

ASSESSING THE NEED FOR CULTURAL EXPERTISE IN CIVIL PROCEEDINGS: FROM COURT'S DISCRETION TO THE DUTY TO SUPPLEMENT THE JUDGE'S EXTRA-LEGAL KNOWLEDGE

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ABSTRACT: In recent years, the topic of expert evidence, usually dealt with having hard sciences in mind, has been enriched with a new profile, as the increasing frequency of multicultural proceedings has prompted the debate about the so-called cultural expertise. Obstacles to the use of this type of knowledge, however, result from a certain distrust in the usefulness of soft sciences for the judge and, more generally, from the strong discretion s/he has in deciding whether to admit expert evidence. Both factors will be critically discussed in the present paper.

KEYWORDS: hard sciences; soft sciences; multicultural proceedings; cultural expertise; intellectual due process; procedural due process; cultural test.

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1. INTRODUCTION: CULTURAL EXPERTISE AND THE CONTESTED USE OF SOFT SCIENCES IN COURT

The use of science in Court proceedings and the relationship between the judge and the expert are widely cultivated topics, and scholars have always adopted a comparative approach to them: one only has to think of the resonance that *Frye v. United States* and *Daubert v. Merrell Dow Pharmaceuticals* had in Europe.

Discussion on the subject, however, is often—albeit implicitly—referred to hard sciences. It is true that, sometimes, Courts indulge in extra-legal arguments, even drawing from soft science: again to recall a well-known US example, consider *Brown v. Board of Education*, where the U.S. Supreme Court, in overturning *Plessy v. Ferguson* and dismissing the doctrine of ‘separate but equal’ in public education, has also based the overcoming of the precedent on the progress of psychological and anthropological knowledge, which ended up showing how racial segregation is detrimental to the personality development of black children. But, given that in that specific case such a reference¹ seems more due to a desire not to frontally contradict previous statements on the legal level², it remains true that «[i]t 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»³.

This is especially true with reference to continental European countries: here, Judiciary’s sceptical attitude has long been coupled with the lack of interest of the doctrine, which is less accustomed to socio-legal studies, and has long neglected the issue of the relevance of the cultural factor in Court proceedings, unlike in the US⁴. Furthermore, it must be acknowledged that even within the American debate there is resistance to this phenomenon, and

¹ As it is well known, the Court even provided a footnote reference to the writings several social scientists in order to justify the assertion that the harm of segregation was «amply supported by modern authority».

² This does not mean that anthropology’s role in overcoming racial segregation was irrelevant: as Rosen (1977), p. 560, points out, recalling *Sweatt v. Pointer*, a case that Supreme Court was called on to decide four years before the Brown decision, the expert testimony rendered by one of the leading anthropologists of the day, Robert Redfield, «was an early and important basis for the contention that no rational foundation for segregation could be found in the social science literature». In that case, «the Supreme Court avoided the implication of Redfield’s argument—that separate education is inherently unequal—and simply found that the facilities provided by the segregated law schools of Texas were not, in fact, equivalent [...]. But Redfield’s testimony was also read into the record of *Briggs v. Elliott*, a South Carolina case which was joined before the Supreme Court with *Brown* and several other cases, and to which Marshall made frequent reference in his briefs and oral argument. By then, a considerable number of social scientists—most notably the psychologist Kenneth B. Clark—had testified in the various desegregation cases, and a number of scholars, Redfield among them, were signatories to the statement by social scientists that formed an Appendix to Appellant’s Briefs».

³ Micheline (2021), p. 71.

⁴ There, some early reflections, however significantly spaced out in time, have been made by Clark (1953) and Rosen (1977).

the reasons usually given (namely, the supposed ontological epistemological difference that would characterise legal and anthropological reasoning and the fear that the cultural argument would be used strategically) show such a general character that they can also influence the debate elsewhere.

However, the situation in Europe has been changing recently: on the one hand, national legislators, often prompted by international conventions and/or external supranational bodies, are more and more aware of the need to deal with multiculturalism's consequences. Also due to the massive migration phenomena in recent years, not only foreign parties are more and more often involved in civil, labour, family or criminal trials, but asylum and international protection proceedings are multiplying⁵; and this, in turn, results in an increasing need for judges to deal with diversity. It is therefore not surprising that doctrine has also begun to show greater interest in the problem: the reference is mainly, but not only, to Livia Holden's scientific initiative⁶ in promoting studies about the so-called cultural expertise, that is «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»⁷. Scientific publications on the subject, by scholars from the most diverse states, are thus multiplying⁸; and this has allowed a number of problematic profiles to emerge, often common to those relating to expertise in general (and, in particular, the idea that the judge should play a gatekeeper role to the introduction of scientific knowledge into Court proceedings and his claimed wide discretion in evaluating the admissibility of expertise), but aggravated—precisely—by the abovementioned Courts' resistance to the use of soft science. This sceptical attitude means that the judge called upon to resolve a multicultural conflict often does not feel the need to have recourse to an expert, but deems, rather, that s/he can rely on common sense, general knowledge or his own knowledge, if any⁹.

To take some examples from Italian case law, doctrine has already pointed out that requests for international protection are often dismissed because the

⁵ As it is well known, asylum is a fundamental right under art. 14 Universal Declaration of Human Rights 1948, and a duty for signatory States of the 1951 Geneva Convention on the protection of refugees.

As to the EU, a number of measures have been prepared after the establishment of the Common European Asylum System (in 1999), partly as a result of the huge increase in migration flows since 2015; most recently, in 2020, the Commission adopted a New Pact on Migration and Asylum.

⁶ See Holden (2011), Holden (2019) and Holden (2023). Livia Holden led the European Research Council's funded project *Cultural Expertise in Europe: What is it useful for?* (EURO-EXPERT) and *CULTEXP Proof of Concept*; she has promoted and edited many publications collecting contributions from practical and theoretical jurists of different nationalities: this testifies to the generality of the phenomenon, albeit different in intensity, even before in the degree of its normative or jurisprudential reception.

⁷ Holden (2011), p. 2.

⁸ Also see the contributions published in a themed section of the *International Journal of Law in Context*: Foblets (2016), pp. 231 ff.; Bens (2016), pp. 235 ff.; Hoehne (2016), pp. 253 ff.; Vetter & Foblets (2016), pp. 272 ff.; Zenker (2016), pp. 293 ff.

⁹ Ruggiu (2017), p. 228.

applicant's story is simply deemed not credible, without really investigating the importance that beliefs about, for instance, witchcraft¹⁰ or vampires¹¹ actually have in his or her system of origin (and thus rejecting the use of cultural expertise or in any case ignoring expert opinion, sometimes on the express assumption that the concepts involved are not really complex)¹².

However, it is not necessary to go so far as to mention cases concerning concepts so distant from Western culture to demonstrate the reluctance Courts often show towards social sciences. Indeed, although Livia Holden's definition seems to imply that at least one of the parties' background is different from the judge's one, this is true in the majority of cases where the need to have recourse to the cultural expert arises, but not in all. By contrast, the integration of extra-legal notions in order to understand parties' behaviour may prove necessary even in cases in which both (or all) of them share the same judge's background: suffice it to mention the quite infamous criminal trial which followed the L'Aquila earthquake of 2009, in which an anthropologist was called upon to assess whether and to what extent the seismic risk diagnosis made by the Commission for Major Risks (CMR) led (a part of) L'Aquila population not to leave their homes the night of the earthquake¹³. The expert concluded that the improperly reassuring message disseminated by CMR had led part of the population to underestimate the risk, thus constituting mental causation relevant for criminal purposes. However, only the Court of first instance expressly embraced the expert argument, while in the second, third, and final-instance trials, «the cultural expertise [...] was formally rejected; at the same time, however, it was "covertly" used as a key tool for confirming the conviction of one of the defendants, the deputy head of Italian Civil Protection»¹⁴.

Against this not reassuring background, the aim of this paper is threefold: firstly, an attempt will be made to demonstrate that there is no reason for the judge to adopt a different attitude towards hard and social sciences; secondly, and consequently, it will be argued that both intellectual and procedural due process apply in the same way in both cases (and, perhaps, even more, when it comes to cultural expertise). Finally, the potential and limits of the main tool available to the judge in order to assess the admissibility of the expert evidence (namely, the cultural test) will be discussed.

¹⁰ See Sorgoni (2012).

¹¹ Civinini (2022), p. 116.

¹² Sorgoni (2012), p. 79.

¹³ The case is summarized by the expert himself (Antonello Ciccozzi) in Ciccozzi & Decarli (2019), spec. pp. 42 ff.

¹⁴ Ciccozzi & Decarli (2019), p. 44; see also Ciccozzi (2016).

2. RELATIVIZING THE HARD/SOFT SCIENCES DIVIDE: THE USEFULNESS AND APPROPRIATENESS OF CULTURAL EXPERTISE

The investigation would have no reason to be conducted if one agreed with the critical remarks addressed to cultural expertise; as mentioned, indeed, both the usefulness and appropriateness of integrating the cultural element into the judge's cognition is contested. But the reasons invoked to justify such criticisms do not appear convincing: no more so than the similar ones addressed to any expert evidence.

Starting from the first profile (i.e., that of usefulness), the widespread judicial scepticism towards the contribution that experts such as sociologists, anthropologists and ethnologists can make to the judicial decision-making process¹⁵ is mainly rooted in the «commonly voiced suggestion that anthropological thinking and legal thinking are incommensurable»¹⁶. Such a statement is not totally wrong, but it must be relativized and contextualized. Indeed, it has already been demonstrated that the idea of the incommunicability of law and anthropology not only appears to be historically determined¹⁷, but also depends on the failure to take into account the fact that lawyers and anthropologists move from different «implicit paradigms of thought» and adopt different practices: in particular, jurists adopt a «pragmatic and judgmental practice», while anthropologists adopt an «explanatory and relativistic» one¹⁸. But, if this is true, it should be acknowledged that this difference runs not only between legal and anthropological reasoning, but between legal reasoning and that of any other science: the scientific approach (whatever science is involved) is summarized by Albert Einstein's famous saying “No amount of experimentation can ever prove me right; a single experiment can prove me wrong”; in other words, scientists do not think in terms of certainty, but in terms of probability, since they are aware that even the most tested assumptions could, one day, be disproved. By contrast, the judge needs (to establish) certainty, even if only formal certainty: hence the need to accept as *true* even those reconstructions which are just *more likely than not*. But, once this basic difference is understood, it is possible to fix the problem: after all, the Frye and Daubert tests themselves, although contested, are nothing but

¹⁵ See, e.g., Wiersinga (2022). It should be noted, however, that such an attitude is bilateral: it is no coincidence that Rosen (1977), p. 557, in his seminal article, already wondered whether «[i]s it true for anthropologists—as most psychiatrists and some sociologists argue for their disciplines—that the kinds of questions which they are capable of addressing are not the same as those posed by a legal case, and that their evidence is therefore either inappropriate for or distorted by the context of a courtroom proceeding».

¹⁶ Foblets (2016), p. 232. The existence of a profound epistemological difference between anthropology and jurisprudence is supported, among others, by Geertz (1983); Davidson (1992); Kandel (1992); Rigby & Severeid (1992); Assier-Andrieu (2015). Other authors, instead, mitigate this gap: see, for instance, Riles (1994) and Edmond (2004).

¹⁷ Bens (2016).

¹⁸ Kandel (1992), p. 1.

an attempt by the Courts to identify the conditions under which the answer that the expert can provide (an answer that is still uncertain and falsifiable) can be accepted from the jurist's point of view. And, if this shows that the problem of incommunicability is not insurmountable, there is no reason to believe otherwise when soft sciences are at stake.

As to the second profile (that of suitability), it should be noted that the arguments put forward by critics often recall those advanced in the United States with reference to the so-called cultural defense. In fact, the US debate—whose influence on the one developed in other parts of the world is historically proven¹⁹—has mainly focused on the role of cultural expertise in criminal trials: there, however, the cultural argument is often invoked in favor of the accused, to support the thesis that the conduct of which s/he is accused would have been decisively influenced by his/her cultural background and should therefore be justified to some extent. And it is precisely with this debate in mind that scholars' opinion has been divided as to whether it is appropriate for the judge to take the cultural factor of the parties into account when assessing their conduct: while some authors support the use of the cultural defense, and have even gone so far as to develop tests to enable the judge and/or jury to verify its validity²⁰, others criticize the concept, noting that cultural diversity is often strategically employed in defense of male offenders, in order to justify crimes committed against women²¹.

Now, it cannot be denied that, in US criminal proceedings, cultural defense is often used in an instrumental way; but it would be erroneous to generalize this 'empirical', *domain-specific*, evidence to challenge the suitability of cultural expertise *as a whole*.

First, this generalization would end up overlapping cultural expertise and cultural defense: on the contrary, as emphasized by European doctrine, these two concepts must be kept quite distinct. As Livia Holden stressed, «[c]ultural expertise does not aim to directly impact legal outcomes. [...] Not differently from any other form of expertise in court, the purpose of cultural expertise is to apply special knowledge to a definite set of circumstances submitted to the expert whose considerations must be elaborated irrespectively from the legal outcome of the case. Similar to any other kind of legal expertise but different from cultural defense, cultural expertise ought to be neutral, no matter whether it is requested by the court or by the parties. Cultural defense, instead, is the use of cultural arguments by the defense lawyer, even though cultural defense has also the scope to provide the judge with supposedly neutral information on culture [...]. Although cultural expertise and cultural defense are often linked and in some cases overlap, [...] cultural expertise differs epistemologically from cultural defense: It precedes it temporally within the proceeding and exceeds it in scope, because it can be requested for a wider range

¹⁹ Bens (2016), p. 237.

²⁰ See *infra*, § 4.

²¹ Volpp (1994); Lawrence (2001); Phillips (2003).

of cases than those of the typical cultural defense which plays a role mainly in criminal law»²².

Second, the risk of instrumental use of expert evidence is not limited to cultural one, since it does not stem from the nature of the expertise involved, but from the procedural model. Suffice it to point out that the above-mentioned criticism developed with reference to the US *adversarial* process: and, as it has been noted when discussing expert evidence *in general*, «[u]nder the adversarial litigation systems [...], parties are entitled to choose the expert they hire. This gives parties the opportunity to appoint not the more experienced expert in their field of practice but an expert who may be willing to best support the party's view. Since experts are appointed and paid on the basis of a contractual relationship, some unfortunately may adopt the position of a "Hired Gun", advocating on behalf of the party which appointed them in an attempt to advance that party's contentions»²³. In this respect too, then, there is no more reason to reject cultural expert contribution than there is to exclude all other types of expert evidence.

3. DUE PROCESS AS A LIMIT ON THE JUDGE'S DISCRETION IN ADMITTING (OR NOT) EXPERT EVIDENCE

In light of the above considerations, it can be argued that, from the perspective of Court proceedings, recourse to anthropology or other soft sciences does not pose any different or more serious theoretical problems than that to expert evidence in general.

Building on this assumption, it seems possible to deal with the most relevant question arising on the subject, that of the very *an* of the use of the expert, in a systematic way, thus considering the sciences in general and drawing inspiration from the whole literature on this topic, notwithstanding the fact that it is almost always referred to the integration of judge's knowledge about hard sciences. This will, first of all, allow the conclusions already reached on *intellectual* due process to be extended to cultural expertise as well.

In a second step, moreover, moving from the assumption that cultural diversity nonetheless presents at least one peculiar characteristic (i.e., the aptitude to potentially influence the conduct of the entire proceeding), it will be argued that having recourse to cultural expertise is also necessary to meet *procedural* due process requirements.

²² Holden (2019), p. 2. L'Aquila trial is also illustrative in this respect, since in that case cultural expertise was used *against* the defendants, to identify the causal link between their behavior and that of the population, on the assumption that the judge, albeit sharing the cultural background of the parties, lacked the necessary expertise to establish the psychological influence of authority reassurances on individuals' behavior

²³ FTI Consulting Report (2013), p. 3.

3.1. General application of intellectual due process principles

Actually, at first glance, the question here addressed seems difficult to deal with in a prescriptive rather than merely descriptive manner: although comparison shows that there is no uniform model for the regulation of expert evidence, one feature that different legal systems certainly have in common is the wide discretion the judge is given in choosing whether to make use of the expert and, in any case, in assessing his/her findings²⁴.

Discretion, however, cannot be understood as arbitrariness, at least in those states that mandate compliance with due process of law.

The first dimension to consider in this respect is that of the so-called «intellectual due process»²⁵. This expression, conceived by Brewer and then embraced by other U.S. scholars²⁶, is explained by the author as follows: «certain rule-of-law values require epistemic nonarbitrariness in factfinding reasoning, as in other types of reasoning. Thus, if the nonexpert cannot acquire scientific beliefs from competing experts in a way that is nonarbitrary, from an epistemic point of view, those beliefs will therefore not be legitimate from the practical legal point of view»²⁷. Nor can it be said that the principle is alien to case law: on the contrary, its existence and recognition may be inferred from developments in the field of complexity exception, i.e., the rule outlined in US case law, according to which a jury trial should be excluded in the case of particularly complex litigation. In *In re Japanese*²⁸, the Third Circuit Court of Appeal held that «[a] suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner. The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules. A suit might be excessively complex as a result of any set of circumstances which singly or in combination render a jury unable to decide in the foregoing rational manner»; and, having recalled that these circumstances include the case in which the dispute involves «conceptually difficult factual issues»²⁹, the Court concluded that «due process precludes trial by jury when a jury is unable to perform this task with a reasonable understanding of the evidence and the legal rules»³⁰.

²⁴ This is true irrespective of the circumstance the expert knowledge is produced by the parties (expert witness) or acquired by the judge, through a Court-appointed expert; in both cases, the idea of the judge as a gatekeeper leaves him/her the power to interdict its admission: Campbell (2020).

²⁵ Brewer (1998).

²⁶ See, among others, Beecher-Monas (2007)

²⁷ Brewer (1998), p. 1672.

²⁸ *In re Japanese Electronic Products Antitrust Litigation* 631 F.2d 1069 (3d Cir. 1980).

²⁹ *Ibid.*, 1079

³⁰ *Ibid.*, 1084

These considerations, although expressed with reference to hard sciences and having the jury in mind, can be generalized: because due process requires that the fact finder (whoever s/he may be, judge or jury)³¹ be able to rationally appreciate the facts. Consequently, it seems possible to theorize a general duty of the judge (and, before that, of the state) to ensure that any question coming into play in court proceedings is dealt with by an authority possessing the necessary expertise, not only from a legal point of view, but also from an epistemic one.

Brewer's proposal for securing such a result is to select judges who are qualified in both respects; in his words, «[i]f legal systems are to endorse and aspire to satisfy the intellectual due process norms (and other related rule-of-law norms), they would be well advised to move toward a «two-hat» model of legal decisionmaking in areas to which scientific results are rationally pertinent. On this model, the system seeks to ensure that one and the same decisionmaker has both legal legitimacy (by being duly elected or appointed by a legitimate elective or appointing authority) and epistemic competence with the basic formal tools of scientific analysis»³². However, it is clear that this goal, if pursued in a generalized way, would be economically unsustainable: since there is no single technical-scientific training, while there are countless disciplines in which the jurist judge would need to train, any type of institutional training of the judge (i.e. a training systematically ensured by the State) could only be partial. Furthermore, if it is difficult to imagine a sufficiently diversified recruitment to ensure the right judge for each dispute, such an effort could only make sense if coupled with the creation of as many courts or specialized sections as there are fields of expertise; and this, in turn, would lead to likely disproportionate costs to the amount of litigation to be managed. That is why, except for those fields where the quantity and quality

³¹ it is well known that U.S. *Federal Rules of Evidence* are built on the assumption that «jurors will overvalue or otherwise misuse various items of admittedly relevant information», so that it is necessary to exclude «some relevant evidence because of a distrust of the reasoning capacities of ordinary people»: Spellman & Schauer (2012), p. 729. This belief, in turn, stems from the idea, which has been perpetuated at least since the 17th century, that 'legal thinking and reasoning' is inherently different from any other, whether common or expert: in other words, «lawyers and judges are believed, at least by lawyers and judges, to employ techniques of argument, reasoning, and decision making that diverge from those of even expert nonlawyer reasoners and decision makers»: Spellman & Schauer (2012), p. 719. This may be true insofar as the courts often rely on second-order reasoning [by virtue of which they would focus not so much on the right decision in the particular case, but on the best decision from the perspective of applying the rule in future cases]. But it is apparent that this difference relates to the final judgment, so that it cannot ground the presumption that the judge is, *as such*, better able to understand any type of fact, even complex ones. By contrast, as I have tried to show elsewhere (Capasso, 2020, pp. 190 ff.), there is no evidence that the lawyer judge is more capable of understanding concepts outside his or her expertise: not only studies on decision-making show how rare it is for individuals who are experts in a given field to be able to transfer the skills they have acquired to fields other than that of expertise, but the judge—exactly like jurors—incur cognitive bias; is incapable of ignoring inadmissible evidence, once known; has difficulty in understanding statistical evidence; and so on.

³² Brewer (1998), p. 1677. A similar idea had previously been expressed by Taruffo (1990), p. 4. According to the author, «the average culture of the judge must evolve and update itself in connection with the evolution of scientific methodologies, so that the judge is able to appreciate their reliability and acceptability» (free translation).

of litigation makes it convenient to establish specialized courts, the most sustainable (and, therefore, most widespread) method of responding to the need to supplement the judge's knowledge is still to appoint an expert, if necessary.

The problem then is to understand when the use of the expert can be deemed "necessary"; and it is possible to argue that this happens whenever the kind of knowledge needed to understand and evaluate facts goes beyond that of the average man. As it is well-known, indeed, whatever their method of appointment (election or open competition), judges are selected by virtue of their legal competence³³, not for their epistemic skills: on the contrary, when it comes to the ability to understand facts, the judge is nothing more than a sample of the society to which s/he belongs and which s/he judges³⁴. Consequently, judge's assessment of fact is legitimised on the basis of the presumption that it is conducted as any average member of the same community would have done. But it is apparent that this presumption can no longer apply whenever 'any average member of the community' would not be able to understand the facts correctly: either because of their technical/scientific nature, or because they cannot be properly understood without adequate knowledge of a different cultural background. In both cases, therefore, the presumption must be reversed, so that the judge (not only *can*, but) *must* have recourse to the expert³⁵.

³³ For a short, comparative overview, see Bovend'Eert (2018).

³⁴ The view of the judge as a "qualified sample" of the average man is also shared by Silvestri (2000), p. 419.

³⁵ This idea does not contrast with the maxim according to which the judge is the "peritus peritorum": indeed, «[t]he meaning of this notion [...] 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»: Michelini (2022), p. 71.

It should also be noted that the conclusion stated in the text also applies when the judge accidentally has extralegal knowledge: as Civinini (2022), p. 109, «[j]udges who use their private knowledge can be compared, *mutatis mutandis*, to judges who decide a case that turns on a fact they personally witnessed. It is clear that these judges jeopardise the right of defense of the parties; the frustrate the principle of the adversarial process and undermine its 'legitimation'».

The author does not invoke the concept of the culture of the average man, but that, which is essentially equivalent, of average cultural level. Of course, this level is likely to change over time, also as a result of the vulgarization of certain scientific acquisitions: that is why «[i]f a judge living before Copernicus were to have stated in a judgement that the earth orbits around the sun, he would have been an excellent astronomer but an incomprehensible judge, unacceptable to the society. The same would happen today with a judge claiming to know about medicine or informatics or customary law in central Africa, and using such knowledge to solve and decide cases». But, when it comes to the in-depth knowledge of different cultures, it is difficult to imagine a process of vulgarization; indeed, «[w]hen cases present transnational or intercultural elements, the cultural knowledge necessary to reach a decision cannot be obtained through the common knowledge mechanism. The 'common knowledge' of the judge does not include the stable heritage of knowledge of the citizen of average cultural level in a historically determined society. In these cases, an expert is needed» (Civinini, 2022, p. 111).

3.2. Specific application of procedural due process principles

Thus far, then, the reasoning is common to all the sciences. It must be recognized, however, that cultural diversity has some peculiar features that make the potential scope of cultural expertise narrower in some respects and broader in others than that of other types of expertise.

Indeed, expert evidence is usually relevant with exclusive reference to the merits of the case (and sometimes even constitutes the ultimate issue); but this makes that the relevance of scientific-technical fact is invariably coupled with the need for the recourse to the expert. By contrast, it would be going too far to say that diversity should always affect the outcome of the proceedings: it is possible that parties' different background is not relevant in the case at stake, or not perceived as such. As noted, indeed, «if the perception of all parties in court is that context and background are more or less shared», so that «there is no cultural gap addressed», then «there is hardly a need to give culture any further consideration»³⁶.

On the other hand, however, it has been convincingly demonstrated that there are at least three dimensions in which culture may come into play, namely 'culture as communication', 'culture as context' and 'culture as norms'³⁷. In other words, cultural diversity may not only be relevant when judges need to decide legal questions involving foreign law or customary norms (culture as norms), but also influence judge's understanding of parties declarations and behaviour when s/he directly exchange with them in courtroom (culture as communication) and judge's ability to gather empirical evidence about parties linguistic, social, political and/or religious background (culture as context); so that the cultural expert's support may prove necessary throughout the course of the entire proceedings. And this necessity stems not only from the principles of the intellectual due process (insofar as the evidence that the judge is entitled to draw from the words and procedural behavior of the parties must also be evaluated in an epistemically correct manner), but also from those of the procedural due process. As it has been recently underlined³⁸, indeed, having recourse to cultural expertise is often essential in order to meet the four-element model of procedural fairness proposed by Blader and Tyler³⁹: having recourse to a cultural expert may actually improve parties ability to present one's case (voice), the perceived impartiality (neutrality) and respectfulness (respect) of the decision-maker, as well as parties understanding of the decision-making process and of the meaning of the decision (understanding).

In the light of the above considerations, the issue that the judge must address in assessing the 'necessity' of cultural expertise turns out to be more articulated than for any other type of expert evidence: the problem is not only

³⁶ Wiersinga (2022), p. 154.

³⁷ Vettors & Foblets (2016), p. 276.

³⁸ Burdziej (2023).

³⁹ Blader & Tyler (2009).

to understand, on a case-by-case basis, whether parties' different culture may have played a role in influencing their behaviour (before the trial), but also whether it may impact their participation in proceedings: in other words, judge's assessment of the need to admit cultural expertise should be aimed at seeking not only the perceived fairness of his/her decision, but also the perceived quality of the decision-making process.

4. THE NEED FOR AN OBJECTIVE ASSESSMENT TOOL: THE SO-CALLED CULTURAL TEST

The growing awareness that the resolution of this issue cannot be totally left to the subjective, discretionary assessment of each judge has led over time both courts and scholars to theorize the use of objective assessment tools, the main one being the so-called cultural test, namely «a set of pre-established questions a judge has to answer in order to decide whether or not to accept a cultural claim made by a migrant or members of cultural minorities»⁴⁰.

The first reported cultural test appears to be the one created by the Canadian Supreme Court in 1996⁴¹; a ruling which can be considered a milestone, not so much because of the content of the test⁴² (which has been quite criticized⁴³, and in any case, although aimed at a general framework, is widely influenced by the historical and legal peculiarities of the Canadian system), but because the idea underlying its conception has been extensively followed by other courts on the international level⁴⁴ and further explored by subsequent doctrine.

⁴⁰ Ruggiu (2019b).

⁴¹ R. v. Van Der Peet [1996], 2 S.C.R. 507.

⁴² Based on 10 questions, each constituting the title of a distinct paragraph:

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.

⁴³ Borrows (1997).

⁴⁴ Ruggiu (2017), p. 225, recalls, a cultural test has been developed by the United Nations Human Rights Committee to deal with cases in which a violation of Art. 27 of the 1966 International Covenant on Civil and Political Rights is invoked. More recently, Italian Court of Cassation, also drawing insights

Interest in such a tool is not astonishing, given the undeniable benefits it brings: as it has been pointed out, the availability of standardized questions ensures greater uniformity of treatment and judgment in similar cases, eases (and, therefore, speeds up) judge's work, allows the anthropologist's report to be circumscribed to only those profiles that are really relevant, and can help in the drafting of better reasoned (and, therefore, more socially acceptable) judgments. This, however, does not mean that the cultural test has been universally welcomed or that there is agreement on its "right" content: on the contrary, not only are there as many versions of the test as there are authors who have addressed this subject⁴⁵, but the very idea of drafting and using a set of standard questions has been criticised from a methodological point of view.

Some scholars, indeed, fear that the use of the tool will end up essentializing groups (that is, building a stereotypical, crystallized image of each particular culture, which would prevent the judge to focus on the subjective declination of such culture and on the particularities of the case at stake)⁴⁶. The fear is not unfounded, but neither should it be overstated: the questions listed in the cultural test may well be used as mere guidelines, especially in civil law systems, where, lacking express legislative provision, such a tool could not in any case be regarded as binding on the judge. Moreover – and this observation also relates to the debates regarding the "best content" of the test – the problem does not seem unsurmountable: the test, however constructed, is meant to provide a general framework for *first* address the question of the relevance of cultural diversity that comes into play in the given case and only *later*, if the first check is positive, to grasp the exact content of the cultural belief or practice at issue; but, with reference to the latter goal, it certainly *can* (and, hopefully, *should*) be supported by other, more specific tools, which are already under discussion⁴⁷.

For the above, it seems fair to conclude that cultural test's pros far outweigh the cons; and, albeit the models developed so far, like all human things, may be perfectible, the search for the optimal list of questions to compose them need not be pushed to the extreme, in an attempt to achieve the likely unrealistic goal of grasping once and for all the full complexity of any different culture.

Yet, there is at least one profile that needs improvement.

Those recalled just above, indeed, do not appear to be the most significant critical issues. Rather, what is worth emphasizing here is a different prob-

from some scholarly writings, seems to have outlined the equivalent of a cultural test, at least in criminal matters: see Court of Cassation, 2nd July 2018, n. 29613, discussed by Monachini (2020).

⁴⁵ See the different versions proposed by Renteln (2004); Eisenberg (2009); De Maglie (2010); Dore (2016); Basile (2017); Ruggiu (2019a), pp. 143 ff.

⁴⁶ Ricca (2014).

⁴⁷ Reference is here made to the proposal to make a handbook on cultural practices and a database of comparative multicultural jurisprudence, as well as to the project, which is already underway, of creating an international database collecting the cultural expertise already gathered. On these tools, see Ruggiu (2019b).

lem, which seems to have been overlooked so far: the different versions of the test proposed over time have always, albeit implicitly, focused exclusively on the ‘culture as norms’ dimension. Despite their different wordings, in fact, the questions listed by the different tests appear clearly aimed at the ultimate goal of determining whether the behaviour at issue can be considered a cogent expression of the cultural background of the person being tried. And, of course, it cannot be denied that this question is also of procedural interest, since the admissibility and assessment of cultural expertise are likely to affect not only the outcome, but also the conduct of the trial.

However, as noted⁴⁸, there are two other dimensions of culture (‘culture as communication’ and ‘culture as context’) which are likely to impact proceedings even more, especially in those systems that give the judge *ex officio* powers in evidentiary matters. And it is precisely the failure to take into account those dimensions that appears to be the major shortcoming of the current tests. Of course, supplementing them with questions designed to let the need for an expert to accompany the judge from an early stage of the proceedings⁴⁹ emerge would probably require even greater attention and combined effort of jurists and anthropologists. And equally likely is that the test, at least *in parte qua*, could not have a general vocation, since questions should be tailored to the specific procedural rules of each system. But this does not make the attempt less useful, nor less necessary to (try to) comply with due process: because «[n]o one can judge without knowing. A [wo]man is chosen as a judge precisely because it is believed that [s/]he knows what is necessary to judge»⁵⁰; should this not be the case, seeking a way to supplement his/her knowledge is not a power, but a duty.

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⁴⁸ *Retro*, § 3.2.

⁴⁹ E.g., during the questioning of the parties, in order to understand their nonverbal language when answering, or the very meaning of certain attitudes usually considered significant, such as reticence or contradictoriness in their statements.

⁵⁰ Carnelutti (1926), p. 99.

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