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## Neo-Democracy, National Security, and Liberty

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6 *Eur. Hum. Rts. L. Rev.* 660-663 (2013) (reviewing Conor Gearty, *LIBERTY AND SECURITY* (2013))

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# Book Reviews

**Liberty and Security**, by Conor Gearty, (Polity Press, 2013), 160pp., paperback, £50.00, ISBN: 978-0-7456-4718-0.

No principle is more basic to our conception of justice than equality under law. Democracy is premised on the requirement that every person must have an equal say in governance—one person, one vote. The rule of law demands that all are equal before the law, even and especially those who exercise legal authority. And human rights are owed to all humans equally, regardless of race, religious, sex, or nationality. As Conor Gearty insists in *Liberty and Security*, the common thread that runs through our commitments to democracy, the rule of law, and human rights is that liberty and security must be guaranteed for all, not reserved for the select few.

Yet the common pattern that Gearty persuasively and trenchantly documents, in countries as diverse as Russia, the United Kingdom, Uganda, Australia, Turkey, and the United States, is that governments have selectively sacrificed the liberties of some for the security of others. The security of the powerful is most often purchased not by demanding that the powerful sacrifice their own liberties, but by restricting the liberty of the weak and vulnerable.

This should not come as a surprise. It is exceedingly difficult to say which of one's own rights one would surrender for the possibility of greater security; we want both. Moreover, the costs of rights infringements and the benefits of security initiatives are notoriously impervious to measurement; and even if they could be measured, they are incommensurable. For a politician, it is so much easier to offer to strengthen the security of the majority or the powerful by surrendering the liberty of someone else.

In the context of counter-terrorism, the focus of this important and engagingly argued book, those who bear the brunt of the sacrifices are, by and large, foreign nationals, and especially Arabs and Muslims. Thus, in the wake of the 9/11 attacks, Parliament enacted a law authorising the indefinite detention of foreign nationals who were suspected terrorists—even though when that law was challenged, the government was forced to admit that it faced terrorist threats from British nationals and foreigners alike. In the United States, thousands of foreign nationals, virtually all Arab or Muslim, were detained on immigration charges in anti-terrorism initiatives after the 9/11 attacks. Almost none of them were ever charged with a terrorist offence. Guantánamo, the CIA's secret prisons and the military commissions were all reserved for foreign nationals. The United Nations Security Council adopted a mechanism for blacklisting individuals and organisations without any procedural protections, and required all nations to freeze the assets of all on the list—a sanction that has been applied almost exclusively against Arabs and Muslims. These and many other counter-terrorism practices would likely be politically unacceptable if they applied equally to all; their viability turns on a double standard.

To Gearty, this problem runs even deeper. He argues that democracies the world over—new and old—have largely abandoned their commitment to universalism, substituting instead at most a kind of formal equality that masks deeper underlying substantive inequalities. As he puts it:

“Increasingly societies have organized themselves as places of great (and rising) inequality with nevertheless apparently strong commitments to democracy and human rights, supported by the impartial demand of a rule of law that claims to stand above politics as a guarantor of freedom. It is when no fair-minded observer not intent on fooling him- or herself can avoid the mismatch between the facts of inequality and the forms of freedom that we know we are living in a neo-democratic world: poverty on the rise; the emergence of super-rich classes; the elections always won by the same crew; the court judgments that go only one way; the human rights ethic that is applauded in the abstract and ignored on the streets; the external inspectors that change next to nothing.”(29)

In Gearty's view, the problem is not just that society's privileged few have exploited double standards to avoid the hard choices posed by trade-offs between liberty and security, but that the liberties of capitalism cannot be reconciled with the demands of equality. At times, Gearty's argument nods toward socialist critiques of the free market, but he does not develop this interesting suggestion. In what ways are the double standards that pervade security initiatives, and which most often pivot on nationality, ethnicity or religion, linked to the class inequalities that a free market permits and often exacerbates? Gearty suggests that they are both endemic in "neo-democracies", but does not explore the link further. It might be that tolerance of economic inequality, so central to capitalism, makes us less sensitive to other sorts of inequalities. It may be that economic inequalities fuel the unrest and violence that then triggers repressive counter-measures. Or it might be that even in the most egalitarian of polities, national security measures would discriminate against outsiders. Gearty does not say, but his argument raises important questions about the interconnections of inequalities driven by economic and security impulses.

Gearty is absolutely right to criticise the selective sacrifices of rights in the name of security, and to argue for "liberty and security for all". But his critique is at times too pessimistic, and his solution gets us only part of the way toward a just counter-terrorism policy.

Gearty emphasises the troubling role that the United Nations and international law have played in inequitable and unjust counter-terrorism practices. Where international law once provided a basis for resisting unfair security initiatives as violations of human rights, Gearty contends that international law has become a facilitator of such violations. The United Nations Security Council in particular has in recent years, and especially since 9/11, adopted a series of resolutions requiring nation-states to adopt a range of counter-terrorism laws, including measures targeted at terror financing and incitement or glorification of terrorism. These resolutions, overseen by a UN bureaucracy designed to hold nations accountable if they do not target terrorism with sufficient enthusiasm, have provided a useful cover for regimes to justify the targeting and suppression of their opponents. Such exploitation of the counter-terrorism mandate is made easier, Gearty notes, by the failure even to reach a consensus on how to define terrorism, leaving the term vulnerable to selective attachment to one's enemies.

But Gearty's diagnosis may be too pessimistic. There have also been key moments when international human rights norms have limited governments' ability to sacrifice the rights of the most vulnerable. The high-water mark of such resistance is the Law Lords' decision in the *Belmarsh* case, in which the Lords declared that the law authorising indefinite detention of foreign suspected terrorists was invalid precisely because it treated foreign nationals and British citizens differently. The court reasoned that as both native and foreign terrorists posed security threats, and as both foreigners and natives have an equal right to liberty, there could be no justification for selectively imposing indefinite detention only on foreign nationals.

When Parliament had to apply restrictions on suspected terrorists to all, Gearty notes, its legislation stirred substantially more discussion and debate. In the end, Parliament dialled back the restrictions, first to "control orders", and more recently, to Terrorism Prevention and Investigation Measures, or TPIMs, a sort of control order lite. International human rights also played a key role in improving the procedures due to persons subject to such restraints. The European Court of Human Rights, in reviewing the *Belmarsh* decision, declared that individuals subject to restraints on their liberty based on secret evidence must be given sufficient information about the charges and evidence against them to permit them to participate in their own defence and instruct their lawyers.

European Convention rights also compelled Parliament to repeal a law that authorised the police to conduct suspicionless stops and frisks in designated geographical areas (such as, for many years, all of London). And the European Court of Justice has now twice invalidated, as contrary to the European Constitution's requirements of procedural fairness, terror-financing sanctions mandated by the UN Security Council.

Of course, the United Kingdom and Europe have each agreed to be bound by international rights standards directly enforceable by European institutions. But international human rights norms also played an important role in reining in the response of the United States to 9/11, despite that country's habitual resistance to international law limits, and President George W. Bush's best efforts to render international law altogether irrelevant to his "war on terror". The Bush administration argued that the Geneva Conventions did not apply to Al Qaeda detainees, but the US Supreme Court in 2005 ruled otherwise, declaring that Common Art.3 of the Geneva Conventions, which guarantees basic human rights for all detainees in wartime, applies to Al Qaeda. And when the Bush administration argued that the international prohibition on cruel, inhuman and degrading treatment in the Convention Against Torture, a multilateral treaty, did not protect foreign nationals held outside the United States, the US Congress enacted the McCain Amendment, which made clear that the prohibition applied to all detainees held by the United States, regardless of where they were located or what passport they held.

More broadly, the US was in effect compelled to retreat from most of its troubling rights-infringing counter-terrorism measures by a combination of international and domestic criticism and resistance, often based on human right norms. Thus, by the time he had left office, President Bush had released over 500 of the detainees he once held at Guantánamo Bay, transferred all detainees out of the CIA's secret prisons, stopped relying on renditions to third countries for coercive interrogations, placed his warrantless wiretapping programme under court supervision, reformed the military commission procedures and stopped authorising waterboarding. When President Obama came into office, he introduced still further reforms. He closed the CIA secret prisons altogether, successfully pushed for still further improvements in military commission procedures, released another 100 or so Guantánamo detainees, forbade reliance on "enhanced interrogation techniques" and disclosed many still-secret Justice Department memoranda and documents authorising coercive interrogation.

Why would the most powerful country in the world, with unmatched military power, retreat on measures that were adopted to further its nationals' security largely at the expense of foreigners' rights? The best explanation, in my view, is the power of appeals to the rule of law, human rights and fundamental fairness, especially where those values are being pressed by an engaged and robust civil society. Groups like the American Civil Liberties Union, Amnesty International, the Center for Constitutional Rights, Reprieve, Human Rights Watch and Human Rights First consistently and strategically challenged the US efforts as contrary to fundamental principles of constitutional and international law. Individuals risked reprisals by disclosing secret programmes that they believed violated fundamental tenets of law, including the CIA's use of disappearance, torture, and cruel and inhuman treatment for interrogation. The press published the disclosures and editorialised against the lawbreaking. And those challenges fuelled criticism from America's friends and foes alike, and ultimately created sufficient pressure to compel the US to conform its actions more closely to legal norms.

Thus, while Gearty is right to be concerned that nations too often pay only lip service to the universalist assumptions of human rights, while using the Security Council's counter-terrorism mandates to selectively undermine those rights, it is not necessarily the case that "neo-democracy" has prevailed. Without a doubt, serious rights deprivations persist—but then again, that has always been and is always likely to be the case. That's why we need commitments to human rights and the rule of law in the first place. But far from being a fig leaf for repression, human rights and the rule of law have been critically important tools in reining in counter-terrorism measures.

Moreover, while Gearty's critiques of double standards are on the mark, even if we could eliminate all double standards, that would not satisfactorily answer the hard questions of how to balance liberty and security in the modern era. Technological advances have given small bands of people or even lone individuals the wherewithal to wreak widespread destruction, and simultaneously afforded governments the power to monitor more broadly and to target more narrowly and at greater distances than ever before.

These developments raise challenging questions, and the answers are not to be found only in the golden rule.

Gearty is sharply critical, for example, of the absence of procedural protections afforded to those who are subject to civil sanctions for terror financing. As noted above, the European Court of Justice agrees with him that the procedures have been deficient. But Gearty is less clear about what procedures, short of a criminal trial, he would find satisfactory. Yet nothing in the concepts of universal human rights demands that civil economic sanctions be imposed only upon conviction in a criminal trial. Fair process is required, but criminal proceedings are not the only form of fair process.

Similarly, Gearty is critical of preventive detention, both for investigatory purposes in the UK, and for preventive purposes in the context of the US's armed conflict with Al Qaeda and the Taliban. But all democracies have resorted to preventative detention under some circumstances—to hold suspects pending trial or deportation where they pose a risk of flight or of injuring others, to incapacitate the mentally incompetent who pose a danger to themselves or others, and to hold the enemy during wartime. It does not follow from the principle that liberty and security should be extended to all that such exercises of state power are illegal.

The universalist demand of human rights also does not answer the question of when, if ever, targeted killing is appropriate against an enemy who is engaged in an armed conflict, operating beyond the traditional battlefield, with the intention and capacity to inflict significant damage on the nation and its people. It does not answer when, and under what circumstances, legitimate concerns about secrecy should be allowed to modify the principle of open justice by holding closed proceedings with cleared counsel. Nor does it answer what the appropriate limits are to surveillance in the modern digital age, when virtually everything we do creates a traceable and searchable footprint. Should security agencies be permitted to sweep up phone metadata across the board, without suspicion, if they commit to searching that data only when they actually develop individualised suspicion? What level of terrorist act triggers a nation's right to self-defence, and what level requires an ordinary law enforcement response? Where an armed conflict arises between a terrorist group and a nation-state, which rules should apply?

These are all extraordinarily difficult questions. None of them is satisfactorily answered by proclaiming that human rights, the rule of law, and democracy demand that we treat everyone equally. Democracies that fully honour those principles might still deploy drones or detain the enemy during an armed conflict, engage in technologically aided surveillance, or use civil sanctions to freeze the assets of those who finance terror. The notion that the powerful should not sacrifice the rights of the vulnerable is critically important, but it takes us only so far. Gearty is right that when we fail to honour that principle, we will almost certainly strike an unjust and unwarranted balance between liberty and security. But recognition of the mandate of universalism is only the beginning, not the end, of the inquiry.

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