

*HISTORY WITH HYPERBOLE  
WITHOUT THE LAW: ADMINISTRATIVE JUSTICE  
AND LEGAL PLURALISM IN NINETEENTH  
CENTURY ENGLAND*

By H. W. Arthurs

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Dale Gibson\*

Legal history is still a woefully neglected discipline in Canada. Interpretative legal history is especially scarce. Things are improving, however, as this fine book bears witness.

Harry W. Arthurs is a veteran Canadian law professor, now President of York University. His main areas of specialty have been Labour Law, Administrative Law, and the Legal Profession. He has nourished his scholarship in these areas with extensive practical experience: as labour arbitrator, Chief Adjudicator for the Public Service of Canada, member of the Economic Council of Canada, and Bencher of The Law Society of Upper Canada. This book draws at least as heavily upon that background as it does upon Professor Arthurs' voluminous research into nineteenth century administrative matters. Therein lies both its strength and its weakness.

*Without the Law* examines the origins and early development of that body of regulatory norms and procedures that we now call Administrative Law and practice. Professor Arthurs persuasively refutes the claim of A.V. Dicey that this development occurred near the end of the nineteenth century. Relying chiefly on secondary sources, he demonstrates that most of the major features of the administrative system with which we are now familiar first appeared, or evolved, in England much earlier than that: roughly between 1830 and 1870.

The story is told in terms of two competing paradigms of law: a centralist model in which judges and lawyers play a dominant role, and stress is laid on uniformity and universality of principles and procedures; and a pluralistic model, which is not monopolized by professional lawyers, and which permits diverse areas of human organization and activity to be regulated by diverse norms, tailored to the needs of particular organizations and activities, and often at variance with the norms with which lawyers and judges are familiar.

Professor Arthurs points out that the English legal system was highly pluralistic at the beginning of the nineteenth century. The great bulk of ordinary legal disputes were dealt with by a wide range of local courts, usually staffed by amateur judges who drew heavily upon local custom for their decisions, and by a number of special tribunals that disposed of matters like mercantile disputes on the basis of specialized custom or practice. He is not entirely persuasive in asserting that at least some of these forms of

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localized justice (the Courts of Request in particular) functioned quite satisfactorily. Relevant evidence one way or the other is apparently difficult to come by.

He then describes the demise of many of these special courts and tribunals from 1830 onwards. Their chief replacement was a new national County Court system. There were also many other changes made to the English legal system during the middle half of the nineteenth century, resulting in further simplification, centralization, and professionalization. Professor Arthurs takes issue with the view, expressed by most orthodox legal historians, that these developments brought about a less pluralistic legal system than had prevailed at the beginning of the century. The growth of new administrative agencies after 1830, paralleling the abolition of local and special courts, provided a new source of pluralism to replace the old. The Industrial Revolution, which brought an end to localized justice, along with localized economic and social organization, simultaneously created a need for new forms of regulation. These involved a pluralism of their own.

The growing body of unique regulatory approaches developed between 1830 and 1870 (which Arthurs properly describes as "Administrative Law" despite lawyers' protestations that "law" involves what the courts do) was frequently at odds with the assumptions of the "legalism" with which the centralist model of law is concerned. Courts and government legal officers tended to restrict the scope of the legislation underlying the new administrative schemes by construing them in a narrow and legalistic fashion. Resourceful administrators, often unable to surmount these obstacles, nevertheless found their way around many of them by indirect means, and the century closed with Administrative Law in a relatively good state of health. But Professor Arthurs, who makes no secret of the fact that he prefers legal pluralism to centralism, and has a deep distrust of the legalism that shapes the thought processes of most lawyers and judges, fears for the future. And here the book turns from history to polemics.

Arthurs sees in the process of judicial review — the courts' power to set aside administrative decisions for failure to comply with legal norms — a threat to the benevolent pluralism that Administrative Law represents for him. He traces — all too briefly — what he sees as the unsatisfactory performance by British and Canadian courts in reviewing administrative actions during the twentieth century, and concludes by proposing a very sensible reform. The proposal is to create a special body for administrative adjudication, perhaps along the lines of the Australian Administrative Appeals Tribunal, which would be able to deal with "administrative legality" in an atmosphere not already steeped in the assumptions of "legal centralism". The adoption of this proposal, based upon the author's experience with contemporary Administrative Law, would indeed provide some assurance that the valuable administrative innovations of the mid-nineteenth century that he documents will survive the assaults of the twentieth century.

The book's major weakness (apart from a penchant for \$50.00 words) is its exaggeration of the evils and the pervasiveness of legal centralism, and of the homespun virtues of administrative wisdom. Interestingly, Arthurs

himself provides some forewarning of this tendency in the "Acknowledgments" section of the book, in which, in the course of the traditional statement absolving his various collaborators of responsibility for his errors, he includes the sin of "hyperbole".

The book is etched throughout with acid observations about the legal fraternity. By demanding supremacy for "the law", he points out, "lawyers and especially judges, as the human agencies through which law is made manifest, are therefore entitled to derivative deference."<sup>1</sup> In this way, legalism enables lawyers "to defend their interests without being seen to do so."<sup>2</sup> The "hostile" attitude of the legal profession toward Administrative Law is described as "an influence largely stimulated by self-interest and rooted in an ideology of self-importance."<sup>3</sup>

But when he turns to descriptions of administrators, Professor Arthurs writes with less corrosive ink. "[C]ommissioners, inspectors, and other officials," he tells us, "genuinely wished to preserve the lives of emigrants or the morals of women factory workers."<sup>4</sup> Whereas "[t]he whole thrust of administrative regulation from 1830 onward was to lend specificity, predictability, uniformity, and rationality to the law"<sup>5</sup>, the decisions of the courts relating to administrative matters during the same period were:

... [O]ften unsympathetic, even hostile, to the new interventionist philosophy; sometimes they were insensitive to the procedural, evidentiary, and institutional qualities that distinguished regulatory legislation from criminal Law; and, proposals for quicker appeals notwithstanding, they were almost always time-consuming and obstructive.<sup>6</sup>

Although errors were made by both groups, the "abuses" of the local justices are described as "widespread", while the "lapses" of administrators were "exceptional".<sup>7</sup>

Unfortunately, this bias in favor of administrators colors some of Professor Arthurs' generalizations about pluralism and centralism in the legal system. The reason that pluralism is essential to a satisfactory legal system in a democratic country is that no one individual or group has a monopoly on truth or justice. We all see the world through distorting lenses. Lawyers and judges unquestionably bring a distinctive and not entirely beneficial slant to their work. So do administrators, law professors, university presidents, and everyone else.

The pluralism of the legal system provides checks and balances that offer at least some measure of protection against these biases. In his more restrained moments, Professor Arthurs acknowledges that lawyers and courts are legitimate components of the overall pluralistic system, requiring

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1. H. W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (1985), p. 183.

2. *Ibid.*, p. 186.

3. *Ibid.*, p. 164.

4. *Ibid.*, p. 175. The parallel compliment that he pays to the legal profession is merely that "most lawyers believed in the superior qualities of British justice."

5. *Ibid.*, p. 151.

6. *Ibid.*, p. 147.

7. *Ibid.*, p. 153.

administrators to meet “minimum conditions” of procedural fairness.<sup>8</sup> He observes, at one point, “how dangerous it is to leave the design of a system entirely in the hands of people immersed in it on a daily basis.”<sup>9</sup> Other comments, however, display a trusting attitude toward administrators that contrasts sharply with his scepticism about lawyers and judges. For example, he rejects such proposals for administrative reform as increased public participation, mandatory notice of proposed regulation-making, the elimination of discretion, formal administrative hearings, and full rights of appeal, on the ground that “they offer little to those who hope to stimulate the administration, but rather more to those who hope to sedate it.”<sup>10</sup> Instead, he urges:

... [T]he best prospects for improving the quality of administration reside in the initial design of structures and procedures and in the genuine commitment of administrators to high standards of performance.<sup>11</sup>

I doubt that I am alone in being as nervous about entrusting my affairs to a “genuinely committed” administrator as to a “legalistic” judge.

Professor Arthurs’ fear of undue influence by the proponents of legal centralism has also led him to exaggerate the importance of centralism in the twentieth century, and to find manifestations of it in some rather strange places.

... [L]egal centralist tendencies are apparent in England, Canada, the United States, and elsewhere.

...

We see ... aggressive promotion of the centralist paradigm of law by an odd assortment of advocates ...<sup>12</sup>

He sees centralism in virtually every recent legal development that has resulted in an expanded range of individual rights being enforceable in the courts — from expanded tort liability to the legal enfranchisement of wives and children. “Pluralism is no longer what citizens seem to want”, he laments, “they have taken to demanding legal rights ...”<sup>13</sup>

The most recent and most pervasive tool of centralism in Canada, he believes, is the *Canadian Charter of Rights and Freedoms*:

Canada has just adopted its *Charter of Rights and Freedoms*, which gives judges unprecedented opportunities to make law, and presumably to effect ‘reforms’, in many spheres of public policy ... Bills or charters of rights are, in a sense, the ultimate expression of legal centralism. All law, all political behavior, all economic and social policy is ultimately to be measured against a single fixed constitutional standard whose interpretation depends upon professional advocacy and formal adjudication.<sup>14</sup>

These statements appear to confuse legal pluralism with Arthurs’ distrust of lawyers and judges. If the developments about which he complains

8. *Ibid.*, p. 205.

9. *Ibid.*, p. 204.

10. *Ibid.*, p. 200.

11. *Ibid.*, p. 201.

12. *Ibid.*, pp. 189-90.

13. *Ibid.*, p. 210.

14. *Ibid.*, p. 189.

reduced the range of remedies available to individuals, they might properly be seen as contributing to centralism. They have not generally had that effect, however. Looked at from the point of view of the individual citizen (and surely that is the point of view that counts) these developments, and many others in recent years, have considerably *broadened* the range of legal options open to those whose rights are involved. In Family Law, for example, courts offer a much broader array of services, relating to a broader spectrum of rights, than ever existed before, and all of this without denying the availability of informal dispute resolution techniques. Indeed, conciliation and family counselling is more widely encouraged by courts than was previously the case. In Tort Law, to take another of the recently reformed areas to which Professor Arthurs refers, the recognition of “structured damage settlements”, designed by the parties in consultation with professional actuaries, has significantly increased the ability of the courts to individualize damage awards in a way that not even the state-administered “no fault” compensation systems operating in several provinces can yet match.

As to the *Charter*, its emphasis on the rights of individuals and minority groups has introduced a very significant new source of *pluralism* to the Canadian legal system. Rights available under the *Charter* (which, by the way, may be available from appropriate administrative bodies as well as from the courts) are *in addition* to all rights previously available from administrative agencies or other bodies. The fact that the *Charter* provides more room for activity by lawyers and judges than was previously the case should not be allowed to obscure the fact that, from the citizen’s point of view, the *Charter* is an instrument of pluralism. A single illustration must suffice. When an Ontario statute calling for Sunday closing of businesses was challenged under the *Charter* by citizens whose religious beliefs required them to close on a different Sabbath, the Ontario Court of Appeal found that the pluralism dictated by the *Charter* implied a special exception from the general law for those who, like the plaintiffs, closed on a different day of the week in genuine observance of religious beliefs.<sup>15</sup> Now that’s pluralism! While the decision may be administratively inconvenient, it significantly broadens the options open to Canadians under law, which is what pluralism is all about.

The fact is that pluralism is alive and well in Canada in the late twentieth century. Professor Arthurs acknowledges several new manifestations of pluralism<sup>16</sup>, and the list could be extended considerably: automobile compensation plans; ombudsman offices; marriage contracts; human rights legislation, and so on. A nineteenth century legal historian, commenting about ancient legal systems, noted a gradual movement from “status to contract” — from the determination of rights on the basis of one’s position in the social structure to more and more individualized and varied (*i.e.*, pluralistic) determinations.<sup>17</sup> There is good reason to believe that this movement continues up to the present time.

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15. *R. v. Videoflicks Ltd.* (1985) 14 D.L.R. (4th) 10 (Ont. C.A.).

16. *Ibid.*, n. 1, at 190, ff.

17. Sir A.H. Maine, *Ancient Law* (World Classics ed. 1931) 141.

Professor Arthurs' concerns about the legal profession's ingrained opposition to change should not be dismissed lightly. Much more needs to be done through education,<sup>18</sup> through more representative judicial recruitment, and through greater use of leavening devices like juries, to overcome the monolithic tendencies of legal thinking. I think that some of the more imaginative early *Charter* decisions demonstrate that progress is being made in this direction. The iconoclasm of *Without the Law* will contribute significantly to the process.

But watch the hyperbole, Harry!

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18. *Law and Learning*, 1983, a study by a Consultative Group on Research and Education in Law, chaired by Professor Arthurs, himself, has made a significant contribution in this direction.