

EQUITY BREAKING OUT: POLITICS AS JUSTICE

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The conventional literature on Equity is marked by honeyed words and dewy tones cleverly combined to depict a reassuring legal framework where social justice must be guaranteed and actually enacted. Indulging this more or less conscious design, Equity comes in as a powerful tool fitted to correct the misfortunes of Common Law, but at the same time this new presence in the domain of English Law is not over-dignified, insofar as it only amends the hardness of the ancient rules without superseding the oldest declared customs. In this perspective, at the beginnings Equity plays an ancillary role: its origins seems to be an inevitable fact, a kind of predictable result of the historical development, a natural consequence of the Common Law's rigidity. Such an account neutralizes every other consideration, assuages the real gash produced by Equity's birth and it postpones the political reasons for the conflict, ignoring its polemical premises.

In my view this plot answers the specific purpose to formulate a foundational narrative with the structure of a tradition that eclipses the more complex genealogy of Equity as a system of rules and sacrifices the seed of tension for the sake of a glorious continuity. Like any other tradition, even the tradition of theorising Equity tend to be willed with ideas taken up deliberately: it becomes an intellectual project.

So my aim is to unveil the intentional ideology hidden in the usual discourse. To that end I'll investigate three main points:

- 1) the reassessment of the Chancellor's figure through the analysis of his relationship with the King and the King's Council in the background of the medieval dispute between temporal and spiritual powers;
- 2) the reversal of the habitual way of representing the relations between Politics and Equity, so to show that the equitable jurisdiction moves from a sophisticated settlement of powers which stability and distortion will trace the following course of the history of Equity. I mean that the consideration of Politics precedes both the origin of a new kind of Justice and its further assessment. Therefore I disagree with the common account according which Equity arises from a social (collective) demand for Justice and then this Justice, conceded in the name of an inner law, affects the course of political events;
- 3) the reinterpretation of the dialectics between Common Law and Equity as a form of communication of the two different languages that shape the political debate: respectively the language of law, which uses such concepts as custom, precedent, rights, liberties, prerogatives, and the language of theology, which has recourse to such terms as God, providence, order, grace, conscience. My concern is to cast light on the basic structure of

political argument and its own codes as they had moulded the forms of communication and transmission of the law.

First of all I'd like to go back to the Chancellor's figure as the pivotal character in the subject of my inquire. The etymology of the word "Chancellor" represents a manifest warning on the political role of this office whatever the opinion one may hold at this regard. According to one interpretation¹, "Chancellor" (that is from *Cancellarius*) derived from the little bars for fencing off the multitude from the recess or channel in which sat the door-keeper or usher of a court of justice. In a different way it is said that the word came from the act of cancelling the king's letters patent when granted contrary to the law: in this figurative sense John of Salisbury, who lived in the reign of Henry II, glorified the Chancellor in the verses prefixed to his Polycraticon, saying 'Hic est qui leges regni cancellat iniquas, et mandata pii principis aequa facit'.

Both the acceptance confers to the Chancellor the eloquent duty and the proper responsibility to protect the domain of the Law against every kind of inopportune intrusion: especially against the profane contamination with the un-learned people and against arbitrary solutions. The name of the office is able to mark the *physical* and *political* boundaries of the juridical sphere as an inviolate kingdom which confers a distinctive sovereignty. But there is another feature I intend to highlight: the presence of the theological element whose different declensions will define the mutual relations between King, King's Council, Common Lawyers, Chancery (then Court of Chancery) and whose close connection with English political theories will shape the uniqueness of the English Law in its real historical existence. A more pondered reading of the English legal history that combines these two inseparable sides of a common and evolving historic reality allows us to approach the questions at stake in a perspective of political theology so to understand the ground of the mutual consciousness of Common Law and Equity. In my view the point at issue is not a mere methodological option, insofar as it represents the ontological nature of the historic dimension: its solution does not concern historiography but it deals with the intimate structure of a more fundamental sphere of being.

Moreover from these considerations I'll try to draw further reflections. My purpose is to clarify that there is an important layer of meaning - usually underestimated if not misconceived in the conventional accounts - when we get closer to understand the 'normative world'². The enunciation of the rules, that is their formulation by the means of words, is combined with other significant and as much eloquent forms of communication or transmission. These forms are often meta-judicial

¹ For the unsolved debate about the etymology of the word 'Chancellor', see J. Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England*, I, Lea and Blanchard, Philadelphia 1847, 3.

² R. Cover, *Nomos and Narrative*, in *Harvard Law Review*, 1983, 4.

and use a bulk of symbols to make visible the dark side of the power. Then, speaking of a liturgical, sacramental and ritual nature of the legal discourse in the medieval England, I want to pay attention to the different ways chosen for manifesting the presence of Law. In the specific context that realizes the basis for the Equity's origins, the liturgical shape becomes the public seal of the legitimacy of power (political and then juridical power).

That having been said, it is possible come back to the role of the Chancellor.

Brilliantly Holdsworth³ says that the Chancellor and the Chancery are in direct connection with all the parts of the constitution. And this is perfectly the point I intend to stress: the settlement of an unexpressed constitution in the mutual definition of the constituent power (the King as the earthly embodiment of the sovereignty given by God and, closely connected to him, the Chancellor as the other voice of the original sovereignty) and of the established power (such as the physical incarnation of the King's Council, the Curia Regis and subsequently the Courts of Common Law, the common lawyers as a growing political community).

First of all during the medieval period, the Chancellor is the secretary of state of all departments and to him is entrusted the Great Seal by which all the acts of state and royal commands are authenticated. All important government acts, such as treaties with foreign States, royal grants, acts of the assembly of Parliament must pass under the Chancellor's review before their sealing. In the same way all the original writs, as royal commands that control the functioning of the machinery of Justice (royal Justice), must be sealed by the Chancellor with the same Great Seal, allowing Lambarde to describe Chancery as 'the forge or shop of all originals'. Therefore, as the keeper of the Great Seal, the Chancellor is at the head of the English Legal system, becoming the legal centre of the constitution. All the political requests and juridical demands have to be accepted by the Chancellor: 'applicants for justice in the Courts of Common Law, petitioners to the King, to the Council or to the Parliament, will sooner or later come to the Chancery either for an original writ or to obtain the execution of the answer endorsed upon their petition'.⁴

Added to that, the evocative power of the Great Seal is stunning. It is the *clavis regni*, the specular imitation of the theological concept. So – Holdsworth notes – it is no wonder that lawyers and statesmen regard the Great Seal with an almost superstition reverence.⁵ Purely as an indication, it's clear the refer to the meaning of the *clavis Petri* in the New Testament and especially the recall, that sounds as warning, is to the words of St. Matthew's Gospel, 16, 18-19: "Also tell you that you are Peter, and on this rock I will build my assembly, and the gates of Hades will not prevail against it. I will give to you the *keys of the Kingdom of Heaven*, and whatever you bind on earth will be

³ Holdsworth, *A History of English Law*, I, Methuen, London, 1956, p. 195.

⁴ Holdsworth, *op. ult. cit.*, pp. 194-195

⁵ Holdsworth, *op. ult. cit.*, p. 195

bound in heaven; and whatever you release on earth will be released in heaven". But I also remember the philosophical dissertation of St Thomas Aquinas developed in his *Scriptum super Sententiis*, (liber IV a distinctione XVIII ad distinctionem XIX) where the Theologian makes a fine distinction between *claves Ecclesiae* and *claves apostolicae*. According to his interpretation of the Holy Scriptures, *claves Ecclesiae* do not really exist, from the words of the Apocalypse *vidi, et ecce in caelo ostium apertum*, and from the verse of St. John's Gospel "I am the door. If anyone enters in by me, he will be saved, and will go in and go out, and will find pasture" (10, 9). On the contrary, the ministers of Ecclesia need to have their own keys as dispensers of God's mysteries. In this perspective the apostolic keys show the assignation of a spiritual power: so the theological question is to define when the keys have to be given and to whom, insofar as their possession means a solemn and holy election. The Great Seal keeps the perfect combination of Politics and Theology.

According to the Treason Act of 1351 a person was guilty of high treason if they - among other cases - counterfeited the Great Seal.

At the same time the Great Seal is the means used to sanction and sacralize the acts of government becoming the real evidence of their authenticity even against or in the absence of an actual will of the sovereign. These arguments came to the fore during the reign of George III, when his illness raised the issue of the juridical basis of a regency and of the continuity of parliamentary activity. When Parliament convened on November of 1788, the King could not, as was customary, communicate to them the agenda for the upcoming legislative session. According to a long-established practice, Parliament could not begin the transaction of business until the King had made the Speech of the Throne. Parliament, however, ignored the custom and began to debate provisions for a regency. Even if Charles James Fox and William Pitt agreed that George III's eldest son and heir-apparent was entitled to take government during the illness of the king, they substantially disagreed over the basis of a regency. The dissenting opinions concerned the relationship between the royal prerogatives and the powers of Parliament: while Fox thought that it was the Prince of Wales's absolute right to act on his ill father's behalf, Pitt argued that it was for Parliament to nominate a Regent. Proceedings were further delayed as the authority for Parliament to merely meet was questioned, as the session had not been formally opened by the Sovereign. The remedy proposed by Pitt was based on a legal fiction. As was well-established at the time, the Sovereign could delegate many of his functions to Lords Commissioners by letters patent, which were validated by the attachment of the Great Seal. It was proposed that the Chancellor, as the Keeper of the Great Seal, affix the Seal without the consent of the Sovereign. Although such an action would be unlawful, it would not be possible to question the validity of the letters patent, as the presence of the Great Seal would be deemed conclusive in court. George III's second son, the Prince, Duke of

York, denounced Pitt's proposal as "unconstitutional and illegal", nonetheless, the Lords Commissioners were appointed and then opened Parliament.

In other times James II, facing with the deposition plan of the Immortal Seven, attempted to flee to France, first throwing the Great Seal into the Thames. This was a political act performed to proclaim the non transferability of the sovereignty. With the material lost of the Great Seal the supreme King's power was consumed.

The above arguments justify the extraordinary pre-eminence of the Lord Chancellor in the English constitutional settings. But further features have to be clarified.

I'm referring, on the one hand, to the hybrid jurisdiction exercised by the Chancellor in the beginning, such as to contain the grounds of the subsequent differentiation and the seed of the later conflict; on the other hand to the position of the Chancellor in relation to the King's Council and to the Parliament, so - I think - the anxiety about the political superiority moved these actors to forge the structure of the Common Law and Equity jurisdiction.

As we have seen, the Chancellor had the power to supply the original writs to suitors who wished to litigate in the Royal Courts. If we consider that writs are equal to remedies and that, according to the English legal thought, remedies precede rights, we can conclude that during the 12th and early 13th century the Chancellor exercised a real control over the oracular power of the Common Law Courts, defining their specific role in the recognition process of new rights. The Provisions of Oxford (1258) put on the stage the fierce resistance of the barons as the new settled 'judicial nobility' against the uncontrolled power of the Chancellor. But this bitter attack on the Chancellor was sustained by the more deep purpose to question the inner source of Justice, replacing the prerogatives of the royal sovereignty, embodied in the King and in his minister, the Chancellor, with the claimed independence of serjeants and justices. Later the Statute of Westminster II (1285)⁶, giving to the Chancellor the power to slightly vary the forms of the writs in order that justice might be done in similar cases, represented the compromise solution achieved by the opposite interests.

In spite of these tensions, during the mediaeval period the relations between the Common Law Courts and the Chancellor did not turned into a public dispute. This was possible because a superior political coherence was assured by the means of the King's Council, where both the Chancellor and the judges sat. In this way the political elitism of the Council played an absorbent role compared to the assertion of distinctive jurisdictions.

⁶ Et quotienscumque de cetero evenerit in Cancellaria quod in uno caso reperitur breve, et in consimili casu cadente sub eodem jure et simili indigente remedio, concordent clerici de Cancellaria in brevi facendo, vel atterminent querentes in proximo parlamento, et scribant casus in quibus concordare non possunt et referant eos ad proximum parlamentum, et de consensu jurisperitorum fiat breve, ne contingat de cetero quod curia diu deficiat querentibus in justitia perquirenda'.

In my view, the mutual definition of independent spheres of jurisdiction and the consequent contraposition Common Law/ Equity as alternative systems of substantial rules is inscribed in the political disputes that lead to the settlement of English Constitution.

The origins of Equity, as the other face of Justice, trace back both to the advent of the Parliament as autonomous body, separated from the King's Council, and to the Chancellor's reappropriation of the ecclesiastical jurisdiction prevented or prohibited by the Common Law Courts.

I'll try to clarify how these two *polemical* movements are closely related and responsible for the success of Equity.

First of all I'll examine the relationship between King, King's Council, Parliament, Chancellor and Common Lawyers to point out which political institution acts as support of which sovereignty.

The working body of the Council consisted of the king's great officers of state and the judges. According to the succinct definition given by Sir Francis Palgrave, 'the council was composed of the Chancellor, the Treasurer, the Justices of either bench, the escheators, the serjeants, some of the principals clerks of the Chancery and such others, usually but not exclusively bishops, earls, and barons, as the king thought fit to name'.⁷

The other word, Parliament, in its proper etymology, recalls rather a colloquy, a discussion than a particular body of persons. As Professor Maitland says 'this word is appropriated to the colloquies of a particular kind, namely those which the king has with the estates of this realm, and still more slowly it is transferred from the colloquy to the body of men whom the king has summoned. As yet any meeting of the King's Council that has been solemnly summoned for general business seems to be a parliament'.⁸ Even the question of the nature and essence of Parliament is still vexed, there are sound reasons to believe that, in the beginning, the parliament was a large meeting of the King's Council afforded by elected representatives from the counties. In the same terms, Sir Maurice Powicke, speaking of the English parliament during the reign of Edward I, asserts that 'in England it [the parliament] had come to mean the king in council in a gathering of wider scope. It implied the presence of the king and we may assume that any parliament held in the king's absence would be held only by his command. It implied also the presence of council and especially of the judicial element without which business in council could hardly be done'.⁹

⁷ Sir Francis Palgrave, *An essay upon the original authority of the King's Council grounded upon a report presented to the honourable the Commissioners on the Public Records, November 1822, in order to explain the nature and importance of the antient [sic] Parliamentary petitions, as materials for the constitutional history of England*, printed by command of His Majesty King William IV. under the direction of the Commissioners on the Public Records of the Kingdom, London 1834, p.20.

⁸ F.W. Maitland, *Parliament Roll of 1305 (R.S.)*, XLVII, I, London 1893, 354-355

⁹ Sir Maurice Powicke, *The Thirteenth Century, 1216-1307*, The Oxford History of England (ed. G.N. Clark), IV, Oxford, 1953, 344.

Now, the origins of parliament are closely related to a political purpose, to jeopardize the King's absolute powers. At first, Magna Carta provided for a *commune concilium*, the assent of which was necessary for taxation¹⁰; then during the reigns of Henry III and Edward I the main constitutional interest concerned what form this kind of concilium, deputed to control the prerogatives of the Crown, should take. The various experiments tried during these years lead to the Model Parliament of 1295, in which representative principles¹¹ definitely found a place beside feudal principles¹².

To our extent it is important to stress what the King's Council did at a Parliament: this assembly was the natural place where different forces carried out their political plans and strategies. Besides taxation and legislation, the King's Council at parliament exercised an original jurisdiction on important cases concerning the king, very great men of the Realm, grave questions of public law, or unprecedented matters.

Moreover the King's Council at Parliament answered petitions presented by individual and communities. As Holdsworth reminds, the petitions were of varied kinds. 'Some ask for things which the petitioners can get by an action at law. These will be sent to the ordinary courts. Sometimes they ask favours of the king. Sometimes they ask for relief which no known writ can give, sometimes they will ask for new legislation. All these petitions come before the Council, who perhaps examine the petitioner. It will then either endorse an answer which sends the petition to one of the ordinary courts, or it will lay the matter before the king'.¹³

In this political and constitutional setting, the Chancellor, as a leading member of the King's Council, played a pivotal role. During the 13th century the cases brought before parliament are often referred to the Council and to the Chancellor for their examination and judgement. Later some of the petitions presented to the parliament were addressed directly to the Chancellor and especially the petitions relating the Great Seal, the wardship of infants, dower, partition, rent charges, tithes, goods of felons.

¹⁰ Magna Carta, c. 14 'Et ad habendum commune consilium regni de auxilio assidendo aliter quam in tribus casibus predictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones sigillatim per litteras nostras; et preterea faciemus summoneri in generali per vicecomites et ballivos nostros omnes illos qui de nobis tenent in capite ad certum diem, scilicet ad terminum quadraginta dierum ad minus, et ad certum locum; et in omnibus litteris illius summonicionis causam summonicionis exprimemus; et sic facta summonicione negocium ad diem assignatum procedat secundum consilium illorum qui presentes fuerint, quamvis non omnes summoniti venerint'.

¹¹ As Helen Cam specifies 'in English sources, the oldest unit to be represented is the vill in 110; the next is the shire and hundred in 1166; the next is the cathedral charter in 1226; the next is the diocesan clergy in 1254; the next is 'the community of the land' – otherwise the barons – in 1258; and the next the borough in 1265'. H.M. Cam, *The Theory and Practice of Representation in Medieval England*, in *History*, xxxviii, 1953, pp. 11-26.

¹² From the end of the 14th century the Council was internally divided into a Privy Council and a Great Council: the first usually consisted of the five great officers of state (the Chancellor, the Lord Treasurer, the Keeper of the Privy Seal, the Chamberlain and the Steward of the Household), the archbishops of Canterbury and York, and from ten to fifteen other members. The second consisted of the Privy Council and the general body of the nobility, spiritual and temporal..

¹³ Holdsworth, *op. cit.*, I, 173.

In 1349 a king's writ to the sheriff of London ordered that petitions relating to the common law should be brought before the Chancellor; that petitions relating to the grant of king's grace should be brought before the Chancellor or the keeper or the Privy Seal, and that only the petitions of which those officials could not dispose should be brought before the king in person.

In this way the Chancellor acquired a predominant importance in the Council and became associated with petitions which asked something of the king's grace.

In the same time the common lawyers took to nourish a feeling of hostility against the King's Council and its jurisdictional functions. This is the beginning of the struggle for jurisdiction that deeply shapes the English Law. The lawyers feared the elastic competence of the Council and armed themselves to defend the ground already conquered, to protect their exclusive fortress. This was a history of belligerent *nomoi* and the clash must be placed in the political arena. So during the Edward III's reign the judges denied that their decisions could be questioned in the Council¹⁴ with the aim to confine its jurisdiction to matters falling outside the common law (such as aliens, maritime and ecclesiastic laws).

The political and juridical dispute became patent during the Tudor period. The fierce proclamation of the Crown's sovereignty required a reorganization of the Council, as a strong executive body and caused the definitive separation both between the Council and the Parliament and between the Council and the Chancellor, at this point the Chief Judge of the constituted Court of Chancery.

The Tudor's ambitions moulded the developments of English Justice.

The Council was identified with the Crown and its prerogatives. The Equity jurisdiction of the Chancery was the means used by royal authority to define the boundaries of Common Law. In my view Equity made possible the historical completion of the sovereignty paradox, in the meaning given to this expression by C. Schmitt in his work *Political Theology*. The sovereign power is *sovereign* insofar as it stands *within* and *outside* of the Law, taking upon itself the decision on emergency, a state of legal vacuum. So, in this perspective, the equity jurisdiction of the Chancery allowed the king to make rules beyond the 'reign' of Common Law, reasserting his supreme sovereignty. Meanwhile royal authority supported the Court of Chancery against the Common Law Courts: the royal prerogatives and the duty to do justice had a direct effect on arrangements within the English system of courts: the monarch's absolute prerogatives supports Chancery as the organ of that prerogatives, as the Court of King's conscience. This is a kind of constitutional legitimacy that recurs in the English history: the rise of the Chancellor's equitable jurisdiction and his relation to the developed system of the common law courts was similar to that of the justices of the Curia

¹⁴ Year Book 39 Edward III, 14: 'Mes le justices ne pristerent nul regard al reverser devant la conseil, pur ce que ne fuit place ou jugement porroit estre reverse'.

Regis to the older local courts. The Chancellor acted, as these justices had acted, on behalf of a king, bound by his office to do right and justice to his subjects.

Therefore Equity rather satisfied political needs than an effective demand for justice.

Besides, the proof is that the Tudors created another court of equity for the same purposes, that is to recover ground in favour of the Monarch and against the Common Lawyers. It was the Court of Requests with jurisdiction over cases of poor suitors or king's servants specially privileged to sue there. The polemical reaction of the Common Law Court was inevitable: after the triumph on the older local courts, again they attacked the new court, sprung, like themselves, from the Crown.¹⁵

Once more Justice was an *instrumentum regni* : the Court of Star Chamber, created as a separate Court of Justice by the 'Star Chamber Act' of King Henry VII's second Parliament, was a powerful instrument to support the functions of King's Council, a kind of *longa manus* of the King, a political weapon for bringing actions against opponents to the policies of the King and his Ministers. Its criminal jurisdiction was so broad to include crimes against the authority and sovereignty of the Crown which common law did not recognize and punish, such as riot, conspiracy, forgery, perjury.

As I have mentioned above, there is another political issue that clarifies the origins of Equity and explains the development of its principles.

The new Court of Chancery, relying on its greater powers of resistance, intended to attract under his sphere of jurisdiction matters and cases that should be administered by Ecclesiastical Courts if the rival Common Law Courts had not interpose their veto.

This is clear with regard to uses and trusts, one of the earliest and most important branches of the equitable jurisdiction. The word use, from the Latin *opus* , meant a kind of property held or received by one person on account of another. The position of the person on whose account the land was held (*cestui que use*) was not recognised at common law. Now, if we consider that such arrangements were perfect to protect the interests on land of the Franciscans Monks, who were pledged to vows of poverty and unable to own land, we can understand the reasons of the common lawyers' proud resistance. It was at stake the distribution of land and the consequent definition of the landed aristocracy. The Ecclesiastical Courts tried to give their protection, on the ground that the violation of these arrangements involved a breach of faith, but they had always been met by writs of prohibition, dispensed by the Common Law Courts. The flat denial of Common Law and

¹⁵ According to the common lawyers a court could not be a legal court unless its jurisdiction was based either upon an act of Parliament, or upon prescription. The Court of Chancery and the King's Council were by prescription legal courts, while the Court of Requests could show neither a statutory nor a prescriptive title. As a consequence the Common Lawyers denied that the Court of Requests was a legal court. The first record of a writ of prohibition issued by the Court of Common Pleas against the Court of Requests is dated 1590. In 1598 Coke decided the illegality of the court in the case *Stepney v. Flood*.

the inability of the Ecclesiastical Courts to protect uses did not prevent their flourishing existence. Finally the uses found protection in the Chancery, becoming a specific kind of equitable ownership (different from the legal ownership created by Common Law), fashioned by the equitable jurisdiction of the Chancellor. Quoting Holdsworth, ‘no doubt the early Chancellors were ready to do as Chancellors what they had failed to do as ecclesiastics’.¹⁶ To understand the constant struggle between hostile competitors, we should remember that the Statute of Uses, an act of the Parliament enacted in 1535 (27 Hen. VIII c. 10), converted all English equitable estates, created through ‘use’, into legal estates. It has often been stated that the purpose of the rule was to eliminate loopholes in property law that allowed possessors of land to avoid paying taxes on their property by holding it in equity. But, as a matter of more realistic politics, the major purpose of the Statute was to facilitate the dissolution of the monasteries: the statute vested a legal title in the monasteries, accelerating the reversion of the lands to the Crown and making possible the proclamation of the King as Head of the Church of England.¹⁷

Once again politics makes the history of law.

I’ll bring another example to support my thesis. The Chancellors, motivated by their ecclesiastical bias, turned their attention to contract with the purpose to rule the private agreements according different principles from those of the common law. In past times, the Ecclesiastical Courts asserted their own jurisdiction wherever there had been a ‘laesio fidei’: such a misbehaviour was sanctioned by penitence or excommunication. Even if the Constitution of Clarendon (§ 15) stated that ‘placita de debitis, quae fide interposita debentur, vel absque interpositione fidei, sint in iustitia regia’, the Ecclesiastical Courts continued to claim jurisdiction. Once more the definitive assertion of the ecclesiastical jurisdiction reached a deadlock in front of writs of prohibition. The old principles invoked by the Christian Courts were developed by the new equitable jurisdiction and they were preserved by the means of new remedies, such as that of specific performance.

What I have tried to explain allows us to rearrange the history of English Law, casting a new light on the different languages that had shaped the system of English political discourse.

I represent the development of English Law as a perpetual and permanent struggle between different jurisdictions, claiming in turn their hegemonic role to define the limits of the others. Each of them conceptualizes its own linguistic resources, borrowing terms and concepts from the oldest tradition of Law and Theology. In this perspective the political clash between Common Law and Equity becomes also a linguistic diversity: even the selected words become a way of legitimizing the political rules, whose origins are sanctioned now by immemorial customs, now by Christian grace.

¹⁶ Holdsworth, *op. cit.*, 240.

¹⁷ The clash Common Law / Equity did not finish with the Statute of Uses: once it had served its political purpose, the ‘use’ was reinvented by legal sleight in the form of the ‘trust’.

On this level the tension moves towards the assertion of which is the master language among the others, responsible for constructing the overall framework that assigns some matters to one sphere and others to a different one. English History – I think – is not fitted for the solution of its inner antagonism. The conflict is its own soul and its main distinguishing feature. Every kind of supposed reconciliation sounds as a mere rhetorical or persuasive argument used to reach the consensus in the public debate, but the bold jealousy of the origins prevents us from corrupting the different body of rules hermetically sealed from outside influence or meddling.

Political Reason precedes and marks the definition of English Justice, sets the place of sovereignty, composes the languages of the historical bargaining with their basic structures and strategies.