

# "Providing security in the 21st century - a human rights challenge?"

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## I. Introduction

The threat of a terrorist attack is ever present in most countries. Western countries have been faced with numerous successful attacks in the last decades: 9/11 just being the most prominent one; while, from a German perspective the Berlin Breitscheidplatz attack readily comes to mind. In addition to these successful attacks, even more have been prevented before they could be carried out. In these circumstances, the question of how to provide security for citizens has been one of the core questions in political debate. Lawmakers have acted accordingly and have enacted many laws targeted at “fighting” the terrorist threat on national and international levels. A reoccurring theme in this legislation is the reference to demands of security as a justification for laws that expand the scope of criminal liability and confer more (investigative) powers on law enforcement agencies.<sup>1</sup> Even in cases where legislators have acted, however, after most successful attacks the following questions are raised mainly by the citizens of the affected state: whether the legislators have done enough, whether the state’s duty to provide security has been sufficiently fulfilled, and whether citizens can ask for more, or even have a right to do so.

Terrorism is but one example of threats from which the state provides and is expected to provide security. In general, security is a cornerstone of a functioning democracy<sup>2</sup> because without it, citizens cannot freely exercise their rights.<sup>3</sup> From a philosophical standpoint, it is one of the main reasons to enter into a social contract with the state.<sup>4</sup> I do not want to delve into the philosophical details of this issue (others have done so already<sup>5</sup>, Etzioni), but instead want to focus on the legal side. There is no doubt that the state does have the (legal) duty to protect its citizens. A different question is whether a citizen’s explicit right to security can provide a contouring of this duty? Does the individual have a right to security that she can assert against the state? Can the state be asked to provide security in a specific form? Is the question of how to best provide security a human rights question? These are the questions I want to address in the following discussion by, first, examining the existence of right to security in German and European Law, and second, by exploring if there exists a need for a (universal) right to security.

## II. The existence of a right to security in German and European law

When examining the existence of a right to security, it is important to specify what exactly it is that we are examining. In looking for a right, there is a need to differentiate between the policy

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<sup>1</sup> On German, Spanish and UK anti-terrorism law see *Petzsche*, *Strafrecht und Terrorismusbekämpfung*, 2013; *Cornford/Petzsche*, in: *Ambos/Duff/Roberts/Weigend/Heinze* (Hrsg.), *Core Concepts in Criminal Law and Criminal Justice*, 2019.

<sup>2</sup> *Szczekalla*, in: *Heselhaus/Nowak* (Hrsg.), *Handbuch der Europäischen Grundrechte*, 2020 spricht von einem "(Ur-) Staatszweck Sicherheit" § 8 Rn. 8.

<sup>3</sup> By which I do not mean to say that security is so fundamental as to predicate all other rights as is argued elsewhere *Turner Democracy and Security* 13 (2017), 46, 59. Etzioni

<sup>4</sup> *Hobbes/Locke*

<sup>5</sup> See for example *Turner* (Fn. 3), 53 ff.; *Lazarus*, in: *Cruft/Liao/Renzo* (Hrsg.), *Philosophical Foundations of Human Rights*, 2015, 424 ff.

objective of security<sup>6</sup> and a legal right to security grounded in human rights law. With view to the rights dimension, I do not want to focus on the classical understanding of rights as negative rights that protect against state interference. What I want to concentrate on here is the search for a positive right to security that obligates the state to protect the individual against interference of third parties. Due to my own background, I am looking from a German and European perspective, so I am excluding from my analysis the written comprehensive right to security that exists in some jurisdictions such as Canada or South Africa. In the following discussion, I examine if and how a (universal) right to security (of person) is embedded in the current German and European legal framework.

## 1. The German Constitution

In Germany, providing security is a recognised state objective.<sup>7</sup> However, the German Constitution, the so-called Basic Law, does not contain a written, express right to security. While there exists an effort in the German constitutional doctrine to establish a general fundamental right to security,<sup>8</sup> this has not yet been taken up by the courts.<sup>9</sup> So far, no independent right to security has been recognised by the Federal Constitutional Court (FCC). In declining to recognize this right, the FCC can rely on a legal-historical argument: While in the legislative history such a right was considered, in the end, it was not included in the Basic Law.<sup>10</sup>

However, while there exists no written right to security, positive state obligations (to provide security) have been derived from other (existing) human rights, such as the right to life. To this end, the doctrine of positive obligations was developed. An early example of this is the first ruling on abortion of the FCC in 1975<sup>11</sup>, in which the idea that fundamental rights are not only to be respected negatively, but also to be protected positively, was re-established. The court argued that this idea results, inter alia, from the wording in Article 1(1) sentence 2 of the Basic Law, “respect and protect”.<sup>12</sup> Both are aspects of the duties of the same fundamental rights, which have the same constitutional rank.<sup>13</sup> According to the cited judgment, encroachments on fundamental rights could no longer be justified merely on the basis of conflicting freedoms, but also via a fundamental rights protection dimension. In the Schleyer decision,<sup>14</sup> the FCC also stated, that the state has a comprehensive duty (Schutzpflicht) on the basis of Art 2 (2) of the Basic Law, to protect and promote every human life and, above all, to protect it from unlawful interference by others. Thus, a positive duty to protect life arises from the basic rights to life and physical integrity themselves.

It follows that in German constitutional law state protection against harm is a duty flowing from a positive fundamental rights protection dimension. The state`s provision of certain aspects of

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<sup>6</sup> See further *Lazarus*, in: Dickinson/Katselli/Murray/Pedersen (Hrsg.), *Examining Critical Perspectives on Human Rights*, 2012, 95 ff.

<sup>7</sup> *Mösl*, *Die staatliche Garantie für die öffentliche Sicherheit und Ordnung*, 2002, 37 ff.

<sup>8</sup> *Isensee*, *Das Grundrecht auf Sicherheit. Zu den Schutzpflichten des freiheitlichen Verfassungsstaates*. Vortrag gehalten vor der Berliner Juristischen Gesellschaft am 24. November 1982 - erweiterte Fassung, 1983; *Robbers*, *Sicherheit als Menschenrecht*, 1987, 51-55; 127-135; *Mösl* (Fn. 7), 84 ff.

<sup>9</sup> *Baldus/Heger*, in: Heselhaus/Nowak (Hrsg.), *Handbuch der Europäischen Grundrechte*, 2020, § 18 Rn. 13.

<sup>10</sup> *Robbers* (Fn. 8), 15 ff.; *Leuschner*, *Sicherheit als Grundsatz*, 2018, 74.

<sup>11</sup> BVerfGE 39, 1.

<sup>12</sup> *Isensee* (Fn. 8), 33.

<sup>13</sup> ebd., 33.

<sup>14</sup> BVerfGE 46, 160 (164).

security can therefore be guaranteed under some specific fundamental rights, without the basis of an express constitutional right to security.

## 2. The European Convention on Human Rights

The European Convention on Human Rights (ECHR) contains in its Art. 5 a “Right to Liberty and Security” which states that “1. Everyone has the right to liberty and security of person. [...]”. In principle, this is a classical negative right protecting citizens from the state’s interference with their liberty. While the wording contains an express right to liberty *and security*,<sup>15</sup> the European Court of Human Rights (ECtHR) (mostly) recognizes no independent meaning of the security aspect.<sup>16</sup> In the ECtHR jurisprudence security is not interpreted as an – independent – concept of substance.<sup>17</sup> This follows also from the next sentence in Art. 5 “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]”, which specifies only the liberty aspect of the right. Consequently, liberty and security are mostly read as a single concept. *Lazarus* speaks of an “an almost complete elision of the express rights of security and liberty.”<sup>18</sup> The guide on Art. 5 that is prepared by the registry (though it does not bind the ECtHR) also does not contain any reference to a freestanding right to security.<sup>19</sup> However, an increasing detachment of the concept of security from the concept of liberty can be detected.<sup>20</sup> In some cases (for example in cases of disappearance) the court has recognized that security could have an independent (positive) meaning.<sup>21</sup> The court therefore does not fully preclude the development of such a right to security. Nevertheless, so far, a fully independent right to security or an obligation of the state to guarantee security is rejected regarding Art. 5 ECHR.<sup>22</sup>

In many instances the ECtHR also has drawn positive obligations from the text of a negative right,<sup>23</sup> so that other rights (such as Art. 3 or 8 ECHR) are interpreted to have a security aspect.<sup>24</sup> These positive duties are subject to specified limitations such as proximity, reasonableness and, importantly, limitations of other rights.<sup>25</sup> And while they contain specific aspects of security, they do not represent an independent universal right to security.

## 3. The EU Charter of Fundamental Rights

Art. 6 of the EU Charter of Fundamental Rights (CFR) mirrors the wording of Art. 5 ECHR. It reads “Everyone has the right to liberty and security of person.” Art. 6 is also mainly interpreted as not containing an independent right to security. This reading is strengthened by reference to Art. 52(3) CFR<sup>26</sup>, which prescribes that the meaning and scope of the rights of the CFR are

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<sup>15</sup> This nexus between liberty and security exists in several constitutions such as the Canadian or Hungarian, see *Lazarus* (Fn. 5), 435.

<sup>16</sup> See further *Leuschner* (Fn. 10), 77 ff.; *Powell* European Human Rights Law Review 2007, 649.

<sup>17</sup> *Powell* (Fn. 16), 655.

<sup>18</sup> *Lazarus*, in: Goold/Lazarus (Hrsg.), *Security and Human Rights*, 2007, 333 f.

<sup>19</sup> Registry of the European Court of Human Rights, *Guide on Article 5 of the European Convention on Human Rights - Right to liberty and security*, 31.08.2021.

<sup>20</sup> *Powell* (Fn. 16), 655.

<sup>21</sup> *Powell*, *Rights as Security*, 2019, 11 ff.

<sup>22</sup> *Baldus/Heger* (Fn. 9), § 18 Rn. 9.

<sup>23</sup> See, for example, *Osman v. United Kingdom* (1998) 29 EHRR 245. (citavi!)

<sup>24</sup> *Powell* (Fn. 16), 657.

<sup>25</sup> *Lazarus* (Fn. 18), 342.

<sup>26</sup> 3. In so far as this Charter contains rights which correspond to rights guaranteed by the

supposed to correspond with Art. 6 ECHR. However, while the European Court of Justice (ECJ) in its decisions mostly follows the interpretation of the ECtHR in not recognizing an independent substance, in a few rulings a possible different interpretation and the recognition of an independent right to security is suggested.

In its Digital Rights judgement<sup>27</sup>, the ECJ held that: “Furthermore, it should be noted, in this respect, that Article 6 of the Charter lays down the right of any person not only to liberty, but also to security.”<sup>28</sup> This reference to an independent meaning is repeated in a later decision and opinion.<sup>29</sup> It is important to note that the ECJ cites this fundamental right to security as an argument for justifying the encroachment on EU freedoms associated with data retention, in particular the rights to the protection of private life and to the protection of personal data (Art. 7 and 8 CFR). Therefore, it refers in its argument to a positive right to security. Though, the ECJ does not go the whole way. In its deliberations on the proportionality of the interference a reference to Art. 6 is lacking. While these decisions should not be overstated, the ECJ seems open to the development of an independent positive right to security.

Another aspect that is relevant to the duties of the member states to provide security is the fact that the ECJ (similar to the ECtHR and the FCC) derives specific duties to protect (Schutzpflichten) from individual fundamental freedoms. However, no universal right to protection from third-party interference is recognized<sup>30</sup> so that this also does not amount to a right to security.

To sum up: Unlike the German Constitution, the examined transnational legal instruments in Europe, the CFR and the ECHR, contain in their wording a “right to security”. However, so far, their interpretation has been relatively clear in that the meaning of the rights is mainly the protection against arbitrary measures restricting freedom.<sup>31</sup> Traditionally, the right does not aim at protection by, but rather from the state.<sup>32</sup> It is recognised that this right does not, in principle, give rise to a claim for positive state action against dangers and risks impairing legal interests that emanate from third parties.<sup>33</sup> However, in the jurisprudence of both the ECtHR and the ECJ an independent right to security has been mentioned. Notably, in the Digital Rights judgement of the ECJ a reference to an independent, positive right to security is made. Therefore, the European level allows for the possibility of developing such a right.

### III. Is there a need for a (universal) right to security?

Traditionally, fundamental rights are a defence against the state. They restrain the state from curtailing individual freedoms. However, it is now widely accepted that they also can give rise to positive state obligations. The question is whether this obligation can and should be derived

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Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

<sup>27</sup> *Baldus/Heger* (Fn. 9) § 18 Rn. 1; *Leuschner*, EuGH und Vorratsdatenspeicherung: Emergenz eines Grundrechts auf Sicherheit, 09.04.2014.

<sup>28</sup> European Court of Justice, Urteil vom 08.04.2014 – C-293/12 and C-594/12 (*Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others.*).

<sup>29</sup> With reference to Digital Rights Decision in ECJ, Judg. v. 15. 02. 2016, Case C-601/15 PPU - J. N., ECLI:EU:C:2016:84, para. 53 and in ECJ, Opinion 1/15 of 26. 07. 2017, ECLI:EU:C:2017:592, para. 149

<sup>30</sup> *Baldus/Heger* (Fn. 9), § 18 Rn. 14.

<sup>31</sup> *Szczekalla* (Fn. 2) Schutz vor willkürlichen freiheitsbeschränkenden Maßnahmen, § 8 Rn. 16.

<sup>32</sup> *Baldus/Heger* (Fn. 9), § 18 Rn. 11.

<sup>33</sup> ebd., § 18 Rn. 7.

from a universal right to security in the sense of a positive right to security not just against the state but also from third parties<sup>34</sup> which Lazarus calls an “overarching and self-standing *meta-right* to security”<sup>35</sup>. Does a need for such a universal right to security exist? As we have seen, in German and European law a positive universal right to security does not exist; but as the development through the jurisprudence of the European courts seems possible, the question is whether they should, and whether a need for such a right exists. To answer this, it is important to first note what such a right to security would entail. *Lazarus* has pointed out that “the notion of security is dangerously opaque”<sup>36</sup>. Therefore, it is important to first closer examine the possible content of a universal right to security (of person) in form of a positive and justiciable right.

## 1. Delineating the content of a universal right to security

A right to security in its wording contains the two important aspects that need to be clarified: “security” and “right”. The right aspect I have already begun to outline in the sections above. It is not the negative aspects of fundamental rights that is of interest here but the positive aspect. A positive and justiciable right means that it gives rise to protective duties by the state and that it can be asserted against the state. It represents a binding and justiciable standard against which state action must be measured and which confers subjective rights. In consequence, this allows for the citizen to demand higher (legal) standards of protection, maybe even the implementation of certain security measures by reference to this right.

The meaning of security in the context of such a right is harder to capture. It is clear that an individual right cannot be based on a universal notion of national or universal security. Indeed, it is extremely difficult to find a precise definition. While certain authors have already examined this concept more closely,<sup>37</sup> I will not delve deeper into this discussion due to the time constraints. For the purpose of this presentation the following brief description is sufficient. In its basic sense, security means the absence of threat or harm. A wider reading as freedom from fear<sup>38</sup> or want<sup>39</sup> does not work for the purpose of our idea of a positive, justiciable right. Therefore, I focus here on a right to security of person that imposes a positive obligation on the state to protect its citizens from harm or threat. Even without giving a final definition of the content, various problems that follow from a universal right to security easily become apparent.

## 2. Challenges arising from a universal right to security

A universal right to security has entered academic debate notably in the Anglo-American world, and substantially less so in Germany. Various aspects of such a right have been explored.<sup>40</sup>

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<sup>34</sup> See further *Turner* (Fn. 3), 47.

<sup>35</sup> *Lazarus* (Fn. 18), 327.

<sup>36</sup> *ibd.*, 329.

<sup>37</sup> *Lazarus* (Fn. 5); *Fredman*, in: Goold/Lazarus (Hrsg.), *Security and Human Rights*, 2007; *Waldron*, in: Beitz/Goodin (Hrsg.), *Global Basic Rights*, 2011; *Zedner Legal stud.* 23 (2003), 153, 154 ff.; *Zedner*, *Security*, 2009.

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<sup>39</sup> *Fredman* (Fn. 39), 307 even speaks of “security from poverty, illness and degradation”.

<sup>40</sup> ....

While many critical voices<sup>41</sup> exist, there are also authors arguing in favour<sup>42</sup> of a universal right to security. Again, I want to focus only on a right to security as described here – a positive, justiciable universal right to security of person. There are several challenges that would follow from its recognition.

There is a danger in giving security too much primacy. The pursuit of security already has a tendency to curtail civil liberties;<sup>43</sup> and basing this pursuit on the protection of human rights can only exacerbate this, because of the force with which it strengthens the security argument. This would be especially relevant for any policy measures and laws aiming – even in part – at providing security (for example against a terrorist threat). It would mean that security measures would be easier to justify. In particular, the status of a universal right, accorded to security, would be relevant in justifying its potential interference with other fundamental rights. It would facilitate the encroachment on other rights, because any conflicts of fundamental rights would have to be considered within the framework of proportionality.<sup>44</sup>

It therefore potentially threatens to weaken other affected liberties, with the costs mainly borne by minorities<sup>45</sup>. When looking at the provision of security from an anti-terrorism perspective, this would be especially relevant to certain rights of minority groups, such as freedom of religion. To base the provision of security for the majority on a right would mean that the liberties of minorities can be even easier encroached upon. In the last decades, we have already seen the tendency of laws that promise to provide security to undermine the rights of specific minority groups.<sup>46</sup> An example being anti-terrorism laws that disproportionately affect the Muslim community. This is very problematic. Not the least because it reverses the fundamental notion of fundamental rights protecting against state's overreach. Furthermore, in this context, the typical function of fundamental rights as protection of the minority from the majority is reversed.

Such a right would evidently strengthen the state power.<sup>47</sup> It could provide legitimacy to the state's overreaching coercive measures.<sup>48</sup> This is exacerbated by the fact that full security can never be achieved<sup>49</sup>. Therefore, to pursue security in form of a rights-based approach risks to be bottomless.

Furthermore, it could allow politicians to frame interferences with rights as a positive, by using the reference to a right.<sup>50</sup> In other words, the human rights discourse allows for a positive spin. It also allows for an argumentative shifting of balance between liberty and security and promotes what *Lazarus* calls a „securitization“ of rights<sup>51</sup>.

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<sup>41</sup> *Lazarus*, in: Dickinson/Katselli/Murray/Pedersen (Hrsg.), *Examining Critical Perspectives on Human Rights*, 2012; *Lazarus* (Fn. 5).

<sup>42</sup> *Turner* (Fn. 3) who favours a communitarian based right to security.

<sup>43</sup> See inter alia *Zedner International Journal of the Sociology of Law* 31 (2003), 155, 169.

<sup>44</sup> *Leuschner* (Fn. 27).

<sup>45</sup> *Zedner* (Fn. 45), 170.

<sup>46</sup> *Ashworth/Zedner, Preventive Justice*, 2014, 257.

<sup>47</sup> *Turner* (Fn. 3), 52.

<sup>48</sup> *Lazarus* (Fn. 5), 434.

<sup>49</sup> *Zedner* (Fn. 45), 158.

<sup>50</sup> *Lazarus* (Fn. 43), 97.

<sup>51</sup> *Lazarus* (Fn. 5), 438.

A more technical point of critique is that it is, if at all possible,<sup>52</sup> at least very difficult to define security precisely, so that it provides a workable base for a subjective right.<sup>53</sup> The problem of vagueness is a classical rule of law concern. It is therefore clear that if we even accept a positive universal right to security, the term “security” must be interpreted as narrowly as possible.<sup>54</sup>

Given these risks, the question is whether there is not a better alternative that protects just as well, but poses fewer dangers.

### **3. An alternative: the doctrine of positive obligations**

The need of citizens to demand, in specific circumstances, positive state action providing security might be better met by using the doctrine of positive obligations.<sup>55</sup> It allows for the demand of security (as was seen above) by reference to specific right (such as the right to life). Read that way, the fundamental right to security can be viewed as the sum of the protective guarantees of the individual fundamental rights but does not go beyond this.<sup>56</sup>

This approach frames the question differently: instead of asking “Does a universal (broad) right to security demand or justify a certain state action?” (with all the challenges this entails), it poses the question of “Does a specific positive obligation, based on a specific fundamental right (such as the right to life), require the state to take specific action, or is the state’s failure to provide security through this specific action a violation of the positive obligation derived from that specific right?”.

Still thinking on this but this way some of the pitfalls of a general right to security might be avoided. (Very interested to hear your thoughts on this.)

## **IV. Conclusion**

Boundlessness is a general danger of the right to security – both with regard to the scope of this term, when used to define a right, and the legal consequences and claims derived from it. Therefore, in my opinion, a positive universal right to security has little to add. Furthermore, it seems to me that the dangers outweigh the benefits even of a narrowly drafted or interpreted right to security. This view is supported by the fact that – in contrast to enforcing security as a fundamental right – the doctrine of positive obligation, at least in specific circumstances, allows for only limited state action, and as such does not carry the same risk of boundlessness as a universal right to security. Therefore, I do not think that the ECJ (and ECtHR) should go any further down the path of developing a right to security. Positive obligations derived from the existing rights should be sufficient to justify state action in the cases where it is necessary. Which brings me to answer the question I put forward in the beginning: yes, there is indeed a danger in framing the provision of security as a human right question if based on a universal, positive right to security.

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<sup>52</sup> *Leuschner* (Fn. 10), 23 f. argues it is impossible.

<sup>53</sup> *Lazarus* (Fn. 5), 438.

<sup>54</sup> *Lazarus* (Fn. 18), 327.

<sup>55</sup> A problem is that so far there is no generally recognized test program for duties to protect, though *Möstl* (Fn. 7), 93 offers one.

<sup>56</sup> *ibd.*, 90.

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As can be seen in current (anti-terrorism) laws, the loss of liberty falls disproportionately on certain (mainly minority) groups under the slogan “their liberty for our security”.<sup>57</sup>

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<sup>57</sup> *Waldron* (Fn. 39), 223; *Dworkin* *New York Review of Books* 28.02.2002.