

Book Review

The Importance of Structures and Ideologies for the Administration of Justice

The Faces of Justice and State Authority. By Mirjan R. Damaška.*
New Haven: Yale University Press, 1986. Pp. xi, 247. \$26.00

Arthur Taylor von Mehren†

I. INTRODUCTION

The Faces of Justice and State Authority describes and analyzes procedural structures, principles, and rules from an encompassing, comparative perspective. The work considers relationships between procedural forms or styles and both the structures of governmental authority and the polity's view of the state's role. The author brings to the work a broad and deep knowledge of procedural systems and arrangements—past and contemporary—and a thoughtful concern for interactions between theory and practice.

For the student of comparative procedure—civil as well as criminal—Professor Damaška's book makes at least two important contributions. First, it provides an analytical framework within which procedural systems that present very different features can be meaningfully compared. This approach to procedural arrangements advances our understanding of the extent to which procedural styles and practices are products of a society's particular governmental structure and political and economic views. In addition, Professor Damaška provides a context and a basis for a revealing discussion of the genesis and functioning of particular procedural features, such as the varying ways in which cause material is

* Ford Foundation Professor of Comparative and Foreign Law, Yale Law School.

† Story Professor of Law, Harvard University.

gathered for presentation to the adjudicator and the extent to which the adjudicator directs and controls the dispute-resolution process.

The book argues that in fundamental respects all procedural systems are shaped by two ranges of considerations: (1) whether the officialdom of the legal order in question is basically hierarchical or coordinate in form and (2) whether the goal of justice is seen as the implementation of policy (the activist state) or the resolution of conflict (the reactive state). Theoretically, these two ranges of considerations allow for four paradigms: (1) hierarchical-authority and policy-implementation; (2) hierarchical-authority and conflict-resolution; (3) coordinate-authority and policy-implementation; and (4) coordinate-authority and conflict-resolution.¹ Certain procedural characteristics reflect both components of a given paradigm; other characteristics are attributable to only one component. The most marked differences in procedural arrangements will occur in systems which derive, respectively, from the first and the fourth paradigms. However, important similarities may exist in procedural systems related to significantly different paradigms. In such cases, one must look to historical considerations for explanation and understanding.

II. STRUCTURES OF AUTHORITY

Professor Damaška first discusses the organization of adjudicatory authority. He contrasts the hierarchical and coordinate ideals and explores the procedural implications of each ideal form. For each, three pairs of elements are decisive: (1) whether those who operate the system are professional, permanent officials or untrained, transitory personnel; (2) whether the system's personnel are organized into a strict hierarchy; and (3) whether decisions are rendered pursuant to "technical" standards or to "undifferentiated or general community norms."² The hierarchical ideal of officialdom, Professor Damaška argues, is embodied in a system marked by professional officials who are organized in a strict hierarchy and who render decisions according to technical standards. The coordinate ideal, on the other hand, encourages reliance on lay officials, horizontal distribution of authority, and recourse to standards of substantive justice in deciding controversies.³ While these neat patterns are not characteristic of all actual systems, they do provide a convenient classificatory mechanism. The models are particularly useful because, in the author's view, "To the extent to which the organization of judicial authority influences the design of the legal process, the hierarchical and the coordinate ideals . . . offer a convenient perspective upon the always intriguing, never fully

1. M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 181 (1986) [hereinafter by page number only].

2. P. 16.

3. P. 23-28.

grasped contrast between Continental and Anglo-American styles of administering justice."⁴ Against this theoretical background, Professor Damaška discusses briefly and in historical context Continental European and Anglo-American administrations of justice. He concludes that the former has close affinities to the hierarchical, the latter to the coordinate ideal. These affinities are seen to generate and sustain characteristics congenial to the relevant ideal form. "Reciprocities between procedural authority and procedural form . . . [are then] explored in more systematic fashion."⁵

The problem posed is "[w]hat features of the legal process, or elements of its design, can be attributed to specific characteristics of hierarchical and coordinate organizations? What bearing do attitudes prevailing in one or another setting have on procedural form?"⁶ In other words, what are the procedural styles characteristic of each system?

For Professor Damaška, the hierarchical ideal implies the following procedural arrangement:⁷ the availability of regular and comprehensive hierarchical review; the primordial importance of the case file which condenses and abstracts the cause materials; piecemeal trials; the exclusivity of the official process;⁸ and a desire to regulate the legal process to the extent feasible by "an internally consistent network of unbending rules."⁹ The contrasting implications for procedural arrangements of the coordinate ideal are the following:¹⁰ the concentrated trial, relatively little emphasis on regular appellate review, reliance on oral communication and live testimony (rather than on a written record) and on private action, especially in preparing material for consideration at trial, and trials subject to extensive technical regulation but with the adjudicator retaining considerable discretion.

III. FUNCTIONS OF GOVERNMENT

Having considered various connections "between the administration of justice and the *structure* of authority," Professor Damaška discusses "how different conceptions about the *function* of government can affect the shape of the legal process."¹¹ For purposes of this discussion he posits two polar or ideal visions: the reactive state and the activist state.

[The former] is limited to providing a supporting framework within

4. P. 17.

5. P. 46.

6. P. 47.

7. P. 47-56.

8. This includes suspicion of pre-trial contact between lawyers and witnesses and of privately retained experts. *Id.* at 53-54.

9. P. 54-55.

10. P. 57-66.

11. P. 70 (emphasis in original).

which its citizens pursue their chosen goals. Its instruments must set free spontaneous forces of social self-management. The state contemplates no notion of separate interest apart from social and individual (private) interests; there are no inherent state problems, only social and individual problems.¹²

The activist state, in contrast, "does much more than adopt a few propulsive policies and welfare programs. It espouses or strives toward a comprehensive theory of the good life and tries to use it as a basis for a conceptually all-encompassing program of material and moral betterment of its citizens."¹³

For the reactive state, "to administer justice is always to engage in dispute resolution . . ."¹⁴ "Adjudicators merely preside over the disputation of the adverse parties and intervene in the process only insofar as intervention is required to monitor and to ensure the fair disposition of incidental controversies."¹⁵ The lawsuit is seen as a symbolic contest in which judges rely on counsel to develop legal arguments and supply authority. Indeed,

the reactive state is never "inquisitive" about the true state of affairs independently of the interaction of its citizens, even within those segments of reality that its citizens choose to bring before its courts as a matter in dispute. The state has no interests to which private self-governance should be sacrificed; individual autonomy is its highest priority, and as a result, it places significant limits on the quest for truth. Moreover, since only difficult cases are litigated, the "truth"—no matter how conceived—tends to appear elusive and ambiguous. Thus, inspired by the ideology of reactive government, the conflict-solving process is indifferent to how it actually was . . . Having already accorded control over the factual parameters of the lawsuit to the parties, it also permits them to take full charge of proving the facts brought within these parameters.¹⁶

In strong contrast to the reactive state, "the activist state's conception of law as an instrument for the realization of its policy makes the legal process independent of dispute resolution."¹⁷ Accordingly, a dispute between individuals may well be transformed in order to advance state policy effectively. "[A]ctivist government has little reason to tailor a lawsuit to the precise contours of an interpersonal controversy . . ."¹⁸ In effect, inter-

12. P. 73.

13. P. 80.

14. P. 78.

15. P. 79-80.

16. P. 123. A detailed discussion of the characteristics of a mode of legal proceedings that is theoretically appropriate for "The Conflict-Solving Type of Proceeding" is undertaken in Chapter IV.

17. P. 84.

18. P. 85.

personal disputes become the occasion for solving social problems revealed by an individual controversy, and the official inquest characterizes the system's procedural style. "The more fully a state realizes its activist potential, the narrower the sphere in which the administration of justice can be understood as dispute resolution, and the more the legal process is pruned of procedural forms inspired by the key image of a party-controlled contest."¹⁹ At the extreme, the system engenders "a pure investigative model of the legal process."²⁰ Unlike their role in the conflict-solving type of proceeding, private individuals or groups in the investigative model are not autonomous shapers of procedure:²¹ "Ultimately, control over the fact-finding process . . . [is] in the hands of state officials."²² This control need not, however, be exercised by the decision maker.²³ Finally, "[t]he readiness of an activist state to correct substantively faulty judgments is coupled with a great reluctance to disturb substantively accurate decisions, even if obtained through violation of procedural regulation."²⁴

Considering various procedural characteristics in light of the four paradigms that result from juxtaposing the hierarchical and coordinate forms of officialdom, on the one hand, and the reactive and the activist state, on the other, Professor Damaška remarks that some features are implied by both—and others by only one—of a given paradigm's elements. The latter case produces a tension in the system. An example is seen in the hierarchical-authority/policy-implementing paradigm. An activist process tends to favor citizen participation in accessory procedural roles; a hierarchical officialdom, however, disfavors citizen participation, viewing it as "disruptive of orderly and efficient performance of technical tasks."²⁵ Where such tensions are present, procedural arrangements are inherently less stable than where no tension exists. Since both elements of this paradigm support strong official control over the fact-finding process, the absence in the system of such control is most unlikely.

IV. APPLICATION OF ANALYSIS TO ACTUAL PROCEDURAL SYSTEMS

In Chapter VI, "Authority and Types of Justice," Professor Damaška discusses a variety of legal systems, historical as well as contemporary, in terms of these four models. The discussion shows both the utility and the limitations of an analysis that employs pure models to examine the com-

19. P. 87.

20. *Id.* A discussion of the characteristics of a mode of legal proceedings that is theoretically appropriate for "The Policy-Implementing Type of Proceeding" is undertaken in Chapter V.

21. P. 152.

22. P. 162. State control can be exercised in various ways; in particular, it is not necessary "for fact-finding to be structured and dominated by . . . [those] in charge of rendering the decision on the merits." *Id.*

23. *See* p. 162-64, 168-70.

24. P. 180.

25. P. 186.

plex reality of human affairs.²⁶ Soviet criminal process is presented as “a pronouncedly activist and hierarchical system”;²⁷ the limiting case of this type of system is, however, China’s criminal process during the period of the Cultural Revolution.²⁸ The civil process of absolutist Prussia²⁹ and of the USSR³⁰ provide further, but more muted, examples of the policy-implementing process of hierarchical officialdom in action.

Two models of the conflict-solving process are then considered: the first involving hierarchical officialdom,³¹ the second involving coordinate officialdom.³² Here the author contrasts historical and contemporary forms of Continental European civil procedure with their Anglo-American analogues. The characteristic arrangements of Continental European procedure can be understood as reflecting the place of hierarchical officialdom in these systems. On the other hand, the tradition and present form of coordinate officialdom decisively shape Anglo-American procedure.

Chapter VI concludes with a discussion of a type of procedure that has far fewer historical or contemporary expressions than any of the other types analyzed: the policy-implementing process of coordinate officialdom.³³ Drawing upon Anglo-American systems for examples of this model, Professor Damaška examines such historical forms as the self-informing jury, investigation and adjudication by justices of the peace, the grand jury, and the criminal process at assizes.³⁴ Several contemporary phenomena are considered and their affinities with the policy-implementing/coordinate-officialdom paradigm discussed; these include the role of so-called “private attorneys general,” the use by federal judges in the United States of “structural” injunctions to take over the direction and management of prisons, schools, and other public institutions, and the rise of so-called public interest litigation.³⁵

V. METHODOLOGICAL AND ANALYTICAL REFLECTIONS

Few scholars could bring to these methodological and comparative tasks such a combination of historical and contemporary learning. Certainly in the English language no analogous attempt to approach procedural systems in comparative terms has ever been made. Damaška’s learning encompasses civil as well as criminal procedure and goes beyond the two

26. See p. 241–42.

27. P. 198.

28. See p. 198–99.

29. See p. 201–02.

30. See p. 202–04.

31. See p. 205–14.

32. See p. 214–26.

33. See p. 226–39.

34. See p. 228–31.

35. The shift from a laissez-faire to a welfare state model of the criminal process is also discussed. See p. 234–37.

great western legal traditions—the common law and the civil law—to include the experience of Soviet Russia and the People's Republic of China. *The Faces of Justice and State Authority* is an excellent, ground-breaking work.

Doubtless those who are specialists in given historical or contemporary systems of civil or criminal procedure can fault Professor Damaška on this or that detail. Of more interest and importance, however, are difficulties jurists may have with the book's methodology and general analysis. Three questions respecting the application to civil procedure³⁶ of the book's methodology and general analysis occur to this reviewer. In the first place, are there procedural policies that require attention in any procedural system and whose formative force does not turn directly on any of the elements that determine Professor Damaška's procedural paradigms? Second, are there discrete institutional characteristics, compatible with—but not necessarily entailed by—these paradigms, that significantly shape systems of civil procedure? Third, for American civil procedure, is not the decisive feature the use of untrained, transitory personnel—the jury—rather than the assertedly coordinate nature of procedural officialdom? And is the jury's presence in the final analysis a historical accident in the sense that the institution does not derive from thinking about the structure of procedural officialdom?

A. *Universal Procedural Policies*

The first procedural policy that strikes one as a relatively independent force operating in all four paradigms is that of reasonable expedition in—depending on the paradigm—implementing policy or resolving conflict. Of course, what is considered *reasonable* expedition is, within limits, influenced by a procedural system's structure and goals. Structural considerations can, moreover, be decisive of the phase of the proceedings in which the problem is addressed. For example, during concentrated (or single-episode) first-instance proceedings, delay resulting from party maneuvers or procrastination³⁷ is unlikely to be a serious problem; instead, the problem is endemic to the pre-trial phase. Conversely, where first-instance proceedings are discontinuous or episodic, the problem of delay centers on the trial stage.³⁸

The point is that concern for delay in itself brings about institutional

36. Having never worked with comparative criminal procedure, this reviewer is not in a position to opine about possible difficulties in the criminal area.

37. Delay due to inadequate staffing of the system is a different matter, of course. But the remedies are more clear-cut: either change the substantive or procedural law to make more efficient use of existing faculties and personnel or increase the number of personnel.

38. See A. von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, in 2 *EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART* 361, 367–70 (N. Horn ed. 1982); A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 207–08 (2d ed. 1977).

accommodations that may be in tension with the procedural arrangements described in Professor Damaška's paradigms. For example, dissatisfaction with delay fueled the reform of the German Code of Civil Procedure, which produced important amendments that came into force on January 1, 1975, and July 1, 1977.³⁹ In first-instance proceedings, these amendments seek, above all else, to concentrate the trial as much as possible within the general framework of a discontinuous procedure. In German first-instance proceedings, the policy of reasonable expedition is thus in tension with the implication of the conflict-solving/hierarchical-authority model within which Professor Damaška locates Continental European civil procedure. The German reforms impose a procedural duty on each party to present his case as promptly and completely as possible. Under the *Zivilprozessordnung*, this duty is sanctioned by the court's power to exclude claims, defenses, and cause material if "in the court's opinion the ultimate disposition of the controversy would be delayed by admitting the matter in question and the delay was due to gross negligence."⁴⁰ Significant discretion is thus exercised by the court of first instance. Furthermore, as a result of the new amendments, where the court of first instance excludes material, the excluded material is no longer admissible on appeal (*Berufung*)—even though, in principle, appeal permits a full retrying of the case, including the introduction of new evidence.⁴¹ The procedural policy of reasonable expedition thus seems a formative force that is not entirely captured by Professor Damaška's paradigms; on occasion, the policy pushes a procedural system in directions other than those suggested by the relevant paradigm.

Another fundamental procedural policy—that which disfavors surprise—requires that whoever is charged with gathering the materials on the basis of which the adjudicator will decide be in a position to do a reasonably thorough job. Regardless of the system in question, this procedural policy finds expression in one of two basic ways: either (1) full preparation is essentially completed before presentation to the adjudicator or (2) the presentation is susceptible to postponements and extensions as new factual allegations or issues arise in its course. Within each of these two basic approaches, several variations are possible. For example, extensive pleadings by each party can be required and continued until every point of agreement and disagreement between the parties has emerged. Alternatively, the pleading process can be abbreviated and arrangements provided whereby those charged with gathering the cause materials can

39. See A. von Mehren, *supra* note 38, at 370.

40. ZPO § 296(2) (1985): "[W]enn ihre Zulassung nach der freien Überzeugung des Gerichts die Erledigung des Rechtsstreits verzögern würde und die Verspätung auf grober Nachlässigkeit beruht."

41. Section 528(3) of the Code of Civil Procedure now provides that "Angriffs- und Verteidigungsmittel, die im ersten Rechtszug zu Recht zurückgewiesen worden sind, bleiben ausgeschlossen." ZPO § 528(3) (1985). ("Grounds of claim and defense, correctly excluded in the first instance, remain excluded.")

familiarize themselves thoroughly with the matter before presentation to the adjudicator begins. In contemporary American civil procedure, the latter approach has been used and provision is made for elaborate pretrial interrogatory and discovery procedures.

A system that does not accommodate the policy in favor of expeditiousness by arrangements that operate before the presentation to the adjudicator begins requires accommodations that take hold during the presentation itself. Postponements and extensions of the presentation become inevitable; a discontinuous trial cannot be avoided.

All solutions to what is usually called the problem of surprise carry certain institutional advantages and disadvantages. For example, reliance on pretrial investigatory procedures such as interrogatories and discovery at the stage of presentation to the adjudicator both enhances the position of those who have prepared the case and encourages a passive role for the adjudicator. Conversely, where the problem of surprise is dealt with after the presentation of the matter to the adjudicator has begun, he need not necessarily remain passive. Indeed, because surprise now tends to become entangled with delay, the adjudicator's position tends to be more pivotal. Here again, as in the case of the delay problem, formative forces are set in motion whose sources lie, at least in some measure, outside Professor Damaska's paradigms.

B. *Institutional Characteristics*

If universal procedural policies shape procedural systems, so too do particular institutional characteristics. Thus, many significant aspects of first-instance civil procedure can be viewed as depending upon whether the presentation of the cause to the adjudicator is concentrated or discontinuous.⁴² In a procedural system that uses a concentrated trial, the delay problem arises not at the trial stage, but prior to trial. Specific pressures that have important effects on procedural arrangements operate in such systems; in particular, as has already been remarked, the surprise problem can be handled only by arrangements that take hold before the presentation of the cause materials to the adjudicator has begun.

Other options for dealing with surprise are available to a system accustomed to the discontinuous trial. Such systems can deal with surprise either by adopting arrangements that attach at the pretrial stage or, alternatively, by simply taking advantage of the discontinuous nature of the system's trial phase. Indeed, an interaction between the procedural policy against surprise and the discontinuous nature of the trial is normal; to avoid surprise, the trial must be discontinuous and, therefore, there is no

42. See generally A. VON MEHREN & J. GORDLEY, *supra* note 38, at 203-08.

need to develop alternative approaches to the surprise problem with their attendant complications and difficulties.

C. *Anglo-American Civil Procedure*

There remains the question whether, for Anglo-American civil procedure, the coordinate nature of procedural authority is as clear and decisive as Professor Damaška suggests. From a contemporary American perspective, only one of the three elements that characterize coordinate authority, the important reliance on occasional, *ad hoc* adjudicators (the jury), seems pervasive and of decisive importance. The reliance on such adjudicators clearly requires practices and arrangements that would not be necessary if all first-instance proceedings in the American system were conducted before judges alone. Use of a jury system requires concentration of the trial phase; an occasional, *ad hoc* adjudicator simply cannot be available for episodic proceedings that occur from time to time over an extended period. Likewise, if a jury system is to remain faithful to its animating philosophy, first-level appellate review cannot undertake a full redoing of the matter except by impanelling a jury. The practical difficulties and costs that would be involved are, of course, far too great for such an arrangement to be feasible. The more restrictive character of the first level of appellate review in the United States than in many Continental European systems is explained quite as well by this reality as by different attitudes towards hierarchy.

In this connection a final observation can be ventured: In large measure, the coordinate nature of contemporary American procedural officialdom can be understood as entailed by the use of juries; however, neither the jury's emergence nor its continued existence seems to be rooted in society's adherence to the coordinate ideal. Theories and values, on the one hand, and social and institutional arrangements and practices, on the other, always interact. But the influence that one side of the equation has over the other varies in the course of history considerably. In the case of first-instance proceedings in the United States, arguably the institutional fact of the jury—rather than the attractiveness of coordinate values—has been, and remains, decisive.

To the extent that these criticisms have merit, they suggest that Professor Damaška's approach underestimates the separate and independent importance of certain procedural policies and institutions. His paradigms may well explain the general contours that procedural systems exhibit. However, the range of possible variation remains considerable. Particularly in comparing systems produced by juridical traditions that are culturally and historically linked, Professor Damaška's approach may attribute too little independent significance and force to procedural policies against delay and surprise and may underplay the importance of discrete

institutions such as the concentrated or episodic nature of first-instance proceedings.

