Intellectuals and the Law

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Abstract

Drawing on Zygmunt Bauman's distinction between two different types of intellectuals, it is arguable that in today's world we need more 'interpreters' than 'legislators', i.e. scholars with high levels of expertise in clearly defined fields rather than ideologues quick to voice opinions on any issue discussed in the public sphere. But this shift, clearly visible in France, has many consequences. What is important today is less the intellectual as an individual endowed with his subjectivity than the knowledge itself which he carries. For as with any technician, it does not really matter who the person is delivering the expertise: any available scholar will serve the purpose. This means, for example, that historians and other scholars who agree to serve as experts in legal proceedings open themselves to the risk of being instrumentalised by a judicial system which they do not control.

Introduction

Compared with other issues examined in this volume, the topic discussed in this article may appear somewhat unusual. The media and gender issues are obviously questions to deal with when one talks about French intellectuals. There are without doubt Francophone intellectuals, and, without doubt too, many French intellectuals do have a problem with the United States. But why should the relationship between French intellectuals and the law be considered problematic? Intellectuals are not nowadays regarded as a political danger for the State, and they are less liable than other social categories, such as businessmen, politicians, artists, or sportsmen, to get on the wrong side of the law. French intellectuals are generally wiser today than before, and most of them - except a small minority - reject any kind of radicalisation, preferring democratic debates rather than presenting themselves as rebels or revolutionaries. In a certain sense, this is probably a sign, among many others, that they have lost part of their power and influence within French society, or at least, that they have changed completely the way they express themselves in contemporary French society.

In point of fact, discussing 'intellectuals and the law' means addressing important recent debates about the difficult relationships between history, memory and the law, and between historians, judges, politicians, 'militants of memory', as well as among historians and scholars in general. Yet why should a problem relating apparently more to the craft of historians be relevant to the current situation of the French intelligentsia as a whole? There could be many reasons, but I will focus in this article on one of them: it is an interesting point of observation to measure the evolution of the relationships - not to say the competition - between intellectuals and politicians in defining norms and values for the present, for the future, and even for the past. I refer here to recent polemics about the 'judicialisation' of history, which are the consequences of two problems which are usually presented as two different things, but which seem closely related: the expertise of historians and other scholars in courts of justice; and the promulgation of a number of recent
laws dealing with the interpretation of history.

The Judicialisation of the Past

During the 1990s, historians - at least a few of them - served as experts in several court cases dealing with crimes against humanity committed during the German Occupation, in 1940-1944. This was particularly visible in the Touvier trial, in 1994, the first trial for crimes against humanity involving a French citizen, and above all during the Papon trial, in 1997-1998, two major 'show trials' dealing with history and with memory. For the first time in France, the judicial system convicted people for what they did 60 years - three generations - before. The two accused were members of the Vichy government, and their cases belonged to what I have called a second wave of purges. In contrast with the purges of 1944-1949, which mobilised French intellectuals, the more recent wave of purges did not provoke any major polemics.

Because of the time elapsed, historians were called to testify in court. Of course, as many historians have argued, this was not the first time that historical expertise was required in a judicial case. It happened during the Dreyfus Affair, an emblematic episode for intellectuals, when historians, like Gabriel Monod, the founder of the Revue historique, had to authenticate the author of the famous bordereau, or when archivists, like Paul Meyer, the director of the École des Chartes, gave evidence, in 1898, at the trial of Émile Zola, to refute the arguments of Alphonse Bertillon, who accused Dreyfus of having written the document (Jeanneney 1998, pp. 24-25; Duclert 1998). In this perspective, the Dreyfus Affair was not only a battle of intellectuals, but a battle of experts as well.

But, in the recent cases, historians were not called to give expert opinion on a specific detail or a specific document. They had to give a kind of a 'global expertise' on a whole historical period. The 'Dark Years' were recent enough to judge perpetrators who were still alive who could not invoke the statute of limitations since this does not apply to crimes against humanity; but the period was old enough to require the expertise of historians, which was supposed to compensate for the fact that most of the protagonists in the court, except the accused and some victims, were born after the facts. Under the French criminal code, all the historians were called as 'witnesses', not as official experts, like a psychiatrist, for example. And many noticed this strange situation when historians took the oath, swearing 'to tell the truth, the whole truth, and nothing but the truth'.

The second aspect of the judicialisation of the past is no less intriguing. Since 1990, the French parliament has voted several laws expressing specific and official interpretations of the past. Most of these laws can be compared more or less to 'resolutions' which are voted by the US Congress. They are known as lois mémorielles ('memory laws').

The first law is the Gayssot Law, banning the denial of the Holocaust. It was passed in 1990, in the context of a rebirth of old-style French Anti-Semitism, and until very recently, very few intellectuals criticised this law, apart from the extreme right, with two major exceptions: Madeleine Rérioux and Pierre Vidal-Naquet, two great representatives of the old figures of French intellectuals. Both were strong opponents of Holocaust deniers, but they considered that freedom of speech was an untouchable principle.

The second law, voted in 1999, declared that what had happened in Algeria, between 1954 and 1962, would be officially and retroactively named 'the Algerian War'. The old official denominations - 'events in Algeria', 'police operations' - are now officially abandoned. This law was passed in the context of the growing debate over the memory of colonisation.

The third law, passed in 2001, declared in one single and short article that 'France publicly recognises the 1915 Armenian Genocide' - the equivalent of the numerous resolutions proposed in the US Congress. This law will probably be completed, in 2009, by another one repressing any speech denying the genocidal nature of this mass crime.

The fourth law, also passed in 2001, presented a real lesson in History: 'the French Republic recognises that, firstly, the transatlantic and Indian ocean slave trade and, secondly, slavery, perpetrated from the fifteenth century onwards in the Americas, the Caribbean Islands, the Indian Ocean, and in Europe, against African, Amerindian, Malagasy and Indian populations, are a crime against humanity'. For the first time, the French parliament gave a very precise and juridical definition of a wide historical process, not without major problems. Contemporary slavery and slave trading have
already been qualified as crimes against humanity by international laws since 1945. However, here we have a retroactive definition of a crime without any potential criminal alive, and without any practical effect. Actually, the real aim of this law was to satisfy the identity claims of some groups from the West Indies. What about trade and slavery in Africa or in Muslim regions during the same period? According to French law, these are not crimes against humanity, a qualification which applies only to the Western trade. The député for French Guyana, Christiane Taubira, who initiated the law, defended this definition by saying that one must not talk too much about the trade conducted by Arabs or Muslims 'to prevent young French Arabs bearing on their shoulders the burden of the wrongdoings committed by the Arabs' (quoted in Conan 2006). Could there be a clearer demonstration that this law is a political instrument for the present which has nothing to do with History?

Last but not least, parliament voted a fifth law, in February 2005, providing compensation for the Harkis (the Algerians who fought on the side of the French during the Algerian war) and the Pieds-Noirs (the million or so settlers of European origin, mainly French citizens, who fled Algeria in 1962). In reaction to the previous laws, especially the last one, a right-wing group in parliament succeeded in passing an article which appeared an outright provocation, requiring high school programmes to emphasise the 'positive role of the French presence overseas, especially in North Africa'. These few words provoked a huge polemic over the political uses of history and memory.

There are many differences between the Gayssot Law and the others, a question which deserves a separate analysis in itself. The Gayssot Law creates a new crime and had criminal consequences by making it possible to prosecute and convict Holocaust deniers which is not the case for the other laws, except the one on the Armenian Genocide. The more recent laws may be seen as a consequence of a post-modern approach to history, taking into account the 'plurality of interpretations', paying attention to 'forgotten memories', seeing history 'from below', etc. This also applies to the law of February 2005 which was an attempt to promote the memory of 'others victims', the Harkis and the Pieds-Noirs, on whose behalf the Right borrowed from the Left its traditional argument of supporting minorities (French Muslims, immigrants, etc.).

By contrast, the Gayssot Law, which started the process of 'judicialisation', may be seen as a radical attempt to protect by the law an ideal vision of the 'historical truth', based on Knowledge and Reason. This restriction of the freedom of speech, even if it is not unusual in French legal traditions, reflects a new political and intellectual context regarding the place of historical truth in contemporary Western societies. This is what Zygmunt Bauman has identified as an 'era of uncertainty':

The most poignant of the post-modern experiences is the lack of self-confidence. It is perhaps debatable whether the philosophers of the modern era ever articulated to everybody's satisfaction the foundations of the objective superiority of Western rationality, logic, morality, aesthetics, cultural precepts, rules of civilised life, etc. The fact is, however, that they never stopped looking for such an articulation and hardly ever ceased to believe that the search would bring - must bring - success. The post-modern period is distinguished by abandoning the search itself, having convinced itself of its futility. Instead, it tries to reconcile itself to a life under conditions of permanent and incurable certainty; a life in the presence of an unlimited quantity of competing forms of life, unable to prove their claims to be grounded in anything more solid and binding than their own historically shaped conventions. (Bauman 1987, pp. 119-120)

Because historians - and scholars or intellectuals more generally - were no longer able to provide and to defend indisputable historical facts, this one had to be protected by a positive law. In such a perspective, the Gayssot Law could be seen as a transfer of legitimacy from scholars to politicians, and from politicians to judges.

What is the connection between the expertise given by historians in trials and lois mémorielles? In 'trials for memory', as they have often been named, the historians who gave evidence accepted willingly to be part of a game without having any influence over its rules. They agreed to be simple experts in a process that provided a very particular narrative on 60-year-old events, which could be clearly seen as 'historical events'. They agreed in this situation to abandon part of their authority to judges, lawyers, juries, etc. who used their knowledge to provide a judicial narrative on the past, sometimes in quite dubious ways. With lois mémorielles, historians watched impotently and unwillingly in
most cases as a new normative view of the past emerged, decided by politicians, supported in some cases by ethnic or political communities, and which had the effect of restraining freedom of speech or of imposing somewhat strange views about the recent or even the distant past.

It is interesting that some historians - for example René Rémond, who had a great influence - agreed on the one hand to be experts in trials, and even claimed that it was the duty of historians to help the judicial system, while, on the other hand, they protested a few years later against the 'judicialisation' of history by parliament. Yet there are many points in common between the two processes. In both cases, the interpretation of historical events has been constrained within criminal definitions, like the notion of 'crime against humanity', which is useful for punishing specific crimes, but not for understanding a historical situation. Historians and intellectuals have the great advantage of inventing their own frameworks to analyze a social or political situation which is not the case of judges or juries. In both cases, historical knowledge has been submitted to a moral perspective: to build a better world and a better future, we urgently need to rebuild a better past. And in the final analysis, in both cases, discourses on history have been submitted to contemporary political aims, not without generating intense controversies. The Barbie trial, sought mainly by Jewish survivors with the aim of focusing on the singularity of the Final Solution, had the effect of triggering a kind of competitive victimhood between former resisters and former Holocaust survivors after a ruling by the Cour de Cassation in 1985 recognizing the right of both camps to file legal grievances. The Cour de Cassation's ruling rested on debatable legal arguments and a hidden political agenda: that of avoiding the Barbie trial having the appearance of being only a 'Jewish' issue. By contrast, in the two other trials (Touvier, in 1994, and Papon, in 1997-1998), crimes committed against the Resistance were not taken into account, and the proceedings focused only on the Holocaust. In this way, the whole judicial process against former French collaborators helped to reshape the identity of French Jews, especially in their relationship with the Republic (Wieviorka 2007). A similar process was involved in the various lois mémorielles, promulgated mainly to defend a new conception of identity based on victimisation, and influenced by the model provided by Holocaust survivors for whom the judicial tool had become a major weapon. By agreeing to be experts in this game without any influence on its rules, by agreeing to be instrumentalised for good intentions by the judicial system, historians who agreed to give evidence in these matters, and others who supported them, opened the way to a strong involvement of politicians in this field.

Legislators, Interpreters or Simple Technicians?

To what extent do these debates over the past among historians apply to French intellectuals in general? On the one hand, judicial expertise does not involve only historians. Many other fields and many other social scientists have been involved in such debates. We may recall here the example of the trials over 'sang contaminé' ('infected blood') in the 1990s, when some prominent politicians, including Laurent Fabius, former Prime Minister, were accused of letting blood infected by AIDS be distributed in blood transfusion centres. Political scientists and sociologists, called to give evidence on how public health policies were operating, faced a similar problem to that encountered by historians in trials for crimes against humanity, that is the question of anachronism - what was known in the 1990s was not known ten years before, when people were infected -or the question of the complex process of decision-making which was not easily accepted by victims wanting to target those who were responsible for the death of their relatives (Le Monde 1999; Libération 1999). Even the philosopher Paul Ricœur was called to give evidence to the Cour de justice de la République (the High Court responsible for judging officers of state) on the moral distinction between being 'guilty' and being 'responsible' (Ricœur 1999). One can even say that some social sciences have developed thanks to a permanent activity of expertise, such as political science working in the field of public policies, and similar arguments can be made in relation to sociology or economics (Bourcier & de Bonis 1998; Chauvaud 1999; Silbey & Ewick 2003).

What is new is the fact that now historians became experts, and that history as such became a field of expertise for public policies aiming at rewriting the past.

The involvement of historians in judicial cases should not be thought of as a French exception. There have been many cases, for example in North America, of historians involved in cases dealing with Native Americans' claims about their former territories, in which historical knowledge was mobilised to help the different parties (who hired their own historians), and also on the key question of slavery (The Public Historian 2007). There have also been cases involving Holocaust deniers in England, Canada, and Germany as well as in France where historians were asked to be experts.
So, one cannot say that this is a French singularity, or that it concerns only historians.

However, we can observe that in France the growing proximity between history and the law has brought on many debates not only among historians, but within French society as whole. What is new and disturbing in the current situation is neither the fact that the State is giving its own view on the past - this is a very traditional role - nor the fact that French intellectuals are involved in issues concerning law and justice: this is a tradition as well. What is new is the growing interpretation of the national past as a long list of crimes that have to be repaired. What is new is the role of the French State in agreeing to give a place to plural interpretations of history, losing sometimes the aim of a coherent national narrative, at least until the recent period: under President Sarkozy, the new government - in a very chaotic way - is trying precisely to reverse the trend by promoting again a 'national history', which is supposed to gather a consensus, which is still far from having been reached.

New also is the place of intellectuals in relation to the law. 'Intellectuals', as currently understood, have always had a strong link with law and justice, but in different ways. In the second half of the eighteenth century, the 'Philosophes' invented the modern notion of a cause to defend. Regarding justice, they were during a long period mainly advocates. One may think of the emblematic case of Voltaire defending the memory of Jean Calas, whom he thought was wrongly condemned to death in 1762. In this famous case, Voltaire transformed himself into an investigator and a public advocate. He acted because of his own conviction and a certain idea of Justice. He was everything but an expert.

One can think of Émile Zola as well, another non-professional advocate in another judicial case involving an innocent person, Alfred Dreyfus, a victim of 'Raison d'État'. And if we go further into France's history with Sartre, Camus and other intellectuals during the Algerian War, we find the same paradigm: when there is a major State lie, a number of intellectuals take the initiative to promote an independent investigation by people who are not policemen, nor judges, nor professional lawyers, and who adopt a posture of 'advocates' to defend a cause, and to seek justice. These people frequently had to fight the existing laws or the positive laws, in defending an ideal of justice.

In this perspective, Zygmunt Bauman has distinguished two major kinds of intellectuals, especially in the French case: the 'legislators' of the modern era (from Voltaire to the 1960s), and the 'interpreters', which he sees as a decline of the traditional model, in the post-modern era - and it is interesting to note that these two figures of intellectuals have to do with the law.

In the first case, intellectuals, especially in France, had a great influence on politics; they formulated values on the basis of a specific kind of authority. They did not provide real laws, but they influenced the rules and values of society, in the name of Reason, Justice, and other major principles. That is the meaning of 'legislators' for which 'expertise' meant a 'global expertise', a global view over the world. This position has been progressively transcended by the 'interpreters', that is intellectuals whose role is now to be mediators between different worlds, between different 'communities of meaning', between different places of legitimisation, according to the plurality we have to cope with in the post-modern world.

If we follow Zygmunt Bauman, we can notice that 'public intellectuals' in France are changing their profession. They are less and less scholars or scientists, defending universal values with a specific knowledge. They are more and more journalists, actors, sometimes writers, using their visibility in the media instead of any kind of intellectual authority.

At the same time, scholars have changed their craft. They are more and more specialised, more and more technicians in their own field, more and more ready to be 'experts' in the narrow sense of the word. They became 'interpreters' in Bauman's sense of the word, if they want to be involved in political or moral issues, they do it, in most cases, from their own field of expertise: this is the role of what Michel Foucault called the 'intellectuel spécifique', as opposed to the
"intellectuel universel", whose major figure was Jean-Paul Sartre (Foucault 1976).

The growing public importance of expertise in the social sciences, including history, could be seen as a kind of recognition of their capacity to 'interpret' the world, to be scientists in the full sense of the word. It is probably more effective for scholars to be helpful on a small scale than constantly to provide opinions on any issue discussed in the public sphere. After all, in a global world, we probably need more 'interpreters' than 'legislators'. But this shift has many consequences. What is important today is less the intellectual as an individual endowed with his subjectivity than the knowledge itself which he carries. For as with any technician, it does not really matter who the person is delivering the expertise: any available scholar will serve the purpose.

Moreover, when you are a mediator, an interpreter, an expert, you do not have real control of your own knowledge: you hand over control to the court, to the parliament, to the government, and to many other social actors

In January 2006, Pierre Nora narrated the following anecdote in a seminar held at the Institut d'histoire du temps pré sent. Among a group of historians, he had taken the initiative in launching a petition a few months earlier, entitled 'Liberté pour l'Histoire' ("Freedom for History"). This petition strongly asked for the abolition of all lois mémorielles, without any distinction. A few weeks after the beginning of the movement, Pierre Nora and René Rémond went to visit the President of the National Assembly, Jean-Louis Debré. They asked him to weigh with all his influence to stop the parliamentarians who wanted to pass new laws concerning history. He warmly agreed, but he added that the parliament was under intense pressure from Armenians, who wanted a law repressing the denial of the genocide committed by the Turkish, and from Ukrainians, claiming for French recognition of the genocidal nature of the starvation organised by Stalin in 1932-33, and from other groups protesting that they have been forgotten. And he said to these two distinguished immortels of the Académie française: ‘You, historians, if you want to be heard, organize a lobby!’

Is this the future for intellectuals? Is this the future of knowledge in a world of lobbies? It is difficult to answer, but Jean-Louis Debré raised a real issue. Must the French model, in which intellectuals occupied a unique position in public debates, now give way to a global model where any profession, any social activity, including that of intellectuals, has to promote itself like any other via a lobbying activity?

References
