The Faces of Justice and State Authority & Constitutional Law Deskbook

Mary Benge Sanchez
Jeremy M. Miller

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr
Part of the Law Commons

Recommended Citation

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol23/iss2/6

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.
BOOK REVIEWS


Reviewed by Mary Benge Sánchez*

In The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, Mirjan Damasca creates a new conceptual methodology to facilitate the comparative analysis of legal systems. In doing so, Damaska constructs a framework for examining the legal process as it is derived from attitudes toward state authority and is influenced by the role of procedural officialdom.

The author develops two primary themes about politics and justice: the character of procedural authority, and the legitimate functions of governments. Damaska develops each theme separately in order to form a context, or taxonomy, within which procedural diversity may be linked to the changing roles and compositions of contemporary governments. Although Damaska acknowledges conventional modes of analysis, his purpose is to redesign the scientific discovery process of comparative law in order to detect relationships, and to sharpen similarities and differences which are not perceived through conventional study.

In discussing the organization of authority, Damaska suggests two models as a framework: the hierarchical and coordinate ideals. Building on this framework, he assembles characteristics of procedural officialdom. The models can be used to distinguish justice in common law and civil law systems; however, use of the models is not limited to the analysis of these two systems. The author explores several aspects of procedural design, the effect of organization on perspective of issues, and the value of discretion as opposed to the value of rules.

One advantage of Damaska's new conceptual methodology is that it

---


is independent of the conventional dichotomy between civil law inquest and common law contest. There is no necessary relationship between the organization of procedural authority and the object of the proceedings. Each style, hierarchical and coordinate, can combine with both of the conventional categories of inquest and contest.

After establishing the concepts of hierarchical and coordinate officialdom, Damaska examines the political ideologies behind the views of officialdom. In his examination, Damaska reveals connections between the design of legal proceedings, and dominant views on the role of government in society.

Damaska uses two models to examine the political ideologies behind the views of officialdom: the activist state and the reactive state. In the activist state, in which the government has a managerial function, the administration of justice is devoted to the fulfillment of state programs, and to the implementation of state policies. In the reactive state, which exists to maintain social equilibrium, the focus of the judicial system is on conflict resolution. Using the two contrasting purposes of justice, the conflict-solving type and the policy-implementing type, Damaska articulates them as two archetypes of the legal process.

In the final chapter of the book, the author assembles four possible combinations of the policy-implementing process, the conflict-solving process, hierarchical officialdom, and coordinate officialdom into a taxonomy. Damaska then applies these combinations to various procedural arrangements and institutions which characterize the administration of justice in some prominent legal systems.

While Damaska’s suggested methodology is novel to the study of comparative law, it invites analogy to the contemporary European structuralist methodology utilized in literary analysis. Although Damaska does not adopt structuralist terminology to describe his work, many structuralist concepts are used eclectically in his discussion of the legal process. In addition, Damaska’s theoretical goals closely parallel structuralists’ goals in literary analysis and in other social disciplines.

Structuralism is an analysis of cultural artifacts which originates in the methods of contemporary linguistics. In other words, structuralism is an attempt to analyze non-linguistic “languages.” The concept began

2. For general explanations and criticisms of linguistic structuralism and its possible applications to other social and cultural phenomena, see J. Culler, Structuralist Poetics: Structuralism, Linguistics and the Study of Literature (1975); A. Greimas, Structural Semantics: An Attempt at a Method (1984); C. Levi-Strauss, Structural Anthropology (1963); A. Jenkins, The Social Theory of Claude Levi-Strauss (1979).
with Ferdinand de Saussure's semiology, or general science of signs. Structuralism is based on the realization that if human actions or productions have meaning, there must be an underlying system of distinctions and conventions that make this meaning possible. Structural explanation relates an object or an action to conventions which give the object its meaning and distinguish the object from phenomena with different meanings. The system of constitutive rules does not regulate behavior so much as it creates the possibility of particular forms of behavior.

Although the principal application of structural analysis has traditionally been in the field of literary analysis, linguists have expressed the belief that structural analysis may be applicable to all types of cultural phenomena, including language, beliefs, techniques, and customs. Linguists have stated two reasons which support this belief. First, social and cultural phenomena are not simply material objects or events, but objects or events with meaning; thus, the phenomena are considered "signs." Second, these phenomena do not have essences, but are defined by a network of both internal and external relations. The defining qualities of cultural and social phenomena distinguish the phenomena from one another, and enable them to bear meaning within their symbolic system. Not only is the context structured, but the object itself is structured and is defined by its place in the system. Hence, this method of analysis is known as "structuralism."

Some structuralists believe that structural analysis is applicable to any object of cognition and can be legitimately viewed as a structure from which appropriate analytical starting points can be found. For example, Claude Levi-Strauss theorizes that anthropology is a branch of semiology which may be adapted to structural analysis. Anthropology is, in part, the study of signs and these signs may provide the requisite analytical starting points. Damaska designates the character of procedural authority and the functions of government as his analytical starting points. Perhaps linguistic analysis, from which the structuralist methodology is derived, provides a formula to successfully direct the analysis of a comparative approach to the legal process.

Synchronic analysis is one of the structuralist concepts which Damaska uses in his analysis. Synchronic analysis is the reconstruction of a system as a functional whole; the value of items is defined by their place in the present system, rather than by their history. The system analyzed in any particular case is broken down to the role of elements in
The system. As a structuralist, Damaska begins by breaking down cultural facts into abstract elements. He then considers these elements in light of their mutual relationships. To clarify relationships between elements of the legal process, Damaska reconstructs two models, or archetypes, and casts out their historical idiosyncracies to sharpen his model. The two resulting archetypes of the legal process are based on two contrasting purposes of justice, the conflict-solving type of proceeding, and the policy-implementation type of proceeding.

Throughout the book, Damaska stresses that these archetypes and their terms are not articulations of existing common law or civil law systems. Instead, they are tools in the study of complex combinations of processes, officials, and systems. The archetypes are means to analyze the processes in terms of their components. Used in this way, the archetypes are versatile enough to be applied beyond the traditional civil law/common law dichotomy.

Another structuralist concept which has an important role in Damaska's methodology is diachronic analysis. Diachronic analysis traces the historical evolution of the elements of an object or act through various stages. Diachronic analysis appears throughout The Faces of Justice and State Authority as Damaska selects data accumulated from the conventional study of comparative law, and rearranges this data in new ways suggested by his analytical categories. However, as is always essential to the structuralist approach, the author carefully separates the diachronic analysis from the synchronic analysis to avoid falsifying the synchronic description.

Language, of course, is a system of relations, and relations are crucial to structuralist interpretation. In examining the association of politics and justice, Damaska isolates numerous types of relations derived from structuralist concepts. Distributional relations are between elements of the same level; integrative relations are between elements of different levels. Damaska's hierarchical and coordinate models of administration of justice are predicated on distributional and integrative relations, respectively. The distributional relation is illustrated in Damaska's description of the coordinate model's case of legal professionals who interact in a symbiotic relationship with lay officials. The hierarchical model, in which dominant views are formed at the top and filter downward, exemplifies the integrative relation.

The actual framework, or taxonomy, which is the product of

---

3. M. Damaska, supra note 1, at 12.
Damaska’s work, is itself based upon the structuralist concept of syntagmatic relations. Syntagmatic relations affect the possibility of combination. By the final chapter of The Faces of Justice and State Authority, Damaska classifies two types of procedures: policy-implementing and conflict-solving. He also classifies two types of authority: hierarchical and coordinate. He then assembles these categories in a table in which resulting combinations fall into four two-by-two combinations. This approach is more discriminating than conventional theory because Damaska’s taxonomy allows for sharper perception of similarities and differences. The taxonomy also facilitates detection of new relationships. Damaska believes that viewing the combinations in such a scheme provides a “better orientation in the midst of so many faces and moods of justice.” This syntagmatic relation is the culmination of the framework which the author hopes will serve as a basis of analysis for a variety of contemporary legal processes.

The paradigmatic relation, which determines the possibility of substitution, is another structuralist concept important to Damaska’s methodology. In paradigmatic relation, the meaning of any item depends on the differences between it and other items which might have filled the same slot in a different sequence. Damaska’s organization of the text itself represents a paradigmatic relation. For example, in his analysis of conflict-resolving proceedings, the author discusses each of the following elements: regulation, status of participants, control over the process, position of the decisionmaker, status of legal counsel, and finality of decisions. He then changes the context to policy-making proceedings and makes appropriate substitutions.

Finally, Damaska’s methodology involves the use of yet another structuralist tool, binary opposition, the poles of which are the activist and the reactive states. To create a binary relation, Damaska builds his models from the most distinctive features that compel contrast between Anglo-American and Continental systems of government. The models arise against two extreme views about the role of government. These views are created through exaggeration and stylization of the distinctions. The advantage of this binary opposition is that the reader is then forced to explore similarities and differences, and to perceive possible connections so as to derive meaning from the disjunctions. Once the model is constructed, mixtures and variations can be explored against the same background.

4. Id. at 240.
The questions of whether one may legitimately consider comparative law a semiology, and whether the elements of judicial process function as signs, invite both reflection and debate. Controversy exists among linguists and among anthropologists regarding the validity of structural analysis of social and cultural phenomena. Criticism surrounds Levi-Strauss' basic understanding and application of Saussurean theory to anthropology, as well as other bases of Strauss' methodology. In The Faces of Justice and State Authority, Damaska builds a similar theoretical framework on which to analyze and compare legal systems and cultures. However, this taxonomy's usefulness as a method of study for comparative law is still speculative.

In the afterword, Damaska warns that political factors are not the sole determinants of procedural form. Also important are criteria such as moral and cultural experience, the fabric of inherited beliefs, and similar considerations. Therefore, determinants from the political sphere account for only a limited number of procedural phenomena.

Damaska's mode of inquiry does not describe legal systems, but instead provides a set of formal classifications to compare legal processes. Again, capacity for realization beyond the models developed by the author awaits further application; what exists now is the algorithm. In its striking similarities to linguistic interpretation of literature, and its derivative, structural anthropology, Damaska's methodology for the study of legal processes should be of interest not only to those interested in the study of comparative law, but also to scholars in other disciplines in which structural interpretation may be given relevance.

Reviewed by Jeremy M. Miller*

For the most part, constitutional law is individual rights; thus, the title of this book, although descriptive, is somewhat redundant. Aside from its virtues, the book is also redundant in another way — there are now literally scores of constitutional law hornbooks, treatises, tapes, and commercial outlines. However, I suppose that there is always room for one more.

In covering the first, fourth, fifth, sixth, and eighth amendments, and the Equal Protection clause of the fourteenth amendment, the authors state that their goal is clarity. For the most part, I believe that they achieve that goal. The book is readable.

Although this book has the virtue of lucidity, it suffers the vice of superficiality. Perhaps this superficiality is more the flaw of the genre: this book is a survey. Despite the fact that practically every important constitutional law case is in the book, too often only one or two sentences are devoted to each case. Even the cases to which more space is devoted are too hastily summarized. Moreover, the ordering of cases within subdivisions of the book is not always satisfactory.

My other major criticism is that the index is far too sparse. Ostensibly, this is a book for the practitioner. Nevertheless, the book is too long for a busy practitioner to read from cover to cover in order to find a case on point. The practitioner’s search is further impeded because the Constitutional Law Deskbook does not have a complete index.

To illustrate this flaw, suppose an attorney has a young client who has been searched for the possession of drugs at school and drugs were found on his person. The attorney naturally contemplates that the issues concerning the search will implicate the fourth amendment and search and seizure. However, when the attorney then consults the deskbook, he does not find any topic headings such as “school search,” “schoolchild search,” or “student search.” The attorney will only find the deskbook’s

* Professor of Law, Western State University College of Law; A.B., Yale University; J.D., Tulane; L.L.M., University of Pennsylvania; B.S., Meru, Leysan, Switzerland.
index helpful if he can recall a named case which addressed these issues. The table of cases is thoroughly indexed. However, the subject matter index is so terse that it is practically useless. This conciseness undercuts the utility and purpose of the book. Incidentally, the authors do impart what we need to know on school-child searches (p. 225), but discovering the passage is time consuming.

In contrast to the sparseness of the book’s index, the first chapter on constitutionalism is well developed and informative. This chapter offers a fine jurisprudential overview. Jurisprudence, which covers legal theory or philosophy, is important to the study of the Constitution. It is thus surprising that the topic of jurisprudence is utterly ignored in almost all of the constitutional law books currently available. Fortunately, the deskbook provides an excellent discussion of jurisprudence in its first chapter which covers Aquinas, Aristotle, the Magna Carta, and the Mayflower Compact. Although the deskbook does not discuss these topics in great detail, it does begin in good form.

Even with its flaws, the deskbook is a helpful resource. For the student and practitioner searching for initial information, authors Chandler, Enslen, and Renstrom have done well in initiating the reader to various topics. However, the practitioner searching for in-depth coverage will need to consult a more detailed hornbook (like that of Nowak, Rotunda, & Young). Overall, despite the authors’ commendable goals, I cannot help but think that the book adds little to an already saturated market.