

BOOK REVIEW

'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England by H.W. Arthurs, University of Toronto Press, Toronto and Buffalo, 1985.

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We will not resist the unusual opportunity to open a review of a book on law by saying it is witty, elegant and felicitously written. As a bonus, Arthur's *Without the Law* should prove to be seminally significant in the renewal of the scholarship of legal pluralism. And assuredly it is a pioneering contribution to the 'new' legal history, to a legal history that is related to the concerns of academic history and not confined in doctrinal or legal-institutional terms. More particularly, it is a pathbreaking history of law and administration in nineteenth-century England.

Nonetheless, *Without the Law* is presented as a piece of legal scholarship but it is not clear what *that* is. The work is not set in a strong overall frame and it tends to diversity in the best pluralist traditions. This diversity is often tied to an encompassing vagueness in focal concepts. Thus "...the 'true nature' of law... [is] a subject we must continue to skirt if we are to press on to any historical conclusions" (p. 163). Ideas of law as state law, even as liberal legality, are found to be too narrow. No replacement is offered. As a legal study, then, the work is bound to be somewhat elusive and non-determined.

Without the law is essentially an attractive humanistic essay whose concerns are wide-ranging and sensitive to, if cautious about, historical forces. Some of Arthur's best, if passing, critiques of positions in legal history arise from this broadening of focus - and more specifically from a broadening to take into account the plurality of law. The book appears to favour a history of people's understandings and consciousness, a history which serves as a guide for the present and an aid to a more humane ordering in the future:

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[T]hese questions from the past continue to assert urgent claims on our attention. Centralist or pluralist assumptions, often not made explicit, lie beneath many contemporary legal policy proposals and intellectual controversies. A much fuller articulation of these assumptions is need[ed] if we are to see clearly and judge wisely. (p. 189)

Arthurs explores the idea of legal pluralism through an account of specialised and private tribunals and administrative bodies in nineteenth-century England. By far the greatest emphasis is given to new administrative jurisdictions emerging between 1830 and 1870. He also sets the relative success of business in maintaining its own legal systems against the decline and suppression of localized courts. State law is seen as unable to deal adequately with the resident rationalities of commerce. There are more appropriate modes for regulating the world of commerce and certain other domains:

[I]n seeking a 'natural' rather than a 'technical' procedure, businessmen were seeking disposition of their disputes entirely outside the framework of the courts and the monopolistic control of the legal profession. (p. 57)

Arthurs is indeed very powerful in his criticism on the limits and ineffectiveness of state courts and, to borrow a phrase from Gurvitch, the "prejudices of the dogmatic jurists" (Gurvitch 1947: 77). Yet the contrasts can be overdrawn. He tends to see lawyers as too distinct and too implacably reactionary. He underestimates the ability of lawyers to permeate the distinctive institutions of the business community. Furthermore, as he recognizes incidentally, there were productive links between administration, including the new administrative law, and lawyers. More broadly, the relationship between state law on the one hand and business or administration on the other can be seen as varying between opposition and mutual support. We will return to this theme shortly.

Many passages in *Without the Law* hint at connections between this decline and suppression of localized courts and the emergence of administrative law. Such connections are never resolutely affirmed. Arthurs flirts with forging links between the decline of one type of legal plurality and the emergence of another, albeit one shrouded in administration and legal centralism. But, as Arthurs recognizes, that exercise would need to incorporate into his explanatory frame much that he relegates to background, such as 'industrialization' and 'urbanization':

[T]he role and influence of professional and other groups can perhaps be analogized to the emergence of human settlements in a legal landscape whose basic elements were determined by the movement of socio-economic forces far below the surface, crudely shaped by the glacial events of industrial change, and made fertile by political wind and weather. (p.177)

This not a negative criticism on our part but a reminder that a more comprehensive frame may be needed to explain these changes. But any such frame may exclude much that is uniquely valuable in the work.

What is most valuable is Arthurs' guiding vision that in the nineteenth century legal pluralism continued, even proliferated, along with administrative and commercial pluralism and in the face of an apparently consolidated legal centralism. And this, to repeat, is a responsible 'history of the present'. His response to the rhetorical question of whether modern states should adopt or promote pluralism is the unequivocal professional advocacy of a tolerant yet ordered and ordering diversity. To demonstrate that the still current centralist paradigm would not survive an operative pluralism he rounds off the book with a pluralist critique of administrative law. The importance of pluralism for administrative law is found in its ability to liberate us from the constraints of a single institutional design. But there is also here a crucial dilemma for an operative legal pluralism: neither complete deference nor complete indifference to other regimes can be expected among the components of a pluralistic legal system. In this case, what is then truly needed is a mediating principle. But what kind of principle should be selected and by whom should it be interpreted? Certainly not jurisdiction, the only persuasive historical contender, which Arthurs sees as a failed principle. For example:

[T]he Supreme Court of Canada, in a brief period of ten or fifteen years, moved from virtually unlimited judicial review under the rubric of jurisdiction to virtually no review at all, and back again, without troubling to rationalize its own precedents.... Exit jurisdiction, confusedly. (p. 209)

As a general problem in the annals of pluralist democracy and guild socialism this is a venerable one whose resolution is not imminent (cf. Hirst and Jones 1987). Arthurs is to be thanked for introducing it to law and to legal pluralism.

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That, in briefest outline, should indicate the concerns of this remarkable work. We would now like to explore its challenges to conventional ideas of law and administration and to explore its provocations to further enquiry. We start with Arthurs' intriguing notions of administrative law. These are varied and can be vague, if productively vague. It is clear, at least, that 'administrative law' is not, contrary to conventional usage, something emerging from the judicial review of administrative action. Rather, it is something internal and integral to administration. In what we could call the restricted notion, Arthurs identifies administrative law as a silhouette of standard state law. Administrative law in this sense is seen by Arthurs as inhibited and underdeveloped or unrecognized. This may result from the powerful 'prejudices of the dogmatic jurists' who struggle to maintain their hold on 'law', from the view that law is standard state law, and from a consequent inability to relate law integrally or constitutively to the very processes of administration. But the administrators are also concerned to keep their processes and administrative law apart from the courts and the lawyers and at a conscious distance from a standard state law experienced as inapt and inadequate. In the administrators' perspective, Arthurs usually and often adopts an expansive notion of administrative law, whether formal:

[A]dministrative law is the pattern of rules that emerges from the hybrid and complementary processes of administration, the issuance of rules and regulations, the glosses developed by informal discussion and formal adjudication and the distillation of understandings into circulars and manuals and statements of policy and practice. (p. 161)

or functional:

[Administrative law] ... encompassed all operational aspects of the administrative regime, however informal, however remote from the model of law familiar to lawyers, so long as they were indeed operational. Thus, circular letters, technical manuals and patterns of enforcement were considered law not because they could be fancifully analogized to formal legislation or common law, but because they helped to secure compliance with statutory policies. (p. 172)

In *Without the Law* Arthurs convincingly delineates the similarities between standard state law and administrative law. For example, he describes the remarkable achievement of the early inspectorates in

laying "the practical foundations of modern administration and social policy":

[I]n doing so they made law: they drafted statutes which parliament enacted; they interpreted legislation and adumbrated it in advice, rulings and bulletins; above all, they secured, through all the formal and informal activities recounted here, adherence to law's purposes and policies. (p. 115)

Furthermore, administrative law found its way into and operated integrally with Victorian regulatory statutes. It thus becomes difficult conceptually to separate standard state law from administrative law. Both did involve strikingly similar intellectual processes. Like adjudication, that ultimate constitutive symbol of bourgeois law, administration often involved the impartial ascertainment of facts and the impartial application to them of a standard announced in, or at least derived from, a statute. Arthurs also insists that the whole thrust of administrative regulation from 1830 onwards was to lend specificity, predictability, uniformity and rationality to administrative law. These are 'legal' values and they are at the same time bureaucratic/administrative values.

But Arthurs insists on an inherent distinctness in similarity for administrative law:

[A]dministrative law can only be understood as law if we accept that it has distinctive characteristics, generally related to those of ordinary law but demanding evaluation in their own terms. (p. 197)

Standard state law may in its terms perhaps be presented as complete unto itself, as a *corpus iuris*, a self-legitimising body of rules, while in terms of administration, administrative law is only part of the repertoire. Arthurs contrasts the legal modes of penalties, prosecution, damages, fines or imprisonment, methods of fact-finding, law-finding and decision-making in adjudication with differing processes and modes for securing outcomes typical of administrative law taken in its expansive sense. As Arthurs richly illustrates, administrative law sought ways and means of making and applying law that relied heavily on conciliation, expanded the role of its discretionary powers, diminished that of adjudication, and unleashed a proliferation of rules which, by virtue of their source and purpose, were specific to a given activity. These, it seems, are not elements of a self-contained *corpus iuris* but ways of achieving goals: 57

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7 The power to give or withhold benefits was one such way, and the process of investigation, report and recommendation was another. [E]ven ... informal adjudication was avoided whenever possible. The characteristic procedure was not the tendering of a decision, but rather on-the-spot inspection, periodic questionnaires, written interrogation and reply, suggestion, admonition, persuasion and negotiation. (p. 144-145)

Administrators did not use the legal prerogative to punish but instead turned to issuing requirements for keeping records and to persuading the regulated to comply by means of instruction and negotiation. That is why, according to Arthurs, a good administrator needed abilities different from those of a conventional adjudicator. Furthermore, many administrative activities were largely immune from judicial scrutiny, although they resulted in the development of norms no less effective than those formally announced by the courts or parliament. Law, therefore, could not serve as a complete corrective for abuses which could result from the administrator's array of discretionary powers. Constraints on abuse had to be found, not in constitutional or common-law rules and procedures external to the administration, but in the norms developed internally which derived their rationality and legitimising power from a purposive science, from utilitarian considerations and a rudimentary managerialism. Administrative law in its bureaucratic/scientific modes can be oblivious of its effect on or even the existence of a 'general' law. Its modes of operation distance administrative law from standard state law, thereby creating two realms with distinct and often incompatible rationalities.

4 8 8 Arthurs' work thus enables us to distinguish between different and distinct types of law neither of which is comprehensively subordinate to the other. It undermines the long reign of 'legal centralism'. It serves to dissolve the apparently homogeneous scientific/administrative state into elements which can be incompatible and in competition with each other. It indicates oppositions 'within' the state confronting its monadic power. And in the similarities between ordinary law and administrative law, as well as in the struggles recounted between jurists and administrators over the use of adjudication, Arthurs' work reveals law as a site and object of contestation.

Our account of Arthurs' work stresses, even exaggerates, the element of plurality. Even his emphasis on similarities between 'ordinary' law and administration has been subordinated to this plurality. But, in Hegel's long shadow, we cannot escape the possibility that things when most dissimilar are most the same, when

most apart they are the most unified. That is, the very plurality which Arthurs locates may be but conditions of an encompassing unity. We will take as a likely contender Foucault's "scientifico-legal complex" and its institutional location in the modern administrative state (Foucault 1979: 23). In this milieu scientific administration is the necessary "dark side" of law (*ibid* : 194 and 222). Its pervasive, normalizing powers both serve to maintain law in its aspects of universality and equality and also enable law to be seen as marking out fields for free action. Liberal legality would prove too delicate for a society founded on inequality and coercive authority were not individuals so pre-adapted, as it were, through scientific administration. This somber perspective is at odds with Arthurs' revisionist claims for the virtues of nineteenth century administration, the virtues of such things as railway and canal commissions and the factory inspectorate. Arthurs provides another but underdeveloped and, for us, telling instance, that of the new poor law, the Poor Law Amendment Act of 1834. The system of 'welfare' and workhouses it introduced would provide in Bentham's untroubled prescription "a mill to grind rogues honest and idle men industrious". Anything virtuous about this carceral machine was instrumentally subordinated to its purposes of discipline and surveillance, purposes effected beyond these institutions and in the very social fabric (Garland 1981).

But if Arthurs' heroes of administration, those epigones of Bentham, were not without flaw, neither was 'ordinary' law as inadequate nor as simply obstructive as he presents it. In terms of the self-presentation of scientific administration, terms that are 'objective' and apolitical, such law is a necessary adjunct empowering officials and practitioners to coerce the 'free' subject, providing mechanisms of ultimate enforcement of the dictates of scientific administration and legitimating the coercive operation of the administrative state. In short, 'ordinary' law and administration (including administrative law) are integrally linked instrumental apparatuses within the modern state. They provide conditions for each other's existence, yet because of this, they stand in a certain mutual autonomy or inviolability. This is but the sketch of an argument but it may provoke questioning of just how far this revealed pluralism in itself can take us along a road to democratic diversity and individual freedom.

The nineteenth century prospect of a benignly administered order must, we are saying, be seen as a paradise lost. But as for Arthurs' work, we would hold the opposite opinion to Dr. Johnson's of *Paradise Lost*: despite, or perhaps because of, its worthiness, the good Doctor considered that "no one would have wished it longer".

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Although *Without the Law* is already long, we would for several reasons, including the enjoyment it gives, have wished it longer. It is nonetheless to be welcomed with admiration and gratitude, especially by those concerned with legal pluralism and with the new legal history.

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