SIR JOHN FORTESCUE AND ENGLISH LAW

Sir John Fortescue (c.1394 – 1479) was a lawyer and senior judge, and the author of *De Laudibus Legum Angliae* (*Concerning the Praises of the Laws of England*) a treatise on English law. He was loyal to Henry VI during the Wars of the Roses, and went into exile as a result between 1463 and 1471. He wrote *De Laudibus Legum Angliae* for the instruction of Henry's young son Prince Edward. The *De Laudibus Legum Angliae* is proof that English nationalist sentiments were not just the product of ignorant xenophobia: Fortescue was a highly-educated man who lived in France for several years.

There are three sources of law – custom, statute law and the common law; and Fortescue explains why the English have the best in all three areas. He starts with custom, explaining that the customs of England are extremely ancient, and must be the best in the world, because they have survived so many changes of regime:

> The kingdom of England was first inhabited by Britons; then ruled by Romans, again by Britons, then possessed by Saxons, who changed its name from Britain to England. Then for a short time the kingdom was conquered by Danes, and again by Saxons, but finally by Normans, whose posterity hold the realm at the present time. And throughout the period of these nations and their kings, the realm has been continuously ruled by the same customs as it is .now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them.

Fortescue then takes a look at statute law, and explains that England is a limited monarchy, because the statutes are not made by the Emperor or Prince alone, as they are in countries where Roman law is adhered to, but are made by the monarch with the consent of Parliament.

> The statutes of the English are good. These, indeed, do not emanate from the will of the prince alone, as do the laws in kingdoms which are governed entirely regally, where so often statutes secure the advantage of their maker only. The statutes of England are made not only by the prince's will, but also by the assent of the whole realm, so they cannot be injurious to the people nor fail to secure their advantage. Furthermore, it must be supposed that they are necessarily replete with prudence and wisdom, since they are promulgated by the prudence not of one counsellor nor of a hundred only, but of more than three hundred chosen men, as those who know the form of the summons, the order, and the procedure of parliament can more clearly describe.

Lastly, Fortescue compares certain aspects of English common law and the Roman or 'civil' law which is used in France and elsewehere on the Continent, to show that the common law is superior. He starts with the fact that under the civil law, the method of proof is generally by reference to the evidence of two witnesses, but that it also relies on the use of torture, to extract a confession from the accused; and he condemns torture as totally wrong and un-English, using arguments which are still current today:

> [The law of France] prefers the accused to he racked with tortures until they themselves confess their guilt, than to proceed by the deposition of witnesses who are often instigated to perjury by wicked passions and sometimes by the subornation of evil persons, By such precaution and disingenuousness, criminals and suspected criminals are afflicted with so many kinds of tortures in that kingdom that the pen scorns to put them into writing, Some are stretched on racks, whereby their sinews are lacerated and their veins gush out streams of blood. The tendons and joints of some are sundered by divers suspended weights. The mouths of others are gagged open while such a torrent of water is poured in that it swells their bellies mountain-high, and then, being pierced with a spit or a similar sharp instrument, the belly spouts water through the hole, as a whale, when it has taken in the sea along with the herrings and other small fish of the sea, spouts water to the height of a plum tree. The pen, alas!, is ashamed to narrate the enormities of the tortures elaborated for this purpose. Their numerous variety can scarcely be noted on a large membrane; the civil laws themselves extort the truth by similar tortures in criminal cases where sufficient witnesses are lacking, and many realms do likewise. But who is so hardy that, having once passed through this atrocious torment, would not rather, though innocent, confess to every kind of crime, than submit again to the agony of torture already suffered, and prefer to die once, if only death be the end of terrors, than to die so many times and to suffer hellish torments more bitter than death?

The English common law system does not use torture, either in criminal cases or in civil. Rather, it relies on juries, as it still does in serious criminal cases. Fortescue is very clear that the jury system is far better than the testimony of two witnesses only, whether this is supported by the use of torture or not. There are elaborate rules designed to ensure the impartiality and incorruptibility of the jury, and therefore ensure justice for the defendant; and Fortescue devotes three whole chapters of his treatise to them; but one could almost write the conclusion for him: English is best

> Twelve good and lawful men having at length been sworn in the form aforesaid, and having as aforesaid sufficient possessions over and above moveables with which to maintain their status, neither suspected by nor hostile to either party, but neighbours to them, the whole record and process of the plea pending between the parties shall be read to them by the court in English, and the issue of the plea, the truth of which they are to certify to the court, shall be clearly explained to them. Thereupon, each party shall declare in the presence of the court, either by himself or by his counsel, and explain to these jurors all and singular of the matters and evidence which he believes may show them the truth of the issue in question. And then either party may produce before the justices and jurors all and singular witnesses whom he desires to produce for his own case. These witnesses, charged by the justices, shall testify on the holy evangels of God all they know concerning the truth of the issue about which the parties contend. And, if need be, the witnesses shall he separated until they have deposed all they wish, so that the evidence of one of them shall not iustruct or induce another to testify in the same manner. All this having been done, the jurors shall then confer together at their pleasure as to the truth of the issue, deliberating as much as they wish in the custody of the officers of the court, in a place assigned to them for the purpose, lest in the meantime anyone should suborn them; they shall return into court, and certify to the justices the truth of the issue thus joined, in the presence of the parties, if they desire to be present, particularly the plaintiff.The decision of the jurors is called by the laws of England "verdict"; and then according to the tenor of the verdict the justices shall render and formulate their judgement.

So far, Fortescue's explanation of the superiority of England is confined to the law and the legal system; but in explaining the merits of trial by jury, he sings a full hymn of praise to England and the English in general, addressed to Prince Edward, who can scarcely remember the home country:

> You were a youth when you left England, prince, so that the nature and quality of that land are unknown to you; if you had known them, and had compared the products and character of other countries with them, you would not wonder at those things that puzzle you now. England is indeed so fertile that, compared area to area, it surpasses almost all other lands in the abundance of its produce; it is productive of its own accord, scarcely aided by man's labour. For its fields, plains, glades, and groves abound in vegetation with such richness that they often yield more fruits to their owners uncultivated than ploughed lands, though those are very fertile in crops and corn.
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> Moreover, in that land, pastures are enclosed with ditches and hedges planted over with trees, by which the flocks

and herds are protected from the wind and the sun's heat; most of them are irrigated, so that the animals, shut in their pens, do not need watching by day or by night. For in that land there are neither wolves, bears, nor lions, so the sheep lie by night in the fields without guard in their cotes and folds, whereby their lands are fertilised.

Hence, the men of that land are not very much burdened with the sweat of labour, so that they live with more spirit, as the ancient fathers did, who preferred to tend flocks rather than to distract their peace of mind with the cares of agriculture.

For this reason the men of that land are made more apt and disposed to investigate causes which require searching examination than men who, immersed in agricultural work, have contracted a rusticity of mind from familiarity with the soil. Again, that land is so well stocked and replete with possessors of land and fields that in it no hamlet, however small, can be found in which there is no knight, esquire, or householder of the sort commonly called a franklin, well-off in possessions; nor numerous other free tenants, and many yeomen, sufficient in patrimony to make a jury in the form described above.

Furthermore, there are various yeomen in that country who can spend more than £100 a year, so that juries in that country are often made up, especially in important causes, of knights, esquires, and others, whose possessions exceed £333 6s 8d a year in total. Hence it is unthinkable that such men could be suborned or be willing to perjure themselves, not only because of their fear of God, but also because of their honour, and the scandal which would ensue, and because of the harm they would do their heirs through their infamy.

So, the reason for the difference between the English and other systems of law, French in particular, is to be found in economic and social conditions. In England, these conditions produce in a sufficient number of prosperous and intelligent yeomen 'capable of jury service, whereas in France and other countries, poverty and oppression prevent the emergence of the men required,

Not any other kingdoms of theworld, O king's son, are disposed and inhabited like this. For, although in them are men of great power, great wealth and possessions, yet not one of them lives close to another, as so many do in England, nor does so great an abundance of heirs and possessors of lands exist as is to be found there. For in those other countries in scarcely a single village can one man be found sufficient in his patrimony to serve on a jury. For, outside cities and walled towns, it is rare for any except nobles to be found who are possessors of fields or other immovables. There, again, the

> nobles do not have an abunsance of pastures, and it is not compatible with their status to cultivate vineyards or to put hand to a plough, though the substance of their possessions consists in vineyards and arable, except only meadows adjoining large rivers and woods, the pasture of which is common to their tenants and neighbours. How, then, can a jury he made up in such regions from among twelve honest men of the neighbollrhood where the fact is brought into trial, when those who are divided by such great distance cannot be deemed neighbours? Indeed, the twelve jurors there will be very remote from the fact, after the accused in those regions has challenged, without cause shown, the thirty-five nearer ones. Thus it would be necessary in those countries to make a jury either of persons remote from the fact in dispute, who do not know the truth about it, or of paupers who have neither shame of being nfamous nor fear of the loss of their goods, since they have none, and are also blinded by rustic ignorance so that they cannot clearly perceive the truth.

A word of warning here. Before we are totally carred away by Sir John's eloquence – and he was after all a barrister, well used to pleading a case or cause – we should remember that this system of law is the same which appears in the pages of the Paston Letters; and those letters, which span almost the whole of the late 15th century, tell a story of endemic injustice, where juries are routinely packed, verdicts do not reflect the evidence, and when it is delivered, justice is repeatedly overturned by resort to main force. In the world of the Pastons, the powerful get their way by hook or by crook. War-war frequently triumphs over jaw-jaw.