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Scientific appraisals

Public session of Tuesday, 6 December 2005, organised by

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At the initiative of Messrs. Jean-Yves Le Déaut and Claude Saunier, a public session was organised on 6 December 2006 by the Parliamentary Office for the Evaluation of Scientific and Technological Choices.

The morning session, whose theme was “Scientific appraisals and judicial decisions”, was chaired by Mr. Jean-Yves Le Déaut. The afternoon session, devoted to “Scientific appraisals serving public decisions”, was chaired by Mr. Claude Saunier.

Summary

Scientific appraisals and judicial decisions

What is the place of scientific appraisals in the current functioning of the justice system? What changes are taking place? Appraisals increase legal costs and often extend trial time, so are the new scientific challenges that the justice system has to overcome limited to just that and what is the share of responsibility of appraisals in these deviations? Is the justice system itself, faced with this dilemma of appraisals which are increasingly necessary yet never sufficient, now undergoing a sort of “crisis”, of the same kind as other institutions have experienced? Will the justice system also have to take into account scientific uncertainty, regulate the complex relations that the decider and the expert maintain, and give the parties what they are demanding?

During the session, a very clear trend was revealed: “the scientific element has become a must in all police investigations”, to prevent not only the most serious displays of criminality but also now against mass delinquency; genetic investigations have experienced “exponential growth”; judicial appraisals are “unavoidable”, even “vital”.

Yet a precise analysis cannot be made of the phenomenon because there are no national statistics. Are there really many more appraisals or have appraisals become more sophisticated, more complex and therefore more costly? Should not allowances be made when it comes to appraisals ordered by the judge of the merits and those ordered in summary proceedings? For investigations entrusted to the technical and scientific police, does a distinction not have to be made for appraisals ordered by the examining magistrate and the requisitions of the public prosecutor, which are becoming increasingly numerous?

These questions show that the issue of legal costs is inseparable from the technical and scientific context, and from the public policies implemented to answer citizens' expectations or the urgency, whose effectiveness often relies on the use of new technical tools.

Another distinction has become necessary. The “big files” compared to “ordinary” appraisals have particularities due to the complexity of the problems to be dealt with, requiring the use of multi-disciplinary abilities, in a “team of experts”, where the financial and economic stakes are substantial. Why not adapt appraisal methods to the kind of questions raised? Should the crash of the Concorde be handled in the same way as a simple water damage case?

The question of the means available to the judge and the expert was raised, but so was that of the means available to the parties, those appearing in court and their lawyers, faced with the judge and the judicial expert.

In the French system, appraisals are ordered by the judge; the parties’ experts do not appear before him, unlike in the Anglo-Saxon systems which seem to exercise a certain “fascination”.

According to the applicable legal provisions, the civil, criminal or administrative judge can make use of the services of a person with technical knowledge to enlighten him by means of an appraisal about the factual questions on which he has to rule.

The judicial expert answers a necessity. The use of increasingly complex and constantly changing techniques forces the judge to enlist the help of experts to evaluate situations which elude his intellectual powers, because they are new or because they require a specialisation. Scientific and technical progress now allows material facts to be established, for example DNA tests. In many cases also, the inadequate clarification of the circumstances of the files submitted to the judge lead him to verify the parties’ allegations by means of a specific appraisal. The introduction of the concept of strict liability will not result in savings being made on appraisals; the judge will turn to the expert to describe and estimate the damage.

Although the assistance of an expert is sometimes an “easy way out” for the magistrate, the search for the truth, credibility but also effectiveness explains this development.

As elsewhere, in the judicial system, the expert has become the “guarantor of all our questions”, as one magistrate acknowledged.

Now that appraisals have become so important, the “core” question arises of the role and powers of the judge but also of the “expert” procedure. The principle, which is essential, of a fair trial now refers to the – new – notion of a fair appraisal, whereas the avowed intention to reduce trial time and control increases in legal costs leads to the search for a better “regulation”.

Several avenues of improvement were suggested during the session.

The appointment of the experts

The judicial expert must have technical qualifications, which are becoming increasingly specialised, but that is not enough. The expert’s procedural competence is just as essential. While the 2004 law introduced certain improvements, the measure is still perfectible, to lead to a national or even European recruitment to promote the “managerial” abilities which have become necessary to handle certain “big files”, to take into account the psychological dimension of some cases.

Objectivity and impartiality are also part of the essential requirements. The question of the expert’s independence vis-à-vis the judge who appoints him was also raised.

Competence and impartiality were therefore at the heart of the debate on the “professionalism” of the judicial expert. Should judicial appraisals continue to be an “occasional” activity or become a true profession? Opinions diverge on this point.

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Scientific appraisals

Mr. J-Y Le Déaut, Deputy, and Mr. Claude Saunier, Senator

Should a “judicial debate” be organised concerning the choice of the expert, or even should the parties be allowed to appoint him, taking inspiration from the system introduced in the United Kingdom in 1999 by Lord Woolf, at the risk of increasing trial time whereas, in view of the very few means made available to justice, the time needed to notify appointments often prolongs the proceedings?

Should a college or team of experts be used to examine complex questions which can have serious consequences?

The expert’s assignment

As the European Court of Human Rights recalled, appraisals must not have a preponderant influence on the judge’s appreciation and, as several magistrates have pointed out, the judge must not be “dispossessed of the case”; it is the judge who has to qualify the facts legally and to draw the legal conclusions.

Digressions have occurred, like those magistrates who, when having to deal with a complex file, let the expert himself define the terms of his assignment, and even left it to him to qualify the offences.

In various areas, an expert with general competence seems to have to yield to the specialist expert and the expert’s assignment must “be restricted to examining questions calling for exclusively technical answers”.

But what about these files which raise “questions to which science is still looking for the answer?” While for one magistrate the expert’s assignment must not extend to “important subjects of principle”, which are sometimes the subject of scientific controversy and for which recourse to an expert or even a college of experts is a “false good solution”, another speaker demonstrated the close overlapping that can exist between the investigations of the judge and those of the experts.

Also, if the judge expects the expert to give the correct answer to his question, thereby avoiding him from having to undertake additional appraisals or counter-appraisals, the judge still has to ask “the right question to get the right answer”.

In this regard, the creation of specialist bodies offers the best guarantees through the training given to the judges and the creation of teams in which “specialist assistants” are assigned directly to the judge.

The conduct of the appraisal

In civil matters, to strengthen the loyal conduct of the parties who sometimes give way to “delaying tactics”, “contractualisation” was suggested as a method of regulation: the drawing up of a “code of good practice” between the experts, the judges and the lawyers or of “procedural contracts” whereby the parties are made aware of the timing and costs and they are then made accountable.

For criminal appraisals, the person before the court – whether the victim or the accused – and his lawyer are not present; the adversarial principle does not apply. The emphasis has now changed

from the all powerful confession, to the “all powerful scientific appraisal without any regulation mechanism”.

The concept of a fair appraisal is therefore at the very heart of a fresh debate.

For some, the appraisal method, guaranteeing a transparent and adversarial procedure, if necessary made standard, is the way to achieve it: a recognised methodology, known and accepted, applicable in all the areas covered by appraisals, and incurring the expert’s liability.

For others, a technical and scientific discussion should be organised in the course of the civil or criminal procedure so that the experts’ conclusions can be debated, like the Australian procedure where the expert is examined and cross-examined after filing his report.

Although the principle of a “reasonable period of time” is an important factor for a fair appraisal and although an attempt must be made to limit the duration of the expert’s appraisal, the appropriate time must still be taken for the appraisal, knowing that during the appraisal, new investigation procedures will be found and science, which is just a “snapshot of knowledge at a given time”, will progress.

Appraisals and preventing a case from going to trial

During the session, the “pre-trial” phase was a topic equally worthy of interest.

As 90% of the appraisals are dedicated to contractual appraisals – insurance appraisals and private appraisals – obviously the better the quality of the appraisal, the fewer the disputes that will get to court. Competence, independence, dialogue are also sought after in this area.

The same is true for the public sector. The improvement of pre-decision appraisals conducted before the public decision is taken will prevent the occurrence of situations where damages are awarded or, failing this, will resolve disputes more easily.

There remains a space that should not be left unfilled: that of the examination of the victims’ claims, for which the essential factor is to find out and understand what happened, even before thinking about questions of liability and indemnification. In this area, Parliament has a full role to play.

Citizens need to be informed. A scientist advances from “error to error” and “any expert can make a mistake”, but science and appraisals are still indispensable to find out why and how a “system” operates or has turned out to be deficient.

Scientific appraisals serving public decisions

Public health, collective, public, internal, external, operational, standard appraisals, evaluations of acquired knowledge, risk evaluations, etc. Are there several kinds of “scientific” appraisals or just several kinds of questions?

Do the many terms used refer to as many appraisal rules, procedures, structures, as many scientific disciplines?

Are they all intended to serve the public decider?

Despite this imprecision in terminology, the public session identified common questions, even though not all the replies elicited corroborating opinions. Also despite the progress achieved, “difficulties still remain”, with which the expert himself is confronted.

Throughout the session two words that were almost incessantly repeated were “recognition” and “independence”, and one theme proved to be a particularly wealthy source of discussion, i.e., appraisal procedures.

Recognition of the appraisal, recognition of the experts

The insistence with which this need for “recognition” or “valorisation” was emphasised shows that the current situation is not consistent with the increased need for appraisals that is felt by society.

This need for recognition is present in several dimensions: recognition of appraisals by researchers, recognition of public appraisals, “respect for the expert by his peers and public opinion”, recognition of appraisal work in “careers”.

Taking into account the “rapid increase in the number of appraisals” also leads to the question of human resources planning in this area, in order to “attract young people” and to create “a pool of experts”. To manage this, the appraisal function must be given added value.

The theme of “professionalism” was broached. On this occasion, the question was raised of the relations to be established between research and appraisals and the choice to be made between recourse to internal or external appraisals.

There is a “direct link” between the expert’s and the researcher’s activities; “any researcher is potentially an expert”; “an expert is not a professional”; there is a risk that professionalisation would cut the expert off from his “environment”. But is the criterion of distinction between the expert and the researcher limited to just this one difference: “in the case of research, the scientist addresses his peers; in the case of appraisals, public deciders”? Although an expert is expected to adopt a professional course of behaviour, is it conceivable for an expert to be an expert from “18 to 70”?

It is far from certain that the positions expressed covered the entire field of appraisals. In the case of a risk evaluation, for example, “professionals” are called upon rather than “experts”. Furthermore, it is necessary to take into account the abilities present in the industrial sector and the difficulty of finding a sufficient number of experts not coming from this area. It was therefore suggested that private appraisals should participate in the “collective evaluation” at least at the stage of the “preliminary investigation”.

However, it seems difficult to define the profession of expert with any real accuracy. There is no solemn taking on the mantle of expert or any properly established “selection” procedures. The requirements in terms of training have not been formalised; some people believe that account must be taken of ever more specialised abilities, such as for example in the area of new genetic and cellular therapies or medicines of biological origin; for others, it is above all necessary to have a “critical and analytical mind”. The question of evaluating the experts was raised: must we set up a body to evaluate experts or leave it up to the various institutions to evaluate their own?

Independence of appraisals, independence of the experts

The public session showed that the independence of appraisals covered two problem areas, the independence of the appraisal body with regard to the decider and the private sector essentially, and the independence of the expert, the individual, this being a recurring topic.

Although the principle of an independent appraisal body exclusively dedicated to overseeing and conducting appraisals is a guarantee, the debate between “internal appraisals” and “external appraisals” was put back on the table in light of the double necessity of taking into account the development of knowledge and the insufficiency of available abilities. In fact, for one speaker, the problem of the expert’s independence with respect to private interests is raised in similar terms for both internal and external appraisals.

For the expert’s independence, the question most often raised concerned conflicts of interest. However, the question of the expert’s independence with respect to his institution was also raised; the need was recognised to protect the expert from more or less insidious hierarchical pressure.

Conflicts of interest are a topic of considerable concern, because of both the growth of “partnership” research activities and also the recourse to experts having “field” abilities and working more or less regularly with industry and the private sector.

Several solutions were proposed.

While the principle of transparency was declared necessary, there were diverging opinions about its implementation. Are the declaration of interests and its publication adequate guarantees? In view of the diversity of the links existing between the expert, the researcher and the private sector, should a “ranking of conflicts of interest” be made? Should sanctions be defined or arbitration mechanisms instituted? Would it be possible and useful to draw up a code of ethics or should it be considered that the “status of the expert” must derive from the “status of the appraisal”?

Insofar as the existence of more or less close relations with the industrial world is in many cases inevitable, should guarantees not be sought in other institutional or procedural ways, such as the constitution of colleges of experts or multi-party/disciplinary commissions or else the definition of a standardised method?

Because of the diversity of the questions raised and the variety of situations encountered, could the solution not be the institution of an “independent authority” or a “Higher Authority”, responsible for settling such conflicts?

What procedure for scientific appraisals?

From the various considerations concerning the procedure of scientific appraisals, several striking points emerged.

↳ The opening up to society

“Scientific appraisals are indispensable but not always sufficient to lead to the decision”. This finding leads to the suggestion of organising “citizens’ debates”, forums, developing operational appraisals, associating users in the decision making process. Yet is it not necessary to have “a separation between the socio-economic evaluation of risks and scientific evaluations”?

In any case, efforts must be made to achieve greater “transparency” and better “communication”, in particular as concerns the procedures followed and the opinions given.

↳ The collective character of appraisals

The “collegiality” or collective character of appraisals is justified both by the determination to gather together all the required abilities – multi-disciplinarity – and the concern to guarantee greater independence.

However, while collective appraisals as practised by the public health agencies are not the “juxtaposition of individual appraisals”, for one speaker, appraisals are necessarily “individual” and the notion of collective appraisals refers to a confrontation or a synthesis of individual appraisals.

The public session was the occasion to evoke other issues: “adversarial” appraisals, the “consensus” which does not always allow the complexity of the problems to be revealed, the regime applicable to “diverging opinions” with the prospect particularly of a search for the liability of the experts.

↳ **Relations between expert and decider**

The importance of the way the decider asks the question was emphasised, the clarity of the question being a key element in confidence. But experts sometimes “reformulate” the question to “transform” it into a scientific question.

The expert must “enlighten the decider without taking his place”. While it is true that opinions can prove to be “frustrating” for the decider, it is still the decider who must “shoulder his responsibilities”. The expert’s liability nevertheless remains a controversial topic, where an error is increasingly assimilated to a fault.

↳ **The method**

The methodology adopted has its importance and the transparency of the method is a token of confidence.

Recourse to foreign experts, the development of supra-national appraisals, in particular European-wide, the necessity of ensuring consistency between the opinions rendered by various appraisal bodies lead one to question the usefulness of applying a standardised methodology guaranteeing the quality of the practices followed and supposing that the expert actually masters it, after suitable training. It is this approach on which the AFSSA has embarked. But the principle of standardisation is not accepted by all.

↳ **The international dimension**

“Whiled science is worldwide, appraisals are still local”.

Changes are occurring. Foreign experts are being used and, although this was not mentioned, foreign institutions have recourse to French experts. The system of agencies is inspired by foreign models, such as the Food and Drug Administration (FDA). The European Union has equipped itself with still complex appraisal mechanisms co-existing with national institutions. Globalisation and the organisation of markets exert ever greater pressure. How then can decisions be harmonised while retaining a high level of scientific and ethical requirements? Must we adopt a national standard or reject any “standardisation”?

Faced with the diversity of the problems raised and the solutions recommended, the question of a better regulation is still unanswered, like that of the ways allowing us to reach it, self-regulation or just straightforward regulation?

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