

# Cultural Expertise in Civil Proceedings in Italy

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## Abstract

This paper emphasises the use of cultural knowledge and cultural expertise in court, with specific reference to civil proceedings. It adopts background scenarios characterised by the presence of *ex officio* judicial powers that introduce knowledge into trials regarding family and juvenile proceedings, guardianship of ill and elderly people, and immigration and asylum proceedings. The assumption of this paper is that when a situation involving intercultural elements is brought to the attention of the court, the usual background knowledge of the judge may be insufficient to render meaningful judgement. In this situation, thanks to *ex officio* powers (in introducing facts, gathering evidence, raising legal and factual questions), the judge should be able to establish the elements to be examined through the lens of cultural diversity. The paper uses examples to illustrate judicial practices and then draws a set of initial conclusions about the status of cultural expertise in Italian civil procedures, the challenges of the present, and initiatives to be taken in a short-term perspective (training, panels of experts, deontological requirements for experts).

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## Cultural Knowledge in Court

I adopt Professor Livia Holden's (2019) definition of cultural expertise: "special knowledge that enables socio-legal scholars, experts in laws and cultures, and cultural mediators – the so-called cultural brokers – to locate and describe relevant facts, in light of the particular background of the claimants/litigants/accused and for the use of conflict resolution or the decision-making authority." The idea of cultural expertise and of the intervention of a 'cultural expert' in trials is substantially new to the Italian judicial system. On the contrary, the theme of introducing cultural knowledge in adjudication is well-known.

In his Eulogy of Judges, lawyer Piero Calamandrei (2006), one of the greatest Italian scholars of procedural law of the last century, speaks about "[t]he ever-changing heart of the judge who ... commands in the margin of choice that the exegesis of the laws leaves to the interpreter." The use of cultural knowledge in court falls within that margin of choice and, therefore, is closely related to the quality and nature of the substantive law rule applied by the court to the rules of procedure. These rules are derived directly from the court's obligation of impartiality and thus are among the consubstantial limits to the action of judging.

In civil law systems, the 'entrance' of cultural knowledge is often represented by open rules (i.e., public order, public policy and morality, best interests of the child, unjust harm, due diligence, bona fides), key concepts (i.e., fairness, reasonableness, equality), maxims of experience (i.e., a 50-year-old has more difficulty in finding a job than a 20-year-old; water boils at 100° C at sea level; 'Cosa Nostra' is a criminal organisation; a witness without ties to the parties is more credible than one who has business links or other relationships with them). In particular, the maxims of experience are the basis of the inductive reasoning typical of the judicial reconstruction of the facts; they are criteria of inference and, simplifying somewhat, one can say that they constitute the major (factual) premise of judicial syllogism (i.e., ex-wives who are not economically independent are entitled to alimony; women over 50 are unable to find a job; X is unemployed and over 50; X is therefore presumed unable to find a job and, for this reason, entitled to post-divorce maintenance).

The maxims of experience feed on general knowledge or acceptance, including cultural knowledge, and notorious facts, meaning facts that can (or rather shall) be the basis of the judicial decision without the need of proof. These are facts which, even though they

consist of events that have taken place once in a while (such as the facts of history and the social and political facts of current public life) or just once (such as those whose topography and descriptive geography give a notion to belong to the stable heritage of knowledge of a citizen with the average cultural level in a historically determined society (the one to which the judge belongs)).

The average cultural level should then be understood as resulting from the excluding specialised acquisition of technical and cultural experience, due to personal inclinations, Endemann (1860); Betti (1936); Calamandrei (1925).

### **Cultural knowledge, impartiality, contradiction and equality of the parties**

It is a generally accepted principle that judges should not make use of their personal knowledge and private science. Only notorious facts, those that do not need proof, are exceptions to this principle. That statement implies that judges cannot introduce into the proceedings extrajudicial knowledge – whether cultural or technical-scientific – that they ‘accidentally’ possess as a result of a private interest or formal study.

Judges who use their private knowledge can be compared, *mutatis mutandis*, to judges who decide a case that turns on a fact they personally witnessed. It is clear that these judges jeopardise the right of defense of the parties; they frustrate the principle of the adversarial process and undermine its ‘legitimation’. Judges are the expression of the current society and its culture. If a judge living before Copernicus were to have stated in a judgement that the earth orbits around the sun, he would have been an excellent astronomer but an incomprehensible judge, unacceptable to the society. The same would happen today with a judge claiming to know about medicine or informatics or customary law in central Africa, and using such knowledge to solve and decide cases.

We are not pleading for a ‘neutral’ judge wrapped in a robe under which individuality disappears, blindfolded, indifferent to the throbbing, living reality beneath the files.

Some cases require background knowledge. Some decisions should be based on equity and others should be adopted in the exercise of discretionary powers in relation to a primary interest; a particular technical and/or factual knowledge should inform still other decisions. Good judges need extra-legal knowledge, which they can acquire through specialisation of judicial function (e.g. family or juvenile judge), repetition (decision of cases based on similar facts, e.g. a pathology, the ‘rites’ of a criminal

organisation, a typology of pollution), and training (e.g. psychology of testimony, hearing the child and the victims). Franchi defines the knowledge acquired through professional experience as *tecnica riflessa (mirrored technique)*, referring to the

organised experience that the judge has in a matter that does not relate to his or her professional education due to the fact of repeatedly becoming aware, in the act of judging, of events and phenomena that belong to the said matter...

In fact,

as a rule, repeated technical integration leads to the formulation of decisions containing technical evaluations of the same kind, and knowledge of previous decisions ... leads to knowledge of the technical criteria ... of evaluation, that is, to the absorption by the judge of the particular experience and ... to the transformation of a particular experience, through the decisions of those who are not technical, in common experience (vulgarisation). (Franchi, 1959)

This process of vulgarisation, as a process from technical to common knowledge / general acceptance, takes time and is often associated with cultural changes and rising awareness within society. In addition to the average cultural level of an entire society, we also observe knowledge common to a profession; for example, following a series of rulings later confirmed by the Supreme Court (Lupo, 1989; Grassi, 1989), prosecutors now must prove only that a defendant belongs to *Costra Nostra*. The existence and organisational qualities of the Mafia no longer require proof.

In the absence of such general acceptance, knowledge shall be introduced to the court through the ordinary procedural channels: allegations of facts and presentation of evidence under the rules of adversarial procedure, in full respect of the right of defence of all parties involved in the trial. This requires, among other things, that the parties and their defence counsels have the possibility of knowing which facts and which evidence are relevant for the judge, of challenging them, and of proposing counterevidence.

## Knowledge of intercultural elements

When cases present transnational or intercultural elements, the cultural knowledge necessary to reach a decision cannot be obtained through the common knowledge mechanism. The ‘common knowledge’ of the judge does not include the stable heritage of knowledge of the citizen of average cultural level in a historically determined society. In these cases, an expert is needed.

When a completely different world (to the one familiar to those present) enters the court, it gives rise to a situation similar to that of two people sitting in a room and wishing to communicate, but speaking different languages or not speaking the other’s language well enough; so, they call in someone who speaks both languages to explain, in turn, what each is saying. The metaphor of the interpreter helps us to understand both the role of the expert and the difficulties and the challenges associated with it: is the expert a bridge between two worlds, or a window into yet another world? Are they expected simply to deliver a faithful and non-partisan ‘translation’ or a much more comprehensive and expanded picture? Are they accurate, neutral, almost invisible agents, or do we expect their help (and their biases) as we search for ‘relevant’ information and ‘necessary’ answers?

For a better understanding of how cultural knowledge interacts with procedural rules (especially during evidence-gathering), reconstruction of facts and the contents of decisions, we should consider some scenarios. Situations with transnational elements occur in all areas of civil law. Nevertheless, culture has a particular role to play in the following areas: family and juvenile proceedings, guardianship of ill and elderly people, immigration, and asylum proceedings.

In the Italian legal system, the judge is attributed significant *ex officio* powers for the management of these cases. The basis of these powers lies in the public nature of the interests at stake. When the usual background knowledge of the judge is challenged, the presence of *ex officio* powers (in introducing facts, gathering evidence, raising legal and factual questions), enables the judge to establish: a) which elements should be examined through the lens of cultural diversity; b) how to introduce cultural diversity in trial; and c) when and how and to what extent ‘culture’ can contribute to a fair decision.

## Knowing diversity

For the judge, acknowledging and knowing diversity is both a duty and a necessity. The language of the Brussels II bis Regulation 2201/2003 in matrimonial matters and matters of parental responsibility makes clear that the judge must be open to diversity when recognising and enforcing foreign judgments, specifying that:

For the purposes of this Regulation: 1. the term ‘court’ shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1; 2. the term ‘judge’ shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation; (...) 4. the term ‘judgment’ shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision.

The conflict-of-laws rules<sup>2</sup> that determine when foreign law is applicable (e.g., personal and property regime of spouses from different countries; the law applicable to filiation and parental responsibility in the case of parents of different nationalities and/or living in a third country; the succession of the foreigner; recognition of statuses acquired in another country; adoption by a same-sex couple; surrogacy; polygamous marriage) require the judge to be familiar with the law of other countries and capable of applying it while taking into account its regulatory, cultural and applicative context.

When the internal order – through international civil law on conflict rules – is open to other legal systems, allowing the application of the law of a different State in civil lawsuits (or civil cases) adjudicated by national courts, we find an ‘open door’ to cultural diversity. This is the case in Italy, especially in the areas identified above (family, children, youth, elderly, non-citizens).

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2 We refer to the field of law dealing with choice of rules when a lawsuit involves the substantive laws of more than one jurisdiction (so-called conflict of laws: conflict between the applicable laws of different States or jurisdictions regarding the rights of the parties in a case) and the court must determine which law is most appropriate to the case.

## Judicial practices

Culture can enter the court through different channels: the judge's knowledge, the lawyers' motions, testimonies, the parties' declarations, cultural mediation, formal expertise, production or acquisition of documents and reports, and interpretation and translation. The Italian experience, although still very limited, can be understood through the following direct accounts of judicial practices I have collected.

The first examples involve adoption cases. The President of the Person, Family and Minors section of the Rome Court of Appeal reported that many cases demand the appointment of a cultural mediator to assess the extent (if any) of parental dysfunction in families with different religious and cultural values. In some cases (mostly concerning adoption), the appointment was arranged following referral by the Supreme Court, which considered the services of a cultural mediator to be needed because the case involved not only addressing a linguistic deficit but also understanding the cultural differences between family models. Without the presentation of relevant cultural knowledge, there was a serious risk of discrimination in the evaluation of parental ability. In such cases, the expert (*consulente tecnico d'ufficio*), often a psychologist, asked for the assistance of a cultural mediator.

The Court of Appeal has identified critical issues with regard to the choice of the professional and the compensation to be paid, especially when the parties are eligible for legal aid. The Court is trying to reach an agreement with the municipality of Roma Capitale for the provision of the support of specialised social services (the initiative was interrupted by the health emergency related to Covid-19).

The second examples involve unaccompanied children. A judge from the Tribunal of Trieste reported:

When I summon unaccompanied children with problems in order to listen to them, I always ask for the support of a cultural mediator (who then also acts as an interpreter). The host structure almost always sends their own cultural mediator and, therefore, there is no economic burden for the State. If they are Pakistanis or Afghans (in my region, Friuli Venezia Giulia, the majority of unaccompanied children belong to these two ethnic groups), I often call on the support of an Afghan cultural mediator who speaks both Urdu and Pashto and who was himself an

unaccompanied child; given that he has gone through similar experiences to the children being summoned, he helps me a lot during interviews, also by 'explaining' their attitudes or behaviour.

A judge from the Tribunal of Benevento reported:

In one case I asked for the help of a cultural mediator in dealing with some unaccompanied children and it seemed very useful to me. I believe the young of the same nationality as the children. As a result, they saw the judicial authority as being closer to them and, therefore, they listened to me and it seemed to me that they had more trust in the institutions.

The third set of examples involves parental conflict. A judge from the Tribunal of Reggio Emilia reported:

Years ago I arranged an expertise (*consulenza tecnica d'ufficio*) in the context of a separation between an Italian and a Japanese citizen who had a son of 6/7. The father did not want the son to go and live in Japan. He claimed that the culture and legislation of Japan – where they had also wanted to give birth to the child according to a couples project initially based on the sharing of the two cultures – posed a threat to the maintenance of his relationship with his son. We decided to request a transcultural expert, and a very helpful consultant enabled us to unblock the situation, to authorise the child's travel abroad and the decision to maintain his residence in Italy.

A fourth example involves support for the elderly and for people with health problems (*amministrazione di sostegno*):

I remember a rather delicate situation that involved giving support to a woman with mental health problems, where the examination of the interested party was facilitated by a mediator who was Nigerian, like her, and just a little older in age. The two girls spoke English, so I could understand what they were saying.



The intervention of the mediator was offered without any request from me (and without any economic burden to the office) by the psychiatric ward where the girl was unfortunately hospitalised, in collaboration with the association supporting the victims of trafficking.

While it is difficult to find judgements of merit (decisions regarding the appointment of an expert or a mediator normally have only intra-procedural relevance), the jurisprudence of the Court of Cassation is innovative to the point that it is possible to speak of ‘Supreme Court activism’ (at least as far as family matters are concerned).

Concerning a case of recognition and enforcement in Italy of a sentence of repudiation (*t.alāq*) by the Sharia Tribunal of Western Nablus (Palestine). The Court of Appeal had denied recognition on the grounds that the sentence was based on the unilateral will of the husband (*Court of Cassation n. 6161/2019*). The husband appealed (*ricorso*) to the Supreme Court, stating that the jurisprudence of the Sharia Tribunal had evolved and that, currently, in order to pronounce the divorce, the effective loss of communion between the spouses must be ascertained. The Supreme Court decided to request information on the law in force in Palestine from the Ministry of Justice and a report on the jurisprudence of the European Courts and of the countries in which the problem of the recognition of *t.alāq* has arisen from the Research Office of the Court of Cassation. This decision is highly innovative because the Court of Cassation decides only on matters of law violations, and it is unusual for it to order a kind of inquiry (*Court of Cassation n. 6161/2019*). The case is pending.

A fifth set of cases concerns two declarations of adoptability. In the first, the biological mother filed an appeal (*ricorso*) complaining that interpretation was not available in Court and that she had not been able to make her family and cultural context understood. The Court of Cassation quashed the decision and referred the case to the Court of Appeal because the procedure was not adequate: the (failed) project to recover the parental relationship and to return the child to his (biological) family had not included the aid of cultural mediation (*Court of Cassation n. 16175/2014*).

In another adoptability case, the biological mother complained, among other things, that her right of defence had been infringed because she had not been able to avail herself of a cultural mediator. The Court of Cassation ordered the Court of Appeal to carry out an expert evaluation of the mother’s parenting capacity within a project

involving the extended family, and to provide cultural mediation, which the court considers an indispensable tool to ensure that the mother and other family members willing to care for children are examined with an adequate degree of information and awareness of the role they are performing.

However, the Court's sensitivity to cultural issues in family matters is not reflected in the field of international protection and asylum (*Court of Cassation n. 6552/2017*). Concerning a request for international protection of a Gambian who claimed to be afraid that he would be devoured by his vampire uncles if he returned home (*Court of Cassation n. 10226/2019*). The Tribunal rejected the request. The reason given was that the plaintiff's story was not credible. The Supreme Court dismissed the appeal (*ricorso*) on the grounds that the credibility assessment was a factual assessment referred to the court of merit:

The Tribunal ruled that the applicant's account having reached a sufficient degree of credibility [...] regardless of the absolute improbability of the vampire nature of the uncles. The same plaintiff rules out the possibility that his uncles could create any problem for him during the day. ...The only plausible explanation is that the plaintiff suffered from nightmares. (*Court of Cassation n. 10226/2019*)

By dismissing the asylum seeker's statement as an unbelievable story, the decision does not take into account the fact that witchcraft exists in many countries as a belief and practice, and is foreseen as a crime in their respective Criminal Codes, which establish that practicing witchcraft or being a victim of it can expose individuals to serious risks and even threaten their lives (Sorgoni, 2012, p. 26).

## Initial conclusions

The preceding observations allow us to come to certain initial conclusions, which will have to be developed in the future:

First, there is an urgent need for cultural knowledge in court proceedings. Changes in society, freedom of movement and residence within the borders of the European Union, the growing phenomenon of migration, the arrival of asylum seekers, and the growth of mixed families composed of people from different countries and cultures mean that,

every day, national judges face the challenge of obtaining sufficient information about different cultures, customs, practices and legal regimes.

Second, Italian judges and lawyers are becoming increasingly aware of this need.

Third, this awareness is very present among judges who deal with family and migration cases, even though – as suggested by the cases quoted above – there is a greater awareness in the family sector than in the area of migration. A possible explanation is that it is relatively easy for Italian judges (at least for judges used to analysing their biases and capable of going beyond prejudices) to recognise the connection between – on one side – parental (or marital) behaviour, educational styles, educational models, assisting and supporting elderly parents' needs and family conflicts, and – on the other side – mistreatment of and violence against women and children, parents' inability to properly exercise their childcare duties, and the need for support and assistance. It is more difficult for them to understand scenarios that are completely alien both to the judicial and common culture of European countries, like witchcraft, but also persecution of minorities or living in conditions endangering survival because of war, terrorism, famine and food shortages. As a consequence, it is more difficult for them to understand the need for greater knowledge before assessing the background reality of the asylum seeker and the credibility of his or her statements.

Fourth, the general principle that the private knowledge of the judge cannot be the basis for a judicial decision must be respected. Sometimes, a factual situation submitted to the court is distinguished by intercultural elements that require knowledge of “laws and cultures ... to locate and describe relevant facts, in light of the particular background of the claimants/litigants/accused” (Holden 2019), in order to be analysed and understood. In these cases, relevant albeit contestable facts and knowledge shall be introduced in the trial in full respect of adversarial principles and the right of defence.

Fifth, specific legal tools are yet to be developed. Knowledge enters the trial through the evidence that is gathered, following the request of the parties or an order of the judge, and concerns (*id est*: is intended to prove) the facts alleged by the parties or that have lawfully emerged in the course of the proceedings (e.g. facts reported by the party in the course of his/her examination or by a witness in the course of his/her examination). The Civil Procedural Code contains rules on the collection of evidence (oral evidence such

as that provided by witnesses and the hearing of the parties; written evidence such as documents presenting certain formal requirements; inspections of things and sites).

Atypical evidence (meaning a source of evidence that is not typified by the Code) is admissible but its evidentiary effectiveness is equivalent to that of circumstantial rather than full evidence. The expertise (*consulenza tecnica d'ufficio*) ordered by a judge and carried out by a professional chosen by the judge from the register of court experts is not a source of evidence, but an instrument that helps the judge to evaluate the collected evidence and to rule on its weight and accuracy. Nevertheless, there are facts that cannot come to be known through the typical evidentiary machinery because the facts must be filtered or revealed through scientific knowledge (i.e. the cause of disease, the incidence of the disease depending from exposure to a putative cause, the relationship between a sickness and working conditions, the risk of congenital malformation, DNA testing, etc.); in these cases, the expertise is increasingly not so much a tool for the evaluation of facts, whose knowledge has already been acquired at the process, but a tool for the acquisition of knowledge of facts (mostly secondary) whose real scope would remain unknown without the mediation of particular methods and techniques.

Since this is the framework of evidentiary tools in Italian civil trials, one can better understand how cultural knowledge can enter the trial and how uncertainties can still exist in judicial practice.

Very different tools (in terms of effectiveness and reliability) are used in judicial practice: documentary evidence (i.e. reports of NGOs, human rights activists or international organisations) and cultural mediation play a privileged role. Given the vagueness of the figure of cultural mediator as a profession (ranging from skilled and well-trained professionals to specific figures in the context of social assistance services or hosts of centres or communities who have acquired a knowledge of administrative proceedings involving foreigners and who have a more or less relevant acquaintance with the society, history and situation of the interested person) and the very different degrees of reliability of reports (depending on the quality, seriousness, professionalism, working methods, neutrality or partisanship of the NGO or HR organisations concerned), there is the risk that the informal use of cultural expertise could endanger the right of defence of the parties.

Judicial practices are still uncertain and judges are still looking for standard procedures and reliable solutions. In this respect, the following guiding principles should be implemented: a) the balance between the introduction of cultural knowledge in trials and respect of procedural human rights shall be granted; this means that the judge should avoid using atypical evidence that has not been assessed through the adversarial procedure; b) the parties have the right to introduce factual elements related to cultural diversity, and to try and prove them; and c) the judge is obliged to evaluate those factual elements.

Sixth, cultural expertise is still unexplored. Among the various procedural possibilities, the appointment of an expert (*consulenza tecnica d'ufficio*) is the procedure most likely to guarantee and respect the rights of the parties. In fact, through a query, judges must specify the issues they wish to entrust to the expert; the parties can argue about the professionalism and independence of the expert and the query that is submitted to him/her and can appoint their own experts to follow the operations. However, the potential outcomes of this procedure have yet to be fully explored.

The proposals presented above have not yet been fully implemented, for three main reasons:

1. *Difficulties in identifying the situation when an expert is needed.* Because the judge normally has only a basic knowledge of the background situations of the persons concerned, it can be awkward to identify which cases are located within a social, political, economic, cultural, and legal context of such complexity that expert help is required. Only training can give judges the necessary awareness and ability to ask themselves: Am I capable of understanding this factual situation? Do my beliefs (and my prejudices) about family, filiation, education or political and religious issues interfere with my ability to judge, or prevent me from recognising if and with regard to what there is a need for further investigation? Am I sure that I have properly analysed and understood all the questions that the parties have represented to me? Could an expert shed light on problematic facts, enable the Court to gain a deeper understanding, overcome the legal limits of the assessment of the individual credibility of the party or witness? What kind of expert do I need? *Training* should: (1) be directed at a *mixed target* of family and juvenile judges, judges from specialised sections for international protection, prosecutors, lawyers, professionals (anthropologists, sociologists, psychologists); (2) have as *training goals*: awareness-

raising; gathering of best practices; analysis of the main problems; analysis of possible solutions and best practices; (3) adopt as *educational methods*: case-studies; interactive discussions; simulations; and mock trials. The pilot training action should ideally be preceded by field research based on a questionnaire and interviews on training needs and best practices.

2. *Impact of the expert's fees.* Often, in family and migration/asylum cases, the parties have a right to legal aid and are assisted by a legal counsel paid for by the State (*patrocinio a spese dello Stato*). These cases are very numerous and a generalised use of expertise would entail significant costs. On the other hand, the repeated recourse to expert opinions on similar issues and their subsumption within the judicial reasoning may give rise in the medium term to general acceptance resulting from the mirrored experience we have talked about. Often, foreign communities or migration flows from specific countries are concentrated in limited territories, which can make it easier for the relevant courts to learn about them.
  
3. *Difficulties in identifying the professional who should perform the function of expert.* Certainly, many Italian universities employ lecturers in anthropology, sociology or law who could be appointed, but problems remain: who is an expert and what are the boundaries of their expertise? What is the basis of their qualifications? What kind of relationship do they have with the group/community/minority/country to which the person concerned belongs? A roster (even a simple list) should be created – with the personal details of experts/mediators, their contacts, their field of specialisation supported by a short *curriculum vitae* – and made available to judges in every court.

This last point of the expert's position vis-à-vis the lawyer's client is of the utmost importance. Judges cannot take the risk of crossing an unsafe bridge. One of the most beautiful novels by Javier Marias, *A Corazon tan blanco* (A heart so white), takes its title from Shakespeare's *Macbeth* and alludes to the guilt of those who, without committing a crime, are accomplices ("My hands are of your colour; but I shame/ To wear a heart so white"). In a key scene from the book, during a meeting between Margaret Thatcher and Felipe González, the interpreter, Juan, deliberately chooses to invent the translation and drive the conversation between the two politicians, thus winning the love of Teresa, another interpreter who is present, and who will be his future wife.

Experts shall not be cultural eunuchs, entomologists of sorts, giving the judge a collection of butterflies to admire in their deadly coldness. In weaving the canvas of the facts and choosing those relevant and significant for the case, contextualising them, experts make choices guided by their schools of thought, the doctrinal lines to which they adhere, their research experiences, probably even their beliefs. What is essential is that experts do not play the role of the partisan for the vulnerable subject in the trial (these subjects already have their lawyers for this, and possibly also party consultants). Rather, by means of judiciously harnessing their expertise, experts shall place the judge in a position to understand the facts, their roots, the existence of different foundations of these facts, thereby providing a scientific justification for judicial conclusions.

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