Some Elements of Political Economy in the Thought of Sir John Fortescue

Stefano Simonetta

Department of Philosophy, Università degli Studi di Milano, Milan, Italy

Dipartimento di Filosofia "Piero Martinetti", via Festa del Perdono 7, 20122 – Milano, Italia, stefano.simonetta@unimi.it

Abstract

This paper focuses on Fortescue's analysis of the economic impact of various forms of government, based a comparison between the material well-being which the English enjoy by virtue of their "political kingdom" and the conditions of extreme poverty of the common people in France, an effect of their political-legal system. Fortescue's criteria for judging between different regimes are pragmatic: the main reason for his preference for the temperate monarchy of England is the fact that it gives all inhabitant full enjoyment of the fruits of their labour, and encourages the economic growth of all parts of the realm.

Keywords: economic rights, property, taxes, financial stability, comparative economic systems

JEL Classification: B11 – History of Economic Thought: Preclassical (Ancient, Medieval, Mercantilist, Physiocratic), B31 – History of Economic Thought: Individuals, H50 – National Government Expenditures and Related Policies: General

1. Introduction

Sir John Fortescue (*c.* 1396-*c.* 1478), for many years Chief Justice of the King's Bench under Henry VI Lancaster during the War of the Roses, is now almost unanimously considered the most eminent English jurist and political theorist of the 15th century. He owes much of his fame to his analysis of different constitutional models, at the heart of which we find the contrast between the form of absolute monarchy ("dominium tantum regale"), which he saw as being perfectly embodied by the France of his day, and the

system of government under which he believed – with a kind of wishful thinking – the English were privileged to live, namely a temperate monarchy[1]. But Fortescue's name is linked above all to the "magic formula"[2] by which he chose to describe this second main type of government, the "dominium politicum et regale": this has always represented the aspect most investigated by those who have grappled with his thought[3]. However, if one examines the nature of the *regimen* that this formula describes and the role assigned to parliament, the royal council and judges in limiting the authority of the king – who cannot adopt any legislative measure without the approval of the representatives of the political community – a number of elements also emerge that reveal the presence of an important economic dimension in Fortescue's thought, within which economic factors were predominant[4].

The aim of this paper is precisely to highlight how in many of Fortescue's pages it is possible to find an embryonic theory of 'political economy'[5] – an aspect that has remained rather in the shadows until now, with a few sporadic (yet noteworthy) exceptions[6]. In order to fill this gap and to assign Fortescue the place he deserves in the

---

1. This form of constitution has aptly been described as "a combination of royal authority and political accountability" (Galligan-Palmer, 2014, 11).
2. Kantorowicz 1957.
3. For my purposes the most valuable commentaries on Fortescue's political and social ideas are Chrimes 1936; McIlwain 1947; Mosse 1947; Passerin d'Entrèves 1951; Hinton 1960; Ferguson 1965; Hanson 1970; Gill 1971; Genet 1973; Pocock 1975; Burns 1985; Dunbabin 1988; Doe 1990; Callahan 1995; Kekewich 1998; Osborne 2000; Ives 2005; Cromartie 2006; Kelly 2014; Kekewich 2018.
4. The main texts of Fortescue I will be working with are the *Opusculum de Natura Legis Naturae et de ejus Censura in Successione Regnorum Suprema* (=DN), his *De Laudibus Legum Anglie* (=DL) and *The Governance of England* (=GE).
5. I am using this expression with all due caution, in light of the well-known argument of that it is inappropriate to speak of 'political economy' before the 18th century. See in particular Pocock 1975, 423-426 and Pocock 1985, 193-195 for the idea that "the first chapter in the history of political economy" dates back to the late 18th century.
6. See Wood 1994, Nederman 2005. A questionable aspect of Wood's interpretation is the argument that for Fortescue increasing the financial independence of the Crown is functional to limiting popular control over the English monarchy; Nederman instead chiefly focuses in particular on the 'nationalistic' elements in Fortescue's economic thought.

history of economic thought, the following pages will first consider the importance of socio-economic consequences in Fortescue's assessment of the two main political systems he deals with (§. 2): it will be shown how he develops a comparison between such systems through careful examination, based on experience, of their respective effects in terms of the common people's well-being – i.e. of the material conditions on the two sides of the Channel.

Secondly, attention will be paid to the close link that Fortescue establishes between respect for subjects' property rights and the degree of loyalty and support that they show their king, both in terms of tax contributions and military aid, especially in times of special need (§. 3). The respecting of subjects' economic rights ensures political stability. In the next section we will then examine Fortescue's novel theory about the genesis of personal property, to better contextualize his ideas on economics (§. 4). According to him, the category of private property in itself predates the Fall and is based on nature's law. Following original sin, this same law introduced and regulated the concrete right to claim some of the original common resources for oneself. It allocated goods to individuals who had engaged in labour and thus earned them with their own sweat. Insofar as property rights were originally established by the law of nature, they should be protected under any type of regime, even though – as we shall see – not all regimes are equally up to this task.

Finally, this article will examine the set of concrete reform proposals formulated by Fortescue in his *The Governance of England*. The purpose of this work was to remedy the situation of serious financial instability that had arisen during Henry VI's reign and to prevent the Crown's revenues from being replenished by improper means, so that every English subject might continue to feel safe (§. 5). At the heart of Fortescue's project for the economic and financial reorganisation of the kingdom there

lies the proposal of a number of changes to the composition and functions of the royal council, which in the English thinker's opinion ought to be transformed into a strong pool of professionals exercising broad control over the management of the royal treasury and, more generally, over the Crown's economic affairs as a whole. At the same time, this article will show how Fortescue entrusts the king and the royal council with the task of removing any obstacles to the country's social and economic growth. This ideal of a form of government seeking to offer every inhabitant of the kingdom the possibility to increase his material happiness will ultimately emerge as one of the most original features of Fortescue's thought.

2. The economic fruits of the two opposing models of government

Among the many important legal opinions associated with Fortescue's name [7], there is one he voiced in 1458, almost at the end of his tenure at the head of the King's Bench. This deserves to be recalled, as it shows his tendency to set significant limits to the power to pardon and give dispensation granted to a "politice regens" monarch. Indeed, Fortescue usually maintains that the royal power to pardon or reduce penalties for any offence is conditional on the fact that the king respects the rights of his subjects and does not "offend" against the customs and statutes of the realm. In the specific case in question, that of a man condemned to bear the cost of repairing a bridge, Fortescue is careful to distinguish between two aspects: on the one hand, he admits the possibility that the king may decide to pardon the man and release him from that duty; on the other, he denies the king the power to dispense with the fine owed to the community[8]. This

---

7. For a selection of these opinions see also *Legal Opinions and Judgments of Sir John Fortescue, as Lord Chief Justice of England*.
8. "[...] ceo nest appurpos, mes tantsolement pur le fyn que le roy mesme averoit": *Year Books*, *De Termino Michaelis*, 37 Henry VI, f. 5^{r-v}. Fortescue had already expressed his views on the same subject on a previous occasion: "si un doit payer pontage a un autre, mesque le roy luy

distinction actually represents an interesting example of implicit recourse to the doctrine of the king's two bodies, which here translates into the idea that the king is free to renounce his own economic rights but cannot do the same with those of his political body, i.e. of all his subjects[9].

In this regard, it should be pointed out that in his writings Fortescue pays great attention to the question of economic rights: not only those of the community, at the centre of the legal opinion just mentioned, but also and above all the property rights of the individual members of the community. The latter are better protected, in his opinion, in a "political and royal" constitutional regime, as a direct consequence of the "institucionis regni politici forma" (DL, 13, p. 32), than in a state where someone "tantum regaliter regens" sits on the throne[10], i.e. in monarchies in which whatever pleases the prince has the force of law. Unlike his sources, which – as in the case of Thomas Aquinas – examine the various political systems from an eminently ethical point of view, Fortescue's constitutional thinking is based above all on a careful analysis of their practical functioning and on a comparison between the various regimes in terms of their concrete efficiency. Fortescue pays particular attention to their economic effects: his positive assessment of given forms of government heavily depends on the possible material benefits accruing to their citizens[11].

---

pardone de pontage, uncore il payera pur le reparation de le pont" (*YB*, *De Termino Michaelis*, 35 Henry VI, f. 29^{v}).

9. Like Shakespeare's King Henry V, he may pardon the drunkard who has railed against him in the streets of Southampton, but he must execute the nobles who, by plotting to kill him, have offended the whole state, the Crown (*Henry the Fifth*, 2, 2, 40-182). In this regard, it is worth recalling a page in which Fortescue points out that the laws grant mitigation of punishment in the case of "personal" offences but not in that of crimes against the body politic: cf. DN, 2.50, 168.
10. Cf. DL, 9, 26; 37, 90.
11. See Passerin d'Entrèves 1927, 284, Wood 1994, 47, 57-61, Nederman 2005, 274-277.

Fortescue starts from the idea that by juxtaposing the two main antithetical systems of government, their characteristics and discrepancies, merits and bitter fruits, emerge more clearly[12]. His whole theory of government is based, first and foremost, on a comparison between what happens in England and France, on a "comparacio" of the process that is followed on the two sides of the Channel to pass (and amend) laws and to establish fiscal policies[13]. In the context of this juxtaposition, especially in the pages of *De laudibus legum Angliae* (*c.* 1469) where the economic advantages deriving from his country's temperate form of *dominium* are mentioned, Fortescue starts from a general consideration: since in a political and royal regime tax choices are the product of an effort made by the entire political body, of a constant dialogue between the monarch and the representatives of the community, in England such choices are always marked by the search for a fair balance between the defence of the common good and that of individual interests. Those who succeed each other at the helm of the English kingdom can never 'put their hands in the pockets' of their subjects without first obtaining their consent, and are therefore deprived of the right to impose unusual and alien ("imposiciones peregrine") forms of taxation on that land (DL, 9, 24; 14, 34). Likewise, they never unilaterally act regarding the body of law of the country: "nor thus the king there, by himself or by his ministers, impose tallages, subsidies, or any other burdens whatever on his subjects, without the concession or assent of his whole realm expressed in his parliament (*sine concessione vel assensu tocius regni sui in parliamento suo expresso*)"[14].

---

12. This is in keeping with the well-known Aristotelian principle "opposita iuxta se posita maius apparent" (cf. DL, 24, 52). On Fortescue's use of the antithetical style described in the *Rhetoric* as an authoritative source for a comparative approach to political analysis, with both a descriptive and an evaluative function, see Nederman 1987, 39-41.
13. On this see DL, 18, 40.
14. DL, 36, 86. See also DL, 13, 30-32, where the same argument is formulated through the organic metaphor comparing the political community to a living creature.

This implies that those who are governed by a political and royal system are free to enjoy their possessions in peace and quiet, "without being plucked" ("nec depilatur") by the prince or anyone else, thanks to the protection afforded to them by the very rules which – as Fortescue often points out – "they have chosen and promulgated" (DL, 9, 24). These people can make whatever use they wish of the fruits of their own labour: "every inhabitant of that kingdom makes the most of the harvest of his land, of the increase of his flock, and of the earnings from the activities he or others in his service (*industria propria vel aliena*) undertake on land or at sea" (DL, 36, 86). This state of affairs is attested by the level of well-being and wealth in a country like England. To show this, Fortescue refers to – among other things – the considerable consumption of meat and fish by its inhabitants, their abundance of woollen cloths and, above all – being the good Englishman he is! – the fact that they drink water only on those occasions when they abstain from other drinks out of devotional zeal. In brief, the inhabitants of that land "are rich in all that is requisite for a quiet and happy life, according to their estate"[15].

In this same treatise Fortescue expresses his preference for the way in which cases are heard and settled before a judge in England, namely: not on the basis of the depositions from only two witnesses produced by the parties involved, as in countries where civil laws are in force, but with the involvement of twelve sworn jurors from the neighbourhood where the events at issue occurred. Fortescue traces the particularity of the English judicial system back to the widespread prosperity of his country and the balanced distribution throughout the kingdom of landowners, big and small, which

15. DL, 36, 88. This condition of prosperity is listed as one of England's strengths in the brief treatise on *The Commodities of England* written around 1452, almost certainly by Fortescue: see *The Works of Sir John Fortescue, Knight, Chief Justice of England and Lord Chancellor to King Henry the Sixth*, i, 547-554; Kekewich 2018, 195-198.

makes it easy to find men in every village with enough wealth to be eligible as jury members and to avert the danger of bribery. In the same pages, Fortescue notes that the increasing spread of enclosed pastures, while lightening workloads, also makes it easier to find suitable candidates to serve as jurors at trials among the inhabitants of the English countryside. Here he is among the first to draw attention to the peculiar organisation of English farms, a direct consequence of those enclosures that were later to shape the economic and socio-political history of his country and which, in his description, consist of a network of hedges and ditches planted with trees[16].

At the opposite extreme, based on a polarisation of the comparison between constitutional models aimed at exaggerating and dramatising differences, we find the account of the drastic impoverishment of the common people of France since their kings, in relatively recent times, ceased to rule *politice*[17]: an account that Fortescue claims is based on direct observation during his long forced stay in that land. In the grim portrayal in the opening pages of *The Governance of England* the French subjects appear as a mass of desperate people covered in rags, forced to break their backs in the fields in order to survive in what is one of the "most fertile regions in the world": "Lo this is the frute of his jus regale" (GE, 3, 115), also due to the tax exemption granted by the King of France to the nobles, for fear of their rebellion.

According to Fortescue's calculations, the French people give their sovereign, "ayenst thar willes", more than twice as much each year as the King of England gets

16. Cf. DL, 28-29, 66-70. As noted by Kelly 2014, 82, in addition to their being central to law-making for the common weal, the common people also underlie the implementation of the criminal law through their presence on juries.
17. Fortescue believed that this change was due to the emergency situation caused by the outbreak of the Hundred Years' War and to the consequent need to adopt a system of taxation that did not involve the three Estates ("wich whan thai bith assembled bith like to the courte of the parlement in Ingelonde"), without whose consent the French kings had not dared to tax the people in a long while: cf. GE, 3, 113-114.

from the taxes he sets with the agreement of the representatives of the political community. As a result, he who sits on the French throne oppresses his subjects "more than all the wrongdoers of the kingdom would have done, had there not been a king there" to prevent it (GE, 4, 116). In this way, the French monarch fails in the fundamental function required of every king, namely the defence of his people against any threat through the administration of justice, a function whose fulfilment helps to justify *a posteriori* every "tantum regale regimen" (originally created by an act of force). Fortescue therefore denounces the French monarch's rule as blatant tyranny, "disguised" (*colourid*) as "jus regale". From his poorest subjects the French king "takes away food, drink, clothing and any other goods necessary for their subsistence", in defiance of the law of nature which binds him to act towards those subject to him as he would act towards himself, if he were one of his subjects[18]. More generally, Fortescue points out that, regardless of the constitutional system, a king who is incapable of protecting the lives and possessions of the kingdom's inhabitants from all dangers, including the risk that economic difficulties may lead him to plunder his subjects, is an example of absolute impotence[19]. By contrast, there is no prince more powerful and freer than the one who is able to overcome the temptation to remove his subjects' property "withowt lafull cause" (GE, 12, 139): something which, in Fortescue's opinion, kings ruling their people *politice* "are in a position to do and indeed always do" (DL, 37, 90).

---

18. GE, 4, 117. Some scholars have interpreted passages like this as an implicit recognition of the natural rights to subsistence, pointing out that Fortescue is an exception among common lawyers, who are generally not very inclined to accept the principle of extreme necessity: see for example Swanson 1997.
19. Cf. DL, 37, 88-90. As we shall see later on, according to the English jurist, this is the reason for the need for a series of reforms to prevent such a state of affairs in his country, which he regards as being on the verge of making a turn for the worse like France.

Equally bleak or even bleaker is the picture of the France sketched out in *De laudibus legum Angliae*, the first and most notable English Mirror of Princes[20], where the man for whom the text is written, Prince Edward, is urged by his tutor to gain first-hand knowledge ("percunctare experienciam") – by means of practical effects ("de experiencie effectu praticata") – of the impact the of the two opposing forms of government[21]. The old chancellor, the other character in the dialogue, here lists a series of further negative consequences of the "purely royal" regime that they have had the opportunity to observe while in exile in France. These include heavy taxes on the production (as much as a quarter of the total) and on the sale of wine[22], the obligation for all villages to bear substantial annual expenses for the maintenance of part of the royal *army*, and the imposition of a royal monopoly on certain major consumer products, which had to be purchased at exorbitant prices.

Fortescue especially dwells on the case of salt, denouncing the French practice of forcing subjects to buy far more than they actually need, "ad regis precium", from royal officials who unilaterally establish their presumed needs, based on the number of members of each household (DL, 35, 82; GE, 10, 131-133). And he comments:

> This rule wolde be sore aborred in Englond, as well by the marchaunts that bithe wonned to have their ffredome in biyinge and sellynge off salte, as by the peple that usen moche to salte thair meytes more than do the Ffrenchmen; by occasion wheroff thai woll than at every mele groche with the kynge, that entreteth hem more rygoursly than his progenitors have done. And so his hyghnes shall have theroff, but as hadd the man that sherid is hogge: muche crye and litil woll (GE, 10, 132).

---

20. See Kelly 2014, 73-74, Kekewich 2018, 198-199.
21. DL, 34, 80; cf. 37, 90. In describing his working method, Fortescue repeatedly quotes the Gospel verse according to which one can recognise the real value of things "by their fruits" (cf. Matthew, 7: 16, 20): see DN, 1.5, 68, GE, 3, 116.
22. In one passage, Fortescue actually acknowledges that these taxes were initially established with the approval of the three Estates: cf. GE, 10, 131.

But what attracts Fortescue's attention and criticism more than anything else is the French Crown's indiscriminate use of the right of purveyance, i.e. the prerogative (also known as *prisa ad opus regis* or *captio*) according to which, when travelling from one point of the kingdom to another, the king can supply himself, his retinue and the men-at-arms escorting him by purchasing goods from local inhabitants at fixed, non-negotiable prices[23]. As evidence of the degree of arbitrariness with which this feudal practice (already very much disliked in itself) is systematically applied across the Channel, Fortescue mentions the fact that during his years of exile there he could only find hospitality in large towns, owing to the extent to which smaller towns and villages were regularly burdened with the weight of royal garrisons. The latter would remain stationed there for weeks at a time, living off the backs of the locals, to whom they refused to pay any compensation for accommodation or any goods they consumed (meat, wine, wood or blankets, shoes, fodder...). Local inhabitants who dared oppose them would be immediately forced to surrender "fustibus"[24]. The effects of this real calamity ("nephanda pressura"), as a result of which every village in France without walls is plundered ("depiletur") at least once a year, are compounded by the constant tax levies imposed by the king and by the other forms of economic harassment already mentioned, making the standard of living of the average French subject appallingly low:

---

23. On this royal prerogative and the resistance it met in late medieval England, see Harriss 1975, 98-111 and 376-383, Nederman 1996 and Simonetta 2010. Harriss focuses on parliamentary efforts to regulate *prisae* and end purveyors' abuses, an object of growing popular grievances, between the late 13th century and the second half of the 14th; Nederman and Simonetta instead pay particular attention to a treatise – preserved in two versions and composed in the early 1330s by the canonist and theologian William of Pagula – in which the right of purveyance is strenuously criticised and a link is established between respect for the economic rights of subjects and popular support.
24. DL, 35, 80-82.

> Hiis et nonnullis aliis calamitatibus plebs illa lacessita in miseria non minima vivit; aquam cotidie bibit, nec alium nisi in solempnibus festis plebei gustant liquorem[25]; froccis de canabo ad modum panni saccorum teguntur. Panno de lana, preterquam de vilissima, non utuntur. […] Carnes assatas coctasve ipsi non gustant, preterquam interdum de intestinis et capitis animalium pro nobilibus et mercatoribus occisorum. Sed gentes ad arma comedunt alitilia sua, ita ut vix ova eorum ipsis reliquantur pro summis vescendi deliciis. Et si quid in opibus aliquando eis accreverit, quo locuplex eorum aliquis reputetur, concito ipse ad regis subsidium plus vicinis suis ceteris oneratur, quo extunc convicinis ceteris ipse equabitur paupertate[26].

If, on the other hand, we consider what consequences the legal and political system of a country like England has on the economic level, and in particular in terms of the respecting of the property rights of its subjects, we find that the opposite is true. In this case, "no one billets himself in another's house against its master's will, nor does anyone take with impunity the goods of another without the owner's permission", just as no inhabitant of that kingdom "is prevented from buying salt or any other good, at his pleasure and from any seller"[27].

---

25. In this case, drinking only water is the rule, not the exception!
26. See DL, 35, 82-84; cf. GE, 3, 114. About a century later almost identical considerations were made by the English political theorist John Aylmer, regarding both the systematic practice of *prisa regis* to the detriment of the subjects of the King of France (whose soldiers consume in a single day the amount of food gathered by a family in years of work) and the impoverishment that ensues (the French peasants are "stripped to the bone" and "rarely see meat and fish"). Aylmer emphasises that a simple juxtaposition of the two countries' conditions should fill the English with gratitude towards their rulers and with the feeling of being in a safe "haven": cf. *An harborowe for faithfull and trewe subjects*, f. Piii^{r-v}.
27. DL, 36, 84-86. In the opening pages of her *Corps de policie* (I, 9, 16-17), written between the late months of 1404 and 1407, Christine de Pizan denounces in harsh tones the systematic practice of royal purveyance, acknowledging that "in other countries" soldiers and officers of the Crown dare not behave in the way they do "in France nowadays".

With specific reference to royal purveyance, Fortescue acknowledges the English king's power to force his subjects to surrender what is necessary for the sustenance of his travelling court. But Fortescue also points out that, according to the laws of the kingdom, the purchase must always be made at a "reasonable price", to be paid immediately or, in any case, by a set date. The rules in force in any "dominium politicum et reale" forbid the king from stripping his subjects of their goods "without due satisfaction for them"[28]. Already earlier, in the first part of his *Opusculum de natura legis naturae* (*c.* 1465), Fortescue had highlighted the profoundly different conduct between the two opposing types of monarchs with regard to their subjects' possessions: referring to the biblical episode of Naboth's vineyard (1 Kings, 21), Fortescue had stressed how, in that case, although holding the prerogatives of a *tantum regaliter* ruler, Ahab had initially offered his subject Naboth to give him a sum of money corresponding to the value of the vineyard he wished to acquire – or at least to exchange it for a better one; therefore, "in a certain sense (*quodammodo*)", Ahab had behaved like a king *politice dominans*, who always pays for what he wants to possess[29].

3. No justice, no peace (and no possibility to adequately defend the country)

As we have seen, one of the great merits Fortescue ascribes to the English constitutional system lies in the fact that it enshrines the absolute inviolability of

---

28. DL, 36, 86. Objections to unlawful seizures and the unwarranted extension of the purveyance in England stretched back to the *Magna Carta* (see ch. 28 and 30), versions of which enjoyed some standing even in Fortescue's time. The great English jurist, however, never mentions the document, in relation to this or any other issue: as pointed out by Kekewich 2018, 270, he had no particular reason to privilege the *Magna Carta*, which he regarded as only one of many legal precedents that had contributed to making England a "political and regal" realm. Certainly, this document, in his eyes was a fundamental piece of legislation willingly approved by the king with the assent of his people: "a royal, not a rebel text" (Keen 2004, 40-43).
29. See DN, 1.27, 89-90. Concerning the episode of Naboth's vineyard, see also GE, 4, 117.

the economic rights of all Crown subjects, and particularly of freedom of trade, which is expressly mentioned[30]. In his opinion, without respecting these rights – and, as we shall see, without adopting the institutional and financial reforms proposed in his treatise *The Governance of England* with the aim of giving economic stability to the kingdom and replenishing state coffers by means other than the oppressive practices in use in France – the king does not have the slightest chance of winning "the hearts of his subjects". Fortescue openly states this in one of the passages in which he subordinates the people's loyalty towards the sovereign (and therefore the stability of the kingdom) to the ruler's ability to live by his own means[31].

The spectre of insurrection is thus evoked at times, in spite of the extreme caution with which Fortescue generally tackles the subject of the right to resistance[32]. On one page he recalls what happened to King Solomon, whose

---

30. As we are about to see, this inviolability is sanctioned by the law of nature, but is only guaranteed under a single model of *dominium*: a contradiction to which we will be returning in a moment.
31. GE, 10, 133. Cf. GE, 4, 116 and 12, 139, where the link between widespread welfare (based on fair taxation) and subjects' good disposition towards their king is reaffirmed. This disposition also translates into a willingness to agree to an increase in taxes and levies, when circumstances require it. In this regard, on the other hand, it is worth recalling Fortescue's idea that in extreme emergencies those who hold a "dominium politicum et regale" can still draw upon their subjects' resources even without their consent. Some scholars believe that Fortescue only grants this prerogative reluctantly (e.g. Fatovic 2004, 290-291), while others consider this concession to be the result of a deep conviction (cf. Gross 1996, 73). The latter scholars emphasise those pages in which Fortescue explicitly states that, in the presence of extraordinary expenses, it is necessary to call upon the entire kingdom to bear them (for ex. GE, 7, 123-124).
32. In spite of a passage in which John Locke uncritically places Fortescue within a group of English thinkers who contemplate the possibility that a prince might lose his right to obedience from his subjects, thereby legitimising some form of resistance (cf. *The Second Treatise of Government*, 19, 239, 444), Fortescue does not admit any initiative from below against a king whose government has degenerated into tyranny. Indeed, he essentially rejects the idea of any right to resistance. Particularly revealing, in this regard, is the page where, with reference to a series of uprisings against an unjust regime that ended with the physical elimination of the tyrant, Fortescue maintains that, although the deaths were "mundo opportuna", no one is justified in carrying out such murders – "especially not the subjects" to whom God has assigned wicked rulers to punish their sins; "let therefore the tyrant, whose

fiscal policy, far more onerous than his predecessor's, cost his son Rehoboam the secession of some tribes from the kingdom. Fortescue mentions this example to argue that it is impossible to avert the danger of rebellion unless the Crown has sufficient wealth to maintain its vast landed properties without overburdening its subjects[33]. Moreover, according to him, at no time in history have individuals ever freely chosen to band together into a kingdom and to submit to the rule of a prince, if not ("non alio pacto nisi ut") to better protect their persons and goods, "which they feared they might lose". But whenever the people have found themselves disappointed in this expectation by being deprived of their means of subsistence by their own king, the latter has lost his subjects' favour and found himself facing an uprising by the lower social classes – something which has indeed happened many times even in England[34]. Fortescue ascribes all revolts of this sort to the category of what Jules Michelet would have called "revolutions of misery", as they have the extreme impoverishment of the population as their sole cause[35], in the absence of which even a situation of miscarriage of justice in many other respects almost never results in open insurrection:

---

death is good and desirable for his subjects, beware lest they kill him; but let the people be even more afraid of assassinating their king, even though he be a tyrant" (DN, 1.7, 70).

33. GE, 10, 133.
34. Cf. DL, 14, 34, GE, 12, 138-139. There is also a reference to the Hussite insurrection in Bohemia, where starvation drove the people to strip the nobles of all their possessions and turn them into commons. But it is clear that what Fortescue also has in mind is the great peasants' revolt that broke out in the English countryside in 1381 and the insurrection led by Jack Cade in 1450. These precedents led him to take the question of poverty very seriously. Indeed, Fortescue's focus on the issue foreshadows that of Tudor age reformers, with whom he shares the conviction that the fight against poverty is essential to contain the spread of crime: "every day, in fact, we observe that those who have lost their possessions quickly turn to theft and banditry" (GE, 12, 140). Already earlier (5, 119), but with regard to a king lacking sufficient means, Fortescue had approvingly quoted the Aristotelian statement that "it is impossible for those who lack means to do good deeds" (*Nicomachean Ethics*, I, 8, 1098b 31-32).
35. "The povere man hath be sturred therto be occasion off is poverte, for to grete gode and the riche men have gone with hem be cause thai wolde not be povere be lesynge off ther gode" (GE, 12, 139).

> Ffor nothyng mey make people to aryse, but lakke off gode, or lakke off justice. But yet sertanly when thay lakke gode thai woll aryse, sayng that thai lakke justice. Never the less yff thai be not povere, thai will never aryse, but yff ther prince so leve justice, that he give hym selff all to tyranne[36].

On the other hand, it is true that, if the Crown's assets are actually at the service of the political community, ensuring justice (including on the socio-economic level) and protection[37], then those who hold the royal office will receive obedience from the people and everything they need for their sustenance, "just as anyone who performs a service must be maintained by those who benefit from it"[38].

In the final analysis, what gives a kingdom "the grettest surete trewly" (also from a socio-economic point of view) and therefore even greater strength, is having the highest possible degree of well-being "in every estate" (GE, 12, 140), so that each of its subjects feels safe, in the context of a flourishing economy. The main factor that leads a community to recognise the political authority of its leader is the level of material satisfaction that distinguishes it[39].

To those who would prefer the English people to be reduced to poverty, because this would deprive them of the means to rebel (starting from adequate weapons), Fortescue replies that it is certainly not poverty that prevents subjects like the French

---

36. GE, 12, 140: here Fortescue seems to imply that the perception of the justice or injustice of laws (and their administration) depends first and foremost on one's economic condition.
37. If the king is really at the service of the kingdom, rather than the other way round: cfr. GE, 8, 127 and DN, 1.25, 86, passages referring to the principle "rex datur propter regnum et non regnum propter regem", which Fortescue associates with Thomas Aquinas but which is actually laid out in the section of *De regimine principum* written by Ptolomy of Lucca (cf. *De regimine principum ad regem Cypri – Continuatio*, 3.11, 51a).
38. "And therfore the kyng mey say off hym self and off his reaume, as the pope saith off hym self and off the churche, in that he writithe, *servus servorum Dei*", claiming the right to receive the support of those he serves (GE, 8, 127).
39. For all members of the community can make full use of their bodies and possessions, and are able to manage and increase the latter without interference: see Nederman 2005, 275.

from rising up, but only their cowardliness. In order to prove this, Fortescue points to the fact that the annual number of people hanged for robbery and murder across the Channel is almost one tenth of what it is in England[40]. This disturbing display of nationalistic pride aside[41], the interesting thing about the comparison with France is the author's emphasis on the different defensive capacities that derive from the two countries' constitutional systems and the consequent fiscal policy implemented in the two kingdoms. From this point of view too, the probability that a condition of peace be maintained within each of them varies significantly. As far as his own country is concerned, Fortescue observes in particular that any action that would have the effect of worsening the conditions of the common people who make up the backbone of the English army – especially the archers, "who are not rich yet account for much of the kingdom's might" – would be tantamount to suicide, since it would leave the country prey to its many enemies[42].

Thus, when once again juxtaposing the two main systems of government, Fortescue is careful to emphasise their effects on the military level. Only where the tax burden and economic policies are reasonable, in that they are agreed upon with the representatives of the various classes, can the sovereign count on a sufficient number of well-equipped men to repel any external threat, without having to resort to foreign mercenary troops[43]. By contrast, in countries like France the subjects have neither the

---

40. GE, 12, 137; 13, 141. Fortescue adds another fact of which he is aware: in Scotland no one has been hanged for robbery in years, but only for theft, as the inhabitants of that land lacked the courage to attack an owner determined to defend his property. For the sinister reputation that late-medieval England had acquired throughout Europe because of its high crime rate, see Bellamy 1973, and Hanavalt 1979.
41. "The Englysh man is off another corage. Ffor yff he be povere, and see another man havynge rychesse, wich mey be taken ffrom hym be myght, he will not spare to do so, but yff that povere man be right trewe" (GE, 13, 142).
42. GE, 12, 137-138.
43. This is precisely what the French Crown was forced to do, using Scottish, Aragonese and German soldiers. In Fortescue's opinion, if England were itself ruled by a "regaliter

strength nor the means to fight. Being in a condition of extreme economic hardship – "ffor thai have not so much ffredome in thair owne godis, nor be entreted by so ffauerable lawes as we be" – they never spontaneously fund the defence of their kingdom[44], unlike in England, whose situation is once again described in highly idealised terms:

> But blessyd be God, this lande is rulid under a bettir lawe; and therfore the peple therof be not in such peynurie, nor therby hurt in thair persons, but thai bith welthe, and have all thinges nescessarie to the sustenance of nature. Wherfore thai ben myghty, and able to resiste the adversaries of this reaume, and to beete other reaumes that do, or wolde do them wronge. Lo this is the fruyt of *jus polliticum et regale*, undre wich we live[45].

4. The natural foundation of the sacredness of property rights

On the basis of what has been argued so far, absolute respect for the property rights of those who belong to a community governed by a "political and royal" *regimen* would seem to depend entirely on the peculiar nature of that constitutional system and those "laws of the land" whereby, for example, the monarch is obliged to always pay for what

---

regulans" prince, it would be at the mercy of any army wishing to conquer it, since it could not count on any timely help from other kingdoms, as Britain is an island: cf. GE, 3, 115 and 12, 138.

44. GE, 12, 139-140.

45. GE, 3, 115. Passages like this have led some scholars to attribute a form of "economic nationalism" to Fortescue: for example, Nederman 2005 (273-281) sees our author's writings as expressing a doctrine that encourages individuals to contribute to the public good by pursuing their own personal economic advantage. In such a way, Fortescue would be promoting values such as the accumulation of wealth, enterprise and even competitiveness among merchants, even though he still follows a tradition that conceives society in a collectivistic way, as revealed by his frequent recourse to the organic metaphor of the state. More specifically, Nederman identifies a favourable opinion on commercial competition in DL, 51, 130, where the Fortescue states that the large number of merchants in the English kingdom cannot be ascribed to chance, "which is nothing", but only "to divine generosity".

he collects when moving with his retinue across the various areas of the kingdom. However, the picture becomes more complicated if we also consider the aforementioned claim that even a king like the French one should refrain from plundering his subjects, in deference to the principle of natural law that requires him to treat them as he would like to be treated himself, if he were a subject[46].

If we return to the earlier treatise *De natura legis naturae*, we come across an unresolved tension within Fortescue's thought, which in this respect seems to contain elements that are not entirely compatible. Two important chapters from the first part of this text (DN, 1.19-20) unequivocally show that, for our author, the sacredness of property rights is sanctioned by a *lex naturae* which, on a theoretical level, required their acknowledgement even before original sin, when, properly speaking, private property did not yet exist. As with the genesis of kingly power – which only emerged, through a divine act of retribution, "after man's nature had been polluted by sin"[47] – with regard to the origin of the set of rules governing individual property Fortescue warns against the risk of being misled by the way in which civil law is formulated. For although it traces the division of earth into kingdoms back to the *jus gentium* – as it does with contracts of purchase, sale and lease – it is necessary to acknowledge that both kingdoms and economic contracts were established "originaliter" by the law of nature and should therefore be protected under any form of regime[48]. Economic contracts

---

46. GE, 4, p. 117.
47. "And the purity of original innocence lost under pagan kings in earth" (DN, 1.29, 91).
48. According to some scholars, by basing private property rights on the law of nature, which is perpetual and immutable, rather than on the law of nations, which by definition is changeable, Fortescue inaugurated the tendency to philosophically absolutize such rights. This tendency was then to reach its climax with John Locke's thought: see for example Shepard 1936, 300-303. The idea that subjects' property rights were regulated and guaranteed by the *jus gentium* – sometimes identified with a part of the law of nature (as already in Gaius) – was *communis opinio* among jurists (with rare exceptions): on this topic, see Canning 1988, 457-458.

legitimately existed long before the emergence of nations, in an age that we may call pre-political; and even if the civil law attributes this emergence to the "law of the nations," this does not indicate anything other than that the true source is the precepts of the *lex naturae* accepted and obeyed by all the political communities that subsequently came to be constituted[49].

> That, therefore, which the civil laws tell us, namely, that the above-mentioned contracts were instituted by the law of nations, means – and can mean – nothing more than that such contracts were instituted by that law of nature which nations apply in such cases, and thus that they were instituted by the law of nations not primarily or originally (*non primarie aut originaliter*), but only secondarily and by way of assent (*secundarie et approbative*). [...] Neither, therefore, were buying, selling and the like begun by the nations, but, having been devised (*inventae*) by the law of nature according to right reason, were according to the same reason ratified and admitted by the *jus gentium* (DN, 1.19, 82).

Regarding the question of how private property arose from the initial condition of common possession, Fortescue identifies the moment when it appeared in the verse from Genesis (3:19) "In the sweat of your brow you shall eat bread"[50]: from then onwards, Adam was justified in selling the fruits of his labour, whatever they may have been (indeed, the term "sweat" refers to any form of human "industria")[51]. However,

---

49. DN, 1.19, 81-82.
50. Pope John XXII had already drawn attention to this verse in the midst of the dispute about the nature and value of Franciscan poverty, to prove that individual property had existed by divine order prior to all human legislation. This put him in a position to challenge the thesis of his opponents according to which the *ius dominandi* had been introduced and was sanctioned by positive laws, and could therefore be voluntarily relinquished, as was the case with the Franciscans. The latter claimed to retain only the natural right to use what was indispensable for their sustenance. See in particular the bull *Quia vir reprobus* (1329), 440.
51. DN, 1.20, 82; cf. also 2.33, 149.

since these words were uttered when the only law in force was that of nature[52], "it must necessarily be admitted that it was only by virtue of that law that man began to increase (*accrevit*) his ownership of things, especially those acquired by the sweat of his brow" (DN, 1.20, 82). It was natural law, which has unchangingly endured since the appearance of the first rational creature [53], that sanctioned and regulated the institution of distinct property, giving origin and form to contracts of sale, rent, etc. On the other hand, Fortescue is keen to point out that what came into play was the same "justitiae naturalis equitas" that, until original sin, had given men all goods in common. The fact that in the postlapsarian age this justice has authorised the acquisition of private property and the use of "mine" and "yours" – hitherto forbidden expressions – does not imply that it underwent any change[54]. It was not the law of nature that changed, but only the state of man, "per peccatum". Fortescue draws an analogy with the act of blowing air out of our mouth, which produces opposite effects – rekindling a smouldering fire or cooling hot porridge – depending on the qualities of the objects affected[55].

---

52. Two other examples given by Fortescue refer to the moment when Abel offered the Lord the firstborn of his flock (Gen 4:4) and to the antediluvian phase during which the earth was divided for the first time, according to Book 16 of Augustine's *De civitate Dei*.
53. The reference is to *Decretum Gratiani,* D. V, *dictum ante* c. 1. It should be noted, however, that in Gratian private property is based on positive law, i.e. on convention, rather than on natural law: as Augustine makes clear in his Commentary on John (6.25), it is the laws of the emperors and kings of the world that make it possible to say "this house is mine", "this slave is mine" (D. VIII, c. 1, coll. 12-3). When it comes to Augustine's position, a page from one of his letters (*To Vincent*, *c.* 407) is particularly noteworthy. Here he rejects the complaints of the Donatists who are outraged at having been stripped of all possessions "accumulated through hard work" following the anti-heretical legislation enacted against them, and who claim this to be an injustice. Augustine rejects this thesis in the name of the fact that no temporal goods can be possessed by anyone, "except on the basis of human law, which resides in the power of earthly kings" (see in particular *Ep.* 93, 50, 203-204).
54. Once the Edenic condition was lost, the law of nature continued to govern man, "in the wilderness of his exile", without ever abandoning any man, whether "just or unjust", and without ever undergoing the slightest change: see DN, 1.29, 91.
55. DN, 1.20, 82-83.

We are in the presence here of a thesis formulated in almost identical terms by the group of Franciscan masters gathered around Alexander of Hales[56], who were attempting to reconcile the idea of an order based on the division of property with the patristic (and particularly Augustinian) tradition. The latter identified the possession of all things in common characteristic of the Edenic state as a model for the kind of relationship with material goods that best suited human nature, as originally conceived by God. The decisive point between the different interpretations proposed concerned the way of understanding the impact of the traumatic anthropological change caused by the Fall. According to some, it represented an element of absolute discontinuity, a complete break that had imposed a veritable "revocation" of the precept of natural law concerning the communion of goods, introducing the right to claim some of the original common resources for oneself ("licentia appropriandi et distinguendi communia")[57]. For others,

---

56. See *Alexandri de Hales Summa Theologica*, 3, 2, inq. II, q. 3, cap. 2, t. IV, 347 and 348. The argumentation is based on the doctrine of the twelfth-century canonist Rufinus, who had distinguished two levels within natural law: that of "commands", which are the basic rules of morality, immutable and inescapable, and that of "demonstrations", i.e. indications concerning behaviour that was lawful for man in his initial condition (for example, having all things in common) but that could be altered, and indeed had been altered, by the anthropological changes triggered by Adam and Eve's Fall.
57. The position of the Franciscan John Duns Scotus is exemplary: see *Ordinatio,* IV, d. 15, q. 2, 78-82. For Scotus, the "distinctio dominiorum" is exclusively the effect of positive human law: a law that he does not conceive of as a specification of the *lex naturae*, but whose validity he traces back entirely to the legitimacy of earthly authorities, which arose via human initiative after the Fall. These authorities instituted and regulated private property in a reasonable manner in order to stem the conflict that characterises fallen humanity. A few years later, in the context of the aforementioned dispute over poverty, the other main exponent of Franciscan thought, the Englishman William of Ockham, also argued that it is positive laws that constitute the exclusive *dominium*, seen as the solution that human reason has indicated as a fitting arrangement for fallen humanity. In other words, for Ockham private property rests on a "human right" that remains distinct from the immutable principles of the *lex naturae* understood in the purest sense of the term (which for the English thinker coincides with divine law, being nothing other than the fruit of the contingent divine will). It follows that Ockham leaves plenty of room for the confiscation of subjects' goods by their rulers, should public interest require such action (which is also justified by Fortescue, provided it is performed with the consent of the individuals involved): cf. *An princeps* (1338-39), 7, 253 and *Opus nonaginta dierum* (1332ca), 89, 664. For Ockham the distinction between positive and natural rights was essential, and aimed at proving that the Franciscans had no legal entitlement (i.e. no power to lay claim before a judge) to things of which they

however, following the loss of the condition of innocence, it had become necessary to adapt that precept to the new situation: therefore, the first differentiation of the *dominia* had not taken place in contradiction with the law of nature, but in accordance with what it had established "secundum statum naturae lapsae", i.e. with the aim of preserving peaceful coexistence and of ensuring everyone's sustenance in the new condition that had come into being[58].

Following the path inaugurated by the first Franciscan school, with the *Summa Halensis*, Fortescue claims that both the communion and the division of goods proceed from the *lex naturae*, whose prescriptions vary depending on the state in which human beings find themselves[59]. By contrast to those who attributed the power to appropriate goods to a right of exclusively human origin, thus assigning it a wholly conventional character, here we find the idea that the existence of the category of private property *per se* and the related theoretical possibility that someone may own something individually predate Adam and Eve's sin. Indeed, according to Fortescue, property ownership is based on a law, the *lex naturae*, which "has never changed in any part, but abides

---

made simple use for their own sustenance – with permission from the owner of such goods – by virtue of a natural right, inalienable and common to all: see for ex. *Opus nonaginta dierum,* 61, 559 and 562.

58. This is the point of view expressed, albeit with different emphases, by the two main spokesmen for the mendicant orders' perspective in the thirteenth century, Bonaventure of Bagnoregio and Thomas Aquinas. Concerning the former, see esp. *In secundum librum Sententiarum,* d. 44, q. 2, a. 2, 1009 ("omnia esse communia dictat secundum statum naturae institutae, aliquid esse proprium dictat secundum statum naturae lapsae ad removendas contentiones"); concerning the latter, see ST, I^{A}-II^{AE}, q. 94, a. 5, vol. II, 675 and II^{A}-II^{AE}, q. 66, a. 3, vol. III, 489. In these passages, Thomas argues that private property is not in itself at odds with natural justice, but rather conforms to it insofar as it more effectively responds to the needs of corrupt humanity. This is so even if it is up to positive law to specify the ways in which the division of goods "devised" by human reason takes shape, by means of a non-contradictory extension of the dictates of the *lex naturae*, which the Dominican theologian considers immutable only with regard to its very general first principles, an "addition" introduced for the benefit of human life.

59. Given the state of corruption of human nature, private ownership is natural.

unchangeable, although the transformation introduced into man by sin has wounded (*lesa*)"[60].

The violation of the prohibition to eat the fruit of the forbidden tree and the consequent change triggered in human beings, in terms of status and merit, led – "pro delicto" – to the loss of the benefit of the regime of shared property. At the same time, it made the establishment of contracts lawful as a means to regulate something, namely private property, which had always existed in the abstract, but which was only concretely granted to men at that particular moment (for in paradise there had been no need for human beings to sweat for their bread). It is therefore those contractual rules, and not private property, that originated with the Fall, through which human beings became aware of something they had hitherto simply ignored. Emblematic in this regard is what Fortescue says about inheritance law in another section of *De natura legis naturae*:

> And, if I am not mistaken, before the Fall of man the law of nature in no way revealed (*nullatenus revelavit*) that right to men[61]. For the right to inheritance was unknown (*non innotuit*) to our first ancestors, so long as they preserved their innocence, seeing that they possessed all things in common then, and were therefore altogether ignorant (*penitus ignorabant*) of property which could be inherited. But afterwards, when they lost their state of innocence, the Lord said to the human race "In the sweat of your brow you shall eat bread", by which words man was granted (*concessa est*) ownership of the things which he could acquire by his labour (DN, 2.33, 149).

---

60. Cf. DN, 1.20, 82 (where there is an explicit reference to *Decretum Gratiani*, D. V, c. 1, vol. I, col. 7) and 29, 91. On this aspect, see Lacy 1949, 407-409, Callahan 1996, 30-31.
61. This is the point: the loss of paradise coincides with the unveiling and formalising of the rules concerning the personal possession of property and its transmission to one's descendants.

The terms used in these lines clearly indicate that the act of insubordination on the part of the first men led to the unveiling – and effective enforcement – of rules that implicitly had always been in place: for, as we have seen, they concerned something that was already theoretically provided for. Property ownership thus dates back to a stage when the legal systems of the various states were not yet in place[62], as it owes its origin to the *lex naturalis* governing paradise. This idea, at least in principle, places strong limitations on the king's power to seize his subjects' goods[63]. For According to Fortescue – whose interpretation in this respect constitutes a sort of ideal *trait d'union* between Jean Quidort's *De potestate regia et papali* (1302) and John Locke's *Second Treatise on Government* (1690)[64] – the law of nature allocates the various goods to those who have dispensed their labour:

> since the bread which a man gained by his labour was his own, and no man could eat bread without the sweat of his own brow, every man who did not toil was forbidden from eating the bread which by his own sweat another man had acquired.

---

62. Following Augustine's analysis in books 15 and 16 of *De civitate Dei*, Fortescue believes that positive laws made their appearance over 3,644 years after the Fall, with the tablets given to Moses: cf. DN, 1.4, 66-7.
63. See Seipp 1994, 78-79.
64. By way of example, consider *Tractatus de potestate regia et papali,* 7, 189 ("bona laicorum sunt acquisita a singulis personis arte, labore vel industria propria, et persones singulares habent in ipsis ius est potestatem et verum dominium, et potest quilibet de suo disponere, [...] sine alterius iniuria"); *The Second Treatise of Government*, 5.27, 305-6: "Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; the labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men". On the two authors mentioned and the idea of a possible link between them, see Coleman 1983, 217-20; 1985, 76-85 and 94-100; Wood 2004, 24-25; with regard to the hypothesis that Fortescue may be the "missing link" between some medieval theories of property (in particular Ockham's) and the later views of John Locke, see Shepard 1936, 299-304. The attempt to associate Quidort with Locke, first made by Janet Coleman, was staunchly contested by Odd Langholm 1992 (393), according to whom it fully demonstrates "the danger involved in anticipatory interpretation of ideas".

> Wherefore ownership of the bread so gained only belonged to the man who had toiled for it, and every other man was deprived of any share in it; and in this way inheritable property first emerged[65].

As in Jean Quidort and Locke[66], in Fortescue's reconstruction the acquisition of an exclusive right to individual parts of Creation, which God had originally given in common to mankind, is made possible by individual work: by the toilsome labour ("laboris sudor") that each individual man performs in order to obtain his bread, meaning "whatever is indispensable for his sustenance". From the moment the sentence against Adam (and Eve[67]) is delivered, the *proprietas rerum* is added ("accrevit") to those who labour to acquire it[68]. It applies to them as a kind of accidental attribute ("quasi accidens sudanti coheret"), which remains associated ("comitatur") with their blood as payment for the effort they make to obtain certain goods: it "ensues (*succedit*) as a compensation for the sweat by which the body of the acquirer is enfeebled

65. DN, 2.33, 149; see also 1.12, 74. As has been pointed out, from the mid-15th century onwards this idea became widespread among common lawyers: cf. Seipp 1994, where attention is drawn to the presence of similar theses in Year Book reports.
66. Who quotes Fortescue, as we have seen.
67. See DN, 2.26, 141-142, where it is made clear that it would be blasphemous to imagine that the female gender is exempt from the curse of having to sweat for one's bread, as this falls on all descendants of the first humans, regardless of gender. The author emphasizes that this punishment affects Eve just as much as Adam, if not more so – as we are about to see.
68. In Locke's labour theory the same process is described in the opposite way: it is the individual who "adds" to the object over which men have a common right something that, being his own, removes it from this common state and makes it uniquely his own. What the individual adds is the work he "incorporates" into that object, thereby changing the state in which nature had originally placed it and increasing its value (*The Second Treatise of Government*, 5.27-28, 5.46). For Locke, too, however, it is natural law that establishes the private ownership of what was previously common, assigning fish to those who catch them in the ocean, water to those who collect it from a fountain using a pitcher, and land to those who till, plant, improve and cultivate it (*ibid*., 5.29-32).

(*attenuatum est*)"[69]. By contrast, in the Edenic condition no property could "adhere" to and unite with the individual human being[70].

On the other hand, Fortescue is keen to point out that, strictly speaking, "property is not a natural accident for man". He notes that this linking of property with the blood of the person who has acquired it through hard work, and hence the loss of his physical integrity, is something that occurs ("accidit") to man – "in the guise (*ad instar*)" of a natural accident – by virtue of the constraints of the law of nature not as this was originally ("primitus") established, but as it now subsists, "stripped of its freedom and power" by human transgression[71]. This is the foundation of a child's potential right to inherit his or her father's property upon the latter's death[72], a right

---

69. DN, 2.33, 149. Cf. also 2.33, 150: "the law of nature united it [viz. property] to its acquirer (*univit ejus conquestori*), so that the property gained might make up for the damage resulting from his loss of bodily wholeness; and thus the property takes the place of man's bodily integrity, which he has lost, and coheres as an accident to the labourer (*quasi accidens sudanti coheret*), thereby becoming infused into his blood (*et sanguinem eius deinceps comitatur*)". Concerning the sources from which Fortescue may have drawn inspiration in formulating this peculiar theory on the origin of property, a theory linking toil and sweat with property and blood, see Callahan 1996, 24-27. In relation to the hypothesis that Fortescue may have been influenced to some extent by the thinking of Continental civilists and canonists, Callahan notes that some of them associate property with bones, but not with blood.
70. Although the law of nature knows no change, what it prescribes for men differs as the circumstances change, i.e. following the loss of the Edenic condition. Fortescue therefore reproposes the Augustinian thesis according to which private property is a consequence of original sin, before which everything was held in common. At the same time, however, he conceives of property as "natural", in a sense that its status is different now only because of the changed qualities of the subject on which the *lex naturae* acts, owing to the corruption of the human race. On this topic, see Schlatter 1951 (72-76), who emphasises the coexistence, in Fortescue's thinking, of traits typical of the medieval tradition (particularly his acceptance of the doctrine that property is the result of sin) and elements (such as his insistence on labour as the natural basis of man's title to property) destined to distinguish the doctrines formulated over the course of the following three centuries in defence of the idea that everyone can do what they want with the fruit of their work and that no king can deprive a man of the things for which he has sweated.
71. DN, 2.33, 150.
72. See also DL, 42, 100-104: in the context of a chapter in which he praises the English legal system – which, unlike civil law, assigns a free status to the son of a woman of servile condition who marries a free man – Fortescue observes how cruel a law would be which made that "innocent" son a servant. It would deprive him of the land for which his free father has toiled, in the hope that his son might have access to it, with the risk that the land might end up in the hands of someone who bears no relation

deriving from the fact that a portion of the father's blood flows through the child, "and from [the child's] being to some extent a sharer in his [viz. the father's] toil"[73]. In Fortescue's view, however, this right does not apply to every kind of property, but only to real estate and immovable goods, "which are as lasting as man's nature". By contrast, movable and personal property – which is not permanent, even though it too may be the fruit of toil – is not always passed on to one's heirs, but often to executors, trustees and legates; sometimes it goes to wives and children, to be divided among them according to various local customs[74]. The English jurist thus seems to preclude wives from inheriting real estate [75], just as he claims that a woman cannot inherit – or pass on to her children – a *dominium publicum* such as a kingdom, but only act as a "natural and domestic" channel of transmission in relation to the father's blood and private inheritance[76]. These two clarifications introduce a profound distinction as regards the effects of original sin on the two genders. Eve's guilt was judged by God to be much more serious than Adam's, because she had dared to instruct the man under whose authority she had been placed from the beginning[77]. Every woman must now pay for

---

("non sudanti extraneo") to the man who earned it, should the woman in question remarry a free man. A portion of an individual's being is incorporated into the objects he acquires through his work and thus becomes part of the heritage that can be passed on to his descendants.

73. DN, 2.33, 150: as long as the father remains alive, this right of succession is enjoyed by the son only "latenter", as a mere promise of an inheritable property ("descensurae proprietatis indicium"). It then actually "infuses itself (*se transfundit*)" into him upon his father's death. The notion of the existence of a close link between private property and blood was probably suggested to Fortescue by his familiarity with the English legal principle according to which a felon's blood was tainted and hence entailed the forfeiture of his property: he could neither inherit nor bequeath any goods.
74. DN, 2.33, p. 150; cf. also, 2.50, 167-168, which stresses the fact that inheritance law does not treat all kinds of property in the same way: real property, such as a kingdom, is passed on to agnates and cognates, whereas movable property is "seized and disposed of" by legatees and executors.
75. The reason for this would seem to lie in women's fickle nature: see Harris 2000, 255-256.
76. Cf. DN, 2.37, pp. 154-5. See also 2.3, p. 117.
77. "[…] in adiutorium eius facta est et eius subdita dicioni" (DN, 2.26, 142). Partially correcting the idea that the first human beings held every good in common, Fortescue notes that in paradise there was already a natural hierarchy involving a certain degree of inequality

Eve's sin: not only through the pain of childbirth and the consolidation of the power ("vinculo firmiori") exercised over her by her husband (cf. Genesis, 3:16), but also by being able to acquire through her own sweat – and to inherit –only personal and movable goods (the kind of goods that may be confiscated)[78].

This consequence of Eve's disobedience, in turn, is associated by Fortescue with the inconstancy and fragility of female nature and with the fact that, according to his reconstruction, the Fall introduced for the first time a form of domination between human beings by virtue of which – "propter peccatum eius" – woman became subjected to man as her master ("subdita ut domino"). Previously the condition of natural inferiority in which woman found herself with respect to man was only that of a "companion" ("ut socio subiecta"): in paradise, Adam was endowed with the role of a leader, but not with the power to threaten and punish[79].

To return now to the central issue, there remains in Fortescue's discourse an at least partially contradictory aspect, as mentioned earlier. Although in theory universally

---

between woman and man, whose pre-eminence ("praelatia") over all creatures also included Eve. While in that context the law of nature had left Eve free to chose whether to submit to Adam or not, her refusal to do so, by abusing the freedom granted to her in an attempt to invert gender roles, increased that inequality through the Fall. This determined a "limitation" of woman's freedom by divine decree, which resulted in the obligation for her to completely submit to man. Whereas previously the law of nature required her to be advised and directed by Adam, "without possible threats or punishments", at the moment of original sin the *lex naturae* appointed him to be "a stricter schoolmaster than he had been before" (cf. DN, 2.27, 143, 2.45, 162-163). Before the Fall, Eve found such a condition of natural subordination desirable and enjoyed being guided by Adam's authority in all difficult matters; after the Fall, the subjection of her will and that of every other woman – "married or unmarried" – to the will of the man appointed as her lord (her husband, father or king) – and therefore authorized to threaten her ("dominus enim quasi dans minas dicitur") – became a cause of distress. Fortescue points out that the punishment inflicted on the female gender because of Eve's responsibility did not change the substance of the original natural subjection of woman to man, but simply imposed a more stringent form of obedience on women: cf. DN, 2.42-43, 159-161.

78. See DN, 2.26, 141-142; cf. also 2.28, 144 and 2.50, 168. Ultimately, the Fall deprived Eve and her descendants not only of the initial (relative) communion of property but also of the possibility of personal ownership of any real and public property.

79. See DN, 2.26, 142, 2.42, 159 and 2.45, 162.

guaranteed by natural law, which is its source, personal property is only systematically respected in regimes governed by a "politice dominans" king – and particularly in England, as we have seen. Indeed, a sovereign of this sort cannot – save in certain exceptional cases – confiscate his subjects' property without their consent, whereas in the other main system of government these goods seem to be at the mercy of the prince. One possible explanation for this contradiction may come from Fortescue's frequent emphasis on the fact that those who hold "political and royal dominion" appear more inclined to conform to the law of nature, to which they are always subject[80]: the *lex naturae* is thus the foundation of the set of customs and statutes that define the character and limits of a constitutional system such as the English one. At least in some of our author's pages, natural law seems to guarantee the rights of anyone who falls within such a system, which includes both the king and the common people.

5. The political dimension of the issue of royal poverty and some possible remedies

Before concluding, there is one more element to consider in Fortescue's reflections on economic issues: the set of reform measures he proposes in *The Governance of England*. This work, in fact, is not only the first treatise on the English constitution written in the vernacular[81], but also contains a sort of rudimentary handbook of political economy[82]. In all likelihood, this was originally conceived for King Henry VI – in a version that was sketched out in the late 1440s, on the basis of Fortescue's experience after he had joined the royal council (1442), and later revised on the occasion of the brief and unexpected Lancastrian restoration of 1470-71. After some further reworking,

---

80. Cf. DN, 1.29, 91, which states that every political and royal regime "semper legis naturae patitur regulas".
81. A milestone in the history of England's political, constitutional and linguistic self-awareness.
82. Cf. Wood 1994, 64.

it was perhaps presented to Edward IV, sometime between 1472 and 1476, as a model of how governance should be reformed[83]. What is certain is that the formulation of these proposals aims to remedy the situation of serious financial instability that had arisen especially during Henry VI's reign, one of the most troubled in the history of England[84], as well as the particularly arbitrary way in which local justice was administered at that time. The proposals responded to the fear of having to face new rebellions (such as that of Jack Cade), but above all to the well-founded fear that the Crown's revenues could be replenished by the same means that had been used in France not so long before: improper means, completely incompatible with a "regnum politicum"[85]. Ensuring that the sovereign has adequate resources to maintain his estate – making him autonomous in this respect[86] – is seen, first and foremost, as something indispensable in order to save him from the clutches of creditors (one of the main themes of Shakespeare's *Richard*

---

83. The Yorkist king is explicitly mentioned a few pages from the end – although not in all ten manuscripts that preserve the text – as a gift sent from heaven to the English, who will form a single assembly to thank God for the fact that through this king they will once again be able to "enjoy their own goods" and live under the kind of justice that had been lacking for a very long time (GE, 19, 155-156). On the question of the addressee of the text (also in the light of the differences between the manuscripts) and the changes that Fortescue probably made to it, see Wolffe 1970, 26-27, Starkey 1986, 15-16, Gross 1996, 63-64, Carpenter 1997, 8, Kekewich 2018, 221-225, 234-235. It is also worth noting the position of Lurie (2011, 293-295 and 314-315), who favours a later date of composition and sees the treatise as ultimately offering a kind of deal to Edward IV: the rehabilitation of Fortescue in exchange for an authoritative position in favour of reforms that would protect the government against any criticism due to the conditions in which the country found itself.
84. The merciless portrayal of the English government described in these pages of GE fits particularly with the 1440s: cf. Wolffe 1970, 26.
85. GE, 4, 117-118, 5, 119. As has been noted (Starkey 1986, 14), in considering the question of a king's poverty not only from an economic point of view but also in political terms, Fortescue puts forward a sophisticated reform programme that might solve the Crown's financial difficulties without altering the balance of the English constitutional system.
86. This is in accordance with the well-known adage that "the king must live on his own", rather than off the back of the people, a principle often proclaimed in parliament during the 14th and 15th centuries, with specific reference to purveyance (cf. Wollfe 1971, 48-49). See e.g. Parliam. VI EDW. III., 1332, in *Rotuli Parliamentorum*, II, 66, §. 3: "& issint qe notre Seigneur le Roi vive de soen, & paye pur ses despenses, & ne greve poynt son Poeple par outraiouses prises n'en autre manere". For the spread in France of the idea that the king should provide for himself and his household without the need to draw on the royal fisc, see Scordia 2005.

II), on whom he would otherwise become increasingly dependent[87]. But it is also necessary in order to prevent a condition of poverty from leading the king to continually devise "exquysite meanes" of collecting money and to try to illegitimately take possession of what does not belong to him (for example, by impeaching innocent but wealthy subjects). This might well trigger a process of degeneration of government in a tyrannical direction, which would both deprive the English of the blessing of the constitutional model under which they lead secure lives and expose the kingdom to the aforementioned risk of insurrection[88].

At the heart of the project for the economic and financial reorganisation of the kingdom formulated in *The Governance of England* we find a number of sought-for changes in the composition and functions of the royal council. In Fortescue's intentions, the latter ought to be transformed into a pool of professional administrators chosen by virtue of their competences[89], with the authority to assume broad control over the management of the royal finances and, more generally, over the Crown's economic policy[90]. To ensure that the privy council[91] will act as an effective counterbalance to the king's authority and as a guardian of the community's interests, Fortescue suggests that it be established in a very different way from the past. Whereas, traditionally, this body comprised princes and members of the great temporal and spiritual aristocracy (as

---

87. For, at the same time, subjects would lose much of their trust in the king, as many would prefer to lend their services to a local lord who is rich and thus able to pay for their services.
88. Cf. GE, 5, pp. 118-20. Fortescue concludes: "we most holde it for undouted, that ther mey no reaume prospere, or be worshipfull, under a poure kynge". It is therefore a question of increasing the king's wealth without impoverishing his subjects, of acting to their benefit rather than to their detriment.
89. Similar suggestions are addressed to Henry V by Thomas Hoccleve in his *speculum principis* (*c.* 1411): cf. *The Regement of Princes,* §. 14, ll. 4859-65, 4915-21 and 4929-44, 175-178. At the same time, it cannot be ruled out that Fortescue's plan to reform government in a bureaucratic sense attracted the attention of some of Henry VII's collaborators.
90. Cf. GE, 15, 147-148.
91. This is the organ into which the ancient *Curia regis* had evolved in those very years, an organ of which Fortescue had direct knowledge.

"consiliarii nati")[92] – all of whom were caught in a constant and obvious conflict of interest, as there were few matters concerning the king that did not also concern their families – the project outlined by Fortescue proposed that the council be composed of twenty-four "privatis personis" (GE, 15, 147). Half of them laymen and the other half members of the ecclesiastical body, chosen exclusively on the grounds of merit ("off the wysest and best disposed men that can be ffounde in all the parties off this land"[93]). These would serve alongside eight other members of the aristocratic class, in office for one year only. Their (well-remunerated) office would be revocable by the king only in the event of serious shortcomings, and in any case only with the approval of the majority of the councillors[94].

Fortescue considers it appropriate for this reformed council to assist the king particularly in the bestowing of offices, pensions and gifts – especially revenues from landed estates – on all those who have truly served the state. The aim is to "regulate" these benefits[95], to the extent of stipulating that any grant or gift from the king must

---

92. See GE, 15, 145-146. Elsewhere (e.g. in DL, 45, 110), the English jurist draws attention to the importance of a public education system for orphaned young nobles at court ("gignasium supremum nobilitatis regni"), to ensure that the kingdom has an aristocratic class that is equal to the political roles it is expected to fulfil. For the attention paid by Fortescue to the issue of the education of future rulers, as an instrument of national policy, see Arrowood, 1935, 406-409.
93. GE, 14, 146. The same indication ("of the mooste wise and indifferente that can be chosen in alle the londe") is provided in the *Articles to the Earl of Warwick* (349), a memorandum drafted by Fortescue in France in 1470-71 for Warwick (before the latter was killed at Barnet), and containing a plan to provide Henry VI with a council as a means to check his power. Prominent in both writings is the idea that it is the common people who should make up the bulk of the council: on this see Kelly 2014, 82-83.
94. Significantly, Fortescue argues that each member of this body should be free to express his opinion, irrespective of rank (GE, 15, 145). In the light of this suggestion, and of the author's insistence on the selection of candidates on the basis of merit alone, it is difficult to share the view of those who see this council as a "clearly aristocratic body", with the intention of making it one of the components of a government intended to be essentially of the mixed sort (see e.g. Blythe 1992, 262). Conversely, the assertion that Fortescue's reform scheme is in total opposition to the role of the nobility seems excessive (Guy 1986, 127), even though the intention to circumscribe this role is clear in the proposed reorganisation of the council.
95. The task of verifying requests for rewards, their fulfilment and "whether the king can grant them through his own revenues while keeping for himself what is necessary to maintain his

explicitly mention that it has been approved "de avisamento consilii sui" (GE, 20, 156). But the powers of this body, which would also have the task of protecting English trade interests and maritime affairs, and of promoting a genuine public welfare programme for the benefit of all[96], appear to be much more extensive. This would make it an instrument for supervising the Crown's economic affairs as a whole: "any difficult case can be determined in this council and the king must act accordingly"[97].

> Thies counsellors mowe contenually comune and delibre uppon the materis of defeculte that ffallen to the kynge, and then uppon the materes off the pollycye off the reaume: as how the goyng owt off the money may be restrayned, how bullyon mey be brought in to the lande, how also juelles and mony late borne owt mey be geytun ageyn; off wich right wyse men mowe sone fynde the meanes. And also how the prises off marchaundise growen in this lande mey be holde up and encressed, and the prises off merchandyses browght in to this lande abatid[98]; how owre navy mey be mayntened and augmented, and uppon suche other poyntes off police, to the grettest profyte and encresse that ever come to this lande. How also the lawes mey be amendet in suche thynges as thay neden reformacion in[99]; wher

---

royal patrimony" (GE, 14, 143-144; cf. also 20, 156-157) is entrusted to the new council. Fortescue points out that, given the composition of the old council, it was extremely unlikely that its members would suggest to the king that he should limit such rewards (which they often enjoyed themselves), and hence prevent him from squandering the Crown's wealth (15, 145-146). On the council's tasks, see also the aforementioned *Articles to the Earl of Warwick,* 349-351. On Fortescue's awareness of the need to balance the (traditionally predominant) personal interests within the royal council, through a reform of this institution that would neutralise as far as possible initiatives aimed at mere individual advantage and provide the king with some disinterested advice, see Ferguson 1959, 185-186.

96. "This counsell shall almost contynuelly studie and labour upon the good politike wele of the londe": *Articles,* 350.
97. GE, 14, 144. Fortescue adds: "As the wise man saith, *ubi multa consilia, ibi salus*". See also *Articles,* 350, where Fortescue states that the king should not take any important decision concerning the government of his kingdom without first sharing and discussing his intentions with the council, and taking due account of its advice. Passages such as those just quoted appear to be in clear contrast to the argument that Fortescue's proposals for reforming the council are aimed at ensuring "the extension of monarchical power" (Gross 1996, 63, 87-88). This argument is misleading, since we are dealing with a consolidation of the whole system of government, aimed at guaranteeing greater protection for the rights of subjects.
98. Some, commenting on these lines, have gone so far as to see in Fortescue "a prophet of mercantilism": cf. Ferguson 1965, 125.
99. Cf. *Articles,* 350.

> through the parlementes shall mowe do more gode in a moneth to the mendynge off the lawe, then thai shall mowe do in a yere, yff the amendynge theroff be not debatyd, and be such counsell ryped to thair handes (GE, 15, 147-148).

While partially reducing Parliament's prerogatives, on the assumption that in order to speed up the decision-making process it would be better to entrust the royal council with the preliminary work pertaining to reform proposals to be submitted for debate and voting by the representatives of the *communitas regni*[100], the last lines of the passage just quoted testify to the author's effort to find the most effective way to limit royal power and subject it to a degree of control. This is particularly true when it comes to the kingdom's economic policies: Fortescue advocates a mode of sharing the government of England that he compares to the "regal-political" rule exercised by Octavian Augustus together with the Senate, with extraordinary results[101]. The key point in the reform scheme championed by our author is his insistence on the public nature of the *counsell*, in an effort to ensure that the king in future will no longer be advised only by those who belong to his inner circle, "by menn of his Chambre"[102].

---

100. The author here promotes a spirit of cooperation between the parliamentary assembly and the *consilium regis*, based on the assumption that this way of proceeding can minimise the risk that the Commons might reject the royal council's proposals.
101. The idea of a regal-political *dominium*, collegial, in the immediately post-Republican Rome is a feature peculiar to Fortescue: cf. DN, 1.16, 77 and GE, 16, 149. There is also an alternative version of GE, 16, published by Lord Clermont in an appendix to his collection (475), with the title of *Example what good Counsayle helpithe and advantagethe* (and reproduced in Plummer's edition of GE). At the beginning of this text, we read: "What good welthe and prosperitie shuld grow to the Realme of England yf suche a counseyle be once parfectly stablished, and the Kynge guided thereby". On the next page Fortescue associates the state's inability to defend the welfare of the English people with kings' tendency to surround themselves with individuals who offer themselves as advisers, rather than being chosen to fulfil this role.
102. *Articles,* 350. Some scholars have gone so far as to argue that the essence of the English "dominium politicum et regale" idealised by Fortescue simply lies in the fact that it is a system of government which obliges kings to always act through councillors: to this end, it ensures that the ruler, in all circumstances, may receive informed, wise and disinterested advice from parliament and the royal council (see Cromartie 2004, 50-51).

Fortescue also provides a number of detailed indications on how to regulate the fixed annual burdens on the sovereign. First of all, a precise estimation of ordinary expenses is needed: the king must have a reasonably large income to cover each budget item[103], and the funds set aside to cover these expenses cannot be diverted for any reason. In Fortescue's opinion, a constraint of this sort "in no way constitutes a limit to royal power", since there is no power in alienating and bestowing goods, but only in preserving those goods indispensable to the sustenance of the king (and his heirs)[104].

The English jurist's reform programme envisages, in particular, a consolidation of royal finances through an act of Parliament ("a generall resumpcion made be auctorite off parlement") that would restore to the Crown all land previously distributed to favourites and relatives of the king, while at the same time endowing the latter with a substantial annual subsidy by which he could reward deserving collaborators, "on the advice of the council", without having to cut into his revenues[105]. In this respect, it should be noted that Fortescue entrusts the royal council and, above all, Parliament, with the task of implementing his reform proposals: proposals to which he adds the

---

103. Fortescue here quotes a passage from a well-known letter *de cura rei familiaris* attributed to Bernard of Clairvaux (*Epistola CDLVI*), in which the author warns against the risk of an unforeseen event bringing ruin to a man whose expenses are equal to "his revenues": cf. GE, 6, 120 and PL, 182, col. 647 A.

104. See GE, 6, 121 and 19, 155: likewise, there is "no prerogatyff" in growing old or falling ill, as in sinning, doing evil or damaging oneself, since it is always a matter of faculties ("poiar") that derive from impotence.

105. Cf. GE, 11, 136 and 14, 142-143. Fortescue considers it essential that this possible "general restoration" of the king's estate should be accompanied by the setting up of a select and "worshipfull" committee (which, in his view, should coincide with the duly reformed royal council), responsible for regulating all new gifts and rewards, "as if they had never been given in the past", in particular by checking their economic viability. An Act of Resumption of Crown Lands – which had been debated in Parliament since the beginning of Henry IV's reign – was approved in 1451 and 1455; a similar measure was taken four times (starting in 1461) during the reign of Edward IV. At least in its initial drafting, therefore, the proposal formulated by Fortescue was part of an open debate and certainly did not constitute an absolute novelty. Its originality lies rather in the legal justification put forward by the English jurist (with all the weight of his prestige) in support of such a measure, i.e. the principle that all donations made by the king "inconsideratle" (GE, 11, 136 and 14, 143) constitute acts with no actual validity. On this subject, see Lurie 2011, 307-309.

hope that, once the king has fully recovered his estate, he will have the foresight "to establish and amortise the same to his Crown", to bind it to the Crown in such a way as to make it inalienable "with owt the assent off his parlement"[106]. As mentioned above, according to Fortescue such a decision would not "be at all contrary to the royal prerogative by virtue of which the monarch is placed above his subjects", i.e. to that "reserve of indefinite power necessary to deal with any emergency"[107]; rather, it would constitute the concrete application of one of the peculiarities of the king's role, since he is the only person in the realm who can regain land he has previously alienated [108]. On the other hand, in the words of our author such a decision would be equivalent to a true "re-foundation of the Crown" which, in turn, would place the entire kingdom on such a solid foundation that "every man on this earth would feel happier and safer every day"[109]. And here Fortescue's argument comes full circle.

---

106. GE, 19, 154. For the gradual emergence in England of the abstract notion of the Crown as a public entity (endowed with legal immortality) distinct from the physical person of the king and as the embodiment of the fundamental rights and claims of the country, see Kantorowicz 1957, 347-364. This scholar also discusses the simultaneous affirmation from the 13th century onwards – under the influence of canonical norms governing the oath taken by new bishops – of the principle of the inalienability of the privileges, rights and possessions of the Crown, officially established through the addition to the coronation oath of a special clause whereby the king swore to preserve the Crown's patrimony.
107. According to the definition given in Chrimes 1936, 42-43.
108. GE, 6, 121; cf. also *Articles to the Earl of Warwick*, 350.
109. This is viewed as a new foundation in comparison to which the foundation of an abbey or a hospital "is nothyng", because what the sovereign would be establishing, in this case, is a "collage in whiche al the men of Ingland, spirituel and temporel" would find themselves united in praise of their king (GE, 19, 155). Once again, what we find here is a way of conceiving England as a sort of spiritual *collegium*: an ecclesiastical collective body (such as the chapter of a cathedral) and personified community that is self-standing and everlasting, yet perpetually under age, and thus needs to be represented and protected by a tutor or guardian (a bishop, for example). This conception is consistent, on the one hand, with the idea of an impersonal Crown representing the shared public interest of the body politic and, on the other, with that of the king (in Parliament) – or at least of the king with the lords – as the guardian of the realm, understood as a public property whose conservation is wholly entrusted to the *tutor regni*. In this regard, see Kantorowicz 1957, 198, 302-13 and 372-83, Lander 1989, 12-3 and Lockwood 1997, xxxv-xxxix.

On the whole, therefore, the measures suggested by Fortescue are primarily aimed at protecting the rights of the subjects – to avert the danger that the English balance of "royal" and "political" power might break down, leading to anarchy or to tyranny. They do so, however, through a strengthening of executive power which translates above all into the allocation of a sufficiently robust endowment to the Crown[110]. On the one hand, it is true that these proposed reforms seem to look back to the past in that they aspire to re-establish the correct order of the political system that made England great[111]. Fortescue appears tied to a largely static and conservative conception of society and government, whose function is primarily protective (to preserve justice and peace, to keep the "chain of being" intact[112]). At the same time, however, many of his pages present us with the image of an intellectual who is at least partly aware of the possibility that the 'king in Parliament' and the reformed royal council may intervene in the functioning of the political body, especially as far as socio-economic processes are concerned, and that they may remedy the shortcomings he has noted and denounced, starting from administrative inefficiency[113]. Fortescue entrusts the king and the royal council with the task of identifying a series of concrete institutional and legal measures to remove any obstacles to the country's social and economic

---

110. Cf. Starkey 1986, 21-22, Keaney 1987, 229-230. The idea that the consolidation of the rights of the members of the community passes through a strengthening of royal power may seem paradoxical at first. However, it is perfectly understandable in the light of the importance for Fortescue of the conception of society and the cosmos as a hierarchical order, within which the development of those higher up on the social ladder has a positive effect on those lower down: the harmonious concord of the great chain of being is thus realised through the reciprocal (political and economic) support between the king and the people.
111. As pointed out by Kekewich 2018 (220), *The Governance of England* is simultaneously "conservative and a manifesto for reform".
112. This is achieved through a political system capable of preserving the hierarchical social ladder by also establishing a set of checks and balances that protect each individual's freedoms, while at the same time limiting them.
113. There is a tendency in Fortescue to attribute the pathologies of the English body politic to impersonal factors, particularly institutional ones, rather than to the corrupt nature of those at the head of the body; cf. Ferguson 1959, 185-186.

development, and its gradual evolution from the embryonic stage to a more evolved one[114].

> Hit is the kyngis honour, and also is office, to make is reaume riche; and it is dishonour whan he hath but a povere reaume, off wych men woll say that he reigneth but uppon beggers. Yet it were moch gretter dishonour, yff he ffounde is reaume riche, and then made it povere. And it were also gretly ayenest is conciens, that awght to defend hem and her godis, yff he toke ffro hem thair godis with owt lafull cause; ffrom the infame wheroff God defende owre kyng, and gyff hym grase to augmente is reaume in riches, welth, and prosperite, to his perpetuell laude and worshippe (GE, 12, 139).

Over the years, Fortescue displayed an increasing tendency to assign the monarchical state new functions in addition to the classic ones associated with royal authority: the fostering of material happiness for the entire community, the creation of the necessary conditions for the well-being, security and economic growth of the members of the political body (primarily through the fight against "poverty and lack of means"[115]) and the protection of individual property[116]. This led him to emphasise those aspects of his legal doctrine that brought it closer to a positive conception of the law, seen first and foremost as an instrument for shaping and improving the country's socio-economic

---

114. On this issue, see Ferguson 1959, 177-179 and Ferguson 1965, 123-126. Particularly in the latter study, Ferguson shows that Fortescue accepts the possibility of social change only within certain limits, as clearly illustrated by his organicistic conception of the state, which only envisages a natural evolution of the political body in the context of a hierarchical view of society. In relation to this aspect of Fortescue's thought, scholars have been divided between those who, in the wake of Ferguson, consider him to be a *de facto* anomaly compared to most of his contemporaries (e.g. Keaney 1987, 228) and those who see him as reflecting a widespread awareness of the social changes which in their opinion characterised England from the 1450s onwards – including an awareness of the inevitability of these transformations and of the possibility of partially controlling them (see e.g. Starkey 1986, 26-27).
115. *Example what good Counsayle helpithe and advantagethe*, 476.
116. Cf. Wood 1994, 53-54, 58, where it is argued that our author's emphasis on economic considerations is one of the most innovative aspects of his thought.

conditions. Herein, in the great attention which Fortescue pays to such economic matters – especially through the ideal of a form of government seeking to offer every inhabitant of the kingdom the possibility of increasing his economic standing[117] – lies one of the most original features of his thought, as well as one of the most evident traces of his belonging to an age of transition for his beloved England and for Europe as a whole.

Acknowledgements
I would like to express my gratitude to Joel Kaye and Giovanni Ceccarelli for their advice, guidance and encouragement.

References

Primary sources

a) Works by John Fortescue

Articles to the Earl of Warwick, in *The Governance of England: Otherwise Called the Difference between an Absolute and Limited Monarchy,* ed. by C. Plummer, Oxford: Oxford University Press, 1885, 348-353.

De Laudibus Legum Anglie (=DL), ed. by S. B. Chrimes, Cambridge: Cambridge University Press, 1942.

Example what good Counsayle helpithe and advantagethe, and of the contrary what foloweth, in *The Works of Sir John Fortescue, Knight, Chief Justice of England and Lord Chanchellor to King Henry the Sixth*, ed. by Thomas Fortescue, Lord Clermont, London: Chiswick Press, 1869, Pars i, 475-476.

117. See DL, 36, 86: this is an ideal realised on earth, more precisely on English soil, also thanks to the peculiar socio-economic (as well as constitutional) structure of the country – a peculiarity of which Fortescue is fully aware, as we have seen.

Legal Opinions and Judgments, in *The Works of Sir John Fortescue,* Pars ii, 3-119.

Opusculum de Natura Legis Naturae et de ejus Censura in Successione Regnorum Suprema (=DN), in *The Works of Sir John Fortescue*, i, 65-184.

The Governance of England: Otherwise Called the Difference between an Absolute and Limited Monarchy (=GE), ed. by C. Plummer, Oxford: Oxford University Press 1885.

b) Other primary sources

Alexander de Hales, *Summa Theologica*, 4 voll., Ad Claras Aquas (Quaracchi): Ex Typographia Collegii S. Bonaventurae, 1948.

Aurelius Augustinus, *Epistulae LVI-C,* ed. by K. D. Daur, Turnhout: Brepols, 2005.

Aylmer John, *An harborowe for faithfull and trewe subjects, agaynst the late blowne Blaste, concerning the Government of Wemen*, At Strasborowethe [i.e. London] 1559.

Bernardus Claraevallensis abbas, *Epistola Ad Raymundum dominum Castri Ambruosii*, PL, 182, coll. 647 A-651 A.

Bonaventure of Bagnoregio, *In secundum librum Sententiarum,* in *Opera Omnia*, vol. 2, Ad Claras Aquas (Quaracchi): Ex Typographia Collegii S. Bonaventurae, 1885.

Christine de Pizan, *The Book of the Body Politic (Le Livre de corps de policie)*, ed. by K. L. Forhan, Cambridge: Cambridge University Press, 1994.

Gratianus, *Decretum magistri Gratiani,* in *Corpus iuris canonici*, ed. A. Friedberg, vol. I, Lipsiae: B. Tauchnitz, 1879.

Guillelmus de Ockham, *An princeps pro suo succursu, scilicet guerrae, possit recipere bona ecclesiarum etiam invito papa*, in *Opera Politica*, ed. by H. S. Offler *et al.*, vol. 1, Manchester: Manchester University Press, 1940, 228-267.

Id., *Opus nonaginta dierum*, in *Opera Politica*, ed. by H. S. Offler, vol. 1, 292-368 and vol. 2, Manchester: Manchester University Press, 1963, 375-858.

Joannes Duns Scotus, *Ordinatio*, *Liber Quartus*, in *Opera Omnia*, voll. 11-14, Civitas Vaticana: Typis Vaticanis, 2008-2013.

Joannes Parisiensis (Jean Quidort), *Tractatus de potestate regia et papali*, in J. Leclercq, (ed.), *Jean de Paris et l'ecclésiologie du XIII^e siècle*, Paris: Vrin, 1942.

Joannes XXII (Jacques Duèse), *Quia vir reprobus,* in *Bullarium franciscanum*, ed. G. C. Sbaraglia-K. Eubel, t. V, Romae: Typis Vaticanis, 1898, 408-449.

John Locke, *The Second Treatise of Government. An Essay Concerning the True Original, Extent, and End of Civil Government,* in Id., *Two Treatises of Government*, ed. by P. Laslett, Cambridge: Cambridge University Press, 1970, 282-446.

Rotuli Parliamentorum; ut et Petitiones, et Placita in Parliamento, ed. by R. Blyke, London: Record Commission, 1767-1777.

Tholomaeus Lucensis, *De regimine principum ad regem Cypri - Continuatio*, in *Divi Thomae Aquinatis politica opuscula duo*, ed. by G. Mathis, Torino: Marietti, 1948[2], 23b-97a.

Thomas de Aquino, *Summa Theologica* (=ST), 5 voll., Romae: ex typographia Senatus, 1886-1887.

Thomas Hoccleve, *The Regement of Princes,* in *Hoccleve's Works*, iii, ed. by F. J. Furnivall, London: Trubner & Co., 1897.

Year Books (=YB), *Anno Henrici Sexti xxxv*, London: R. Tottel, 1586.

Year Books, *Anno Henrici Sexti xxxvii*, London: R. Tottel, 1567.

c) Secondary sources

Arrowood, C. F. 1935. “Sir John Fortescue on the Education of Rulers.” *Speculum* 10: 404-410.

Bellamy, J. 1973. *Crime and Public Order in England in the Later Middle Ages*. London: Routledge & Kegan Paul.

Blythe, J. M. 1992. *Ideal Government and the Mixed Constitution in the Middle Ages.* Princeton: Princeton University Press.

Burns, J. H. 1985, “Fortescue and the Political Theory of *Dominium*.” *The Historical Journal* 28: 777-797.

Callahan, E. T. 1995. “The Apotheosis of Power: Fortescue on the Nature of Kingship.” *Majestas* 3: 35-68.

Callahan, E. T. 1996. “Blood, Sweat and Wealth: Fortescue’s Theory of the Origin of Property.” *History of Political Thought* 17: 21-35.

Canning, J. P. 1988. “Law, Sovereignty and Corporation Theory, 1300-1450.” In *The Cambridge History of Medieval Political Thought, c. 350-c. 1450,* edited by J. H. Burns, 454-476. Cambridge: Cambridge University Press.

Carpenter, C. 1997. *The Wars of the Roses: Politics and the Constitution in England, c.1437-1509.* Cambridge: Cambridge University Press.

Chrimes, S. B. 1936. *English Constitutional Ideas in the Fifteenth Century.* Cambridge: Cambridge University Press.

Coleman, J. 1983. “Medieval Discussions of Property: *Ratio* and *Dominium* According to John of Paris and Marsilius of Padua.” *History of Political Thought* 4: 209-228.

Cromartie, A. 2004. “Common Law, Counsel and Consent in Fortescue’s Political Theory.” In *The Fifteenth Century – IV: Political Culture in Late Medieval Britain*, edited by L. Clark and C. Carpenter, 45-67. Woodbridge: The Boydell Press.

Cromartie, A. 2006. *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642*. Cambridge: Cambridge University Press.

Doe, N. 1990. *Fundamental Authority in Late Medieval English Law*. Cambridge: Cambridge University Press.

Dunbabin, J. 1988. "Government." In *The Cambridge History of Medieval Political Thought, c. 350-c. 1450,* edited by J. H. Burns, 477-519. Cambridge: Cambridge University Press.

Ferguson, A. B. 1959. "Fortescue and the Renaissance: A Study in Transition." *Studies in the Renaissance* 6: 175-194.

Ferguson, A. B. 1965. *The Articulate Citizen and the English Renaissance*. Durham (NC): Duke University Press.

Galligan, D. J. - Palmer, C. 2014. "Patterns of Constitutional Thought from Fortescue to Bentham." In *Constitution and the Classics. Patterns of Constitutional Thought from Fortescue to Bentham*, edited by D. J. Galligan, 1-50. Oxford: Oxford University Press.

Genet, J.-P. 1973. "Les idées sociales de Sir John Fortescue." In *Économies et sociétés au moyen âge: Mélanges offerts à Edouard Perroy,* 446-461. Paris: Publications de la Sorbonne.

Gill, P. E. 1971. "Politics and Propaganda in Fifteenth-Century England: the Polemical Writings of Sir John Fortescue." *Speculum* 46: 333-347.

Gilson, J. P. 1911. "A Defence of the Proscription of the Yorkists in 1459." *English Historical Review* 26: 512-525.

Gross, A. 1996. *The Dissolution of the Lancastrian Kingship: Sir John Fortescue and the Crisis of Monarchy in Fifteenth-Century England*. Stamford: Paul Watkins.

Guy, J. 1986. “The King’s Council and Political Participation.” In *Reassessing the Henrician Age: Humanism, Politics and Reform, 1500-1550*, edited by A. Fox and J. Guy, 121-147. Oxford: Basil Blackwell.

Hanawalt, B. A. 1979. *Crime and Conflict in English Communities, 1300-1348*. Cambridge (MA): Harvard University Press.

Hanson, D. W. 1970. *From Kingdom to Commonwealth: The Development of Civic Consciousness in English Political Thought*. Cambridge (MA): Harvard University Press.

Harris, E. K. 2000. “Turning Adam’s Disobedience into Opportunity: the Acquisition of Property and Identity in Sir John Fortescue’s Theory of Natural Law.” *Florilegium* 17: 251-275.

Harriss, G. L. 1975. *King, Parliament, and Public Finance in Medieval England to 1369*. Oxford: Clarendon.

Hinton, R. W. 1960. “English Constitutional Doctrines from the Fifteenth Century to the Seventeenth. I: English Constitutional Theories from Sir John Fortescue to Sir John Eliot.” *English Historical Review* 75: 410-425.

Ives, E. W. 2005. “Fortescue, Sir John.” In *Oxford Dictionary of National Biography*, Oxford: Oxford University Press, https://doi.org/10.1093/ref:odnb/9944.

Kantorowicz, E. H. 1957. *The King’s Two Bodies: A Study in Mediaeval Political Theology*. Princeton: Princeton University Press.

Keaney, W. G. 1987. “Sir John Fortescue and the Politics of the Chain of Being.” In *Jacob’s Ladder and the Tree of Life: Concepts of Hierarchy and the Great Chain of Being,* edited by M. Leathers Kuntz and P. Grimley Kuntz, 221-237. New York-Frankfurt am Main: Peter Lang.

Keen, M. 2004. “Early Plantagenet History Through Late Medieval Eyes.” In *The Fifteenth Century – IV: Political Culture in Late Medieval Britain*, edited by L. Clark and C. Carpenter, 33-44. Woodbridge: The Boydell Press.

Kelly, M. R. L. 2014. “Sir John Fortescue and the Political Dominium. The People, the Common Weal, and the King.” In *Constitution and the Classics. Patterns of Constitutional Thought from Fortescue to Bentham*, edited by D. J. Galligan, 51-85. Oxford: Oxford University Press.

Kekewich, M. 1998. “Thou Shalt Be Under the Power of Man’: Sir John Fortescue and the Yorkist Succession.” *Nottingham Medieval Studies* 42: 188-230.

Kekewich, M. 2018. *Sir John Fortescue and the Governance of England.* Woodbridge: The Boydell Press.

Lacy, E. W. 1949. “The Relation of Property and Dominion to the Law of Nature.” *Speculum* 24: 407-409.

Lander, J. R. 1989. *The Limitations of English Monarchy in the Later Middle Ages*. Toronto: University Toronto Press.

Langholm, O. 1992. *Economics in the Medieval Schools: Wealth, Exchange, Value, Money and Usury according to the Paris Theological Tradition 1200-1350*. Leiden: E. J. Brill.

Lockwood, S. 1997. “Introduction.” In Sir John Fortescue, *On the Laws and Governance of England,* xv-xxxix. Cambridge: Cambridge University Press.

Lurie, G. “Sir John Fortescue’s Legal Prestige.” *History of Political Thought* 32: 293-315.

McIlwain, C. H. 1947. *Costitutionialism: Ancient and Modern*. New York: Cornell University Press.

Mosse, G. L. 1947. “Change and Continuity in the Tudor Constitution.” *Speculum* 22: 18-28.

Nederman, C. J. 1996. “Property and Protest: Political Theory and Subjective Rights in Fourteenth-Century England.” *The Review of Politics* 58: 323-344.

Nederman, C. J. 1987, “Aristotle as Authority: Alternative Aristotelian Sources of Late Medieval Political Theory.” *History of European Ideas* 8: 31-44.

Nederman, C. J. 2005. “Economic Nationalism and the ‘Spirit of Capitalism’: Civic Collectivism and National Wealth in the Thought of John Fortescue.” *History of Political Thought* 26: 266-283.

Osborne, T. M. Jr. 2000. “*Dominium regale et politicum*: Sir John Fortescue’s Response to the Problem of Tyranny as Presented by Thomas Aquinas and Ptolemy of Lucca.” *Mediaeval Studies* 62: 161-187.

Passerin d’Entrèves, A. 1926-27. “S. Tommaso e la costituzione inglese nell’opera di Sir John Fortescue.” *Atti della Reale Accademia delle Scienze di Torino* 62: 261-285.

Passerin d’Entrèves, A. 1951. *Natural law: An Introduction to Legal Philosophy*. London: Hutchinson’s University Library.

Pocock, J. G. A. 1975. *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition*. Princeton: Princeton University Press.

Pocock, J. G. A. 1985. *Virtue, Commerce, and History*. Cambridge: Cambridge University Press.

Schlatter, R. 1951. *Private Property: The History of an Idea*. London: George Allen.

Scordia, L. 2005. *“Le roi doit vivre du sien”: la théorie de l’impôt en France (XIII^{e}-XV^{e} siècles)*. Paris: Institut d’Études Augustiniennes.

Seipp, D. J. 1994. “The Concept of Property in the Early Common Law.” *Law and History Review* 12: 29-91.

Shepard, M. A. 1936. “The Political and Constitutional Theory of Sir John Fortescue.” In *Essays in History and Political Theory: In Honor of Charles Howard McIlwain,* edited by C. Wittke, 289-319. Cambridge (MA): Harvard University Press.

Simonetta, S. 2010. “‘Che il re viva del suo’. Il tema della *royal purveyance* nella trattatistica politica dell’Inghilterra tardomedievale.” In *I beni di questo mondo: Teorie etico-economiche nel laboratorio dell’Europa medievale,* edited by R. Lambertini and L. Sileo, 253-279. Porto: Fidem.

Simonetta, S. 2017. “*Ex fructibus eorum cognoscetis eos*. John Fortescue alle origini del comparativismo costituzionale e giuridico.” In *“Summa doctrina et certa experientia”*, edited by G. Zuccolin, 337-355. Firenze: SISMEL - Edizioni del Galluzzo.

Simonetta, S. 2019. “John Fortescue.” In *Encyclopedia of the Philosophy of Law and Social Philosophy,* edited by M. Sellers and S. Kirste. Springer: Dordrecht. https://doi.org/10.1007/978-94-007-6730-0_657-1

Starkey, D. 1986. “Which Age of Reform?.” In *Revolution Reassessed: Revisions in the History of Tudor Government and Administration,* edited by C. Coleman and D. Starkey, 13-27. Oxford: Clarendon Press.

Swanson, S. G. 1997. “The Medieval Foundations of John Locke’s Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity.” *History of Political Thought* 18: 399-459.

Wolffe, B. P. 1970. *The Crown Lands 1461 to 1536: An Aspect of Yorkist and Early Tudor Government*. London: George Allen.

Wolffe, B. P. 1971. *The Royal Demesne in English History: The Crown Estate in the Governance of the Realm from the Conquest to 1509*. London: George Allen.

Wood, D. 2004. *Medieval Economic Thought*. Cambridge: Cambridge University Press.

Wood, N. 1994. *Foundations of Political Economy: Some Early Tudor Views on State and Society*. Berkeley: University of California Press.