

Transcript



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THE RULE OF LAW: A HISTORICAL SURVEY

By John Patrick Quigley

WHAT IS THE RULE OF LAW?

The following was obtained from an ABA (American Bar Association) website: "By definition, the rule of law describes a system based on fair, publicized, easily understood and stable laws enforced with equity by knowledgeable lawyers and judges." (Bar Leader Tool Kit Issue 5) A less constrained definition is the second of five given in *Black's Law Dictionary*: "The supremacy of regular as opposed to arbitrary power."

Regular (non-arbitrary) power is indeed reflected in "stable laws", whereby people can predict the legal effect of their actions. But the other constraints in the ABA definition raise questions about fairness, equity, and the need for lawyers. For purposes of our survey, we use the simpler definition for the Rule of Law and don't assume that it was originally applied equally, consented to, or even in writing.

THE DEVELOPMENT OF THE RULE OF LAW IN CODES

The first known written Rule of Law was the Code of Hammurabi, ordered by the Babylonian King, about 1700 B.C. *The Hammurabi Code, and the*

Sinaitic Legislation, GEN A KL2212.H35 1971. In chapter VI, the author infers on page 132 that "...the Hammurabi Code must have been the immediate or remote progenitor of the Hebrew legal system." A different view is presented in *Law and Narrative in the Bible*, GENA BS1181.17.C37 1985.

The greatest achievement of the later Romans may have been developing codified law, starting with their "Twelve Tables" and culminating with *Corpus Juris Civilis*, a compilation ordered by Byzantine Emperor Justinian, including *The Digest of Justinian*, GEN A KBD.D5. This served as a model for later continental codes (the best known being France's *Code Napoleon*, GEN A KJV444.2 1804 .A52), which are collectively referred to as the Civil Law. See *The Principles of Roman Law and Their Relation to Modern Law*, GEN A KBD.B87 1938a, and, more concisely, *The Making of the Civil Law*, GEN A K585.W37 (1981).

THE RULE OF LAW IN THE COMMON LAW

"The theoretical descent of Roman Jurisprudence from a code, the theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the develop-

ment of their system differed from the development of ours." (From the first page of *Ancient Law*, GEN A K190.M35, a classic written in 1861 and recently republished with commentary in 2002.) See also *An Introduction to Comparative Law*, GEN A K583.Z813 1998.

The Civil Law is best described as a deductive reasoning process: general principles were written in codes, and cases were decided by reasoning from those principles. In England, a more inductive legal system developed. The barbarians who overran England after the withdrawal of the Roman Empire probably weren't much on reading and didn't use written codes. But their development of the Rule of Law may give some idea of how it had developed among the ancient Latin tribes. English court rulings were used as precedents to develop general rules for use in later cases, thereby creating predictable rules to establish a "common law" on their island. This process was described by Justice Oliver Wendell Holmes, in the first paragraph of *The Common Law*, GEN4 KF394.H65 (1881), as: "The life of the law has not been logic: it has been experience."

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“...seeking common ground on which to join as a nation, specified limited government powers in their constitution and amended it with a Bill of Rights...”

THE RULES OF LAW AS CONSTITUTIONS

“England has no written constitution, but its form of government under an amalgam of customs and ancient statutes, which are its ‘unwritten’ constitution, is no less definite and certain than our own.” *Historical Introduction to Anglo-American Law in a Nutshell* (pp. 16-17), GEN A KD532.Z9K44 1990.

Closer to what we would call a constitution was the Magna Charta: Rules of Law which English barons not only put in writing, but extended to include actions by their sovereign, King John, introducing the revolutionary concept of individual rights against government. *Law and Legislation: from Aethelbert to Magna Carta*, GEN A KD20.R5 (1966).

American colonists, seeking common ground on which to join as a nation, specified limited government powers in their constitution and amended it with a Bill of Rights, reflecting some of the values of the Magna Charta. *Magna Charta: the Rise and Progress of Constitutional Civil Liberty in England and America*, GEN A KD4080.W45 2002 (first published in 1880). Learned colonists were also influenced by current philosophies of the “Enlightenment” period. For example, see “The Social Contract” by Rousseau, pages 215-236, and other readings in *The Great Legal Philosophers*, GEN A K226.M6A2 1959.

THE RULE OF LAW AND EQUITY

Englishmen found that the Common Law’s rules sometimes precluded relief that they were seeking and appealed to the King’s grace. He delegated this function to his Chancellor, who was considered to be the “Conscience of the King”. Over the years, the Chancellor’s Equity Court came to give relief that the Law Courts wouldn’t give. In the ensuing competition, Law Courts became more flexible and Equity Court became less so. After wars, revolu-

tions, and beheadings of a Chancellor and a King, all sovereign powers, including all courts, were brought under the nominal control of an elected Parliament.

The Romans also had alternative legal systems, similar to English law and equity, but both were replaced with the codified Civil Law ordered by Emperor Justinian,


The U.S. Constitution, Article III, Section 2, stipulates that: “The judicial power shall extend to all cases, in law and equity...” As in England and the European continent, the two have gradually merged into one system with different rationales.

An interesting discussion on the relationship between Law and Equity, especially quotes from Alexander Hamilton, is in *Equity and the Constitution*, GEN4 KF399.M32 (1982).

THE RULE OF LAW IN A DEMOCRACY

In our view, the different goals of Equity and the Rule of Law often lead to conflicting results, which helps explain their checkered relationship throughout history. They also are reflected today in opposing legal philosophies, as expressed in *Judges on Judging: Views from the Bench*, GEN4 KF8775.A75J82 2004.

On pages 124-134, Supreme Court Chief Justice Rehnquist argues against a liberal view that the Supreme Court should be “the voice and conscience of contemporary society.” He claims that changing the rules of law to reflect changing values of society is more legitimately done by the elected representatives of the people.

But the differences between the Rule of Law and Equity encompass more than different agents for change. On page 201, liberal Supreme Court Justice Breyer argues against a “legalistic approach that places too much weight upon language, history, tradition, and precedent alone while understating the importance of consequences.” 

SOMETHING OLD, SOMETHING NEW...

Steven Nadolny, Catalog Technician

... something to (use or) borrow, something “blue?” Well, thankfully we don’t normally arrange volumes by color! – But maybe we can keep you out of the “red?”

We have received or re-cataloged some material recently that patrons might be interested in. Volumes in the *Bancroft Whitney California Civil Practice* collection -- formerly shelved together at KFC995 -- have been split up. These titles which have been taken over by Thomson West and are now located in their subject areas [e.g. civil rights litigation (KFC695), torts (KFC310), etc.].

And if your New Year’s resolution was to keep yourself updated in legal education, remember that you can fulfill up to 12.5 of your 25 hours required for Minimum Continuing Legal Education (MCLE) through self-study hours. The Library has recently added titles in the areas of real property/landlord and tenant (*Fast Forward!: Ethical and Practical Considerations in the World of Unlawful Detainer Motions and Discovery* -- GEN A: SBC 68 CD), government liability (*Government Tort Liability: Claims, Litigation & Recent Developments* -- GEN A: CEB 1113 CD), summary judgment (*Summary Judgment and Other Dispositive*

Motions -- GEN A: CEB 1117 CD), estate planning (*Estate Planning for Unmarried Partners* -- GEN A: CEB 1128 CD) and lawyer’s fees (*Attorney Fee Agreements and Fee Disputes* -- GEN A: CEB 1129 CD).

Bankruptcy and foreclosure are certainly subjects on people’s minds and in the news. Nolo’s: *Chapter 13 Bankruptcy: Repay Your Debts* (REF and GEN4: KF1524.6 .L46 2006); Rutter Group’s *California Practice Guide: Bankruptcy* (Annex: KFC365.A6 M37 2007); ABA’s *The New Bankruptcy Code: Cases, Developments, and Practice Insights Since BAPCPA* (Gen4: KF1511.597 .H46 2007); Thomson West’s *Bankruptcy Litigation* (Gen4: KF1527 .S64 2007) and *Real Estate Finance Law* (Gen4: KF695 .N45 2007); *Norton Bankruptcy Law and Practice* (Gen4: KF1524 .N672 2008); and National Consumer Law Center’s *Foreclosure Prevention Counseling: Preserving the American Dream* (Gen4: KF697.F6 F679 2007) and *Foreclosures: Defenses, Workouts, and Mortgage Servicing* (Gen4: KF697.F6 R36 2007) should all be helpful.

Remember to check the Library’s catalog and Recent Acquisitions Lists for material to help with legal problems “old” and “new” to keep you from feeling “blue.”📖

Ask a Librarian

by Lu Nguyen, Reference Librarian

Q: Is there a publication on conservatorships that tells what the responsibilities of a conservator are that can be accessed online?

A: Yes, you can find the information at the Courts Equal Access Project web page <http://www.courtinfo.ca.gov/programs/equalaccess/com>.📖

On Display

Our Spring Book Display celebrates the “Rule of Law,” the American Bar Association’s theme for Law Day, on May 1st. This year is the 50th anniversary of Law Day, first proclaimed by President Eisenhower in 1958.📖

Looking at the Web

by Mora Prestinary, Reference Librarian

JUDGES PROFILES

- California Supreme Court
<http://www.courtinfo.ca.gov/courts/supreme/justices.htm>
- California Courts of Appeal
<http://www.courtinfo.ca.gov/courts/courtsofappeal/>
- Federal Circuit Courts
<http://www.ca9.uscourts.gov/judgbios.html>
- Federal Judges Biographical Database contains the service record and biographical information for all judges who have served on the U.S. District Courts, U.S. Circuit Courts, U.S. Courts of Appeals, and the Supreme Court since 1789
<http://www.fjc.gov/history/home.nsf>
- Orange County Superior Court
<http://www.occourts.org/cfdocs/departments.cfm>

ELDER LAW

- California Senior Legal Hotline
<http://www.seniorlegalhotline.org/>
- Elder Law & Legal Resources on the web
<http://www.seniorlaw.com/resource.htm>
- CataLaw
<http://www.catalaw.com/topics/Elder.shtml>
- California Dept. of Aging :
<http://www.aging.ca.gov/>
- Stetson University College of Law :
<http://www.law.stetson.edu/excellence/elderlaw/eldersites.htm>

ELECTIONS -- Everything you've always wanted to know:

- OpenSecrets.Org
<http://www.opensecrets.org/index.asp>
- Federal Election Commission
<http://www.fec.gov/>
- SmartVoter
<http://www.smartvoter.org/>

TAX FORMS

- Internal Revenue Service
<http://www.irs.gov/formspubs/>
- State Tax Forms (1985 -)
<http://www.taxadmin.org/fta/link/forms.html>

CALIFORNIA COURT FORMS (These forms can be filled-out online and printed).

- Judicial Council Forms
<http://www.courtinfo.ca.gov/forms/>

OCPLL will be closed for the following Court Hollidays

March 31—Cesar Chavez Day
May 26—Memorial Day
July 4—Independence Day

We're on the web
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Or
www.ocpll.org

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