

Osgoode Society 30<sup>th</sup> Anniversary Symposium

Historians and Low Law: A Case Study of Municipal Administration in Mid-Nineteenth  
Century Canada West/Ontario

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As studied by anthropologists and sociologists of the legal pluralist school, law is often classified according to a binary heuristic—there is formal law, the law of the superior courts and legislatures and the informal, or customary, law of the people. One historian of the British Empire, Peter Karsten, has given this binary a hierarchic cast, calling formal law ‘high legal culture,’ and the customary law practices of colonists and indigenous peoples ‘low legal culture.’ Another, Doug Hay, has made note of a further binary occurring *within* the formal law. Beginning with studies of the justice of the peace in the 18<sup>th</sup> century in England, Hay has called the law with which was carried out by the justices of the peace in the 18<sup>th</sup> century and exported by the magistrates of the Empire ‘low law.’ ‘High law’ for Hay is the law with which legal historians generally have concerned themselves, the law of the superior courts of record which may have originated in, or been supplemented by statute, but is primarily ‘common law,’ structured by the concept of *stare decisis* and published in reports and treatises. Equally formal in the sense that it was institutionally based, with the imprimatur of the sovereign through the appointment process, and enforced by state coercion, however, ‘low law’ was only loosely connected to the common law. Theoretically subject to judicial review through appeals and the prerogative writs, the law as administered by the mostly amateur JPS was based in statute and accessed through handbooks. This law was generally what we would call public law, the law of petty crime and the law of quasi-crime, such as the law of Master and Servant which Hay and Paul Craven and their colleagues in the Master and Servant project have explored to such rewarding effect.

Karsten has also carved out some room in his schema for what Hay and Craven call ‘low law.’ Recognizing that the law of the magistrates was not the law of the people, but also not the law of the judges, Karsten called this (somewhat confusingly) ‘middle law.’ In a recent study which would have profited from engagement with the work of Karsten, Hay et al., American historian James Henretta eschews positional terminology, but depicts the law of the magistrates as in the thirteen colonies as something of a hybrid of the two types of low law, that is, law which was formal and institutional, but still ‘popular’ in much of its orientation.

Henretta also sees magistrate-dominated law as the first stage in an overlapping chronological sequence of historical development of law in America: the 17<sup>th</sup> century being the era of magistrates, the 18<sup>th</sup> of courts, the 19<sup>th</sup> of legislatures. Had he carried his categorization past 1815, he might have introduced a fourth epoch—the era of the tribunal. As it is, however, administrative law, which as Harry Arthurs has ably demonstrated had a long history but

experienced a transformation and re-birth in the nineteenth century, before flourishing, and arguably dominating the legal landscape in the 20<sup>th</sup> century, has little place in any of these models, in spite of general recognition that the quarter sessions of justices of the peace in England and the Americas also were significant institutions of local administration.

In this presentation, I explore the applicability of the high/low dichotomy to the beginnings of the administrative law revolution in Ontario. Around the middle of the nineteenth century the government of Canada West took its first tentative steps away from the 18<sup>th</sup> century model of local governance by magistracy, first by professionalizing the courts of quarter sessions, and secondly by giving much of the magistrates' administrative jurisdiction to elected local governments and their (legally mandated) staff.

The municipal clerks of mid-nineteenth century Ontario, a province with considerable communication and transportation challenges and an embryonic civil service, were as central to governance as the county JPS had been in 18<sup>th</sup> century England. Unfortunately, like the justices of the peace, municipal clerks did not leave much easy-to-find evidence of their activities. Indices for the acts which they administered—which went far beyond the Municipal Acts proper—are one finding aid, albeit a possibly misleading one. The records of high law, ironically, are better: now that Ontario reported cases have been digitized, it is possible to find considerable evidence of the activities of municipal clerks, despite a paucity of pointers in head notes and report indices which would have stymied researchers in the past. Using these cases and archival records—the minutes the clerks compiled for their immediate employers, the municipal councils—I argue that the low law of the municipal clerks had much in common with that of the JPs. Both groups were theoretically subordinate; in practice there was little direct 'high law' judicial control. Still, both groups seem to have carried out their primary functions for central purposes as required without supervision. Each was indirectly but firmly integrated into the structure of governance; the JPS by their desire for power and status, the municipal clerks by their enviable salaried position and their very visible statutory mandates for the legalization of the various dealings of the municipalities and their residents.