**Hastings Law Journal**

Volume 49 | Issue 2 Article 10

1-1998

# Vision, Abstraction, and Socio-Economic Reality

Johannes F. Nijboer

# Vision, Abstraction, and Socio-Economic Reality

*by*
JOHANNES F. NIJBOER*

## Introduction

To many people in the world, the tragic death of Diana, Princess of Wales, on August 31, 1997, caused a world-wide shock. Evaluating the accident and especially the reports in the media about it, we can conclude that the event put comparative law in the center of legal interest. Even on the television network CNN, French legal experts and specialists in comparative law were interviewed. For lawyers with a common law background, this drew attention to the type of investigation conducted by investigative magistrates. Familiar with an adversarial system of investigation, common law lawyers are not accustomed to the figure of a judge who, in a neutral position, investigates a case such as this accident and the complexity of its causes. Nevertheless, an investigative judge is the hallmark of procedural quality in many Continental countries. I will not expand on this here, since there is a vast literature on the subject.

The tragic accident, moreover, can awaken American or Dutch prejudice or bias toward the acceptance of alcohol in French social life, especially with regard to drivers' consumption of alcoholic beverages prior to driving. Apart from such bias, one can at least question the relation between legal norms and practical enforcement of those norms in countries such as France or, with regard to other laws, The Netherlands.[1]

On a more general level, and apart from comparative law and the French Republic, the first results of the police investigation in Paris, as they were released by the public prosecutor, are very interesting. Without decades of forensic technical opportunities, and forensic expertise, the investigation probably would have concentrated exclusively on the behavior of the paparazzi. The

* Professor, Faculty of Law, Rijks Universiteit Leiden (Leiden University); Director, International Network for Research on the Law of Evidence and Procedure/Seminarium voor bewijsrecht; Judge, the Court of Appeals of Amsterdam

1. The Netherlands is also known as a country where regulation and practice often are contrasted; one example is the manner in which the drug legislation is enforced. The best explanation a person from the Netherlands can give a person from France is as follows: "we do with soft drugs what you do with alcohol and traffic after lunch—it is being lenient."

objective data concerning the blood alcohol level of the driver, however, drew attention to other circumstances relevant to criminal law. Forensic expertise in the field of blood or breath testing has provided us with ever better and more accurate tests throughout the years. In order to avoid evidentiary problems with subjective legal standards about taking risks in driving, most legislatures have chosen the formal, technical definition of permissible and impermissible quantities of alcohol in the blood or breath. The increasing number of experts and forms of expertise have shaped and are thoroughly shaping the legal landscape in criminal law. In the epilogue of *Evidence Law Adrift*,[2] Mirjan Damaška pays attention to the Copernican revolution in the criminal justice system, caused by the overall appearance of expertise and experts of known legal disciplines.[3] This is his book's second plot.

I will now more systematically discuss aspects of the most recent book of Professor Damaška, and in so doing I will focus primarily on his first plot. But before I do this, I would like to express my gratitude to the Evidence professors of Hastings College of the Law, who invested so much effort in bringing me here this Fall trimester on a staff exchange program with Leiden University. Apart from this, I am honored to be a participant in this panel, since we discuss here the most recent intellectual product of one of the most significant comparativists of this time.

Like Professor Damaška, I have a Continental background. I received my legal education from the law faculty of the Free University in Amsterdam and since then I have taught Criminal Law, Criminal Procedure, Evidence, and Comparative Law at Leiden University. In particular, my research in the field of comparative law has brought me all over the world, and I have become accustomed to common law legal systems, thought, and practice. Apart from my scholarly work, I have been active as a judge in the Court of Appeals of Amsterdam for close to a decade. The Court of Appeals in a Continental system is usually a trial court. So it is in my case. The Court of Appeals of Amsterdam tries criminal cases de novo. Thus, I try to combine theory and practice. My criminal law orientation may be recognizable in my remarks about evidence law, although most of what I have to say is not limited solely to criminal procedure.

## I. Outline of Damaška's Book

During the preparation of these comments, I learned that

2. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997).
3. *Id.* at 142-52.

Gordon Van Kessel prepared a summary[4] of *Evidence Law Adrift.* Therefore, I can be very brief here. According to Damaška, typical Anglo-American evidence law, especially its American variant, can be perceived as the product of three somewhat inter-dependent factors, or pillars, that shape the context in which this part of the law can exist and survive. The first is the split in functions of judge and jury (or variations thereof). The second is the concentrated oral trial as it traditionally exists in common law countries. The third is the adversary system--the party-driven process. In the book, all three elements or factors (or pillars on which the "system" of the rules of evidence rests) are discussed in separate chapters. These chapters are full of comparative elements, especially comparisons with Continental systems. At the heart of Damaška's analysis, he states that the so-called bifurcated trial (the system with the split tasks of judge and jury) and the concentrated trial are disappearing in the sense that they often are replaced by other forms, leaving the adversary system as the only factor that still contributes to the permanence of typical Anglo-American evidence law. These changes are highlighted and discussed in the account of institutional transformation, in chapter five of the book. In his epilogue, as I have stated above concerning his second plot, Damaška gives attention to the impact of the increasing involvement of non-legal experts in steadily more different applied forensic forms of expertise in the legal process.

Damaška's comparative remarks show that his scholarly enterprise—the comparison of Continental and Anglo-American forms of procedure—has become mature. His account of similarities ('look alikes') and differences between national and legal systems and cultures is nuanced. He gives many examples, and the footnotes that accompany his remarks show an extraordinary quantity and quality of reading.

## II. Vision, Abstraction

It is difficult to disagree with many of the general views advocated by Damaška. His examples are remarkably well documented and the analysis shows both experience and vision. Where vision is important, I do not think it makes much sense to criticize small details of arguments and examples. Related to the criminal procedure law of Continental countries, such a mini-discussion occurs when Damaška observes that the standard of

4. *See* Gordon Van Kessel, *A Summary of Mirjan R. Damaška's* Evidence Law Adrift, 49 HASTINGS L.J. 356 (1998). Professor Van Kessel is a Professor of Law at the University of California, Hastings College of the Law, and a former visiting professor at Leiden University, The Netherlands.

intimate conviction (*conviction intime*) has recently been replaced by a standard of explicable conviction (*conviction raisonnée*).[5] Here, he seems to neglect the fact that by the end of the 19th Century in The Netherlands, a distinction was drawn between the *conviction intime* and the *conviction raisonnée*, and that already for more than a century it has been required that decisions be accompanied by inter-subjective, compelling arguments.[6] Moreover, as we will see,[7] giving reasons for factual findings is not unique to Continental systems.

The book is a coherent, consistent, and well-written piece of work. It combines description with analysis and evaluation, and from time to time does not avoid opinion. Damaška treats the systems, with respect for national differences, as a whole. This leads to a sort of abstraction which has strong sides and weak sides. The strong sides are related to the helicopter view, in which a whole system can be characterized and compared. This is without doubt a very powerful form of comparison. The weaker sides have their origins in exactly the same abstraction: what, exactly, is the system of law described? And are there not many more factors, interrelated with the three pillars mentioned above, that contribute to the existence and permanence of Anglo-American evidence law? Here, I will make some critical remarks about Damaška's book. The core point of my remarks is this: I do not believe that evidence law in common law countries has been watered down to such an extent in recent years. Further, I expect that it will stay in its place in the years ahead. The book I would like to compare to Damaška's is Umberto Eco's *Foucault's Pendulum*,[8] where all the details are true, but the plot is fiction. Similarly, Damaška's plot, that evidence law is adrift, is fiction. But Damaška—in contrast to Eco—has a second plot: the impact of forensic expertise in legal processes.[9] In my opinion, this second plot is not fiction.

## III. Remarks

Here, at first, it might be important to trace back the origins of Damaška's analytical model presented in his 1986 book, *The Faces of*

5. DAMAŠKA, *supra* note 2, at 40.

6. Damaška mentions the giving of reasons in relation to the tasks of appellate courts. Although in earlier days the "checking" rationale often was felt as the most important, the "explanation" rationale was not unknown. *See, e.g.*, David Simons, *Motiveering van strafvonnissen*, XI TIJDSCHRIFT VOOR STRAFRECHT 321-54 (1898); Bernardus Maria Taverne, *Motiveering van strafvonnissen*, XXXVII TIJDSCHRIFT VOOR STRAFRECHT 210-63 (1928).

7. *See id.* concerning South Africa.

8. UMBERTO ECO, FOUCAULT'S PENDULUM (William Weaver trans., Ballantine Books 1990).

9. DAMAŠKA, *supra* note 2, at 147.

*Justice and State Authority*. In the 1970s, Damaška was involved in a discussion about the meaning and realism of experimental studies of the performance of lay decision makers. In his well known 1973 article in *The University of Pennsylvania Law Review*,[10] Damaška asked why the evidentiary barriers to conviction appeared to be so much higher in common law jurisdictions than in civil law jurisdictions. In this context, Damaška, without labeling it that way, already drew attention to the difference between atomistic and holistic approaches to evidence. From this point, Damaška's sophistication in analyzing the differences between Continental and common law systems begins to fly higher and higher. Reading his most recent book,[11] I noted that he seems very much oriented to legal texts, especially authoritative texts like codes and statutes, but also case law and scholarly writings. In a certain way, Damaška as a comparativist goes "native": he does not explicitly distance himself from the internal views of the legal discipline. And insofar as he sometimes does go further, political science seems to be nearly the only social science that seriously forms part of his intellectual exercise.

One of the failures of legal scholarship and legal education is an apparent preference for describing and analyzing the complex and the unique, rather than the average, and for paying more attention to exceptions and exceptions to exceptions, instead of the main rules, especially the rules that apply to standard practice. In fact, the regularities of the law in action are often neglected or overlooked. In most legal systems, or maybe it is better to say here legal cultures, there are considerable differences between theory and practice. In the example I began with—the death of Diana, Princess of Wales—I already pointed to the possible difference between the legal regulations for driving under influence of alcohol and its practical enforcement by the criminal justice system. Another example may be the exceptional character of full formal processes and full formal trials in average cases in modern Western countries, like The Netherlands. Out of all criminal cases in Holland involving serious offenses, about 70% are dealt with along different routes than the full trial process. Many cases end with a transaction without getting to a judge; another large segment is dealt with by a judge sitting alone instead of a panel of judges.[12] This, as such, is not new at all. The same kind of observation can be made about the American criminal

10. Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

11. Not all Damaška's writings are as "legal" as *Evidence Law Adrift*.

12. The Dutch Court of Criminal Procedure provides in this form of process, but one can infer from the system that it was meant as an exception, not as the rule, for the majority of cases.

justice system. Although the decision-making body seems to be the jury, in fact only a small minority of cases are dealt with by a jury. Settling the facts in the form of plea bargaining is often the best option for all participants involved to end the case. The defendant avoids a high penalty, and the prosecutor avoids high investments in time and money in the concrete process.[13] The small number of cases tried before a jury is not such a new phenomenon in common law jurisdictions. In my opinion, it would be worth not simply stating that indeed the importance of the jury is on the retreat, as Damaška does, but also analyzing further the question of whether or not we are confronted with a further decrease; an in-depth analysis of what exactly differs here between practice and theory. Therefore, I ask for both a qualitative and quantitative analysis of the transformation—or the supposed transformation—that is taking place with regard to the function of the jury in Anglo-American systems. A related theme of research is the impact of the law of evidence in the "negotiations" between parties before trial, intended to avoid trial.[14] Ironically enough, this theme is closely related to the adversarial system. It seems that one impact or effect of the third factor upholding the law of evidence, the adversary system, is that in practice the first and second lose—or more precisely, have lost—much of their importance. Only from a monodisciplinary legal perspective might this be perceived as a paradox.

With regard to the loss of the concentrated trial, I think that both in relation to common law and to Continental law systems, we should be aware of the emergence of many forms of alternative procedures, that are indeed abbreviated in their fact-finding function, but which can be depicted as very concentrated trials or procedures. Only complicated and high-profile cases challenge the possibilities of the system, including the evidence rules, to the utmost; the requirement that the trial should by preference be oral and concentrated is not a unique legal requirement in common law systems. Continental countries like Germany, France, and The Netherlands also have provisions in their Codes of Criminal

13. There are other forms of "alternative adjudication" as well. *See* DAMAŠKA, *supra* note 2, at 58-73, 125-42.

14. A small excursion: as I already mentioned, the *conviction raisonnée* is a standard of proof that includes giving of reasons for factual findings. A recent experience of legal tourism has been the "discovery" of South Africa. South Africa is a common law country, at least at the procedural side of the law. Criminal cases are dealt with by courts consisting of a magistrate or a judge eventually sitting together with assessors (sometimes lay assessors). I was surprised by the custom to motivate factual findings very extensively. Many court sessions I attended, which were conducted in Afrikaans, a language closely related to Dutch, resembled typical Dutch elements in the common law system.

Procedure that require making the process as compact as possible. Here again, practice frequently overtakes the written law. But is that not equally true in common law countries?

One of the most forceful aspects of Damaška's book is his analysis of the adversarial system. On other occasions, following Malcolm Feeley's views,[15] I have written about the American adversarial system, perceived as not only a legal system, but also as a social system, deeply rooted in the specific socio-economic and political ideological aspects of the American society. In a recently published article on the adversarial system in the special issue of the *Cardozo Journal of International and Comparative Law* about culture and proof,[16] I explicitly referred to the commercial and competitive character of the social and economic conditions in the American society.

I referred above to the fact that Damaška as a comparativist finds his sources for his comparative analysis primarily in legal and comparative texts, and that although he delivers a kind of meta-theory on the law, his sources often seem to be limited to the perspectives of lawyers describing the law. That means that in a certain way, the texts that Damaška uses and, indirectly his own text, "reflect ideals rather than the real." That is to say, the analysis often assumes that things in daily procedural reality occur as prescribed. When we come back to the three factors in his analysis, we might find that both the bifurcated decision body and the concentrated trial are legal conceptions with respect to which the legal rule does not directly reflect daily practice. It is only the full formal process where they come aboard. Again, this is not new. And this might be the difference between the first two pillars or factors in Damaška's analysis and the third pillar. The adversarial system seems to be much more real than the first and second, in terms of not only a legal system, but also a social system, and that might explain why there is a good foundation for the thesis that the adversarial system will stay firmly in its place in the years ahead. It is the system of "partisan" conduct in the trial, but especially of "partisan" preparation and avoidance of the trial (which John Griffiths[17] once labeled the 'battle-model'). It might be worth further analyzing the adversarial system as a social system from the perspective of professionalism and the

15. *See* Malcolm Feeley, *The Adversary System, in* 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM: STUDIES OF THE PRINCIPAL INSTITUTIONS AND PROCESSES OF LAW 753, 753-66 (Robert J. Janosik ed., 1987).

16. J.F. Nijboer, *The American Adversarial System in Criminal Cases: Between Ideology and Reality*, 5 CARDOZO J. INT'L & COMP. L. 79, 96 (1997).

17. *See* John Griffiths, *Ideology in Criminal Procedure, or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 367-71 (1970); John Griffiths, *The Limits of Criminal Law Scholarship*, 79 YALE L.J. 1388 (1970).

increasing impact of technique and science on society. Professionalism in the legal practice within the market economy of the United States might be related to professionalism in other societal regions, such as the applied sciences. And here the circle is completed by the subject matter of the sixth chapter of Damaška's book: the era of the expert.

When we look at the current development of the human rights case law in Europe, we see a move towards more adversariality within the minimum standards for a fair process, such as that intended by Article 6 of the European Convention on Human Rights. The impetus comes from the Human Rights Court in Strasbourg, together with the increasing professionalism in the legal domain in Europe, where the profession of legal counselors and advocates (the Bar) is growing in impact and number. Negotiations between prosecution and defense are becoming a more usual phenomenon in Europe, as in the United States. The single-market Europe stimulates the market economy, which fosters the adversary system, just as in the United States! It is the market of freely competing professional lawyers and of creativity in finding new (commercial) forms of applied forensic expertise.

## IV. The Need for Detailed Studies

If we take comparative law as a serious and enlightening enterprise, it is of course undeniable that the highly abstract and sophisticated kinds of analysis engaged in by Damaška are major landmarks for orientation. But, when we analyze legal systems from a comparative point of view, we should not restrict ourselves to the "upper" levels of the law, the black letter law, the case law of Supreme Courts, and official guidelines, et cetera. We should also look to daily practice and routines. I would advocate a series of comparative studies that combine quantitative data about the criminal justice system, such as the kind of profile studies published by the HEUNI Institute in Helsinki. Apart from that, I would like to see more detailed qualitative studies at the case level, especially in the domain of evidence. It is very important to see how the actual actors in different systems handle evidential aspects of investigation and proof. In theory, one might expect that especially in Western countries, one would find many similarities across the borders. Truth, as well as means and techniques of investigation, are not that different throughout the Western world. But it might very well be that unarticulated local factors and cultural elements change the picture in an unpredictable way.

As a metaphor, consider the work of a task force of the European Railway Societies. They tried to develop a driver's cabin

for a train that would be usable throughout Europe. They accomplished a major task, since they finally succeeded in developing such a cabin, but the approach they were forced to follow was very difficult. It appeared that very few functional differences existed—for instance, the various electric currents used in the different countries—but the enormous differences in the design of train cabins in different countries seemed mainly to result from non-explicit cultural assumptions about human behavior, which are different everywhere.[18]

18. The difficult to articulate "collective mental program" is the mode of thought shared by the members of the same society or group of (sub-)culture.