Activity 1: What is Law?

Part 1

While reading the Gearty (2019) article, keep in mind the following question: what is the point that Gearty is trying to make?

Skim read through Zeno-Zencovich's book; focus on the conclusion. When finished reading, consider whether Zeno-Zencovich convinced you of his argument. In particular, reflect on whether the approach of eliminating the conceptual distinction between legal systems can aid prevention and apprehension of cyber harm?

Record your thoughts in your e-portfolio and be prepared to share these in seminar 1, next week.

Answers:
For Gearty (2019):

- "Every society chooses authority over anarchy -- but whose authority?" (Gearty, 2019)
- Rule of law:
  - replaces priests, monarchs, cultural leaders
  - "explicitly agreed contstraints on power" (Gearty, 2019)
    - Checks and balances, if you will --> if a leader misbehaves, s/he will be sanctioned but not murdered
    - Magna Carta
- Laws are protections against populism and mania
  * logic, reason, facts, "wedded to the preservation of the status quo" (Gearty, 2019)
  So perhaps that is what Gearty finds the law to be, not simple strictures which keep ancient opinions etched forever through the restriction of others' actions, but a complex interwoven syntax which aims to prevent anarchy.

For Zeno-Zencovich:

- Chapter 1
  - Modern "democracy" can be summed up in US Presidentialism and UK Parlimentarism
    - President has more "legitimacy" because s/he is elected in separate vote independent of Congress
    - Presidentialism in practice is difficult to export

- can also have a hybrid system
- The EU breaks most of these strictures --> parliament basically has no independent use
- Voting can have the majoritarian system and the proportional system
  - proportialism can devolve into a multi-partied ineffective governments
  - majoritariansm --> Gore v Bush, lost by < 600 votes
- Chapter 2
  - Values are very important --> what is law without fundamental human rights?
    - think of Nazi courts, they staisfied a) b) and c), but we would hardly consider them just courts in the realm of democracy and freedom
      a) legal decisions are made by those institutions given the power to make these decisions
      b) decisions are "taken in accordance with sertain substansive and procedural rules" (Zeno-Zencovich, 2019: 26) already in existence
      c) thirty party verification (commly through a judge) that a and b are satisfied
  - US --> oldest surviving constitution (1787)
    - 7 original articles
    - Bill of Rights not long after
      - individual liberites --> freedom of press, speech, gun ownership, religion, etc.
      - procedural rights --> limitations to police and judicial power, double jeopardy, etc.
  - UK doesn't have a 'consitution' but a collection of documents and precidents which form the same conclusion
  - Europes consitutions are much younger/longer than US
  - legal systems can be more open to international trety input or more closed
  - religion can be a factor in how the rule of law is conceptualised
    - Islamic and Jewish courts
    - Separation of church and state
- Chapter 3
  - Federalism --> it's Swiss, though US is most well-known/copied
  - administration
    - amount of power given to the administration
      - UN --> have strong regulatory powers
      - In certain parts of the UK --> local beaureaucracy == $1M toilet (SF)
    - the norms of their structure is "directly related to the features of the entity that sets those rules" (35)
- Chapter 4

- All demos have a highly developed capitalistic economy
  - economically, not ideologically
  - inextricably intertwined with the law
    - provate autonomy
    - Legal entities
      - "compagnie" ==> company
      - LLC == the big cheese today
    - insolvency
    - Regulation
      - Who sets the rules?
    - State aid
  - "What is the balance between what is taken by regulation and what is given under the form of aid" (49)
- Chapter 5
  - Taxation
    - Need to consider the public finance model of a system
    - historically, taxation is "the first form of public control over economic factors" (51)
    - What are the risks/benefits of the implemented system?
  - social services
    - "How systems place themselves with regards to services provided to their citizens [...] largely determines public finance choices"
    - Influenced by social theories
    - complex legal/admin system is required
    - Europe's is larger than the US
- Chapter 6
  - criminal law "expresses all the characteristics of a legal system, together with its anthropological roots" (61)
  - Substantive law vs Procedural law
    - substantive == defining what a crime is/the punishment for it
    - procdeural == how to try an accused/find them guilty or innocent
  - What is a crime?
    - not altogether clear what exactly is a crime
      - save for the obvious ones, i.e. killing
    - what should be the punishment?
  - Who establishes crime?
    - "distinctions cannot be based on the quality of the authority which establishes that a certain conduct is a crime" (64)

- Sanctions
- Investigations, prosecution, trial
  - policing authorities --> can be *motu proprio*?
  - relationship between prosecutor and judge
  - evidence --> scientific/technological evidence is always included, even if it's junk
- Offenders and victims
  - Lombroso --> "put the personality of the offender at the center of the crime scene" (68)
    - scientic for its time
  - so we use science to determine likelihoods
- Chapter 7
  - role of judges
    - common law --> judge-made system
    - civil law --> different history
  - status of judges
    - used to be appointed by monarch in Europe
      - contemporary --> "independence of judges and the judiciary becomes a fundamental element of the system" (71)
    - England --> appointed by monarch but chosen among peers, so actually independent
  - judicial organisation
    - europe --> only recently independent
      - prosecution and judiciary
    - in UK/US --> prosecutors are not associated with judiciary / can be an elective office (US)
  - Rules of procedure
    - "without procedural rules [any judicial system] cannot exist" (73)
      - access to justice in civil and admin cases
      - criminal policy orientations
      - right to appeal
      - burden of proof
      - who bears cost of litigation?
      - form of the judicial decision
  - judicial power
    - US supreme court (US)
    - judicial restraint and excess (UK)
    - moving past the 'mouth of the law' (EU)

- Roles
    - judiciary
        - as legislator
        - as government
    - regulation by adjudication
- legal education
    - Judges reflect the systems in which they operate
    - length of legal education is not a secondary aspect
    - law degree == many career options
    - system builders and problem solvers
    - legal education creates legal identity
- Chapter 8
    - International conventions
        - to what extent do external conventions impact areas of domestic law not formerly considered?
        - international conventions "reflect the complexity of relations with systems other than one's own" (82)
        - Int'l area decides values, models, strctures "which are in a constant relationship with domestic systems" (82)
    - Uniform laws
        - reduces differences between different systems
        - but --> issues == legal efficiency, "best regulation", costs of implementation, enforcement
    - Lex Mercatoria
        - globalisation ==> need substansive international trade laws so things go smoothly
- Chapter Nine
    - just as in science and tech, certain ideas come, are important, and then become obsolete
    - civil law vs common law
        - civil --> based on roman law
            - law == a "general and abstract command set by a public authority [...] parliament" (96)
        - common --> no roman law heritage
            - "consolidated by the gradual sediment of deicions taken by courts in which judges were selected by colleagues" (96)
        - distinction makes very little sense outside private law context

- founded when private law was at heart of legal system
- Codes
  - civil => org'd into codes
    - comprhensive, exhaustive legal text, wide scope + self sufficient
    - now there are a multitude of "codes"
    - special legislation can fall outside the codes -> *lex specialis* principle
  - no longer are codes a sort of computer program for judges who put in some numerical computations which results in "an invariable and certain response" (98)
    - judges always had to interpret, even in the 19th century
    - the diverse interpretations are actually the law of the land
- legal families
  - the metaphor of "legal families" has disintegrated along with the nuclear
- Non-western legal systems
  - Western ==>
    - Judeo-Christian moral principles
    - Greek / Roman philosophy
    - basic role of law and justice in terms which are unique to the location
    - separation of law from religion
  - comparison can be used to "superimpose one's own mentality" (99)
- Alternative criteria from grouping legal systems
  - How should the modern tapestry be interpreted?
    - history --> powerful mould of countries and legal systems
      - sometimes uniting, sometimes dividing
    - use of common language within a community
      - law is "basically a linguistic convention" (100)
      - common language is essential
      - common law --> not kept together by historical precident, but because the language allows for "circulatin of ideas, concepts, cases, arguments, solutions"
    - law is an intellectual product
      - social elite "influenced by the dominant philosophical trends and ideologies"
        - natural law and political thought
    - social compliance with legal norms
      - norms set by a public authority
      - more important is compliance with private law

- payment of debts, relations with neighbors, professional negligence, etc.
  - and administrative law
    - traffic rules, construction permits, waste disposal, etc.
  - to what extent is a legal system effective?
    - does the majority abide by the laws set?
    - may depend on group or specific law
  - societies "are governed not only through commands that come from established authorities, but [...] through what are called'social norms which keep a community together" (102)
- A holistic view and beyond
  - A new path, in four related aspects:
    - the functional comparative method still remains unsurpassed
      - should compare social function, not nominal quals / dogmantic setting
    - method needs to be supplemented "by the systematic approach one has attempted to lay out in the prev. chapters" (103)
    - effectiveness of comparative law
      - "depends on who is comparing, on what one is comparing, and which aspect is the purpose of the comparison"
      - easier to detect what is untrue than true-true
    - must look at numbers, stats, appraisals
      - why compare systems with vastly different performance
  - must "constantly try to understand the interactions between the various elements, even when they may appear to be very distant" (104)
- My reaction:
  - I am hardly a legal scholar, so my interpretations and conclusions may be full of holes/I may have misunderstood the overall point, but
    - I can definitely get behind the idea that laws are as good as the public's willingness to follow them. What good is having a legal code which is ignored? That is no better than anarchy. Therefore, public interest and public approval are an important aspect of the law
    - I disagree that common law supersedes civil law, insomuch that Zeno-Zencovich admits that jurists are limited by the trends and philosophies of their own era -- if common law is made sole precident for future law making, then erroneous or inhuman laws are justified by whichever era deems them appropriate (thinking of Nazi Germany, Stalinism, McCarthyism). There is value in civil law as a monolith --> common law is inextricably linked to it, but it not completely of it.

Therefore, the civil law can always be reviewed and revived if needed, but only if it stands as an example, perhaps not as vibrant as common law but still very much alive. It could be seen as a rip-cord for a parachute if common law begins to fall too fast from the western system. I also concede that this conclusion may be in direct contradiction to my first point, and therefore is not perfect.

Part 2

Reflect on the above and consider (you might need to carry out some brief internet research) to what extent and how these arguments are reflected in your own home country. Be prepared to share your findings (it will be helpful to have at least one example) in next week's seminar.

Answer:

As I am originally from the US, basically the entire book applies to my home country. But in the country I am currently living in, Thailand, there is a very interesting tradition of military coups which almost serve as a forth, quasi-official check-and-balance, especially regarding progressive-leaning Thai parliaments. Since the 1920s (or for most of Thailand's history as a Constitutional Monarchy) the military has regarded itself as a keeper of tradition and peace. Progressive politics tend to cycle into Parliament every 20-30 years, which then ends in a military coup, returning a more conservative government who in turn fosters progressive senitments in the public which then leads to a more progressive parliament and then another coup. But, interestingly, and with exception (notably during the Vietnam War years (1965-1975)), the function of "democracy" as it exists in Thailand remains intact through every coup, and the generals responsible tend to see themselves more as arbiters of moderation who then reliquish power to more "moderate" and "appropriate" PMs. It was only with this last coup (~2015) that the military actually used its position to change the function of Thai Parliament, adding an unelected Senate handpicked by the majority military party. Though this senate can be chosen again by the next majority party (and is supposed to soon), we have yet to see how this will truly alter Thai politics and governance at the Parliamentary level.

Part 3

Watch the following video and reflect on how cybercrime fits the definition of crime:

Cyber crime fits the analog definition by

- facilitating theft of data
- scamming individuals
- selling illegal substances
- facilitating other crimes with a clear victim and perpetrator

All cybercrime does not easily fit into the analog defintion. This is for various reasons:

- the crime may cross international borders
- countries involved may not have extradition treaties
- VPNs may be held in countries with strict privacy laws which hinder law enforcement
- there may not be clear victims and perpetrators
  - data, organisations, individuals
  - bots, online groups, individuals
- companies may violate their data-privacy agreements with customers
  - Cambridge Analytica
- due to the possibility of scale, "cybercrime" may include instances which would normally not be considered prosecutable in real life, such as cyberbullying, doxing, slander, etc.

Learning Outcomes
Explore the challenges and opportunities of regulating and policing cyberspace.

References

Gearty, C. (2019) *What is Law?* | Blog. The British Academy. [Available Online] https://www.thebritishacademy.ac.uk/blog/what-is-law/

Zeno-Zencovich, V. (2019) *Comparative Legal Systems: A Short and Illustrated Introduction*. 2nd Ed. RomaTrE-Press. Roma.