History, Historicity, and the Law (draft)

Introduction

While I am very grateful to be involved in this panel, I am also approaching this discussion with some measure of trepidation. Other colleagues here have a distinguished track record of reflecting explicitly on the interface between anthropology and history. By contrast, I have never properly addressed myself to this question although I have had the benefit of reading their work and others on the subject. In fact I have come to suspect that there is something perverse in my intellectual make-up that incessantly draws me back to structures, patterns and forms, rather than processes, flows and transformations.

This is paradoxical because history and historicity have in actual fact loomed large in all of the various topics I have engaged with as an anthropologist. My doctoral research on Corsica was often concerned with the way islanders related to their own past, and I drew extensively on the sterling work of French, Corsican and other historians for an understanding of the present. Much of the theoretical impetus behind my later work with behavioural biologists came from engaging with historians of science such as Lorraine Daston, Robert Kohler, or Eileen Crist. More recently, the work which Freddy kindly singled out as potentially of relevance for our panel - my writing on anthropological comparison - could reasonably be described as an exercise in the history of anthropological thought, even though I have actually gone to some lengths to evade the responsibilities which I felt this label would confer upon it[1]. As for my current research on law and freedom of speech in France, which is what I will be talking about today, it is more and more turning into a historical ethnography of the social life of one particular law - the iconic 1881 press law.

In fact, putting it like this, I realise that one might describe my anthropological work as increasingly shifting into the terrain of history - yet all the while without having ever addressed the question of interdisciplinarity. One of the reasons I so welcome the chance to participate in this panel is precisely as a wake-up call to address this question explicitly.

In particular, reading up for this panel has focused my attention on the difference between two ways in which I had been engaging with history as an anthropologist. The first is what I now realise was a rather unreflexive historicism as I reached out for historians' work in order to provide context and background for the ethnographic material I had first-hand knowledge of[2]. The second is my abiding interest in experiences of what I am learning to call - following Eric Hirsch and Susan Bayly - *historicity* amongst the people I worked with.

[1]This work was also initially developed in the context of a CRASSH Sawyer seminar organised by Renaud Gagné, Simon Goldhill and Geoffrey Lloyd which brought together anthropologists and historians around the question of comparison.

[2]This way of reaching for history was not entirely uncritical - having been exposed to Derrida early on in my PhD gave me a strong tendency to consider all history as first and foremost 'historiography'. Yet in practice, I tended to approach the work of historians with the deference due to expertise in a different discipline.

In failing to distinguish more clearly between historicism and historicity, I may have been influenced in part by the fact that my research to date has all taken place not merely in geographical 'Euroamerica', but in the very heartlands of liberal modernism: with schoolteachers, scientists and now lawyers. The anthropological insight that historicism is just one, parochially western or modern flavour of historicity, was honed in encounters with other historicities, elsewhere. By contrast, the people I worked with, on the face of it, lived squarely in a historicist universe.

And yet this first impression, like many first impressions, is partly erroneous. As Palmié and Stewart so clearly demonstrate in their recent edited collection *The Varieties of Historical Experience*, historicism is to some extent parochial even amongst Euroamerican moderns. Even professional historians have a range of other regimes of historicity at their disposal {}, let alone everyone else in what we too often caricature as 'the modern west'. In the rest of this paper I will look at some of the ways in which time and history play out for legal professionals engaged with the juridical management of freedom of speech in contemporary France. I will in other words be asking of French judges and lawyers the question which Hirsch in his paper asks of the Fuyuge, namely how they "see the past as inextricably connected to their present and future – how they are situated and transform in time." The answer is more surprising than might perhaps be initially assumed.

The paper comes at this question of legal historicity from two different yet complementary angles. The first concerns the way the 1881 press law is situated in time by its practitioners. Here what comes across as a flatly historicist form slowly reveals some more uncanny edges. The second is the way in which legal practitioners - or as they might somewhat fetishistically put it, 'the law itself'- operate upon time.

the law as historical object

To outsiders, the world of lawyers often seems impenetrable, convoluted and complex, shot through with jargon, arcane rules and treacherous exceptions. Once one begins to penetrate its mysteries, however, the legal field is revealed to be full of internal zones of relative clarity and obscurity for lawyers themselves. Thus to French legal professionals, press law is a distinctly tricky and resistant area, full of "procedural traps" {} to ensnare the unwary traveller[3]. For this and for other reasons, the judges, lawyers and other legal professionals who have specialised in this particular branch of law have come to form something of a community, almost an intimate circle. This community centres around one particular courtroom in Paris - the 17th Chamber, a.k.a the chamber of the press and of public liberties, where the majority of cases which fall under the remit of the 1881 Press Law first come to court [4]. In the words of judge M, former president of the 17th Chamber, these professionals' shared commitment to the 1881 law forged a "sense of community, around a law we want to keep alive and to keep evolving." The 1881 press law is this group's rallying point, their lodestar and their special preserve. This shared focal point entails a distinctive genre of historicity.

Monumental liberalism

One strand of this historical experience might be characterised a kind of *monumental liberalism*. The clue is in the name: the 1881 law is a historical landmark. Like a number of other famous laws of this period - the 1905 law (on the separation of church and state), the 1901 law (on associations) - the 1881 law is usually evoked by professionals and the public alike simply

[3] press lawyers giggling at recollections of naive plaintiffs calling upon their family lawyer to prosecute cases of libel…

[4] This entente cordiale between judges and lawyers is rather exceptional in France where relations between the two professions are often rather strained if not

by its date. Its date in turn indexes the early days of the third republic, a period which still stands squarely in contemporary imaginings as foundational of the modern French state. In this popular historiography - in which colonisation and empire are usually conveniently minimised - the third republic marks the moment when, after a century of turmoil, the aspirations of the French revolution were finally enshrined in the form of a stable, admittedly bourgeois yet still broadly progressive, national project. The 1881 law fits this historicist mould to a T. It is usually introduced as the law which ended censorship[5], thus giving form to the constitutional principles of free speech articulated in the *Declaration des droits de l'homme et du citoyen.* As the guardians and curators of the 1881 law, the judges and lawyers of the 17th chamber are thus the gatekeepers of what has often been called a "liberal monument"{}.

As Susan Bayly shows us in her paper, however, such grand historicist imaginings are also shadowed by intimations of disquiet and fragility. In the case of the 1881 law, its public status makes it a frequent target for legislative intervention. Politicians are fond of proposing amendments to the press law, in response to high-profile events or electioneering readings of the public mood. Some of these would seek to tighten up restrictions on speech - for instance by adding to the list of historical events whose denial is criminalised, on the pattern of the Holocaust, or by redefining the responsibilities of online platforms[6]. Others would seek to loosen such restrictions, - for instance by protecting journalists and whistle-blowers.

The professionals I have worked with are not systematically opposed to such 'evolutions' of the 1881 law - to reprise Judge M's term above - since after all such evolutions made the law what it is today. But they are often suspicious of what they see as ill-informed and heavy-handed interventions into a law which most of them see as delicately balanced, nuanced and fragile. From this angle, the 1881 law is not a monument so much as a complex historical accretion of written law, jurisprudence, scholarly analysis and procedural know-how. It is akin less to a timeless statue or memorial to the third republic and more to a living thing, a fragile ecosystem shaped by the efforts, trials and tribulations of successive generations of judges, lawyers and legal scholars.

(creative) anachronism

Whilst the visions above map a familiar set of historicist possibilities, these are interwoven with stranger historical intuitions. Here again, the clue is in the name. Insofar as it is a current law yet anchored to a different time, the 1881 press law sets up a number of uncanny historical disruptions. In some respects, the 1881 law brings the past into the present. While the most high-profile cases heard at the 17th chamber are often concerned with pressing contemporary social debates (such as for instance, the famous Charlie Hebdo 'Mohammed Caricatures' case), these are few and far between. The bulk of the cases heard at the 17th Chamber concern a much more enduring set of concerns, namely questions of libel, honour and reputation. These have been at the heart of press law ever since the regulation of the press began in the 18th century {}. The frequent metaphorical association of the 17th Chamber with a 'duelling ground' speaks to this sense that press law is slightly vintage, old-fashioned, antiquated.

This is more than a mere metaphor, however. It speaks to the enduring mark left on French press law by the context in which it was originally crafted. As historians such as Robert Nye have shown, the late 19th century was a period in which duelling saw a surprising boom in France, just as it was dying off elsewhere in Europe. In the 1880s in France, over 200 duels opposed journalists and their readers. The 1881 press law was crafted in the shadow of the alternative meta-legal world of honour and duels, and this inheritance remains vividly alive in arcane details of its procedures, as I discuss at greater length elsewhere {}.

[5] defined for these purposes restrictively as prior restraint {see Candea}.

[6] removal of terrorist speech offences and effect on charlie hebdo events…

This sense that the 1881 law is 'out of time', that it breaks proper historical sequence, is frequently invoked by those who would seek to 'modernise' it[7] or simply to remove certain offences from its remit. Yet my interlocutors sometimes read the anachronism backwards as it were. Thus one judge I spoke to pointed out that, far from being obsolete 'in the days of the internet', some aspects of the 1881 law revealed their full power precisely under these changed conditions. In particular, he pointed to the extremely short statute of limitations in cases of libel, which is a mere three months. This, he argued, is a fundamentally sensible way of thinking about the temporality of reputation in the days of social media. The speed at which social media moves means that if a 'buzz' is not created soon after something is made public, then it can hardly be seen as having caused serious reputational damage. It is as if the 19th century legislators had anticipated an altogether different technological reality. Or perhaps the dynamics of reputation are, somehow, timeless? Either way, such reflections send the present back into the past, positing the 1881 law as a type of what Pedersen and Nielsen have called a 'trans-temporal hinge' {}

legal operations upon time

The question of statute of limitations points to another way of thinking through the relationship between law and history. As legal historian Jan Thomas {} has perceptively argued, through devices such as statutes of limitation, or its converse, imprescriptibility, through operations such as amnesty, invalidation and annulment, the law operates upon history as much as it sits within it. Such devices, operations and creative fictions enable the law - or less fetishistically, lawyers and legislators - to construct what Thomas calls "regimes of temporality" {}, crafted precisely against everyday experiences of time. The law mandates people to behave as if time moved more quickly or less quickly than it does, as if memories, responsibilities, grudges, could be erased at will or retained for ever.

In the case of press law, we have already seen one instance of this type of time-crafting in the short statute of limitations. From that perspective, the 1881 law stipulates that reputation moves fast and words have no lasting effect. Yet in other respects, the law and its operation slow things down drastically. Lodging a claim interrupts the statute of limitations, freezing the dispute as it were, until the court has a chance to schedule the actual trial, which in recent years has taken an inordinately long time - frequently years.

One reason the 17th Chamber is so over scheduled is that trials themselves are slow. The procedural rules around press law allow parties to call as many witnesses as they wish, and the habit of the court has long been to pore over the detail and implications of words with erudite gusto. The people I worked with reflect with a mix of ruefulness and pride that whilst in other chambers cases of robbery or grievous bodily harm are expedited in 30 minutes, they can spend hours or days poring over the implications of a few well-chosen epithets. This slowness is sometimes derided and sometimes hailed as the epitome of how justice ought properly to be served. It is also evoked by those who claim that the 17th chamber recalls again the 'chronotope' {Bakhtin, Valverde} of the duel of honor - in all its punctiliousness and precision over seemingly small matters.

But perhaps the most spectacular instance of the complexity of the law's operations upon history is revealed in the way judges seek to distance themselves from historians in prosecuting holocaust denial cases. Judges I spoke to who had been involved in this type of case at the 17th were adamant about the fact that it was not their business or remit to decide upon matters of historical truth. This they claimed, was a matter for historians. What then were the grounds upon which they prosecuted holocaust deniers? Judge T, faced with this question, explained

[7] myriametres…

that the offence of holocaust denial was not technically about the denial of a *historical* truth, but rather about the denial of a particular kind of *legal* truth: the verdict of the Nuremberg trials. In prosecuting such cases, he argued, judges were not enshrining historical facts in law, but rather enforcing the authority of a prior legal decision. They were acting as the guardians, one might say, of a distinctly legal type of historical continuity.

Whatever one makes of this argument[8], I evoke it here because it suggests some of the intricacy of the shadow-play between legal time and historical time, and the law's power to produce an alternative, intra-legal continuity which sits beside yet has powerful effects upon the history of historians. More than anything else, it is in their familiarity with this idiom of quasi-temporality and these devices of 'time-crafting', that the judges and lawyers I worked with differed most starkly from their contemporaries in other professions.

Parting thoughts

As I said at the outset, in writing about history and historicity, I am straying into a conceptual terrain in which my footing is uncertain. It's not simply that I am tangling with history as a non-historian. That is certainly part of the problem, but leaving it there would be too easy. In present company, I cannot simply retreat behind disciplinarity. We have amongst us anthropologists who have written brilliantly about history and pushed the boundaries of disciplinarity in profound ways. Rather my trepidation comes from the fact that even as an anthropologist my intellectual temperament has always rather led me to privilege structure over processes - form over growth, as it were. In that context, this brief and merely suggestive foray into the question of what an ethnography of historicity might look like for a particular subset of French legal professionals is really little more than a promissory note of work in progress. I would be very grateful for any thoughts you might have, particularly perhaps on my deployment of notions of historicity and historical experience here.

I do wonder in closing, however, whether the very attraction of notions such as historicity for someone like me, who so often struggles to think outside of structures, might lie precisely in the way it gives anthropological comparatism a (residually structural) grip on history? And if so, should that be a cause for suspicion or on the contrary a cause for celebration?

[8] Jan Thomas argues rather convincingly that in purporting to stay away from matters of historical fact, judges in practice take on the much greater power of deciding upon the adequacy of the historical method as a whole for certain purposes.