

# Borders of Equality

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2022-03-15T17:36:02

The meaning and role of (national) borders have been subject to constant change throughout human history. The recent past and the globalized world of the present are no exception. The central thesis of this contribution is that legally sanctioned, robust border security today marks a fundamental inequality in the world; it is a reflex and sign of unequally distributed resources (such as wealth and security) – and at the same time perpetuates this inequality. Nevertheless, borders – as dramatically demonstrated these days in light of the terrible war in Ukraine – also have an inherent protective dimension. Border regimes can therefore only be interpreted and legitimized as legal instruments of order in a society of the free and the equal; their function as barriers cannot be justified in terms of fundamental considerations of justice and equality.

## I. Borders in (Legal) Reality

### *1. Transcendence of the Border: Globalization, World trade, Cosmopolitanism*

A spirit of rapprochement and understanding, „die Wende,“ characterized the end of the 20th century: The Cold War ended, disarmament agreements were signed, Germany was reunified, the European Union expanded, and the Schengen Agreement allowed unimpeded passage past empty border huts. The desire to dismantle borders and barriers, both political and economic, was an important driver of these developments. A flourishing world trade was supposed to bring prosperity, and the WTO was founded with the aim of reducing trade barriers. These developments went hand in hand with growing globalization and close economic relations between almost all regions of the world brought prosperity and security gains in many places.

But global environmental problems – from „acid rain“ and forest dieback to the destruction of the ozone layer by excessive CFC emissions, and most recently the issues of climate change mitigation – also transcend borders. They are human challenges that cannot be controlled within national borders or by nation states. The effects often affect other, mostly vulnerable, people and regions (catastrophes like the one in the Ahr Valley, Germany, in 2021 show, however, that this does not always have to be the case); but at least the secondary effects (flight, migration, reconstruction) affect everyone.

This – admittedly slightly romanticizing – snapshot is intended here less as an (in reality, of course, much more complex) historical narrative, but more as a reflection of the political attitude to life, which should sober developments in the new millennium.

### *2. Renaissance of the Border: Isolation, Autarky, New Nationalisms*

In many ways, the attacks of September 11, 2001, forced another turning point, with repercussions far beyond the borders of the United States. They marked the beginning of a new, growing threat of terrorist attacks that were no longer limited to a specific, mostly regional conflict, but repeatedly shook the „Western world“ or the „global North“ in ways that were unpredictable in terms of time and place. Attacks in Madrid, London, Nice, Berlin – it could happen anywhere, and it happened everywhere. For Europe, these attacks also meant the end of a long period of peace: a generation shaped by the peaceful fall of the „Iron Curtain“ suddenly found itself facing a new threat, unpredictable and marked by violence. *Fukuyama's End of History* became *Huntington's Clash of Civilizations*.

A first reaction to this new threat was the [helpless attempt](#) to impose ever stricter national security legislation, and isolation, even at the cost of restricting fundamental and human rights. Borders were closed, states were declared to be an „axis of evil,“ the Schengen rules were partially suspended, and nation-state interests increasingly came to the fore. Populism gained strength.

Slogans such as *America First* express a widespread desire for separation from others, for economic self-sufficiency, for security through affection for the familiar and exclusion of the foreign. The unequally distributed gains in prosperity and the deeply dark downsides to globalized capitalism also help fuel protectionist and nationalist populisms – the goal, according to these narratives, is not the taming of the global economy or a more just international order, but a return to the *status quo ante*.

Neo-nationalisms and protectionist approaches have also sparked a new competition between systems. World trade, once a symbol of openness in the world and a visible expression of its interdependencies, is being drawn into this demarcation dynamic: Trade wars and new (punitive) tariffs are increasingly used as tools in interstate economic relations. The previous rapprochement is reversed, old enemy images are reactivated, alliances are broken off to protect one's own (national) interests (Brexit) and new barriers are erected. National borders are closing, people are suspected of terrorism because of their origin. In the slipstream of economic nationalism, global efforts to preserve the natural foundations of life together are becoming collateral damage of the new thinking in terms of national borders. The need for individual protection against a diffuse danger, and for isolation for the sake of one's own prosperity, lead to a renaissance of the border.

## II. Purpose of Borders

Borders are not laws of nature, but legally sanctioned, human fictions – thus ultimately legal instruments for controlling behaviour. Like any state measure, they must be justifiable. This requires, first, that they serve a legitimate purpose. What may be considered „legitimate“ is an extremely thorny, unresolved question. For the present considerations, a standard such as the *Kantian* imperative or the *Harsanyi/Rawlsian* veil of ignorance may be workable operationalizations: What agreement of ends, what validity of norms, and what use of means would any human being reasonably agree to – if they did not know what situation, what position and role,

they were born into on earth? In other words: What do people consider appropriate for themselves – and can therefore claim validity as generalizable for all people?

One of the most central principles of the constitutional order of values and law in Germany – and beyond, that of liberal-democratic orders – is that of the equality of all human beings. The (formal) Aristotelian idea of equality, according to which equal things are to be treated equally and unequal things unequally, still predominates the legal discourse today. With the help of law, numerous privileges were thrown overboard in favour of equality: The system of estates, for example, was overcome; and for the Basic Law, the women involved in the Parliamentary Council, especially *Elisabeth Selbert*, fought for the explicit guarantee of equal rights for men and women under private law with the special principle of equality in Article 3 (2) of the Basic Law.<sup>1)</sup> *Susanne Baer/Nora Markard*, in: v. Mangoldt/Klein/Starck, Grundgesetz, Art. 3 Rn. 339.

### *1. Defence of Resources and Prosperity*

Borders – and the need to robustly protect them – on the other hand manifest, document, and mark inequalities that still exist today, and thus highlight an ethical dilemma: While parts of the world are allowed to live in freedom and peace, others are shaken by war and terror, and prosperity, too, is very unequally distributed. The decision whether a life is lived in peace and prosperity or in war and poverty is, at least in the literal starting point, not the subject of a decision that can be influenced in any way or even made consciously: Which circumstances a person grows up in depends on the coincidence of birth and origin.<sup>2)</sup> *Ayelet Shachar*, *The Birthright Lottery. Citizenship and Global Inequality*, 2009. The worldwide migration and flight movements are an obvious sign of this fundamental injustice. [According to the UNHCR](#), 82.4 million people were fleeing war, conflict and persecution at the end of 2020 – and as long as people fear for their survival or even fight, there will be such flight movements. Behind the veil of ignorance, therefore, will hold: Every human being would leave his or her familiar homeland for his or her own survival (whether life is threatened by war, despots or deprivation), but probably also for a sustainable life for himself or herself and his or her children, and seek refuge in other countries, regions, continents – which makes the derogatory talk of „economic refugees“ or of „immigration into the social systems“ seem particularly cynical and bigoted.

States, like a reflex, counter this inequality primarily with isolation – since forever, but since „9/11“ again with particular verve. Whether it is a border wall between the USA and Mexico for the „protection“ against refugees or the securing of the EU's external border by pushbacks and with partly military means by the European border protection agency Frontex: access to prosperity and security is controlled and regulated at the borders.

At the same time, these borders are fictitious and arbitrary, in any case historically contingent rules. They are owed to random historical events, often the result of green table negotiations or created on the drawing board, without regard to evolved structures and cultural developments. They are not a necessity set in stone. And still, they give rise to states, and legal consequences are attached to their existence, with

almost absolute effect. Yet, they are not even visible when looking at the world from above: forests and meadows, roads and railroad lines do not break off abruptly at national borders, but „transcend“ them seemingly effortlessly.

Nationality, too, has thus become a tool of partition, violence and humiliation.<sup>3)</sup> *Dimitry Kochenov*, *Citizenship*, 2019. Similar to feudal prerogatives, which were thought to have been overcome long ago,<sup>4)</sup> *Joseph H. Carens*, *Aliens and Citizens: The Case for Open Borders*, *The Review of Politics*, 1987, Vol. 49 pp. 251-273. citizenship also manifests the randomness of the opportunities associated with origin. It arbitrarily determines inclusion or exclusion. This goes hand in hand with an essentialization often denounced in anti-discrimination law: citizenship or place of birth becomes an essential characteristic that defines a person.

The fiction of the border has real, tangible consequences. It empowers states to decide under what conditions people may enter their territory, but also who may leave it. The exit restrictions of the GDR, for example, or the general mobilization in Ukraine at present, which prevents men from leaving the country, also manifest a form of exclusion through borders that perpetuates inequality. Basic rights protections or visa requirements depend on citizenship. People who leave their homeland in the hope of a better life fail to cross these borders – which are insurmountable for them because of the organized state power confronting them – and, in the worst case, lose their lives.

## 2. *Guaranteeing Order and Security*

In all this, we must not lose sight of a second purpose of borders – the flip side of the coin, so to speak. Every human organization is compartmentalized, divided into departments, areas, regions, cells, parts, horizontally and/or vertically divided, and this division necessitates the drawing of boundaries (which, of course, often enough give rise to conflicts). The border is thus an elementary characteristic of every human order.

The complete abolition of all (national) borders, as *Joseph H. Carens* considers essential for a just social order,<sup>5)</sup> *Joseph H. Carens*, loc. cit. does not sufficiently take into account that borders serve further functions besides securing prosperity, isolation and exclusion. They fulfil an organizational and protective function in that they serve to divide a country into jurisdictions, and can protect its territorial integrity.<sup>6)</sup> *Steffen Mau*, *Sortiermaschinen*, 2021, p. 25 et. seqq. They justify a state's monopoly on the use of force and, in a world of autocrats and despots, can guarantee freedom and security and be a sanctuary for refugees. Hundreds of thousands of Ukrainian refugees are currently leaving their war-torn country and can at least save life and limb by crossing the border into Poland, Romania, Slovakia and Hungary. On the other side of the border, they find a legally justified shelter under the Geneva Convention on Refugees or national residence laws, which allows them to escape the acute danger of the Russian invasion. Corona, too, has shown that borders can play an important regulatory and protective role, for example in containing a pandemic.

The idea of opening all borders and allowing free migration can therefore not be the ideal solution in view of the ordering and protective effect of borders. This would effectively lead to disorder and chaos at places of refuge. The resulting loss of prosperity and destabilization – including the loss of the ability to offer „saving shores“ – would benefit no one. The idea of or demand for free migration, however, could provide an incentive for wealthy states to contribute much more seriously than they have in the past to achieving prosperity and participation everywhere in the world.

### III. Justification of Borders

It remains to be said that in liberal-democratic legal systems, and measured by philosophical-ethical standards such as the veil of ignorance, the design of border regimes is legitimate for the justification and maintenance of an order, but cannot justify the sealing off of borders for the defence of prosperity that goes beyond this.

Existing borders are therefore an invitation to work towards a more just world and to resolutely reduce injustice. More permeable borders and more liberal citizenship and immigration laws are not only economically desirable, for example because of demographic change, but more fundamentally because they advance humanity on the path to more equal living conditions for all people. From Article 72 (2) of the Basic Law, we are familiar with the postulate that social cohesion also requires equal living conditions – precisely because the promise of equality is a central pillar of the liberal democratic order.

People do not flee of their own free will. They flee because living conditions in their homeland have become unbearable, because violence and hunger drive them away. On the run, they live off the hope of a life in peace and security, without existential fears. The legal idea of the border should not become a deadly obstacle where people drown or freeze to death.

*This text is a translation of the article, [„Grenzen der Gleichheit“](#), by Felix Kröner.*

#### References

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