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STATE, LAW AND BORDER IN ANCIENT ROME

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It is often assumed that globalisation leads to open frontiers, yet, at the beginning of the XXIst century, more and more walls are being built, many of them dividing hostile States, and some of them separating gated communities within the State. What can be made of these walls? It is often said that, far from symbolizing the State power, they are a sign of its weakness, as the building of walls in turn promotes other forms of power such as religion or money¹. History would appear to confirm this theory, for instance in relation to the most famous ancient wall, built in the Roman Empire. I shall see how the construction of the Roman border was the first step towards the decline of the Empire and how the wall, neither inside nor outside, is an intermediate space in which new cultures, new ways of life and beliefs emerge and grow.

Firstly, let us consider the notion of border as applied to Rome. Border is linked to the concept of a separation between two spaces. This is a constitutive idea in Ancient Rome, as can be seen in the myth of the foundation of Rome, the famous story which describes how two brothers, Romulus and Remus, shaped the City. As legend has it, the brothers took two oxen and dug the ditch that was later to frame the city. On creating this very first boundary Romulus uttered the very first legal sentence: “nobody shall go beyond this line”. On issuing his order, his twin brother disobeyed and crossed the border. The two brothers engaged in a struggle for power, for the kingship. Romulus, acting as a king, punished Remus and killed him, and the blood of his twin, streamed down into the bottom of the ditch.

This myth says a lot about the fundamental structures of thought. As we can see, the first step in building the *Res publica* (maybe not yet a State) was delimiting the city. As time went on, this remained the first delimitation of space for the constitution of new cities – the so-called “*Limes*”². This delimitation is significant as it is not only physical, but also symbolic. The boundary creates a frame, shapes the community of citizens whilst shaping the area of the Law. Inside the *limes*, the Law stretches, so that within the city, the citizens are protected against the Power.

¹ W. Brown, *Les murs de séparation et le déclin de la souveraineté étatique*, Paris, Les Prairies ordinaires, 2009.

² Y. Le Bohec, « La genèse du limes », *Revue d'Histoire du Droit Français et Etranger*, vol. 69, 1991, p. 303-330.

For instance, any signs of violence are strictly forbidden inside the City; there are no executions, no soldiers, and no graves. The City remains a place of peace, thanks to the Law. But if the citizen wanders outside of the *limes*, he will face the Power and violence of the world. Outside the city, the magistrates are no longer judges, administering justice in accordance with the Law, but rather heads of the Army: there is no more *ius* but only *imperium*. The fact that the citizen, upon becoming a soldier outside the border, on taking an oath before his general, is no longer considered a citizen granted with rights, but a mere subject of the Power, is highly symbolic. If he should disobey his general, he would be punished and the magistrate would act not as a judge but as a general. The sentence would be an act of Power, not a judgement³.

As we can see, in western legal representation, geographical limits establish a separation between Law and power. But what do they consist in? This geographical line is called *limes*, which means a path, a road between two legal spaces. The line divides, but it is not a border, as the very idea of border does not yet exist. The *limes* shape a legal space, the city of the citizens, the objective of the *Res Publica* is to stretch out and expand further. The *limes* deals with the internal aspect of the city, but from an international perspective, the *Res publica* has no limits, no borders. The city will go beyond: the values of Rome, and the most important of all, the Law, must be brought beyond, to the so-called Barbarians. It is the destiny of outsiders to become Romans. It is simply a question of time.

In ancient times, the concept of separation is a very efficient one, but it is applied at an internal level. There is no international border, the purpose of the *Res publica* is first to submit the entire inhabited world to its power, then to its Law.

But at the very beginning of the Empire the situation changed. Rome faced severe difficulties and cruel losses against the Barbarians. For a long time, Rome faced tribes who were more or less civilised and, as such were able to be romanised. But in the first centuries, the Empire had to deal with fierce Barbarians who ignored the very concept of civilisation that is to say from the Roman point of view, the city, the idea of *Res publica*, of Law. In old Europe, many tribes lived under completely different rules, they were prone to revenge more than judgement and kinship, solidarity was their most important rule. So there was a huge gap between the legal representation of the *Res publica*, and the way of life of European tribes, based on customs. This led the Empire to set aside the idea of unlimited conquest and to consider others who dwelt upon its limits differently.

In the second century, Rome set its limits, built a border, frequently shaped in the form of a wall, with towers, scouts patrolling and soldiers controlling the frontier... The fact that at the very same time the form of government changed

3 M. Humbert, *Institutions politiques et sociales de l'Antiquité*, Paris, Dalloz, 2014.

for a State and that Law was proclaimed to be dictated by this State, is of great significance. Of course, in reality, things were rather different, but the discourse emphasized the fact that the Law was made by the emperor. Another important change occurred in 212 when citizenship was granted to all of the inhabitants of the Empire. Hence on the one side there was a legal Roman space called *Romania*, inhabited by Romans, and on the other one a Barbarian space called *Barbaria* in which Barbarians dwelt. And in between, stood the border, the new border.

But what exactly is this border? Is it just a straight line, a line dividing two worlds: inside the *ius*, outside the Power? Inside the Empire, things were quite different. The Romans believed that beyond the border lied a strange, aggressive and terrifying world. Let us describe who exactly these outsiders, the Barbarians, were. Romans were prone to describing them as being near animals, wild animals embracing violence, living without any rules. Outside the border, was wildness, disorder? Romans sometimes imagined strange creatures, a mixture between dog and human, it was said that they ate raw meat and even ate themselves, that mothers had sex with their sons ... This very depreciative picture of the Barbarians beyond the border explains why Christian missionaries were reluctant to convert them as they did not want to meet up with them again in Paradise, and have to live with them for Eternity.

Thus, in the late Empire (IVth -Vth century), on the one side there was a legal space with citizens living under the rule of Law, the State, and on the other one, from the Roman point of view, Barbarians unable to understand the very meaning of Law. The border, between these two spaces, was not just a line but a fringe area devoted to the Army. This space was neither Roman nor Barbarian, as its purpose was to be something different to protect the Romans against the Barbarians, to act as a sort of buffer zone. What I would like to underline is the fact that new cultures, new forms of Law, new practices of power appeared in this intermediate space.

I. New cultures

Let us first consider the signification of this border. The border was new on the Roman landscape, so this begs the question: what did the construction of such a barrier reveal about the international representation of Rome? If we consider the physical aspect of the wall, the ditches, the towers, it was imposing and could be conceived as a symbol of power, the Roman sign of imperial domination. But we should be careful before drawing parallels with modern walls. As highlighted by Wendy Brown, the building of the wall is correlated to the decline of State sovereignty. It is by no means a sign of State Power, but rather a mere protective reflex. The wall is intended to preserve a society who feels unsafe, jeopardised.

It may seem paradoxical that just when the Roman State claims its power and Roman Law becomes universal, the Empire should feel so vulnerable. Of course many studies have tempted to explain the decline of the Empire, but maybe one of the deepest problems the Empire had to face was the lack of solidarity between Roman citizens. But now is not the time to discuss such a highly-strung question. Let's suffice it to say that the Empire was feeling vulnerable, and let's try to understand how it tried to protect itself.

In the second century, Rome built castles, towers and ditches to establish its borders, but this may not have been the most significant aspect. The most efficient way to divide *Romania* from *Barbaria* was not through physical means but rather through people. Indeed, it is very significant that as soon as the Empire established its borders, the processing of war prisoners was dramatically changed. For a long time, prisoners were executed, sold as slaves or, for the most valid, recruited as soldiers. But at the beginning of the second century, prisoners were deported to the borders of the Empire. Let us first consider the legal aspect of these establishments and then analyse their social meaning.

The Barbarian communities were not granted citizenship. Neither were they slaves. The Empire introduced a new status for them, a semi-liberty. Barbarians had the "worst of freedom". This means that, even though they were not slaves, they still had no rights and were subject to military power. They represented military communities and for them there was no space for *ius*, but solely *imperium*, military power.

As for the social aspect of these establishments, we should bear in mind the famous quotation: *divide ut imperas*, divide in order to rule. The Empire's strategy was to create a genuine intermediate space between *Romania* and *Barbaria*. Neither completely Roman, nor truly Barbarian. The Empire matched communities, using diversity as a tool to avoid creating any sort of solidarity between them. For instance a community of Britons was set up beside a community of Germans, so that each one was able to control the other.

II. New forms of Law

What were the legal consequences of this policy?

Firstly, the influence of military power was crucial. As trials were conducted by the military power, new ways of thinking the rules were developed. The sentence was no longer the result of a legal analysis, but an order issued by an authority. It is possible that, in this context, the semantics of the Law changed. A new term gradually appeared to refer to the Law: no longer *ius* but *directum*. This also shaped

the word for Law in many European languages: droit, *diritto*...

As for the rules, with time, books of Law were written. It is worth noting that the style of this Law has changed considerably. Roman Law was written in a very complex style as the Law was intended not only to set a rule but also to emphasize the power of the emperor. At the border, the book of Law was just a tool for military judges. In many cases, the difficulty for the military judge lied in accommodating the Roman rule with Barbarian customs. The law-books were a collection of precedents, the best sentences that had to be remembered. It is also important to note that a sort of case law was developed. Another noteworthy point is the fact that the language of the Law was kept simple. A very ancient term came back into usage: “if ... so”. This is worth highlighting as this form provided the ground for syllogism. The link between Law and custom is also worth noting. What was the nature of these books of law? Were they law or custom? Though this question is not appropriate, as custom did not exist at the border when the administrative authority consecrated it. To such an extent that “legal customs” were collected in books to help the judge in his office. They were administrative customs⁴.

This was the Roman point of view. But these legal customs affected people and the representation of these people toward these books should be analysed. These books actually had a very important impact on building the identity of these national communities. As we have seen, at the beginning, Rome deported its prisoners of war, depriving them of their past; a situation close to the colonial experience in modern times. How could these people share their past, construct their identity? Not through religion, but through the Law: at the border of the Roman Empire, law-books helped the national communities feel as if they lived together under the same Law, that they had the same obligations, the same rights, that they belonged to the same community, and most importantly, that they had received this Law because they belonged to the Roman Empire. This was very important in light of the fall of the Roman Empire, as it helped build the present with the past.

III. New trends of power

The fringe of the Empire was devoted to the Army and the nature of the power was a coercive discipline. But as time went on, the Empire had to implement other forms of power. In fact it was impossible to submit people to such strong coercion for years without gaining some sort of advantage in return. The rulers of these communities were frequently taken from the community itself, often a former king, an ancient *rex*. For the Romans, it was just good policy: it was a good way to let the

⁴ S. Kerneis, « Loi et coutumes dans l'Empire romain. À propos du droit vulgaire », in *Inter cives necnon peregrinos. Essays in honour of Boudewijn Sirks*, éd. J. Hallebeek, M. Schermaier, R. Fiori, E. Metzger & J.-P. Coriat, V&R unipress, 2014, p. 367-384.

ethnic community be governed by its tribal king as this man knew the language, the customs, and the way of life of his people. But, these little kings were in actual fact no more than Roman officers and it was actually an advantage for the Roman administration to settle this self-government at the border. But that was Rome's point of view, for the tribe itself, the king was less a Roman officer than their king, acting as their noble king.

It has sometimes been asked why kingship was so widespread in the early middle Ages. As we know, the Romans did not have kings, but emperors. Of course this is a major distinction, as the roots of power are quite different. In fact the first medieval kings are less heirs of the tribal kings than the successors of these Roman tribal kings. Once more, we have to consider the complex process of acculturation that took place at the border. In this way we will be able to comprehend the complex nature of the regal power in the early Middle Ages and even later.

The border is a creation of the State but at the border a new way of dealing with the State becomes possible. State, Law and Border, these three institutions have to be considered together as it is at the border that the complex dynamics between inside and outside truly come into being and give birth to new forms of Law and power.

To conclude, the lesson of the past is easily understood. Walls are built everywhere with the purpose of protecting societies against poor people, other cultures or religions. But this is nothing more than an illusion as the wall is no more than the expression of the fear of the other. It would be more appropriate to consider borders as a place of cultural and political exchange where new ways of life and maybe new forms of politics can develop⁵.

5 G. Le Blanc, *Dedans, dehors. La condition d'étranger*, Paris, Seuil, 2010.