

*Mirjan Damaška:
A Bridge Between Legal Cultures*

HAROLD HONGJU KOH *

HOW MANY PEOPLE ascend the highest mountains in both their native and adopted countries? In law, I know of only one: Mirjan Damaška, Sterling Professor of Law at Yale Law School. Professor Damaška rose to the top of the legal academy of Croatia during the first half of his life, uprooted himself to the United States and then rose to the top of the legal academy in his new country. The University of Zagreb Law School, where Mirjan Damaška served as Acting Dean nearly four decades ago, is 230 years old; Yale Law School, of which I am proud to be Dean, is nearly 200 years old. But in those two centuries, only one individual has scaled the heights of the legal academies of both the United States and the former Yugoslavia. Only one scholar has received the Ruder Bošković Award for Legal Science in Croatia and the Sterling Professorship of Law at Yale University. Only one lawyer has been elected a Fellow of both the American Academy of Arts and Sciences and the Croatian Academy of Arts and Sciences.

What would be a stunning accomplishment for any scholar has been made particularly poignant by Mirjan's unique scholarly role as a 'comparative law bridge' between the United States and Europe. Damaška has divided his life between two legal cultures. After his student days studying for his basic law degree at the University of Zagreb in Croatia, he earned

* This chapter grew out of remarks delivered in November 2006 at the 230th Anniversary Ceremony for the Faculty of Law, University of Zagreb, at the awarding of the Ruder Bošković Prize in Legal Science to Professor Mirjan Damaška, in conjunction with the International Conference on Global Legal Trends in Comparative Perspective. I am grateful to Dean Josip Kregar and Vice Deans Ivan Šimonović and Ksenija Turković of the Faculty of Law, University of Zagreb for their extraordinary hospitality; to Kate Desormeau and Nicole Hallett of Yale Law School for their outstanding research assistance; and to Mirjan Damaška for including me in an unforgettable event in which Croatia's President, Prime Minister, and his two law schools honoured his lifetime of achievement.

his Diploma in Comparative Law from Luxembourg and his PhD from the University of Ljubljana in what is now Slovenia. Soon thereafter, he began his professorial career at the University of Zagreb Faculty of Law, where he taught for 11 years, two of them as Acting Dean of the Faculty. His integrity was legendary. When the son of Yugoslavia's President Josip Broz Tito presented him with a failing examination, Professor Damaška forthrightly awarded him a failing grade. How many of us would have had the courage to do the same?

In 1971, when he saw his own students being beaten and arrested, Damaška made a heart-wrenching decision: To leave his native land and accept a tenured professorship at the University of Pennsylvania School of Law. There he taught for six years,¹ before moving to Yale in 1976, where he has graced our faculty for the past three decades, first as Ford Foundation Professor of Foreign and Comparative Law and then as Sterling Professor of Law.

As a scholar who has spent his life between two cultures, Mirjan Damaška has never turned his back on the past. He became a mentor to many young scholars, whose tributes appear in this *festschrift*. Seeing in me another child of immigrants, he has shown me special kindness as his junior colleague. In the more than two decades we have taught together on the Yale law faculty, he and his lovely wife Marija have been the most gracious friends and faculty colleagues. He served on the appointments committee that voted me a junior professorship at Yale. He reassured me during my tenure process. When I was asked to serve as Assistant Secretary of State for Democracy, Human Rights and Labor, he advised me on the likely challenges and rewards. And as a former Dean himself, he has confided wise secrets on how best to survive and thrive as a law school dean.

For all of his personal graciousness, Mirjan's greatest contribution has been as an intellectual bridge between the two cultures he has inhabited. His greatness is measured best, not just by his academic achievements, but by the pathbreaking ideas he has contributed to legal thought. He has written six books and published over 80 articles, in eight countries, regarding comparative law, criminal law, criminal and civil procedure, evidence, constitutional law, and Continental legal history. Proficient in eight languages, he has served on boards of editors of journals all over the

¹ For a thoughtful account of his early years in the United States, see M Damaška, 'A Continental Lawyer in an American Law School: Trials and Tribunals of Adjustment' (1968) 116 *University of Pennsylvania Law Review* 1363.

world;² and he has served as an intellectual bridge particularly in three areas: comparative and foreign procedure, the law of evidence, and international criminal law.

In comparative procedural law, his deepest influence has come from his pathbreaking book *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*.³ Rejecting the traditional dyad of comparative procedure, which equates common law with adversarial process and civil law with inquisitorial process, Damaška offered a more nuanced descriptive framework, organised along two different axes. Damaška's 'hierarchical – co-ordinate' axis reflects the way a state has organised its judicial officials, with hierarchic states structuring their judicial branches with stratified authority and rigid role definition, in contrast to co-ordinate states, who organise their judges loosely, with overlapping spheres of authority and concentrated, informal decision-making processes. Damaška's second, 'state activism' axis considers as 'activist' those states that seek to implement substantive values through many vehicles, including the judicial process, while reactive states endorse no specific substantive vision of the good life, with their judiciary playing the role of neutral arbiter of private disputes, enforcing contestants' bargains, and deferring to party autonomy.

Any procedural system, Damaška argued, can be located along these two axes. Viewed in this light, the classic Anglo-American trial is co-ordinate/reactive, while the classic Continental approach is hierarchic/activist. Within these frameworks, procedural rules evolve to carry out the work that they are doing. The particular rules of procedure that develop within these systems reflect an organisational structure that captures the society's preferred view of the state. Thus, Damaška views particular procedural rules as reflections of complex sociopolitical attitudes and choices about the social ends that trials are designed to achieve. By viewing procedural rules as components of larger legal systems, he builds holistic interpretive frameworks, without lapsing into reductionism or oversimplification.

Damaška's reframing of comparative procedure has been hugely influential, by shifting the explanatory weight from narrow policies designed to

² Professor Damaška has served on the Board of Editors of the American Journal of Comparative Law; on the Board of Editors of the International Journal of Evidence & Proof in London; on the Boards of Editors of *Zbornik Pravnog*, at the Faculty of Law in Zagreb and of *Hrvatski Ljetopis za Kazneno Pravo* in Zagreb; and on the Advisory Board of the Journal of International Criminal Law.

³ M Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, Yale University Press, 1986). He is also the co-author of a leading comparative law casebook. See M Damaška *et al*, *Comparative Law*, 5th edn (Mineola, NY, The Foundation Press, 1988).

explain particular rules toward broader cultural attitudes toward governance and state authority. Under Damaška's two-by-two matrix, for example, the distrust of hearsay in Anglo-American procedure (as opposed to the relative tolerance of hearsay by civil law procedure) does not simply reflect distrust of the cognitive limitations of lay juries. More fundamentally, the more restrictive hearsay rule in common law countries is a functional antidote to the nonhierarchical, co-ordinate structure of decisionmaking in those countries, a structure that increases the risk that derivative evidence will be entered in error.⁴

Damaška's second seminal book, *Evidence Law Adrift*, expanded upon his cultural enquiry into comparative procedure.⁵ Asking why Anglo-American common law rules of evidence have evolved into their current form, Damaška offered a characteristically systemic and cultural answer. He isolates the bifurcated jury trial, the temporal concentration of the hearing, and the adversarial system of dispute resolution as three distinctive institutional pillars supporting our modern Anglo-American system of evidence. Yet each pillar, he notes, is fast eroding. Jury trials are disappearing; the stages of trial are proliferating; and the rise of managerial judging, plea bargaining, settlements, administrative procedures, and alternative dispute resolution have all diluted the traditional party-driven adversarial system. As Anglo-American common law trials have begun to resemble Continental, civil law trials, Damaška writes:

with jury trials marginalised, procedural concentration abandoned, and the adversarial system somewhat weakened, the institutional environment appears to have decayed that supplied distinctive features of common law evidence with a strong argumentative rationale. ... Therefore, the rules of evidence 'face the danger of becoming antiquated period pieces, intellectual curiosa confined to an oubliette in the castle of justice.'⁶

At the same time, however, Damaška explains that common law jurisdictions will not simply converge into civil law systems, because they lack the professionalised civil service bureaucracy and activist mentality needed to support the activist enforcement of civil law rules. Instead, he predicts, common law jurisdictions will produce 'indigenous remedies' to reflect

⁴ See M Damaška, 'Of Hearsay and Its Analogues' (1992) 76 *Minnesota Law Review* 425, 427–29. Damaška notes that Anglo-American courts typically have juries deliberating *in camera*, left to their own devices outside the judge's earshot, while Continental courts allow factfinders to sit side by side with professional judges. Civil law trials are only one stage in an ongoing sequence of hearings; thus, if a witness reproduces an out-of-court statement in a civil law trial, the factfinder can usually find the original declarant in time to secure his testimony in court during the next phase in proceedings. Thus, the unhurried pace of the civil law system, made possible by the *hierarchical* organisation of its judicial system, permits hearsay to be vetted more easily and hence entered into evidence with less risk of error.

⁵ M Damaška, *Evidence Law Adrift* (New Haven, Yale University Press, 1997).

⁶ *Ibid* 142 (internal citations omitted).

their judicial systems' changing demands on the rules of evidence.⁷ In the end, Damaška suggests, the strong Anglo-American adversarial system is more committed to dispute resolution than to truthfinding, elevating

considerations of disputational fairness – such as the balancing of advantages between the litigants – to the status of values capable of interfering with the search for the truth. And it is the primacy of the conflict-resolving vision that explains why the competitive fact-finding system appears acceptable – or even desirable – in Anglo-American countries, despite the departures it entails from ordinary fact-finding practices.⁸

Like *The Faces of Justice, Evidence Law Adrift* has been hugely influential, and these two works have become canonical works in the field of comparative procedure.⁹ Damaška has been celebrated not simply for his ability to bring order to complexity, but for his prodigious 'wealth of learning and ... richness of detail,'¹⁰ his 'sterling record of scholarship'¹¹ and his stature as a 'historian of great breadth and ability.'¹² Beyond his erudition, Damaška has been praised for his 'finesse,'¹³ and his unusually

graceful English, ... [marked by] remarkable precision and ease ... [which] conveys a sense of fascination with the language and what it can do.¹⁴

But what most inspires his admirers – one of whom calls his work 'spell-binding'¹⁵ – is his ability, like Linnaeus, to catalogue phenomena and, by cataloguing, to illuminate their places in a larger ecosystem¹⁶ and, like a chess grandmaster, to understand and illuminate complex systems

⁷ *Ibid* 151–52.

⁸ *Ibid* 124. See also M Damaška, 'Truth and Its Rivals: Evidence Reform and the Goals of Evidence Law' (1998) 49 *Hastings Law Journal* 289 (elaborating upon the goals of fact-finding in common law proceedings, particularly the diminution of the goal of truth-finding).

⁹ For just a sampling of the academic praise for Damaška's work, see, eg, RD Friedman, 'Anchors and Flotsam: Is Evidence Law "Adrift"?' (1998) 107 *Yale Law Journal* 1921 (book review); M Reimann, 'The Faces of Justice and State Authority: A Comparative Approach to the Legal Process' (1988) 82 *AJIL* 203 (book review); NV Demleitner, 'More Than "Just" Evidence: Reviewing Mirjan Damaška's Evidence Law Adrift' (1999) 47 *Am J Comp L* 515 (book review); I Markovits, 'Playing the Opposites Game: On Mirjan Damaška's "The Faces of Justice and State Authority"' (1989) 41 *Stanford Law Review* 1313 (book review); RC Park, 'An Outsider's View of Common Law Evidence: Evidence Law Adrift' (1998) 96 *Michigan Law Review* 1486.

¹⁰ Markovits, above n 9, at 1316.

¹¹ HT Edwards, 'Comments on Mirjan Damaška's *Of Evidentiary Transplants*' (1997) 45 *Am J Comp L* 853, 853.

¹² Friedman, above n 9, at 1923.

¹³ Reimann, above n 9, at 204.

¹⁴ Park, above n 9, at 1506.

¹⁵ Demleitner, above n 9, at 515.

¹⁶ See Markovits, above n 9, at 1315: 'Like that great classifier, Carl von Linne, who brought order into the bewildering richness of plant life by devising a consistent hierarchy of plant properties that allows botanists to name and group every conceivable species, Damaška

with multiple moving parts.¹⁷ Indeed, it is precisely because Damaška has enough distance from both his home and adopted legal systems that he can grasp the deep structure of both systems and see their commonalities and convergences.

Damaška's scholarly approach emphasises three demands: careful attention to context; resisting oversimplification; and the need for legal systems to adjust to revolutionary change. He argues, for example, that evidentiary rules are so rooted in their historical and cultural context that they cannot be transplanted piecemeal from common law to civil law jurisdictions. 'The score may be the same, so to speak,' he once said, 'but if the instruments and players are not, the legal music will sound differently.'¹⁸ For the same reason, Damaška calls for restraint from those scholars who would simplistically call for transplanting certain procedural rules from one jurisdiction to another. Yet at the same time, Damaška recognises that, as jury trials disappear, concentration of procedural hearings diffuses and the adversarial system weakens, the common law procedural and evidentiary system will undergo real, revolutionary change, which our legal policymakers will need to address.

A third and final area of Damaška's interest has been the fast-moving field of international criminal law.¹⁹ Since 1995, he has periodically advised the Croatian government in its relations with the International War Crimes Tribunal for the Former Yugoslavia and the International Court of Justice in The Hague, and he has studied legal issues facing the International Criminal Court as well. He has counseled leading law firms on matters of foreign law, conflict of laws, and international criminal law, and served on the advisory board of the *Journal of International Criminal Law*. As we have seen in recent years, international criminal justice serves multiple functions in a global system of human rights: deterrence; truth-telling; retribution for the victims; and enunciation of emerging global norms,²⁰ as well as delegitimation of political actors – such as Slobodan Milošević, Radovan Karadžić, or Charles Taylor – who might otherwise

wants to construct procedural archetypes that will allow us to name the components of the most diverse existing procedural styles and group them into recogni[s]able and meaningful patterns'.

¹⁷ Markovits, above n 9, at 1314 (comparing *The Faces of Justice and State Authority* to 'a grandmaster's opposites game').

¹⁸ Edwards, above n 11, at 853, quoting Mirjan Damaška.

¹⁹ See, eg, M Damaška, 'Negotiated Justice in International Criminal Courts' (2004) 2 *JICJ* 1018–1039; M Damaška, 'Boljke Zajedničkog Zločinačkog Pothvata [The Malady of Joint Criminal Enterprise]' (2005) 12 *Hrvatski Ljetopis za Kazneno Pravo i Praksu [Croatian Annual of Criminal Law and Procedure]* no 1, 3–11; M Damaška, *L'incerta identità delle Corti penali internazionali* [The uncertain self-identity of international criminal courts], (Criminalia, *Annuario di scienze penali*, 2006) 9–55.

²⁰ See, eg, *Prosecutor v Kunarac et al*, Judgment (22 Feb 2001), Case No IT-96-23/1, available at <<http://www.un.org/icty/foca/trialc2/judgment/index.htm>> accessed 13 June 2008 (holding that rape and sexual enslavement in wartime are crimes against humanity).

seek to play a future role in the political life of an embattled country. Damaška's rare knowledge of both the common law and civil law systems makes him the logical scholar and lawyer to help shape this critically important, quickly evolving field.

In short, although Mirjan Damaška has accomplished a great deal in his two lifetimes, the crises of our times gives him much work still to do. In this essay, I have deployed an array of metaphors to describe Mirjan Damaška's intellectual gifts and scholarly role. I have called him variously a mountaineer, a botanist of the law's ecosystem, and a grandmaster of the law of procedure. But in the end, perhaps the most lasting image of Mirjan will be as an intellectual bridge between legal cultures. For as globalisation proceeds, Mirjan Damaška's ideas will only grow in importance, as the rapid development of transnational and international law create multiple channels for dialogue among diverse legal cultures in a globalising world.

