CHAPTER FOUR
ARBITRARY CHANCELLORS AND
THE PROBLEM OF PREDICTABILITY

M. Macnair

INTRODUCTION

Our common project is a comparison between Roman *ius praetorium* and English Equity. My particular theme is as follows. Roman law experienced concerns about arbitrary decision-making by the praetors. Since English Equity came into being much more recently, we have much better evidence both for actual arbitrary decision-making by Chancellors, and for concerns about arbitrary decision-making by Chancellors. The remedies adopted, however, are profoundly different. The Romans made the praetorian Edict more like the XII Tables, that is to say more like a code. The development of English law, in contrast, made Equity more like the Common law: a system based on the *communis opinio* of a narrow group of advocates (in the case of modern Chancery equity, the specialist Chancery bar), expressed in the heavy use of precedent and case reporting, modified by *particularistic* statutes, and governed by collegiate courts of review or (in modern times) appeal.¹ The eventual upshot is that modern ‘Chancery bar equity’ is perhaps the *least* ‘equitable’, in the Aristotelian *epieikeia* sense of ‘flexible’, branch of English law.

¹ The fundamental characterisation of the Common law here as a system of *communis opinio* of a narrow professional group follows A.W.B. Simpson, “The Common Law and Legal Theory” in *Oxford Essays in Jurisprudence*, 2nd series, ed. A. Simpson (Oxford: Clarendon, 1973); some historical supporting evidence in J.H. Baker, *The Law’s Two Bodies* (Oxford: Oxford University Press, 2001), though Baker does not quite reach the point of drawing Simpson’s legal-theoretical conclusions. The assessment of the role of English statutes as *particularistic* interventions in the system is a commonplace, and is, in fact, already visible in the Statute of Merton of 1236 and throughout the later Middle Ages in the statutes in [Record Commissioners] *Statutes of the Realm* I (London: George Eyre and Andrew Strahan, 1810). Collegiate courts were, of course, a common feature of the medieval and early modern European legal systems, and the single judge was thus a peculiarity of the English Chancery and some (not by any means all) of the other courts of equity, albeit shared with the episcopal courts. As will appear below, it was a visibly problematic feature of the Chancery.
ARBITRARY PRAETORS

This point must be extremely brief. There is evidence of concerns about arbitrary decision-making by praetors in the late Roman republic, which were expressed (and attempted to be remedied) by the *Lex Cornelia de iurisdictione* of 67 BC, which is reported to have required praetors to comply with their edicts issued on taking up office. There is a possible connection with the ancient Roman historians’ reports of projects of codification (or perhaps re-codification) in the period of the ascendency of Pompey in the late 50s BC and in that of Caesar in 48–44 BC. About the same time, juristic commentary on the Edict reportedly appeared: in effect, this implies that the *Lex Cornelia* had at least sufficient effect in stabilising Edicts and making them more statute-like to make commentary worthwhile.\(^2\) After the fall of the Republic the information available on this issue becomes much less, but it is trite according to the textbooks, though disputed in the literature, that the emperor Hadrian promulgated a codified form of the Edict, drafted by the jurist Julian, *circa* 130.\(^3\) After this point ‘equity’ in the *epieikeia* sense in Roman law would have to take the form of juristic interpretations or of *actiones utiles* or *in factum*.\(^4\) My point here

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