

Security, Law and Borders

At the limits of liberties

Tugba Basaran



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To my mom for her lifelong support –

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Introduction

At the center of this inquiry are people deprived of rights, purposively barred from fundamental liberties under liberal rule through the politics of borders. Liberal democracies argue that refugees and migrants detained at airports, intercepted on the high seas or sent to refugee camps in third countries are outside their borders and therefore outside the remit of their legal rights procedures. The politics of borders has become an important security practice of liberal states. Borders and the distinction between inside and outside are strategically used to change the ordinary balance between security and liberties in liberal states: to increase policing powers and to limit access to legal rights and procedures. Through the politics of borders, liberal states can deny to particular populations fundamental rights, which are the normative and legal foundation of liberal states, whilst continuing to control the very same space through policing powers. The effect of the politics of borders is legal exclusion. Legal exclusion can include denial of due process, unlimited detention, denial of access to courts, to legal advice and to substantive rights, under conditions of quasi-isolation, combined with legally contestable return and rendition policies. These violations of human rights and civil liberties are committed by liberal democracies that continue to operate under the rule of law and value liberal rights, but at the same time restrict or even suspend fundamental rights for a specific category of people at specific places. The politics of borders highlight that illiberal practices are embedded in ordinary politics of liberal democracies and, moreover, how illiberal practices can be legally authorized. These are essentially questions on the borders of liberal rule.

It is here that one finds an interesting line of inquiry on how the limitation of liberties is rendered possible under liberal rule. To pursue this question, this book will focus on the relation between the rule of law and liberties. Liberal democracies face a constant struggle in the protection of liberties. In this struggle, rule of law is considered to be an indispensable safeguard for the defense of liberties. According to the liberal conception of law, law guarantees liberties, and moreover facilitates a piecemeal struggle for a more just and inclusive order. This book concentrates on a

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different use of law in liberal democracies: law that is purposively designed to restrict liberties; law that constructs and legitimizes unequal access to liberal rights. It seeks to critically examine contemporary manifestations of this problematique inherent to liberal democracies. To explore contemporary liberal security practices at borders, this study will focus on the globally widespread use of migration controls.

The location of rights

The politics of borders has become an important security practice of liberal states in the limitation of liberties, for the exclusion of people from legal rights and procedures. They highlight the politics of place, the geographies of law and their effects on human rights and civil liberties. The border is the space of encounter between the gatekeepers of liberal democracies – border guards, police, military – and people who seek admittance to liberal democracies – the refugee, the non-admitted, people without legal voice. This is an encounter between policing powers and the individual in liberal democracies that appears to take place outside the liberal state, but neither the gatekeeper nor the person who seeks admittance is in a lawless place. They are in the border zone – a place suffused with law, but denying access to constitutional rights and liberties and access to the liberal state. The border guard has the right to allow or to deny entry to the state, to detain and to return individuals without further justification. An appeal against these decisions is often difficult or impossible. This is the situation that many refugees encounter when stopped at the airports, in maritime waters or third countries. They have not legally entered the liberal state and, as such, do not have access to liberties. Nonetheless, they are under the law of the liberal state. While constitutional protection is limited to those who have legally entered the state, the law of policing extends beyond these borders. The powers to arrest and detain are present at airports, maritime waters and in cooperation with third countries; however, the individual's recourse to the law to contest these powers is limited. Some are held for weeks, months or years in camp-like structures often without a possibility to appeal against their conditions, excluded legally and/or practically from constitutional guarantees. These are questions of access to the legal system, the criminal justice system and also access to refugee status determination.

Governments consider people who are not legally on the territory of the liberal state as being outside the state, and hence outside the scope of ordinary liberal rights. The international border has a highly political function. The border defines who is inside and who is outside the liberal state. The border defines who can claim rights and who has lesser or no rights. Legal borders are a widely accepted liberal practice for the restriction of liberties. Legal borders are based on the argument of entry. Three illustrations: in 1981, a bilateral agreement between the United States and Haiti entered

into force, which authorized the United States to intercept, board, detain and return Haitians on the high seas. Contrary to the extension of policing powers, legal protection against policing remained limited to the territory. In 1992, France established the waiting zone for foreigners who arrived at an airport in France, but were not admitted. Even though these people were on French territory, they continued to be legally outside France and could not benefit from its legal protection. In 2001, the Australian government started with offshore processing in third countries. Those who had legally not entered Australia were placed in camps in third countries and could not benefit from the protection of Australian law.

While each case is singular with distinct characteristics, together they demonstrate the rationale of liberal security practices, namely the expansion of policing powers and the contraction of rights through ordinary legal procedures. These border zones, places of disproportionate policing powers without the correlate constitutional guarantees, are known under a variety of names in migration controls: waiting zones, reception zones and transit zones at airports; offshore processing centers and safe havens in third countries; interdiction and interception practices in the maritime waters. The terminology of border zones should not suggest that these spaces are unitary legal constructs. They take different forms, shapes and some of them do grant more rights than others. Their common framework is that they dilute the foundation of liberal democracies, the fundamental rights of individuals guaranteed in liberal constitutions. The individual is face-to-face with state power that s/he cannot, or can only marginally, contest. In these spaces, the security interests of the state trump liberty concerns.

It is usually taken for granted that core fundamental rights, often anchored in the constitution, are the non-negotiable basis of liberal rule. These rights are instituted to protect the individual from government power, symbolized most forcefully by its policing powers. In border zones, substantive and procedural rights, the normative and legal foundation of liberal states, can be limited or suspended for particular populations. These are essentially questions on legal safeguards against policing powers, complemented by specific substantive rights relative to refugees. Legal safeguards against policing powers are, within given variations, coherent and well defined across liberal democracies. They include limitations to police investigations and the possibility to contest the policing powers through access to the judiciary, including the right to due process, the right to petition for habeas corpus, access to administrative and judicial review, defined rules of criminal proceeding and the right to counsel. These rights, embedded within the criminal justice system, provide protections of the individual against excessive policing powers in an effort to balance policing powers and individual protection. Policing in border zones changes this balance, however, and prioritizes policing over the rights of the suspect, sometimes even leading to the suspension of all the rights of the suspect.

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The most complete limitation of liberal rights is the denial of access to the legal system. Here the individual is under the policing powers of the state, but barred from access to its courts to contest its policies, such as was the case for many refugees detained in Guantanamo or interdicted on the high seas. The denial of access to the legal system provides the framework for denial of all rights associated with liberal rule, expressing itself often through unlimited detention, conditions of quasi-isolation and contestable return and rendition policies.

Further, a specific set of rights that is of relevance for this study is based on the suspension or limitation of refugee laws. The scope of rights always had significance for refugees, especially relative to the principle of non-refoulement, enshrined in Art. 33 of the Refugee Convention. This specifies

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
(United Nations Convention Relating to the Status of Refugees 1951, Art. 33)

For the principle of non-refoulement an important point of contestation is whether this principle is limited to the state’s territory or the state’s jurisdiction. The treatment as a refugee depends on a distinction between inside and outside; being inside guarantees rights of access to refugee status determination, whereas being outside denies these possibilities. This study is primarily about legal safeguards against policing powers under liberal rule, even though the case studies also relate to the scope of refugee law. Narrowing this study to refugee rights is insufficient, as it would implicitly accept the contemporary border regime and confirm a distinction in the treatment of refugees and non-refugees. Fundamental rights, on the other hand, are vested in anybody under the powers of the police, including refugees; the emphasis is on fundamental rights applicable to all.

These are essentially questions on the scope of rights, the inclusion and exclusion of populations from fundamental rights under liberal rule, the limitation of liberties to specific populations, questions of equal protection. While core liberal rights are the non-negotiable basis of liberal rule, these questions are not on the substance of rights, but on the scope of rights, on who can benefit from liberal rule. Fundamental rights do not apply equally for all the populations under liberal rule. It is here that politics of borders is of uttermost significance. Legal exclusions from fundamental rights have been and continue to be an ordinary tool under liberal rule. Liberal rule grants rights to certain populations and excludes others from constitutional protections. Border zones infringe the basic principle of equality before the law by excluding certain spaces and certain people from consti-

tutional protection. My underlying argument is that fundamental rights, especially those to limit policing powers and the powers of government, should be non-discriminatory, applicable equally to all subjects under liberal rule, whether citizens or non-citizens, whether on the state's territory or within the state's jurisdiction. In this sense this is not a question on the right of states to control their borders nor about its right to police its borders, but argues that all sovereign policing should be balanced by the provision of fundamental rights. This is hardly a radical proposal, but nothing more than the basic claim to fundamental liberties under liberal rule in an effort to fulfill the promise of liberal rule, which provides the normative underpinning for this book.

Liberal rule and liberties

The limits to liberal rule are the object of an established inquiry, interest that peaks at specific moments in history as liberal states openly resort to violence and breach rights that have become the corpus of liberal fundamental rights. It is such a moment in history that has sparked renewed interest in issues of security and liberties, stressed the limits of liberal rule and demanded a renewed focus on the relation of illiberal practices and liberal rule. How are liberties limited under liberal rule? In an attempt to come to terms with human rights violations committed by liberal democracies, recent literature has depicted these places as lacking the rule of law. Security practices were portrayed as the result of non-legal, extra-legal approaches or arbitrary executive rule without proper checks and balances. It was the lack of liberal rule that allowed human rights violations, and, by inference, establishing the rule of law could restore the respect for human rights. Many of these discourses, prevalent especially in politics, international relations, security studies and political geographies, explored contemporary security practices and human rights violation primarily through the lens of exception. The exception refers here to the departure from liberal rule, similar to, but not always concurrent with, the political and legal rationale of the state of exception. It is not only the lack of human rights that makes these spaces exceptional, but these spaces appear to stand outside liberal rule.

Terminologies employed include archipelagos of exception, spaces of exception, camps, extra-territorial spaces, in-between spaces, states of exception, legal black holes, lawless spaces, extra-legal spaces and, in reference to executive powers, places of pure sovereign power or arbitrary executive rule (Agamben 1998, 2004; Johns 2005; Kaplan 2005; Neal 2004; Scheuerman 2006; Landau 2005). Setting aside minor variations, these approaches have a common basis. The infringement of liberties is portrayed as an exception to liberal rule, with the assumption that liberal and illiberal rule are distinct ways of governing, and that safeguarding liberties is possible through return to liberal rule and the rule of law. Inherent to

these characterizations is that the politics of security is distinct from ordinary liberal politics. Security appears to result from an exceptional form of government that is inherently different from the normal liberal order based upon the respect for the rule of law.

While contemporary literature has provided an important lens to understand illiberal politics and pinpointed to specific sites where people lack access to legal rights, they need to be questioned and complemented through empirical and comparative analyses of the establishment of these spaces. This is the point of intervention for this book. The purpose of this study is to analyze how liberties are limited under liberal rule, by investigating how border zones are established, how they operate, the conditions for their proliferation and thus to explore possible paths for the contestation of these spaces. Analyzing the legal infrastructure of the border zone can provide an answer on whether these spaces are inside or outside the state, who bears responsibility and whether these spaces are indeed exceptional spaces.

Are these places beyond rule of law? Are these liberal security practices fundamentally different from ordinary liberal politics? Are these spaces really located beyond the state or in an international space? Are they external to the state? These are some of the issues that will be explored. In essence, these are fundamentally inquiries on liberal democracies, the distinction between liberal and illiberal rule, the distinction between the state's inside and its outside, its scope of law, its space of authority and its responsibility. A number of other crucial questions develop from here: How is the distinction between inside and outside defined for the liberal state? Is territory the appropriate basis for this distinction? How far does the guarantee of fundamental rights by the liberal state extend? What is the scope of liberal government?

An empirical analysis of legal techniques for constituting illiberal spaces provides a different viewpoint for the infringement of liberties than the exception discourse. The rule of law – rather than an exemption from it – provides the framework for the infringement of liberties and the legal order itself prevents access to liberties. The limitation of liberties is hence not an extraordinary state of liberal rule, but both liberal and illiberal effects are produced through the same, regular democratic and legal processes of liberal democracies. Contrary to the exception discourse, liberal security practices are embedded in ordinary politics of the liberal state. These spaces of legal exclusion are created by means of ordinary law and politics of space and borders. The legal design of the border zone creates a space that justifies excessive policing powers and concurrently restricts the outreach of rights for a specific category of people. Rule of law can serve as liberal security practices used to create legal borders and restrict the fundamental rights of certain people by placing them outside normal legal procedures. The Achilles heel of fundamental rights is, in these cases, not their substance, but the scope of rights in comparison to the scope of policing

powers. This leads to three inter-related hypotheses on security, law and borders.

The first point is on security. Security is often portrayed as an exception to the liberal order. It is seen as institutionally, legally and spatially distinct from the liberal state. Security practices, and specifically the routines of producing security through legal procedures, show that border zones are not exceptional in their constitution, but rather a consequence of normal modes of government. Security is not distinct from the liberal state, but established by means of regular legal processes and practices of legal identification and legal bordering. The problem of security, I argue, is not its exceptionality, but rather its banality. Security is a normal mode of government in the repertoire of liberal democracies. Border zones are characterized by legal proliferation rather than being outside the law, by juridical complicity rather than executives acting on their own, and often also international consensus rather than unilateral approaches by states.

The second point is on borders. Whether portrayed as borders, boundaries or frontiers, borders are often conceptualized as static borders, physically fixed. Rather than tracing the geography of territory as the basis of political mapping, this study turns toward the geography of law and governmental practices. From this perspective a state's borders are multiple, shifting and fluid and their location depends on the population to be governed. The state is not a territorially fixed entity, but has multiple, liquid and selective borders. These borders are in constant transformation, negotiation and contestation. Sovereignty gains its full power precisely through the possibility to define its legal borders, its space of jurisdiction and space of legal rights. The possibility to expand and contract its legal borders is a technique that states use to create border zones of limited rights. Two legal borders are of importance here: the legal borders of policing and the legal border of rights. It is precisely their separation that opens up possibilities for creating border zones within liberal states.

The third point is on law. Border zones are legal constructions and law is an ordinary means by which the liberal state legitimizes illiberal practices. Contemporary analyses of security tend to ignore the significance of ordinary law for the constitution of border zones. They focus on the state of exception, extra-legal approaches or the notion of lawless spaces. Each of these approaches places illiberal rule outside ordinary law and assumes a distinction between normal law as the basis of the liberal state and border zones as an exception to this norm. As a consequence, it is assumed that law can contain security; it is argued that if only these exceptional spaces were under the rule of law, then they could become a part of the liberal state and border zones could cease to exist. The limitation of rights is in fact part of the common repertoire of liberal states. The production and control of space and identities are fundamental to the art of government. Law's most powerful tools are also its most ordinary tools: the creation of legal identities, the creation of legal spaces and of legal borders,

and the definition of the scope of legal rights. Law constructs borders, produces identities, regulates these, marks legal spaces, criminalizes and grants rights. There are multiple possibilities for changing the scope of rights; these include the scope of populations covered by these rights as well as their geographical scope, combined with possibilities for changing the legal scope of policing. All of these functions of law can also be found in border zones. These legal technologies are not proper to border zones but rather normal tools of law. Therefore, border zones can be easily produced and reproduced without resorting to an exceptional tool of government.

The questions posed in this book are essentially about the nature of liberal rule, highlighting the political function of law and the relation of law and liberties. Liberal rule is constantly confronted with the transgression of its own values and norms and none of these inquiries is new to our times. They are the well established subject of an extensive and varied literature, enduring contemplations, over the course of the twentieth century, whether in the Kafkaesque conditions of trial, Orwellian dystopias on surveillance society or in an effort to understand the mixed blessing of enlightenment (Orwell 1961; Kafka 1998; Horkheimer and Adorno 2004). In the past and in the present, law has served to limit fundamental rights – substantive and procedural rights – of particular populations. In this sense, this book seeks to critically reexamine our contemporary societies, their limitations on individual rights and liberties and their future prospects. It explores the conundrums of modern rule, political communities between security and liberty, citizen and foreigner, territory and its outside, liberal and illiberal rule. In each case the analysis of boundaries between two concepts is also indicative of values, structures and exclusions.

It is impossible to discuss these questions without reference to fundamental concepts of political theory, questions of the state, sovereignty, borders and territory; questions of globalization and mobility, of differential mobility for different populations and questions of contemporary exclusion. These are questions of liberal security practices and the limits of liberal democracies, exclusionary practices, possibilities of limiting legal protection and overall a critical reexamination of contemporary liberal democracies in light of their underlying normative principles. In this sense, this research seeks to complement existing literature on security and liberties in contemporary liberal democracies and explore the contentious relation between liberal democracies, law and liberties. It constitutes an effort to understand the politics of security and liberties as implemented through the rule of law in liberal democracies.

Chapter outline

This book seeks to explore how liberties are legally limited under liberal rule. The first two chapters provide a conceptual analysis of liberal rule,

law and borders; the subsequent three chapters illustrate specific instances of deprivation of rights in the context of migration controls; the final chapter provides a summary and outlook on challenges to liberties.

Chapter 1, “Limits of liberal rule”, explores how liberties are limited under liberal rule. It scrutinizes liberal discourse, and its invention of liberal and illiberal rule as distinct ways of governing, and proposes to collapse this distinction by focusing on the rule of law and its role in limiting liberties. This chapter sets the argument that illiberal practices are not an exception to the liberal order, but that illiberal practices are based on regular democratic and legal processes of liberal states. It highlights the need to move away from a binary distinction between the rule of law and its suspension, and to analyze the rule of law and the legal order to understand limits to liberties. This chapter provides the framework for analyzing illiberal practices as practices of liberal rule. These are essentially questions on the techniques of governing, power and rule, powers of normalization and exclusion embedded in ordinary routines of liberal rule.

Chapter 2, “Borders of liberal rule”, scrutinizes the nexus between borders, law and liberties to frame the politics of borders in migration controls. It proposes to turn from territorial geographies to legal geographies, legal spaces and legal borders. They allow perception of the state not as a homogeneous unit, but one with multiple geographies and multiple borders; the legal infrastructure of the state is more fragmented and more flexible, allowing for expansion and contraction, than territorial geographies. Legal geographies allow conceptualizing border zones, based on discrepant legal geographies of policing and rights.

The following chapters explore specific instances of deprivation of rights under liberal rule and legal techniques for constituting illiberal spaces. They will demonstrate through detailed empirical analysis how the rule of law provides the framework for the infringement of liberties, how the prevailing legal order prevents access to liberties and, by implication, how the infringement of liberties is rooted within liberal rule. The case studies are based upon established liberal democracies, the United States, Australia, France and common approaches of the European Union, all signatories to the 1951 Refugee Convention and influential in shaping global policies and practices in migration controls.¹ The case studies reveal the legal structure of border zones and demonstrate the specific processes, through which legal spaces of lesser rights are constructed, evolve and potentially devolve over time. They analyze the limitation of liberties in three complementary spaces: on the territory of the state, in maritime waters and on the territory of third countries. While each case is singular and has distinct characteristics conditioned by the particular historical events and the diversity of legal systems, together they demonstrate the common rationale of liberal security practices, namely the expansion of policing powers and the contraction of rights, both through ordinary legal procedures. For this purpose, each case demonstrates the legal scope of policing powers and

contrasts them to the legal scope of rights, to provide proof of the disjuncture between them that creates the possibility for illiberal practices under liberal rule; their particularities, on the other hand, illustrate the variety of practices for limiting liberties. In each chapter the focus is usually on one or two specific cases, which are then related to other global cases to illustrate common practices for each set of border zones, territorial, maritime and offshore border zones.

Chapter 3, “Liberties on the territory”, analyzes how liberal rights are limited on the territory of the state. The normal assumption is that constitutional protection applies across the territory of the state. Certain places are excluded from these guarantees, however. These are territorial border zones, peculiar inventions of states, which are *within* the state territory, but nonetheless regarded as *outside* the guarantee of constitutional protection. For the liberal state the infringement of liberties on its territory is the most difficult case to justify. How can the liberal state create a legal order that limits fundamental liberties on its territory? This chapter focuses on the waiting zone in France to explore how liberal rights are limited on the territory. It demonstrates how liberties are limited through a distinction between physical presence and legal presence, while policing powers are justified through territorial jurisdiction. This creates a legal space that provides for greater policing powers and lesser rights than ordinary French law. This chapter also illustrates how this rationale is applicable to other territorial border zones across the globe, including international ports, territorial waters and land territory.

Chapter 4, “Liberties on the seas”, analyzes how liberal rights are limited in maritime waters. This chapter focuses on maritime policing beyond state territory, on the high seas and foreign waters. The burden of proof is to provide evidence that liberal rule, symbolized most forcefully through its policing power and interdiction measures are legally justified beyond the state’s territory, while the scope of rights remains limited to the territory. This chapter focuses on interception practices of the United States in the Caribbean and of European states in the Mediterranean. Maritime spaces merit a special analytical category, as they are constituted under a special international framework the Law of the Sea applicable to all states. For the purpose of this inquiry three legal spaces that derive from the Law of the Sea are of interest – territorial waters, the high seas (international waters) and foreign territorial waters – to explore how policing and interdiction measures are legally justified beyond the state’s territory and how rights are limited.

Chapter 5, “Liberties in third countries”, analyzes how liberal rights are limited on the territory of third countries. The usual assumption is that each country is responsible for its own territory and, hence, the creation of camps in third countries is intended to absolve or limit the responsibilities of the initiating state. Here, it is important to show how liberal rule is not territorially bound and highlight the extension of liberal rule beyond its

territory. Leased spaces are on the territory of third countries, but nonetheless under the initiating state's jurisdiction. Legal document of lease, bilateral agreements and the possibility to employ police and/or immigration officers in third countries demonstrate that these spaces are legally under the jurisdiction of the initiating state. This chapter explores how border zones are legally constructed in third countries and their implications for rights. Two case studies will be discussed in depth: Australian offshore approaches and the United States' lease of Guantanamo Bay. These will be complemented by questions of delegation of management functions to third parties, such as other states, private companies and international organizations.

To sum up, this study draws upon various types of border zones (excision zones, foreign zones, international zones and externalization zones), different sites (airports, seas and land territory) and various established liberal democracies (including European states, the United States and Australia). Illiberal practices under liberal rule need to be scrutinized independent of the space they are operating in, whether on the territory or outside it. Analyzing the spatial effects of different laws demonstrates the liquidity of these spaces – temporally, spatially and legally. While there are a number of studies on specific sites, this approach permits exploration of the global breadth of this phenomenon as well as the common structures of its legal framework. The wide range of case studies seeks to demonstrate the global scope of border zones as an important phenomenon of liberal political infrastructure. This allows security practices, politics of borders and legal exclusion to be embedded in the framework of security as an ordinary form of liberal rule.