

剑桥政治思想史原著系列（影印本）

CAMBRIDGE TEXTS IN THE HISTORY OF POLITICAL THOUGHT

# 论英国的法律和政制

## *On the Laws and Governance of England*

Sir John Fortescue

约翰·福蒂斯丘爵士

Edited by

SHELLEY

LOCKWOOD

中国政法大学出版社

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SIR JOHN FORTESCUE

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## 图书在版编目(CIP)数据

论英国的法律和政制/(英)福蒂斯丘著. —北京:中国政法大学出版社, 2003. 6

剑桥政治思想史原著系列(影印本)

ISBN 7-5620-2359-X

I. 论... II. 福... III. ①法律—研究—英国—英文②政治制度—研究—英国—英文 IV. ①D956.1②D756.121

中国版本图书馆 CIP 数据核字(2003)第 049551 号

\* \* \* \* \*

书 名	《论英国的法律和政制》
出 版 人	李传敢
经 销	全国各地新华书店
出版发行	中国政法大学出版社
承 印	清华大学印刷厂
开 本	880 × 1230mm 1/32
印 张	6.875
版 本	2003 年 7 月第 1 版 2003 年 7 月第 1 次印刷
书 号	ISBN 7-5620-2359-X/D·2319
印 数	0 001-2 000
定 价	15.00 元
社 址	北京市海淀区西土城路 25 号 邮政编码 100088
电 话	(010)62229563 (010)62229278 (010)62229803
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网 址	<a href="http://www.cupl.edu.cn/cbs/index.htm">http://www.cupl.edu.cn/cbs/index.htm</a>

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SIR JOHN FORTESCUE  
*On the Laws and Governance of England*

原书由剑桥大学出版社于 1997 年出版,此影印本的出版获得剑桥大学出版社财团(英国剑桥)的许可。

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# 剑桥政治思想史原著系列

## 丛书编辑

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在政治理论领域，“剑桥政治思想史原著系列”作为主要的学生教科丛书，如今已牢固确立了其地位。本丛书旨在使学生能够获得从古希腊到 20 世纪初期西方政治思想史方面所有最为重要的原著。它囊括了所有著名的经典原著，但与此同时，它又扩展了传统的评价尺度，以便能够纳入范围广泛、不那么出名的作品。而在此之前，这些作品中有许多从未有过现代英文版本可资利用。只要可能，所选原著都会以完整而不删节的形式出版，其中的译作则是专门为本丛书的目的而安排。每一本书都有一个评论性的导言，加上历史年表、生平梗概、进一步阅读指南，以及必要的词汇表和原文注解。本丛书的最终目的是，为西方政治思想的整个发展脉络提供一个清晰的轮廓。

本丛书已出版著作的书目，请查阅书末。

## CAMBRIDGE TEXTS IN THE HISTORY OF POLITICAL THOUGHT

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**For my parents with love**



## Acknowledgements

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.

## *Acknowledgements*

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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 Whitchurche 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 1 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 'politicum 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', 'praesere', '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:

Ffor 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 Englund. Ffor euery man off þe lande *shal* 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 conseyue.

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,<sup>1</sup> but they feature heavily in the political literature of the period, especially in poems and ballads.<sup>2</sup> 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'.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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-

<sup>1</sup> Bellamy, *Criminal Law and Society*; Bellamy, *Bastard Feudalism and the Law*; Powell, *Kingship, Law and Society*.

<sup>2</sup> Kail, *Political and Other Poems*; Scattergood, *Politics and Poetry*.

<sup>3</sup> Harvey, *Jack Cade's Rebellion*, p.189.

<sup>4</sup> Griffiths, *The Reign of Henry VI*; Watts, *Henry VI and the Politics of Kingship*; Wolffe, *Henry VI*.

<sup>5</sup> Watts, *Henry VI and the Politics of Kingship*.



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.<sup>6</sup> 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).<sup>7</sup> 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,<sup>8</sup> 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,

<sup>6</sup> Clough, *Profession, Vocation and Culture*; Genet, 'Ecclesiastics and Political Theory', in R.B. Dobson (ed.), *The Church, Patronage and Politics*.

<sup>7</sup> Gill, *Politics and Propaganda in Fifteenth-Century England*; Litzén, *A War of Roses and Lilies*.

<sup>8</sup> Blayney, 'Sir John Fortescue and Alain Chartier's "Traite de l'Esperance"', Blayney (ed.), *Fifteenth Century Translations of Alain Chartier*; and Blayney (ed.), *A Familiar Dialogue*.