The Structure of English Judiciary from the Perspective of Continental Legal System

Abstract:

Description of English and continental judiciaries indicates similarities and dissimilarities. English idea of “equity law” interlinks English and continental legal notions. Description of the English judiciary begins with discussion on the operational rules of the new Supreme Court, which was created to enhance the separation of powers and is compared with the alike Polish, German and French institutions. Subsequently, the inferior courts are described – Court of Appeal and High Court of Justice. Within the latter’s complicated structure, what seems interesting are the Administrative Court, being a substitute for a non-existent English administrative judiciary, and the Specialist Courts – solution for new legal problems. Functions and operational rules of the Magistrates’ Courts (Courts of Peace) and the Tribunals with flexible judgment model are discussed last. Regulations regarding the inferior courts may indicate the direction for changes. Analysis of the English judiciary indicates that despite ongoing convergence with the European law, it still rejects the most important Roman law rules – i.a. restriction to change the sentence against appellant. Despite this, the equity law, formerly preventing negative consequences of the writs’ formalism, recalls the Roman law institutions. In conclusion, despite different backgrounds, the emerging legal problems in both systems were being resolved in a similar way.

Key words: judiciary, England, Europe, law, equity

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1. Introduction

The article presented below is by and large to accomplish three seemingly various, yet in fact strictly interlinked objectives. The first one would be to describe and find specifically English characteristics of legal and – what seems even more vital – judicial system that would enable us to compare the heritage of both English (case law – common law) and undoubtedly contrary continental (statute law) judiciary. Having acquired knowledge, which stems from discerning not only dissimilarities but also affinities of both mentioned systems, it would be useful to put a stress on the particular backgrounds from which the formers had emerged. The second objective is then projected to disclose the conspicuously Roman influence on the Continental system and indicate some factors embodied in the English system that in some certain spheres of praxis ought to be considered Roman as well, especially if one spoke about the equity courts. The last objective would be then to evoke and describe an amusing phenomenon of English equity law, which was formally ceased in 1873 (practically living up to this day in a moderate form within the High Court’s Chancery Division) and could make a relevant illustration for what could be called a windfall for the comparative law scholar, given its many possible origins and generally a very amusing legal concept it mirrors.

2. Structure of the English judiciary

To begin with, let us take a closer look at the English judiciary – yet what is worth mentioning, the stress will be rather put on its structure than the legal proceedings’ forms. “When you see a judge or magistrate sitting in court, you are actually looking at the result of 1,000 years of legal evolution” is the best phrase to conceptualise the plentiful traditions of this particular legal system to be discussed. These traditions

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2 The form ‘English’ is being used deliberately, following judiciary.gov.uk – as a condensed name for Her Majesty’s Courts of Justice of England and Wales (the focus on the English judiciary is to avoid the vagueness; the existence of Scottish and North Irish courts will only be alerted).

have profoundly complicated the relations between the respective courts and tribunals, making the whole system undoubtedly unclear and indistinctive even for the English society itself. However, it provides some hierarchy which is necessary to maintain the rule of law\textsuperscript{4}.

\section*{2.1. The Supreme Court of the United Kingdom}

What sits at the apex of the United Kingdom’s legal system is \textbf{The Supreme Court of the United Kingdom}, which had been constituted by the Constitutional Reform Act prepared in 2005 and in October 2009 eventually replaced both the Appellate Committee of the House of Lords as the final court of appeal and the Judicial Committee of the Privy Council which had jurisdiction over the devolution matters. What is worth mentioning is the idea to appoint such a body was drawn out of the separation of powers rule – since the general jurisdiction had been exercised by the legislative institution – the House of Lords. All the Law Lords headed by the \textbf{Lord Chancellor} (who is currently a part of the British Cabinet and used to be a presiding officer of the said House) were split-off from Parliament and their judicial eligibility was moved into the new Supreme Court. Finally, as Nicholas Stephanopolous remarked, “Britain is now getting a taste of some U.S.-style separation of powers”\textsuperscript{5} – this could be indeed true, yet at the same time one ought to acknowledge the implementation of continental solutions as well, what is surprisingly blatantly often omitted in the recently published papers.

Nowadays, the Supreme Court of United Kingdom is comprised of twelve Justices who serve a life tenure (yet with mandatory retirement at the age of 70 or 75 – depending on the appointment date) and are appointed by the Monarch with the Prime Minister’s recommendation. The Court’s vital role is to hear appeals on disputed points of law of the greatest public importance, for the whole of the United Kingdom in civil cases, and for England, Wales and Northern Ireland in criminal cases. “The greatest public importance” is a somewhat vague notion though – but while referring to the Supreme Court Rules 2009\textsuperscript{6} act it gives one a feeling that it is a procedure that matters under appeal rather than the subjective view of what is essential or not. Therefore, \textbf{the Supreme Court of the United Kingdom does also decide on “devolution issues”}, i.e. “whether the devolved legislative and executive authorities...
of Scotland, Wales and Northern Ireland have acted or propose to act within their powers or have failed to comply with any duty imposed on them”\(^7\). Saying it less formally, the Court’s concern is first and foremost to resolve any feuds between devolved institutions in the United Kingdom and besides that to have a jurisdiction over the legal powers of the Welsh, Scottish and North Irish governments and their law-making activities.

As one could have presumably remarked, the institution of Supreme Court is to great extent new\(^8\) on the ground of English judiciary. The Court’s tasks can be easily compared with the recognition spheres of German Federal Justice Tribunal (Bundesgerichtshof), French Reversal Court (Cour de Cassation) or Polish Supreme Court (Sąd Najwyższy) – since in each evoked case there is a clearly visible similarity, as all of them are called chief judicial authorities in their own states’ legal orders. Nonetheless, the Supreme Court is more limited in its judicial review than the previously mentioned continental courts and their constitutional counterparts just like the Polish Constitutional Tribunal (Trybunał Konstytucyjny), German Federal Constitutional Tribunal (Bundesverfassungsgericht) or French Constitutional Council (Conseil Constitutionnel). It comes down to really strong and distinct parliamentary sovereignty doctrine, which constitutes the Parliament as the supreme legal authority in the United Kingdom, being able to create and repeal any given act. In general, courts cannot overrule its legislation. Undoubtedly, the Supreme Court is in power neither to spread its control over the primary legislation implemented by the Parliament nor overturn it, however it is given an ability to react to any secondary legislation, which in its opinion is beyond the powers of the primary legislation itself (it could be plainly considered a part of devolution issues, as described above). Although the Court cannot step into the legislation, it is accoutred in right to publish the Declaration of Incompatibility\(^9\) on the grounds of the Human Rights Act 1998,

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\(^7\) It would be beneficial to append three possible ways the Supreme Court can be reached by devolution cases, through: a reference from someone who can exercise relevant statutory powers such as the Attorney General, whether or not the issue is the subject of litigation; an appeal from certain higher courts in England and Wales, Scotland and Northern Ireland; a reference from certain appellate courts; J. Simson Caird, *The Supreme Court on Devolution*, House of Commons Library 2016, p. 5–8, http://www.open.edu/openlearn/ocw/pluginfile.php/989910/mod_resource/content/4/CBP-7670.pdf, 1.02.2018.

\(^8\) This point can evoke a strong dissent, as one can effortlessly bring up the examples of the Supreme Court of England and Wales (known as the Supreme Court of Judicature until 1981), which was created in the 1870s, or the Supreme Court of Judicature in Northern Ireland. Even though the names were the same, it should be noticed there were implemented a few solutions in the new Supreme Court – be it an ability to recognise European Convention on Human Rights and European Community law within the extent of devolution cases – and thereby British invention converged much with European legal solutions. It is also a point, as Nicholas Stephanopolous wrote in the National Law Journal, that “Britain has never had a Supreme Court before” – meaning the lack of the all-UK last resort court, because courts called alike have already existed; N. Stephanopolous, *op.cit.*

\(^9\) Several other British courts have this right as well; they are enumerated in section 5, legislative chapter of the Human Rights Act 1998.
if it is satisfied that the legal provision embodied in particular act is incompatible with a Convention right\(^\text{10}\). Yet it has rather a mere moral substance or symbolic dimension, since it “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given”\(^\text{11}\), it can stand well against an ill-implemented legislation, thus showing strong concern on the part of the Supreme Court. However, it is not yet a full legitimisation that the majority of continental supreme or constitutional courts have, since they are usually able to overturn particular provisions of the legislation if these are standing against the Constitution or the community law, but it is a sound modernising step that cannot be underestimated. It should be rather considered a milestone. The fact is, that the Supreme Court, which has emerged from the six hundred years’ haze of “medieval” parliament jurisdiction, brings up many important questions related to the judiciary system as a whole, often showing its backwardness\(^\text{12}\). Not only had the problem of gender inequalities or ethnic discrimination come up, but also an idea – which is terrifying for some of conservative British backgrounds – that courts (Supreme Court in particular) would be able to overrule legislative decisions thus impairing the whole traditional political system. At this point an author feels incompetent to discern whether there is a real possibility to infract this solid structure, yet he is convinced the British judiciary is gradually converging with continental and American legal systems, steadily adjusting itself to new political, social and legal perspective.

2.2. Her Majesty’s Court of Appeal in England and Wales

Having described the apex of the British – and thereby English – judiciary, let us move to Her Majesty’s Court of Appeal in England and Wales, which is hierarchically lower than the Supreme Court. The Court comprises of thirty-eight Lord Justices of Appeal and is divided into two divisions – Criminal and Civil. The former is led by the Lord Chief Justice (1st judicial rank in the United Kingdom), whilst the latter’s head is Master of the Rolls. The criminal division plays a role of an ordinary court of appeal – it hears appeals against conviction and sentencing from people convicted or sentenced in the Crown Court. Traditionally, there are three judges adjudicating during the sessions – the majority opinion is delivered as the Court’s decision though. Their range of jurisdiction is strictly narrowed – criminal division has power to quash or uphold a conviction, order a re-trial and, in sentence appeals, vary the sentence – yet is not allowed to increase it – as a matter of fact, the last statement is barely true and it will have to be contextualised later on. In the late 90s the sphere

\(^{10}\) Sections 1–4, legislative chapter, Human Rights Act 1998.

\(^{11}\) Section 6, subsection a), legislative chapter, Human Rights Act 1998.

of recognition (for both divisions) had become a way more limited – in minor cases the Court’s sentence reviewed the lower court’s decision (in fact, the appeal must have been in compliance with its perspective) and in major ones, if – for instance – there occurred a high probability of severe procedural irregularity or the verdict was wrong because of ‘blatant error’, the Court was given a right of a full appeal. While speaking of a procedure in the criminal division, one has to bear in mind one strong and stark example of how different from the continental patterns English law and judiciary can be. Namely, there is a possibility of a full-negation of broadly-accepted Roman law rule that says reformatio in peius iudici appelato non licet – which is not working in the Court under this particular condition. This happens only if the Attorney General “refers a sentence in the Court of Appeal if it appears to him that it was unduly lenient”. The Court of Appeal may review and alter the sentence imposed by the Crown Court, as prescribed in the Criminal Justice Act 1972. A more severe sentence may be imposed. This concept would be conspicuously hard to be thought about in the continental Europe, which resides firmly in the Roman law. It might be, however, neatly understood as an execution of equity principle and therefore not condemned by the Roman law enthusiasts from the very beginning.

On the other hand, one has a civil division, which mainly deals with the appeals against the High Court’s verdicts (including Chancery, Queen’s Bench and Family Division) and decisions of county courts as well as some certain tribunals across England and Wales. It makes decisions in much the same constitution as the criminal division does. There are relatively small “three judges” (Lord Justices) groups in which all the conclusions appear and despite the fact a decision-making process is based on the majority opinion, it has an apparent individual element, as will be going to be proved later on. While proceeding cases, rarely do the judges hear the witnesses – it might occur specific – although they are firmly devoting themselves to documents and – for instance – transcripts from the former hearings or the parties’ representatives’ brief notes. Within the civil division competencies, one can eventually find an ability to make orders that normally should have been made in the court from which the case had been referred, to call the lower court into question or plainly to order a re-trial (what is rather an uncommon practice, due to its “radicalism” – the “unique circumstances” are indicated as a particular ground for such an action). To sum it up and draw some conclusion, one must undoubtedly

13 Latin: “The judge of appeal cannot increase the sentence”.
15 Section 36(1), Criminal Justice Act 1972.
ascertain that the civil and criminal division differentiate obviously in the spheres of recognition and the procedures undertaken in order to hear the appeals. In spite of this fact, there must be alerted an essential issue that actually single the whole Court of Appeal (no matter the divisions) out of any other appellate courts. “In England, where the judges are being observed while they work and where each is expected to express his own views, a ‘one man opinion’ rubber-stamped by the other judges, is unlikely” – the English type of adjudications does indeed seem here really firm, on the contrary to the American one. The individuality of judgement, a kind of meticulousness the English appellate judges present is unheard about in the United States and therefore treated as a benefaction. The collegial (bench) model of the judicial constitution is considered worse and less intellectually efficient than the English individual model by American Delmar Karlen. The British lawyers think likewise: “It is the tradition of English common law that the appellate judge is an individual personified. By contrast, the judges in the legal systems of Western Europe opt for a system of collegiality in which benches of judges hand down synonymous, formal, collective judgments” – this quotation gives one a feeling of what attitude the authors have towards the continental appellate system – it is consequently escalated in the later part of the text, where it is proudly mentioned that “anyone travelling forensically to Strasbourg for a hearing before the European Court of Human Rights will witness the adoption of separate assenting and dissenting judgements.” Unquestionably, this particular, more individual way of judging has its attractive points, yet it is not the author’s purpose to assess them in the present work. Nevertheless, the point had been to show the differences between the American, Europe’s continental and English Courts of Appeal, putting the stress on the uniqueness of the latter and this objective was apparently reached.

2.3. Her Majesty’s High Court of Justice

Let us now focus on Her Majesty’s High Court of Justice in England, which has a very complex and a bit incoherent structure itself. Following Encyclopaedia Britannica, it should be rather called a “court system centred in London and comprising three divisions of both original and appellate jurisdiction” – “System” is probably the best word to express this peculiar body (in the continental jurists’ way of thinking), regarding the fact that its parts are to some extent autonomic and divide themselves to even smaller divisions and constitutions. Historically first and the largest of three

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20 Ibidem.

mentioned divisions was the Queen’s Bench. Its recognition sphere is really wide but it goes along with the Civil Procedure Rules – it exercises the civil and criminal jurisdiction. The cases are heard by the head of the division – the President – and seventy-three judges who are led by him. Judges hear the occasional important criminal cases in the Crown Court and travel across the country to do so. However, the criminal recognition fades amid the civil one – is just like a drop in the ocean. It is true that the civil cases are overwhelming within the Queen’s Bench – these include actions for damages arising from all sort of breaches of contract, torts, libels, technology and commercial disputes, as well as admiralty and construction cases – it is a bulk of its work. It is not then surprising why is this particular division so diverse – overall, there is a General Queen’s Bench Jury and Non Jury List considered a premier body, comprising of judges; just below one can find one of the most known divisional courts – an Administrative Court. Its case is immersive for two reasons – firstly, because it has an extraordinarily broad cognisance – its work is varied as it consists of the administrative law jurisdiction of England and Wales as well as a supervision over the inferior courts and tribunals. The work it does is remarkable, even though there are some ongoing problems in the Court. It is in power to provide a supervisory jurisdiction by applying the Judicial Review procedure (which covers persons or bodies exercising a public law function) – not only can it have an insight into the other courts and tribunals’ work, but also into the other persons and bodies’ duties, as mentioned above. Nonetheless, this procedure can be implemented only within some certain areas, such as welfare benefits cases or the immigration issues. Secondly – picking-up the strand once again – the Administrative Court’s case is interesting because of the utterly various profile of its work (compared with the continental Europe). What is fairly lucid, the Administrative Court is strictly subordinated to the High Court (particularly to the Queen’s Bench) what stands on the contrary to the continental models, in which the Administrative Courts have a greater autonomy in the first place – both in the verification model – Polish (Wojewódzkie) Sądy Administracyjne – Naczelny Sąd Administracyjny or German (Ober)Verwaltungsgerichte – Bundesverwaltungsgericht and the “dual-jurisdiction” model – French Tribunal Administratif – Cour Administrative D’appel – Conseil D’etat, and in the second place – the different range of jurisdiction. The last statement does not only mean the English Administrative Court has a way fewer chances to have a real influence on the structure of the state, on the decisions being given, but has also fewer (if any) possibilities to regulate the relations between the citizens and the state, even though its name resembles the continental Europe’s institutions – continental administrative

22 Interestingly, the name above is versatile and depends on the Monarch’s sex – if there was a male, the division would have to change its name to King’s Bench.

23 The divisional court – in the Queen’s Bench cognition – ought to be understood as a certain body with its particular tasks within the Bench that includes at least two judges.

courts, being precise. It is interesting, as in this case – and as it will appear later in the text (while elaborating the English Tribunals) – the problem and misunderstanding lies definitely in both the legal backgrounds and the demarcation between the statute and case law themselves.

### 2.3.1. Specialist Courts

At the bottom of the basic structure (contrasted hereunder with the specialised bodies) being down to Queen’s Bench is the **Planning Court**, with its role directly linked with the Administrative Court – it deals with all judicial reviews and statutory challenges involving planning matters in accordance with the Civil Procedure. This includes appeals and applications relating to enforcement decisions, compulsory purchase orders and planning permissions. Within the High Court’s Queen’s Bench there are several other specialised divisions (Specialists Courts) as well. They all function in the Rolls Building International and Financial Dispute Resolution – one well-organised centre gathering under one roof both the specialised courts from the Queen’s Bench Division, such as **Mercantile Court**, **Admiralty Court**, **Technology and Construction Court** or the **Commercial Court** – and the **Chancery Division** courts at the same time (the Chancery’s issue will not be explicated in this certain case as it is going to be discussed separately in the second part). Unlike the continental Europe, the English judiciary presents an advanced approach towards the new world’s branches and needs, organising a specialists courts adjusted to their thorough requirements. Another symptom, revealing the progressiveness of the English judiciary, was decision announced on the 8th July 2015, which introduced a **Financial List** – a specialist body consisted of the Commercial Court and the Chancery, dedicated for financial claims exceeding fifty million pounds or the issues concerning international and domestic markets, i.e. the equity, derivatives, FX and commodities markets. “The new list will not only encourage international litigants to continue to use our courts, the principles they embody and their jurisprudence, but in doing so they will help to raise standards” said Lord Thomas of Cwmgiedd, the Lord Chief Justice, in his Mansion House speech on the 8th July 2015. This proves that the eagerness to pave the way is in the English judiciary even more vigorous than ever before. This legal phenomenon – the constant will to self-actualise in such conservative conditions (which is not often met in the continental judiciaries) – is really worth mentioning; two other quotations from the press

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26. ‘FX’ stands for Forex – which is “the foreign exchange (or forex) market (...) for trading currencies, one pair against another. It’s the world’s largest market, consisting of almost $2 trillion in daily volume and is growing rapidly”; V. Gaucan, [Introduction to the foreign exchange market](http://www.scientificpapers.org/wp-content/files/1120_Introduction_to_the_foreign_exchange_market.pdf), 3.02.2018.

release on the 21st October 2015 meeting in the Rolls Building, regarding this issue must be then forgiven. “The new List will provide a more efficient and economical forum for financial dispute resolution using the expertise of dedicated High Court judges” – remarked the Lord Chief Justice, being followed by Alasdair Douglas, Chairman of the City of London Law Society: “Litigants expect judges to be familiar with the subject matter of a case, and the Financial List will offer the assurance that these significant cases will be heard by a high-calibre judge who, for example, has an understanding of the global financial markets”. The intention so far was to show how afar from the English legal perspective is the continental one. **English High Court, because of its List, will have a long-term legal advance**; it will either have a possibility to adjudicate some of the most important world’s financial cases or simply develop the procedures and the way of good and useful practices while dealing with them. English judiciary, as one can see, is trying to modernise itself – it is struggling to foresee, unlike the continental courts. The idea of creating the List was conducted by the judges and these should be the European judges who should bring up this urgent matter as well. It must be honestly said that even the advanced European Union courts have not yet made such a step into the legal future. The fact is, that the specialists courts within the English High Court are able to prefigure the future needs and get prepared for them – it is their immanent characteristic.

### 2.3.2. The Family Division

At this point, let us additionally mention the least known of all the High Court’s main divisions – **the Family Division**. Judging by its name meets the needs of any avid and inquisitive reader; the type of cases discussed and heard before this court is closed within the narrower subject of family cases – specifically where a child, as the subject of the proceedings, is not granted protection under the Children Act 1989. According to the Court’s own agenda, the biggest share of the hearings concern the situation in which the child is made a “ward of the court”, where the court consent is needed while making vital decisions. What is more, the Court handles cases of international child abduction, provide that the abduction falls under either the Hague Convention on the Civil Aspects of International Child Abduction or Brussels II Regulation (EC) no. 2201/2003. The Family Division should be then considered a warrant of the public and private rights protecting children and family.

### 2.4. Inferior courts and tribunals

The inferior courts and tribunals of England and Wales do also have their own, a big deal unique natures, which on the one hand are usually very practical and beneficial, but on the other would also be criticised for their non-transparency, which cannot be always easily ‘cut through’ by the ordinary citizens. Their structure is firmly based on a model division: criminal, civil, family and administrative judicial review as well as two-level appeal model.

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28 Children Act 1989, Part IV Care and Supervision, Part V Protection of Children.
The court mainly responsible for the criminal jurisdiction, being in fact the higher court of the first resort, is the Crown Court of England and Wales. In the structure of English judiciary it plays a role of a lower quasi-court of appeal, as it can hear the appeals forwarded from the people convicted in the Magistrates’ Courts. Together with the High Court of Justice and the Court of Appeal, it constitutes a body called the Senior Courts of England and Wales. Trails within the Crown Courts are often prosecuted with the presence of jurors – since an attendance of jurors paying tribute to their civic duties is more likely to happen in the criminal cases. It is down to the fact that the catalogue of such cases is wider than the possible civil ones – jurors usually try the most serious criminal cases such as: murder, rape, assault, burglary or fraud, whereas the civil cases being obliged to take place in front of jury embrace only: libel, defamation and cases involving the state. The English jury resembles to some extent the continental institutions of jury; the main difference between these two solutions is the number of members they consist of, as in the continental Europe the jury is usually comprised by the professional judge and only a few civic jurors, whilst in England and Wales juries are constituted by much more jurors. Furthermore, there may be found some affinities between the English juries and the Roman institution of recuperatores. If any real connection was discovered, it could decide the joint ancestry of both English and continental juries or just show the mechanisms of the latter are alike virtually everywhere.

On the other side of the higher first instances’ courts one can find the County Court, which will be only briefly presented. The Courts decide about the civil and family cases that are referred to them directly or by an appeal; and whose jurisdiction covers a certain administrative area – a terrain of approximately one or a few counties. The appeals from this body are directed to the High Court or the Court of Appeal immediately, if the importance of the case or the assessed contested value is exceptionally high. Besides this, the Court has an ability to form a jury while dealing with the cases indicated above – for instance libel, defamation or said “cases involving the state”.

2.4.1. Magistrates’ Courts

Below the Crown Court and the County Court there are the Magistrates’ Courts, which have to deal with some sorts of minor civil and family proceedings. These...
are also the bodies in which all the criminal proceedings begin\textsuperscript{33}. Their phenomenon seems to be underestimated. Not often does one evocate them as one of not so plenty examples of well-functioning courts that are whole based on the magistrates’ – volunteers – work and judgements\textsuperscript{34}. “Justices of the Peace”, as they are also called, are people who want to volunteer their services. There is no requirement for formal legal qualifications, but they have to undertake a training programme (including court and prison visits) to develop the necessary skills. During the proceedings, they are given legal and procedural advice by qualified clerks. Notwithstanding the decent results of their work, many of the Magistrates’ have been recently decided to be reduced or integrated with some other courts (they will not be the only, yet undoubtedly the biggest victim of the reform) due to the extraordinary costs of maintenance raising up to 500 million pounds a year and the potential that could not be maximised\textsuperscript{35}. The criminal cases, which are adjudicated by the magistrates, can be divided into three categories: summary offences (less serious offences cases such as minor assault), either-way offences (more serious cases; can be handled by the magistrates or passed on to the Crown Court) and indictable-only offences (a murder for instance; such case must be heard at a Crown Court). At the same time the civil cases are heard at the regular trials, whilst the family ones are sat in the Youth Courts or in the Family Proceedings Courts, which are the sections of the Magistrates’ Courts themselves. The instance of the Magistrates’ Courts make a relevant illustration for what could be gradually introduced in the continental Europe, which episodically lacks in such grassroots institutions. The lack of such might otherwise seem a bit odd if one considered the Roman background of the continental judiciary and inspected the Roman idea of appointing for the judges people with no legal education, yet the decent members of the community. However strange this idea may sound (particularly – leaning it on the historical matters), the advantages of Magistrates’ Courts are rather undisputable, unless one has taken the recent English reform and its reasons for granted – then the matter becomes a way more complex.

2.4.2. Tribunals

The last, truly interesting form of an English judiciary are the Tribunals, being one (apart from the Magistrates’ Courts) of the basic ground to conduct litigations. Both the civil and administrative cases are heard in the Tribunals. As to the civil procedure, the proceedings in tribunals are often considered quite informal in comparison to the courts, the way of work resembles rather an extralegal procedure than the real

\textsuperscript{33} Virtually all criminal court cases start in a magistrates’ court, and more than 90 per cent will be completed there; https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/magistrates-court/, 3.02.2018.

\textsuperscript{34} This is not exactly true, since within the Magistrates’ Courts one might find a tiny percentage of District Judges, who – as a matter of fact – are professional lawyers and thus could be considered regular judges.

trial, especially regarding the “informality of hearings”36. While comparing this pragmatic method of jurisdiction with some continental Europe’s societies’ stubbornness towards any extralegal procedures, one could have only a pious wish to change the way some continental Europeans think. Having concisely described the civil procedure, let us have a remark on the administrative proceedings, that should have been made even earlier, while discussing the Administrative Court. One must know that the contemporary structure of the Tribunals, as the quasi-courts performing judicial tasks, was established by the Tribunals, Courts and Enforcement Act 2007. The mentioned document divided the Tribunals into two new forms: the First-Tier Tribunal, consisting of seven chambers, and the Upper Tribunal, hearing most of the appeals from the former and performing administrative functions (in its Administrative Appeals Chamber) as well37. However, what was the point, an English perspective concerning the administrative cases is utterly different from the continental one, as it does not really regulate the citizen–state relation. Administrative courts do not surprisingly have a power to influence the law; on the contrary, the continental administrative courts have a full ability to analyse whether the administrative decisions were consistent with the ruling constitution and the other acts. English administrative courts support mainly this second option – referring rather to facts that to the legal acts, trying to conjure the reality up and not alter the bills. The administrative courts perform the executive actions, turning out to be less judicial and often leaving a right (given them – at least theoretically) to prepare judicial reviews. “In Mr Cane’s opinion, this particular problem [to which power should we qualify the administrative courts – executive or judiciary] is down to the fact that there has not been a written Constitution in Great Britain. Hereby the formal division of the public authorities and to judicial and non-judicial functions does not exist”38. It is indeed hard not to agree on this particular point of view.

3. Equity courts

The word “equity” has taken its origin from the Latin word aequitas – i.e. concept of justice, equality, conformity, symmetry, or fairness. Equity law should be then regarded as a legal system, which includes and respects the equity principle (and principles or policies at all, understood as a recourse to law’s moral merits – referring to Dworkin’s nomenclature) and whose verdicts are based not only on the strict legal grounds, but also external and internal circumstances of the particular case.

3.1. Historical perspective

Historically, the law of equity together with maxims (principles) of equity were developing along the development of English law and common law system in particular39.
The legal system started to emerge just after the time, when Wilhelm the Conqueror had defeated the Anglo-Saxon King Harold’s army in the battle of Hastings in 1066, and subsequently crowned himself in Westminster. The birth of a new feud system with King in its central point, issuing the Domesday Book in 1086 (land cadastre) and developing the fiscal judiciary led to situation in which all the arguments and ill-relations in the society, considered harmful to royal treasury, must have found a room for solutions. The creation of the Court of Common Pleas dedicated for the criminal and civil cases and the Court of King’s Bench – competent to adjudicate the political ones, contemporarily ought to be comprehended as a “safety valve” for the whole state system. Nonetheless, the new English judiciary did also come up with an idea of writs, measures to launch the legal proceedings, which generally resembled formula actionis known from the Roman formulary system. Very quickly the writs were standardised – “for each same arguable factual status the same writ was granted” and the sets consisted of them appeared. Eventually the Register of Original Writs was issued; it has been compared with the praetor’s edictum, since in both situations these acts could have been easily completed by including new privities that demanded a legal protection. Afterwards, the legal proceedings were becoming more and more complicated – history resembling the Roman one – and vital too, as the wrong choice of writ yielded in the lost trial. The law of equity became an undisputed remedy – the parties that were aggrieved before the court (because of the wrong writ they chose or due to the lack of an appropriate one) could turn to Monarch, who was asking his Chancellor to handle such cases. However, as a matter of fact, it was not the king with whom the English law bound the equity privileges. One must agree with prof. Ireneusz Kamiński that such a privilege was definitely bound with the position of the Chancellor. It was the Chancellors that had been revocating the recent verdict and conducting the case once again, leaning not on the common law rules, but on the self-prepared law of equity. Roman law scholars should be familiar with this situation, as the common law and the equity law remained in such relation to themselves, in which had once remained ius honorarium and ius civile. It is apparent that in both situations their existence had a parallel character.

Albeit these statements might raise questions of whether the English law was influenced by the Roman law, following an opinion of a distinguished prof. Henryk Kupiszewski, Prawo rzymskie a współczesność, Cracow 2013, p. 169 (quotation translated by the author).

40 “The measure to launch the legal proceeding in medieval England was a writ – short written proposition in which the King, having characterised an object at issue, was calling an adequate official – judge, to call the respondent or defendant before his court and judge the case with the presence of the parties. (...) With the time being, the King’s place was taken by the Capitalis Iusticiarius and thereafter the royal Chancellor”; H. Kupiszewski, Prawo rzymskie a współczesność, Cracow 2013, p. 169 (quotation translated by the author).

41 Ibidem.


43 Ibidem, p. 80–85.
Kupiszewski who defined it as a “reflexion of English moral philosophy” would give a right answer.

3.2. Equity and Common law

The system which emerged on that ground was at the beginning complementary to the common law. With the time being, however, the equity law (as well as the other English law systems, be it the maritime law administered by the Admiralty Court…) appeared as a competition for the common law jurists, who started fighting it. Besides that, the both law system required other skills and practical preparations from the lawyers and judges to perform and execute them – one of such essential matters was a necessity to have an academic grade in the Roman law (many of these having such were priests too), unlike the common law lawyers, who first and foremost had to be educated in the corporations. Nevertheless, even though the equity law was eventually merged with the common law when – in 1873 – the Judicature Act was published, it did not have such disastrous effects, as one could expect. The merge itself was rather of a formal nature since the masses of the common law and equity law were not mixed and it was only the Chancery Court (which will be discussed a bit wider below) must have been subordinated to the new High Court, making one of its divisions – Chancery – in the end. The positive thing was that after the unification – be the reason its formal character – it was the common law that found itself under the “equity’s” influence, not otherwise. In fact, the maxims (principles) of equity – a ‘product’ of many years of the Chancery Court’s practice – were not forgotten. Clarification of these strongly contributed to the flowering of the subject literature, enabling the equity law to have a strong impact on the judiciary as a whole and the new generations of English lawyers. The conclusion, should one demanded such, would be that the English law did not really need (and in general was barely using) the Roman (considered widely – continental) notion of equity, as it was able to develop its own version, similar to the continental one from the procedural side, that was embodied in the equity law system and its mere body – the Chancery Court.

44 Ibidem, p. 171 (quotation translated by the author).
45 Ł. Marzec argued alike that “the Englishmen – in fact – created this system division on their own, having not recognised the Roman solutions”, what underpins the given conclusion; Ł. Marzec, Kilka uwag o sądzie kanclerskim i systemie equity w Anglii, Zeszyty prawnicze 2005, p. 195 (quotation translated by the author).
48 It might be interesting to evoke few of them here, making a relevant illustration of what they were: beginning from the most known “Equity sees that as done what ought to be done” or “He who comes into equity must come with clean hands” ending at the least known, specialists’ ones “Equity will not allow a statute to be used as a cloak or fraud” or “Equity will not allow a trust to fail for want of a trustee”.
49 H. Kupiszewski, op.cit., p. 173.
3.3. The Chancery Division

Let us now say a word about the Chancery Court and subsequently – the Chancery Division within the High Court of England and Wales. The Chancery Court was regarded the main administrator and the sound executor of the resolutions made on the equity law ground. It is argued, that its method of work immensely resembled the Roman praetor’s work. The joint characteristics of the equity law and ius honorarium would be that, for instance, they were both created for the practical purposes, namely to enhance the judgements’ and overall law’s quality. England system went even further ahead than the Roman ius honorarium – the Chancery Court judges did not have to adhere to the common law rules, whilst the Roman praetor in order to omit ius civile, was obliged to create fictional legal states (formula fictiae). It would be a decent remark, too, that the main purpose of both the praetor’s edicts and the Chancellor’s writs was to make a reasonable alteration of law that might seem unjust and had a basic character. However, King’s will was always the last resort that could cease the changes. The common law was in a particular way essential too, as in the lawyers’ opinion a good Chancellor ought to have at least a good recognition in the former. The Chancery Court, comprising of masters in Chancery, masters of Rolls and clerks, laid great merits on the ground of acquiring several solutions that were unknown in the English legal system, such as assignment of debts, trust (fideicommissum, referring to its Roman roots) or a hypothec. Needless to say, the Roman law had some visible influence on the Chancery Court and should be regarded as its essential element. This influence can be seen even now, many years after 1873 reform, since the Chancery Division in the High Court of Justice performs a very similar jurisdiction as to which was indicated above. Contemporarily, it does decides in the cases covering the real properties, trusts, patent law and some branches of the economic law. It performs its functions in a few separate courts – Intellectual Property Economic Court, Patents Court, Bankruptcy and Companies Court and the Chancery, which additionally collaborates with the Commercial Court of the Queen’s Bench Division within the modern institution of a Financial List. Continental or Roman influence this particular division has had, may undoubtedly appear very useful and beneficial at this field.

4. Conclusions

Having discussed both the structure and characteristics of the English judiciary as well as the phenomenon of equity courts – in fact the Chancery Court – it would be now with benefits for the reader to draw some conclusions. The view into the English judiciary might left one with a feeling of a complete chaos, since everything seems so complex,
The Structure of English Judiciary from the Perspective of Continental Legal System

competences are blurred and the precedence – dysfunctional. The English legal system is undoubtedly an invention on its own rights, having logically and historically stemmed fonts, but merely little logic in it. However, it the recent times it is rapidly converging with the Continental statute law, as at the same time the rest of Europe derives much from the common law tradition. It should be then considered a bilateral process. The instance of the recently created Supreme Court is here sufficient. English judiciary had to adjust to the new procedures, change sometimes anachronistic courts in order to participate in the European Union and international trade. Some initiatives do indicate it is currently happening, given an example of Financial List – some examples however prove otherwise, if one looked at the Court of Appeal and the lack of reverence towards the rule reformatio in peius, which would seem obvious in the continental Europe. The English judiciary has also an intriguing local inventions, such as the Magistrates’ Courts or the Tribunals, that could favourably change the continental judiciary and maybe cure its urgent problems, provided of course that the alterations were introduced sensibly, with respect to the local conditions. Since these two systems – English and Continental – are so various, any haste in action would be inadvisable. In fact, the flow of law, mixing of the legal cultures, goes steadily. It might be that the English legal system, the unique judiciary is even closer to the Continental system than we might think. The upcoming moment of the Great Britain leaving the European Union will possibly slow the whole process down. Even though, the Chancery Court’s example and the development of equity law can convince one that the same methods, the alike solutions, can be reached in fundamentally distinct devices – this finally would be the most important conclusion of the present work, changing one’s view at the English and Continental judiciaries; enabling to see the profound differences, but what seems far and away more practical – the concealed similarities of which we should be aware.

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Struktura sądownictwa angielskiego
z punktu widzenia kontynentalnego systemu prawnego

Opis systemów sądownictwa angielskiego i kontynentalnego wskazuje na ich podobieństwa i różnice. Miejscem, w którym krzyżują się pojęcia prawne systemów angielskiego i kontynentalnego, jest „prawo słuszności”, będące oryginalnym tworem prawa brytyjskiego. Opis sądownictwa angielskiego rozpoczyna się od omówienia zasad funkcjonowania nowego Sądu Najwyższego, którego powstanie motywowało koniecznością wzmocnienia trójpodziału władz, a który porównany zostaje z podobnymi instytucjami polskimi, niemieckimi oraz francuskimi. Następnie opisane zostają sądy niższe: Sąd Apelacyjny oraz Wysoki Sąd Sprawiedliwości. W ramach skomplikowanej struktury tego ostatniego zdaje się interesujący Sąd Administracyjny, będący namiastką nieistniejącego w Anglii sądownictwa administracyjnego, a także sądy wyspecjalizowane, które powstają jako odpowiedź...
na nowe problemy prawne. Omawianie sądownictwa angielskiego kończy się na nakreśleniu funkcji i zasad działania sądów magistrackich (sądów pokoju) oraz trybunałów, charakteryzujących się bardzo elastycznym modelem orzekania. Uregulowania dotyczące sądów niższych mogą wskazać kierunek zmian w sądownictwie kontynentalnym. Analiza sądownictwa angielskiego wskazuje, że mimo postępującej konwergencji z prawem europejskim, odrzuca ono jednakże najważniejsze zasady przejęte z prawa rzymskiego – miedzy innymi zakaz orzekania na niekorzyść apelanta. Mimo to, instytucja „prawa słuszności”, mająca pierwotnie na celu zapobieganie negatywnym skutkom formalizmu skarg, przypomina instytucje prawa rzymskiego. Zasadną więc jest konkluzja, że mimo różnych dróg rozwoju obu systemów, pojawiające się w nich problemy prawne rozwiązywane były w podobny sposób.

Słowa kluczowe: sądownictwo, Anglia, Europa, prawo, słuszność