

**Judging Female Judges: Sir John Fortescue's
Vision of Women as Judges in *De Natura
Legis Naturae***

Emma Hawkes

The fifteenth-century English legal commentary, De Natura Legis Naturae, is probably the most obscure of Sir John Fortescue's renowned writings. Fortescue's text examines female authority more explicitly than his other writings, there has, however, been an almost complete absence of feminist analysis of his thoughts on female judges. Fortescue draws on fifteenth-century ideas of public and private spheres to support his contention that female judges were usually, but not invariably, undesirable. This article maintains that despite Fortescue's reluctance to support the concept of female judges, a tension existed in his argument in that traditionally the figure of Justitia, in Northern European art, was depicted as female.

In the rules of the lawe thus it is written: Women are removed frome all civile and publicke office, so that they nether may be iudges, nether may they occupie the place of the magistrate, nether yet may they be speakers for others.¹

Women could not act as judges in the higher courts of the common law, equity or ecclesiastical jurisdictions of fifteenth-century England. Despite this, a fifteenth-century legal theorist, Sir John Fortescue, entertained the possibility of female judges. In this work I explore his conceptions of women as judges, as givers of justice. I examine Fortescue's *De Natura Legis Naturae*, a late-medieval legal text which considered the possibility that a woman could act as the supreme judge in the network of English common law courts.

This article begins with a brief description of the conditions under which Fortescue wrote *De Natura Legis Naturae* and its importance as a unique fifteenth-century exploration of women as judges. As Fortescue structured this text as a debate so he could argue both for and against female judges, these detailed, and sometimes contradictory, visions of female judges are next explored in detail. I am interested in these 'myths' of fifteenth-century legal doctrine.² In particular, a close examination is made of Fortescue's remarkable discussion of widowed gentlewomen as judges in local, manorial courts as this issue highlighted the contradictions inherent in his arguments. This tension in Fortescue's work allows insight into his understandings of femininity, masculinity, rationality, judgment and the public sphere. Finally, I conclude by outlining the ways in which the figure of *Justitia*, the symbol of justice, was defined in Fortescue's work and by suggesting how women were imagined as judges in the fifteenth century.

Context of De Natura Legis Naturae

Fortescue wrote *De Natura Legis Naturae* between 1461 and 1463 as Lancastrian propaganda. Fortescue was Henry VI's chief apologist during the Wars of the Roses. Having been made Chief Justice of King's Bench in Henry's reign, Fortescue went into exile with the king after 1461. In this period Fortescue tutored Prince Edward and also produced scholarly works rehearsing the Lancastrian claim to the throne. Only after the failure of the Lancastrian cause in 1471 did Fortescue recant and produce for Edward IV a work supporting the Yorkists.

While Fortescue's other pro-Lancastrian works discussed the rival claims of the contenders in the Wars of the Roses, *De Natura Legis Naturae* was a more abstract work. The text took the form of a mock trial before a divine and wise judge considering the claims of a brother, a daughter and a grandson through the female line to inherit the crown. Fortescue had the figure of a supreme judge conclude that the woman could not rule because she could not adequately fulfil the duties of the crown, notably the duty to give justice. This work served as Lancastrian propaganda, as it implicitly denied the Yorkist claim, relying, as it did, on a double female descent.

This approach to the inheritance debate meant that Fortescue also articulated a detailed and sometimes contradictory description of women as judges which drew on contemporary Biblical, moral and legal thought. Fortescue described the regal duties as

'repress[ing] the bad with the sword, and ... defend[ing] and cherish[ing] the good; so that [the king] hath the duty not only of fighting, but also of judging'.³ Fortescue quoted I Samuel 8: 20 approvingly: 'Our king shall judge us, and go out before us, and fight our battles for us.' ... Behold, therefore, to fight and to judge are the duties of a king!⁴ So when Fortescue discussed the status of female rulers, he explicitly considered women as fighters and judges; even when he wrote generally about female rulers, his comments were based on this definition.⁵

As the most abstract of Fortescue's works, *De Natura Legis Naturae* has attracted virtually no academic study.⁶ While Fortescue has received some historical criticism, attention has mostly focused on the more famous *De Laudibus Legum Angliae* and on the purely political and constitutional aspects of his thought. *De Natura Legis Naturae* is, however, a unique document and Fortescue's discussion of women judges offers insight into fifteenth-century conceptions of masculinity, femininity and the law.

Arguments of De Natura Legis Naturae

Fortescue's arguments in *De Natura Legis Naturae* can be contextualised in late-medieval legal and political thought. Much of Fortescue's work was traditional, drawing on existing medieval scholarly and Biblical authorities to argue that women were unfitted for judicial office, but he also outlined some rarely noted exceptions to this rule, describing the role of women in the administration of justice in manorial courts. In both the sections which echoed accepted beliefs about women's inability to act as judges and the more unusual sections in which he depicted gentlewomen as the heads of manorial courts, Fortescue constructed a discourse about female judges. My aim is to explore these bodies of beliefs about the nature of judges, masculinity and femininity, and in particular to consider how Fortescue's vision of women as subordinate and irrational creatures suited to work in the private sphere meant that they were, on the whole, ontologically unsuited to work as judges. I am interested in the points in *De Natura Legis Naturae* at which Fortescue's discourse of the law was strained and he was forced to admit that there were exceptions to his neatly constructed vision of justice in late-medieval England.⁷

Fortescue used the figures of both the son and the brother to argue that there were no Biblical examples of female rulers,⁸ that women had been subordinated since the creation of Adam and Eve,⁹ and that women could not rule independently because to do so

would be to violate their inferior status as it would mean giving orders to and judgments over men.¹⁰ Fortescue had the daughter attempt to rebut these claims by arguing that these Biblical provisions applied only to married women and that they were introduced only after the Fall, suggesting that prior to this women and men had been equals.¹¹ The son replied that the subordination of women dated to before the Fall and encompassed all women, asking, '[h]ave we not shown that at the very beginning of the existence of the human race the female sex was fashioned in subjection to the male?'¹² This stance echoed contemporary legal pronouncements on the status of women. For example, the *Mirror of Justices*, which was compiled under Edward I and circulated in legal circles in the fourteenth and fifteenth centuries, called on Biblical authority to assert that

[a]ll save those forbidden by law can be judges.
The law forbids women to act as judges ... For
God himself when on earth held a consistory
[court] wherein a woman who was a sinner was
to be adjudged to death ...¹³

Women's limited legal statuses reflected their subordination by God's plan. Women were created as inferiors to men and thus could not rule over them; certainly, they could not give judgment on them. Fortescue's divine judge, the ultimate authority in the fictive world of *De Natura Legis Naturae*, concluded that '[t]he male sex was made superior to the female in all that kind of moral virtue by which the world is ruled and its peace preserved'.¹⁴

Fortescue then had the characters of the son, grandson and daughter call on natural law in their debate about why women were incapable of acting as judges.¹⁵ Within the natural law framework God's will could be deduced through reason, and thus the physical condition of each entity expressed its inner qualities. So Fortescue had the son and the brother argue that the status of women was inferior to that of men because they were physically smaller and weaker:

So that there is no living animal, bird, or fish
which doth not by its organs, form, or powers
signify the office for which nature created it:
who, as [Aristotle] says ... gives to every animal
members adapted to the work for which she
designed it ... Wherefore, seeing that those other

members in women are smaller and less efficient
that those of men, the bodily organs and powers
of women manifestly prove them to be formed
for lesser and inferior duties than men.¹⁶

These arguments were based on the Aristotelian position that 'a woman is as it were an infertile male'.¹⁷ Since women were 'mulcted male[s]' (*mas occasionatus*), as 'deficient in [their] physical framework' as they were in their 'reason',¹⁸ they were unsuited for fighting or giving judgment:

Is then a woman able to exercise that office, or is
the female sex equal to such duties? For fighting
is the greatest of all the actions of man's body,
and judging is the loftiest operation of his spirit.
For the performance of the greatest actions of
the body nature has adapted the limbs of men,
which she has made of larger size and greater
strength than the corresponding limbs of
women; and for the greatest achievements of the
spirit nature has given to man a perfect reason,
in respect of which she has made the woman
the weaker vessel.¹⁹

The inferior nature of women not only subordinated them to men, it also prevented them from exercising judgment since this required reasoning faculties which women lacked.²⁰

Fortescue frequently referred to the inherently irrational nature of women, contrasting them with men whose 'rational minds' put them in dominion over creation and over women.²¹ He used the figure of the ideal judge to cite two authorities on this issue, both of whom argued that women lacked rationality or had, at most, an inferior form of rationality to that of men:

St Augustine also ... says, that the woman ought
to be subject to the man, as the flesh is to the
spirit; ... in which sentences the pre-eminence
of the man over the woman seems to be
compared to the pre-eminence of the reasoning
faculties over the sensual appetites, or of the soul
over the flesh. But the Master himself, not only
in the said Book, but also on St Paul's 1st Epistle

to the Corinthians, chap. xi., when treating of this subject, seems to compare the higher part of the reason to man, and the lower part to woman.²²

This argument fitted into the mainstream of late-medieval scholastic thought. St Thomas Aquinas concluded that women's innate irrationality meant that they inevitably should be subordinated to men:²³ 'Such is the subjection in which woman is by nature subordinate to man, because the power of rational discernment is by nature stronger in man'.²⁴ A medieval description of the ages of man associated the quality of reason with men, noting that they became more 'reasonable ... firm and stable ... in middle age'²⁵ while women were not 'as stable as men'.²⁶ John Trevisa wrote in his translation of *De Proprietatibus Rerum* that the

condiciouns of man and womman bee[th] diuers
in discrecioun of witte. For in alle kynde of
beestis [th]e male is more crafty and war[y]
[th]an [th]e femel ... [th]erfore a man passi[th] a
womman in resoun, in scharpnes of wit and
vnderstandinge.²⁷

Christopher St German, an early sixteenth-century legal theorist who drew on Fortescue's work, stated that Adam, though not Eve, was given 'the iye of reason whereby he knows things invisible and divine'.²⁸ The belief that women were inherently less rational than men meant that they could not be envisioned as giving legal judgment, work which required fine reasoning and discernment:

[N]ature has not made them sagacious like men.
And for this reason they cannot act as judges,
since of all things human the judicial function
requires the most discernment. From a
consideration of these things lawgivers have not
suffered women to be judges, nor to hold a
public magisterial office.²⁹

This line was followed throughout the bulk of *De Natura Legis Naturae*, but Fortescue used the figure of the daughter to tentatively suggest that women could sometimes act as judges. The daughter argued that women could rule if they used 'sufficient deputies' to

'give judicial sentences'.³⁰ Further, she pointed out that women were no less incapable than infirm men or boys, an argument which was particularly relevant in the troubled reign of Henry VI:

[I]t would ... follow that infants, decrepit old men, and men wasting under severe disease should be rejected from the summit of dominion, since they too have not the power of waging war and giving judicial decisions, like men of unbroken health and in the prime of life.³¹

Interestingly, these same arguments were taken up by John Aylmer in the debate about the succession of Elizabeth I.³² Defending Elizabeth against John Knox's suggestion that she could not give legal judgments, Aylmer pointed out that some male rulers suffered from weakness – he noted the 'tenderness of age' of Edward VI³³ – and argued that all rulers relied on legal advisors:³⁴

Nowe what unhablenes is in a woman for the
ministring of lawes? She knoweth not the lawes,
no more doth your kyng. She sitteth not in
iudgement, howe oft doth your kyng?³⁵

However, Knox felt compelled to add reassuringly that statutes would still be made in parliament and that the legal judgments would rest in the hands of the '12 menues' of the juries.³⁶ Similarly, Fortescue maintained a fundamental belief that women could not give judgment competently and he stated that 'nature makes a woman unwilling to repress with the sword the audacity of men, or to adjudge criminals to death, according to their deserts; and yet nothing is more incumbent on the regal office than these acts'.³⁷ The intersection of beliefs about the subordination of women and their lack of reason made it difficult to envision female judges.

Despite this, Fortescue acknowledged that there was one exception to the general rule that women could not give judgment: widows were able to act as lords of manorial courts.³⁸ He had all the characters in *De Natura Legis Naturae* agree unanimously that 'nature ... does not forbid women to succeed to Dukes, Marquises, and Earls ... or to rule the men of their domains'.³⁹ Tenurial rights meant that the gentry, as owners of manors, had the roles of givers of justice in the local courts for their tenants, so wealthy widows who held manors controlled such manorial courts. These courts had originally

claimed jurisdiction over local land squabbles, debt, contract and minor trespasses, but by the fifteenth century their jurisdiction was greatly reduced. Civil litigation was limited to cases involving less than the forty shillings set by the 1278 Statute of Gloucester and inflation had eroded this jurisdiction to a small number of petty cases. They were the lowest level of courts, offering judgments based on customary and common law to the tenants of particular manors.

Nevertheless, owning manorial lands and serving as the givers of justice in the manorial courts were socially significant acts.⁴⁰ Fortescue acknowledged that widowed gentlewomen, like gentlemen, could assert their position by controlling manorial courts. This process can be seen in action in a letter sent to the widowed Isabel Plumpton in the 1550s which told her that 'your cort' had been kept at Sacombe 'according to your commaundment'. The writer, her nephew Robert Girlington, went on to say, '[a]nd I desire [you] to let me know how you will have your corts ordered, whether you will have them kept one or tow times in the yeare ... and I according to your commaundement therein I should doe'.⁴¹ Although it could be argued that this passage indicates that Isabel merely decided how often the court would meet, I would suggest that it implies a more active role for her as in 'commaund[ing]' how justice was to be given in the court.

Christine de Pisan, one of the few other fifteenth-century writers to portray women as heads of manorial courts, stressed the flair with which women carried out their judicial duties. She wrote in *The Treasure of the City of Ladies* that newly widowed women 'will immediately summon [their] principal men and also all the officers and bailiffs of her lordships ... They must particularly see to it that justice is well observed or otherwise [the widows] will remove them and punish them'.⁴² In *The Book of the City of Ladies*, she argued even more explicitly that women capably ran manorial courts.

I could tell you much about other ladies of France who, as widows, governed themselves and their jurisdictions with fairness and justice ... I assure you that the same can be said of a great many women, whether from the upper, middle, or lower class, who, as anyone who wishes to pay attention can clearly see, have maintained and maintain their dominions in as good condition as did their husbands during their lifetime and who are as well-loved by their

subjects. There are better examples, too, for there can be no doubt – no offence to men, certainly – that although there are ignorant women, there are many women who have better minds and a more active sense of prudence and judgment than most men – isn't it so? – and if their husbands would believe them or would have equal sense, it would be a great boon and profit for them.⁴³

Christine de Pisan's description of female judges stemmed from her own wish to assert women's intellectual competence. She claimed that women understood and could enact the law:

But if anyone maintained that women do not possess enough understanding to learn the laws, the opposite is obvious from the proof afforded by experience, which is manifest and has been manifested in many women.⁴⁴

Fortescue's acknowledgment that justice was given in the names of women in the manorial courts did not lead him to similar conclusions. Rather, Fortescue's description of gentle widows as the heads of manorial courts was a point of tension in *De Natura Legis Naturae*, a point where his assumptions about femininity, masculinity and the giving of judgment contradicted each other. On one hand, Fortescue argued consistently that women were constitutionally unsuited for the giving of justice. On the other, he had to point out that in certain circumstances women could act as judges, work which he had stated they were inherently unable to undertake. Fortescue attempted to resolve this contradiction by maintaining a distinction between judging in manorial courts and judging in higher common law courts, claiming that the former were private jurisdictions arising from the regulation of individual manors while the latter were public jurisdictions linked to kingship.

At the beginning of the debate proper in *De Natura Legis Naturae* Fortescue made a careful distinction between the inheritance of private property (such as lands which might come with attached local courts) and the inheritance of public office (such as a kingdom with its attendant judicial system) and argued explicitly that women could inherit only the private possessions of their fathers. Fortescue had the figure of the son note that '[p]ublic and private duty ... are

not governed by the same law, nor do an inheritance and the conferring of an office fall under the same principle of law'.⁴⁵ Using the example of Zelophehad's daughters, Fortescue acknowledged that women could inherit private property from their fathers but argued that they could not inherit a kingdom.⁴⁶ Fortescue thus made a distinction between manorial courts which were incidents arising from the possession of private property and the higher common law courts which were ultimately headed by the king.

On one hand, Fortescue acknowledged in an uncontested section of *De Natura Legis Naturae* that women could head manorial courts. 'No one ever doubted that women of rank possessing great domains, and other women also, often govern men.'⁴⁷ On the other, throughout the whole of *De Natura Legis Naturae* he limited their authority to the household and stressed that they could act only within a wider patriarchal framework:

Thus a mother governs her son, a matron her house, and an industrious wife the household of her husband. For the law of nature does not prohibit such women as are subject to men from ruling men; nor is this contradicted by our discussion, which will only decide concerning supreme government.⁴⁸

Women's judicial activities in the manorial courts which were attached to their lands were, in a sense, an extension of their management of households. Women could control the courts only at the very lowest level and under the ultimate supervision of men. In this context, work in the manorial courts was a form of the 'internal business of the family'⁴⁹ rather than 'the discharge of higher and public offices' which was 'fit for men alone'.⁵⁰

The distinction between public and private realms was, of course, a common trope of late-medieval thought.⁵¹ The enormously popular *Dives and Pauper* noted that women were associated with the private sphere. 'As [th]e sonne schynyng illumynyth [th]e world in [th]e hei[th]e of [th]e day, so [th]e bewte of a good woman is in confort & aray of hyr houshold.'⁵² Ptolomy of Lucca, writing around 1300, used a historical example to argue for a division of interests between men and women:

Just as offices are distinct in political affairs, so also in matters of household management, so

that the paterfamilias attends to outside affairs and women to the internal acts of the household. Here we can make an analogy to the Roman Republic, which, as the histories tell us, had two consuls: one attended to matters of war, the other exercised governance over the Republic.⁵³

Fortescue's ideal judge ultimately concluded that women's duties could exist only within the private sphere, that they had to be 'of a household and domestic nature only'.⁵⁴ He used a biological metaphor to naturalise the differing spheres of activity suitable for men and women:

Nature disposes greyhounds for the fields and the pursuit of hares, but cats for staying at home to catch mice. It is a shame, as though a man should hunt game with cats, to draw away from home, for the purpose of governing nations, the woman whom nature has fitted for domestic duties.⁵⁵

Fortescue's conceptions of public and private spheres were, of course, based on different beliefs to those underpinning twentieth-century views of a public/private division. Katherine O'Donovan, a contemporary feminist legal theorist, offers a tentative definition of these terms which can be compared with Fortescue's:

"Public" may be used to denote state activity, the values of the market-place, work, the male domain or that sphere of activity which is regulated by law. "Private" may denote civil society, the values of family, intimacy, the personal life, home, women's domain or behaviour unregulated by law.⁵⁶

In the fifteenth century the market-place was not separate from the household; rather, work took place in the household.⁵⁷ The state scarcely existed as an administrative unit except, of course, for the household of the king.⁵⁸ The household was a space in which behaviour was relatively unsupervised by legal officers, but it was not entirely 'unregulated by law'. Indeed, for those members of the gentry owning manors, manorial courts could be adjuncts to their

households and justice could be given in the local villages in their names.

It is, perhaps, more useful to consider the Aristotelian divisions of household, town and kingdom which Fortescue drew on. Within this framework, there was a division between the *polis* or public sphere and the *oikos* or household.⁵⁹ In one realm free men ruled, fought and gave judgment; in the other, women, children and slaves lived under the rule of patriarchs. Fortescue called on this tradition when he wrote of the 'household subjection' of women.

[H]e declares the woman to be by nature subject to the man, says that she is put under him in the way of household (*yconomica*) subjection; and thus her whole duty is considered to be of a household and domestic nature only, especially as nature has not provided her with appliances suited to other purposes.⁶⁰

There was, however, a crucial difference between Fortescue's description of justice giving in fifteenth-century England and Aristotle's political theory: the feudal system of land tenure practised in medieval Europe meant that justice was administered in manorial courts on privately held lands. As a result, women, who were associated with the household, were sometimes in a position to head the courts.

It could be argued, then, that Fortescue's definitions of public and private spheres were distinguished by degree and not by kind. He thought of the public sphere as consisting of the official duties of the king: warfare and the giving of justice in the common law and equity courts. The private sphere was equated with the household and with the administration of inherited property. While men headed such households, women were seen as particularly suited for domestic activity. In the absence of their husbands, widows could extend their household duties to include the giving of justice within the household and in the attached courts. Fortescue's depictions of public and private areas underpinned his consideration of women as judges and implied that women could undertake legal work within the domestic sphere.

These beliefs about women as judges were discussed both explicitly and implicitly throughout *De Natura Legis Naturae*. When this legal discourse is examined, Fortescue's assumptions about what was natural, acceptable, licit and honourable (and, conversely,

unnatural, unacceptable, illicit and dishonourable) are exposed.⁶¹ Fortescue accepted a cluster of beliefs about masculinity and femininity which meant that he could not see women fulfilling the regal duty of giving judgment. He saw women as inferior to men and subordinated to them by divine plan. Likewise, women were perceived as inherently irrational and frivolous creatures who lacked the critical abilities necessary to act as judges. Finally, women were associated with the private sphere, with the household, an area which was, in general, removed from the administration of the law. Within this framework, it was unnatural and unusual for women to act as judges.

On the other hand, Fortescue's writings also highlighted the contradictions in these beliefs. Although women rarely acted as judges and certainly never sat in the chief Westminster common law and equity courts, Fortescue accepted that justice was given in the names of some women in manorial courts. According to Fortescue, women belonged in the household and thus were appropriate persons to give justice in the absence of their husbands. Since the manorial courts were the lowest forms of common law courts, they only judged their tenants and there were courts of appeal above them. In this way, women owning manorial courts remained under nominal male supervision and the structures of late-medieval English society were able to accommodate female judges.

Justitia in De Natura Legis Naturae

While a handful of exceptional female judges worked in the lowest level of courts, *Justitia*, the symbol of the law and the giving of judgment, was present in every court. Male judges worked within a field which was allegorically presented as female. Medieval allegorical writing and artwork – including the artwork displayed in halls of justice – presented justice as a woman with a sword, horn and scales.⁶² Even representations of the Last Judgment which showed the ultimate patriarch, God, judging all souls, sometimes included Mary acting as a petitioner or legal counselor.⁶³ Justice was a feminine virtue, even though judgments were given by men. Fortescue noted this contradiction in *De Natura Legis Naturae* when he described the ideal judge, his final authority, as female:

Justice is also a judge, for a judge is so named from pronouncing judgment (*Judex quasi jus dicens*), and she pronounces judgment, since, as the Laws say generally, judgment is given by

her; she is indeed herself the judge of all human actions, so constituted by the Supreme and Almighty Lord ... Nor is it any obstacle to her power that women are by law excluded from the judicial office; for although the word justice (*justitia*) be of the feminine gender, she herself is not a woman, nor of the female sex; for sex hath no place in virtues any more than in spirits.⁶⁴

Fortescue followed a traditional line when he argued that the symbolism used to express the virtues stemmed only from the historical accident that the names of the virtues were feminine in grammatical gender in Latin and Greek.⁶⁵ Yet it is difficult to believe that the symbols were not read in gendered ways when they were consistently shown in embodied forms.⁶⁶

Fortescue did not give a detailed description of the physical appearance of *Justitia* in *De Natura Legis Naturae*, other than to note that she was 'seated in a place assigned as judgment-seat'.⁶⁷ This is an interesting omission, as contemporary literature emphasised the iconographic significance of the figure of Justice. Christine de Pisan's *Book of the City of Ladies*, for instance, began with a description of the virtues, including Justice who held a vessel as the symbol of distributive justice:

This vessel of fine gold which you see me hold
in my right hand, made like a generous measure,
God, my Father, gave me, and it serves to
measure, each his rightful portion. It carries the
sign of the fleur-de-lis of the Trinity, and in all
portions it measures true, nor can any man
complain about my measure.⁶⁸

Others emphasised the sword and rods, symbols of retributive justice.⁶⁹ The tapestries of Hampton Court, woven around 1500, for instance, showed Justice as a female figure rushing at *Homo* (humanity) with a drawn sword before she was caught by Mercy.⁷⁰ A mock debate published in Italy in 1490 demonstrated the variety of ways in which Justice could be depicted (with one arm, with one eye, with a wax nose, covered in ears, holding a sword, holding a lead rule, seated or standing).⁷¹ The only constant element was that justice was always to be shown as a woman.

It is perhaps for this reason that Fortescue did not describe *Justitia* in detail. There was some tension and contradiction in having Justice, depicted as a woman, giving judgment that women could not rule or act as judges. While Fortescue glossed over the appearance of Justice, he did describe her qualities. She was addressed as learned, upright, pious, wise and righteous.⁷² She was, above all, knowing. At one point the son was depicted as addressing Justice, the divine judge, directly 'with a modest air'.⁷³

These things now, out of all that has been already
shown, we have brought together, as it were, into
a heap, not to instruct thee, the wisest of Judges,
to whom nothing is unknown, but that they may
become perfectly evident to my mother, who,
as we before suspected, knew not the truth of
the law ...⁷⁴

The figure of the brother was used to further define this judicial knowledge as a masculine quality:

O most learned of Judges, who, like a man,
explorest the hidden things of the Divine
counsels, whence it belongs to thy virtue to
unfold Divine as well as human reason in
this dispute.⁷⁵

On the other hand, Fortescue also hinted at a special feminine form of judicial knowledge in *De Natura Legis Naturae*.⁷⁶ He had the daughter call on the ideal judge for attention, 'breaking out of sobs into a voice mingled with sighs':⁷⁷

For thy understanding is not like man's; for thou
dost detect at the first glance the crafty devices
of all who deviate from the truth ... there is even
a proverb which says, "A man may not teach
Minerva".⁷⁸

These petitions to the divine judge were moments of particular awkwardness in *De Natura Legis Naturae* because they were points at which the gender of the judge was acknowledged. The judge was otherwise rarely directly addressed, and the tricky question of her gender was thus avoided. At these points in the text the

construction of judging as a masculine undertaking was directly contrasted with the feminine nature of *Justitia*, and in this way *De Natura Legis Naturae* hesitantly admitted the possibility of female judges.

Conclusions

Fortescue aimed to prove in *De Natura Legis Naturae* that women could neither judge nor rule competently. In the 1470s he described the work as a text written 'to enforce [his] intent ... that no woman ought sovrantly or supremely to reynge upon man'.⁷⁹ However, the text he produced was not an entirely unequivocal condemnation of female judges. Fortescue admitted that in exceptional circumstances some women could head manorial courts, and he conceded that the qualities associated with femininity could sometimes bring women to the courts.

Fortescue called on both Biblical and natural law authorities to present women as subordinate, irrational and private creatures, but even this damning depiction did not entirely rule out the possibility of envisioning women as judges. Fortescue argued that the subordinate, unreasonable nature of women meant that they were less suited for giving judgment than superior, reasonable men, but he conceded that women's association with the private sphere could sometimes qualify them for work as judges. Although Fortescue accepted that women belonged in the private sphere, he concluded that the private realm could sometimes stretch to include courts. The web of beliefs about women and judgment could, then, be pulled apart at this point and some of the inconsistencies of these assumptions were explored in *De Natura Legis Naturae*.

These inconsistencies and tensions were even more apparent in Fortescue's depiction of *Justitia*. Although Fortescue claimed women were too irrational to act as judges, he accepted that *Justitia*, the symbol of justice, was feminine. While Fortescue denied that the quality of justice had a sex, his own language was gendered. Throughout the bulk of *De Natura Legis Naturae* he described *Justitia* with adjectives which were grammatically feminine (*judicum prudentissima*) but in the conclusion, where he had the judge speak, he used the word *Judex*, a noun which is grammatically masculine.⁸⁰ Fortescue was unable to resolve the inconsistencies in his depiction of *Justitia*. These tensions remain one of the most interesting aspects of *De Natura Legis Naturae*, because Fortescue's condemnation of female judges was undermined by the language and symbolism of justice.

In *De Natura Legis Naturae* women were particularly prominent as judges at the points where exceptions to general rules were made, where the contradictions of legal theory were made apparent. Thus female judges were found in the manorial courts, areas where their 'commaundment'⁸¹ could be given and their 'great understanding'⁸² could be displayed. And above all, *Justitia*, the majestic female figure of justice, overshadowed all legal acts and the undertakings of all the courts in fifteenth-century England. 'Justice [was] also a judge' although 'women [were] by law excluded from the judicial office'.⁸³

Notes

¹John Knox, *The First Blast of the Trumpet Against the Monstrous Regiment of Women* (1570), The English Experience, Walter J. Johnson, Amsterdam, 1972, p.B3.

²Peter Goodrich, 'Gynaetopia: Feminine Genealogies of Common Law', *Journal of Law and Society*, vol. 20, no. 3, 1993, p.281.

³John Fortescue, *De Natura Legis Naturae*, Garland Publishing, New York, 1980, p.258. I have modernised the spelling of this edition, turning f into s, i into j, and v into u in accordance with twentieth-century principles.

⁴*ibid.*

⁵This was a widely accepted definition. John of Salisbury, *Policraticus* (Cary J. Nederman, ed.), Cambridge University Press, Cambridge, 1990, p.104; James of Viterbo, *De Regimine Christiano: On Christian Government*, (R.W. Dyson, ed.), Boydell Press, Suffolk, 1995, p.75.

⁶Despite Fortescue's importance as a fifteenth-century English legal writer, there has been very little analysis of his work and almost no feminist consideration of his writing. S.B. Chrimes, 'Sir John Fortescue and His Theory of Dominion', *Transactions of the Royal Historical Society*, vol. 17, 1934, p.117; Sir John Fortescue, *De Laudibus Legum Angliae*, (S.B. Chrimes, ed.), Cambridge University Press, Cambridge, 1942; Paul E. Gill, 'Politics and Propaganda: The Polemical Writings of Sir John Fortescue', *Speculum*, vol. 46, 1971, p.333; J.H. Burns, 'Fortescue and the Political Theory of Dominion', *Historical Journal*, vol. 28, 1985, p.777; Norman Doe, 'Fifteenth-century Concepts of Law: Fortescue and Pecoek', *History of Political Thought*, vol. 10, 1989, p.65; Sir John Fortescue, *On the Laws and Governance of England*, (Shelley Lockwood, ed.), Cambridge University Press, Cambridge, 1997; James H. Landman, 'The Doom of Resoun': Accommodating Lay Interpretation in Late Medieval England', in Barbara A. Hanawalt & David Wallace (eds), *Medieval Crime and Social Control*, University of Minnesota Press, London, pp.90-123.

⁷Zillah R. Eisenstein, *The Female Body and the Law*, University of California Press, London, 1988, p.43.

⁸Fortescue, *De Natura Legis Naturae*, pp.254-255.

⁹*ibid.*, pp.269-288.

¹⁰*ibid.*, p.280.

¹¹*ibid.*, pp.300-301.

¹²*ibid.*, p.304.

¹³William Joseph Whittaker (ed.), *The Mirror of Justices*, Selden Society, London, 1895, p.44. 'Juges poent estre tuz ceaux a queaux lei nel defent. As femmes de fent droit qe eles ne seient judges ... Car dieu meismes quant il fu en terre entra en consistoire our une peccheresse devoit estre jugee a la mort ...'

¹⁴Fortescue, *De Natura Legis Naturae*, p.325.

¹⁵For an analysis of natural law, see Norman Doe, *Fundamental Authority in the Late Medieval English Law*, Cambridge Studies in English Legal History, Cambridge University Press, Cambridge, 1990, pp.108-131. For fifteenth- and sixteenth-century commentaries on natural law, see Fortescue, *De Laudibus Legum Anglie*, pp.37-39; Christopher St German, *St German's Doctor and Student*, (T.F.T. Plucknett and J.L. Barton, eds), Selden Society, London, 1974, pp.3-39.

¹⁶Fortescue, *De Natura Legis Naturae*, p.257.

¹⁷Aristotle, *Generation of Animals*, William Heinemann, London, 1953, Bk 1, Ch. 20, p.103.

¹⁸Fortescue, *De Natura Legis Naturae*, p.257.

¹⁹*ibid.*, p.258.

²⁰The association of law and reason was clearly set out by St Thomas Aquinas. 'Consequently law is a function of reason' (*Ergo lex est aliquid rationis*): St Thomas Aquinas, *Summa Theologica*, vol. 28, Blackfriars in conjunction with Eyre and Spottiswoode, London, 1966, Ia2ae, 90.1, pp.4-7.

²¹Fortescue, *De Natura Legis Naturae*, p.270.

²²*ibid.*, p.326.

²³For a discussion of Aquinas' association of reason with men, note the work of Genevieve Lloyd, *The Man of Reason: 'Male' and 'Female' in Western Philosophy*, Methuen, London, 1984, pp.33-37.

²⁴Aquinas, *Summa Theologica*, vol. 13, Ia 92.1, pp.38-39. 'Et sic ex tali subjectione naturaliter femina subjecta est viro, quia naturaliter in homine magis abundat discretio rationis.'

²⁵Philippe of Navarra, *Les Quatre Ages de l'homme traite moral de Philippe de Navarre*, (Marcel de Freville, ed.), Societe des Anciens Textes Francais, Firmin Didot et Cie, Paris, 1885, p.52.

²⁶*ibid.*, p.49. 'Et interiorem rationis quo inuisibilia agnosceret atque diuina.'

²⁷John Trevisa, *On the Properties of Things: John Trevisa's Translation of Bartholomaeus Anglicus De Proprietatibus Rerum*, vol. 1, Clarendon Press, Oxford, 1975, p.307.

²⁸St German, *St German's Doctor and Student*, pp.82-83.

²⁹Fortescue, *De Natura Legis Naturae*, p.259.

³⁰*ibid.*, p.266.

³¹*ibid.*

³²S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century*, Cambridge University Press, Cambridge, 1936, pp.62-64.

³³John Aylmer, *An Harborowe for Faithfull and Trewe Subiectes* (1559), The English Experience, Da Capo Press, Amsterdam, 1972, p.C5.

³⁴*ibid.*, p.H3A.

³⁵*ibid.*, p.H2A.

³⁶*ibid.*

³⁷Fortescue, *De Natura Legis Naturae*, p.252.

³⁸J.H. Baker, *An Introduction to English Legal History*, Butterworths, London, 1979, pp.8-9 & 199-200.

³⁹Fortescue, *De Natura Legis Naturae*, p.277.

⁴⁰While the fifteenth-century land market was often sluggish, lands which came with courts were competitively sought after. Christine Carpenter, 'The Fifteenth-Century English Gentry and their Estates', in Michael Jones (ed.), *Gentry and Lesser Nobility in Late Medieval Europe*, Alan Sutton, Gloucester, 1986, p.38; Christine Carpenter, *Locality and Polity: A Study in Warwickshire Land and Society, 1401 - 1499*, Cambridge University Press, Cambridge, 1992, p.97.

⁴¹Joan Kirby (ed.), *The Plumpton Letters and Papers*, Camden Fifth Series, Cambridge University Press, London, 1996, Letter 250, p.226.

⁴²Christine de Pisan, *The Treasure of the City of Ladies*, (Sarah Lawson, trans.), Penguin, New York, 1985, p.83.

⁴³Christine de Pisan, *The Book of the City of Ladies*, (Earl Jeffrey Richards, trans.), Persea Books, New York, 1982, p.35.

⁴⁴*ibid.*, pp.31-32.

⁴⁵Fortescue, *De Natura Legis Naturae*, p.313.

⁴⁶Numbers 27: 1-8.

⁴⁷Fortescue, *De Natura Legis Naturae*, p.251.

⁴⁸*ibid.*, p.277.

⁴⁹*ibid.*, p.257.

⁵⁰*ibid.*, p.251.

⁵¹Judith M. Bennett, 'Public Power and Authority in the Medieval English Countryside', in Mary Erler & Maryanne Kowaleski (eds), *Women and Power in the Middle Ages*, University of Georgia Press, London, 1988, pp.18-36; Judith Everard, 'Public Authority and Private Rights: Women in the English Royal Courts of Justice, 1196-1250', in Penelope Hetherington & Philippa Maddern (eds), *Sexuality and Gender in History: Selected Essays*, Optima Press, Western Australia, 1993, p.129.

⁵²Priscilla Heath Barnum (ed.), *Dives et Pauper*, vol. 2, Oxford University Press, Oxford, 1976, p.89.

⁵³James M. Blythe (trans.), *On the Government of Rulers: De Regimine Principum: Ptolemy of Lucca with portions attributed to Thomas Aquinas*, University of Pennsylvania Press, Philadelphia, 1997, p.231.

⁵⁴Fortescue, *De Natura Legis Naturae*, p.258.

⁵⁵*ibid.*, p.259.

⁵⁶Katherine O'Donovan, *Sexual Divisions in Law*, Law in Context, Weidenfeld and Nicolson, London, 1985, p.3.

⁵⁷Lindsey Charles & Lorna Duffin (eds), *Women and Work in Pre-Industrial England*, Croom Helm, London, 1985; Alice Clark, *Working Life of Women in the Seventeenth Century*, (Amy Erickson, ed.), Routledge, New York, 1992; Merry E. Wiesner, *Women and Gender in Early Modern Europe*, Cambridge University Press, Cambridge, 1993.

⁵⁸See, for example, Chrimes, *English Constitutional Ideas in the Fifteenth Century*.

⁵⁹Margaret Thornton, 'The Cartography of Public and Private', in Margaret Thornton (ed.), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, 1995, pp.2-16.

⁶⁰Fortescue, *De Natura Legis Naturae*, p.258.

⁶¹Eisenstein, *The Female Body and the Law*, pp.42-43.

⁶²Marina Warner, *Monuments and Maidens: The Allegory of the Female Form*, Weidenfeld & Nicolson, London, 1985, pp.146-176; Dennis E. Curtis & Judith Resnik, 'Images of Justice', *The Yale Law Journal*, vol. 96, 1987, pp.1743-1744.

⁶³Curtis and Resnik, 'Images of Justice', pp.1745-1746.

⁶⁴Fortescue, *De Natura Legis Naturae*, p.249.

⁶⁵Warner, *Monuments and Maidens*, pp.63-70.

⁶⁶ibid., pp.152-153.

⁶⁷Fortescue, *De Natura Legis Naturae*, p.250.

⁶⁸de Pisan, *The Book of the City of Ladies*, p.13.

⁶⁹The division of distributive and retributive justice was explored by Thomas Aquinas. See R.J. Henle, *Saint Thomas Aquinas: The Treatise on Law*, University of Notre Dame Press, London, 1993, pp.3-93.

⁷⁰*Justitia* was shown several times in the Hampton Court tapestries, almost always as a figure of retributive justice. In 'The Redemption of Man' *Justitia* tried to attack Homo with her sword but was restrained by Misericordia. In 'The Last Judgment' Misericordia presented the saved to Christ while *Justitia* drove away the damned. And in 'Music' *Justitia* again attacked Man with her sword while Misericordia restrained her. This last tapestry was captioned 'Before the Judge, in the presence of the Virtues Justice and Pity plead their cause. Sin (Man) is threatened by Justice but reconciled by Pity.' (*Ante Judicem in Virtutum presencia/Arguunt Justicia et Misericordia/Minatur Culpa a Justicia/Sed reconciliatur a Misericordia*). H.C. Marillier, *The Tapestries at Hampton Court Palace*, Her Majesty's Stationary Office, London, 1962, pp.12-18.

⁷¹Samuel Y. Edgerton, *Pictures and Punishment: Art and Criminal Prosecution during the Florentine Renaissance*, Cornell University Press, London, 1985, pp.222-223.

⁷²Fortescue, *De Natura Legis Naturae* pp.256, 264, 274 & 284.

⁷³ibid., p.268.

⁷⁴ibid., p.274.

⁷⁵ibid., p.256.

⁷⁶Goodrich, 'Gynaetopia: Feminine Genealogies of Common Law', p.282.

⁷⁷Fortescue, *De Natura Legis Naturae*, p.264.

⁷⁸ibid., p.300. This was a late-medieval saw. Jere Bartlett Whiting & Helen Wescott Whiting (eds), *Proverbs, Sentences and Proverbial Phrases from English Writings Mainly Before 1500*, Oxford University Press, London, 1968, p.404.

⁷⁹Sir John Fortescue, *Declaracion made by John Fortescue Knight upon certayn wrytings sent out of Scotteland*, cited by Thomas Fortescue, 'Remarks' in *De Natura Legis Naturae*, p.337.

⁸⁰Landman, "'The Doom of Resoun': Accommodating Lay Interpretation in Late Medieval England', pp.104-105.

⁸¹*The Plumpton Letters and Correspondence*, Letter 250, p.226.

⁸²de Pisan, *The Book of the City of Ladies*, pp.31-32.

⁸³Fortescue, *De Natura Legis Naturae* p.249.