

# BORDERS, VIOLENCE, LAW

JAVIER DE LUCAS<sup>1</sup>

**Abstract:** This article explores the relationship between violence, law and borders by analyzing both the violence at the borders and the violence of the borders. In both cases, the author states that violence exerted by means of law, as well as migratory and asylum policies, threaten the universal human rights of the most vulnerable people and cannot be seen as exercising the legitimate monopoly of force, resulting in the destruction of the Rule of Law.

**Keywords:** Borders, Violence, Immigration, Asylum, Rule of Law, Human Rights.

The relationship between the notion of Borders and Law is a classic, a basic argument of the Philosophy of Law and political Science. However, there is another relationship which remains unexplored, that which exists between Violence, Law and Borders: Violence at the borders, Violence of the borders. How does Law handle this? What role does it play before these both forms of violence?

1. Let's begin with the most obvious violence, **the violence at the borders**. The impact of the acts of *violence in the border* (for instance, Lampedusa, Melilla, Ceuta) is undeniable: this is always the case when there is *harm*, when there is suffering. Since violence means, above all, harm, to the extent in which violence seeks to impose or obtain something by the means of force<sup>2</sup>. Still, unjustified or disproportionate harm is the evil that Law cannot and must not accept. This idea is further reinforced if we accept the thesis sustained by certain Law philosophers (such as Ballesteros), who maintain that the core of the usefulness of Law lays in its very condition of a barrier against

---

<sup>1</sup> Professor of Philosophy of Law, Institut de Drets Humans, Universitat de València, Spain (lucasfra@uv.es).

<sup>2</sup> We must recall that the academic definition of violence refers to its origin, its Latin etymology: *violentiā*, comes from *violo*. <Violence is the quality of violent or the action and effect of *violare*. Violent, on the other hand, is that which is outside of its natural state, situation or mode; which is executed with force, vigour or brusqueness; or which is done against the taste or will of oneself>. Violence, therefore, is a deliberate behaviour that can result in physical or psychological damage to a third party. Since Galtung, violence is differentiated into three categories, cultural, structural and direct violence. The most serious one, meaning the most dangerous one according to the Norwegian philosopher, is the second one, that which consists in the dissatisfaction of basic necessities as a consequence of the structure of the political-economical system.

violence and inequality: that is why Law would –ideally- be “non-discrimination and non-violence”.

Moreover, the core of what it must forbid, according to the well-known reasoning of J.S.Mill in his book *On liberty*, is precisely the *harm* to a third person. Thus, the first reflection regarding <violence on the borders> is that many of those acts seem to coincide with what we consider to be a crime, to the extent to which they reveal disproportionate use of force, disproportionate menaces to life, to physical integrity, to freedom. We are referring to harm in basic necessities, in primary legal assets, in universal human rights: considering such harms, we can state that the borders today often entails a risk of death, if not death itself.

And still, is Law perhaps different from violence? Isn't it a form of institutional violence in itself? Is this not precisely the sense of the weberian <monopoly of violence>, which entails the monopoly of Law as an instrument of coercion and sanction? Is not the link between Law, power and fear, the means of fear as an instinctive political link (at least as much as the gregarious instinct, the flock instinct, the will to be a servant), and retraceable to the principle *primus in orbe deos facit timor*<sup>3</sup>, a constant in political theory, from Greece up to present day<sup>4</sup>? Does not this conclusion require from us a realistic examination, as the one put forward by Ross in his polemic with Kelsen regarding the distinctive note of Law, which would not regard its validity but rather its coercive efficiency? How can we refute such a reasoning of Law as expressive violence, so evocatively portrayed by Eastwood in the dialogue of *Unforgiven* between the gunman/sheriff *Little Bill Dagget* (Gene Hackmann) and the gunman *English Bob* (Richard Harris), as the former delivers a terrible beating to the latter:

- *Little Bill Daggett*: I guess you think I'm kicking you, Bob. But it ain't so. What I'm doing is talking, you hear? I'm talking to all those villains down there in Kansas. I'm talking to all those villains in Missouri. And all those villains down there in Cheyenne. And what I'm saying is there ain't no whore's gold. And if there was, how they wouldn't want to come looking for it anyhow.

- *English Bob*: A plague on you. A plague on the whole stinking lot of ya, without morals or laws. And all you whores got no laws. You got

---

<sup>3</sup> The idea that fear created the gods, is a common place of the *retores*, and therefore, can be found in several authors and in different forms. Often attributed to PETRONIO, extract 22 (*Loeb Classical Library*, Harvard University Press, vol.3, 661). However, others refer it to STACIO, *Tebaida* 3.661 or even to LUCRECIO, in the Canto V of his *De natura rerum*. Cfr. J-F Rieux, “Aux Sources de la croyance. Petite histoire d'une formule”. Also, Heuten, G., “Primus in orbe deos fecit timor”, *Latomus* 1 (1937), 3-8. I owe this preciseness to my colleague Mar Marcos, professor of Ancient History and religions at the Universidad de Cantabria.

<sup>4</sup> A tradition which includes the names of EURIPIDES, TRASIMACO (*República*: justice is that which the strongest takes advantage of) CALICLES (*Gorgias*, Law, the natural law of the strongest), SAN AGUSTIN, HOBBS and WEBER, ROSS and PETRAZISKY: Law is force, inexorable impositivity.

no honor. It's no wonder you all emigrated to America, because they wouldn't have you in England. You're a lot of savages, that's what you all are. A bunch of bloody savages. A plague on you. I'll be back.>

In order to be able to justify this distinction, to distinguish the legitimate monopoly of the violence exerted by the one who has enough power to impose it, resorting to the idea of justice is inevitable. Furthermore, so that this latter does not become a formal resource, malleable in the hands of the powerful, it is necessary to refer the use of power to the notion of human rights, to the historical consciousness of that idea of justice. Only the Law which is understood as fight for the Law, *Kampf um Recht* (Ihering) which in turn resolves in fight for the rights, *Kampf um Rechten*, can aim to be a different instrument than that of the resource to violence, in other words, as suggested by Ferrajoli, the Law understood as the *law of the weakest*. Yet not in the prenietschean sense taught by Calicles, as an ingenious, witty and resentful resource of the weak against the strong, *the true natural master*, but rather as the recognition of the other, as the struggle for the rights of the other and in particular *a more vulnerable other*<sup>5</sup>.

In fact, the more vulnerable is the person who seeks asylum, the person who is deprived in his own country of the right to have rights, the very first right, the *Urrecht*. This struggle for the first right compels to fight for those who cross borders seeking it, in order to obtain their recognition, the first legal protection, which is the very early institution of asylum as an institutional form of hospitality<sup>6</sup>. If the coercive force that is inherent to the right exerted in the borders does not respect these limits, it ceases to be the exertion of the legitimate monopoly of the force and becomes violence. We will soon return to this matter, which is probably the most obvious proof of the illegitimate drift of European migration and asylum policies.

2. Nevertheless, beyond what it is strictly visible, the <violence at the borders>, resides the question of <the **violence of the borders**>, in other words, the question: Are borders harmful and, thus, violence? Furthermore, are they structural violence? Borders nowadays imply, for many human beings, I insist, a serious risk of death or of serious damage to their physical integrity. They entail for many a restriction in their freedom of movement which appears as discriminatory and unacceptable. Should we abolish them because they are harmful? Or are they simply one of the many rules that enable freedom?

---

<sup>5</sup> I am referring to the Book of Luigi Ferrajoli, *Derechos y garantías. La ley del más débil*, Madrid, Trotta 2005 (with an excellent foreword of Perfecto Andrés Ibáñez). I believe that is the sense of the claim defended in the theory of recognition put forward by Axel Honneth, especially in his *Das Recht der Freiheit: Grundriss einer demokratischen Sittlichkeit*, Suhrkamp, Berlin, 2011.

<sup>6</sup> I devoted a book to the legal foundations of this initial right, *Puertas que se cierran. Europa como fortaleza*, Icaria, Barcelona, 1996 in which I proposed a philosophical and legal reflection on the closing of European borders that foreshadowed the narrowing of this *Urrecht* that is asylum, based on the proposals of Arendt and Brecht.

I am referring to <violence of the borders> to the extent in which the legality that currently establishes and defines the borders plainly is breaking the Law, violating rights. Since, regarding the case of the EU at present day, as a consequence of the process of renationalisation of migration and asylum policies, the borders are a <war instrument against immigrants and refugees>, as it has been reported for some time now by the NGO *Migreurop*: a war in which the Law is the basic tool, which means the destruction of the Rule of Law and of the very thing that gives sense to Law itself, the fight for the rights.

War is, in a sense, the denial of Law itself, and that is why I believe it is justified to say that the drift of the EU's migratory and asylum policies entail the resurgence of a legal and political tradition that develops the **negative of Law**. Indeed, this "war against the immigrants and refugees" finds its alibi (I refuse to use the term justification) in that perversion of the logic of Law that is the principle of discrimination of the other, on which the *legal architecture of his non-recognition* is built upon, and which sums up in the denial of equality (the denial of the other in its recognition as a person), in the absence of a safety legal status. Moreover, such conception is further reinforced by its functionality from an economic point of view, this is, to feed the business of labour exploitation; which on one hand reveals all its cruel ambiguity at both ends of the <bubble economy>'s policy of self-overexploitation, casino capitalism and closure policies (all of which, in themselves, promote in a different way the clandestine exploitation networks) and on the other, it reveals the extreme condition of precariousness –the epitome of the condition of "disposable", of its "liquidity"-attributed to immigrants.

In a certain way, as it has been denounced, this use of immigrants highlights the link between the new form of slavery affecting immigrants (as workers) and the migratory policies (asylum policies as well). It is a well-known thesis. In the same way that we speak about institutional racism and xenophobia, the other side of the coin of racism and xenophobia, the migratory (and asylum) policies are the institutional framework that promotes the new forms of slavery affecting immigrants (and refugees). These policies are part of a conception that shows how the migratory movements are structural pieces of a system, rather than spontaneous, wild and incomprehensible waves: invasions. On the contrary, migrations integrate in an economic global system, which we refer to as globalisation process, governed by the neo-fundamentalist logic of global market capitalism, which promotes inequality and exploitation under the pretence of mobility and market freedom. The denial of freedom (refusing to recognise the other as a person), results in the absence of a safety legal status and in the collapse of the principles of legality and equality under the law, of the guarantee of equal freedom and thus the reduction of these subjects (infra-subjects, or rather non-subjects) to mere property. In other words, this is what it is actually being instrumentally used by means of that Law of exception that is Migratory Law (more than it is Immigration Law), which, as warned by Danielle Lochak, opts for the "state of siege" instead of the Rule of Law, thus, turning into permanent what was in fact an exceptional, provisional and extra-ordinary situation as should be a "state of exception".

Indeed, these infra-subjects are even deprived of their own condition of immigrants, of the right to be an immigrant, resulting in the right to free circulation (a complex right, as exposed by Professor Chueca), which links directly with the principle of autonomy and its corollary which is having the opportunity to choose our own life plan, and to be able to move accordingly. The construction of the legal figure of the immigrant as an infra-subject or non-subject is obviously related as well to its utilisation as a problem-obstacle to the effects of the internal biased consumption. The immigrant as the scapegoat, as the external aggressor from whom citizens must be protected. In doing so, the system re-legitimises itself, even if it is according to the most antique model of legitimisation which is, as we have seen, the principle *primus in orbe deos facit timor*: fear. Therefore, I believe it can very well be denounced that these migratory and asylum policies are war policies, that they try to instigate fear, to make us afraid, to compel us to give up our freedom and rights, starting with the freedom to criticise, for the sake of the protection we are being offered instead.

I find it hard for someone to deny that such model of <border policies> violates the logic of the Rule of Law itself, its principles and values, its rules: the primacy of the rights, of the legal assets and interests that are established as a priority because they serve basic needs. When all the effort of the migratory policy is to conceptualize immigration in times of crisis as a menace to public order and even security, defence, it is understandable that it requires the institutionalisation of instruments of exception, such as internment camps, the use of armed forces or analogous measures (the FRONTEX system) and the criminalisation of immigrants and even refugees.

Moreover, this borders' policy imposes the logic of state territory, serving the notion of market and power, even more of sovereignty, which are already perished: borders violate the universalist logic of legal and political globalisation, which follows the path of legal cosmopolitanism at least regarding the equal recognition of universal human rights and its guarantees. A path that reveals the oxymoron of a notion of state sovereignty, which still today aims to force itself upon commands of the Rule of Law, meaning of the submission to Law, starting with human rights.

To conclude, as we have seen, this borders' policy we are referring to is violence that violates, harms those who are most vulnerable before the Law, those who are not citizens: the refugees, and in doing so it violates the most basic right, the right to have rights: the asylum. Therefore, as it is evidenced by the existence of the CIE and, most of all, the externalized camps, as it yet confirmed by the will to revoke the right to asylum exhibited by a large part of European governments, with Rajoy's government at the head of it, the struggle for Law, for the rights, for the Rule of Law, at present day, is the fight against this utilization of borders as violence, a use that entails a perversion of Heraclitus' proposal in their fragment 44 : "The people must fight for its laws as for its walls" (753 (22 B 44) D. L., IX 2).