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NECESSARY AND UNNECESSARY WALLS*

1. My definition of freedom. – 2. Ambivalences. – 3. Dualisms. – 4. Laws. – 5. Our bodies, ourselves. – 6. To conclude.

1. My definition of freedom

Though I have dedicated most of my work to the critique of various kinds of material and immaterial "walls" (those of prisons, psychiatric hospitals, national borders, the traditional family, gender and other stereotypes), in time I have learned to recognize and appreciate other types of walls. Those of that "room of my own" of which Virginia Woolf spoke, for example. Privacy, the possibility of keeping others outside of one's locked door, may be seen as a hard won privilege for many people, especially women. But feminism taught me also to take into account and appreciate, rather than devaluate, those limits and restrictions which are inherent to our bodies (sex, sexual orientation, age, illness, disabilities). On their turn, these bodily (and mind) limits refer to our being, inexorably, social beings: we depend on others, and others depend on us. And relationships are both limits and resources. We cannot be or do all that we wish to be and do, but we can try to reflect back on what we perceive our limits to be and go on from there. This is what I believe individual freedom to be: the ability and capability to make our limits our own and construct our life starting from them. In order to do this, we need many different resources: economic, social, cultural and emotional resources. This implies, to begin with, a society ordered in such a way that these resources are accessible not just to me but to to all. We also, I have come to realize, should not be or (especially) do all that is now possible to be or do: these are, for example, the limits necessary for the survival of the planet, the quality of the natural environment we live in, the future we wish our children to have.

All these limits require not just social and cultural norms, but positive laws. Which is something quite problematic nowadays, as the power of laws has been weakened by the increasing weakness and loss of sovereignty of most nation states. But also because in most cases these laws should in fact be supranational, or transnational, and although there are transnational authorities, these are weak for many reasons, among which the fact that they

lack democratic legitimacy, and, crucially, the force and power to implement laws. Not to mention the opposite force and power of megacorporations and financial capital, which are much more global than these authorities and actually shape them to serve their interests, plus producing and using another type of law: lex mercatoria.

2. Ambivalences

Modern (western) political theory works with a notion of the individual as abstract, neutral and without ties. Society and the state are seen as the result of a pact this individual makes with his similars in order to achieve security and internal peace. The sovereign thus created has the monopoly of the means of legitimate violence and both the duty and the right to emanate laws binding for all. Sovereignty is here a key word and concept, as it implies at the same time the idea of an individual subjectivity predicated on the possession and domination of his (the use of the masculine is intentional) own body and that of an Authority whose power of command extends to a given territory and the people living in it: the State constructs the Nation and fixes its territorial, cultural and "ethnic" borders. States are constituted as individual sovereign subjects, as international law reveals. Individuals and States are then homologous, and it is easy to demonstrate that they have been theorized and constructed as masculine (as well as proprietary, adult, white and healthy: the construction of the modern state in Europe goes hand in hand with colonialism and racism. The conquest of America is contemporary to the "crusade" launched by the Spanish king and queen against "Moros" and "Jews", in the name of "limpieza de sangre"). A consequence of the accumulation of capital coming from colonization is the phenomenon of "enclosures", i.e. the appropriation as private property of until then common land, that is land used by peasants to collect wood, feed animals, etc. (Karl Marx has described and commented on how wood collection became theft). Many students, among which fundamentally Michel Foucault, pointed to and analyzed another process connected to the formation of nation states and the construction of their "peoples": the process which Foucault called the "great internment", referring to workhouses and later prisons and psychiatric hospitals. The birth of disciplines (in the sense of "sciences") goes together with the expansion and diffusion of discipline, together constituting that *dispositif o*f power-knowledge which is at the basis of the production of modern subjectivity.

But even aside from Foucault, it appears clearly that all these different "enclosures", and their philosophical and legal justifications, do not just prohibit, censor, limit. On the contrary, they at the same time create and

justify a number of new liberties. After all, it is in the name of the protection of individual liberty that Locke justified the creation of a political authority legitimated to pose universally binding laws. But even Hobbes, the theorist of the absolute State, saw it as the means to free individuals from fear and insecurity, so that they might pursue their interests and desires in peace. Borders limit, but also protect from external dangers. The monopolization by the State of the means of legitimate violence, in turn, is a way to keep citizens from fighting each other (*ne cives ad arma veniant*), and therefore to free them from constant fear for their lives. In time, the secularization of the State invoked by Hobbes and Locke produced other liberties: that of religion, for example, which means freedom of conscience, of opinion, of expression, in short all the civil liberties later inscribed in all modern constitutions.

At the same time, of course, these liberties and rights could be, have been, and are being denounced as mere fictions for most people, or, even worse, as potent means to secure consensus and continue domination by the few. Yet, even Marx, who called the French revolution "rights of man" "bourgeois rights", acknowledged they might function as spurs to battle owing to their promise to be "universal". Anyway, to make a long and complicated story short, borders, limits, "enclosed" subjectivities, discipline, even power and domination, may work simultaneously both ways: as constraints and as means for freedom. Better: as new constraints and new freedoms. In other terms, limits are a condition of and for freedom, as well as unfreedom and domination. We could also add that when there is no awareness of limits, there is no notion of freedom either…

Prisons, which have become in modern times the primary punishment for transgressors of the law, and which may be seen as paradigmatic of the interplay between freedom and coercion in modernity, were not just places where to confine people: they were conceived as institutions which should produce "citizens", that is individuals capable to recognize their interests and pursue them, in other terms as institutions which should transform disorderly (according to the new norms of the industrial system) people into responsible and, therefore, "free" subjects of the new world (Bentham).

3. Dualisms

But let us return to the notion of sovereignty, because it is fundamental to understand how humans have been conceived in (western) modernity, with cultural, social and political consequences that are still with us. The individual is sovereign insofar as he reigns over himself: he does not just own his body, he reigns over it, commands it. That is, the individual is conceived as having a (potentially) free mind (reason, spirit, thought) which dominates the body.

This dualism is what permits at the same time to think of freedom as a natural "right" and to deny it to those who are constructed as not having the ability and possibility to "own" and especially dominate their bodies: women, first of all, but also children, the insane, the uneducated, the poor, the blacks, the "savages" (whether or not the "Indians" possessed a soul was a crucial debate among theologians at the time of the conquest of America. In the end, though the idea that they indeed had one prevailed, colonization – and the subsequent genocide – was justified nonetheless. At the time, paradoxically, by invoking the natural right (of the Spaniards) of "*communicationis*", whose infringement on the part of the invaded legitimated their extermination. Later, by defining colonization and domination as necessary to the civilization of the colonized). Thus, on the one hand the dualism mind-body stands as the foundation of the idea of freedom as something humans were born with a right to, and on the other may be used to deny this same right to those who are conceived as not being able or not having the possibility to rule over their bodies. Yet, of course, this dualism (present already in Greek thought, but reinforced by the monotheistic religions) is also at the basis of the idea of human universal equality: all human beings are equal insofar as they possess a mind (soul, reason).

I have recently re-read some notes Lévinas wrote in 1934 (1996) over the "philosophy" of Hitlerism. What I think he says is that it is precisely the refusal of this dualism that leads to an irreparable retrenchment into the body, the impossibility of projecting into the future and imagining freedom, with the consequence of taking refuge into what the body seems to stand for: a community of same-blooded people, "race", "traditional" identity. Is there then no alternative between the idea of a reason conquering the body (and therefore constructed as potentially free from it) – an idea, according to Lévinas, necessary to democracy and individual liberty – and that of a mind reduced to the body, determined by it – an idea, according to Lévinas, at the basis of totalitarianism?

This question appears again crucial today, at least in Europe. Many Europeans, afraid of the future, seem to want to take refuge in newly rediscovered and even invented blood-and-soil communities, invoking "tradition", calling for the protection of the "past", fighting against "contamination" from people coming from "outside". Indeed, since the Schengen agreements on European security, it has become common to call the European Union "Fortress Europe".

Wendy Brown (2009) has appropriately noted and analyzed a paradoxical phenomenon: globalization, and the subsequent erosion of state borders, not to speak of states' sovereignty, is accompanied by a frantic construction of new walls everywhere, both real and symbolic. Walls between states (the wall

built by the USA at the border with Mexico), between peoples (the wall built by the Israelis to keep Palestinians at bay), within cities, to separate different "ethnic" communities or protect the rich from possible incursions by the "dangerous" poor (gated communities, for example). Security has been a key issue in politics and policies all over Europe, and elsewhere, in the past 30 years: street crime in the urban context, immigration in the national and continental contexts and terrorism in the global context have become the targets of discourses and policies purportedly aiming not only at fighting these phenomena, but also, and sometimes especially, at reducing people's feelings of insecurity. Though this last objective has not been achieved, these policies have had the effect of multiplying the prison populations to such an extent that many scholars talk of a new "great internment". Plus, administrative internment for migrants (going under different names according to different countries) has become a legitimate and diffuse practice all over the European Union.

But also the primary objective for which these various walls are said to have been and are being erected is not achieved: they cannot stop migrations, terrorism, etc. What they, and security policies in general, do is to divide people between the good and the bad, and offer the "bad" as scapegoats for the good ones' fears, thus deflecting unease and diffuse insecurity towards the first.

Unease and insecurity (in our part of the world) may be seen as effects of a globalization in great part produced and managed by financial capital, big multinational corporations and the neoliberal governance of institutions such as the IMF, the World Bank and the WTO. The erosion of welfare protections, increasing rates of unemployment, the present economic crisis all combine to make many people, and especially the increasingly impoverished middle classes, uncertain, insecure, fearful. The new walls, real and metaphorical, are a symbol of this fear, while at the same time failing to assuage it. A fear, as I said, which is being deflected onto those, and onto all that, which are and is defined and constructed as the Other, not-us. While contact and communication with the wide world has never been so easy and rapid (thanks to the new electronic devices), "new walls are being erected at every street corner".

The key word after world war II was equality, nowadays it is difference. Equality meant at the same time the attempt at diminishing economic and social inequalities and equal respect for all humans. In the past decades, though, it is "difference" which has been celebrated. Equality and difference need not be in contrast with each other, on the contrary: it can be argued that they are complementary (L. Ferrajoli, 2007). Yet, precisely in those countries where equality policies have been most pursued, difference emerges as the

new rallying cry, denouncing equality policies as assimilatory at best and inefficient in general. Due respect and "recognition" of one's (chosen) identity are invoked to bring justice to underevaluated and discriminated against specific characteristics deemed important for one's self esteem. One of the effects has been, together with the multiplication and pluralization of recognition requests, a politics of identity whereby rights are demanded precisely in terms of one's "identity". While "equality", or at least most equality politics, appear to adopt and work with a notion of the individual as "neutral", that is devoid of any specific characteristics as to sex, gender, race, etc., "difference" and identity politics put forward an incarnated self. With two consequences: on the political level, a multiplication, but also a dispersion, of low-intensity conflicts having to do much more with "recognition" than "redistribution" (Fraser, 2013); on the cultural level, the legitimation of the reclaiming of an "embedded" identity.

On its turn, the reclamation of an embedded identity gives new life to xenophobia and racism (P. A. Taguieff, 1988), blood-and-soil rhetoric, retrenchment into a "community of accomplices" (Z. Bauman, 2005). A new life which is reinforced by insecurity and fear and actually supported by security policies in search of scapegoats. It would then appear that Lévinas was right in denouncing the demise of the dualism mind-body as a pre-requisite of racism and totalitarianism. Yet, even aside from the early denunciation of the dark side of the Enlightenment (and therefore of the dualism mind body) by the Frankfurt School, this dualism has indeed led, and still leads, to what Martha Minow (1990) has called "the dilemma of difference", that is to difference being interpreted by equality politics as pathology, abnormality, deviation from an implicit standard. And of course, in the Euroamerican tradition, this dualism is only one of the many other dichotomies we may find and which are connected to this one: culture vs nature, reason vs emotion and passions, etc.. In these dichotomies there is a hierarchy: the first term is superior to the second and dominates it. A domination, then, by those who are deemed to be on the side of the first term over those who are constructed as being on the side of the second: men over women, culture over nature, as well as mind over body.

Both conceptions, then, are liable to lead to the construction of "walls": to keep in or to keep out, to confine and discipline or to separate, to mark "differences" and /or to legitimate inequalities.

4. Laws

Laws may pose limits as well as abolish them. On the other hand, if we define laws as that particular kind of norms which are heteronomous, that is

external to the subject, and posited by an authority competent to do so and whose transgression is sanctioned, laws can always be conceived as external limits to a subject's freedom of action. Yet, there is no outside norms. We live immersed in a normative universe, whereby all that we do is oriented according to some kind of norms. Language is itself normative (P. Legendre, 2005) and it is through and by language that we relate to the world, make sense of it, some even say construct it. Most of the time, we are not aware of the norms we follow. In this sense, laws are norms we are, or ought to be, aware of: therefore, also, potentially critical of and opposite to, whereas we cannot be critical or oppose the norms we are not aware of. Thus, in a way, laws allow us a freedom that social, customary, not to speak of religious and, especially, nowadays, "technical" norms, do not. Today States and other national agencies produce an enormous amount of laws, an amount inversely related to their effectiveness. We happen to be regulated and disciplined not so much by laws which can be contested and fought against, but by a mode of government which is supranational and international, an almost invisible web made up by what is called lex mercatoria (rules designed by big law firms for corporations operating on the global market), rules and regulations fashioned as merely technical and therefore not contestable, posited by supranational bodies (FMI, World Bank, etc.), and the pervasiveness at all levels of "obeying to numbers". Anybody working in universities today, for example, knows very well what this is all about: in the name of efficiency and transparency, university workers spend most of their time filling up digital forms, trying to conform to quantitative criteria of "quality" and "scientificity" which owe their appearance of neutrality and impartiality precisely to their translation into numbers.

The hegemonic neoliberal rationality, many students have observed (among others, P. Dardot, C. Laval, 2009; T. Pitch, 2010), actually governs and rules by and through "freedom". Freedom here means first of all autonomy and independence, i.e., not to depend upon others and especially the State and its resources. It also means self-entrepreneurship, i.e. using one's own personal resources (aptly called "human capital") to the best of their capacities. Also, it means total responsibility for oneself, that is managing oneself the consequences for one's choices, bad or good that these consequences may be. "Freedom" is thus explicitly contrasted to "equality", a political aim which has been accused to produce dependency, passivity, and to be contrary to efficiency and the creation of wealth. The command is to compete, and competition is seen as the best, or only way, to discover and reward "merit". Those who fail, and more and more people do fail at this game, have to face the consequences by themselves. But those who cannot compete are also those who cannot face the consequences of failure. They will be blamed, at best, or constructed as

dangerous at worst, thus confined in urban ghettoes, marginalized, imprisoned, relegated to the care of private charity. In short, we have returned to the XIX century division between worthy and unworthy poor, and the erection of real and symbolic walls between these last and the "good" citizens. Such walls need not rely on laws: they are also made up by all those devices whose ownership by itself declares you are a bona fide citizen (credit cards, passes of all kinds, passports and visas, etc. see D. Lyon, 1994; N. Rose, 2000).

At the same time, we lack precisely authorities and legislation which may effectively put limits to what we do and can now do to the world we live in: environmental protection, in all senses, would need a global authority and globally binding legislation.

5. Our bodies, ourselves

I started this brief discussion by putting forward my notion of freedom. Such notion owes much to my intellectual and political experience as a feminist. Feminism is neither a theory nor (only) a political movement, and of course there are many versions of feminism. Most, albeit not all, try to deconstruct and work with a notion of the individual subject different from both the one best spelled out by Descartes (the mind-body dualism) and the one denounced by Lévinas (the collapse of this dualism towards a retrenchment into the body). Nowadays, we are confronted by two different kinds of reductionism: on the one hand, there are those who say that everything is always already in our DNA, on the other there are those who maintain we can actually get rid of the limits dictated by our bodies, thanks to the possibilities inherent in the new technologies, by which we can be and become whatever we want. Both reductionisms actually deny our own experience of ourselves and our relationship with the world: we experience with our senses and give meaning to this experience through language, i.e. culture. We are, or we experience ourselves as being, inextricably nature and culture, history and biology, mind and body. It is this concrete experience that ought to be taken into consideration while constructing the individual subject in legal and political theory: its denial is at the same time the denial of the relevance of our relationships, of our depending on others and vice versa, of our being constitutively social beings. Our singularity is made up of these plural and complex relationships and of our taking them into account, our reflecting back on them. There are limits to what we can do and be, limits inherent in our being vulnerable, mortal beings, and the awareness of these limits is important if we aim to construct a less unjust social and cultural environment, capable as well of taking care of our natural environment (J. Butler, 2004). But there are also limits due to an unequal access to those economic, social

and cultural resources indispensable to the use and development of our capabilities (A. Sen, 1995), therefore to a freedom not reduced to the mere exercise of "rational choice". Indeed, there can be no freedom without a (measure) of equality.

Thus, we have, and we need, limits, but, at the same time, there are limits, walls and obstacles we should get rid of. This is of course what politics is all about, if we do not restrict the meaning of this term to institutional politics. What limits we need and what limits we should overcome and abolish changes in time and context. From what I have written so far, I hope I have made clear which walls I think we should destroy now, and at the same time which walls we might want to maintain and perhaps reinforce.

6. To conclude

In an interconnected world like ours, walls are being erected at every street corner. We should interrogate this fact and wonder what it is we are afraid to lose and want to conserve. But in order to do so without erecting ever more walls, we should work with a notion of the individual subject constituted by her relationships, and whose body and mind are neither separated nor collapsed one into the other.

References

BAUMAN Zygmunt (2005), *Vite di scarto*, Laterza, Roma-Bari.
BROWN Wendy (2009), *Murs. Les murs de séparation et le déclin de la souveraineté étatique*, Les Priaries Ordinaires, Paris.
BUTLER Judith (2004), *Precarious Life*, Verso, New York.
DARDOT Pierre, LAVAL Christian (2009), *La nouvelle raison du monde*, La Découverte, Paris.
FERRAJOLI Luigi (2007), *Principia juris*, Laterza, Roma-Bari.
FRASER Nancy (2013), *Fortunes of Feminism. From State-Managed Capitalism to Neoliberal Crisis*, Verso, New York.
LEGENDRE Pierre (2005), *Le désir politique de dieu*, Fayard, Paris.
LÉVINAS Emmanuel (1996-1934), *Alcune riflessioni sulla filosofia dell'hitlerismo*, Quodlibet, Macerata.
LYON David (1994), *The Electronic Eye*, Polity Press, London.
MINOW Martha (1990), *Making All the Difference*, Cornell University Press.
PITCH Tamar (2010), *Pervasive Prevention*, Ashgate, London.
ROSE Nikolas (2000), *Government and Control*, in "The British Journal of Sociology", 40, 2, pp. 321-39.
SEN Amartya (1995), *Inequality Reexamined*, Oxford University Press, Oxford.
TAGUIEFF Pierre-André (1988), *La force de préjugé*, La Decouverte, Paris.