
Raphael's School of Athens and Comparative Law

*Joachim Herrmann**



Floyd Feeney and I lived in different parts of the world, nine time zones apart, but a common interest in comparative law turned us into academic friends. Our friendship lasted for more than twenty years. We met at my University of Augsburg, Germany, where Floyd presented several interesting papers on American criminal justice problems. We later collaborated at the University of California, Davis, School of Law, where I was a visiting professor teaching classes on comparative law and, together with Floyd, seminars on comparative criminal justice. Together we

* Copyright © 2020 Joachim Herrmann. Professor Dr. Joachim Herrmann, LL.M., University of Augsburg, Germany. The author wishes to express his thanks to Professor (em.) Carol Bruch, University of California, Davis, School of Law, for having helped him with his English and for valuable information on the common law.

published a book on comparative criminal justice. Remembering my times with Floyd, I am happy to contribute the following Essay to the symposium honoring my good friend.

TABLE OF CONTENTS

I.	RAPHAEL'S PAINTING	1763
II.	THE GESTURES OF PLATO AND ARISTOTLE	1763
III.	THE TWO WESTERN LEGAL SYSTEMS AND JAPANESE LAW	1764
	A. <i>Continental European Law</i>	1764
	B. <i>Anglo-American Law</i>	1765
	C. <i>Japanese Law</i>	1766
IV.	COMPARATIVE LAW AS A BASIS FOR A BETTER UNDERSTANDING OF NATIONAL LAW	1767
	A. <i>Philosophies of Individual Rights</i>	1767
	1. Germany	1767
	2. United States	1768
	3. Japan	1768
	B. <i>Discovering of the Truth in a Criminal Trial</i>	1769
V.	CONCLUDING REMARKS.....	1770

I. RAPHAEL'S PAINTING

For academic tourists in Rome, it is a highlight to visit the Vatican Museum. On their way through the Papal Palace to the famous Sistine Chapel they will pass by the Stanze, the formerly private living quarters of the Pope, where on one of the walls they can see Raphael's "School of Athens." The famous Italian artist painted this more than twenty-two-foot-wide fresco some 500 years ago. Known best for his sweet paintings of the Madonna, this fresco introduced Raphael as an accomplished student of Italian Renaissance philosophy.

Looking like a "Who is Who" of the past, the fresco brings together philosophers, scholars, and intellectuals from many disciplines. They are placed in groups on the steps of an imaginary temple. In the middle, one can see the two greatest, Plato on the left and Aristotle on the right. Both are surrounded by famous persons who lived in different centuries and could be counted as followers of one of the two philosophical schools Plato and Aristotle founded, those of Idealism and Empiricism respectively. The groupings show how Plato and Aristotle influenced the intellectual life of generations to come. Although it would be interesting to explain in more detail who those in the two groups are, this Essay will try to do something else. It will ask how Plato and Aristotle have influenced legal theory through the present.

II. THE GESTURES OF PLATO AND ARISTOTLE

In Raphael's painting, Plato lifts his right forefinger to point towards heaven. With this gesture he draws the attention to the metaphysical world of ideas. As Plato explained in his famous "Allegory of the Cave," things in the real world come and go; they are no more than imperfect reflections of their essential and everlasting ideas. The eternal truth is that ideas are the essence of things. Human beings are, with the help of their inborn reason, able to recognize ideas and use them to guide their actions.

Standing next to Plato, Aristotle extends his flat hand horizontally pointing to the ground. For some time, Aristotle was a student of Plato, but like many good students, he later left his master. So to speak, he turned Plato's theory of ideas upside down by teaching that ideas do not exist independently from the things of the real world. In contrast to his teacher, Aristotle believed that ideas were but general concepts that people develop after having seen individual things. While Plato lifted his eyes to the heaven of ideas, Aristotle looked to the reality on the ground. Consequently, Aristotle extended his interests to everything he

found in the real world; he never stopped collecting and categorizing things.

In Plato's purely idealistic philosophy, things we see in the real world are but weak reflections of eternal ideas in a transcendental world. Necessarily, that means that positive law (a measurable thing in the real world) is but a weak reflection of the idea of justice. On the other hand, according to Aristotle's philosophy ideas are simply reflections of things in the real world. As a consequence, positive law and the idea of justice are equally important.

There can be no doubt that Plato's and Aristotle's models of law and justice have influenced legal thinking in different parts of the world for thousands of years. The gestures of the two great philosophers as depicted in the "School of Athens" can, therefore, be taken as helpful guidance when embarking on comparative law. In a somewhat simplified way it can be argued that Plato's idealistic model has influenced legal theory in continental European countries. On the other hand, Aristotle's empirical model has dominated the Anglo-American legal world. And contemporary Japanese law can be placed somewhere in the middle, having first been heavily influenced by continental European law during the Meiji Restoration which started in 1868 and then by American law after World War II.

III. THE TWO WESTERN LEGAL SYSTEMS AND JAPANESE LAW

A. *Continental European Law*

Before the seventeenth century, European legal philosophy had combined the law with notions of Christian morality. But beginning in the seventeenth century, this traditional legal philosophy was replaced by a new rational approach to law. Legal theory was liberated from moral theology, as divine revelation was being replaced by a new idealistic concept of the reasonable human being. A background radiation of this philosophical "Big Bang" can still be found in the existing Austrian Civil Code, which dates back to 1811. One of its opening sections reads: "Man is endowed with innate rights, already evident with the help of reason, and must, therefore, be regarded a person."

The new rational background became a basis for dealing with legal questions in what its adherents characterized as strictly scientific ways. The idealistic picture of the rational human being was, with the help of logical reasoning, taken to develop "natural law" systems. This new legal theory started with specific provisions and progressed to ever more general rules and principles. At the same time, new political ideas were

integrated into these legal systems. As a consequence, comprehensive civil codes with abstract concepts and general parts were enacted in continental European countries. It was typical of European idealism to assemble whole bodies of law in systematically organized, easily accessible books.

B. Anglo-American Law

Legal theory in the Anglo-American world has always been pragmatic and down to earth, much like Aristotle's gesture suggests. In the past, common law was almost exclusively case law. Today, it has become a mixture of case law and different kinds of legislation, but legal analysis is, in the first place, still centered on cases. It is only necessary to look at decisions of English and American courts, which have the habit of citing cases rather than provisions contained in statutes. Reasoning from case to case has been developed during debates in common law courtrooms, while a systematic and principle-oriented interpretation of legal texts was the method used in the quiet studies of continental European scholars.

When solving legal problems, American and English lawyers tend to make sure that a solution would fit into an existing chain of precedents. Unlike their continental European colleagues, they are not used to asking, in the first place, how an answer would align with the general ideas and values of their legal system. In a way it can be said that continental European judges ask, "How shall we decide this case?" English and American judges on the other hand tend to go back to the past, asking, "How did we decide last time?"

Oliver Wendell Holmes, the famous American judge and legal philosopher, once stated, "The life of the law has not been logic; it has been experience." Holmes referred to the whole of the law, rather than the common law in particular. He nevertheless spoke from a typically pragmatic, so to speak Aristotelian background, because he neglected important developments of continental European law. One only needs to go back to some instances of systematic and "logical" codification such as the Roman emperor Justinian's *Corpus Juris Civilis* of the middle of sixth century and the wave of codification, starting with the five Napoleonic codes and permeating continental European countries in the nineteenth century.

The case-oriented, pragmatic method of legal thinking can also be witnessed if one looks at the texts of American statutes. Unlike continental European legislation, they often lack systematic organization and rely on casuistic details rather than on general and abstract concepts.

The California Civil Code may not be the most typical example to be mentioned in this context, because the Code is, to a considerable extent, based on the work of David D. Field and continental European civil law thinking. Nevertheless, a law review published in California seems to be an appropriate place to cite a series of provisions of this Code that demonstrate the casuistic method typical of common law legislation. In the Code's chapter on the "Rights of the Person," an introductory provision is followed by sections on the rights of the fetus, the mother's right to breastfeed her baby in any location, and the denial of damages after a fraudulent promise to marry. This looks like a typical unsystematic common law approach!

Another striking example showing the differences in the two legal systems may be found in the provisions on self-defense in penal codes. The German Penal Code simply defines self-defense as "the defense which is required to avert an imminent unlawful assault on oneself or another." It is left to judges who have to decide a case of self-defense to develop this idea by relying on general rules of interpretation in light of prior court decisions and explanations they find in legal texts. On the other hand, American penal codes follow a typical pragmatic philosophy. In general, their definitions of self-defense run through several pages that read like collections of case law. Distinctions are made, for example, between attacks on a person defending himself or herself, attacks on a third person and attacks on things. It further defines in great detail what kind of force may be used against what kind of aggressor, distinguishing aggressors who have or do not have a weapon, and what kind of force may be used against a trespasser, including when the victim defending against an aggression may apply deadly force in defense against the trespasser.

C. Japanese Law

Starting with the Meiji Restoration in 1868, Japan slowly opened to Western law to modernize its society and open it to international business. First, it adopted French law and the Napoleonic codes of the early nineteenth century as a model. Then after the unification of German states in 1871 brought a wave of codification in Germany at the end of the century, Japan took the new German codes as a basis for reforming its own law. A new Japanese penal code of 1908 and a criminal procedure code of 1924 mainly followed German law. After World War II, Japan came under the influence of American law taking it as a model for reforming, above all, its criminal justice system.

In spite of the reforms after 1945, continental European lawyers looking at Japanese law today may feel at home. That is because the

texts of Japanese codes, even the reformed criminal procedure code, rely on concepts and systematization typically found in continental European codifications. It must, however, be asked whether and to what extent Japanese legal thinking has also been influenced by the continental legal tradition. Conversations with Japanese lawyers often leave the impression that the task of analyzing legal problems in Japan tends to take more careful and smaller steps than one might find in the Western world. Japanese lawyers often rely on more or less vague indications where clear and definite answers are offered by their western colleagues. Keeping this in mind, Plato's gesture seems to exert a somewhat limited influence on Japanese legal theory, which is certainly governed by its own philosophy.

IV. COMPARATIVE LAW AS A BASIS FOR A BETTER UNDERSTANDING OF NATIONAL LAW

In the light of these general observations, two examples may demonstrate in which ways the gestures of Plato and Aristotle may still be useful in understanding the different approaches taken by national laws.

A. *Philosophies of Individual Rights*

1. Germany

The text of the German Constitution begins with a statement of two most important individual rights, the inviolability of human dignity and the individual's right to free development of personality. Both rights represent basic ideas and value judgments dating back to the Enlightenment, the philosophy of Idealism and Christian teachings, all of which are reminiscent of Plato's upward gesture. The two rights in the German Constitution are followed by a list of specific individual rights, but this list is far from being complete. To close this gap, German courts and authorities, above all the Federal Constitutional Court, have taken the freedom of construing the clauses of "human dignity" and the "free development of personality" in liberal and enterprising ways. Starting with the idea that there should be no place where the protection of individual rights does not apply, these clauses have been turned into general safety umbrellas.

2. United States

As is typical of the common law, the protection of individual rights in the amendments to the United States Constitution does not, in the first place, rely on general, philosophical clauses such as human dignity and the free development of personality. The protection is rather based on a catalogue of specific individual rights, such as freedom of religion and speech, the right to bear arms, and a number of rights concerning the administration of criminal justice. This is a pragmatic method following Aristotle's philosophy as opposed to the Platonic approach in Germany looking at the stars! It is also true that Platonic ideas can be found in American constitutional theory. For example, the American Founding Fathers were believers in the concept of natural rights. Such kind of philosophy, however, hardly becomes visible in the text of the American Constitution. It also does not dominate American constitutional law theory.

An exception seems to be the Due Process Clause of the Fourteenth Amendment, which provides that no one shall be deprived of life, liberty, or property without "due process." Like the German clauses on the protection of human dignity and the free development of one's personality, the impact of the Due Process Clause has been vastly expanded, above all by the U.S. Supreme Court. But unlike the German clauses, due process refers, in the first place, to procedural rights, thus protecting substantive values with the help of procedural mechanisms.

3. Japan

The Japanese Constitution contains a long list of individual rights which mainly follow the model of the amendments to the U.S. Constitution, but are much more comprehensive. As the Japanese Constitution was enacted in 1946 soon after the end of World War II, the German idea of individual rights did not play any role. The new German Constitution was prepared only in the following years.

Individual rights in the Japanese Constitution include a right to the "pursuit of happiness." This right was obviously modelled after a similar clause in the American Declaration of Independence of 1776. While the clause does not appear in the American constitutional amendments, it serves in Japan as a general basis for the protection of individual rights. Japanese courts and legal scholars have taken it, together with another clause on "respecting people as individuals," to protect individual rights in all kinds of cases which are not covered by specific provisions of the Japanese Constitution. Among others, a pervasive protection of privacy as well as the environment developed under the umbrella of these

clauses. It seems that Japanese philosophy of individual rights protection has been expanded in similar ways as in German and American law.

B. Discovering of the Truth in a Criminal Trial

Criminal trials mainly follow one of two models, the inquisitorial or the adversarial. In the inquisitorial trial, which can be found in Germany and other continental European countries, the judge examines the accused and the witnesses. It is the job of the judge to extend the taking of evidence to all issues that might be relevant for deciding the case. The prosecutor and defense counsel may ask additional questions and bring motions, but they play only supplementary roles. The main idea of the inquisitorial trial is that the judge charged with making the final decision knows best what evidence is required to achieve this goal.

As is well-known, the roles of the judge, the prosecutor, and defense counsel are largely reversed in the adversarial trials of the United States and other common law countries. The parties introduce the evidence at the trial. But, under certain conditions, the judge has the power to expand the taking of evidence. The relative passivity of a common law judge may be taken as the background of what an English judge allegedly once said, "During trial judges just sit and think."

In Germany, there have always been scholars who severely criticised the idea of the adversarial trial. They argued that the main purpose of the criminal trial is "to discover the truth." To achieve this goal might be problematic, if not impossible, they asserted, in a trial where the taking of the evidence is left to the prosecutor and defense counsel. Parties will not feel responsible for the outcome of a case. Unlike the judge, the prosecutor might not always function in an objective way, but might just seek the conviction of the accused. There can be no doubt, however, that it is also the purpose of the adversarial trial to find the truth. The requirement that the guilt of the accused must be proved "beyond a reasonable doubt" states this in clear and pragmatic language. As is typical of pragmatic common law thinking, there is not much theoretical debate about the ideal of "finding the truth."

If German scholars criticizing the adversarial trial were to look at Japanese criminal justice, they would have seen that the principle of "finding the truth" may very well be combined with such trials. After World War II, Japan, influenced by American law, replaced its formerly German-oriented inquisitorial system with adversarial trials. At the same time, Japan explicitly adhered to the principle of "finding the truth" at the trial. Thus, relying on Aristotelian realism rather than on

Platonic theorizing would have helped German scholars to solve their imagined problem.

V. CONCLUDING REMARKS

Because the world is now moving closer together, comparative law is playing an increasingly important role. In the European Union, for example, a new layer of European law is being introduced on top of the legal systems of the member states.

Closer business connections between individuals and enterprises in more than one country require new laws that facilitate fast and flexible international transactions. These laws must be in harmony with the national legal systems of the respective countries. New laws are mainly concerned with practical and technical questions. At the same time, it seems they are often burdened with an abundance of detail. In view of this, it would seem advisable to remember the gestures of the two great philosophers, asking how their insights could usefully continue to influence such important legal developments in our day. Plato's approach could hold a great promise in this setting, because law should seek to provide more than an accumulation of technical rules; it should set forth general principles that are capable of being applied to new circumstances as they arise.