

The polemical Spirit of English Law.
The path towards Judicature Acts' adoption

Cristina Costantini

Embracing the history that brings us until the Judicature Acts, I'd like to focus my attention on the marked character of English Justice as a personified abstraction¹ moulded in the background of political, juridical and theological clashes.

¹ With this concept – ‘personified abstraction’ – I’m referring to M. Fortier’s brilliant inquiry on the English legal disputes of 1616, the notorious and patent conflict between Common Law and Equity, M. Fortier, *Equity and Ideas: Coke, Ellesmere, and James, I*, in 51 *Renaissance Quarterly*, 1998, pp. 1255-1281. The Author highlights how ‘one longstanding and continuing scholarly tradition looks at the characters of the principal personages involved’ [in the legal strife of 1616]. So ‘in this mode of analysis, historical and legal events are the product of the characters of prominent people’. To support his argument, Fortier draws on various passages from different historians where the final clash between Common Law and Equity is represented through the clear understanding of the specific characters of its leading actors: Coke, Lord Ellesmere and James I. In this perspective Fortier quotes the work of Gardiner, insofar as it ascribes to Coke a ‘personal ruggedness of character’, a ‘crabbed and uncouth personality’, an arrogance of bearing and a narrowness of intellect (S.R. Gardiner, *History of England From the Accession of James I to the Outbreak of the Civil war 1603-1642*, Vol. I, AMS Press, New York, 1965, 6, 17). Moreover Fortier reminds the words of John Baker, according which Lord Ellesmere, the Chancellor, had ‘the timidity of a man of his age’, was ‘obstinate and difficult’, or was a tough-minded politician with ‘an ability to grasp problems and get the job done’ (J. Baker, *The Common Lawyers and the Chancery*, in 4 *The Irish Jurists*, 1969, 368-392). To describe James I’s personality, Fortier remembers that he has been called variously ‘the widest fool in Christendom’ and ‘Great Britain’s Salomon’. On this ground Fortier concludes that ‘the stubbornness, strength, irascibility, and folly of these men become the great forces molding early modern history’. We can find the same view in Glenn Burgess, where he argues that ‘Coke’s fall in 1616 had as much to do with an intransigent personality as with any differences between Coke, Bacon, Ellesmere and James I on fundamental principle’, G. Burgess, *The Politics of the Ancient Constitution: An Introduction to English*

In this perspective the Judicature Acts' adoption represents the epilogue of the *polemical* spirit of English Law.

Despite the ideological representation of the Common Law Tradition as an immemorial flow of customs that moves from an enchanted past to an eternally present, the shape of the English Law was designed and carved by rival body of physical characters fighting for the defence of an unviolated and predominant power.

The History of English Law developed as a progressive resistance to external contaminations capable of altering and corrupting the purity of the origins; but this was a process of bold conflicts, not of unquestioned evolutions.

The con-fusion acted by the Judicature Acts sounds as a conscious reverse of the past antagonism, as a coherent appeasement of forces and principles. But the mood of this con-fusion was totally determined by the previous contrapositions. Therefore we have to look towards the battlefields in which the most significant fights took place openly or slyly.

At this aim I'll analyze four main points:

- 1) the rediscovery of Equity's roots in a conscious political plan designed to contradict the inner justice of Common Law;
- 2) the opposite process that involved the development of Common Law and Equity as an

Political Thought, 1603-1642, University Park, Pa, Pennsylvania State University Press, 1992, 207.

- alternative motion towards or against a theological reconstruction of the system of Law; and consequently the elaboration of different aesthetics and the communication of a divergent rhetoric of power;
- 3) the rising of the Common Law anxiety about its proper supremacy over Equity that blew up in a frontal collision;
 - 4) the final solution represented by the Judicature Acts as a political product of the conflicting past.

First of all we have to deal with the unusual tension direct to transform the maxims of equity, the moral rules prescribed by the individual or collective conscience into an institutional and identifiable *corpus* of suitable remedies. This was a learned construction built on the margins of the Canon Law and at the same time walled against the peril of an adverse overlap. In this way the Chancellor, who initially was a bishop, became the medium through which the internal forum was converted into a public sphere of protection and evaluation of the human behaviours.

According to the conventional view, the origins of the Equity system are traceable to the indispensable reduction of the Common Law's rigour and inadequacy. Such an explanation does not satisfy a more honest attempt at intellectual and scientific understanding, actually it seems an oversimplified way of depicting the relationship

between Common Law and Equity, insofar as it introduces an implicit acknowledgment of the priority of the Common Law, that ought to be only amended and improved, not superseded.

A more founded historical consciousness leads us to say that the beginnings of Equity rest on the struggle for the Dominium of (and over) the juridical sphere.

From this critical standpoint, Equity emerged as a ruled *epieikeia*² to cast doubts on the authority of the sapiential heritage guarded by Common Lawyers within the confines of the elective space chosen to announce the real Law. The possibility of recanting the exclusive legitimacy of the Common Law rules required the individuation of an autonomous and superior source of authority and influence, that could be easily identify in the Law of nature and in the Law of reason, the nearest to God's plan and will.

In a perspective of Political theology³ we can reconstruct the origins of Common Law and Equity in terms of a dispute between two

² I'd like to mention William West's *Symboleography*, a pivotal work to define Equity in early modern England and its proper relation with law. Particularly I'm referring to the West's sentence according which equity has at the same time, rigour, rule and measure: 'Equitie as some other say, is reasonable measure, containing in it selfe a fit proportion and rigor, so that it differeth from Law in this; that Law is a determinate sentence set downe according to the rules of the law: but equitie is a certaine proportion and allay, upon good occasions, setting on side the common rules of justice, and so they call it a *ruled kind of justice* [cursive is mine], alloyed with sweetness of mercie', W. West, *The Second part of Symboleography*, Printed by Thomas Wight, Anno Do. 1601, London, p. 175.

³ In my view the history of Common Law vividly exemplifies the two opposite conception of the 'political theology' formulated by J.Assmann and C. Schmitt. In fact the foundation of the serjeants' brotherhood shows the political transposition of fundamental religious concepts (see the following footnote), leading us to say that the spirit of Common Law arises from (and it is formed by) the spirit of theology.

different models of incarnation of the theological ascendancy of the Law. On one side the theological dimension was constructed by the community of the serjeants at law, the oldest and most powerful common lawyers, who acted as *sacerdotes iuris*, deputed to the ritual, liturgical and oracular declaration of the rules.⁴ On the other, the theological element was represented by the *ministerium* of the Chancellor, the ecclesiastical qualification that inevitably recalled a transcendental order and a proper hierarchy. So the serjeants at Law and the Chancellor embodied two divergent archetypes of *servientes*, destined for the theological administration of the Law. The Justice of Law, pronounced by the Courts of Common Law was settled in front of the Justice of Conscience, declared by the Chancellor in the Chancery Court.

On the contrary the sovereignty and its 'constitutional' legitimacy is fulfilled through the theological representation of the political power. In this perspective I conclude that the foundational history (or mythology) of Common law is the clearest incarnation of the definition of political theology as 'the inscription of the Political into a more fundamental sphere of Being' (I owe this brilliant definition to P.G. Monateri; P.G. Monateri, *Il problema di una definizione di Europa: una questione di teologia politica?*, in *Rivista Critica del Diritto Privato*, 1, 2005, pp. 3-19). As a further development of this definition, I suggest the existence of an original and unique ruling thought, capable of various declensions and different embodiments, that produces and moulds both Theology and Politics.

⁴ Quoting Sir John Fortescue: "We, who are the Ministerial Officers, who sit and preside in the Courts of Justice, are therefore nor improperly called Sacerdotes (Priests): The import of the Latin word (Sacerdos) being one who gives teaches Holy Things"; J. Fortescue, *De Laudibus Legum Angliae*, (S.B. Chrimes ed.), Cambridge University Press, Cambridge, 1942. These words unequivocally mark the sacerdotal role of the legal profession and assimilate the oracular pronouncement of the maxims of Law to a kind of theology, transferring liturgical and sacramental concepts from the religious sphere to the political-juridical dimension. A corresponding metaphoric transposition was fulfilled on the Continent, but following a different path and coming to a dissimilar end.

Moreover, in the background, I'd like also to suppose a political role played by the Chancellor as the keeper of the King's conscience. This function not only introduced a tacit kind of control, but also protected the sovereignty of the King from the erosion or the more aggressive divestiture thought by the Courts of Common Law, since their emancipation and autonomous constitution against the King's Council. At this regard the Equity jurisdiction was a potent instrument used to stem and contain the growing and elitist independence of Common Law principles.

Secondly, we have to face toward the strengthening of the original antagonism.

The individuality of the English system demanded a specific criterion of validation which could be applied to both of its souls. This was a history of mutual disavowal.

The political theory packaged by clever Common Lawyers rediscovered the coessential inclusion of Equity in Common Law. St. German in his *Doctor and Student* demonstrated that Equity was not something outside the Law, but, on the contrary, something within it, therefore the Englishmen ought to govern their conscience by the positive law of the land and not by an abstract reason lying outside it.⁵ In the same way Edward Hake in his work *Epieikeia*, written in the reign of Elizabeth I, refused the ancient view that 'Equity and the

⁵ St. German, *Doctor and Student*, (ed. T.F.T. Plucknett & J.L. Barton), Selden Society, London, 1974, Prologue, pp. 2-5.

Common Lawye weare distincte things and dissevered the one from the other': Equity was not a set of principles apart from the law, but it was inherent in the Common Law itself, 'a parte or virtue attributory to the lawe'.⁶

Such a theoretical propositions transferred to the rules of Common Law the specific features and ontological properties that had justified the origins of Equity. The newest formula was in the sense that when maxims of the Common Law are subject to equitable construction it does not mean that they are being rejected, but rather they are being 'expounded by the hidden righteousness of those growndes and maxims'.⁷

These claims on behalf of Common Law were made from professional self-interest: undoubtedly the prior reason for asserting the self-sufficiency of the Common Law was to aid its proud battle with the non common law courts. The equitable jurisdiction of the Court of Chancery did not create a body of equitable principles to be administered separately from – and possibly over – the Common Law.

The supposed certainties of the past were broke up. Now the Common Law was perceived as a self-contained system for giving political guidance, without any kind of external control. Consequently the present was worshipped much more than the ideologically worshipped past.

⁶ E. Hake, *Epieikeia. A Dialogue on Equity in Three Parts*, (ed. D.E.C. Yale), New Haven, 1953, p. 5.

⁷ E. Hake, *ibid.*, pp. 16; 55-56.

Another significant fact that altered the presumed balance of powers was the interruption of the tradition according which only an ecclesiastic could be appointed to the office of Chancellor. The merit or demerit of this resolution is paid to King Henry VIII, following his dissident resolution against the Roman Pope. The secularization of the Chancellor's functions made an attempt on the Equity's stability: the collapse of the theological foundation threatened to surrender the fortress of Equity to the invading Common Law. At that time the hateful con-fusion, or better the sharp defeat of the equitable jurisdiction were prevented: Equity defended itself entrenching in its proper principles and opposing a recently erected building of doctrines to the ancient rules of Common Law. To outlast, the secularized Equity had to adopt the same rhetoric of its oppressor. The price paid for salvation was the definitive loss of the original characters: the discretionary power of the Chancellor used to shape the justice according to the peculiarities of the individual cases changed into an observant application of rules more and more fixed. The victory of Common Law could not be celebrated but its deplored rigour was transmitted to the Equity system.

The third stage of the path that leads to the Judicature Acts' adoption is marked by a fight between the Crown and the Parliament. But the questions at stake remained unchanged: the conflicting powers did not renounce their privileges. The Tudor's effort to extend the royal prerogatives was ostracized with a fierce resistance by the Barons retreated in Parliament. The same hostility inspired the

Common Lawyers, withdrawn in their Courts. In this way the Parliament and the Common Law Courts functioned together as stronghold in defence of the medieval order and powers' composition. The history of English Law would have been quite different (and maybe more similar to the Civil law) if the monarchy and the special courts outside the dominium of Common Law (such as Star Chamber, Admiralty and Court of Chancery) had won the final clash.

The Stuarts accession to the throne modified the present scene. The juridical definition of sovereignty and kingship was again in dispute and Equity was used as a perfect *instrumentum regni*.

James I was a prolific and systematic theorist of his own authority. In this perspective he grounded kingly power in the Holy Scripture: 'Kings are called Gods by the propheticall King David because they sit upon God his throne in earth and have the count of their administration to give unto him'.⁸ The authority of kings over their subjects is given them by God and in consequence they need answer to no one but God. James I embodied the triumph of the principle of personal monarchy and he thought he could sit as judge over all his judges. So the king could claim to be acting *outside* the common law using political languages other than common law, the theological language, and the language of the external jurisdictions (special and equity jurisdiction).

⁸ Quoting from *The True Law of Free Monarchies*, a book of political theory attributed to James I and written around 1542.

On the contrary common lawyers believed that common law had a jurisdiction that defined the limits of other jurisdictions. They used the rhetorical language of ancient constitutionalist idea to defend a constitutional right of resistance.

The definition of legitimacy and legality was expressed by the means of different languages of political discourse, that alternatively promoted the theory of absolute prerogatives or the theory of limited prerogatives.

In this context we can understand the polemical diatribe between Coke, Common lawyer, Chief Justice of the Court of Common Pleas and then of the King's Bench and the Chancellor Lord Ellesmere.

In fact Lord Ellesmere considered himself legitimated to interfere in the subjects traditionally included in the exclusive jurisdiction of the Courts of Common Law and with respect to definitive judgements. In reply to these intrusions, Coke urged the loosing parties condemned by the Court of Chancery to defy the injunctions pronounced in Equity, going so far as to release the prisoners with the means of writ of habeas corpus.

In 1616 James I resolved the crisis with a decree, stating that Equity had to prevail in case of conflict with Common Law.

But Coke undermined also the sovereignty of the King, declaring that the King could not to judge in a Court of Common Law, because the law applied is suggested by an artificial reason that only the study and the experience allow to master and control. This was the

final assertion of the independence of the juridical discourse from every other kind of discourse (moral political philosophical discourse).

In 1688 the Stuarts' defeat overturned the result achieved in 1616 and in the new constitutional order the Parliament won.

The Judicature Acts represented the final political solution that pacifies the different languages in which English Constitution found expression. The break of the past was committed to a normative act, as an external and superior decision both to Common Law and Equity.

The definitive betrayal of the origins imposed the Judicature Acts' solution: Equity went away from the supposed correspondence to the moral order and became a settled system of rights' allocation that follows formal and strictly juridical criteria.

The homologation of the discourses of Common Law and Equity corresponded with the separation from the contending powers that expressed the ancient rules.

From this time onwards the juridical landscape was dominated no longer by the incarnate Powers, but by equivalent sets of fixed principles and predictable decisions.

This process claimed that the remedies were administered by the same Courts: the patrons of Common Law and Equity had lost the meaning of the beginnings.

In this way the Lambarde's prophecy was fulfilled: "Even as two Herbes being in extremitie of heate, or cold, bee by themselves so

many poysons, and if they bee skilfully contempred, will make a wholesome Medicine: so also would it come to passe, if either this Aritmeticall Government by rigour of Law onely or this Geometrically Judgment at the pleasure of the Chancellour or Praetor onely should bee admitted; and yet if they bee well compounded together, a most sweete harmonicall Justice will follow of them”.⁹

⁹ Lambarde, *Archeion or a Discourse upon the High Courts of Justice in England*, (ed. C.H. McIlwain and P.L. Ward), Harvard University Press, Cambridge Mass. 1957, pp. 71-72.