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# Cultural Expertise

## An Emergent Concept and Evolving Practices

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Edited by  
Livia Holden

Printed Edition of the Special Issue Published in *Laws*

# Cultural Expertise



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## An Emergent Concept and Evolving Practices

Special Issue Editor

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Article

# The “Cultural Test” as Cultural Expertise: Evolution of a Legal–Anthropological Tool for Judges

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**Abstract:** This paper analyzes the state of cultural expertise in Italy and then focuses on how it can be improved through a kind of cultural expertise that Italian academics, judges, and lawyers are currently debating: the so-called “cultural test”. This is a legal test for dealing with culture, which originally emerged as judicial tool in Northern American courts: It consists of a set of pre-established questions that a judge has to answer in order to decide whether or not to accept a cultural claim made by a migrant or by a person that belongs to minority communities. Whereas some questions of the cultural test refer to typical legal balancing between rights, other questions incorporate anthropological knowledge within the trial, requiring the judge to analyze the cultural practice at issue, its historical origin, the importance it has within the community, and other information about which the judge would not be sufficiently knowledgeable without resorting to anthropology. In this sense, the “cultural test” is a form of standardized cultural expertise that helps both the judge and the cultural expert in their tasks. The paper reveals both the arguments against and those in favor of the adoption of the “cultural test” and how they are currently unfolding in the Italian debate.

**Keywords:** multiculturalism; cultural expertise; cultural test; cultural rights; culture; migration; judiciary

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## 1. Introduction

Law and anthropology exist within diverse epistemological and methodological fields; they have different aims (e.g., descriptive, anthropology/prescriptive, the law) and different ways of dealing with the diversity of human behavior. Nevertheless, the present condition of multicultural societies urges a dialogue between the two disciplines in an effort to elaborate practical tools in which these two different fields can meet. The law needs anthropology to ensure justice. While judges may not have any anthropological training, they nonetheless must judge behaviors rooted in what the present status of knowledge calls “culture”. People can go to prison or lose their children simply because legal systems apply the law without an adequate evaluation of the cultural dimension of behavior. People can see their cultural rights (art. 27 of the 1966 International Covenant of Civil and Political Rights) unjustly denied if the cultural dimension of a controversy is not taken into account by the judge.

Thus, in multicultural societies, cultural expertise is becoming increasingly important as a way of imbuing the law with a kind of knowledge that would otherwise remain inaccessible to judges, lawyers, and other persons involved in a case.

In 1977, Lawrence Rosen—in his seminal article “The anthropologist as expert witness” (Rosen 1977)—analyzed the inclusion of the anthropologist into the trial and the consequences that this could have on judicial reasoning. Since then, cultural expertise has extended its borders and contents. In this paper, I adopt the definition of cultural expertise provided by Livia Holden, according to whom, “cultural expertise is the special knowledge that enables socio-legal scholars, anthropologists, 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, litigants or the accused person(s), and in some cases of the victim(s)” (Holden 2011, p. 2.).



At the comparative level, each State has different practices on how to introduce this “special knowledge” in the trial, whom to consult as cultural expert, what questions to ask, and what role to recognize to the cultural expertise in the decision. So far, no common model has been adopted, and cultural expertise takes on several forms, which I suggest classifying as follows in the Italian context: professional/nonprofessional, public/private, and case-by-case/standardized.

“Professional” cultural expertise is that performed by a qualified anthropologist or other professional (e.g., ethnopsychologist, historian, academic) who is an expert of the cultural practice<sup>1</sup> emerging in a trial. In this case, the cultural expert is a professional figure, not necessarily belonging to the cultural group, who has studied the practice through fieldwork or books. “Nonprofessional” expertise can be said to be that performed by an institution of that cultural group (e.g., embassy, consulate, government, prefecture, mayor, rabbi, imam, cultural association) or by a lay person (e.g., a *quisque de populo*—man in the street member of that group who is heard as a witness). In this case, the special knowledge/cultural expertise comes directly from a member of the group: The lay/nonprofessional cultural expert is, in fact, capable of explaining the meaning of the cultural practice as they belong to that culture. It is worth pointing out that such definition is unbiased by any intention to look down upon the “lay expert”.

“Public” cultural expertise is that requested by the judge in the exercise of their jurisdictional function, and paid using public money, whereas “private” cultural expertise is that which the lawyer introduces in the proceedings of their own motion, by identifying a cultural expert. In this case, the defendant bears the costs. Generally, public cultural expertise requires the cultural expert to be a professional, such as an anthropologist, an ethnopsychologist, etc., whereas private cultural expertise can be provided also by lay experts like embassies, prefectures, etc.

Cultural expertise can be either on a “case-by-case” basis, when an individual cultural expert is consulted for each proceeding and without a pre-established matrix of questions, or it can be “standardized” expertise when there is a fixed procedural tool to use (e.g., handbooks of cultural practices; database of cultural expertise to be consulted by judges; legal tests for dealing with culture).

Although the case-by-case approach may be an appropriate way to deal with the cultural background of facts and people, and it has the indubitable advantage of permitting a more tailored approach to the nuances of each cultural dimension, in practice, it also presents some flaws. It may happen, in fact, that, not having a systematic judicial method to understand the context of the facts, some judges fail to call any cultural expert at all; it may happen that judges ask certain questions and omit others, thus failing to acquire some relevant anthropological information; it may happen that the weight given to certain elements is higher in a case than in another, causing uncertainty; or even that anthropologists, called as experts, without any matrix, might elaborate detailed reports on the cultural dimension of a controversy that do not always respond to what the judge needs.

This paper goes beyond the case-by-case approach that so far is the most widespread in Italy and Europe and argues for the need to reflect on a more structured and standardized way to approach the role of the cultural expertise within cultural disputes. In order to pursue this aim, the paper analyzes a case study: the Italian one. After briefly reconstructing how cultural expertise works in Italy, this paper tackles the present practical challenges connected to cultural expertise in the trial by suggesting the adoption of a legal tool: the so-called “cultural test”, which can be used both by judges and by anthropologists. This tool has been known in the legal language as “cultural test” since

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<sup>1</sup> Far from the intention of essentializing groups and attributing them a static feature, as cultures are dynamic and become embodied in different ways according to different individuals within the group and their movements in space and time, in this paper, I chose to use the concept of “cultural practice” because in the dialogue between the law and anthropology, it appears still very useful for the following reasons. Firstly, the judge has to face a single practice/action/behavior relevant for the law and deliver a judgement with regard to it. Secondly, I recognize that the law needs the concept of “cultural practice” as a tool to give substance to cultural rights internationally recognized as human rights. I invite the reader to approach the concept of “cultural practice” as comprehensive of semantic fields, actions, world-view, beliefs, customs, ideologies, collective memories, and narratives.

1996, when the Canadian Supreme Court created it with the aim to define the conditions to recognize the First Nations' aboriginal rights protected in Section 35 of the Constitution Act, 1982. Actually, because the "cultural test" is a tool designed by jurists, a more appropriate referential terminology might be: "a legal test for dealing with culture". Nevertheless, scholars adopted this judicial wording thereafter (Dundes Renteln 2004; Eisenberg 2009; Dore 2016; Basile 2017; Ruggiu 2019), and this paper uses the common terminology of the cultural test with the caveat that "cultural" does not mean that the test necessarily reflects the view of anthropology on culture. This tool, already used in some jurisdictions in Canada and the United States, although in ways that are not regarded as satisfactory (Borrows 1997–1998), is currently being debated in Italy by judges, lawyers, and legal academics.

The paper argues that the cultural test could become a useful tool in the hands of the "anthropologist judge". By this expression, I mean "any judge who may find herself facing different cultural practices and who decides (on her own initiative) or is induced (by the lawyer) to confront the concept of culture, either in civil, criminal, or administrative jurisdictions and in trial, appeal or supreme courts" (Ruggiu 2019, p. xvii.) The cultural test is addressed as a tool to guarantee the cultural rights of migrants, which are internationally guaranteed. In fact, the precondition to cultural rights is the right to present a cultural defense (Dundes Renteln 2002, p. 199) but benefitting from a guide that enables the judges to perform, with the help of anthropology, an accurate analysis of the elements at stake.

This paper analyzes a specific cultural test that I have elaborated by gathering the most persuasive and recurring *topos*<sup>2</sup> that Western judges use when they settle a case in which the cultural background of facts and people is relevant (Ruggiu 2019).

By looking into the Italian debate, the article aims to provide more general suggestions useful at a comparative level on how judges can be guided in incorporating anthropological knowledge into the trial through the cultural test.

## 2. The Present State of Cultural Expertise in Italy

In Italy, cultural expertise practice is not systematically used, but there are many occurrences and varieties. When used, cultural expertise can be both professional and nonprofessional, public and private, written and oral and is so far provided on a case-by-case basis.

The lack of request for anthropologists in juridical fields combines, in Italy, with a lack of bureaucratic structuring of anthropology. Anthropologists are not organized in a state board from which the judge can select experts, as happens with engineers, doctors, psychologists, and other technical experts falling within more established and recognized categories (Ciccozzi and Decarli 2019, pp. 36–38). The Italian Legislature has not yet addressed the creation of a state board for cultural experts in the context of multicultural disputes. The only intervention so far, with a view to setting up national professional rolls of anthropologists, is represented by Law 22 July 2014, no. 110 "Amendment to the Code of Cultural Heritage and Landscape, as per Legislative Decree 22 January 2004, no. 42, in the field of cultural heritage professionals, and establishment of national rolls of the aforementioned professionals". This law introduces art. 9 *bis* to the Code of Cultural Heritage and Landscape enacted in 2004, envisaging the setting up of national professional rolls of anthropologists and of a new professional category called *demo-ethno-anthropologist*. Both profiles will be involved in the protection of cultural heritage, namely, in archaeological excavation sites or museums, but not in the issues connected with multiculturalism. A nationwide board of anthropologists to be involved in multicultural disputes would facilitate the work of the lawyers and judges, as they would have a list, with associated CVs, from which to select the name of the persons to consult. Many European States share this situation. Furthermore, in Italy, there is neither a national exam to become an anthropologist, like the bar exam for lawyers or the exam to become an architect or a psychologist, nor a national list of anthropologists. Together with a lack

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<sup>2</sup> With *topos*, I mean, with Aristotle (384–322 B.C.E.), the shared points reached in a discourse on which there is a stable consensus (Aristotle 2012, book 5.) In this case, the discourse is the one going on between judges in search of multicultural justice.

of demand from judges, these are other obstacles to the systematic involvement of anthropologists in the trial as experts in the context of multicultural disputes. In addition, anthropology suffers also the (misplaced) prejudice in favor of “hard sciences” (medicine, engineering), being a social science, and one of the youngest, so it happens that the judge does not think they need to deepen the information concerning the cultural dimension of the case. Therefore, Italian judges often tend to act as a “solo” anthropologist, analyzing the cultural claim or the cultural context autonomously. Sometimes, this task is well performed, as in the case of a young Moroccan child that was trying to reach his uncle living in Rome to whom he had been entrusted by virtue of *kafalah*. The child was stopped in Casablanca because the Italian Government refused the visa, claiming that *kafalah* was not enough to create a family bond. Judge Giacinto Bisogni, drafting the opinion (Italian Supreme Court of Cassation, I civil section, 2 February 2015, no. 1843), engaged in his own research, found documents concerning *kafalah*, and resolved the case in favor of the recognition of this cultural practice, thus allowing the family reunification of the child with his uncle. Although this “anthropologist judge” analyzed accurately the cultural practice, within other proceedings, Italian judges have committed several “anthropological mistakes”. Those can be framed either in the category of “blaming culture for bad behaviour” (Volpp 2000)—as when a judge treated rape in Afghanistan as a cultural practice (Giudice Udienza Preliminare-GUP Bologna, 16 November 2006)—or in the category of “exoticism”—as when the Supreme Court of Cassation treated Roma begging as a cultural practice, while Roma people themselves said that it was not a cultural practice (Ruggiu 2016 and infra).

In addition to judges that act as “solo anthropologist”, there are also judges that request cultural expertise (Ciccozzi and Decarli 2019), but more frequently, in Italy, cultural expertise enters the trial on request of culturally-sensitive lawyers who gather information on the cultural dimension of the controversy to be presented to the judge. When this happens, we can talk of a form of “private” cultural expertise.

Cultural experts consulted in Italian case law have heterogeneous expertise. Sometimes they appoint anthropologists, as in the Tavarez case (decided by Court of Appeal of Trieste 19 February 2009, op. no. 48), a family law case in which Nicole Tavarez, daughter of Mr. Louis Aneury Tavarez Marte, was declared adoptable as the judge considered the child abandoned. Anthropologist Federica Rossi was asked by Mr. Tavarez’s lawyer to draw up a cultural expert witness report. In the document, the anthropologist states: “I answer the questions asked by lawyer Alberto Patrone, of the *forum* of Trieste, concerning the evaluation of the cultural patterns existing in the Caribbean sea and specifically in the Dominican area, which are relevant to understand the facts decided by the Court of Appeal of Trieste, 19 February 2009, op. no. 48”. The expert witness report unfolds along eight pages of detailed analysis firstly of the broader cultural, political, and social history of the Dominican area, then of the model of family existing comparatively in the world. The anthropologist concludes by saying that the extended family model existing also in the Dominican area determines different standards of child care in which the child, as Nicole was, is often entrusted to relatives or friends, or even left alone, and that this does not mean lack of care.

Whereas in this case, an anthropologist was consulted, in most cases, Italian lawyers request cultural expertise from other subjects: official institutions of the defendant’s country, such as the Consulate, Embassy, and Prefecture or recognized members of the minority which the defendant belongs to. An Indian Consulate’s certificate was, for instance, produced by the lawyer of Mr. Singh, an Indian citizen and member of the Sikh religion, reported to the police for carrying illegal weapons while shopping in a supermarket in Cremona. Along with the traditional clothes and turban, the man was wearing the *kirpan*. The *Trial Court of Cremona*, 19 February 2009, no. 15 stated the reasons, reporting in its opinion excerpts from the Indian Consulate’s certificate: “in accordance with what is known based on the documents produced by the defence . . . the symbols of (the Sikh) religion are: the *Khanda*, symbol of the *Khalsa*, that is the Sikh community, which consists of a central sword (symbol of faith in God) and two crossed swords (symbol of spiritual and temporal power); the *Khanga* (comb), a symbol of personal care of the person as a creature of God; the *Kirpan* (dagger), a symbol

of resistance to evil; the *Kara* (metal bracelet that recalls the principle of non-stealing and also has a balancing function of the iron in the human body) as a sign of unity with God and, finally, the beard and uncut hair, a sign of acceptance of God's will, as the natural will of God is followed. In particular, the follower of the Sikh religion should always carry the *kirpan*, as well as the turban. And this is also expressly confirmed, in a similar case, by the Consulate General of India (see the certificate of 21 June 2001, produced by the defence) which indicates how the Indian Sikh is 'forced', and does not merely have an option, 'for religious reasons to always carry a turban and *kirpan* (small dagger) as required by Sikhism'. After these assessments, the judge acquitted the Sikh for having exercised freedom of religion.

In another case of an Albanian father who kissed his son's genitals, as a form of "homage to the penis" (John et al. 1991) cultural practice, the lawyer presented a statement from the Prefect of Vlore, Albania. This cultural expertise stated that it was common in that area to caress the penis of the child to celebrate "the glory of prosperity" and the happiness for having a male child. This case was brought as a result of the report made by two teachers of an Albanian child who had overheard a conversation between the child and another five-year-old. The latter was reportedly saying: "Yesterday I made all my family laugh by running naked in the house", to which the Albanian child answered: "And my father sucked mine [*penis*]". Requested by the teachers to explain what he meant, the Albanian child mimed the act, by putting a teaspoon in his mouth and moving it up and down: "like that, like a feeding bottle". The teachers reported the case to a judge who ordered to place secret video cameras in the Albanian family's home. The video cameras filmed two episodes in which the father sucked his son's penis; the child's mother was present on one of the occasions. The father and the mother of the child were prosecuted based on such evidence with the charge of sexual abuse. The court of first instance (Tribunale di Reggio Emilia, 21 November 2012) stated the reasons by saying that, although the gesture was clearly sexual according to the Italian criminal code, the father lacked sexual intention since the behavior was culturally motivated based on a tradition of rural Albania (as it was an expression of affection). The Court of Appeal (Corte d'Appello di Bologna, 9 April 2017) upheld the decision, adding that the conduct could not even be considered a crime because "it was a gesture of love and paternal pride toward the male offspring, completely lacking any sexual connotation and conforming to a cultural tradition of rural Albania". The Italian Supreme Court of Cassation (Cassazione, III criminal section, 29 January 2018 no. 29613) annulled the judgment and ordered that a new trial take place (in a different section of the Court of Appeal of Bologna) in order to allow for the rights of the child to prevail, since the sucking and kissing of the penis, which is an erogenous zone, is inherently sexual and the cultural defense cannot be used when it affects crucial rights of the child. The Supreme Court of Cassation deemed the document of the Prefecture of Vlore not accurate, as it "was unverified and lacked authentication (as evidenced by the judge of first instance and by the Public Prosecutor who appealed the judgment) and such document simply reported that in some rural areas of Albania a tradition existed, consisting in caressing one's own son's private parts, as a wish for prosperity" not mentioning at all the kissing of the penis. On 16 May 2019, the Court of Appeal of Bologna condemned the man to 2 years and 8 months of prison for the crime of having committed sexual activities with a minor (sec. 609 quarter Italian criminal code). Given the importance of the interests at stake, in this case, a professional and more detailed cultural expertise explaining that the practice of the "homage to penis" of the child (John et al. 1991) is spread in areas of Albania, Afghanistan, Bulgaria, Cambodia, India, Italy, Vietnam, and several others would have been essential. In fact, the cultural practice was completely unknown to the Italian society, where the mass panic toward pedophilia led the teachers to report the father to the police.

In Italy and elsewhere, it may also happen that the lawyer resorts to the cultural defense without substantiating it by means of any cultural expertise, that is, just claiming that the defendant was moved by their enculturation based on what the defendant claims. This generally happens when the defendant belongs to a cultural minority that is already known in Italy, like the Jewish or the Roma (Gypsies) people, or with respect to cultural practices well known internationally (*kafalah*, female

genital mutilation, male circumcision). But sometimes, the lack of cultural expertise and the excess of self-confidence by the lawyers and judges in dealing with a cultural practice lead to misunderstandings, as happened in the so-called “begging case”, a 2008 Supreme Court of Cassation opinion (Cassazione, V criminal section, 17 September 2008, op. no. 44516) in which the begging practiced by Roma (Gypsies) was (incorrectly) regarded as a cultural practice (Ruggiu 2016). The case concerned a Roma mother who took her child with her when she begged on the streets. The lawyer asked the judge “not to criminalize a thousand-year-old cultural practice” (without previously consulting any Roma people or any anthropologist). The Supreme Court accepted the cultural claim and mitigated the sentence. A few days after the opinion was delivered, the Roma and Sinti association *Federazione Rom e Sinti Insieme* (“Roma and Sinti Together Federation”) denied that begging was part of their culture, stating that, conversely, it was a consequence of the decline of that very culture due to urbanization. In response to this incorrect framing of begging as a Roma cultural practice, the Italian debate polarized and in 2009, in the name of children’s rights “against culture”, the Italian Parliament enacted a new crime (“begging with a child” art. 600 *octies* of the criminal code), with severe penalties and the automatic loss of parental authority for parents who take their children with them to beg.

The heterogeneity of ways in which anthropological knowledge is brought into Italian courts is also reflected at a procedural level. Indeed, in Italy, cultural expertise can be written or oral: It can be formalized in a document and brought to the attention of the judge by the lawyer; or the cultural expert can be a witness expert, summoned by the lawyer to make a statement and answer questions during the trial; a lay person or the same defendant may be subject to oral examination during the trial with regard to the cultural dimension of the conduct at issue.

This is the status quo of cultural expertise in Italy, but it must be pointed out that there is growing debate, particularly between judges and lawyers, with a view to enhancing the dialogue between law and anthropology and to finding ways to incorporate cultural expertise into the trial in a more efficient and systematic manner. Given the present situation of migration in Italy, the issue is becoming urgent.

### 3. The Urgency of Incorporating Cultural Expertise into the Trial in Italy

Italy can be classified as a recent de facto multicultural country if compared to other countries where migration is a more consolidated phenomenon. Until the 1970s, Italy was a country of emigration, whereas nowadays, the immigrants who permanently live in the country represent 10% of the population: approximately 6 million people out of a total population of 60 million.

Cultural diversity brings new challenges in the domain of justice, similar to those already seen in other de facto or de iure multicultural states, like the United States (Dundes Renteln 2004) and Canada (Eisenberg 2009). Just to make a few examples of recent cases in which the lack of anthropological knowledge led to failing to attain justice, it should be recalled that in Italy, parents lose parental authority over their sons because judges confuse the cultural practice of the “homage to the penis” with pedophile sexual abuse (see *supra* sec. 2), and Sikhs cannot wear the *kirpan* any longer because it is considered a “weapon” and is regarded as a violation of “Western values” (Court of Cassation, I criminal section, 15 May 2017, no. 24084. Italian courts used to acquit Sikhs wearing a *kirpan* until 2016). Lack of basic anthropological tools—such as “cultural translation”, the capacity to adopt the migrants’ “point of view”, the search for a “cultural equivalent” in the host society—in the hands of judges, lawyers, mayors, social services, teachers, and citizens are causing several cultural misunderstandings that affect the achievement of actual justice.

Italian civil and criminal courts address each cultural dispute with a case-by-case approach. There is no Multicultural Act, no clear rule for the judges on how to use the cultural defense or recognize foreigners’ right to culture, since art. 27 of the 1966 International Covenant of Civil and Political Rights (1966) has never been implemented through a law or through an amendment to the Constitution aimed at recognizing multiculturalism.

The problem of incorporating anthropological knowledge into the trial has become particularly urgent after the so-called “migration crisis” (2014–2017). The number of migrants landing on the

Italian courts brought thousands of applications for asylum or other forms of international protection to the judges' desks. Many of them are based on cultural grounds: people claiming that they need protection from voodoo rituals, black magic, female genital mutilations, "honor killings". Judges and lawyers started to face cultural questions that often the C.O.I. (Country of Origin Information) they were provided with could not help in answering.

The requests for asylum and international protection have led to a transformation in the same structure of the judiciary. In fact, in order to try to expedite and make the analysis of asylum applications more specific and specialized, 26 special migration sections, one for each Court of Appeal, were established by law 13 April 2017 no. 46.

Given this background, the role of cultural expertise becomes increasingly crucial to the justice system in Italy.

The Italian judiciary has realized the importance of tackling the challenges of multiculturalism. The Italian Supreme Court of Cassation organized a Conference on 2–3 October 2015, at its venue in Rome, on *Multiculturalism and the Courts*, nationally broadcasted on the radio station [www.radioradicale.it](http://www.radioradicale.it), in which the judges reflected on the possible tools to be adopted for the solution of multicultural disputes. In March 2018 and 2019, the Italian School for the Judiciary (*Scuola Italiana di Magistratura*) organized at its venue in Scandicci-Florence a three-day course on the subject "Multiculturalism and criminal law" with the participation of a hundred of judges, in which topics such as the role of the "anthropologist judge" (2018) and the "cultural test in theory and practice" (2019) were discussed. In May 2017, the "Observatory on Justice, Transcultural Dialogues and International Protection" (hereinafter, the Observatory on Transcultural Dialogues or the Observatory) was established with the task of drawing up a protocol and guidelines for Italian judges and lawyers on how to solve multicultural disputes. The Observatory is a spontaneous organization based on a model (Observatories on Civil Justice) forged in the 1990s by judge Carlo Maria Verardi, who had the idea of bringing judges and lawyers together to discuss new issues before actual litigation handled by lawyers and judges in court. The task of the existing Observatories is to elaborate protocols and guidelines.<sup>3</sup> Although those are nonbinding, they are informally used in many courts in Italy. The Observatory on Transcultural Dialogues consists of about twenty judges, twenty lawyers, and ten academicians, coming mainly from the school of law. The organization is also open to anthropologists and ethnopsychologists as well as stakeholders, such as migrants' organizations. The Observatory is coordinated by Giacinto Bisogni, judge of the Italian Supreme Court of Cassation, and Paola Lovati, attorney in Milan.

Among other tasks, this Observatory decided to focus on the legal tool known as the "cultural test" in order to analyze how judges and lawyers can benefit from the use of this tool. In the following sections, I analyze this legal tool for dealing with culture as a sort of new form of cultural expertise and describe the current debate around it.

#### 4. The "Cultural Test" as a Form of Cultural Expertise

What is a cultural test? This expression refers to 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. The cultural test is a legal tool created by judges and used at the judicial level comparatively. In fact, in order to decide whether or not to accept cultural and religious claims, several judges (the Canadian Supreme Court, the US Supreme Court, the UN Committee of Human Rights) have elaborated so-called "religious tests" and "cultural tests". The first "religious test" was created in the US in 1963 in the Supreme Court opinion *Sherbert v. Verner* (1963), 374 U.S. 398; the first "cultural test" was created in Canada in 1996 in the Supreme Court opinion *R. v. Van Der Peet* [1996], 2 S.C.R. 507.

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<sup>3</sup> <http://milanosservatorio.it/vista-dellassemblea-nazionale-degli-osservatori-reggio-emilia-del-prossimo-fine-settimana-pubblichiamo-la-seconda-scheda-preparatoria-altro-materiale-del-gruppo-lavoro-giustizia-dialogh/>.

The US religious test asks the following questions: Which is the religious practice (detailed description)? Is the subject sincere? Is there a substantial burden over a mandatory practice? Is there a State's compelling interest to limit the practice?

The Canadian cultural test asks the following questions: Which is the cultural practice (detailed description)? Is the practice "essential and integral" to the cultural survival of the group? Is the practice "distinctive" from other majority practices? Did the practice exist prior to contact with Europeans (pre-contact test)?

While some questions of the existing cultural tests refer to the typical legal balancing between rights, other questions try to incorporate expertise about culture within the trial, requiring the judge to analyze the cultural practice at issue, its historical origin, and the importance it has within the community, recognizing that the judge would not be sufficiently knowledgeable without resorting to anthropology. For instance, the fact that the judge is obliged to provide a detailed description of the cultural practice at stake by both the abovementioned tests ensures that they do not miss crucial cultural information in deciding the case and that they have to consult an anthropologist to answer the test question.

Some existing cultural tests present old-fashioned visions of cultures or are incomplete with regard to the questions to be asked. The North American tests have been elaborated by judges, under the contingency of their legal systems, and without any consultancy with anthropologists. For instance, the question "did the practice exist prior to contact with Europeans?", included in the Canadian cultural test, has been heavily criticized for freezing aboriginal groups in time (Borrows 1997–1998), against all the contemporary ideas of culture as a dynamic system elaborated by anthropology.

Despite some potential limitations (*infra* sec. 6), the idea of a "cultural test" is worthy of being explored, as it could be a way of introducing on stable terms the cultural expertise into the trial, making sure that crucial anthropology-relevant questions are raised when facing a multicultural dispute.

Comparatively, strong interest in the tool of the cultural test has been shown by several legal scholars who, whilst criticizing existing judicial cultural tests, have put forward their version of a cultural test that can guide judges, lawyers and anthropologists in approaching a cultural dispute (Dundes Renteln 2004, p. 207; Eisenberg 2009, p. 12; De Maglie 2010, pp. 253–60; Dore 2016, p. 552; Basile 2017, pp. 131–34; Ruggiu 2019, pp. 143–201.) The idea of adopting a cultural test is gaining momentum between both legal scholars and practitioners who feel the need to put an end to the random approach to culture in the context of multicultural disputes. The Italian Supreme Court in 2018 referred to some elements suggested by Fabio Basile (2017, pp. 131–34), an Italian professor of criminal law, as important in assessing a cultural claim. The Italian Supreme Court of Cassation, III criminal section, 29 January 2018 no. 29613 opinion reads: "in order to evaluate the impact that the cultural matrix has on the awareness of the agent, it will be useful, as suggested by the most recent academic legal theory [*scholars*], to evaluate *the nature of the cultural provision* to comply with which the crime was committed, whether of a *religious or legal nature* (as would happen if the cultural rule matched a corresponding legal rule in force in the legal system of the immigrant's country of origin, since in the latter case the awareness of the unlawfulness of the conduct, and therefore the culpability concerning the committed fact would be relevant), and [*evaluate*] *whether the cultural norm is binding* (if respected in a homogeneous way by all the members of the cultural group or, rather, obsolete and not widespread also in that context). Ultimately, the *extent of the integration* of the immigrant in the culture and social fabric of the country of destination, and the extent of *persistent adherence to the culture of origin* (an aspect which is relatively independent of the time spent in the host country) will also be *relevant factors to assess*." Personally, I do not consider this embryonic cultural test to be complete, but I consider this opinion relevant since, for the first time, the Italian Supreme Court mentioned the need of fixed elements to construct the judicial evaluation. The next step, in my opinion, should be to refine this embryo of a cultural test in order to ensure that a permanent and complete form of standardized cultural expertise is introduced into the trial. The following sections show how Italian judges are tackling this challenge.

## 5. A Proposal of “Cultural Test” Debated in Italy

In order to stop the unpredictable and heterogeneous way in which Italian judges approach multicultural disputes, judges, lawyers and legal scholars within the Observatory on Transcultural Dialogues are discussing the possibility of adopting a cultural test as a guideline in stating the reasons of judgements and opinions. In perspective, other jurisdictions may also use this tool comparatively, as it gathers the most persuasive questions already adopted by judges (and anthropologists) in the trial.

The test currently debated at the Observatory on Transcultural dialogues and during training courses with Italian judges (e.g., Superior School of the Judiciary, Scandicci, 14 March 2019 course on Multiculturalism and criminal law) still needs a deeper discussion with a wider community of anthropologists, in Italy and internationally, as so far, it is a legal instrument discussed mainly among jurists. So far, it represents an attempt, from part of the law, to incorporate cultural expertise within the trial, and in this sense, it can be considered a starting point of a possible dialogue between the law and anthropology.

The cultural test currently debated at the Observatory on Transcultural dialogues consists of the following questions:

1. Does the matter fall within the *category of culture*?
2. *Describe* the cultural practice and the group.
3. Relate and link the practice with the broader cultural system/web of significances.
4. Is the practice *essential* (to the group’s survival), *compulsory* or *optional*?
5. Is the practice *shared* or *contested* within the group?
6. Is the group *vulnerable* within a society? Is it discriminated against?
7. How would a *reasonable person in that group* behave in the same circumstances?
8. Is the subject *sincere*, *honest* and *consistent* in claiming the cultural practice?
9. Is there a *cultural equivalent*, a similar or comparable practice, in the majority culture?
10. Is the practice *harmful*? Is the harm irreparable?
11. Does the practice perpetuate *patriarchy*?
12. What is the impact of the practice on the culture and value system of the *majority*?
13. What positive reasons support the minority following that practice? Is the practice an *equally valuable and meaningful life choice*?

These questions, intertwined and complementing each other, can be grouped into a triadic structure comprising the objective, subjective, and relational parts of the test.

1. *Objective evaluation.* The first group of questions (#1–6) aims to investigate the conditions for the recognition of a cultural practice by examining its objective characteristics. In this stage, the cultural expert’s contribution is essential as the law provides no answer to those questions, except for question 6, which the judge can answer by observing the social context in order to check if the minority is welcomed or discriminated against.
2. *Subjective evaluation.* The second set of questions in the proposed test (#7–8) focuses on the relationship between culture and its actual manifestation in different personal identities. This subjective investigation is needed to verify that the litigants do not use cultural arguments as a mere tactical tool, as well as to give the judge a more accurate measure of the interests involved in the dispute. In this stage, factual evidence from witnesses is essential. The help of a cultural expert is also necessary in this stage, especially for question 7.
3. *Relational evaluation.* The test is completed with a relational assessment of the conflict (questions #9–13). The fact that the objective (there is a cultural practice, with a certain extent of obligation) and subjective (the person sincerely adheres to that practice, which is a constituent part of their identity) requirements are met does not mean that the legal response must necessarily be recognition. In fact, there is the need to consider cultural needs compared with those of others,



in this case of the majority of the society. A test that is limited to the mere objective assessment betrays the particularity of law as a science of settlement of social conflict. In this relational part of the test, question 9 calls for the help of an anthropologist. Only a cultural expert, in fact, is able to proceed to the “cultural translation” of behavior explaining its value and significance in the two different “webs of significances” (Geertz 1973, p. 5), of the majority and the minority.

The discussion regarding the possibility of adopting this legal test for dealing with culture is still ongoing within the Observatory and the Italian Judiciary, but it is already possible to identify the main arguments against and in favor of its adoption.

## **6. Arguments against the Adoption of the “Cultural Test”**

Without any order of importance, the following criticisms towards the adoption of the “cultural test” can be foreseen.

A first criticism is that it appears to be a “legal transplant” from common law systems that could alter the way in which, in Italy, judges state the reasons of judgments. Indeed, whereas Italian judges have the duty to state the reasons of their opinions, they are not subject to fixed rules on how to do this and enjoy discretionary power in this regard, connected to the independence of the Judiciary. Therefore, some perceive the test as a tool that limits the freedom of the judge and their capability to choose the arguments to settle the multicultural dispute. One possible solution to this is that the test remains an element additional to the written opinion. This would mean that the judge takes it into account, albeit without having to state the reasons in such a manner as if they were compulsorily answering the questions of the cultural test. This could be a compromise between a common law tradition and a civil law tradition, which could ensure that judges use homogeneous tools in their reasoning whilst not losing their discretionary power.

A second risk, connected to the first, concerns the lawfulness of the cultural test, until it is introduced in the formal legal system by the legislature. Italian judges (as all democratic judges) give their opinion “in the name of the Italian people”, and they are subject only to the law. In Northern America, the US religious test became a law (Religious Freedom Restoration Act-RFRA 1993), but the same is unlikely to happen in Italy, where the legislature tends not to impose on the judiciary tools to state the reason of their opinions. Therefore, some judges foresee an issue of lawfulness in deciding a case following such method. Again, the solution to this problem—discussed within the Observatory on Transcultural Dialogues—could be that the test does not become a compulsory tool but is used as a form of guideline, of best practice for the judges. Another solution is that the test starts to be used by the Supreme Court of Cassation in its decisions as the proper way to state the reasons in the context of a cultural case. In this way, the cultural test could become a self-adopted judicial tool.

A fourth possible risk of adopting the cultural test is that of essentializing groups (Ricca 2005). Within the Observatory, for instance, the anthropologist Stefania Spada observes that cultures are dynamic and embodied in a different way: The test, risking to proceed according to a reifying and reductionist logic, would not cover the multiple subjective declinations of cultural knowledge and would not be able to understand the contextual and particular differences of individuals. The knot that raises criticality is precisely the way to elaborate the concept of culture. Culture is co-produced at both intersubjective and group level, in the different spaces/places in which the subject is embedded; the dynamics of co-production also proceed in a different way according to the contexts they originate from or the situations that host the contact with “cultural otherness” (migratory contexts, post-colonial spaces, etc.). In “handling the cultural dimension”, it would therefore be appropriate to look at life stories and material conditions of existence to avoid misunderstandings arising from an ethnocentric reading, implemented through categories established in a unilateral way and often essentialized.

There is also the risk that cultural groups submit cultural claims tailored to the questions of the test, thus distorting their culture, and even constructing false cultural claims. According to this view, a case-by-case approach should be preferred, as it would help to avoid that the litigants construct a case around the issues highlighted in the test that they know the judge would take into consideration.

A response to those criticisms comes from the urgency to avoid cultural injustice by assessing cultural aspects within the trial's features and constraints. While it is important not to essentialize an individual or stereotyping a group, cultural practices and behaviors do, in fact, exist. Actually, the judge is under a duty to decide the case. In contrast to the legislature, which is free to decide to leave multicultural conflicts without a legal framework, the judiciary cannot say "*non liquet*", "I do not know how to solve this case". Judges must provide a solution, and the more expertise about the cultural dimension of that behavior relevant for the law they have, the better they may serve justice. One could say that this expertise could enter the trial case-by-case, but in practice, if the judges are not guided in a field that is often unknown to them, they may completely ignore that cultural aspects are at stake. The presence of a test which has several questions to be answered, with the help of an anthropologist, can avoid this risk.

A second response to the anti-essentialist criticism is that sometimes, essentialism can be the lesser evil. Particularly in criminal law and family laws, persons face heavy charges: Parents that kiss their sons in the penis as a kind of cuddle, because in their culture this is an admitted behavior, risk going to jail for sexual abuse; parents that practice cupping (a folk medicine) on their children risk going to jail for the crime of assault and battery of a minor. Those persons risk having their children given to foster care, their family broken, their life destroyed. I believe it is a lesser evil to run the risk that Italian society essentialize Albanian fathers as "fathers who kiss their baby's penis" rather than that an Albanian father goes to jail. Anti-essentialism was born out of anticolonial discourse. We should be careful it does not become a way to indirectly perpetuate injustice. We live in an age of mass migration. Many of the six million persons who have immigrated to Italy had to leave their countries for injustices connected to the neocolonial political structure of the world (e.g., capitalist wars, globalization, climate change). If to the trauma of having to leave their home-country, we add the trauma of having their cultural rights ignored, we would disadvantage migrant minorities. In this context, the concept of a "strategic essentialism" (Spivak 1996) was born. According to strategic essentialists, whilst essentialism and reification of cultures and other vulnerable groups (Stone 2004) should be avoided as descriptively inaccurate, it can be politically promoted as a tool to obtain political results in favor of the group. Of course, if the cultural dimension of the behavior is not genuine, the claim does not deserve recognition: The cultural test precisely provides the questions to avoid false claims.

A fifth adverse argument against the test is that the questions of the test are imbued with ethnocentrism. The thirteen questions designed as relevant, in fact, may not necessarily coincide with the ones that are significant to the litigant: Being constrained in the straitjacket of a legal test, the litigant might silent facets and items relevant and truly important for him/her. Furthermore, the approach to knowledge based on cultural models—as the cultural test might appear—is antithetical to the current anthropological method. The test might seem to appeal to anthropological knowledge, but actually it could limit it, as in anthropology, the study of culture does not proceed by "practices" but, rather, by semantic fields, discourses about practices, ideologies, memories, and politics.

But as already discussed, the "cultural test" should be intended as a guideline containing the essential questions to ask when facing a cultural dispute: It should not be intended as closed and fixed. Actually, some of its questions are already built in a broad way to allow the anthropologist who answers them to describe accurately all the aspects involved. For instance, questions 2 and 3 ask to describe the cultural dimensions of facts at stake and then to insert it within the broader web of significance. In this part, the anthropologist can detail more relevant aspects emerging from fieldwork explaining the semantic fields, discourses about the practice, ideologies, memories, and politics in which the behavior, belief, or word view can be understood. As explained before, the alternative is to risk failing to consider any cultural aspects of the controversy at all.

Other criticisms concern single questions within the cultural test. For instance, asking if the practice is essential, compulsory or optional (question no. 4) might seem inaccurate from an anthropological point of view, as anthropologists are disinclined to classify practices on the basis of their binding nature.

Here, we can see the difficulty of the dialogue between two sciences with different epistemological and methodological horizons. In fact, this question is very important with regard to the legal balancing that the judge has to carry out and is also one *topos* of multicultural case law nowadays (Ruggiu 2019, p. 161).

Another question which needs a deeper discussion with anthropologists is that (no. 7) concerning the behavior of the reasonable person within the group, as different individuals embody culture in different ways, whilst lawyers and judges need to size up behavior against some parameters in order to understand if the defendant concerned can actually be justified by their cultural rights or not.

### 7. Arguments in Favor of the Adoption of the “Cultural Test”

The first argument in favor of the adoption of the cultural test is that it provides a clear path to the judge, the lawyers, and the same anthropologist called as expert witness, concerning the questions to address when faced with a cultural dispute. The existence of a test according to which the court is called upon to verify, through a matrix of predetermined questions, the conditions under which to grant recognition to culture is a way that stabilizes cultural expertise within the trial and guarantees that the judge, the lawyers, and the anthropologist do not overlook key questions. Nowadays, multicultural disputes in Italy are resolved within very heterogeneous statements of reasons: Some judges deem it relevant to ascertain whether the cultural practice is compulsory or optional; others, whether or not the cultural practice causes harm. The presence of a grid of predetermined questions that each judge can follow should favor the principle of legal certainty.

A second benefit, which concerns both judges and anthropologists, is that of ensuring conciseness. The test can be a useful tool that guides the same anthropologist with a fixed number of questions. In fact, sometimes, anthropologists tend to draft long cultural witness reports containing information that might be of no interest for the judge. Particularly in a context in which judges are overwhelmed by asylum seekers’ requests based on culture, the test can limit the length and comprehensive nature of a cultural expertise, creating an easy-to-read document.

A third benefit of the cultural test is that it may contribute to saving time and consequently guaranteeing a more expedite way to deliver judgements. Knowing what questions to ask when resolving a multicultural dispute avoids delays and doubts for both judges and anthropologists.

A fourth benefit is that of obtaining more clearly reasoned opinions that can favor social coexistence, rather than exacerbate social conflicts and hostility towards minorities. Often the opinions in which the judges were inclined to recognize a form of cultural defense brought about contrast with Italian public opinion because they stated the reasons in a way that was not anthropologically accurate: Saying that Roma beg for culture draws a line between Roma people and Italians, creating an “other” that is far from us and not understandable. By contrast, saying that Roma take their children to beg with them because they do not want to part from their children and they involve them in adults’ activities is something that Italians can understand better. Asking to describe the cultural practice at stake in detail (question no. 2) implies that the judge must consult an anthropologist that is able to frame begging in a more accurate way.

Further, identifying the “cultural equivalent” (question no. 9) in the Italian culture would bridge the cultural gap and make the practice more understandable.

### 8. Other Tools to Go Beyond the Case-by-Case Cultural Expertise

Whilst drafting a protocol and guidelines for Italian judges and lawyers on how to resolve multicultural disputes, the opportunity to provide, together with the tool of the test, also a handbook of the cultural practices is being discussed.

Again, this need felt by the legal systems, might clash with the current anthropology which could see it as an “encyclopedia of cultures”, a tool that, again, might essentialize groups and provide a fixed, stereotypical idea of cultures, freezing groups and persons in time and space. The handbook might bring the old colonizers’ reports during imperialism back to anthropologists’ minds (Holden 2019a, p. 183). I believe that a solution to this criticism could lie in the way in which

such a handbook is written. It should not be an “atlas of cultures” but rather a recollection of single cultural practices. If anthropologists are involved, and it is designed in a critical and conscious way, this tool can satisfy the need to incorporate expertise about culture in the trial. In fact, judges need information, and often, the “urgency” and “emergency” of the case cause them to overlook some important cultural information, which a readable easy-to-consult handbook can provide. In this regard, it is interesting to note that some lawyers are autonomously creating their own database of cultural practices that may appear in their cases. For instance, Benedetta Piola Caselli, attorney in Rome, member of the Observatory, who deals constantly with culturally motivated behavior in her legal practice, has contacted the anthropologist Claudia Cavallari in order to prepare a list of the most relevant cultural practices, in particular concerning groups coming from Africa, that the lawyer has faced in her profession.

Written by anthropologists in cooperation with jurists, this tool would provide judges and lawyers with an easy-to-read, nonstereotyped description of the cultural dimension of facts that have so far appeared in courts or that may appear in the future. The presence of a cultural expert is ideal and should always be guaranteed in a trial, but when, for any reason (e.g., lack of available experts, difficulty to find them, cuts to budget to consult experts) judges cannot find one, they can, at least, rely on a tool written and constantly updated by anthropologists that provides crucial information. Something similar already exists in Italy with the “Country of Origin Information” (C.O.I.): reports used in the context of asylum seekers’ and international protection cases that list the political situation and persecutions suffered in the home country. Sometimes the C.O.I. includes references to the cultural background of certain practices. The aim of the handbook on cultural practices is broader and consists in providing an accurate description of the cultural dimension of recurrent practices and their roles in order to answer questions from 1 to 5 and no. 9 of the cultural test. This idea was endorsed by the honorary president of the Italian Society of Applied Anthropology, professor Antonino Colajanni, during the training course for judges which took place at the Superior School for Judges on 14 March 2019, Scandicci (Florence).

Another need expressed by Italian judges in this same training course is to know how the case has been decided in the home country: Knowing the legal decision of the cases, they could align their decisions to guarantee, when possible, that the defendant is treated in a similar way as if they were judged in the country of origin. At the moment, there is no project that collects this kind of case law.

The Observatory on Transcultural dialogues showed great interest toward ongoing projects aimed at elaborating other tools that collect in a more stabilized way cultural expertise. The project EURO-EXPERT coordinated by the legal anthropologist Livia Holden at the University of Oxford is elaborating a database on cultural expertise in fifteen European states. Another project coordinated by Marie-Claire Foblets at the Max Planck Institute for social anthropology of Halle (The Max Planck database project on religious and cultural diversity) is elaborating a database on comparative multicultural jurisprudence (Foblets and Renteln 2009). Both projects provide databases that are useful when a judge is resolving similar cases.

All these possible instruments work together for a better justice.

## **9. Conclusions**

In this paper, I have analyzed the current debate on cultural expertise in Italy and supported the importance of going beyond the existing case-by-case cultural expertise, to reach more standardized forms that can guide the judges when resolving a multicultural dispute. Particularly, I have focused on the “cultural test”: a legal test for dealing with culture that can be considered as a type of cultural expertise. I have claimed that the cultural test falls within the current broad phenomenology of cultural expertise since, within its thirteen questions and particularly within questions 1–5 and 9, it permits to imbue legal proceedings with knowledge about culture. In fact, when using the cultural test as a guideline to state the reasons of their judgement, the judge has to carry out, with the help of a cultural expert, an anthropological analysis of the cultural dimension of the case.

The “cultural test” tool has been contextualized in light of the state of the art of cultural expertise, and it has been actively compared with other standardized tools.

In Sections 1–3 of this paper, I analyzed the status quo of cultural expertise, showing how cultural expertise can manifest itself in several forms, which I have proposed to classify as follows: professional/nonprofessional, public/private, and case-by-case/standardized. I have noticed that this confirms the need for a more inclusive concept of cultural expertise (Holden 2019a). I have also claimed the urgency to stabilize cultural expertise in Italy in order to avoid cultural misunderstandings such as that which led to the sentencing of Sikhs for wearing the *kirpan*, and of an Albanian father who kissed his son’s penis while performing an “homage to the penis” (John et al. 1991) cultural practice.

In Sections 4 and 5, I endorsed the adoption of a new tool to resolve multicultural disputes in Italy: the so-called cultural test. I have described it as a legal tool that can favor the encounter between the law and anthropology and serve as a guide both for judges and cultural experts. The cultural test, in fact, contains some of the most relevant questions that should be asked to ascertain the nature of a cultural practice and to balance the right of the migrant to preserve their culture with other rights.

In Section 6, I discussed the criticisms against the cultural test: the fact that it is transposition of a legal institute not belonging to the Italian judicial tools; the risk it entails of limiting the freedom of the judge in stating the reasons of the judgment or opinion; and the risk of becoming an ethnocentric, essentializing straitjacket that compresses the specificity of each case. In Section 7, I discussed the advantages of using a cultural test: favoring the principle of legal certainty; guaranteeing a more expedite way to deliver judgements; and obtaining more clearly reasoned opinions that can favor social coexistence.

In Section 8, I endorsed the adoption of other tools that can favor the democratization of anthropological knowledge and work alongside the cultural test for a better justice: a handbook on cultural practices, a database on the cultural expertise gathered so far, and a database on the comparative multicultural jurisprudence about cases similar to the one judges are solving.

Despite the epistemological and methodological differences between the law and anthropology, this age of mass migration calls for both jurists and anthropologists to actively contribute to the accomplishment of practical aims and to identify solutions that can help to protect cultural rights of migrants and favor multicultural coexistence. In order to obtain this, I reckon it is important to overcome the case-by-case cultural expertise and to find ways to standardize the latter. There is still a “widespread reluctance of anthropologists to become involved with applied sciences” (Holden 2019b, p. 3) rooted in the “self-reflection” (Holden 2019a, p. 188) going on after the errors of the “colonial anthropology” (Holden 2019a). However, there is also an increasing consciousness about the need to participate in order to ensure a multicultural justice, thereby revaluing the historical role of anthropology in support of subalterns and minorities (Holden 2019c). Jurists at present admit that they cannot tackle multicultural litigation without the support of anthropology, and, by providing cultural expertise, anthropologists answer the call for a better justice. The time is ripe to conceive practical tools that can favor the encounter between anthropology and the law within legal proceedings.

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