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Religious freedom and inviolable lines in pluralist societies: the case of cultural crimes *

SOMMARIO: 1. Multicultural societies and conflicts of loyalty: cultural crimes - 2. The Italian reaction to cultural crimes - 3. The case of *kirpan*: the recent judgment of the Court of Cassation - 4. A questionable decision: the fundamental role of pluralism in Western societies - 5. Conclusions: the centrality of human dignity.

1 - Multicultural societies and conflicts of loyalty: cultural crimes

Multiculturalism and religious pluralism constantly pose new challenges to Western societies. From a juridical point of view, one of the main concerns is the management of the double belonging of "faithful citizens", at the same time subject to the laws of the State and to the ones of their religious community. Religions also impose rules to be observed by their adherents and the compliance with these rules, sometimes very far from the traditional framework of secular legal systems, risks degenerating into misunderstandings and possible "conflicts of loyalty".

Actually, this type of moral conflict is not totally new: the phenomenon recalls some typical traits of the problem of conscientious objection, even if they differ for an essential aspect¹. In the case of conscientious objection, the collision² between mutually incompatible duties that bind the individual is characterized not only by the contradiction between the two precepts, but also for the subject's attitude of ideological opposition to the State rule, whose conformity to a superior ideal of justice

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¹ **A. LICASTRO**, *Il motivo religioso non giustifica il porto fuori dell'abitazione del kirpan da parte del fedele sikh (considerazioni in margine alle sentenze n. 24739 e n. 25163 del 2016 della Cassazione penale)*, in *Stato, Chiese e pluralismo confessionale*, Online review (www.statoechiese.it), n. 1, 2017, p. 5.

² **R. BERTOLINO**, *L'obiezione di coscienza moderna*, Giappichelli, Torino, 1994, p. 18.



is disputed and whose observance is, therefore, considered in itself negative³.

On the contrary, this paper aims to analyse a completely different circumstance, where religious believers are not intimately opposed to the duty imposed by secular law. They simply are led by their moral conflict to break State criminal laws, supposing they are allowed to do so in the name of religious freedom and the related right to express their religious identity.

From a strictly legal perspective, this is what doctrine has described as “cultural crime” or “culturally motivated crime”. The most commonly accepted definition of cultural crime is the one formulated by Jeroen Van Broeck almost 20 years ago: an act by a member of a minority 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 situation⁴.

The concept of “culture” has notoriously multiple meanings, but its first (and so far, only) legally relevant definition at international level is affirmed in UNESCO Universal Declaration on Cultural Diversity of 2001:

“culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs”⁵.

Therefore, religion, as a belief, is certainly an aspect, and an essential one, of culture.

At the same time, criminal law is the branch of law that more than any other is influenced by the so-called dominant culture, the culture which provides the ideological basis of the penal rule on which the defendant is tried⁶. This “cultural non-neutrality”, due to which criminal law is imbued⁷ with culture and particularly affected by the identity profile of a particular population at a given historical moment⁸, leads to another typical feature of it: its “localism”, so that this branch of law has been efficaciously described as “typical local product”⁹. Given these two specificities, it is easy to

³ A. LICASTRO, *Il motivo religioso*, cit., p. 6.

⁴ J. VAN BROECK, *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, in *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 9/1, 2001, p. 5.

⁵ UNESCO, *Universal Declaration on Cultural Diversity*, 2001.

⁶ J. VAN BROECK, *Cultural Defence*, cit., p. 5.

⁷ F. BASILE, *I reati cd. “culturalmente motivati” commessi dagli immigrati: (possibili) soluzioni giurisprudenziali*, in *Questione Giustizia*, n.1, 2017, p. 127.

⁸ G. FIANDACA, *Populismo politico e populismo giudiziario*, in *Criminalia*, 2013, p. 103.

⁹ F. BASILE, *Immigrazione e reati culturalmente motivati*, Giuffrè, Milano, 2010, p. 76.



understand their implications with respect to the phenomenon of crimes committed by immigrants for cultural or, more specifically, religious reasons: crimes, that is, committed by people who move from one State to another and that consequently find, in the place of arrival, a criminal law very different from that in force in the place of origin.

Faced with this conflict between the criminal rule and the religious one rooted in the culture of the defendant, which accepts or endorses the same conduct, a legal system has necessarily to wonder whether or not it should recognise culture as a defence and to what extent.

2 - The Italian reaction to cultural crimes

In Italian criminal law, there are no general rules that give specific importance to the cultural factor¹⁰.

This gap, however, is not surprising: both the Western countries that adopted, with regard to cultural diversity, a “multiculturalist” model (e.g. United Kingdom, Canada, USA) and those who otherwise chose an “assimilationist” approach (above all, France) have not introduced any clarification on the point yet¹¹ and certainly Italy, with its “hybrid” policy¹², could not make exception to this inactivity.

The legislator's indifference in dealing with this topic thus led to the search for immediately usable solutions in the courtrooms¹³. From this point of view, the jurisdiction seemed to constitute a more accessible passage for new instances such as the multicultural ones, proving to have more adequate means available to intercept and incorporate social questions differently excluded from decision-making places. In this way, courtrooms have become the privileged channel for the resolution of issues raised by cultural crimes, a topic at the meantime broadly analysed by Italian scholars¹⁴.

¹⁰ P. DI FRESCO, A. NEGRI *I reati culturalmente motivati*, in *Il Penalista*, Giuffrè, Online review, 28 July 2017, p. 3.

¹¹ About these two models, L. BELLUCCI, *Immigrazione e pluralità di culture: due modelli a confronto*, in *Sociologia del diritto*, n. 3, 2001, p. 131 ss., F. BASILE, *Società multiculturali, immigrazione e reati culturalmente motivati (comprese le mutilazioni genitali femminili)*, in *Stato, Chiese e pluralismo confessionale*, cit., October 2007, pp. 17-22.

¹² G. CASUSCELLI, *Il diritto penale*, in G. Casuscelli (ed.), *Nozioni di diritto ecclesiastico*, 5^a ed., Giappichelli, Torino, 2015, pp. 372-373.

¹³ E. OLIVITO, *Giudici e legislatori di fronte alla multiculturalità* in *Stato, Chiese e pluralismo confessionale*, cit., May 2001, p. 17.

¹⁴ C. DE MAGLIE, *I reati culturalmente motivati. Ideologie e modelli penali*, ETS, Pisa, 2010, A. BERNARDI, *Il “fattore culturale” nel sistema penale*, Giappichelli, Torino, 2010, F.



First of all, it could be worthwhile to clarify which crimes could be “cultural” or “culturally motivated”. Looking at the concrete procedural dynamic, the notion of “cultural crime” could seem indeed particularly broad, covering all the cases where the defendant asks an extension of judge’s knowledge to his cultural background, so that the court can reach a more correct reconstruction of the facts and, therefore, in the defendant’s expectations, a decision more favourable to him¹⁵.

In the light of this wide definition, doctrine suggests to “shatter” it in some criminological sub-categories¹⁶, which emerge directly from the analysis of case law¹⁷:

- domestic violence;
- honour killings;
- child rights violations (slavery or refusing to send children to school);
- sex crimes;
- female genital mutilations and male circumcisions;
- drug-related crimes;
- crimes concerning ritual clothing.

As it could be easily seen, almost all these types of crimes share at least one element: the relevance of family and interpersonal relationships, which, just like conceptions of honour and behaviour in the sexual and reproductive sphere, always constitute a dominant theme in the traditions and rules of different cultures and religions¹⁸. Family is undoubtedly the primary site in which these traditions and cultural rules are practiced and transmitted and so it can’t be surprising if the imprint left by the culture of origin can re-emerge in an overbearing way, when it comes to these issues, with its ancestral charge.

Since cultural crimes, as previously said, are mainly dealt with by judges in absence of a criminal law rule, major disparities in case law are

BASILE, *Immigrazione*, cit., **F. PARISI**, *Cultura dell’«altro» e diritto penale*, Giappichelli, Torino, 2010, **A. PROVERA**, *Tra frontiere e confini. Il diritto penale dell’età multiculturale*, Jovene Editore, Napoli, 2018.

¹⁵ **F. BASILE**, *Dialogo tra un penalista e i cultori della disciplina giuridica del fenomeno religioso: reati contro il sentimento religioso e reati c.d. culturalmente motivati*, in P. Consorti (ed.), *Costituzione, religione e cambiamenti nel diritto e nella società*, Pisa University Press, Pisa, 2019, p. 433.

¹⁶ **F. BASILE**, *Le principali categorie di reati culturalmente motivate. Profili criminologici e normativi*, in *DPU - Diritto Penale e Uomo*, Online review, 2019, pp. 6-7.

¹⁷ **F. PARISI**, *Cultura*, cit., pp. 103-120; for the most recent cases, see **F. BASILE**, *Ultimissime dalla giurisprudenza in materia di reati culturalmente motivati*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 30, 2018, pp. 3-6.

¹⁸ **F. BASILE**, *Immigrazione*, cit., pp. 161-162.



unavoidable¹⁹. Exactly in order to avoid such uncertainties, since the '90s the American and Canadian jurisprudence developed so-called "cultural tests"²⁰, which aim specifically at proceduralising judge's argumentative process in a series of logical steps that allow him, in the face of multicultural conflicts, to be able to decide with a greater degree of certainty, organizing and directing the reasoning towards less random rulings.

Italian doctrine has recently suggested a new cultural test²¹, to be adopted on a regular basis by the Court of Cassation or to be included in a handbook which should be provided to judges who deal with cultural crimes.

Here are its thirteen points:

1. Is the "culture" category usable in this case?
2. Describe the cultural practice and the characteristics of the group.
3. Insert the single cultural practice in the broader cultural system of origin.
4. Is the practice essential to the survival of the group, mandatory or optional?
5. How much is the practice shared by the group? Or is it disputed?
6. How would the model agent of that culture behave?
7. How sincere and consistent is the person who claims the practice?
8. Is the group discriminated in the society?
9. Is there a cultural equivalent of that practice in the dominant culture?
10. Does the practice cause damage?
11. Does the practice perpetuate patriarchy?
12. What impact does the practice have on the dominant culture?
13. What good reasons does the cultural group have to continue the practice?

¹⁹ See e.g., on the one hand, Court of Cassation, n. 32436, 1 August 2008 (Pakistani charged with homicide): "The different culture of origin can be taken into positive consideration only to the extent that it does not conflict frontally with the values expressed by our Constitution which (...), if it is rightly open to the plurality of different cultures, it is not to the extent of appreciating the death given in the name of them". On the other hand, Court of Cassation, n. 22708, 17 March 2017 (Romani charged with homicide): the judge underlined how the personality of the defendants was correctly evaluated in consideration of a shared subculture, marked by an "insane sense of protection of the family order".

²⁰ The first cultural test was developed by Canadian Supreme Court in 1996 in *R. v. Van Der Peet*, [1996] 2 S.C.R. 507. It was useful to make cultural rights recognized to natives by art. 35 Cost. effective.

²¹ **I. RUGGIU**, *Il giudice antropologo e il test culturale*, in *Questione Giustizia*, Online review, n. 1, 2017, pp. 226-232.



As can be seen, the test, that aims at improving the degree of certainty of the sequence of logical-argumentative passages that each judge must follow before deciding on a crime culturally motivated, necessarily needs the advice of an anthropologist, especially answering the first six questions. Indeed, it would be difficult for a judge to contextualize a cultural practice in the broader context from which it derives, or to understand its degree of binding within the original group, especially when it comes to cultures totally distant from the dominant one.

The recourse to anthropological support in the Italian courtrooms is, however, still rather rare²²: beyond a resistant prejudice in favour of the natural sciences at the expense of the social sciences, our ritual code does not admit expertise to establish “the character and personality of the defendant and in general the psychic qualities independent of pathological causes” (Article 220, paragraph 2, Code of Criminal Procedure). This prohibition would seem to justify the choice not to use anthropologists in courtrooms, although the doctrine clarified that the anthropological expertise, in cultural crimes cases, would not have as its object the personal or psychic qualities of the individual, but the existence of a group characterized by a specific culture. Therefore, the judge would not deal with a report about the personality of the defendant, but only about the possible cultural value of the fact he committed²³.

The second part of the test, formed by the last seven questions, would instead bring judge’s reasoning back into a more strictly legal sphere. This, as it is easy to understand, precisely in order to avoid adherence to a totally relativist reconstructive scheme, which is essential for the anthropologist, who moves on a purely descriptive level, but not for the judge. On the contrary, the latter, required to find a balance point between different demands, has to contribute to delineating the new values of coexistence in a multicultural context. This could be done only by enhancing in the resolution of the conflicts those types of assessments that are strictly legal²⁴.

Waiting to see if this test will find success in Italian courtrooms, it is worth reporting a very recent ruling of Court of Cassation²⁵ about a sexual

²² **A. BIGIARINI**, *La prova culturale nel processo penale*, in *Cassazione Penale*, n. 1, 2018, pp. 413-415.

²³ **C. DE MAGLIE**, *I reati*, cit., p. 157.

²⁴ **I. RUGGIU**, *Il giudice*, cit., pp. 230-232.

²⁵ Court of Cassation, n. 29613, 2 July 2018. About it, see **A. PROVERA**, *Carezze o violenze? La Cassazione affronta il problema dei reati sessuali a presunto orientamento culturale*, in *Diritto penale e processo*, n. 11, 2018, pp. 1432-1438; **I. RUGGIU**, *Omnia munda mundis. La pratica culturale dell’ „omaggio al pene” del bambino: uno studio per la cultural defense*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 27, 2019.



crime committed by an Albanian man against his son: in that case, the court identifies some “key points”, which every judge called to deal with culturally motivated crimes should take into consideration, thus drafting a sort of “test”, which could help the judges themselves to elaborate a more articulated and better reasoned decision²⁶.

3 - The case of *kirpan*: the recent judgment of the Court of Cassation

Without any doubts, the most debated decision about cultural crimes in Italy has been the one issued by the Supreme Court of Cassation in 2017²⁷, where the judge has upheld the conviction of a Sikh Indian for withholding a *kirpan*, the ritual dagger central to his faith.

Sikhism, which widespread in Western society²⁸, requires the exposure of five key religious symbols, the so-called “Five Ks”²⁹: these, as known, include the *kirpan*, the knife which is an essential part of Sikh identity and whose carriage is mandatory.

In particular, the Court of Cassation has confirmed the judgment issued by the Court of Mantua for the crime of carrying weapons pursuant to art. 4, paragraph 2, of Law no. 110/1975. The pronouncement aroused a huge media coverage³⁰, in particular for the mention of the obligation, for the immigrant, “of conform his values to those of the Western world”³¹. According to the judges, it would not be tolerable that the multi-ethnic society, while constituting a necessity, would lead to the formation of “conflicting cultural archipelagos”, because the uniqueness of the cultural

²⁶ F. BASILE, *Quanto conta la “cultura”? La Cassazione torna sui reati c.d. culturalmente motivati*, in *Giurisprudenza Italiana*, October 2018, pp. 2250-2251. More specifically, there are three “key points” identified by the Court of Cassation: the legal right offended and the degree of the offense, the nature of the cultural rule in compliance with which the crime was committed and the degree of integration of the defendant into the dominant culture of the country of arrival.

²⁷ Court of Cassation, n. 24084, 15 May 2017.

²⁸ For C. PETRUCCI, *I Sikh dall’India al mondo*, *Liberazione*, 9 May 2010, Italy hosts the second largest Sikh community in Europe, after the United Kingdom, with 70,000 faithfuls.

²⁹ F. POLI, *I Sikh - la comunità dei “discepoli” dal Panjab al mondo*, Edizioni Studio Domenicano, Bologna, 2007, p. 51.

³⁰ See, e.g., I. SACCHETTONI, *Cassazione: i migranti devono conformarsi a nostri valori*, in *Corriere della Sera*, 16 May 2017, S. MARZIALETTI, *Cassazione: i migranti devono rispettare i nostri valori*, in *Sole 24 Ore*, 16 May 2017, C. MELZI D’ERIL, G. E. VIGEVANI, *Se un pugnale compromette i valori occidentali*, in *Sole 24 Ore*, 19 May 2017.

³¹ Court of Cassation, n. 24084, 15 May 2017, “Considerato in diritto”, par. 2.3.



and legal context of Italy, that identifies public safety as a good to be protect, would obstruct it³².

The facts are known: the defendant was stopped in the street by the local police, who found him in possession of a knife, carried on his belt, of the total length of 18.5 cm and considered, therefore, suitable for offense. At the request of the policemen to consign it, he refused, claiming that the port of the knife was imposed by the precepts of his religion, Sikhism³³. The court of first instance found the defendant guilty, but the latter appealed to the Court of Cassation, invoking art. 19 of the Constitution: the knife was a symbol of his faith and its carrying would have been justified exactly from his religion freedom³⁴. As known, art. 51 of Criminal Code states that the exercise of a right excludes the possibility of punishing the offender.

The ruling of the Cassation, which confirmed the judgment, is no surprising as the final outcome. Indeed in 2016 the same Court intervened on two separate occasions on that topic³⁵, stating in both cases that the religious reason could not justify the conduct of the Sikh. In this way the previous address supported by some other judges³⁶, who had more correctly balanced religious freedom and security concerns, recognizing, also in consideration of the limited offensiveness of the defendant's conduct, prevalence to the first³⁷, was already censored by the Supreme Court, albeit with very concise motivations³⁸.

Whereas these rulings of 2016, however, had not attracted the attention of public opinion, the 2018 judgment, as previously said, did. This can be undoubtedly explained by the judges' mention of a supposed obligation, for the immigrant, to conform to the "values of the Western world" - an expression strongly evocative but indeed very vague and indefinite.

³² Court of Cassation, n. 24084, 15 May 2017, "Considerato in diritto", par. 2.3.

³³ Court of Cassation, n. 24084, 15 May 2017, "Rilevato in fatto", par. 1-2.

³⁴ Court of Cassation, n. 24084, 15 May 2017, "Rilevato in fatto", par. 3.

³⁵ See Court of Cassation, n. 24739, 14 June 2016 and n. 25163, 16 June 2016. About these judgements, see **A. LICASTRO**, *Il motivo religioso non giustifica il porto fuori dell'abitazione del kirpan da parte del fedele sikh (considerazione in margine alle sentenze n. 24739 e n. 25163 del 2016 della Cassazione penale)*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 1, 2017, p. 1.

³⁶ See Cremona Court, n. 15, 13 January 2009 or Vicenza Court (Gip), dismissal decree, 23 January 2009.

³⁷ This initial approach of criminal courts led someone to identify, in the *kirpan* issue, a sign of "traditional Italian hospitality"; see **C. CARDIA**, *Il simbolo religioso e culturale*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 23, 2012, p. 20.

³⁸ On the evolution of the Italian jurisprudence about *kirpan*, see **A. BERNARDI**, *Populismo giudiziario? L'evoluzione della giurisprudenza penale sul kirpan*, in *Rivista Italiana di Diritto e Procedura Penale*, 2017, pp. 673-689.



4 - A questionable decision: the fundamental role of pluralism in Western societies

The Cassation has apparently based its decision on value-related reasons, more connected to ethical evaluations than juridical ones³⁹: and this can only arouse perplexity. If, in general, value judgment is a way of proceeding refractory to objective regulatory and delimiting criteria, all the more so in this case, given the absolute vagueness of those “Western values” to which the immigrant would be required to comply. The ambiguity of this formula is immediately demonstrated as soon as we look beyond Italian borders, towards other legal systems, certainly equally “Western”, which, however, have chosen a very different approach towards the issue of *kirpan*⁴⁰.

United Kingdom, for example, despite its particularly restrictive legislation on weapons, has issued in 1988 a provision authorizing people to carry cutting or pointed weapons “for religious reasons; or as part of any national costume”⁴¹, just in order to allow Sikh Indians to wear *kirpan*.

In the United States, even in the absence of an *ad hoc* provision, judges based their decision on the Religious Freedom Restoration Act, issued in 1993 by the Congress, in order to acquit a Sikh Indian from the crime of abusive port of a hidden lethal weapon⁴².

In Canada, finally, in the name of multiculturalism, which in that country has been formalized even at constitutional level⁴³, the Supreme Court has affirmed that a young Sikh is entitled to bring his *kirpan* to school⁴⁴. A ban, in Court’s opinion, would have transmitted to the students the message that some religious practices are not worthy of protection, thus limiting the spread of the values of diversity and respect for others.

So, the “values” on which the above-mentioned choices are founded are, without a doubt, typically “Western” ones: religious freedom and

³⁹ A.M. NICO, *Ordine pubblico e libertà di religione in una società multiculturale (Osservazioni a margine di una recente sentenza della Cassazione sul kirpan)*, in *Osservatorio Costituzionale*, vol. 2/2017, p. 4.

⁴⁰ A. NEGRI, *Sikh condannato per porto del kirpan: una discutibile sentenza della Cassazione su immigrazione e “valori del mondo occidentale”*, in *Diritto Penale Contemporaneo*, Online review, 3 July 2017, p. 2.

⁴¹ *Criminal Justice Act 1988*, Section 139 (5).

⁴² *State of Ohio v. Harjinder Singh*, No. C-950777-Appeal, Court of Appeals of Ohio, First Appellate District, Hamilton County, 31 December 1996.

⁴³ *Canadian Charter of Rights and Freedoms*, art. 27.

⁴⁴ *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256. About this decision, see M. FERRI, *Gli accomodamenti ragionevoli in materia di libertà religiosa tra giurisprudenza della corte europea e della corte canadese*, in *Jus*, vol. 3, 2015.



cultural and religious pluralism, which in the present case the Italian Court of Cassation has inexplicably neglected.

And yet the latter is recognized both on international and national level. It is enough to recall the UN Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005⁴⁵, also approved with the Decision of the Council of the EU on 18 May 2006⁴⁶ and ratified by Italy in 2007⁴⁷; or the art. 22 of the Charter of Fundamental Rights of the European Union, in force of which the EU respects cultural and religious diversity.

Moreover, ECHR jurisprudence on this topic is rich and meaningful: since the *Handyside v. United Kingdom* case⁴⁸, in 1976, ECHR has recognized a fundamental role to pluralism, understood as a so essential character of the democratic society that “there can be no democracy without pluralism”⁴⁹. And it was exactly with a decision on religious freedom that ECHR clarified the role of the State in the face of the difficulties that can unavoidably arise in pluralist societies: it has the task “not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other”⁵⁰.

Coming to the Italian legal system, the essential principle is enshrined in art. 2 of the Constitution, which expresses the pluralist nature of our democracy: it is an open and composite pluralism, which, in harmony with the confessional pluralism (art. 8)⁵¹, constitutes a structural profile of entire Italian system and whose role has now grown up to being recognized as one of the pillars of republican democracy and of any democratic system in the European Union.

And it is exactly from those two constitutional provisions, together with articles 3, 7, 19 - which guarantees religious freedom - and 20, that Constitutional Court inferred, in its historic decision n. 203 of 1989⁵², the

⁴⁵ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

⁴⁶ Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2006/515/CE).

⁴⁷ Law n. 19/2007.

⁴⁸ *Handyside v. United Kingdom*, European Court of Human Rights, n. 5493/72, 7 December 1976, par. 49.

⁴⁹ As more recently reaffirmed in *Refah Partisi and Other v. Turkey*, European Court of Human Rights, nn. 41340/98, 41342/98, 41343/98, 41344/98, 13 February 2003, par. 89.

⁵⁰ *Serif v. Greece*, European Court of Human Rights, n. 38178/97, 14 December 1999, par. 53.

⁵¹ G. CASUSCELLI, *Dal pluralismo confessionale alla multireligiosità: il diritto ecclesiastico e le sue fonti nel guado del post-confessionismo*, in *Stato, Chiese e pluralismo confessionale*, cit., April 2007, p. 4.

⁵² Constitutional Court, n. 203/1989.



supreme principle of Italian *laicità*⁵³. In this context, the role of confessional and cultural pluralism is so decisive that it not only even founds the “regime” of rules from which *laicità* is derived, but also necessarily has to be the key to a democratic interpretation of that *laicità*⁵⁴. Therefore, doctrine can validly describe the State demanded by Constitutional Judges as a “*laico-pluralist*” one⁵⁵, highlighting the indissoluble bond between the two principles.

Laicità, citing the words of the Constitutional Court, “does not imply indifference to religion but the State guarantee for the protection of freedom of religion, under the religious and cultural pluralism”⁵⁶. Among the corollaries of this supreme principle, moreover, it is worth remembering the protection of the minorities⁵⁷; it is one of the features, together with others as the duty of impartiality and equidistance from any religion, which defines Italian *laicità*.

It is clear, therefore, that in the present case the Court of Cassation made a sort of “political” choice⁵⁸, preferring, among the “Western values”

⁵³ It is preferable to leave the word *laicità* in Italian, without translating it, at least for two essential reasons: firstly, to underline and distinguish the specificities of Italian approach towards religions and religious freedom, an active and positive one; secondly, because its most common literal translation would be “secularism”, a wide-ranging and ambiguous concept. According to National Secular Society, the British association who promotes secularism since 1866, it consists essentially of three principles: separation of religious institutions from State institutions, freedom to practice one’s faith or belief and equality “so that our religious beliefs or lack of them doesn’t put any of us at an advantage or a disadvantage”. See National Secular Society website, www.secularism.org.uk/what-is-secularism.html/. This definition could actually embrace very different contexts: for instance, both Ireland and the US are “secular” States, but, as clarified by High Court of Ireland in 2009, “where the terms of the Establishment Clause are neutral, or «blind» as to religion, the Constitution of Ireland actively recognises the existence of diverse religious denominations and guarantees them certain rights. It might be said that in United States jurisprudence there is a wall of separation; under the Constitution of Ireland there is a constitutional «domain» of religious recognition” (*McNally v Ireland* [2009] IEHC 573, 17 December 2009, paragraph 135). Specifically, about Irish constitutional framework governing State and religion, see at least **E. DALY**, *Religion, Law and the Irish State*, Clarus Press, Dublin, 2012; **G. WHYTE**, *Religion*, in **G. HOGAN, G. WHYTE, D. KENNY, R. WALSH**, *Kelly: the Irish Constitution*, Bloomsbury Professional, Dublin, 2018, pp. 2457-2509.

⁵⁴ **J. PASQUALI CERIOLI**, *La laicità nella giurisprudenza amministrativa: da principio supremo a “simbolo religioso”*, in *Stato, Chiesa e pluralismo confessionale*, cit., March 2009, p. 9.

⁵⁵ **N. MARCHEI**, *La giurisprudenza ordinaria in materia penale: le contraddittorie anime del principio di laicità*, in *Stato, Chiesa e pluralismo confessionale*, cit., February 2009, p. 13.

⁵⁶ Constitutional Court, n. 203/1989, “Considerato in diritto”, par. 4.

⁵⁷ Constitutional Court, n. 329/1997.

⁵⁸ **A. BERNARDI**, *Populismo giudiziario?*, cit., p. 684, defines the judgment as a “ideologically influenced” one.



- generally mentioned but not specified - , security to religious freedom, *laicità* and pluralism, the latter being cited only *en passant*, in paragraph 2.3 of the decision, in its declination of “social pluralism”. This choice, however, ends up contrasting with the hierarchy of principles identified by the Constitutional Court in the last decades: supreme principles, as *laicità*, possess a value even higher than the other provisions of constitutional rank⁵⁹ and, as such, are meant to prevail over them.

Not to mention the difficulties in identifying the constitutional character of safety, as doctrine is still debating about the existence of an actual “right to security”⁶⁰.

In summary, the motivational process followed by the Supreme Court, and above all the ambiguous and misleading mention of the obligation to comply with some indefinite and arbitrarily identifiable Western values, has certainly to be censored.

Beyond the present case, the basic problem about *kirpan*, in a perspective of “positive” *laicità*⁶¹, is to find an accommodation between security concerns and religious freedom.

In such a view, it must be mentioned the Bill presented in Italian Senate on 6 May 2015, aimed at addressing directly the issue of the port of *kirpan*⁶². This proposal is based on a pilot project of Cremona police concluded with the production of a *kirpan* in all respects similar to the traditional one, but without the characteristics suitable to make it a cutting weapon, judged congruous also by the Italian Sikh communities. The Bill intends to authorize all Sikhs to carry their traditional religious knife, as long as it is tailored in this way and, in any case, provided with a special recognizable sign.

The Bill, which has been presented again in Parliament in May 2018⁶³, is now passing the exam of 1st Standing Committee of Constitutional

⁵⁹ Constitutional Court, n. 1146/1988, “Considerato in diritto”, par. 2.1.

⁶⁰ **Y.M. CITINO**, *Sicurezza e stato di diritto nella minaccia dei foreign terrorist fighters*, in *DirittiFondamentali.it*, Online review, n. 2, 2019, p. 6. On this debate, see, *ex multis*, **T.E. FROSINI**, *Il diritto costituzionale alla sicurezza*, in *forumcostituzionale.it*, Online review, 2006; **T.F. GIUPPONI**, *La sicurezza e le sue “dimensioni costituzionali”*, in *forumcostituzionale.it*, Online review, 2008.

⁶¹ **G. CASUSCELLI**, *La laicità e le democrazie: la laicità della ‘Repubblica democratica’ secondo la Costituzione italiana*, in *Stato, Chiese e pluralismo confessionale*, cit., 2007, p. 9.

⁶² Senato della Repubblica, XVII Legislatura, DDL S. 1910 - “Disposizioni in materia di porto del Kirpan da parte dei cittadini o degli stranieri di confessione Sikh legalmente residenti nel territorio della Repubblica”.

⁶³ Camera dei Deputati, XVIII Legislatura, DDL A.C. 346 - “Disposizioni in materia di porto del Kirpan da parte dei cittadini o degli stranieri di confessione Sikh legalmente residenti nel territorio della Repubblica”.



Affairs and could represent, on the one hand, an effective solution to an increasingly felt problem and, on the other hand, a brilliant example, also in our legal system, of forms of accommodation that respect at the same time security needs and fundamental rights.

5 - Conclusions: the centrality of human dignity

Beyond the specificities of single cases, the whole issue of cultural crimes can be faced with a uniform approach, if addressed from a different perspective.

If it is certain that multicultural societies pose new challenges about the respect of legal system's fundamental values, a point of balance has to be identified: what a *laico* State can require is that anyone accepts the pluralistic nature of its constitutional system, without the claim that they spontaneously accept all the other principles which found the latter⁶⁴. Not forcing them to any other adhesion means first and foremost enhancing the same pluralism on which the *laico* State is based.

In other words, just the respect of the methodological approach adopted by the legal system could be demanded: the respect of that fundamental "pact on the method" consisting in the renunciation of that little of its own specificity which is necessary for avoiding social disintegration⁶⁵. For what concerns people coming from other cultures, ask them for more would mean denying that same method and consequently those same principles, on which the pluralist society is founded, and requesting an inadmissible assimilation.

Imposing on everyone the obligation "of conform his values" to the ones shared by the majority, whatever they may be, would contradict the supreme principle of *laicità*. Indeed, the latter would be denied if the State chose to follow an "assimilationist" policy in order to level out different cultural and religious expressions⁶⁶, because *laicità* is not an ideology, but a framework⁶⁷, within which promoting pluralism.

⁶⁴ E. GROSSO, *I doveri costituzionali*, Lecture given at 2009 Annual Congress of Associazione Italiana dei Costituzionalisti titled "Lo Statuto costituzionale del non cittadino", Cagliari, 16-17 October 2009, p. 17.

⁶⁵ E. GROSSO, *I doveri costituzionali*, cit., p. 19.

⁶⁶ S. MONTESANO, *Dalla laicità dello Stato alla laicità per lo Stato. Il paradigma laico tra principio e valore*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 36, 2017, pp. 35-36.

⁶⁷ C. McCRUDDEN, *Quando i giudici parlano di Dio. Fede, pluralismo e diritti umani davanti alle Corti*, il Mulino, Bologna, 2019, p. 203.



No one can be subjected to a specific culture, if not at the cost of offending his/her personal conscience, understood as that intimate and privileged relationship of an individual with himself which constitutes both the spiritual-cultural and the ethical-juridical basis of fundamental rights⁶⁸. This intimate sphere, as clarified by Constitutional Court in 1991, “must be considered as the profoundest juridical result of the universal idea of human dignity that surrounds those (fundamental) rights”.⁶⁹

Coming to cultural crimes, precisely the paramount “constitutional value”⁷⁰ of human dignity could play an essential role. If it represents the insurmountable ethical minimum⁷¹ which is at the same time premise, foundation, essential shared element and limit of all fundamental rights⁷², its relevance cannot be ignored in courtrooms. Especially when defendants invoke the exercise of an inalienable right as justification for committing the crime, judges necessarily have to take into consideration if and how that right could be limited.

Dignity, together with proportionality, could lead the way: the first one, evaluated both as the dignity of the victim of the crime and the one of the offender, the second one, as an essential principle⁷³ when it comes to balancing different rights and interests, as security may be. A pluralist Constitution is precisely characterized by the fact that fundamental rights are never affirmed in absolute terms, but are part of a complex constitutional framework, in which other rights and other constitutionally protected interests can legitimately limit their scope⁷⁴.

⁶⁸ L.S. MARTUCCI, *Laicità e diritti nei programmi di deradicalizzazione dal terrorismo religioso*, in *Dirittifondamentali.it*, Online review, n. 2, 2018, p. 13.

⁶⁹ Constitutional Court, n. 467/1991, “Considerato in diritto”, par. 4.

⁷⁰ Constitutional Court, n. 293/2000, “Considerato in diritto”, par. 4.

⁷¹ J. PASQUALI CERIOLI, *Propaganda religiosa: la libertà silente*, Giappichelli, Torino, 2018, p. 162.

⁷² In EU law, Treaty on European Union includes, at art. 2, human dignity among the values which found Union and Charter of Fundamental Rights of the European Union’ Title I is headed “Dignity”. With regards to international law, Both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights declare in their Preamble that inalienable rights “derive from the inherent dignity of the human person”.

⁷³ Recently, EU Court of Justice defined proportionality as a general principle of European Union law. See *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, 17 April 2018, par. 68.

⁷⁴ M. CARTABIA, *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana*, Lecture given at “Conferenza trilaterale delle Corte costituzionali italiana, portoghese e spagnola”, Roma, 24-26 October 2013, p. 9.



In this context, dignity could offer a solution: understood as the “mutual recognition” that underlies all individual rights⁷⁵, every concrete attack to that ethical minimum has to be punished⁷⁶. So, this is the case of some cultural crimes, like sexual offences, domestic violences or child rights violations.

But when judges deal with different types of cultural crimes, without a clear identification of the victim as the *kirpan* case, they have to wonder how they can guarantee the full realisation of human dignity, an achievement which necessarily implies respect and support for religious freedom as expression of a search for answers to existential doubts⁷⁷.

In conclusion, in that circumstance, a decision which shows clear hostility to other cultures would firstly entail the marginalization of the openings in a plural and multicultural sense of our Constitution⁷⁸, starting precisely from those in religious matters referred to in articles 8 and 19. Then, and foremost, it would not reach the essential goal of a legal system built, together with others, upon the supreme principle of *laicità*: to identify the most suitable solution for the development of human dignity⁷⁹.

⁷⁵ S. DELLAVALLE, *Dall'immagine Dei al riconoscimento reciproco. L'evoluzione del concetto di dignità umana alla luce della difesa della libertà religiosa*, in *Costituzionalismo.it*, Online review, n. 3, 2014, par. 6.

⁷⁶ J. PASQUALI CERIOLI, *Propaganda religiosa*, cit., p. 164.

⁷⁷ S. DELLAVALLE, *Dall'immagine Dei*, cit., par. 6.

⁷⁸ A. BERNARDI, *Populismo giudiziario?*, cit., p. 703.

⁷⁹ C. McCRUDDEN, *Quando i giudici parlano*, cit., p. 204.