies as part of a long-haul program aiming to manipulate power relationships from a defined and stable *locus standi*, while uneducated women, in absence of a proper *locus standi* are limited to tactics that provide short-term relief.[17] However, for Jafri, there can be hope in the disfranchised women's tactics because they can provide from inside the context of their oppression elements of disruption to their local hegemonic context. He quotes an oral poem told by a 14-year-old girl from Sindh, who expresses her feelings of fears equally shared by other women in the rural contest who may face the risk of being declared *kari* or blackened for having committed a sin (from Urdu black) and subsequently murdered. It represents for Jafri an example of the tactical feminism according to which women can address and challenge the hegemonic discourse of the community in which they live.[18]

Whilst Jafri's analysis might be optimistic, it nevertheless remains much more articulate than the so-called rescue narrative, which developed in the wake of political and ideological changes affected by the events of 9/11. The neo-liberal "War on Terror" agenda started to plead for the need to literally rescue Islamic women whose rights were supposedly ignored in areas of the world associated with terrorism and militancy. In this connection, liberal feminists, who supported international pressure and an interventionist agenda, have been accused of co-optability, or "hitchability" with neoconservative projects.[19] Spivak's earlier cautions against white colonialist

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[14] A. H. Jafri, *Honor Killing*, Karachi: Oxford University Press, 2008, 94.
[15] A. H. Jafri, *Honor Killing*, Karachi: Oxford University Press, 2008, 97.
[16] A. H. Jafri, *Honor Killing*, Karachi: Oxford University Press, 2008, 94-99.
[17] A. H. Jafri, *Honor Killing*, Karachi: Oxford University Press, 2008, 99-102.
[18] A. H. Jafri, *Honor Killing*, Karachi: Oxford University Press, 2008, 117-119.
[19] A. S. Zia, *Can Rescue Narratives Save Lives? Honor Killing in Pakistan*, in *Signs: Journal of Women in Culture and Society*, vol. 44, n. 2, Chicago: University of Chicago Press, 2019, 357.

attempts at "saving brown women from brown men" have been resurrected in order to objectify the use of this rescue narrative.[20]

The rescue narrative has by now been overcome by transnational feminism, according to which "honour" killing and violence against women in Pakistan and Afghanistan should be read as the consequence of Cold War policies of intervention in the region.[21] Consequently the responsibility has shifted from the cultural context to the much wider geopolitical arena. Similarly the association between terrorism and "honour" killing has been strenuously fought against by Abu Abu-Lughod and other social scientists who prepared an *amicus curiae* brief for the Supreme Court of the United States stressing that the use in court of the expression '"honour" killing negatively connotes Muslims as violent and uncivilised and that there is no link between "honour" killings and terrorism.[22]

Transnational feminists contrast the liberal feminist universalist discourse, which focuses on the violence perpetuated in the name of patriarchal ideology, because liberal feminism ignores instances of local agency and resistance both from the grassroots and at the level of feminist activists. Liberal feminism severs the link between women and their context of origin by relocating them into an abstract international realm. It ignores furthermore the political agenda of the state that fails to protect women,[23] and enforces a reified and essentialist view of culture whose role is to fill the gap between the laws protecting women and the state's inability to enforce them. Thus the role of the state is minimised and specific crimes are routinely attributed to cultural practices thereby ignoring the role of the state in possibly perpetuating the social framework that condones "honour" killing.

The intersection between politics and gender is explored by Vishweshwaran who analyses violence against women and asylum cases. She argues that in asylum cases in the United States the gender persecution argument is comparatively stronger than the political persecution one. She argues that, despite hard evidence, Western surrogate states that grant protection to women suffering violence often experience similar problems of violence against women whose invisibility is the counterpart of the culturally constructed violence against women in the Third World.[24] We will see later that Gioni reaches a similar conclusion on the reinforcement of the ideological stereotypes by the media in Italy, which emphasize the crimes committed by migrants.[25]

Similarly to the methodological opposition posited by Jafri between mythical and rational attitudes, Zia criticizes the opposition between Muslim feminists, ready to assign culpability to the most visible actors in tradition and patriarchal oppression,[26] and the transnational feminists denouncing the unholy alliance between liberal

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[20] A. S. Zia, *Can Rescue Narratives Save Lives? Honor Killing in Pakistan*, in *Signs: Journal of Women in Culture and Society*, vol. 44, n. 2, Chicago: University of Chicago Press, 2019, 356.

[21] A. S. Zia, *Can Rescue Narratives Save Lives? Honor Killing in Pakistan*, in *Signs: Journal of Women in Culture and Society*, vol. 44, n. 2, Chicago: University of Chicago Press, 2019, 356

[22] https://www.scotusblog.com/wp-content/uploads/2017/09/16_1436_16_1540_bsac_Social_Science_Scholars.pdf

[23] K. Visweswaran, *Un/common cultures: racism and the rearticulation of cultural difference*, Durham: Duke University Press, 2010, 189-190.

[24] K. Visweswaran, *Un/common cultures: racism and the rearticulation of cultural difference*, Durham: Duke University Press, 2010, 202-203.

[25] E. Giomi, *Neppure con un fiore? La violenza sulle donne nei media italiani*, in *Il Mulino*, 2010, n. 452, vol.6, 1002.

[26] A. S. Zia, *Can Rescue Narratives Save Lives? Honor Killing in Pakistan*, in *Signs: Journal of Women in Culture and Society*, vol. 44, n. 2, Chicago: University of Chicago Press, 2019, 359.

feminism and the neo-liberal agenda. She acknowledges the responsibility of cultural norms but highlights the practical uselessness of the constant criticism by Muslim feminist activism. Zia says that change is needed to provide a practical albeit temporary solution to the problem of "honour" killing.

Transnational feminism considers the notion "honour" killing as the product of agencies that are always beyond the local context. This amounts to obscuring two fundamental positions: the perspective of the perpetrators, who perceive the outcome of their violent acts as restorative justice and the importance of the sexual agency demonstrated by most of the victims when infringing the set code of conduct of their community. In stressing these two key positions, Zia rejoins Jafri on the centrality of women's agency and dissociates from the scholarship on "honour" killing, which denies any substantial juridical value to traditional jurisdictions.[27]

As an alternative to the transnational feminist interpretation and to the Muslim feminist critical view of local forms of resistance, Zia suggests that, if the aim is to save lives without withdrawing women from the context of their own everyday lives, a middle ground between rule of law and customary law can be defined. The empirical alternative found by Zia in Sindh requires to temporarily suspend the conventional approach of international universal rights. These women voluntarily transgressed fundamental local social norms but their own protection need to accept the local hierarchy and dynamic of power, which is a male prerogative.[28]

Zia extensively reports on an interview conducted with Nadir Magsi, a prominent landowner in Sindh, who is educated and abhors the conditions of women and the violence that they suffer. He uses his traditional position of influence to protect them. As far as they are in his property, they are safe from violence. This also gives him some time to mediate with the family and eventually to arrange a marriage which will end the immediate risk of them facing death as punishment. In doing so, Magsi is often confronted with both state law and customary law, whose praxes are in conflict with his own ways of providing solutions. Magsi says that other landlords offer refuge and provide mediation for re-marriage to women at risk of "honour" killing but they do not always act in the best interest of the women.

Zia's description of Magsi is framed within a theoretical underpinning that focuses primarily on culture: "Feminist advocacy on honor killings in Muslim contexts such as Pakistan has not benefited in any practical manner from the efforts to deculturalize such forms of violence against women."[29] While not claiming that Magsi Nadir's commitment to protect women will provide a solution to "honour" killing in Pakistan, Zia attests to the "interruptive value" of Magsi's actions for positively affecting the lives of women in Sindh. Even if not directly emanating from women, Magsi's activities are a non-repressive traditional answer to women who dared to challenge and disrupt the customary norms that made their lives unbearable.

3. Facts, culture, and law

[27] T. Khan, *Beyond Honour*, Karachi: Oxford University Press, 2006, 225-252.

[28] A. S. Zia, *Can Rescue Narratives Save Lives? Honor Killing in Pakistan*, in *Signs: Journal of Women in Culture and Society*, vol. 44, n. 2, Chicago: University of Chicago Press, 2019, 368 and seq.

[29] A. S. Zia, *Can Rescue Narratives Save Lives? Honor Killing in Pakistan*, in *Signs: Journal of Women in Culture and Society*, vol. 44, n. 2, Chicago: University of Chicago Press, 2019, 359.

In the summer of 2006, a young woman of Pakistani origin was killed in Brescia by her father and two brothers-in-law because she lived with her partner and had a lifestyle that her family considered too liberal. The defence lawyer requested the mitigating circumstances due to the cultural background of the accused. However, the court explicitly rejected the lawyer's cultural arguments and eventually both the father of the young woman and her brothers-in-law were convicted to 30 years in prison for murder aggravated by premeditation and *motivi abietti*, or abject reasons.

The facts attracted considerable media coverage in Italy and since then have been analysed in detail by Italian scholarship, especially with regard to patriarchy. The public debate focused on the role of the culture and religion of the accused. Among the commentators and bloggers some wondered if, because the murder was associated with religious and cultural motivations that some degree of leniency may have been granted as, in some cases, this was shown by Italian judges in the past who accepted that such motivations could have played a role in the execution of a crime.[30] For the vast majority, the religious and cultural reasons underlying the murder of the young woman were to be considered as aggravating circumstances. Both arguments took for granted the link between the culture and religion of the accused and the murder.

However, feminists remain silent. Ida Dominijanni, a journalist for the leftist newspaper *Il Manifesto*, in her 2006 article entitled "Patriarcati Trasversali" (Transversal Patriarchies) argued that the crime had to be understood as an expression of patriarchal ideology, which has little to do with culture and religion.[31] She maintained that this murder was not very different from the frequent episodes of violence against women in Italy. She justified abstaining to engage in a polarised debate for or against cultural diversity and promoted instead greater awareness about the "home-grown" forms of abuse towards women. She concluded her article by stating that women are at risk of being used as *peons* in a politically ideological game both in the name of right-wing hostility against diversity and of a leftist agenda for the protection of the cultural rights of minorities.

Indeed, Daniela Santachè, a member of parliament of the right wing party Alleanza Nazionale, (National Alliance), noticing that the feminists had not expressed an explicit condemnation of the murder criticised their silence.[32] Furthermore, she officially attended the funeral of the victim and later represented the Association od Muslim Women in a civil action against her father and brothers at trial. Gioni describes how such political statements do nothing other than conceal and perpetuate patriarchal ideology, which is the background to the murder of many women within the majority group context in Italy.[33] It is evident that the press, by selectively covering cases of women killed by migrants or among migrant communities, intend to divert the attention of the public away from the frequent violence against women found across all groups in Italian society.[34] The silence by Italian feminists did not go unnoticed by the scrutiny of media abroad. For instance, John Hooper in *The Guardian* commented how the void created by the paralysis of the intellectual left was

[30] https://www.loccidentale.it/articoli/86512/hina-i-giudici-negano-le-attenuanti-religiose-e-per-una-volta-fanno-bene

[31] http://www.libreriadelledonne.it/patriarcati-trasversali/(consulted on the 6 March 2019).

[32] http://www.bsnews.it/2007/05/17/hina-processo-arriva-la-santanche-an/?refresh_ce (consulted on the 6 March 2019).

[33] E. Giomi, *Neppure con un fiore? La violenza sulle donne nei media italiani*, in *Il Mulino*, 2010, n. 452, vol.6, 1002.

[34] E. Giomi, *Neppure con un fiore? La violenza sulle donne nei media italiani*, in *Il Mulino*, 2010, n. 452, vol.6, 1006.

filled by the right-wing parliamentarian Santachè whose active participation was praised by the Association for Moroccan Women in Italy (ACMID).[35]

However, among the jurists the decision of the judge was interpreted as taking distance from culture and religion and the arguments of the abject motives have been positively received. In her study on the relevance in the Italian penal system of cultural motivation, Maria Pina di Blasio describes the judge's decision as congruent with the principle of Italy's constitution and law. She furthermore stresses that the verdict harmonises with recent juridical trends, which purposefully ignore cultural and religious arguments requesting mitigating circumstances.[36] Among the very few exceptions in a 2009 essay, Gerardo Milani sets the Brescian case within the historical framework of "honour" killing in Pakistan by concluding that given the cultural background of the accused, the cultural defense in asking for mitigating circumstances has a sense even if it was unacceptable under Italian law.[37]

Di Blasio notes cases confirming the orientation of Italian judges in brushing aside cultural or religious motivations and extensively comments on the case of an Italian waiter from Sardinia who was found guilty of violence against his partner but was granted some mitigating circumstances by a Buckeburg law court in 2007. The waiter, charged with violence towards his partner, obtained a reduction of his sentence for cultural reasons as the judge accepted that his behaviour might to be understood in relation with his ethnic origins. Di Blasio argues that the judge was culturally unprepared to evaluate the Sardinian context and says that Sardinia was the homeland of Eleonora d'Arborea, a lady judge who at the end of the 13th century adopted the Chart of Logu, the first European Code acknowledging women's rights.[38]

The Brescian case was also mentioned in a 2010 law proposal for introducing cultural and religious motivations as aggravating circumstances.[39] While hailing the decision of the magistrate for ignoring any cultural motivation in the Brescian case, MP Souad Sbai criticised the leniency shown in another case involving an individual of Algerian origin. In that case, the Trieste Court of Appeal accepted that the accused was incapacitated by the conflict between his Islamic radical beliefs and Western behavioural models. In that decision, biological determinations and cultural motivations conflated into the concept of *vulnerabilità genetica* (genetic vulnerability). The judges acknowledged the influence of this factor, which had increased the risk of a culturally-modelled criminal behaviour, and granted a one-year reduction of the prison sentence. The arguments of MP Sbai against the leniency of the courts in connection with cultural motivations relied on the rejection of the notion of cultural defence as exogenous to the Italian system and also acting in favour of patriarchal attitudes. Hence, she proposed to limit the judges's discretionary power in applying mitigating circumstances for cultural and religious reasons.[40]

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[35] https://www.theguardian.com/commentisfree/2007/mar/12/shallowgraveshallowconvicti (consulted on the 6 March 2019).
[36] http://www.giurisprudenzapenale.com/wp-content/uploads/2016/04/Scarica-il-contributo-2.pdf (consulted on the 6 March 2019).
[37] http://www.psicologiagiuridica.com/pub/docs/2009/numero%20X%20rivista/tesi%20Milani.pdf (consulted on the 6 March 2019).
[38] http://www.giurisprudenzapenale.com/wp-content/uploads/2016/04/Scarica-il-contributo-2.pdf (consulted on the 6 March 2019).
[39] http://www.camera.it/_dati/leg16/lavori/schedela/apriTelecomando.asp?codice=16PDL0035540 (consulted on the 6 March 2019).
[40] http://www.camera.it/_dati/leg16/lavori/schedela/apriTelecomando.asp?codice=16PDL0035540 (consulted on the 6 March 2019).

The position of Italian legal scholars can be summarized with a statement by Antonella Massaro, researcher at the faculty of law at the University of Rome, who declared that culture and religion should affect the judge's decision only if the crime is minor. Hence murder cannot attract any mitigating circumstances for religious and cultural reasons.[41] Such a position of a priori distance from culture and religion in Italy shows on the one hand a formal commitment of the Italian judiciary against gender-based violence; while, on the other it implicitly supports the idea that anthropological or cultural knowledge can lead to the granting of mitigating circumstances to the accused. As a consequence, judges in Italy have tended to show a purposeful indifference towards cultural diversity.[42]

The uneasiness of the judiciary's position on the challenges of multiculturalism reflects the incertitude of legal systems at a global level torn between the perpetuation of territorial sovereignty and the increasing inability of the state to ensure rule of law.[43] Ilenia Ruggiu, in her book entitled *Il giudice antropologo* (The judge anthropologist) asks whether culture had a role in the decision making of the Brescia "honour" killing.[44] She goes even further and asks whether culture should have played a role in the decision making, and if yes, why it did not play a part. Ruggiu supposes that the judge may have feared the reaction of the Pakistani community and the unbecoming remembrance of the *delitto passionale* (i.e. crime of passion) of the 1930 Italian Penal Code (referred to as the Rocco Code). The latter's art. 581, until 1981 provided for a prison sentence between three and seven years for an "honour" killing committed in the altered state of anger generated by the discovery of an "illegitimate carnal relation", i.e. out-of-wedlock sexual intercourse.

Ruggiu's hypothesis of disregard for the potential role of culture is confirmed by the fact that no cultural experts were appointed. This is however not surprising considering the uncertainty surrounding the role of culture and the potential role of cultural expertise in Italy[45] (Ciccozzi and Decarli 2019). In fact, a closer reading of the verdict shows the struggle of the judge, who on the one hand clearly wants to take distance from the other types of cultural defence requesting mitigating circumstances, while on the other cannot avoid recognizing that " … in the evaluation of the abject reasons the judge must take into consideration the subjective reasons of the action such as the cultural, national, and religious referents and the motifs of the criminal action." The verdict, however, at this point avoids offering any consideration regarding "honour" killing in Pakistan and instead turns to an examination of the parental relationship between the victim and her father. "But" - the judge continues -, "the action of the accused was not determined by cultural tenets, it was instead instigated by a distorted and pathological parental relationship which did not tolerate any disobedience." In other words, the judge took for granted that the evaluation of abject reasons on the basis of an assessment of the cultural, national, and religious background of the accused would have necessarily lead to mitigating circumstances.

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[41] http://www.poliziaedemocrazia.it/live/index.php?domain=ricerca&action=articolo&idArticolo=2935 (consulted on the 6 March 2019).
[42] http://www.aracneeditrice.it/pdf/9788854855731.pdf (consulted on the 6 March 2019).
[43] Mattei and Nader
[44] I. Ruggiu, *Il giudice antropologo*, Milan: Franco Angeli, 2012.
[45] G. Decarli, A. Ciccozzi, *Cultural expertise in Italian courts - contexts, cases and issues* in L. Holden (ed.), *Cultural Expertise in Socio-Legal Studies*, Studies in Law, Politics, and Society Series, Bingley: Emerald Publishing, 2019.

In order to steer away from this risk, the judge prefers to engage in a seemingly culture-free assessment of the parental relationship between the victim and the perpetrator without realising that this too is affected by culture. Such a cursory assessment of culture was perhaps satisfactory for that particular judgement in Italy because, as Ruggiu seems to suggest, it might have conjured at that time the resentment of the Pakistani community while handing a punishment that was considered to be just by the majority. Yet, in my view, this judgement is at the same time fraught with the very risks that it might have wanted to avoid. I proceed now to consider how a cultural expert might have been requested to contribute.

3.1. What role for cultural expertise?

According to a general principle in most common law countries, the expert might be requested to provide information on foreign law and on its implementation. In civil law countries, according to my preliminary research and sources, the judge tends instead to think that foreign law is irrelevant, except for international private law. Hence, the cassation court did not act exceptionally when it directly engaged in socio-legal considerations that may have benefited from expert knowledge of foreign laws and of the socio-legal background of the facts.

What kind of information would the judge and the defence lawyer request from an expert if they were to appoint one? On the basis of the plea of the lawyer and the reasoning of the verdict, two sets of information may have been requested: societal perceptions as well as expectations concerning "honour" killing in Pakistan, and the law concerning "honour" killing including its implementation in light of the socio-legal setting in Pakistan. Although expert reports vary significantly in style and format, the appointment of an expert could have provided the court with a more textured version of perceptions of "honour" killing in the Pakistani socio-legal environment. Hereafter, I sketch a few potential sets of information touching both on the societal perceptions of 'honour killing" and on the relevant law in Pakistan.

A good expert report would have conveyed the socio-legal background of "honour" killing whose inexcusable logics are without doubts linked with the patriarchal tenets of South Asian societies, yet are at the same time repulsive to the majority and punishable by law. A cultural expert would have made clear that the concept of "honour" killing might be perceived as having an inherent logic in the likelihood of social punishment as a reaction to the loss of honour caused by the immoral conduct of one's own daughter.

Cultural expertise would make also clear that there is no room, according to Pakistani law, for mitigating circumstances in connection with "honour" killing even at the time of the Brescia murder in 2006, which preceded the adoption of the *Anti-Honour Killings Laws (Criminal Laws Amendment) Bill* 2015. In fact the adoption of this law is itself an indicator of the social awareness of "honour" killing as a problem and the relative willingness to eradicate it. A good expert would have not shied away from mentioning the similarity between the concept of "honour" killing and *delitto*

passionale (i.e. crime of passion), which provided for mitigating circumstances in Italy until 1981. This would have had the effect of avoiding the allusions of the judge to assume cultural, religious, and national referents as supposedly condoning "honour" killing in Pakistan. Instead the judge, either not knowing that an "honour" killing was punished as any other murder according to Pakistani law, or assuming that it would attract mitigating circumstances in Pakistan, engages in a reasoning, which struggles to distance itself from a stereotyped vision of Pakistani society.

One thing is certain in this verdict: the effort of the judge to reject the reified cultural interpretation of the defence that pleaded for mitigating circumstances on the basis of the supposed cultural background of the perpetrator that would condone "honour" killing. However, this is not the object of my criticism. On the contrary, I argue here that the judge was particularly skilful in avoiding this "cultural trap." However, because of the lack of adequate cultural expertise the reasoning of the verdict confirmed the stereotyped version of the defence, which stigmatises the entire Pakistani community in Italy. In other words, I suggest that an expert report could have made the judge's work easier by showing that not very differently from Italian society, Pakistani society recognises an "honour" killing as a likely reaction to the loss of honour within a patriarchal setting; moreover, it largely fights against these types of crimes in legal settings. If the judge was aware of the aforementioned, perhaps the verdict would have not necessarily engaged in reasoning that carries the risk of stereotyping and stigmatization.

3.2. Anthropology of human rights, the risk of reification of culture, and strategic essentialism

The reluctance and perhaps the fear of engaging in reasoning including in the scrutiny of cultural arguments by the judge deciding the Brescian "honour" killing, confirms on the one hand the doubts and concerns regarding the usefulness and appropriateness of cultural expertise in court and on the other, the fact that existing conceptual tools do not allow for an adequate treatment of cultural arguments in court. In the socio-legal sciences this reluctance is connected both with the history of the difficult relationship between human rights and anthropology and with the criticism against the notion of culture as potentially stigmatizing entire social groups. This is not the place for an in-depth treatment of these important debates. However, a short survey is useful in order to progress toward my conclusion on the potential benefit of cultural expertise in the Brescian "honour" killing.

The Declaration of Human Rights proposed by UNESCO in 1947 was met with refusal by anthropologist Melville J. Herskowitz, who rejected the declaration on three grounds: 1) the multiplicity of moral systems is such that any statement of rights is forcefully prescriptive while anthropology is a descriptive discipline; 2) the status of science describing empirically social and biological processes cannot be associated to a project requiring normative judgements to be made on a specific culture in relation to pre-defined criteria; 3) as a program, the Universal Declaration of Human Rights imposes an agenda reflecting the will "to reshape the word in line with some

preferred standards".[46] Herskowitz's statement was adopted by the American Anthropological Association (AAA)'s executive board in 1947.

For the following 30 years the engagement of anthropologists with human rights was sporadic, occasional and based on specific and individual research trajectories; nevertheless, with the passage of time anthropologists have contributed in varied ways to human rights. Forensic and biological anthropologists have privileged the restitution of remains to native relatives over scientific investigation.[47] Anthropologists spoke out against the human rights abuses of political dictators in Africa and Latin America but also about the complicity of US and European aid.[48]

In particular, for what concerns the right to self-determination, anthropologists have elucidated the ideologies and the dynamics of elite culture that marginalize and abuse indigenous people.[49] Anthropologists contributed to UN discussions about genocide and discrimination against women and it was exactly through the expansion of the human rights formulation that the principle of the interdependence and indivisibility of civil-political and economic social-cultural rights gained significance. In so doing, anthropologists have definitively confronted the limits of cultural relativism without shying away from scrutinizing their own discipline. In many anthropological reports of the 1980s, anthropologists have denounced the elitist cultural ideologies that rationalise brutality in the name of cultural survival. Today anthropologists often carry out field studies that strive to combine an in-depth understanding of contexts of abuse and violence together with plans of social change grounded on a global sense of social responsibility.

Two recent developments show how anthropology was able to reframe its role in relation to human rights: 1) as a consequence of the acknowledgement of the power-knowledge nexus, the anthropologist should put into practice their knowledge to help the group under study; 2) the relationship between culture and rights can constitute a field of research for the scrutiny of the social practice of human rights.[50] Most of the criticism focuses on the central role that the notion of culture as a reified object occupies in anthropology and the cultural relativist approach of anthropologists. This criticism mainly emanates from sister disciplines such as human rights, cultural studies, feminist studies, subaltern studies, and gender studies, which are in a dynamic relationship of provisional alliance, conflict, and competition with anthropology.

Visweswaran warns against the risk of the displacement of the notion of "race," dating back to the establishment of Boas's culturalist paradigm, to the field of biology

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[46] M. Goodale, *Introduction to "Anthropology and Human Rights in a New Key"*, in *American Anthropologist* Vol. 108, Issue 1, 2006, 2.

[47] M. Goodale, *Introduction to "Anthropology and Human Rights in a New Key"*, in *American Anthropologist* Vol. 108, Issue 1, 2006, 2.

[48] J. Clay, *Politics and the Ethiopian famine 1984-1985*, Cambridge Mass: Cultural Survival,1986.

D. Mosse, *Adventures in Aidland: the anthropology of professional international development*, New York: Berghahn Books, 2011.

[49] M. Diskin, *Ethnic Discourse and the challenge to anthropology: The Nicaraguan case*, in G. Urban and J. Sherezer (eds.) *Nation-States and the Indigenous Indians in Latin America*, Austin: University of Texas Press, 1991.

C. Smith, *Development and the State Issues for anthropologists*, in E. Moran (ed.), *Transforming Society, Transforming Anthropology*, Ann Arbor: University of Michigan Press, 1996.

[50] M. Goodale, *Introduction to "Anthropology and Human Rights in a New Key"*, in *American Anthropologist* Vol. 108, Issue 1, 2006.

and substituting it with a similarly deterministic concept of "culture".[51] Yet the author also scrutinizes the indiscriminate application of human rights in order to pursue political agendas that, in spite of being progressivist, do not necessarily benefit the very individuals that they should protect. The unintended result of such an application of positive law is, according to Visweswaran, nothing other than another mode of subjectification, or the stigmatization of vulnerable groups.[52]

Feminist scholarship has also formulated the approach of strategic essentialism which promises the beneficial use of a reified notion of culture. Gayatri Spivak suggests that the definition of ethnic groups with the use of preferential and generalised components such as "all Europeans are …", whilst being problematic from a scientific perspective, can be used to politically counterbalance unequal power relations and eventually help vulnerable groups. This is an example of how even the reification of culture which has figured among the most prominent criticisms against cultural relativism, can be transformed into an active agent of social change.

In fact, far from playing an acquiescent role, anthropology re-claims today a central role vis-à-vis international human rights, on the one hand in analysing how international human rights fulfil their mission and on the other for the commitment of anthropologists to progressive law making and expert witnessing in legal proceedings (Goodale 2006, Good and Merry, 2017 and Holden 2011 and 2019a).

4. Conclusions: cultural expertise as an antidote to judicial populism

Section 1 of this article shows that the concept of cultural expertise is an emergent one and lesser known than that of cultural defence; however, because it is broader than cultural defence it encompasses all the variety of uses of cultural arguments made in conflict resolutions with or without the appointment of an expert. Hence a slight reformulation of the concept of cultural expertise is proposed here as special socio-legal knowledge which allows for a description of the background of the facts in light of the particular context of the claimants and litigants and for the use of the decision-making authority. On the basis of this definition one could argue that the judge in the Brescian case responded to the cultural defence of the lawyer by engaging directly in cultural expertise. However, as we have seen, this direct engagement, whilst laudable per se, is fraught with dangers, which Cassazione Penale 12.11.2009 only partially eluded. In fact the judge did not give in to the stereotyped cultural defence proposed by the defence lawyer. However, the judge did not elude the unconscious valorisation of populist representations of culture for which minorities are often stigmatized as backward and violent.

Section 2 of this article shows that a simplistic opposition between backward and modern reverberates as a constant throughout the socio-legal scholarship on "honour" killing. This binary opposition is nuanced and reformulated according to new paradigms such as the transnational criticism of Western dominance or human rights activism but remains as an underlying trope in the literature on "honour" killing. Hence the instance for clear distinction between crimes of passion and "honour" killing, which clarifies the formal and ideological specificity of the two but it also

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[51] K. Visweswaran, *Un/common cultures: racism and the rearticulation of cultural difference*, Durham: Duke University Press, 2010.

[52] K. Visweswaran, *Un/common cultures: racism and the rearticulation of cultural difference*, Durham: Duke University Press, 2010.

denotes a clear divide between societies that follow patriarchal dictates and others that supposedly align themselves with modern standards. I share the feminist critical standpoint vis-à-vis violence against women and do not have much to add to what has been already said by the said scholarship concerning the need for a thorough scrutiny of male-oriented societies, including the Italian one, that are complacent of violence against women.

Section 3 shows that the judge in *Cassazione Penale 12.11.2009* was in fact skilful in avoiding the cultural trap set by the defence lawyer but did not have the instruments to adequately engage with cultural expertise. To date we do not have yet systematically collected data on the use and impact of cultural expertise even though the Italian legal system provides for the appointment of cultural experts in the format of *consulenza* e *perizia*.[53] Yet, EURO-EXPERT is collecting case law and distributing and online survey to the legal profession, cultural experts, and beneficiaries of cultural expertise in fourteen European countries, including Italy.[54] We are not yet in the position to say with any certitude what may have changed had the judge in the Brescian case appointed an expert. However, echoing also Basile and Ruggiu, it seems possible to suggest that adequate cultural expertise may support a reasoning that does not perpetuate the stereotyped perceptions of migrants and minorities as backward and inherently violent. In other words, in the current socio-political scenario, in which the judiciary is pressured to settle new conflicts generated within *de facto* multicultural Europe, cultural expertise might help in eluding the dangers of judicial populism.[55]

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[53] See G. Decarli, A. Ciccozzi, *Cultural expertise in Italian courts - contexts, cases and issues* in L. Holden (ed.), *Cultural Expertise in Socio-Legal Studies*, Studies in Law, Politics, and Society Series, Bingley: Emerald Publishing, 2019 and F., Basile. 2018. "Ultimissime dalla giurisprudenza in materia di reati culturalmente motivati." *Stato, Chiese e Pluralismo Confessionale*.

[54] https://www.law.ox.ac.uk/research-and-subject-groups/cultural-expertise-europe-what-useful (consulted on the 13 February 2019).

[55] See also L. Holden, "La cultural expertise contro il rischio del populismo giudiziario." XXII Congresso Nazionale Magistratura democratica, http://www.magistraturademocratica.it/congresso/2019/intervento-livia-holden (consulted on the 30 April 2019).