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Justice and the defence of rights in England and Wales : the case of Equity

Anne-Marie O'Connell
University of Toulouse 1 Capitole

Résumé :

Alors que le système connu sous le nom de *Common Law* se développait, un phénomène de fossilisation de la procédure d'accès aux tribunaux limita le recours à la justice pour les sujets du royaume ainsi que le pouvoir des juges (1258 *Provisions of Oxford*). Le Roi, « Fontaine de justice » et dernier recours des pétitionnaires, délégua son pouvoir de rendre la justice à son *Lord Chancellor*, son Secrétaire d'État et ecclésiastique à l'origine, qui remédia à ces nombreux dénis de justice en créant un système destiné à corriger les défauts de la loi sans s'y substituer : l'*Equity*. Système inspiré du droit canon, l'*Equity* juge en fonction de ce qui est moralement acceptable, et introduit en droit anglais de nouveaux droits, de nouvelles procédures et de nouveaux remèdes.

La présente contribution analysera comment l'*Equity*, au moment où elle se constitue, peut représenter un embryon de justice réparatrice, et le *Lord Chancellor* un prototype lointain du défenseur des droits, et comment, d'autre part cette approche particulière du droit demeure fermement ancrée dans le système judiciaire anglais.

Mots-clés :

Equity – justice – Lord Chancellor – Common Law – réparation – procédures – droits – défenseur.

Abstract:

As the legal system known as *Common Law* was developing in England, access to justice via the procedural writ system was abruptly limited by the 1258 *Provisions of Oxford*, which denied access to those litigants who could not fit in the existing claim forms and prevented judges from creating new ones. The King, “Fountain of Justice” and last resort for the petitioners, delegated his residual prerogative to render justice to his Lord Chancellor, both secretary and confessor. The latter remedied to this denial of justice by setting up a system of court designed to mitigate and correct the rigours of the law without becoming a substitute for it. This system, inspired by canon law and called *Equity*, decides cases according to what is morally right, and introduces new rights, new procedures and new remedies into English law.

The present contribution analyzes how the emerging system of *Equity* can be seen as the starting point of reparative justice, and the *Lord Chancellor* as the prototype of the defender of rights; secondly, it will also see the limits of this analogy by showing that this particular approach to law remains firmly anchored in the English court system.

Keywords:

Equity – justice – Lord Chancellor – Common Law – reparation – procedures – rights – defender.

INTRODUCTION

The Office of the Human Rights Commissioner in England and Wales is a relatively recent creation; it can be tied to the development of Human Rights law as embodied by the European Convention on HR or the UN *Universal Declaration of Human Rights*. All but two of the articles in the European Convention were incorporated into domestic law by the *Human Rights Act* 1998. In spite of all this, the history of the English legal system shows no clear influence from other legal traditions pertaining to the defence of individual rights by reference to a single overarching document. However, the notion of right is embedded in English law and can be defined as the sort of interests that society will protect, under the control of courts. John Locke, in his *Second Treatise of Government* (1698), enumerates them as: property, quiet enjoyment, physical integrity and civil rights such as individual freedoms provided that public order be not under threat (Locke 1698: 157).

But rights, like law, are part and parcel of the social fabric that gave rise to them, and, consequently, they are also submitted to change, not in terms of definition, but must be upheld consistently with the normal evolution of society. In other words, the defence of rights goes on a par with the manner in which equity mitigates and corrects the rigidity of legal rules.

In England, this corrective dimension took the form of a new approach to law called Equity. It emerged as a body of principles when the Common Law courts could no longer address those legal disputes that did not find any correspondance in the limited set of writs, i.e. the claim forms available to enter a plea in court. This led those who were denied legal remedies to petition the King, the “Fountain of Justice” (Goodnow 1891: 495). The latter transferred that matter to his Lord Chancellor, a prominent member of the Royal Council, the Keeper of the Royal Seal and the intermediary with the Barons who had formed the first form of Parliament (what would become the House of Lords). He soon assumed a full judicial position by setting up the Court of Chancery, the role of which was to give redress to plaintiffs where the Common Law courts could not, by resorting to its own equitable principles called the “Maxims of Equity”. With time this remedial institution became a court with its own rules of procedure and precedents until the Judicature Acts of 1873 and 1875 merged the Common Law courts and the Courts of Chancery: today all English courts can judge both at law and in equity.

The present contribution aims to address the two following issues: first, can equity be considered as a source of creation of rights and interests? If so, how were these rights defended? Finally, how far can the Lord Chancellor be considered as a prototypical defender of rights?

However, considering the close connection of Equity with the English court system, and the particular position of the Lord Chancellor, the second part will examine what can mitigate this vision and limit the risks of anachronism when dealing with Equity.

I- Equity as an early form of defence of rights

The term “equity”, meaning “fairness” illustrates Aristotle’s definition of the inner tension that exists within the province of law. In his *Ethics*, he claims that the law is a general principle that is applied universally and equally to every member of the polity and governs every aspect of society: justice is akin to equality (Book 5, 2, 1130b30- 1131a1). However, a strict and uniform application of the law, which is globally desirable, may generate injustice in individual cases. It is therefore necessary to mitigate the rigour of the law by deciding on the ground of fairness, and thus make sure that law is compatible with justice, according to Aristotle’s *Ethics* (Book 5, c. 10). This must yet guarantee that the corrective dimension of justice does not distort the equal application of legal principles to everyone and every situation. This is precisely what the maxims of Equity aim to show. This series of short proverbs, designed by lawyers as a learning tool for students who had to memorize the core principles of the law, express how the pursuit of justice will constitute a factor of change in law. Equity also addresses the issue of accessibility to justice which was felt to be a key characteristic of the law. Universal applicability of the law implies its accessibility.

A- “Equity follows the law”

This maxim illustrates the ancillary nature of Equity that originally aimed to redress the hardships of the law. Common Law itself had attempted to deal with its increasing procedural rigidity in relation to natural law principles (Curzon 1979: 96):

In accordance with medieval principles the King has been considered as the Fountain of Justice, and retains a residuary jurisdiction to ensure that justice was done to his subjects by means of petitions addressed to him. He could issue writs called *brevia magistralia* when *brevia de cursu* (those issued by courts) would not deal with the harm complained of (Bracton 1250-56). This lasted until the *Provisions of Oxford* were enacted in 1258, which put an end to this form of judicial creativity by the King’s Courts. The limits put to the creation of new writs was essentially the result of a power struggle with the Barons, who feared the growing influence of the monarchy. Until then, the King’s Council (*Curia Regis*) could also exert a discretionary right to give relief on the basis of petitions received. This would define rights as immanent to the case in point, and privileged the claim over procedural constraints. From this perspective, rights are considered negatively: claiming a right for a plaintiff would mean having access to courts, which in turn is an acceptable definition of justice. But rights are also consubstantial with the outcome of the

case, in that it should be possible to give justice over time, which may conflict with the limits imposed by the rendering of a final decision. Justice thus coincides with the possibility to reopen a case or appeal against a decision. And indeed this became possible under Edward III in certain circumstances, as when new matter had emerged since judgment of a case had been passed. This was done by means of a writ of *audita querela* ("quarrels having been heard").

Accessibility to justice is also complemented by taking local circumstances into account, which was the case with *Bills in Eyre*, developed between the 13th and the 14th centuries. It meant that travelling circuit judges in the provinces could exercise equitable jurisdiction throughout the realm in local assemblies called Eyre. With this circumstantial dimension, the law considered that rights were tied to specific situations, and to the necessity to adapt the law to them. This is further evidenced by Common Law developing actions of an equitable nature among which actions of *covenant* (when the defendant is ordered to perform his obligations) can be mentioned, along *writs of prohibition*, which were an early type of injunction, *suits of mill* (the Common Law equivalent to a perpetual injunction), writs of *quia timet* ("because he fears"), or the delay allowed by the King's courts in repayment of mortgage and debt, which was akin to the equity of redemption. These measures devised by Common Law courts embraced the notion that the purpose of the justice system was to resort to what Aristotle calls "prudence", which consists in tailoring the rules to the particular circumstances: it lies at the heart of decision-making, not in the existence of intrinsic rights owed to those seeking the intervention of courts. The coincidence of prudential decisions and Christian (or Church) doctrine reassessed the concept of right more positively as Equity emerged as a body of doctrine. Petitions for justice were gradually considered, albeit in a prototypical manner, as civil rights and entitlements. Equity takes responsibility for the upholding of these rights, and this is impersonated by the emergence of the Lord Chancellor as the key official in such matters.

B- "Equity will not suffer a harm to be without remedy"

Unlike the other senior positions in the Judiciary, which emerged from the structure of the court system, the Lord Chancellor came from an altogether different background. Originally Lord Chancellors were ecclesiastics and acted as the King's secretaries or even Prime Ministers of sorts, and were known as the "Keepers of the King's conscience" (Burdick 2004 : 79). Petitions were addressed to them on appeal "for charity and in God's name"; Chancellors were well-versed in canon law, and remedies were influenced by the Christian doctrine, both in form and in content. They were sought "in the name of reason, of right and conscience", a perspective that was distinctly set in the school of Natural Law. What makes the Lord Chancellor so different from the Common Law judges is that he already held other offices : although he had no elective mandate, and did not stand to represent

those whose rights had been violated by the government or its bureaucracy , the Lord chancellor cumulated many functions :as a member of the Executive, he was the King's secretary and his advisor in spiritual and temporal matters, drafted documents and affixed the Royal Seal as a sign of authenticity (he was the Keeper of the Royal Seal) ; he was a member of the Great Council, to which Chancery was attached as an administrative service ; by the end of the 12th century, Chancery had become a separate department .As a member of the Legislative, he was the Prolocutor of the House of Lords (the older House of Parliament, chronologically), and thus, became in time the Speaker of the House of Lords. He was not legally trained in Common Law doctrines, and thus held a different view on the manner in which decisions of justice should be rendered. The Lord Chancellor was not independent from the King, but his position was singular; indeed, he became the first official to embody judicial redress and the possibility to give a voice to the petitioners whose right to justice had been denied by the rigidity of court procedure. In fact his way of dealing with cases that courts could not hear showed that justice was attached to a position, or more particularly to a person who embodied moral rectitude and Christian values.

C- "Equity acts on the conscience"

Equity is based on the precepts of natural law (*jus naturalis*) and on the laws of God, and its doctrine was referred to as "the doctrine of conscience"; one important judicial consequence was the reliance on discretion exercised by the Lord Chancellor himself, who conducted the examination of the defendant, to seek out the principles and moral standards underlying the act complained of. For the same reason, the Chancellor (later on, in the courts of Chancery) did not resort to juries, contrary to Common Law courts. Conversely, access to Equity was more direct. Moreover, the association of Equity to the laws of God as embodied in the concept of "conscience" and "conscionable act" had other effects: first, it could prevent the operation of a law found to be contrary to the Law of God if the plaintiff's hardship could be attributed to that law. The measuring rod in those circumstances was the Chancellor's conscience, and this had to be taken literally. But it also assumed that the plaintiff followed the same moral principles, and that his moral conscience would be hurt along with his sense of justice. Secondly, when Common Law gave remedies "as of right", equitable remedies were discretionary. The Lord Chancellor established the right that needed to be upheld by means of cross-examination, then he also provided the remedies that would best serve these rights: thus the remedies were not only discretionary, they were also the result of judicial activism and creativity.

Moreover, Equity acts *in personam*, not *in rem*, which means that it proceeds not against the defendant's chattels but against him and his conscience. One consequence of this doctrine is that any attempt by a litigant to avoid or refuse to

comply with a court order would be considered as “contempt of court”; this was punishable by imprisonment.

More importantly, the Chancellor could issue a decree in the form of a “declaration of rights” or an “order” that would finalise his decision and impose remedies. Again, ignoring an order would lead to prison. The penalty also applied to the first stages of the proceedings when the Chancellor issued a writ of *subpoena* against the defendant summoning him to appear before him.

The importance of conscience as a tenet of a judicial doctrine was- and still is- such that acting unconscionably in equity would deny any relief to an otherwise arguable case. Hence the value of a maxim that claims “He who comes to equity must come with clean hands”. The procedural flexibility of procedure in equity derives from the role played by the Chancellor. It was therefore consistent to adopt a less rigid approach to procedure, which would improve access to court and justice for litigants. The emphasis was deliberately more on the substance of the case, and less on the form.

D - “Equity looks to the intent and not to the form”

Procedural rules in equity differed from procedure at Common Law in that a formal error would not result in the dismissal of a case. Equity aims at solving disputes, so it developed a certain number of procedural tools enabling the Chancellor to hear disputes and decide in conscience.

Proceedings commenced with a *bill* (petition) and not by a writ: it has no prescribed form, which means it was more accessible to the plaintiffs; the defendant was then served with a summons to attend (writ of *subpoena*) on pain of penalty (a “commission of rebellion” was issued if the writ was ignored), which can be considered as the ancestor of “contempt of court”. He then appeared before the Lord Chancellor and answered the petition orally, and then the Chancellor conducted an interrogation in order to “purge” his conscience if necessary. The examination of a defendant under oath had no parallel at Common Law at the time.

Besides, originally, proceedings were initiated in Anglo-French, then in English (and not in Latin contrary to the usage of the time), and all this meant that petitioners did not, at the beginning, need the assistance of a counsel. But the most original contribution of Equity to the law lies in the variety of remedies devised by the Court of Chancery; these remedies are still in use nowadays.

E - “Equity looks as done what ought to be done”

Equity developed remedies alongside its principles, and it also came to recognize rights that the courts of Common Law did not. The matter was all the more urgent

as the creativity of the Common Law courts had been severely curtailed with the *Provisions of Oxford*; procedural rigidity did not come from law itself but as the result of a political struggle for power between the king – and his courts- and the Barons, who were not only the pillars of feudalism, but also emerged as the natural opponent to the monarch. One consequence of the then limited powers of the *Curia Regis* provided the bulk of the cases that were brought before the Chancellor and his court. First there would be matters arising out of the lack of Common Law remedies, notably the failure to recognize the *use*, and equitable interests in land ownership, matters pertaining to the rigidity of Common Law rules of evidence, as described above. Another aspect of the importance and efficacy of Equity concerned matters arising out of the inadequacy of damages at Common Law: the latter only awarded financial compensation called *damages*, which may not be the best solution to all disputes. Equity awarded specific relief, like an order to perform an obligation (called *specific performance*), or to return the goods lent to the plaintiff (*restitution*). Equity also intervenes in matters arising out of mutual agreement (contracts): when a dispute concerns the performance of a contract, equity is concerned with establishing the good faith of a party (“Equity imputes an intent to fulfil an obligation”): the polymorphic nature of the doctrine of conscience enables the Chancellor to examine the elements of contract formation, namely the intent that presided over the agreement. Thus his jurisdiction also encompassed matters arising out of fraud: Equity could prevent the Common Law enforcement of an agreement entered as the result of duress or fraud or misrepresentation. Likewise, it extended its competence to matters arising out of a transfer of debt, whereas Common Law did not recognize the assignment of a debt. Equity may be considered as a source and means to defend rights in so far as it put the person at the centre of the dispute, and considered the consequences of the case on the parties to the litigation. Emphasizing the role of conscience is also to correlate it to personal, moral responsibility; on this basis rights emerge, and this provides a reason to defend them. Conversely, even if these considerations were not completely absent from Common Law doctrines, the latter focused more on the rights arising out of the facts, and less on the intentions that gave rise to the case. Equity associated moral criteria to the material circumstances of the case and analysed it on the basis of justice as fairness. This applied to the most fundamental interest protected by medieval society, namely the ownership of land. It encompassed the rights of tenants, the rights of beneficiaries, the right to divide land, or the administration of estates (which led to the creation of *trusts*), and the clearing of debts, called equity of redemption. Another, more marginal jurisdiction, concerned the petitions from foreign merchants, who were deprived of access to Common Law courts by reason of their nationality.

To sum up, Equity represents an early form of defence of rights in terms of accessibility, of creation of rights otherwise ignored by Common Law, which it aimed to supplement.

However, there are mitigating factors in that description indicative of Equity's fundamental difference with the office of the Defender of Rights.

II- Equity and the protection of rights: the limits of the analogy

A – Equity was born out of the justice system, and never departed from it.

The remedial nature of Equity must be seen in the light of the existing dichotomy between law and justice; because of its ancillary nature, Equity remedies the hardships of the law; it was never alloted a specific jurisdiction entailing the guardianship and protection of any specific, or individual right. The following points will enlighten this statement: first, Equity developed its own remedies while following the changes incurred by Common Law courts jurisdictions; in fact it owes its existence to the gradual fossilization of the writ system, and not to the necessity to uphold rights that feudal society would consider as essential. Secondly, the Lord Chancellor structured his new office by setting up a court under the auspices of the Chancery. As a result, and like any other court, the Court of Chancery became increasingly technical in terms of procedure. Even if the approach to law remained distinct from that delivered by the Common Law courts, its everyday administration became similar in form. Consequently, Equity in the Court of Chancery built up its own precedents and specific rules of procedure: it stood as a separate jurisdiction by the end of the 14th century, to the extent that it acted as a “rival” system to the Common Law courts. The struggle for influence was embodied in the 16th and 17th centuries by the ongoing feud between the Lord Chancellor and the Lord Chief Justice, head of King's Bench. Beside the personal animosity between Cardinal Wolsey and the common lawyers, Equity and the Bench fought for the supremacy of their decisions, thus mirroring the rivalry between two court systems. It seems that, until the end of the 18th century, the court of Chancery became considerably more powerful than its Common Law counterparts until some rationalisation of the judiciary appeared to be the only solution to the incongruity of the dual court system. . An attempt to curb the influence of the court of Chancery came with the royal initiative to enforce the *Statute of Uses* 1535, which were enforced by Equity only ; the Court of Requests (“poor men's court”) another court attached to the Court of Chancery came under attack, but managed to flourish until 1643 . The strife between the two courts, exemplified by the row that erupted between Lord Chancellor Ellesmere and Lord Chief Justice Coke between 1611 and 1616, was not limited to political considerations, since it was fueled by the common lawyers' perception that the Chancery was gradually removing jurisdiction from the Common Law courts in

increasingly important areas. Indeed Chancery had acquired a new jurisdiction over mercantile cases, and the Common Law courts saw their case load curtailed in favour of Equity, the Admiralty Court and the Court of Star Chamber, which dealt with political cases like treason.

The Judicature Acts of 1873 and 1875 did not mark the end of Equity as a principle of justice, nor as a separate jurisdiction, but fused the two systems so that now, every English judge can decide at law and in equity; besides, there is still a court of Chancery, albeit confined to the Chancery division of the High Court, where it deals with areas traditionally within the province of equity, namely patents, trusts, the rights of shareholders and estates. This was made possible because of the judicial nature of the courts of Equity and of the commonality of purpose between the two approaches to law, both of them shaped by Natural Law theory (Blackstone 1765). The process was also facilitated by the evolution of the office of the Lord Chancellor.

B- The peculiar position of the Lord Chancellor

The Lord Chancellor's position gradually encompassed the various branches of governments, as was described in the preceding paragraphs, a state of affairs that was ended by the *Constitutional Reform Act* 2005. He was involved in all areas of the administration of the realm, and became the head of the Judiciary as a senior member of the Cabinet, and also because he was in charge of the issuing of writs by affixing to them the Royal Seal as a sign of authenticity (Curzon: 104). In that sense, no other holder of a judicial position could rival with him. However, the Lord Chancellor had been chosen from the ranks of the Judiciary at a relatively early stage of the development of Equity: Cardinal Wolsey (1475-1530) was the last influential ecclesiastic to hold the office; he was succeeded by Sir Thomas More, who was legally-trained as a common lawyer; this contributed to reinforce the judicial nature of Equity.

But the most controversial aspect of equitable jurisdiction was the use of discretion granted to the Lord Chancellor. It helped create some rights, like equitable interests, but it also introduced some degree of arbitrariness into the judicial process, as exemplified by the saying according to which “Equity changes with the length of the Chancellor's foot” an impression confirmed by the fact that the Lord Chancellor gave remedies “as a matter of grace”, not “as of right”. Besides, the evolution of Equity, both in jurisdiction and in power, was largely due to the personal influence of Lord Chancellors, more than to the specific area they dealt with (cf. *Courtney v. Glanvil* 1615 and the *Earl of Oxford* case 1615), which epitomised the strife between Lord Ellesmere, the then Lord Chancellor, and Sir Edward Coke, the Lord Chief Justice- which ended in the victory of Chancery thanks to the help of Sir Roger Bacon, the Attorney General. In the course of the 19th century, the

court of Chancery had become archaic in procedure and in the manner in which delays were imposed on litigants, thus contradicting the equitable maxim that “Delay defeat Equity”. The influence of Common Law on Equity was strong enough to impose the doctrine of precedents on the Court of Chancery, something that rebuked the discretionary powers enjoyed by the Lord Chancellor. The merging of Common Law and Equity by the Judicature Acts 1873 and 1875 therefore seemed to have solved a surviving incongruity. Maybe this convergence was finally due to the similarity between the two branches of law, as Lord Neuberger, former Master of the Rolls (the current President of the UK Supreme Court), quoting Francis Bacon, wrote in his speech to the Chancery Bar Association in January 2012:

“Applying the metaphor to the law, the ant is the common lawyer, collecting and using the forms of action, seeing what works and what doesn’t, developing the law on an incremental, case by case, basis. The spider is the civil lawyer, developing intricate, principle-based codes, which can be logically and rigidly applied to all disputes and circumstances. And the bee is the Chancery lawyer steeped in equity, and not relying purely on the common law method or on the civil law’s approach, but picking and choosing the best of both, blending the two approaches”
(Neuberger 2012 : 3).

This quote seems to encapsulate the complex relation that the two approaches to law have developed in the course of English legal history. The influence of Equity has receded to just a few areas of law, like trusts or shareholders’ rights, and the Lord Chancellor of today has lost his traditional influence over the entire legal system. Yet if Equity is no longer the forum where claims are heard in matters of accessibility to justice, it does not signify that those issues have disappeared from the British legal landscape. On the contrary, as we shall see, there is still a need for more Equity in the justice system.

C- Equitable values and the issue of legal aid

Since the ratification of the *European Convention on Human Rights* in 1950, incorporated into English law with the passing of the *Human Rights Act* 1998, access to justice has been interpreted in the light of Article 6. It indeed guarantees some fundamental protections relating to fair trials and hearings, the presumption of innocence, the rights of the defence, access to legal representation and to translation when a defendant does not speak the language of the court. This legal doctrine developed differently in Civil Law and in Common Law systems. Traditionally, the former emphasized the right to counsel in civil disputes, while Common Law jurisdictions focused their legal aid programmes on criminal cases (Regan 1999: 114). In England, legal aid was established in 1949 by the *Legal Aid and Advice Act*, and it is administered in England and Wales by the *Legal Aid Agency*, which replaced

the *Legal Services Commission* in 2013. Under the Access to Justice Act 1999, the Lord Chancellor can authorize the funding of cases that would otherwise fall outside the scope of the legal aid scheme. Additionally, the European Court of Human Rights ruled in 2005¹ that denying legal aid to litigants in defamation cases could violate a defendant’s rights. The scope of legal aid has therefore been extended by judicial decisions and the Lord Chancellor can still exert some discretion in the granting of legal aid on a range of cases². However, the funding system has been under attack by the British government for some time; in April 2013, this service was curtailed for a number of civil proceedings by the *Legal Aid, Sentencing and Punishment of Offenders Act* to curb the soaring costs to the State that amounted to nearly two billion pounds per annum. The list of cases now excluded from legal aid range from divorce and custody battles, to personal injury and clinical negligence, to employment, education, debt, benefit issues and immigration³. The legislative rationale was to act both as a deterrent against frivolous lawsuits and a better support for those most in need. The legal profession has staunchly opposed the passing of the statute, due to the reduced fees they would be paid for taking legal aid cases⁴ and also because access to justice would be seriously restricted, according to a 2013 report by the *Joint Committee of Human Rights*⁵. This situation echoes the distant times when those litigants dismissed by the Common Law courts petitioned the King, then the Lord Chancellor, for justice. This sentiment and aspiration has not changed with time, but it certainly asks the question of the forum that would hear their pleas. Equity has ceased to exist as a court system on its own terms and it seems as though justice had become one step removed, financially, institutionally and geographically. The Court in Strasbourg, being the custodian of the *European Convention on Human Rights*, may have a say in the matter, but there is a long way to go for a claimant to reach it as he or she would have to bring their cases before domestic courts first and find a lawyer willing to do so for a pittance. Beyond the dire social situations behind the curtailing of legal aid and the possible tragedies that lay in waiting, one of the major risk for the UK would be to lose the trust of its citizens in their legal system. This may in turn prompt desperate individuals to take justice in their own hands if they are denied access to justice because they lack the means to do so. This is where the issue of values becomes center-stage: Equity, which owes much of its legal perspective to Church law, is steeped in the Natural Law tradition, which was a source of inspiration for many legal tradition worldwide, and so is human rights

¹ *Steel & Morris v United Kingdom* (2005)

² See <https://www.gov.uk/legal-aid/what-you-can-get> (Visited 15/10/15)

³ See <http://www.bbc.com/news/uk-21668005> (Visited 13/10/15)

⁴ See <http://www.independent.co.uk/news/uk/home-news/criminal-courts-across-england-and-wales-could-grind-to-a-halt-as-lawyers-protest-legal-aid-cuts-10346409.html> (Visited 13/10/15)

⁵ See <http://www.theguardian.com/law/2013/dec/13/further-legal-aid-restrictions-endangers-access-justice> (Visited 10/10/15)

law. One of the cornerstones of that school of jurisprudence is the existence of a close connection between law and morality. Such a relation is symbolized by the concept of “justice”, of “fairness” that upholds the necessity to facilitate access to the courts and to judicial redress. As Equity no longer deals with that thorny issue of accessibility, as human rights concerns have been devolved to specific bodies and, ultimately, to a supranational court, it may be time to think of a new legal mechanism that would balance out the constraints of a nation's budget and the essential right to be heard by a court, irrespective of one's social background and financial means.

Conclusion

The office of the Lord Chancellor underwent some major changes in 2005, when a constitutional reform removed his legislative and judicial prerogatives: he was no longer Speaker of the House of Lords, and the judicial powers he had held were finally transferred to the Lord Chief Justice as Head of the Judiciary. He remained a senior member of the Cabinet, and retained his title out of reverence for tradition. The long history of this office shows that, in spite of the novelties introduced by Equity to the legal system and the rule of law, the defence of rights was not the Lord Chancellor's main prerogative. The discretionary nature of his decision-making power could hardly be reconciled these days with the defence of rights and liberties for all. Unsurprisingly, the protection of such rights and liberties fell to statutes and the incorporation of international conventions like the European Convention on Human Rights. The *Equality and Human Rights Commission* was established by the *Equality Act 2006*, and is an independent body that advocates the promotion and understanding of human rights among members of the public and the institutions, and monitors the *Police Complaints Commission* investigation involving a death. In today's world the procedures in Equity and the craftiness of the remedies it helped develop may no longer correspond to the definition we give of “rights”. Yet Human Rights legislation and conventions share with Equity the heritage of Natural Law and natural rights that have shaped the face of the English and European legal system in the course of history.

Bibliography

Aristotle. 350 BCE. *The Nichomachean Ethics*. Translated by W.D. Ross . Electronic version available at <http://www.virtuescience.com/ethics5.html#5.2> (Visited 01/02/15).

Blackstone, W. 1765. *Commentaries on the Laws of England*, vol. 1. Philadelphia: J.B. Lippincott Co. Electronic edition by the Liberty Fund Inc. available at http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf (Visited 15/12/14). Vol. 2 available online at <http://oll.libertyfund.org/titles/2142> (Visited 09/02/15).

Bowcott, O. “Further legal aid restrictions endanger access to justice, say Mps”. *The Guardian online*, Friday 13 December 2013. Available at <http://www.theguardian.com/law/2013/dec/13/further-legal-aid-restrictions-endangers-access-justice> (Visited 10/10/15).

Burdick W. 2004. *The Principles of Roman Law and Their Relation to Modern Law*. Rochester: The Lawyers Co-operative Publishing Co.

Bracton H. *On the Laws and Customs of England*. Transl. and ed. By Thorne S. Electronic edition available at <http://bracton.law.harvard.edu/> (Visited 01/02/15).

Curzon, L. 1979. *English Legal History*. Plymouth : M&E Handbooks.

Cusick, J. “Legal aid cuts: criminal courts across England and Wales could grind to a halt as lawyers protests”. *The Independent online*, Friday 26 June 2015. Available at <http://www.independent.co.uk/news/uk/home-news/criminal-courts-across-england-and-wales-could-grind-to-a-halt-as-lawyers-protest-legal-aid-cuts-10346409.html> (Visited 13/10/15).

Evans MB. and RI Jacks (eds). 1984. *Sources of English Legal and Constitutional History*. Sydney: Butterworths.

Goodnow, F. 1891. “The Writ of Certiorari.”. *Political Science Quarterly*, vol. 6, n°3, pp. 495-536.

Neuberger of Abbotsbury MR, Lord. 2012. *Developing Equity- A View from the Court of Appeal*. London: Chancery Bar Association Conference 2012. Available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-chancery-bar-assoc-lecHYPERLINK> “<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-chancery-bar-assoc-lecture-jan12.pdf>” (Visited 10/02/15).

Regan, F. 1999. *The Transformation of Legal Aid: Comparative and Historical Studies*. Oxford: Oxford University Press.

Saint Germain, Christopher. 1518. *Dialogues Between a Doctor of Divinity and a Student of the Common Law*. Lonang Institute. Available online at <http://lonang.com/library/reference/stgermain-doctor-and-student/>.

Selden, J. *Table Talks*. Edited by Reynolds S. 1892. London: Oxford University Press.

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Auteur

Anne-Marie O'Connell

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