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SIR JOHN FORTESCUE

On the Laws and Governance of England

EDITED BY
SHELLEY LOCKWOOD
Board of Continuing Education,
University of Cambridge
For my parents with love
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My former students have been foremost in my mind during the final preparation of this volume and I thank them for their interest and enthusiasm for the study of political thought and for helping me to remember that things are rarely self-explanatory. My greatest debt of thanks, and one which I am delighted to acknowledge here, is to Quentin Skinner who, as lecturer, research supervisor, colleague and friend, has been a constant source of inspiration and encouragement. Brendan Bradshaw, who first introduced me to the thought of Sir John Fortescue, and Jimmy Burns, whose work stimulated my initial research, have also helped and advised at crucial stages and I hope that they will enjoy seeing Fortescue back in print and being read and discussed. Many other scholarly friends have also contributed a great deal to my understanding of the work of Sir John Fortescue through their expertise and willingness to enter into debate, especially Annabel Brett, George Garnett, Magnus Ryan and, above all, John Watts.

I should also like to thank the Master and Fellows of Christ’s College, Cambridge under whose auspices (as A. H. Lloyd Research Fellow) I conducted much of the research which informs my Introduction in this volume. I thank the staff of the Rare Books Room at the University Library in Cambridge for their cheerful forbearance. Several people from the Press have been involved in the production of this volume, but I should especially like to thank Elaine Corke, whose commitment to clarity and patient good humour has eased the final stages considerably, and also the Series Editors for their helpful comments at an earlier stage.
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Finally, the love and support of Richard Bailey and of my family is of infinite value to me in everything I do and I thank them for it with all my heart.
Editor’s note on the texts

The text of In Praise of the Laws of England is largely the version (see Note on the translations) edited by Chrimes (Cambridge, 1942). Chrimes’ text is a collation of the three extant manuscripts (Cambridge University Library, ff.5.22, British Library Harleian MSS 1757, and Bodleian Library Digby MS 198) and the text printed by Edward Whitchurch c.1545 (probably taken from the original or a copy of it). The original manuscript has not survived, but it may have been the version contained in the Cottonian Library MSS Otho B i which perished in the fire of 1731.

The work now known universally as The Governance of England was not so called until Plummer’s edition of 1885. It was first known as ‘Of the difference between an absolute and limited monarchy.’ Plummer’s edition is a collation of the ten extant manuscripts, but is primarily based on Bodleian Library Laud MS 593. The present text is a translation (see Note on the translations) of Plummer’s edition.

The notes to both these texts owe a great deal to the previous editors, although it has not been possible to reproduce the volume of material contained in their editions. Instead, I have given revised and up-dated textual and bibliographical references so that the reader can see the range of sources used by Fortescue and is able to find further information as required. All quotations from medieval English sources have been modernised.
Note on the translations

In Praise of the Laws of England is an amended version of Chrimes’ translation (Cambridge, 1942). I have retained his familiar and elegant words and phrases as far as possible, but some alterations have been made. Where these involve a significant change in meaning, the reader’s attention is drawn to this in the notes. I have also removed the archaic ‘th’ endings; for example, ‘Perfect love casteth out fear’ becomes ‘Perfect love casts out fear.’ A major difference not referred to in the notes is the translation of the key terms ‘political et regale’ and ‘tantum regale’; I have followed Fortescue’s own translation of these terms as ‘political and royal’ and ‘only royal’. ‘Dominium’ is always translated as ‘dominion’ and ‘regimen’ as ‘government’. Fortescue uses several verbs meaning ‘to rule’ – ‘regere’, ‘regulare’, ‘dominare’, ‘imperare’, ‘principare’, ‘praesse’, ‘gubernare’ – and Chrimes did not differentiate between them. I have translated ‘gubernare’ as ‘govern’ and ‘regulare’ as ‘regulate’, but the others are left as ‘rule’.

The Governance of England is a modernised version of the text edited by Plummer (Oxford, 1885). Given the difficulty of the language for the non-expert, this has meant a translation into modern English. I have, however, tried to be as literal as possible and not to resort to paraphrase. Bridging the gap between the way we spoke and thought in the fifteenth century and the way we speak and think now can be highly misleading. To illustrate the nature of my translation, here are a couple of sentences from chapter 19, first Plummer’s transcription and then my translation:
Note on the translations

For all such thynges come off impotencie, as doyth power to be syke or wex olde. And trewly, yff þe kyng do thus, he shall do þerby dayly more almes, þan shall be do be all the ffundacions þat euer were made in Englon. Ffor euery man off þe lande skal by this ffundacion euery day þe the meryer, þe surer, ffare þe better in is body and all his godis, as euery wyse man mey well conseuye.

For all such things come of impotency, as does power to be sick or to grow old. And truly, if the king does thus, he shall do thereby daily more alms than shall be done by all the foundations that were ever made in England. For every man of the land shall by this foundation be the merrier, the surer and fare the better in his body and all his goods, as every wise man may well conceive.

All Latin phrases in the original have been translated into English and put inside inverted commas. A particular problem was the translation of ‘counsel’ and its variants; given the fact that Fortescue is almost always referring to the institution, I have translated this as ‘council’.
Introduction

Throughout this introduction, references to primary sources are given in the form of author, title and section of work, page number; e.g. (Aquinas, *On Princely Government*, II.i, 7); the page reference is to the edition listed in the Select bibliography, primary sources. The exception to this is Fortescue, where the page reference is to this volume unless otherwise stated. Secondary works are given in footnotes with a full reference of author, title and publication details, unless they appear in the Select bibliography, in which case they are given in the form of author and short version of the title.

Sir John Fortescue (*c.*1395 – *c.*1477) was undoubtedly the major English political theorist of the fifteenth century. His works are famous, above all, for their vision of the English polity as a ‘dominion political and royal’, ruled by common law, and they have been widely quoted and used over the past five hundred years. This very popularity, however, has resulted in their original meaning falling victim to the various purposes of his commentators.

The process of distortion began in the sixteenth century, when the development and strengthening of both the monarchy and the institution of parliament led to a division and potential conflict of power between the two. In attempting to deal with this problem, political writers of the late sixteenth and seventeenth centuries interpreted Fortescue’s ‘political and royal dominion’ in support of their own projects to define the respective spheres of king and parliament. Thus for over three hundred years, Fortescue was cited
primarily as an authority on the nature of the English ‘constitution’. Since the end of the nineteenth century, however, his work has been more frequently used as an historical source; he has been taken as a simple mirror, a straightforward recorder and commentator on events and institutions as they actually were, rather than as a reflective and critical political theorist. As a more detailed picture of the workings of fifteenth-century law and government has been produced by legal and political historians, Fortescue’s account has been dismissed as simply ‘wrong’, not to mention ‘smug’, ‘naive’, ‘crude’, and ‘distorted by the romanticism of the ageing and exiled patriot’.

As a result, the recovery of Fortescue’s original intentions has become a task akin to archaeological excavation, carefully removing the accumulated layers of interpretation. Nevertheless the task is more than worthwhile, both for historians of political thought and for historians of fifteenth-century English law and government, for we cannot recover Fortescue’s original meaning without first gaining some knowledge of the man, of the resources available to him and of the historical context in and for which he wrote. We shall then see him as writing in response to a real crisis of governance in the mid-fifteenth century – not merely reflecting, but reflecting on the workings of contemporary law and governance.

Following the triumphant kingship of Henry V (1413–1422), the war, debt and disorder which marked the reign of the incapacitated Henry VI created a widely perceived crisis of governance in England from the 1440s to the 1470s. By 1450, the Crown had huge debts, Normandy was lost and there had been massive abuses of the king’s patronage (most notably by William de la Pole, duke of Suffolk). There were factional rifts in the council, overspending in the king’s household made a mockery of the notion that the king should ‘live of his own’ and in the localities there was violence and corruption in the administration of justice. The cluster of abuses – retaining, livery, maintenance, embracery, riot and forcible entry – which have, since Plummer’s edition of The Governance, been referred to under the heading ‘bastard feudalism’ (Plummer edn, 1885, 15–16), were perceived to be on the increase despite statutory legislation against them. It is hard to quantify these abuses, let alone
to judge their actual effect on the working of local government, but they feature heavily in the political literature of the period, especially in poems and ballads. Frustrations at these injustices were summed up in the ‘Complaint’ of Jack Cade (1450) which paints a vivid picture of an impoverished king who ‘can not pay for his meat nor drink and owes more than ever any king of England ever owed’, and who is surrounded by ‘insatiable, covetous, malicious,’ persons who ‘daily inform him that good is evil and evil is good’.

Although blame was mainly laid at the feet of ‘evil ministers’, the weakness of the king himself was an inescapable and crucial fact of political life. Henry VI succeeded his father in 1422 at the age of nine months. He took up the reins of government in 1437, but suffered bouts of mental breakdown from 1453 onwards. This absence of the single unifying and controlling will at the centre of government represented a failure of the king in the key duties of his public office – peace and justice – and a negation of the virtues expected of a monarch. A chronically weak king was as much of a threat as a tyrant because he would lack that constant and perpetual will to justice which was the sworn duty of his office.

Fortescue’s works, in response to this crisis, form a coherent and extended argument for justice against tyranny, for public against private interest. The precedence of private over public good is seen to be the definition of tyranny because it leads to injustice and oppression: ‘covetise’ (desiring and having more than one’s own) in one or some produces a corresponding poverty (having less than one’s own) in others, and the peace and tranquillity of the realm is thereby shattered. Justice (each having one’s own) is to be ensured by means of natural and human laws which are also sacred because they are divine in origin. Fortescue’s works are thus dominated by a concern for justice which is seen to be the touchstone for the legitimacy and proper functioning of political authority. His per-

1 Bellamy, Criminal Law and Society; Bellamy, Bastard Feudalism and the Law; Powell, Kingship, Law and Society.
2 Kail, Political and Other Poems; Scarrandall, Politics and Poetry.
3 Harvey, Jack Cade’s Rebellion, p.189.
4 Griffiths, The Reign of Henry VI; Watts, Henry VI and the Politics of Kingship; Wolfe, Henry VI.
5 Watts, Henry VI and the Politics of Kingship.
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spective is that of someone who thinks politically about law; he was a self-consciously analytical and highly experienced lawyer and government official.

John Fortescue was one of a growing group of lay professionals. He attended Lincoln’s Inn, of which he was Governor four times before 1430. Between 1421 and 1436 he was elected eight times to parliament. He was created serjeant-at-law in July 1438, by 1441 was a king’s serjeant and became Chief Justice of the King’s Bench in January 1442, after which he was knighted. He served as justice of the peace thirty-five times in seventeen counties and boroughs, received over seventy commissions of oyer et terminer, assize, etc., attended meetings of the council and tried petitions for parliament.

He was present at the battle of Towton (1461), following which he was attainted, having fled to Edinburgh with Henry VI and Queen Margaret. Whilst in Scotland he wrote a series of pro-Lancastrian succession tracts, including On the Nature of the Law of Nature (Clermont edn, 1869). In July 1463, he went across the Channel with the court to St Mihiel in Bar where, by his own account, they lived in poverty (Clermont edn, 1869, 23–5). He remained in exile in France for seven years, travelling occasionally to Paris. During this time, he wrote In Praise of the Laws of England, possibly translated the works of Alain Chartier, and wrote a ‘memorandum to Louis XI’ urging an invasion to restore Henry and establish peace between England and France (Clermont edn, 1869, 34–5). On the 4th of April 1471 he landed at Weymouth with Queen Margaret and Prince Edward. On the 5th of May, at the battle of Tewkesbury, Prince Edward was killed and Fortescue was captured. Thereafter he wrote his Declaration upon certain writings sent out of Scotland in which he repudiated his earlier, pro-Lancastrian succession tracts (Clermont edn, 1869, 523–41). He was subsequently pardoned (Rot. Parl. vi, 69 and Clermont edn, 1869,

4 Clough, Profession, Vocation and Culture; Genet, ‘Ecclesiastics and Political Theory’, in R.B. Dobson (ed.), The Church, Patronage and Politics.
7 Gill, Politics and Propaganda in Fifteenth-Century England; Litzen, A War of Roses and Lilies.
Introduction

43) and became a member of Edward IV's council. We do not know when The Governance was first drafted, but it is clear that an updated and revised version was presented to Edward IV after 1471.

Fortescue's credentials as an authority on the formal workings of law and government in fifteenth-century England are thus unimpeachable; not only had he been directly engaged in the central and local administration of justice and sat in both council and parliament, but he had also had a period of political exile which gave him the time and perspective to reflect and write in some detail about the law and governance of his country. But in addition to his practical experience and expertise, Fortescue also used the resources of contemporary theory as a basis on which to construct his work.

The political thought of late medieval England was dominated by the moralising tradition of mirror-for-princes literature, concentrating on the duties of kingship and the virtues of the king. The philosophical framework was scholastic, in particular the Thomist interpretation of Aristotle. The key term was 'governance', the 'gubernator' or governor being the helmsman who directs the ship safely to port – 'to govern is to guide that which is governed to its appointed end' (Aquinas, On Princey Government, I.xiv, 73). The 'end' to which the governed were directed was the Aristotelian secondary happiness of living in society in accordance with the moral virtues (Aristotle, Nicomachean Ethics, x, 331), which, according to the Thomist gloss, would ultimately be rewarded by beatitudo or eternal salvation. In broad terms, the means to those ends were the king, law and the grace of God; in specific terms, the means were to be determined through counsel and deliberation, that is, by the light of reason – 'man has reason, by the light of which his actions are directed to their end' (Aquinas, On Princey Government, i.i, 3). This was the substance of the practical science of politics.

Among the most popular ways in which philosophical knowledge was transmitted were the florilegia or anthologies, such as the Auctoritates Aristotelis (Hamesse edn, 1974) which Fortescue used. The fifteenth century saw an increased use of the vernacular in England, a prime example of which are the works of Bishop Reginald Pecock

Genet (ed.), Four English Political Tracts; Green, Poets and Prince Pleasers; Guenée, States and Rulers, pp. 37–44.
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(c.1305–c.1460), written in English for a lay audience, and there were very many translations into English from French, Latin and Italian. Fortescue’s sources include Poggio Bracciolini’s translation (into Latin from Greek) of Diodorus Siculus’ Ancient Histories and the Isagoge of Moral Philosophy of Leonardo Bruni. Fortescue himself may have translated the works of Alain Chartier (Chartier, A Familiar Dialogue) and comparisons have recently been made between Fortescue and the work of Jean de Terre Vermeille.

There were many general historical sources, such as the Old Testament, Geoffrey of Monmouth’s History of the Kings of Britain, Higden’s Polychronicon and numerous chronicles and genealogies, as well as the works of chivalry known as books of ‘urbanity’ or courtesy books which usually contained a mixture of heraldry and a version of Vegetius’ De Rei Militari, as, for example, Sir John Paston’s Grete Boke. In addition to these, there were also English institutional works, such as the Dialogue of the Exchequer and the Modus Tenendi Parliamentum, and the literature and sources of the common law. Of the lawyers, Bracton’s work was perhaps the most used, providing as it did a framework for the discussion of English law; a framework gathered largely from Roman civil law, via the work of the glossator Asio. Bracton was particularly useful to discussions of kingship and law because of his synthesis between the Roman law prínceps and the English rex; he stresses that kingship is an office and gives lex and those learned in the law a very high status (Bracton, On the Laws and Customs of England, i, 305).

The history of the development of English government adds a further dimension to these theories: in the thirteenth and fourteenth centuries, the concept of the communitas regni developed greatly, as evidenced by the addition of a fourth clause to the coronation oath, binding the king to keep the laws which he and the people ‘will have

12 Blayney, ‘Sir John Fortescue and Alain Chartier’s “Traité de l’Espérance”’
13 Burns, Lordship, Kingship and Empire, ch. 3.
14 Kingsford, English Historical Literature.
15 Plucknett, Early English Legal Literature; Genet, ‘Droit et Histoire’.
16 Maitland, Selected Passages from the Work of Bracton and Aso; Seipp, ‘Roman Legal Categories in Early Common Law’ in T.G. Watkin (ed.), Legal Record and Historical Reality, pp. 9–36.
chosen',¹⁷ and with the growth of parliament as the representative institution of the realm.¹⁸ References to the oath and to parliament are recurrent features of the political polemic of the fifteenth century.

A further strand of vocabulary and associated theory comes from ancient Rome by way of the work of St Augustine. Augustine cited Scipio’s definition (from Cicero’s De Re Publica) of res publica as res populi (the property of the people), where ‘a people’ is a ‘numerous gathering united in fellowship by a common sense of right and a community of interest’ (City of God xix.xxi; De Re Publica 1.xxv). The language of res publica was still relatively new in fifteenth-century England, and the author of the Boke of Noblesse (c.1449) attempted to define and translate the terms: res publica becomes ‘common profit’ and the definition combines Ciceronian (Augustine) and Aristotelian (Aquinas) vocabulary. The author of Somnium Vigilantis (1459), a work at one time attributed to Fortescue, also used this language extensively.

These various strands led to a general theory of polity-centred kingship: an hereditary monarch who ruled by his will, but after due consultation with, and in the interests of, his subjects, and who was bound to keep the laws of his realm and to ask the consent of his people for taxation. Although there existed no means for coercing the king, there was nevertheless a strong sense of obligation to a common sphere in which king and people shared; a public sphere, the mode of designation for which was the abstract notion of ‘the Crown’: ‘in the figure of the Crown, the rule and polity of the realm are presented’ (a parliamentary sermon of 1436). Bracton’s concept of the Crown had included both the communal sense and the important further notion of inalienability:

a thing quasi-sacred is a thing fiscal (res fiscalis), which cannot be given away or be sold or transferred upon another person by the prince or ruling king (rex regnante), and those things make the Crown what it is, and they regard to common utility such as peace and justice.

(Bracton, On the Laws and Customs of England, ii, 58)

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Just as kingship was a public office, so the kingdom was public property and must not be alienated. A corollary of the idea of non-alienation was that the body politic or realm had the status of a person under age (a minor) in need of a guardian or tutor. Thus the king became guardian of the realm and the realm consequently had the privileges of a minor with regard to its property. In that way the public sphere was protected.19

The realm was thus perceived to be a single organism with an appointed end towards which it had a natural desire and inclination; that organism was a body politic with one man as head, whose will unified and ruled the body as a whole, and the end towards which it tended was the common weal of peace and justice. The realm was corporately visible when the king was in his parliament and it was represented by the abstract notion of the Crown. The king was guardian of the Crown; he could not alienate its property, nor could he take his subjects’ goods without their consent. The king had to ensure that justice was done through the laws and had himself to be the ‘living law’ when equity required. The king took an oath to that effect at his coronation when he was ‘elected’ by the people and anointed with holy oil.20 But the king was also minister of God and of a higher estate than ordinary men, as evidenced by his sacral powers21 (Fortescue, De Titulo Edwardi, ch.X, in Clermont edn (1869), p.85*). He was undoubtedly the key to good governance, the man at the helm. So, to what use did Sir John Fortescue CJKB put these ideas, how did he adapt them to suit his needs, what response did he make to the circumstances in which he wrote?

Fortescue clearly created his central concept of ‘dominium politicum et regale’ from a combination of the sources mentioned in the preceding section and his own experience of law and government in England. The concept is developed throughout Fortescue’s works and a progression can be traced from the philosophical origins of the first book of On the Nature of the Law of Nature, through the reforming ideal of In Praise of the Laws of England to the concrete, institutional reforms of The Governance.

19 Kantorowicz, The King’s Two Bodies; Schramm, A History of the English Coronation.
21 Bloch, The Royal Touch.
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Book I of On the Nature of the Law of Nature contains a great deal of the scholastic theory referred to above: Fortescue’s main sources are the Bible, Augustine, Aristotle and Aquinas. It provides a substantial theoretical context within which to examine In Praise of the Laws of England and The Governance since Fortescue’s understanding of the fundamental concepts of law, justice, and kingship are first revealed in this work. Using Aristotle by way of Aquinas, Fortescue states that kingship originated under the law of nature (Appendix A); it was established by natural law which is divine, and its purpose is to guide people to a virtuous life (Nature, in Clermont edn (1869), i.xliv, 243). This in turn will be rewarded with eternal salvation, through the grace of God, ‘for it is not by law only, but rather by grace that we attain unto beatitude’ (Nature, in Clermont edn (1869), ii, xxxiv, 292). On the Nature of the Law of Nature Book 1 establishes that the office of the king is to rule rightly and that he must rule by means of the law which is the sacred bond of human society (Nature, in Clermont edn (1869), i.xviii and xxx). It is also in this work that we have Fortescue’s most detailed account of ‘dominium politicum et regale’.

Here he states that the government of the realm is ‘political’ because it ‘is ruled by the administration of many (est plurium dispensatione regulatum)’, and ‘royal’ because the subjects cannot make laws without ‘the authority of the king (regia auctoritate)’ and because ‘the realm . . . is possessed by kings and their heirs successively in hereditary right’ (Appendix A). It is also made clear that the ‘political’ element does not constitute an infringement of the king’s power or liberty, because the ability to do wrong is not power, but lack of power or impotence (Appendix A). A further important point is made in On the Nature of the Law of Nature: that the king who rules politically must also be able to rule ‘only royally (tantum regale)’ when necessary either for reasons of equity (Nature, Clermont edn (1869), i.xxiv) or in time of rebellion (Nature, Clermont edn (1869), i.xxv).

22 Because of the importance of the theory established in On the Nature of the Law of Nature, three relevant extracts have been included in this volume (Appendix A). It should be remembered, however, that the work forms part of Fortescue’s writings on succession and addresses fundamentally different issues from those contained in the works edited in this volume. For a discussion of the work, see Litzen, A War of Roses and Lilies.
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Turning now to the argument of the two texts contained in this volume: *In Praise of the Laws of England* is a dialogue in Latin between Prince Edward (son of Henry VI and Queen Margaret) and the Chancellor. It is a didactic dialogue of the master-student variety, as, for example, the *Dialogue of the Exchequer* and later, Christopher St German’s *Doctor and Student*. It is formally structured: the Chancellor ‘moves’ that the Prince should study the laws, the Prince gives a ‘replication’ to the Chancellor’s motion, in response, the Chancellor strengthens his motion and ‘proves’ his case, he then summarises (*epilogat*) the ‘effect of his argument’ (chs.i–vi). Thereafter, the Chancellor ‘shows’ or ‘teaches’, whilst the Prince ‘questions’ and ‘interpellates’. This part of the dialogue is Aristotelian in character, much like one of Fortescue’s sources, Leonardo Bruni’s *Isagoge of Moral Philosophy*.

Seeing the Prince spending all his time on military training, the Chancellor seeks to teach him that the prime duty of the office of kingship is justice, which is to be achieved by means of the law. Having proved the value of law, using a combination of arguments and examples taken from Deuteronomy, Aristotle, Roman law and Bruni (*Praise*, chs.i–vi, pp. 4–13), the Chancellor goes on to show the Prince that the English ‘political and royal’ kingship which operates by means of ‘political and royal’ law is preferable to the ‘only royal’ kingship of the French civil law system because it provides a better defence against tyranny and is a better guarantor of justice (*Praise*, chs.x–xii, pp. 17–24). He also demonstrates to the Prince that the laws of England are the best because they are uniquely suited to the realm of England (*Praise*, xv and xxix, pp. 25, 43).

*In Praise of the Laws of England* is thus a rhetorical work: the author seeks to persuade the reader of the value of English law and government as it should be and suggests ways in which reform might be undertaken. Fortescue’s concern was to establish a defence of political monarchy on the grounds of reason, law and justice and thereby to provide a theory to fit the practice of that monarchy as it should be. In his account of ‘dominium politicum et regale’ Fortescue was not fitting practice to existing theory since, despite his claim to have taken his argument from Aquinas (*Praise*, ch.x, p. 18; *Governance*, ch. 1, p. 84), his synthesis appears original, nor was he creating a theory to which practice in reality conformed, which
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it did not. He was creating a theory to which he felt English practice should ideally conform: England should conform to ‘dominium politiccum et regale’ because that was the best form of dominium for England.

In Praise of the Laws of England is therefore to be seen as a critical and reforming work rather than as complacent or merely descriptive. Any pretence that he is describing the actual situation is dropped in the chapters on the administration of justice in the localities, a matter in which Fortescue was himself experienced – the titles of the chapters state that this is how jurors ‘ought to be’ chosen and informed (Praise, chs.xxv and xxi, pp. 36, 38). The work should therefore be read as an account of how English law and government should ideally be, it is a kind of modus guernandi regnum, along the lines of the early institutional manuals, the Dialogue of the Exchequer and the Modus Tenendi Parlamentum (Pronay and Taylor edn, 1980, 32). Fortescue is instilling faith in an idealised system of government, thereby highlighting the gap between ideal and actual in order to stimulate reform.

Pride and praise is most genuine (perhaps unsurprisingly) in the sections of the work concerning the English legal profession, its status and organisation (Praise, chs.xlvii–li, pp. 66–75). A picture is drawn of a unique and distinct body of substantive law, taught in a special academy – the Inns of Court. Trained lawyers are of high standing: following Roman law, but probably taken from Bracton, Fortescue states that law is ‘holy (sanctum)’ and that lawyers are ‘priests (sacerdotes)’ (Praise, ch.iii, pp. 6–7). The serjeants-at-law are especially favoured; they are character indelibis and therefore survive intact the demise of the king (Praise, ch.ii, p. 70 and notes). It is remarkable how much detail Fortescue gives on the Inns and the legal profession, given that the Chancellor states at the beginning of the work that the Prince shall not himself have to undertake such training. These sections give a solid grounding for the uniqueness of English law and for the status of law and lawyers in the body politic – they know the mysteries of the law which binds the realm together and by means of which it shall attain peace and justice.

It is in seeking to explain the nature and value of English law for England (in preference to the civil law), that the Chancellor embarks on his account of the origins of the realm of England and
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its form of rule. These well-known passages are the key to the meaning of Fortescue’s theory of ‘dominium politicum et regale’ for England.

Using Aristotle and Cicero (via Augustine), Fortescue states that a people does not constitute a body unless it has a head. Therefore, he continues, when a people ‘will’ to ‘erect itself into a body politic (se erigere in corpus politicum)’, it must always set up one person for the government of that body and that person is usually called ‘king’ (Praise, ch.xiii, p. 20). The analogy is then made between the people as embryo and the kingdom (regnum) as the developed physical body, regulated by a head or king. Most importantly, the kingdom ‘issues from the people (ex populo erumpit)’ and ‘exists as a body mystical (corpus extat mysticum)’. And ‘thus the kingdom of England blossomed forth (prorupit) into a political and royal dominion out of Brutus’ band of Trojans’ (Praise, ch.xiii p. 22). Corpus mysticum is a theological concept signifying an undying corporation, a universitas. It therefore represents a more sophisticated theory than that of the organological concept of the body as head and members because it allows for the perpetuation of the plurality of the realm (Kantorowicz, 1957).

Fortescue tells the same story in The Governance: a ‘fellowship’ came into England with Brutus, ‘willing to be united and made a body politic called a realm, having a head to govern it’. They ‘chose’ Brutus to be ‘their head and king’. Then ‘they and he upon this incorporation, institution, and uniting of themselves into a realm, ordained the same realm to be ruled and justified by such laws as they all would assent to’ (Governance, ch.2, p. 86; Praise, ch.xxxiv, p. 48).21 This law is thus to be known as ‘political and royal’; ‘political’ because all assent to it, and ‘royal’ because it is ‘administered by a king’. The verb used here is ‘ministrare’ and this is therefore associated with the king’s role as minister Dei and with his guardianship of the realm. The origin of the body politic or body mystical which is the realm of England is thus the will of those who came to England with Brutus; they willed to be a body politic and so they incorporated themselves, the natural corollary of which was that they chose a head to govern them. The governance of England is clearly based on consent.

21 Schramm, A History of the English Coronation.
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The crucial relationship is said to be that between the heart and the head (Praise, ch.xiii pp. 20–1). Following Aristotle, the heart is the first formed part of the embryo, the first organ or member to have life. In the body politic, the heart is ‘the intention of the people (intencio populi)’ which contains the blood or ‘political provision for the interest of the people’. I have altered Chrimes’ translation of two key phrases in this passage in order to bring out the meaning more clearly. For ‘intencio populi’ Chrimes had ‘will of the people’ which would imply voluntas, but this is precisely what the people no longer have once they have incorporated themselves because they had to choose a king to be head and to provide the single unifying will. Also, I have altered Chrimes’ ‘forethought’ as a translation of ‘provisionem’ to the more literal ‘provision’, both in order to maintain the original sense of ‘looking out for’ and also to preserve the connection with ‘providence’ which in turn was associated with ‘prudence’;¹⁴ ‘provision’, ‘providence’ or ‘prudence’ was the political virtue needed for the proper deliberation about the means to the ends of human life – ‘from prudence come choice and deliberation and all actions depend on them’ (Bruni, Isagogue, 281).

The implications of these ideas for the nature of the governance of England and the constitution of the body politic become clearer if we look at the work of Aquinas, perhaps Fortescue’s major source. For Aquinas, too, the heart is the principal member of the body, by which all the others are moved (On Princely Government, i.i and i.ii, 4 and 7). From the same work it is clear that the ‘end’ of human intention is the bonum commune. Members of the body politic ‘intend’ or are ‘intent on’ the common weal, to which they are directed by the light of reason (On Princely Government i.i and i.v, 2 and 13). But it is in Aquinas’ analysis of human action in Summa Theologica that we can clearly see the point of the distinction between intention and will: intention means ‘in alium tendere’, a striving for or desiring something. This desire cannot manifest as action until there has been some deliberation about the possible means to the end that is desired. Following a process of deliberation and consent, the individual can act. The final action is an act of choice which is an act of will (voluntas). Importantly, it is the intention which determines both the end and the legitimacy of the action

¹⁴ Genet, Four English Political Tracts, pp. 119, 193.
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of the will (Aquinas, *Summa Theologica*, ta nae qus.12 and 19). This language of ‘intending the common good’ is present in Aquinas’ *On Princeely Government* (1.v 13 and 1.xv, 40–1) and it is also to be found in works contemporary with Fortescue, notably the *Boke of Noblesse* and the *Sommn Vigilant*. Thus it is the intention of the people which is the prime motivation in the setting up of the political kingdom, just as it is the heart which first moves and gives life to the physical body. In the process of incorporation, the political kingdom acquires a king in the same way that the body ‘grows’ a head. The fully-formed body politic then acts (as does the physical body) through its will. The aim or end of its actions and the touchstone for the legitimacy of those actions is the intention of the people, the intention that their lives and goods should be protected by the king who has been given tutelage of the realm. The means of protection and justice is the law. This can be clearly seen in the following passage:

The law (*lex*), indeed, by which a group of men (*cetum hominum*) is made into a people (*populus*), resembles the sinews of the body physical, for, just as the body is held together by the sinews, so this body mystical is bound together and united into one by the law, which is derived from ‘ligando’, and the members and bones of this body, which signify the solid basis of truth by which the community is sustained, preserve their rights through the law, as the body natural does through the sinews.

(*Praise*, ch.xiii. I have changed Chrimes’ translation of ‘nervi’ from ‘nerves’ to ‘sinews’).

The law is what binds the body politic together and through which its members preserve their rights; Fortescue elsewhere uses the phrase ‘a bond of right (vinculam turis)’ to define law (*Nature*, t.xxx), the literal meaning of ‘vinculum’ being the rope used to lash a ship together which thus fits well with the notion of ‘gubernatio’ as the steering of a ship. The motive for the act of self-incorporation is the protection of life and goods. This aim would be frustrated if the very person whom they had set up could then take everything away from them (*Praise*, ch.xiv p. 23); hence the king cannot change the laws without the consent of his people any more than the head can change the body’s sinews (*Praise*, ch.xiii p. 21). The Chancellor concludes:

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You have here, Prince, the form of the institution of the political kingdom, whence you can estimate the power that the king can exercise in respect of the law and the subjects of such a realm; for a king of this sort is obliged to protect (ad tutelam erectus est) the law, the subjects, their bodies and goods, and he has power to this end issuing from the people (a populo effluxam), so that it is not possible for him to rule his people with any other power.

(Praise, ch.xiii)

The people ‘intends’ the utilitas publicum, that is, the protection of their lives and goods, their interests, justice, the common weal, and it is to this end that the king has power from the people. The flow of power (like the flow of blood) is from the heart to the head in and for the interest of the whole body. This is what is meant by the participation of many in government by one. There is no sense of opposition, no real duality at all, because the body politic is a single organism. The rule of law is a co-operative and corporate matter which must involve the intention, deliberation and consent of all members of the body politic, including the king, but which cannot be manifested as action without the single will of the king. In the establishment of a political kingdom the people do not hand everything over to the discretion of the king and they continue to make their intentions known in the representative and consultative bodies of the realm – parliament and the council. Government is a public concern.

There are many clear advantages to the English system according to Fortescue. First, there is the fact that the king becomes character angelicus; as king, he does not have the capacity or power to sin, he has his power for good and good alone, good being defined as the common good. This is a very significant part of Fortescue’s theory; it is important that the ‘political’ nature of the monarchy should not be seen to reduce the power of the king or to place limitations on it, therefore Fortescue employs the notion of ‘non-power’ or ‘impotence’. Power to sin is not power but impotence, therefore the king’s inability to err, makes him more divine than human, he is perfectly free and all-powerful (Praise, ch.xiv, p. 24; Governance, chs.6 and 19, pp. 95, 122; Nature, Appendix A). Secondly, the king’s provision of justice is better in a ‘dominium politicum et regale’ because the people receive ‘such justice as they desire themselves’ (Governance, ch.2, p. 87), and thirdly, the king
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always works for the common good because he is constrained thereto by the political law (Praise, ch. ix, p. 18). Fortescue states that because (as Aquinas says), ‘the king is given for the kingdom and not the kingdom for the sake of the king’ (Praise, ch. xxxvii, p. 53; pseudo-Aquinas, De Reginime Principum, iii. iii),

hence all the power of a king (potestas regis) ought to be applied to the good of his realm, which in effect consists in the defence of it against invasions by foreigners, and the protection of the inhabitants of the realm and their goods from injuries and rapine by natives.

(Praise, ch. xxxvii, p. 53).

A king who cannot achieve this level of protection ‘is necessarily judged impotent’. But a king who is ‘so overcome by his own passions or poverty that he cannot keep his hands from despoiling his subjects’, ‘ought to be called not only impotent but impotence itself and cannot be deemed free’. Whilst a king who can defend his people against the oppression of both others and himself,

is free and powerful . . . for who can be more powerful and freer than he who is able to restrain not only others but also himself? The king ruling his people politically can and always does do this.

(Praise, ch. xxxvii, p. 53).

In the context of the mid-century crisis of governance caused by the weak and incapacitated kingship of Henry VI, this looks to be far from complacent commentary; in the atmosphere in which it was finally presented to Edward IV, it could equally have been read as a warning.

The realm of England is a ‘dominium politicum et regale’, a political kingdom, a polity-centred kingship, which originated in consent, not force. It is primarily contrasted with the civil law kingship of France (The Governance, ch. 1, pp. 83–4). There, ‘what pleases the prince has the force of law’, whereas the law whereby the kings of England rule consists in customs and statutes, as well as natural law, and they are bound to its observance by their coron-

25 Praise, chs. xii–xiii, pp. 12–23; Governance, ch. ii, p. 87; a major reason for not mentioning the Norman Conquest is that it would entail acknowledging the establishment of authority by force. In Fortescue’s own collection (Bodleian Rawlinson MS c.398) there is a copy of Rede’s Chronicle in which the paragraph on the Norman Conquest has been scored through, fo. 29.
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...ation oath (Praise, ch.xxxiv, p. 48). The chapter on English customary law is perhaps the best known of the whole work; in it the Chancellor states that throughout the history of England, from the rule of the Britons, through that of the Romans, Saxons, Danes and Normans,

the realm has been continuously ruled by the same customs as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them . . . [no other laws] are so rooted in antiquity. Hence there is no gainsaying nor legitimate doubt but that the customs of the English are not only good but the best.

(Praise, ch.xvii, pp. 26–7).

This passage, more than any other, is responsible for the reputation of Fortescue from Edward Coke onwards and thence to the twentieth-century charges of smugness. Let us deal with the last sentence first. It must be read in conjunction with the preceding claim that England’s laws are to be judged according to the standard of justice and their suitability for the realm (Praise, ch.xv, p. 25); English common law is ‘the best’ because it is best suited to the realm of England (Praise, ch.xxix, p. 44 and Chrimes, 1942, ciii). Fortescue is not, however, saying that English laws are the best because they are the oldest; the fact that the laws of England are ancient and have survived so long intact, is proof that they are the best and most just laws, it is not the reason for their being so,26 Fortescue states that they have not been changed because they have not needed to be changed ‘for the sake of justice’. This is an attempt to play down all of the major constitutional upheavals of the realm in order to stress that the essence of English kingship has remained unchanged since its first institution by Brutus’ band of Trojans; history is pulled into line behind an idealised notion of the constitution of the realm.

Some of the implications of Fortescue’s combination of political and royal elements become clearer when we look at his understanding of statute law. In England, statutes ‘are made not only by the prince’s will, but also by the assent of the whole realm, so they cannot be injurious nor fail to secure their advantage’ (Praise,

26 Pace Pocock, The Machiavellian Moment, p. 15.


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ch.xviii, p. 27), unlike laws in a ‘dominium regale’ which work against the subjects to the advantage of the prince. Statutes made in parliament, are ‘necessarily replete with prudence and wisdom’ because they are ‘promulgated by the prudence . . . of more than three hundred chosen men’ (Praise, ch.xviii, p. 27; cf. Modus Tenendi Parliamentum). Moreover, if they ‘happen not to give full effect to the intention of the makers (intenio conditorum), they can speedily be revised, and yet not without the assent of the commons and nobles of the realm, in the manner in which they first originat-ed’ (Praise, ch.xviii, p. 28).

The corpus mysticum of the realm becomes visible, is physically represented, in time of parliament. The universitas makes the laws by which it is governed; this is self-government, a ‘dominium politicium’. But members of the realm of England are subjects, not citi-zens, and they are summoned to parliament by the will of the king; this is self-government at the king’s command, a ‘dominium politicium et regale’. However, the king himself is bound at his cor-onation to ensure that justice is done ‘as often as equity requires it’ (Praise, ch.III, p. 78; cf. Nature Clermont edn 1869, i.xxiv) and therefore England is ‘always really or potentially governed by the most excellent laws’ (Praise, ch.IV, p. 78). It is in parliament that the body politic strives to actualise its potential by means of the law, hence ‘all the laws of this realm are the best in fact or potentiality (in actu vel potentia), since they can easily be brought to it in fact and actual reality (essenciam realem)’ (Praise, ch.III, p. 78).

The central sections of Praise are comparisons of the English and civil law systems on specific points of law and procedure and these are dealt with in the footnotes to the text. These chapters became a model for later writers, notably John Hales and Thomas Smith. Fortescue compares the private, summary justice meted out by the provosts of the marshals in France, the routine use of torture and the inadequacies and iniquities of witness procedure with an English system cleansed of all corruption, pride of place going to the unique trial by jury (Praise, chs.xxi–xxviii, pp. 30–42). The main reason for the difference in procedure is the fertility of England and its

27 Doe, Fundamental Authority in Late Medieval English Law.
28 The commons were added to the formal assenting clause of statutes in 1444–5, McKenna, ‘The Coronation Oil of the Yorkist Kings’.
29 Burns, ‘Fortescue and the Political Theory of dominium’.

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county system (Praise, chs.xxx–xxx, pp. 42–4), but the nature of the law of England is also due to the origin of the realm. Both Praise and The Governance contain passages contrasting the condition of the ‘poor commons’ of each realm (Praise, ch. xxxv–xxxvi, pp. 49–53; Governance, ch. 3, pp. 87–90), with the intention that ‘by their fruits you shall know them’ (Governance, ch. 3, p. 90). In France, the picture is one of abject poverty; there the people live under excessive tax burdens, they are not free to enjoy what they have, being constantly plundered by the king’s men, they toil on the land, wander barefoot in sackcloth and eat no meat. The picture for England is an early presentation of England as the land of ‘roast beef and liberty’, where the people freely enjoy their goods, eat meat, wear woollens and where the land is so fertile it scarcely needs cultivation. These are the blessings of the land of the just and obedient contrasted with the curses of tyranny and disobedience (Deuteronomy 28).

In Praise, then, Fortescue argues for justice against tyranny, showing clearly that England is a political monarchy which functions according to the intentions of, or in the interests of, the people; the king is for the sake of the kingdom. The dangers of monarchy are manifold; with one person at the helm, the fundamental problems of human weakness are ever-present, such as the tendency to give in to one’s passions. This would lead to tyranny; the seeking of private over public good. As we have seen, this can happen because of the lust and ambition (passions) of the king, or because of his poverty which compels him to seek beyond what is his own. The central theme of The Governance is the provision of safeguards against the poverty and hence potential tyranny of the king.

The poverty of the king was a constituent part of the crisis of governance as contemporaries saw it in the 1440s and 1450s. The debts and excessive gifts of Henry VI during that period constitute the situation for which it was first drafted.30 By the time it was

31 Of the ten extant manuscripts of The Governance, two read ‘Henry VI’ in place of ‘Edward IV’ at chapter 19, one, whilst reading ‘Edward IV’, has an added note that the work was ‘written to King Henry the Sixth’, three stop short of chapter 19, and in one, the relevant passage is mutilated, leaving only three full copies addressed unequivocally to Edward IV, (Plummer edn, (1885), 87-94). Plummer believed that the manuscripts were altered ‘to avoid shocking Tudor susceptibiliti-