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THE INTENTION AND WILL OF THE LAW-GIVER IN JOHN FORTESCUE

John Fortescue (1385?-1476?) is regarded as one of the most eminent followers of Henry Bracton and one of the most important English 'constitutionalists' who contributed to the formulation of the 'Whig argument' on the supremacy of the parliament.[1] The language and the style of this author of three important works (*Opusculum de natura legis nature et de eius censura in successione regnorum suprema, De laudibus legum Angliae*[2] and *The Governance of England Otherwise Called the*

[1] See especially C.A.J. Skeel, 'The Influence of the Writings of Sir John Fortescue', *Transactions of the Royal Historical Society*, Series 3, Vol. 10 (1916), pp. 77-114, and the remark of F. Gilbert, that 'Fortescue's writings were esteemed among the Whigs, who used to refer to them in their struggle against the claims of royal absolutism' in 'Sir John Fortescue's Dominum Regale et Politicum', *Medievalia et Humanistica*, No. 2 (1943), p. 88. Gilbert noticed, however, that Fortescue's arguments were not used by contemporary English political parties and simply belonged to a redundant theoretical conception and as such could only be looked at in the right context of late medieval political thought. We can add that research on Fortescue undertaken by C.H. McIlwain failed to appreciate the context in which his works were written (see his *The Growth of Political Theory in the West*, New York 1932, pp. 355-358), and he acquired followers in M.A. Shepard ('The Political and Constitutional Theory of Sir John Fortescue' in *Essays in History and Political Theory in Honor of Charles Howard McIlwain*, Cambridge, Mass. 1936), S.B. Chrimes ('Introduction' in Sir J. Fortescue, *De laudibus legum Angliae*, ed. and trans. by S.B. Chrimes, Cambridge 1942) and in Gilbert.

[2] *De laudibus legum Angliae*, the work written in 1461-1463 or around 1469, at any rate no later than April 1471 (the most often mentioned period is 1468-1470), is a Latin dialogue between Edward, the imprisoned Prince of Wales and heir (son of Henry VI and the queen Margaret) and the Lord Chancellor of England who teaches the prince that the first duty of his office is to pursue justice by the way of the law, and that the political-regal kingdom of England and the law of his state are better than 'purely regal' governance typical to French kings; it is higher than the system of civil law of the continental states as it provides better protection against tyranny and guarantees that justice will always prevail (ix, xii-xiv). He also shows the prince that English laws are the best as they are so well accommodated to the particular constitution of the kingdom (xv, xix) with the regal-polit-

Difference Between an Absolute and a Limited Monarchy),[3] can be found in numerous documents. His analysis of the English political system of the Lancaster period and the remedies he offered in terms of strengthening the Crown and weakening the influence of noble families can be seen as launching the process which laid the fundaments for the New Monarchy.[4] Fortescue is sometimes said to be the first English thinker of the late Middle Ages who wrote about 'the constitution in making' and who formulated his own vision of the right form of government in which a political community can accomplish its goals, instead of looking for some universally valid conception of a government. It is even emphasized that his ideas were a departure from the categories that were typical for the Middle Ages because he introduced new categories which were precursors for a later period. He continued Wyclif's idea of the superiority of a particular form of government over the projects that were typical for continental Europe at the time, and the superiority of a particular tradition over 'two cosmopolitan systems of law' that dominated the continent and which had their roots in the political heritage of Rome or in the canons of the universal Church.[5]

It is true that the theoretical reflection rooted in doctrines of the past centuries played a smaller role in Fortescue than observation. It does not mean, however, that he recoiled from the lines of reasoning that were known for centuries and from questions that had been discussed in the past. The reading of his major works reveals not only the remarkable erudition of their author, but also shows that he was inspired by *De regimine principum* of St. Thomas Aquinas and by the masterpiece of the same title written by the hierocrat, Giles of Rome (Aegidus Romanus). Apart from these works, Fortescue also referred to the works of Aristotle, Cicero, St. Augustin, Bracton and numerous other continental authors who were contemporaries or almost contemporaries of him, such as Leonardo Bruni, Poggio Bracciolini, Jean de Terre Vermeille, Alain Chartier (whose works he translated), and to some au-

ical system of government in England which is also well accommodated to them. *De laudibus…* is a critical rather than descriptive piece and the criticism that Fortescue's account is not adequate miss their point since he wrote about the law and government in England as they should be, offering an idealized vision that provides a bridge between the actual and the ideal in order to convince the readers that reforms are necessary (S. Lockwood, 'Introduction' in J. Fortescue, *On the Laws and Governance of England*, Cambridge 1997, p. xxv).

3 This work was first published as *The Governance of England: Otherwise Called the Difference Between an Absolute and a Limited Monarchy by Sir John Fortescue, Kt., Sometime Chief Justice of the King's Bench* by Sir John Fortescue-Alanda in 1714. The second edition was published by Ch. Plummer (Oxford 1926, here we refer to this edition).

4 H.A. Myers notices that Fortescue was to some extent following the arguments of lawyers who referred to the Roman tradition, which came to England owing to a Bologna jurist Vacarius, and was continued by his disciples. In this tradition the dominant tendency was to make the king the centre of power, but also to make him aware that he must respect laws accepted by his subjects, use taxes that they gave consent to, and co-operate not just with the aristocracy or a bigger representative body, but with a permanent council of twenty four members which had no function of governing (*Medieval Kingship*, Chicago 1982, pp. 289-291).

5 H.D. Hazeltine, 'General Preface' in Sir J. Fortescue, *De Laudibus Legum Angliae*, Cambridge 1949, p. xvii.

thors less well known today: Vincent of Beauvais, the author of *De morali principum institutione* and Roger of Waltham, the author of *Compendium morale*. Using such diverse sources, Fortescue did not represent the moralist tradition of 'the mirrors for princes,' which dominated in the English reflection of the previous centuries. In his view of the institutional order, he put a stronger emphasis than Bracton on the normative context of the governance of the 'ruler' who would complete the structure of a community and who would guide it to the right destination (in line with the teleological conceptions of Aristotle, John of Salisbury and St. Thomas[6]). This was to be done in accordance with the requirements of law that was not an expression of somebody's will, but was rather based on custom. Such a law would make the ruler a leader of a community who would provide its members with the conditions necessary for them to fulfil their potential according to the requirements of rational nature that mirrored eternal law which all legislative acts of a political community should comply with. Such a ruler would consequently guide the community towards happiness. In Fortescue, governance was supposed to facilitate the pursuit of a goal achieved in the earthly order which held a lower status than that which Acquinas foresaw in his doctrine, and which in this sense was unknown to Aristotle. This higher order was salvation, which was viewed as being the final goal of human life. Authority and law were the means which the ruler could use to facilitate the achievement of this first and at the same time ultimate goal. It was through the connate light of human reason, which was capable of recognizing the goal which every reasonable person pursues, and through those inclinations which led to these goals, that authority and law could be determined and accomplished. Reason was also seen as capable of instituting the norms that protect connate dispositions (and they were therefore good since they reflect in human beings all that which comes from the eternal law) that facilitate the pursuit of the closer and the final goal. The connate reason, which did not refer to the content of the Revelation, would illuminate man's will and would guide him towards the right goal.[7] When used by the ruler and reflected in legislation it would reinforce such a pursuit.

There is no doubt that Acquinas' works, which Fortescue often referred to, influenced his main theses in the philosophy of law and politics. They shaped his reflection on the aims of political power and on the right propositions of the ruler who

[6] St. Thomas Aquinas, *De regimine principium*, I.xiv.73 (*De regno – On Authority* published in a Polish translation of J. Salij et al. in św. Tomasz z Akwinu, *Dzieła wybrane*, Kęty 1999, pp. 225-258).

[7] Ibid., I.i.3. Fortescue wrote: 'all human law, no matter whether it is custom, ius gentium, statute, civil law or law of the king is derived from natural law and is always related to it' (*De natura*, i.v, p. 67). Similar to the norms of canon law, which had no character of law as long as they were against natural law, the king in the parliament could break neither the 'fundamental law of property and the rule which excluded women from the throne' nor the lawful natural norms of the Magna Charta Libertatum (ibid., p. 82). Baumer notices that Fortescue departed from the standpoint of St. Thomas and Ockham who claimed that property was established after the fall of man and treated it as a natural institution known to the First Parents (F. Le Van Baumer, *The Early Tudor Theory of Kingship*, New Haven–London 1940, p. 10). Shepard on the other hand claims that Fortescue anticipated Locke's position ('The Political and Constitutional Theory…').

would make sure that enacted norms were not contradictory to the norms of natural law recognized by reason.[8] The question of how much freedom a lawgiver possessed interested Fortescue to the same degree that it preoccupied Aquinas; they both tried to establish the criteria of 'lawful governance,' seeing them rooted in rationality and in concern for the common good, understood as the good of the whole and not simply as the sum total of the particular goods of the community. They both could say that 'it is the king who is given to a kingdom and not the kingdom to him, that all king's authority (potestas Regis) should be used for the welfare of the kingdom, that it should provide a defense against external invasion and protection of the kingdom and the goods of the subjects against injustice and infringements from fellow-citizens,' not because of some abstract rights they have, but because of the requirement of law that is characteristic for the whole species and for a given political community.[9] The king who would not provide such protection was regarded by both thinkers as 'incapable of ruling' and achieving the common good. They were even more critical of a king who would not be guided by reason but by 'passions', who, for example, because of poverty, would be unable 'to refrain from infringing upon property of the subjects. Such a ruler would be proclaimed incapable of ruling, as someone who due to his own actions would dispose himself of the capability to rule' for he would lose the necessary freedom connected with the primacy of reason over emotions. 'An irrational ruler' would strive for power and wealth abjuring the traits that determine what is common among people and what makes him one of them. It would also

[8] J.H. Burns, 'Fortescue and the Political Theory of Dominium', *The Historical Journal*, Vol. 28 (1985), p. 793.

[9] *De laudibus…*, xxxvii, p. 89 with a reference to Aquinas' *De regimine principium*. The similarity between the accounts of Fortescue and St. Thomas Aquinas, particularly when it comes to the concept of *dominium regale* and *dominium politicum*, was noticed by C.H. McIlwain (*The Growth…*, p. 359) and A.F. Passevin d'Entreves ('San Tommaso d'Aquino e la Constituzione Inglese nell'opera di Sir John Fortescue', *Atti della Reale Accademia delle Scienze di Torino*, Vol. 62 (1927), pp. 261-285). Their interpretation weakens Clermont's conviction that Fortescue referred only to the experience of the government of England (*Life and Works of Sir John Fortescue*, London 1869, Vol. 1, p. 126). McIlwain's and d'Entreves' position is also shered, despite some hesitations, by Chrimes and Gilbert who rightly notices that Fortescue could have found in Thomas the concepts of *regimen politicum* and *regimen regale* as well as *dominium imperiale* compared with *dominium regale* (the ruler as the highest judge of an empire or kingdom entitled to independently enact law and taxes) and *dominium politicum* (the ruler of an empire or a kingdom rules not on the basis of his hereditary title but as a result of being elected or even on the basis of usurpation but with acceptance of a people). According to Glibert, Fortescue changes Aquinas' theses and provides a different understanding not only of the political and the regal but also of *dominium.* This observation is important for it is the starting point for research on the concept of *dominium* that developed in the last two decades, and it illustrates that in Fortescue, the nature of 'the political' becomes legislation in agreement with a representation of a community according to *intention populi* while the nature of the regal is a hereditary title and not an independent enactment of the law by the ruler. In both cases the interpretation is different from and even contrary to Aquinas' understanding (F. Gilbert, 'Sir John Fortescue's Dominum…', pp. 90-93). In this crucial distinction Fortescue's definition seems to follow Giles of Rome as noticed by C. Plummer, 'Introduction' in Sir J. Fortescue, *The Governance of England*, Oxford 1885, p. 109.

mean rejecting the very essence of ruling that was primarily seen as reasonableness and the pursuit of the fulfilment of the common good independently from all vested interests, including those connected with individual will. Following St. Thomas, Fortescue asserted that only a king who would be capable of protecting the people from oppression, who would act for the common good, and would at the same time surrender to the dictates of reason could be simultaneously 'free and full of authority.' Along with St. Thomas, Fortescue could ask: 'for who is more powerful and freer from that who is able to constrain not only others, but also himself, who while ruling politically' is not only the most powerful, but also the freest.[10]

This statement, which in my opinion illustrates the essence of Fotescue's position, is problematic today, from the perspective of a twenty-first century reader. It turns out that *political ruling*, which has raised many controversies among researchers over the last few decades, and which I will refer to later, is usually associated to exclusivity in legislation and thus with order-giving, which usually means arbitrariness rather than the subordination of the order-giver's will to the requirements of reason and the common good. Fortescue did not only take a similar position as scholastics who identified a set of non-contradictory legal norms for a universal corporation of Christians, norms which possessed a guiding and at the same time compelling force, which direct will in two ways (like in John Salisbury and Bracton). Being aware of the fact that the connotations of the notions *dominium* and *ius* were effectively bringing together the owners of things and the rulers to establish some kind of 'owners of a public thing,' he also aimed to specify the basis of governance of a different type than 'regal' (*dominium regale*) which made the arbitrary will of a single ruler the only source of law. Fortescue searched not only in the works of those authors already mentioned, but also in those of legists who did not accept such an implication and who neither regarded a ruler as the 'incarnation of law' nor prescribed him a 'lawful reason' deprived of a deeper source. The two great English thinkers, Fortescue and Bracton, referred to the same tradition and therefore they had similar views with regard to their analysis of the form of the monarchy; they associated the vision of a Roman *princeps* with that of an English ruler who personified the Crown-kingdom and who as a bearer of his office recognized the primacy of a law binding him and his subjects, which was based not on human will but derived from a deeper source recognizable not only by a ruler but also by others. Fortescue, however, highlighted what Bracton said about the role of a council and of the permission of the nobles. For, as Burns has correctly observed, at that time, in England especially, the law bound rulers to such an extent that kings could not change it without the consent of the representation of the three estates of the realm, and judges could not give judgement against the laws thus made, not even in response to the king's direct orders. Moreover, the representation of the estates could not make laws on its own because it could not take any decisions without the king (*sine regis auctoritate*). Custom was to

[10] *De laudibus…*, xxxvii, p. 91. See also J.G.A. Pocock, *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition*, Princeton 1975, pp. 9-12, 21-25.

constitute the basis for that 'deeper normative structure' which decided on the content of the decisions taken by the king, the representatives and the judges.[11]

The thesis which emphasises the closeness of the views of Fortescue with those of both St. Thomas and Bracton is valid despite the fact that Fortescue, a fifteenth century thinker, was aware of the changes that were taking place in England, and he knew that the conclusions of the thirteenth-century authors were not utterly suitable for his time because of the changes his country had been through during the previous two centuries. One of them resulted from a clause added to the royal oath which obliged the king to respect the laws that he enacted along with the representatives of the community. This clause, which strengthened the role of representatives a great deal, became a subject of polemics produced in the fifteenth century. Their participants often referred to the Roman heritage, especially to Cicero's concept of the state understood as the public thing (*res publica*), the property of the people associated in an agreement with respect to justice (that is just law which does not contradict the requirements of reason) and partnership for the common good. Not always was this notion understood in a teleological perspective that was characteristic of the Aristotelian-Thomistic tradition that influenced the later middle ages English tradition of political thought; nor was the primacy of the common good of the universe and of the creation always given prominence, for sometimes the particular good of a given community at that moment was emphasised – as in Ockham or Wyclif. In such views, which Fortescue shared with Aquinas, the association of the particular with the universal, decisive as far as the relationship between the particular good and the higher good of a bigger whole was concerned, was either not noticed or intentionally omitted. Such an approach meant that the benefits of the individual and of a given community as well as a danger – which cannot be found in Fortescue – of rulers and norms independent from universal requirements were highlighted. That was due to a specific construction of custom typical for English thinkers.

Attention paid to the 'benefit of the community' could justify 'the creation of something new' by the holder of power, and not the administration of justice whose measurements were not dependent on the will of a king or any other institution.[12]

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[11] J.H. Burns, 'Fortescue and the Political…', p. 780. In *The Governance* Fortescue asserts that a king can act against the law anytime he wants. This thesis, presumably formulated for Edward IV's use seemed to totally undermine his construction. Nevertheless, it is worth noticing that there is some irony in this formula and the message of his work is different, the king who would prefer his own particular will to the public interest would act against *intention populi*. His most important remark concerns the right moulding of the king's will in accordance with the intention of a people. Fortescue goes so far as to emphasize the meaning of a council and of the consent of a people; in doing so, however, he does not develop a concept of the 'division of power', but stresses the dependence of the procedures of representation (although not of representation itself) on the king's will illustrating that representatives of the subjects cannot participate in governance as long as they were not asked to express their will.

[12] According to Burns, while this thesis applies to regal, political and political-regal rulers as the principals of *dominium* based on natural law, it cannot be applied to rulers of a *dominium despoticum*,

Yet for Fortescue as well as for John of Salisbury, any particular good was not only derived from a universal good, but was also associated with a community understood as a kind of corporation and never as a multitude of the 'particular benefits of its parts.' Burns emphasized this argument when he critiqued Chrimes' interpretation, and it is seen by commentators as indicating that Fortescue understood representation not as a representation of individuals or groups, but of the community as a whole. It was a representation which was to be aware of the reason for the existence of a community and of its position in the order of the universe and which – similar to a king – did not hold power transferred by the individuals and other parts, but was an organ of a corporate community. In Fortescue's view, neither individuals nor other parts of the realm (for example guilds or classes) were the primary holders of power – guided by their own benefit – which they could transfer to their own organs variously understood and thereby give legitimacy to the holders of power whose only title to ruling would come from them.[13]

Various concepts analysed above shed light on Fortescue's views on reasonable rulers who govern for the common good and who pursue the good of a particular community in accordance with the good of the widest whole. The existence of such rulers is indispensable for the existence of a political body understood as a whole and not as a multitude of individuals who are given rights or who evaluate the law on the basis of their own utility. Referring to the views of Acquinas and Aristotle, Fortescue claimed that the main part of the body is the heart which works for the good of the whole body transmitting blood to all its limbs including the head. The limbs are thus dependant on the heart and act with it for the good of the body; they help it to guide the community to the achievement of the right goal, 'directing themselves' and 'being directed' by the heart which in Fortescue and St. Thomas 'would want the same as the organism and as a whole'[14], and would show the head and all the other limbs the right motions that they should be making. St. Thomas' thesis is important for it paved the way for Fortescue's conception of the heart as 'the intention of the people' (*intentio populi*). This thesis is based on Acquinas' distinction between intention and will. He demonstrates that intention means the pursuit of something and can disclose itself as an act only after reason has revealed the means leading to the achievement of 'the desired goal'. It is down to reason to recognise the goal and the means which lead to it, but as it undertakes this process it 'wants' something; the goal and the means revealed by reason subsequently become the object of intention, and only after the act of will has taken place. This act is 'conditioned in two ways,' by inten-

which is different from a *dominium regale*. Fortescue uses this term with reference to Nimrod, a 'tyrant and usurper' who gained power by force (conquest) and did not respect any laws taking his will to be equal with legal norms (J.H. Burns, 'Fortescue and the Political…', pp. 785-787).

[13] A polemic that contains Fortescue's thesis that *dominium* is *plurium dispensatione regulatum*, concentrated around the meaning of the term *dispensatione*, has been presented by J.H. Burns ('Fortescue and the Political…', p. 780 and following) with S.B. Chrimes (*English Constitutional Ideas in the Fifteenth Century*, Cambridge 1936, p. 310).

[14] Św. Tomasz z Akwinu, *De regimine principium*, I.i., I.ii.4 and 7, I.v.2 and 13.

tion and reason which precede the act of will and the action which follows it.[15] If we take these conclusions into consideration we will be able to approach the concept of *intentio populi*, which can be found in Fortescue and which can be translated as the intention of a people or a community, at any rate as an intention of some whole. One could think that intention is the primary motive to create a political community if the heart – which formulates this intention for the whole body – moves and gives life to the body. Like in a physical body, a political body directed by intention would act through will. In the process of the transformation of a society into a common whole, the people or a body politic, the body, the heart/intention would precede the establishment of a king in the same way as the head comes from the body. Fortescue does not answer directly the question of who should express the will before the holder of power is selected. There are interpretations which suggest that the intention of a community as such is preceded by the intentions of each individual which comprise the future communal intention. Yet Fortescue, who owes a great deal to the Aristotelian/Thomist tradition, seems to believe that the intention of individuals is related to their preconscious inclination to live in a community arising spontaneously rather than out of their conscious will. It can be said that this preconscious intention of individuals constitutes the intention of the community only at the moment of their joining of communal life; later on each of them (not only those who have initially expressed such an intention-inclination) joins the already existing community and does not distinguish his or her intention from the intention of the community, which is 'a common or public thing'. And although intention still affects the will, it is now the intention of the community as a whole and not the intention of all the individuals who comprise it. Communal intention, when identified in this way, determines the will of the community and that of its organs. This intention is, however, related to the rational character of the preconscious inclinations which lead to the creation of spontaneous bonds with others in order that 'the rational intention' determines the content of the will of the individuals and of the community. Therefore it is neither the 'arbitrary intention' of the people or an intention directed by the momentary sense of individual benefit, but it has a deeper source, as it is by necessity reasonable and therefore real, it corresponds with a wider metaphysical structure. Thus the intention of the people, which is the basis of the will directing the political community, has as its final basis the rationality of the creation.

Let us go back to Cicero's definition, quoted by Fortescue after St. Augustin, which describes the state as a 'public thing', the property of the people associated in an agreement with respect to justice and 'the partnership for the common good'. According to some authors writing at the same time as Fortescue,[16] what was important in this definition was not so much its first, but its second part – the element

[15] Idem, *Summa Theologiae*, 1-2, q. 12 i 19. See more in J.G.A. Pocock, *The Machiavellian Moment…*, p. 24.

[16] This attitude can be found not only in Fortescue's works, but also in the works of his contemporaries, e.g. in *Boke of Noblesse* (1449).

which made individuals the people. In their reading, 'the partnership for the common good' was the primary characteristic of the state, understood, though – against the definition – not as the good of the community as a whole, but as the good of its individual parts.[17] Fortescue found this interpretation of Cicero and Augustin in the work of Reginald Pecock, for whom the constitutive aspect of the state benefits, as they understood it, the subjects, the vassals or corporations with their privileges and immunities, but not for the benefit of the community as a whole.

We need to have in mind this remark if we want to understand why this is problematic from the perspective of Foretscue's concept of law, which evolves over a long period of time. In his view, there was no room for 'consent' or an 'agreement' of the multitude of individuals or its other parts that would be a necessary element in the process of turning proposals into legal norms. Nor did 'human law' depend on the character of particular wills comprising the whole. Reason and intention were to become the right source of the will's decision and thereby it was not to be determined by the arbitrary benefit or emotions of a ruler even if he acted along with a representative body. All these dangerous conclusions arose from a false, individualist interpretation of Cicero's concept of the state which Fortescue found in Pecock. In his view, the king was to govern his subjects who consciously accepted the duties present in the norms and consciously agreed to obey the ruler.[18]

Fortescue rejected such an interpretation for it was bound to lose 'the communal moment' determined by the common intention which preceded the will of individuals and which confined the subjective benefit with the benefit arising from the mutual partnership and respect for common law that comprised the norms that are decided upon spontaneously and over a long period of time. They were neither norms whose benefit could not be measured by the benefit of a given generation or circumstances, nor those which were determined accordingly to the actual and particular will of the ruler even if he was supported by the representatives of the realm. The individualist approach omitted also another important aspect. Because it concentrated on the benefit of the ruler, the individuals or other parts of the whole, it did not take notice of the normative fundament whose binding power was the benefit of the community as a whole determined by the principle of being, like in John of Salisbury, or by innate inclinations – like in St. Thomas and many of his English followers, including, it seems, Fortescue. This fundament – whose content would be recognized by reason – determined the content of norms which although at first did not have

[17] S. Lockwood, 'Introduction', p. xxi.

[18] This conception was developed by Pecock in five theological treatises written in 1443-1456: *The Reule of Crysten Religioun* (1443, where he discusses the nature of God, God's law and man's duties towards the others), *The Donet* (1443-1449, where he discusses the main principles of faith) with a supplement entitled *The Folower to the Donet* (1453, where he presents moral and intellectual virtues), *The Book of Faith* (1456, where he analyses the relation between reason and faith) and the most well-known *The Repressor of Over Much Blaming of the Clergy* (1456, where he refutes the accusations of lollards against the clergy). See N. Doe, 'Fifteenth-Century Concepts of Law: Fortescue and Pecock', *History of Political Thought*, Vol. 10 (1989), pp. 257-280.

a human sanction, were compulsory for the human will. Reason would discover the norms which would arise naturally with intention that subsequently conditioned the will. The will could be guided by a particular benefit only outside the sphere which was regulated by that normative fundament. Fortescue's solution avoided the tension between the particular benefit and the normative foundation that the community's life was based upon. It viewed the kingdom as a political community and not as a multitude of individuals and other parts. It was a community centred upon a hereditary king who would pass the law after he consulted the representatives of the community and for the interest of the whole community. The king would manage the community not under the guidance of his personal and therefore particular and arbitrary intention, but he would be guided by the intention of the community. Such an intention would not be the sum of arbitrary intentions, but the rational intention of a mystical body which possessed a corporate character (*universitas*), loftier than that of the simple organistic conception of a body and its limbs.

The present analysis demonstrates that Fortescue's reflection on the origin of a political community, which, according to many historians, shaped English constitutionalism in the late middle ages, resulted in a concept that will always be associated with his name, *dominium politicum et regale*. It was a conception of rule based on political law which expressed the intention of a people or a community[19]. Following Cicero, St. Augustin, and St. Thomas, Fortescue maintained that the people could not properly be called a body as long as they continued with a head. When its rational intention leads to its transformation into a political body (*corpus politicum*), it becomes absolutely necessary that someone should preside as the governing principal, who usually holds the title of king.[20] This person 'grows out' of the whole, and thus establishes which wants are to develop rationally, the same way as a head grows out of any organism which wants to 'develop rationally' or like a heart which is responsible for its movements and growth. In the analogy between *embrio* and *regnum* which Fortescue looked at, the process of the development of a body politic governed by the king-head is similar to that of the development of a natural body. The realm 'erupts from the people' (*ex populo erumpit regnum*) and becomes a mystical body, which does not mean that its head and heart are created by some body of the people existing prior to it, but rather they should be understood as its 'natural offsprings.' So the Kingdom of England, political and regal at the same time, did not have its origin in either an act of conquest or in a mindful decision of calculating individuals, but in a supraconcsious consent resulting from the intention to fulfil the rational and natural inclination to transform the social multitude into a community.[21] Such a transformation took place during the reign of the legendary Brute,[22] when 'the intention' of the developing organic community was completed with the establishment of a visi-

[19] *De laudibus…*, ix, p. 25.

[20] Ibid., xii, p. 29.

[21] *The Governance…*, ii, p. 87.

[22] *De laudibus…*, xiii, p. 31.

ble head, the ruler. With the coming of Brute, England experienced the rule of a king which turned the multitude of men into a realm understood as a new organic community as required by the rational order of the universe.[23] Brute became the 'head governing the community' which owing to his rule could 'unite' and become a 'body politic called a realm.' It was the act of unification into a realm and the establishment of institutions which transformed the social multitude into a community guided by 'the intention to transform what was feasible into that which was set up.' This community-realm, which was established due to a rational and therefore just intention, was to be 'justly subordinated by the laws observed by all'[24] which would than reflected a communal 'rational intention.' Therefore they were laws which by necessity were political and regal at the same time, and as such 'administered by a king' who was a minister of God (*minister Dei*), and enacted norms not by an arbitrary will but in response to the intention of the community.

Was that common approval of the rule of Brute – the head indeed of a consciously reached contract on the establishment of a holder of authority understood in terms of the right to govern transferred by an already existing and therefore implemented authority? Could subjective authority exist before the head was decided upon, and could it belong to the multitude of people as a whole, to individuals as such, or to other parts of the multitude? Could this authority exist only potentially if there was no holder of it, and therefore it could only be realized through the selection of the head? The above analysis suggests that Fortescue would answer positively to the last question as he applied 'approval' only to the act of the foundation of a community and not to either the selection of each temporary ruler, or the repeated consent of the community or its representatives to the rulers' acts, or especially not to their control over his doings. It also seems that Brute as the 'first head' of a newly created community was the first holder of authority and as such he held the title independently of a transfer from any previous ruler. This reading can be supported by Fortescue's opinion that the legitimacy of a ruler was derived from his hereditary title and not from the power of attorney given by the community or its representatives as well as by his thesis that there was no control over the acts of the ruler exercised by any human order. A different answer would make a people/community or its representation both the head and the political principle of the ruler; this view is reflected in the interpretation which is applied by many researchers today who apply contemporary concepts to such remote periods. It is then difficult to attribute to Fortescue, as Chrimes does,[25] the thesis of a contractual character of a community, since for him,

[23] S. Lockwood, 'Introduction', p. xxvi.

[24] *The Governance…*, 2, p. 86; *De laudibus…*, xxxiv, p. 81.

[25] S.B. Chrimes, *English Constitutional History*, London 1958, pp. 117-119. We should also note that F. Le Van Baumer, who considered Fortescue to be a representative of 'pre-Tudor English constitutionalists' and emphasised their input in building the foundations of the organic New Monarchy, understood the conditions of authority introduced by Fortescue as being related not to its institutional side or with the 'positive consent' from the subjects or their representatives, but to the fact that the monarch was obliged to derive laws from eternal, natural and common law and had to

a fifteenth century thinker, the reason for the development or even the very existence of a political community as well as the basis of authority was *intention* rather then *voluntas populi*. According to Forescue, *intentio*, which personified the wisdom of the heart that loved all that developed spontaneously and preceded consciousness, was decisive not only for the creation of a community but also for its lasting existence. Such an intention cannot be identified with the people's will that results in the will of the king. Following Chrimes[26] and Lockwood it should be identified with the intention of a spontaneously growing body politic. Only such an interpretation adequately explains the true relationship between the intention of the body/people and the ruler and their will since the intention manifested itself in the will, but it was the intention and not the will that provided a reason for the creation of the English realm. The will, guided by a rational intention, 'agreed' on its actualization and the creation of a body politic in which intention still persists and still affects the will, not so much the undetermined will of the community as the will of the ruler who is able to recognize the community's intention and to follow the advice of its representatives. Fortescue seems to suggest that in a body politic the intention of a community is revealed rather by the will of a ruler than that of the community. The will of a people should then accede to the will of a ruler, who is determined by the intention of the community; or to put it another way, in a body politic, if both wills are determined by the intention of the community, the will of the people and the will of the ruler should be the same. They both – if determined by the intention of the community as a whole and are thus, of necessity, common – are capable of overcoming the particularity of the will of a social magnitude or a ruler as an individual; they also make it possible the for the law-giver and ruler to attain impartiality, which was so important for the whole tradition which shaped Fortescue's position. It was a tradition which defended rationality and the common good as the criteria of lawful governance and opposed particularity, which was inevitably caused by governance of a will which was not determined by the 'rational motions' of the communal or universal heart/intention.

abstain from enacting norms in 'the spiritual sphere', which was regulated by 'universal canons and papal law'. In special circumstances ('in declaring the norms of common law and imposing extraordinary taxes') he was supposed to cooperate in the parliament with representatives of the lords and commons. In the view of the contemporary constitutionalists, including Fortescue, 'the king was responsible only before God for "good life" of his subjects, and only morally before a people'. Thus in their doctrines it is hardly possible to find a concept of resistance. F. Le Van Baumer, *The Early Tudor Theory…*, pp. 5, 10-13.

[26] The 'General Preface' formulated some reservations about the interpretation that in Fortescue 'the will of a people' expressed by a representative body was a 'source of law' that not only was binding for the ruler but came from an the organ that personified the political community. 'Fortescue claims', wrote Hazeltine, that 'English kingship is restrained by consent of the parliament', but his position was different from Thomas Smith's in the next century who is regarded as a predecessor of Hobbes. It was not Fortescue but Smith, a leading representative of English constitutionalism in the sixteenth century, who asserted that 'the power of parliament is the highest and absolute authority of the English Kingdom', and the parliament 'represents and holds the power of the whole kingdom including both its head and the body (H.D. Hazeltine, 'General Preface', p. xxxviii).

If we take into consideration the remarks made so far, we will notice that for Fortescue intention was closely linked with people's inclination to live in a community and to be governed. This shared inclination facilitated everybody's pursuit of an analogous goal and the intention was not the sum of particular intention, but was a common intention. If that was not the case, Fortescue would need to accept the existence of many separate 'hearts' that enliven the organs of a community, including its head which governs the community, and he would not talk about the heart of a community as representing one, universal and common intention. Some researchers (including Chrimes and to some extent Lockwood) accept a nominalist interpretation, which assumes that each member of a community is able to express an intention and which often requires from the ruler some protection of individual, natural or long-established rights. Applying such an interpretation, they tend to identify *utilitas publicum* with the protection of individual persons and goods and to see the public benefit, understood in these terms, as the only criterion of the intention of providing justice and welfare to the community. Such an approach might result in a thesis that the king is not only supposed to follow an *intentio populi* of a nominalist-individualist content, but that his power comes from a people understood as a multitude of individuals who demand that he acts for the public benefit measured by individual benefit, and he therefore rules not so much for the community as a whole or for an organic and mystical unity, but for individuals or their magnitude.[27] Such a thesis is not completely excluded form Fortescue's insight, but it is contrary to his way of thinking in terms of complete wholes rather than parts.

It seems that only the interpretation defended here provides a good understanding of the problem of governance which was vital for Fortescue. For him governance was exercised in accordance with the intention of a people and not with 'individual interests' (as Chrimes believes[28]). It did not have much to do with the realization of the rights of individuals or the will of a people as a calculation of particular wills (as Lockwood asserts), but it was inextricably connected to the intention of a body seen as a community that pursues one goal.

Furthermore, only this interpretation allows us to grasp the meaning of another part of Fortescue's thesis on the participation of the many in the authority of one. Such a thesis excludes opposition or 'duality' since a body politic is seen as an organism, and all its parts participate in deciding on the content of its intention rather than its will. They do so not so much through active participation in deliberation,

[27] Many scholars interested in Fortescue emphasize that he 'did not even think of a republic' (C.H. McIlwain, *The Growth…*, footnote 1 on p. 359). Others, like Burns, observe that Chrimes' translation of *De laudibus…* has significantly contributed to misunderstandings in interpretation as it had an explicitly contractual sense ('Fortescue and the Political…', p. 788).

[28] Chrimes himself, as if contradicting his own individualist interpretation, observed that Fortescue exceeded the doctrine which was characteristic for English medieval political thought by introducing the parliament as a body which was to participate not in the process of the enactment of new norms, but was entitled to declare norms that were derived from the community's customs. He also found the rights of the parliament itself in a custom that developed at least since the time of Bracton ('Introduction', p. cii).

like in the ancient city-states, but through 'participation in intention' that precedes and determines that will, as well as in the process of making its content conform to that intention. This observation is important because it is decisive for how Fortescue understands the rule of law. Law, which should not only reflect intention but also *show how to depart from evil,*[29] is simply a set of norms which regulate the common and corporate acts that aim at the attainment of a people's intention,[30] and serve as a means for man to declare a decree of God.[31] A community that acquired a political character after its head was established was a body in which *dominium politicum*, political governance in a wide sense, was accomplished. Such a governance could have different forms, it could be *dominium politicum* in a narrower sense (when the rules govern according to the law enacted by a people or its representatives), *dominium regale* (when the ruler governs according to the law which only he enacted), *dominium regale et politicum* or *politicum et regale* (when the ruler rules on the basis of the law which he enacted with consent of the kingdom). Each of these types differs from *dominium despoticum* where the arbitrary will of the ruler who does not pay attention to the intention of the community governs. A wider connotation of *dominium politicum*, derived along with other elements from the Aristotle/Thomist tradition, emphasizes the communal character of the individual and the corporate nature of a community that possesses its own good. Conversely, a narrower connotation of this term turns out to indicate the most convenient form in which 'the rule of law' can be implemented. The law is understood here as being derived from a specific source, which to some extent corresponds with the source of a political community. This is because a form of government which has existed for a very long time, from the every beginning of a given political community, has a similar 'genetic character' to that of binding law which is also shaped 'by consent,' and which enforces the content of norms which are derived from custom, and which already have a legal character. In a regal-political kingdom the content of the community's intention is decided upon by its head and its representatives. Such an intention is revealed through a law-giving

[29] It seems that misunderstandings often arise because researchers do not notice the differences in Fortescue's positions as presented in the earlier work *De natura* and the later ones *De laudibus…* and *The Governance*, which lack a distinct juxtaposition of the 'political' and the 'regal' aspects of a realm and thus the thesis that a people (and not a king) have the right to make and change laws, and not only to express through their representatives their consent as regards taxation and a change in legal norms. This modification resulted, in particular, in Fortescue's abandoning his reflection on the three forms of government: regal, political and regal-political. Instead, he focused on the mixed form, as Gilbert says. Let us also note that the differences between the first work and the other two also have a political meaning to them. *De natura* was a polemic against the Lancaster House and it questioned their hereditary title to the crown based on natural law and not just on statutes and the consent of the representatives (F. Gilbert, 'Sir John Fortescue's Dominum…', pp. 94-100, and E.F. Jacob, 'Sir John Fortescue and the Law of Nature', *Bulletin of the John Rylands Library*, Vol. 18 (1934), pp. 357-376).

[30] *De laudibus…*, I, p. 7.

[31] Ibid., iii, p. 9. Fortescue says: 'Seeing the Apostle says that all power is from God. Laws which are made by men, who for this very end and purpose receive their power from God, may also be affirmed to be made by God (ibid.).

will. In a *dominium regale* this content is read by a ruler without representatives of a community but not freely. It needs to be emphasized that the ruler refers to the intention of a community, and not only to his own interest as is the case in a *dominium despoticum*. A despotic governance is implemented where the intention of a community is mistakenly taken for the will of a people, where the content of the intention-will is decided upon by a people or its representatives, and where the intention of a people is not taken into consideration by any means, and its very existence results from 'an enforced unification' by the law imposed from outside (which merely compels but does not guide). In this form of governance there is no need for representation because norms become the arbitrary orders of a ruler whose intention is deprived of the valour of rationality. This is how Fortescue compared 'political' with degenerated forms of governance. 'Political' forms would take into consideration the intention of a people and would accept representation as a participant in governance. Conversely, despotic forms would pay no attention to the intention of a community. On this reading, 'the political' was found on two levels, and on both it concerned the influence of the 'many' (*pluralitas*) on the decisions of a community as a whole. On the higher level, which concerned the political character of the intention of a community as a whole, both political, regal-political as well as 'purely regal' governance could be said to have the trait of the political while 'non-political' despotic governance' could not. On a lower level, where the 'political' aspect needs to be taken into consideration in the process in which a community's intention is formulated, only two types of governance could be considered – political and regal-political. In this sense, it was not enough that there existed some social multitude governed by an individual, if the ruler was a despot who was directed only by his own intention. Such a multitude would not become a body politic because it was not administered by the intention of the 'social unity.' For a political community to exist as a whole and as a 'mystical body politic' it was necessary that communal intention and its realization prevailed, first, through the creation of this new whole; and second, due to its continuous existence which resulted from the intention and had the support of the law. It was not the law which could be understood simply as a set of norms enacted arbitrarily, easy to change or modify in accordance to the new requirements of utility decided by the ruler. The law was to respond to an enduring intention which – like in the followers of Aristotle – was written in some sequence of intention, continuous existence, and the development of a given entity. A community was able to flourish as a body politic only if it was governed by a 'corporate or communal intention' that could not be abolished or replaced by the individual intentions of the parts, their numerical majority or an arbitrary single ruler.

This argument was applied not only to the form of government that included a regal and political aspect, but also to a kingdom whose ruler was supposed to allow for *intentio populi* as long as he wanted to preserve the 'political' character of the kingdom despite the absence of co-operation in legislation with representatives of the community. Both a regal ruler, *rex*, like the French monarch, as well as a regal-political ruler, *rector*, like the English monarch who 'could neither make any al-

teration, or change in the laws of the realm without the consent of the subject nor burthen them, against their wills', were asked to rule 'so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely, and without the hazard of being deprived of them, either by the king or any other.'[32] The regal and the regal-political ruler held the same power although they wielded it differently and usually would acquire the title of a monarch in different circumstances. The regal ruler would derive his legitimacy from conquest and his superiority over those who had surrendered to him, expecting that he would provide peace in the country and the security of property.[33] In reality such a ruler usurped the title of a king, but by making his governance 'purely regal' he could still complete the natural purpose of governing if he realized the intention of a people. By doing so he could justify his title and gain the consent which though it was not explicitly expressed, could nonetheless be related to *intentio populi.* Many Old Testament rulers and some rulers of Rome, who *usurped their rule over the world*, belonged to this category. Israelites who urged Samuel to establish a regal king for them not only were rejected by the prophet, but also by Jehovah himself who – as, according to Fortescue, *The First Book of Kings* explains – commanded Samuel to show them the nature of government over them; that is, mere arbitrary will and the pleasure of the king.[34] His intention, as the example mentioned by Fortescue indicates, was soon to become particular and the ruler proved to be a despot who lost his power, and whose successors were accepted for their regal governance which conformed to God and the community's intention and did not descend into despotism. The danger of slipping into despotism was much smaller in a political-regal kingdom which was a *mystical body governed by one man as its head*, in which 'the first thing which lives and moves is the intention of the people, having in it the blood, that is the prudential care and provision for the public good, which it transmits and communicates to the head, as the principal part; and to all the rest of the members of the said body politic, whereby it subsists and is invigorated.'[35] The law of this body politic was created by its head together with the representatives of the community. The law was preserved by the king who was appointed to protect his subjects' lives and properties and for this

[32] Ibid., ix, p. 24. In his analysis of this fragment, Burns juxtaposes *dominium regale* and *dominium politicum* based on 'political law' (*lex politica*) which, 'according to "Aquinas", is the law by which the entire human race would have been governed but for the fall'. Burns suggests that Fortescue makes a point reminiscent of Marsiglio of Padua that laws in such a system where all participate in their making cannot be against their intention. A juxtaposition of Thomas' and Marsiglio's arguments, however, is at least problematic as they lead in two different directions. Thomas' arguments have a realist character; those of Marsiglio are nominalist. In my opinion, it is Thomas' position that shaped Fortescue's argumentation (J.H. Burns, 'Fortescue and the Political…', p. 784).

[33] Lockwood claims that Fortescue did not provide an analysis of the Norman conquest because the power of William the Conquer was based on a source typical to a purely regal kingdom ('Introduction', p. xxx).

[34] *De laudibus…*, xii, p. 29. See on this subject F. Gilbert's contradictory remarks in 'Sir John Fortescue's Dominum…', pp. 93-94 and J.H. Burns, 'Fortescue and the Political…', pp. 781-782.

[35] *De laudibus…*, xiii, pp. 37-38.

very purpose the people delegated power to him. He therefore had a just claim to the power derived from his predecessors from 'the primary intention' to establish a community and not from an act of conquest.[36]

Following Bracton, Fortescue emphasized that the law was a means to secure peace and justice, that it was binding for both the subjects and the ruler, for whom it was a source of legitimacy. He also pointed out that the primacy of law was characteristic of three, and not two, forms of government. It certainly does not exist in a state ruled by a despot where his arbitrary will, which neglects the intention of a community, becomes law, but it is maintained (or it can and should be maintained) in *dominium politicum et regale* and *dominium regale* as well as in a 'purely political' kingdom.[37] Respect for law determined the fundamental nature of a political community regardless of whether the law was made by the head together with representatives of the community, or by the community itself, or by its representatives. In each case governance was 'analogous numerically.'[38] independently from the form that determined the way a community's intention was articulated. In every 'political kingdom' (*dominium politicum* in a wider sense, not necessarily 'governed politically' or 'regally-politically') law was to rule and not anybody's arbitrary will. The problem, however, was that the 'rule of law' was the easiest to establish and tended to last not in 'kingdoms created in a regal way' but 'in kingdoms created in a political way,' because in the first type, which was usually established as a result of conquest, the ruler would find it more difficult to acknowledge that law is something relatively independent from his will, while in the second type of kingdom law is the factor 'through which a multitude is formed into a people,' but it also vitally contributes to the continual existence of the community as a whole. The law thus conceived 'may be compared to the nerves of the body natural, for, as by these the whole frame is fitly joined together and compacted, so is the law that ligament (to go back to the truest deriva-

[36] Ibid. It is worth noting that for Fortescue not only England since Brute was a regal and political kingdom, but also such other kingdoms as Scotland, Egypt, Ethiopia and Arabia. Giving these examples he refers to a historian of the antiquity, Diodurus Siculus. Ibid., p. 33.

[37] It is to be noted that an analogy between these two types of kingdoms was discussed by Burns who argued that in both cases the authority is exercised by a ruler *secundum leges*, but while in a *dominium regale* the ruler governs *secundum leges quas ipsemet statuit et secundum arbitrium suum*, in a *dominium politicum* he governs (*dominatur*) *secundum leges quas cives statuerunt* (*De laudibus…*, pp. 152-153). Even if we note that with Fortescue, a *dominiu regale* originated in conquest, in *The Governance* we find a trace of an argument that justifies a 'legal code' of law which is nothing but the ruler's will made without any consultation (does it also mean without the consent?) of the people's representatives. Furthermore, such a ruler *dominium tantum regale*, like a 'political' and a 'regal-political' ruler can make just laws that serve the common good (see J.H. Burns, 'Fortescue and the Political…', pp. 778-779 and 786). Referring to this last thesis, however, we need to note that Burns, who does not distinguish tyranny from usurpation, argues that even a tyrant who makes such a law may justify his power. It seems, however, that such a justification might be applied only to a usurper, who holds power without a title, and not to a tyrant who governs against a people's intention and turns the community back into a multitude subordinated to his despotic and awful norms (ibid., p. 787).

[38] *De laudibus…*, xi, p. 27.

tion of the word, *lex à ligando*) by which the body politic, and all its several members are bound together and united in one entire body. And as the bones, and all the other members of the body preserve their functions, and discharge their several offices by the nerves, so do the members of the community by the law.'[39] The law is thus the binding force of a political community; it secures the rights for its subjects; it determines the nature of the community directing it towards a certain aim and makes the common nave sail to the harbour. Consequently, in this type of kingdom, where the principal institution is law and the character of a 'law-nerve' is preserved, the form in which a fundamental intention is articulated is not overly important. It is because the law, almost by necessity is associated with leadership, *gubernatio*,[40] entrusted to someone who is appointed to protect his subjects in their lives and properties, who governs the community without changing freely its norms, who neither does 'bend' its nerves nor distorts a body politic in the way that 'bending nerves' distort the appearance of a natural body. It is someone who does not interfere with his subjects common aspirations, let alone by depriving them of what belongs to them, for he has got for his use the greatest wealth and thus he is not interested in the worsening situation of others.[41]

As was noted above, for Fortescue any despotic governance was deprived of any traits of 'political' governance found on a higher level. He distinguished three forms of government in which this type of the political could be accomplished, but we need to be aware of his ambiguous attitude towards these forms and try to find the reasons for the primacy of the English constitution, which was different from both a typically regal French constitution and the typically political constitutions of the Italian republics. As far as the 'purely political' form is concerned (on a lower, one could say, formal level which does not concern intention but only the way it should revealed), we do not find in Fortescue's works any detailed analysis. Nevertheless, this in itself, and his emphasis on a regal-political trait of the political system of his own country which he admired, forces one to conclude that he did not think much of a 'political governance,' Perhaps he followed Aristotle's arguments against a democratic form as being too susceptible to the domination of particular interests, unlike a 'purely regal' form in which a ruler's will could be the subject of his own personal desires. If this reading is correct, a critique of purely political governances should also be applied when we examine Fortescue's arguments against purely regal governance expressed mainly in relation to his arguments as to 'the right mould' of the ruler's will. This

[39] *De natura*, xiii; *De laudibus…*, xiii, p. 38.

[40] *De natura*, xxx. C. Morris finds the distinction *jurisdictio-gubernatio* misleading, not only with a reference to Fortescue. According to his reading, it differentiates the judicial function of a ruler which is limited, and the function of a governor which cannot be limited by any means. Consequently, this distinction differentiates something that cannot be differentiated if the ruler does not govern, but only holds jurisdiction (*Political Thought in England. Tyndale to Hooker*, London–New York 1953, pp. 12-13).

[41] See. H.A. Myers, *Medieval Kingship*, pp. 292-294, and B. Szlachta, *Monarchia prawa. Szkice z historii angielskiej myśli politycznej do końca epoki Plantagenetów*, Kraków 2001, pp. 265-318.

problem was to become even more complicated when a 'purely political' rule was at stake which not only listened to the community's intention, but also respected 'the political mechanism' of revealing such an intention so that both 'the voice of the heart-intention' and the will decided upon by various representatives of a community were taken into consideration. An additional and even more difficult problem than that of a regal-political or regal ruler also emerges from this discussion: how to mould a representative body in order to overcome particular interests

It seems that it is an epistemic reason that makes Fortescue abandon the projects of kingdoms based on purely political or purely regal governance. In the first case it is mainly because of difficulties caused by particular interests; in the second case it is because of the intellectual and moral imperfection of each individual, including a king. This was also the fundamental reason, supported by historical and judicial arguments, for co-operation between a ruler and a representative body in the difficult process of finding and recognizing norms shaped by custom which needed to be respected, and if there was such a need, then turned into legal norms in the statutes of the king. Therefore Fortescue was at pains to show the distinctiveness of the English constitution and the legal system in comparison with continental states which were either based on purely regal or purely political governance. He urged the king to undertake the difficult task of examining legal norms based on custom which were binding in his country and to respect institutional guarantees in order to ensure that his verdicts were right and that they protected 'the nerves of the community' from distortion, both when it came to the process of governing the community and the passing of legislation.

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