

Transatlantic Forum Session #3 – Minutes

Topic – Providing Security in the 21st Century: A Human Rights Challenge?

Speaker: Dr. Anneke Petzsche (Humboldt-University, Berlin)

Discussant: Dr. Lucia Zedner (All Souls College, University of Oxford)

Rapporteur: Joseph Shiovitz

December 1, 2021 @ 1:30pm

Presentation by Dr. Anneke Petzsche

The speaker first distributed a PDF outline of the presentation and announced the title of her talk. She asked how are we to protect citizens in the aftermath of many terrorist attacks occurring in western countries in recent decades? There has been a growing demand for security and an expansion in scope of criminal liability as lawmakers have passed new legislation addressing national and international crimes. In response, citizens have raised several questions: Have legislators done enough? Has the state fulfilled its duty to protect citizens? Can we ask for more? Terrorism is just one example of a threat which the state is expected to protect against.

Dr. Petzsche argued that security is a cornerstone of functioning democracy and essential for citizens to exercise their rights. There is no doubt that a state has the duty to protect citizens, but does that grant citizens the right to security? Can the state be asked to provide security in a specific form? Are questions about security best answered within the realm of human rights? There is a need to differentiate between policy objectives and legal rights grounded in human rights law, and presently only the latter is of interest. She emphasized the focus on a positive interpretation of rights, rather than negative. She pointed out that in German and European law, there is no express right to security, or any independent right recognized by a federal court. Where no written example exists, there is a reliance upon adjacent rights. The ruling on abortion in 1975 established that rights are to be respected negatively and protected positively. She examined relevant articles taken from the German Constitution, European Convention on Human Rights and EU Charter of Fundamental Rights.

She claimed that the negative aspect of treating security as a fundamental human right is the likelihood that the state would use such a right to justify their encroachment upon other freedoms, for example, rights to privacy and personal data. There is the possibility for developing the right to security, but is there a need for a universal human right to security? What would that entail? The notion of security is dangerously opaque, allowing the possibility for overreach, and therefore a much closer examination of the content of such a right would be necessary. The right to security contains two important aspects, which are the notions of ‘security’ and ‘rights’. The positive dimension of rights concerns assigning duties to the state, and would mean citizens could demand a higher legal standard for protection. The meaning of security, however, is harder to capture. Individual rights cannot be derived from conceptions of national or international rights. For example, there is an army for the state, but not personal security for each citizen. In a basic sense, the definition of security has meant the absence of threat or harm, and has not included fear as sufficient to be protected against. There is danger in providing the state with too much primacy. The pursuit of security has a tendency to curtail other human liberties.

She suggested that if the right to security became a universal human right, stricter security measures, like those observed as a result of anti-terrorism laws, would become even easier to justify. It would also facilitate the encroachment of the state upon other rights, potentially weakening those rights. These costs could be most significantly incurred by minority groups, particularly Muslims when it comes to security from terrorism. The freedom to religion could be threatened by such security measures established in the name of a right to security. There are other examples where law enforcement has undermined the rights of minority groups disproportionately, which would be furthered by a universal right to security. The right to security could strengthen state power and be followed by overreaching powers. Another problem could be enabling politicians to frame interferences with other rights as a positive by referencing the right to security. There is risk of a 'securitization' of rights, especially as the precise definition of security remains difficult to establish. If a universal human right to security were established, we must interpret the term 'security' as narrowly as possible.

Given all the risks of establishing a universal right, Dr. Petzsche suggested that we may consider another alternative. One example is the Doctrine of Positive Obligations, which is a demand for security by appealing to certain other rights, such as the right to life. This approach reframes the question. Instead of asking if a broad right to security justifies state action, it asks whether a specific positive obligation based on a specific right warrants a state obligation to take action, or whether a failure by the state to take action could be deemed a violation of a positive obligation to observe that right. Boundlessness is a general danger of security. Positive obligations pertaining to existing rights should be sufficient to apply where necessary, so a universal human right to security has little to add, especially considering the negative risks created by doing so.

Response by Dr. Lucia Zedner

Dr. Zedner acknowledged that Dr. Petzsche was right to be skeptical because of the insufficient definition of security and profound challenges and risks that would result from making it a universal right. A doctrine of positive obligations could be a better alternative, but Anneke should talk more about why it would be expected to succeed where other conceptions of security have failed. She raised some concerns about a universal right to security: (1) Practicability; (2) Risk of overreach by coercive state powers.

She argued that it was not clear how to interpret such a right. How extensive would it be? How would it affect extreme measures like detention? When, if ever, should intrusive measures to rights be applied? And to whom? What could we reasonably expect from a right to security? She provided an example of the state protecting life, wherein the Strasbourg court established, under Article 2, there would be a breach of rights if state authorities knew or ought to have known of a real risk to an individual by criminal acts of a third party. There would also be a breach if the state failed to take measures within their powers to reasonably avoid risk. She mentioned that there was a 2012 case in which a man was murdered by the suspect against whom he was intended to provide evidence of a crime. It was held that there was no point at which the police knew of a risk. Accountability for protecting rights is already limited by a high threshold that is often difficult to satisfy. Security has been limited on the basis of pragmatics. In the UK, there are limits on making claims against officials on human rights grounds. For example, a threshold

of 1yrs for human rights and 6yrs for negligence. She asserts that we must differentiate between security from the state and security by the state. But these are at odds.

She suggested that we should be wary of relying upon the state for ensuring human rights as a positive obligation, as it risks state overreach, rather than contains it. John Locke warned against blind faith in strong government. Although a law may state there is a right to 'X', in practice there are often a series of qualifications. For example, under article 8, there are rights to privacy, to family and private life, etc... EXCEPT in issues of national security, well-being of the country. When is it appropriate to lose our rights? This dilemma suggests a conflict of rights. There are cases of detaining persons to protect society against spreading diseases, but also to protect against persons of unsound mind, alcoholics, and even vagrants. Protections of the grander public are prioritized over those of individuals. In practice, it is possible to 'qualify-away' certain rights altogether. That is, citizens have a right to something, but the exact legislation includes so many qualifications that the said rights are rarely protected in practice. The Strasbourg court has observed a shift in the conception of rights towards that of a demand, rather than a duty. There have been many cases involving significant intrusions upon human rights, and yet the courts have constantly found these erosions of rights 'Human Rights compliant'. Citizens are liable to concede to state powers which can be used to combat our enemies, without conceiving of the possibility that we may one day become the state's enemy.

Dr. Zedner concluded that violations of human rights could be too easily rendered compliant with modest qualifications. Instead of relying upon universal human rights, we should consider rights as but a single element in a much richer tapestry of values integral to assessing the proficiency of security laws and how they are properly enacted.

Dr. Anneke Petzsche Replies

She agrees about a lot of points and believes the two seem to be going in the same direction. She acknowledges having similar fears. The negative aspects of a right to security are very important because of the primacy the state holds in our lives. While not perfect, the Doctrine of Positive Obligations is only one example of an alternative to declaring a universal right to security. This inclination may be attributed to having a German background, considering cases where the German courts have been effective. For example, a law whereby planes with a terrorist onboard that would crash into something could be shot down was struck down by the courts on the basis of human dignity.

Dr. Lucia Zedner Replies

She says we must ask how implementation would play out according to local legal cultures (considering the present discussion about the differences between the US, UK, Germany, and Europe).

Summary of Discussion

Q: How would your argument on positive obligations fit in with a greater need for pragmatic emphases by law enforcement?

Dr. Petzsche: Practitioners are not considering all the complex dimensions of human rights on a daily basis. There are different levels to the discussion, but conceptions of human rights trickle down into pragmatic actions.

Q: How does the right to security/the responsibility of the government to provide security jive with programs like the UK's Prevent program that not only securitize civil society but also arguably punish civil society members (such as by withholding funding) for the refusal and/or failure to take on such a role?

Dr. Zedner: The Prevent program tries to identify people deemed to be at risk of being drawn into terrorism. It tends to target minority groups. This question refers to the 2015 amendment effectively turning civil servants like teachers into the police (and students into suspects). Funding is withdrawn from universities who fail to comply. It caused enormous damage to academic freedom and freedom of expression. It has taken case law to re-assert those rights. It forces us to deal with conflicts of rights.

Q: Considering the doctrine of positive obligations, and terrorism being one of the main motivating factors of the paper, it's relevant to note terror has not always been a concern for a person's daily routine, to the extent it is today. Establishing rights are important to protect from standard threats, and I argue that 9/11 has standardized the protection from terror. A new problem has risen concerning the global war on terror securitizing a wide range of rights. Could the doctrine of positive obligations result in the opposite outcome of what you are hoping for? Could it reinforce the securitization of rights because the fight against terror is becoming more prevalent within our daily lives?

Dr. Petzsche: We can reframe the problem as a conflict between the right to security and the right to life. The right to life is much stronger. The doctrine of positive obligation as something that limits the state from taking certain measures is then preferable to adopting a universal right. One problem is that security seems to trump everything in some western countries like the US and UK.

Q: Given the emerging challenges of the 21st century, why should we maintain the definition of security tied up exclusively to the realm of terrorism and crime? Should we not expand this definition into economic security and even the relationship between the right of security and the effects of climate change? If we think about security as developing a more resilient society, wouldn't this change of definition help us to clarify in more detail a more expansive definition of security in the context of political, economic, and social rights?

Dr. Petzsche: The right to security is bottomless, and therefore creates a risk of state encroachment. These things certainly have an effect, but widening the definition would not be helpful, because that would exacerbate all of the problems already mentioned.

Dr. Zedner: Security has for decades escaped the realm of terrorism. Health security, environmental security, etc... are discussed widely. Although it is much more difficult to see how we would articulate a legal right to such things.

Final Words

- Dr. Petzsche: The right to security, especially positive obligations, would mean a lot more protecting against than only terrorism, but terrorism is a good lens to look upon this right. We need to think about whether the doctrine of positive obligation can help here. Although we all agree a universal right to security is something to which we should never aspire.
- Dr. Zedner: Thank you.