CHAPTER I

GENERAL CHARACTERISTICS OF LIBERTAS

1. Libertas—Leges

As has been seen, libertas at Rome and with regard to Romans is not an innate faculty or right of man, but the sum of civic rights granted by the laws of Rome; it consequently rests on those positive laws which determine its scope. This fundamental idea implies that libertas contains the notion of restraint which is inherent in every law.[1] In fact, it is the notion of restraint and moderation[2] that distinguishes libertas from licentia, whose salient feature is arbitrariness; and libertas untempered by moderation degenerates into licentia.[3] True libertas, therefore, is by no means the unqualified power to do whatever one likes; such power—whether conceded or assumed—is licentia, not libertas. The necessary prerequisite of libertas is the renouncement of self-willed actions; consequently, genuine libertas can be enjoyed under the law only.

There is profound truth in Cicero's saying, "legum idcirco omnes servi sumus ut liberi esse possimus".[4] For were it not for the restrictions imposed by law, everyone would be free to do always as he liked, and that would result—to use Hobbes' phrase—in a "bellum omnium contra omnes", that is to say, it would result, not in the enjoyment of complete freedom, but in its self-

[1] Quint. *Inst.* VII, 5, 5: Lex omnis aut tribuit aut adimit aut punit aut iubet aut vetat aut permittit. Cicero in *De Leg.* III, 10 uses "iussa vetita" in the sense of "leges".

[2] Livy XXIV, 25, 8: Ea natura multitudinis est: aut servit humiliter aut superbe dominatur; libertatem, quae media est, nec struere modice nec habere sciunt. Cic. *Pro Planc.* 94: Libertatem...non in pertinacia, sed in quadam moderatione positam putabo. Cf. Tac. *Dial.* 23 *ad fin.*

[3] Cic. *Pro Flacco*, 16: Illa vetus (Graecia)...hoc uno malo concidit, libertate immoderata ac licentia contionum. Livy XXIII, 2, 1: Licentia plebis sine modo libertatem exercentis; XXXIV, 49, 8: Libertate modice utantur: temperatam eam salubrem et singulis et civitatibus esse, nimiam et aliis gravem et ipsis qui habeant effrenatam et praecipitem esse.

[4] *Pro Cluent.* 146. Cf. 147.

destruction through excess. Fools, observed Tacitus, identified licentia with libertas.[1]

The element of restraint inherent in libertas is not necessarily, nor primarily, self-restraint; it is not, nor expected to be, solely the result of *sophrosyne* which voluntarily follows the maxim "nothing to excess". "Modus" and "moderatio" may be imposed on libertas from outside without destroying it. Libertas is quite consistent with the dictates of the disciplina Romana, mos maiorum, and instituta patrum,[2] because it is conceived of as a right and faculty, not of an isolated individual, but of the citizen in the organized community of the Roman State. As will be seen later, libertas at Rome was not the watchword of the individual who tried to assert his own personality against the overriding authority of society.

It would be very misleading indeed if a definition like "Quid est enim libertas? Potestas vivendi ut velis", or "(Libertas) cuius proprium est sic vivere ut velis",[3] were taken without qualification to represent the Roman concept of freedom. This Stoic definition of abstract freedom stresses only the subjective free will of the agent, whereas with the Romans libertas was in the first place the objective right to act.[4] The Romans conceived of libertas, not in terms of the autonomy of the will, but in terms of social relations, as a duty no less than a right: a right to claim what is due to oneself, and a duty to respect what is due to others, the latter being exactly what acceptance of the law amounts to, for to be law-abiding ultimately means to respect rights other than one's own. Libertas postulates that everyone should be mindful of other people's freedom no less than of his own.[5]

[1] *Dial.* 40: Licentia quam stulti libertatem vocabant. Some editors emend: vocant.

[2] Livy v, 6, 17, puts into the mouth of Appius Claudius Crassus, tr. mil. cos. pot., the following ironical remark: Ea demum Romae libertas est, non senatum, non magistratus, non leges, non mores maiorum, non instituta patrum, non disciplinam vereri militiae. Cf. H. Kloesel, *Libertas*, Breslau Diss. 1935, p. 34.

[3] Cic. *Parad.* 34 and *De Off.* I, 70. Cf. Epict. *Diatrib.* II, 1, 23 and IV, 1, 1. Dio Chrys. *Or.* XIV, 3 ff., examines and refutes this definition of freedom.

[4] See R. von Ihering, *Geist des römischen Rechts*[3], II, 1, pp. 219 f.

[5] Livy XXIII, 12, 9, puts into the mouth of a Carthaginian the remark: Si reticeam, aut superbus aut obnoxius videar: quorum alterum est hominis alienae libertatis obliti, alterum, suae. VII, 33, 3: Haud minus libertatis alienae quam dignitatis suae memor. Cf. also II, 10, 8; Cic. *De Off.* I, 124.

Nor must Livy's remark that libertas "suis stat viribus, non ex alieno arbitrio pendet"[1] be misunderstood. What Livy had in mind was probably not the autonomy of the will, but the idea that freedom was enjoyed of right, not on sufferance, and that freedom meant self-reliance.

Livy singled out "imperia legum potentiora quam hominum"[2] as the essential feature of the free Commonwealth, and Sallust made Aemilius Lepidus say that the essence of Roman freedom was, among other things, to obey none but the law.[3] Both writers pointed to the same idea which Cicero expressed in his dictum "legum servi sumus ut liberi esse possimus", namely, that freedom can exist only under the rule of law.

2. Aequa Libertas

Before we examine the particular rights that in the Roman view constituted freedom, and the manner in which the Romans sought to secure the rule of law, another essential point may be profitably discussed here.

Does libertas imply democratic equality (*isonomia*), and, if so, to what extent?

One of the interlocutors in Cicero's *De Re Publica* (I, 47) is credited with the following view:

> Itaque nulla alia in civitate, nisi in qua populi potestas summa est, ullum domicilium libertas habet; qua quidem certe nihil potest esse dulcius, et quae, si aequa non est, ne libertas quidem est. Qui autem aequa potest esse, omitto dicere in regno, ubi ne obscura quidem est aut dubia servitus, sed in istis civitatibus in quibus verbo sunt liberi omnes? Ferunt enim suffragia, mandant imperia, magistratus, ambiuntur, rogantur, sed ea dant, quae, etiamsi nolint, danda sint, et quae ipsi non habent, unde alii petunt; sunt enim expertes imperii, consilii publici, iudicii delectorum iudicum, quae familiarum vetustatibus aut pecuniis ponderantur. In libero autem populo, ut Rhodii sunt, ut Athenienses, nemo est civium, qui...

Two principal points emerge from this plea for democratic egalitarianism, one explicit and the other implicit: (*a*) The rights in

[1] XXXV, 32, 11. [2] II, 1, 1.

[3] *Hist.* I, 55, 4 M: Nam quid a Pyrrho Hannibale Philippoque et Antiocho defensum est aliud quam libertas et suae cuique sedes neu cui nisi legibus pareremus? Cf. [?]Sallust, *Ad Caes. senem* II, 5, 3: Nullius potentia super leges erat.

which libertas consists must be virtually equal for all; (*b*) Libertas is the *upper* limit of political rights. In conjunction these two points imply that libertas ought to amount to complete egalitarianism and true government by the people. Thus aequa libertas would coincide with the Greek ἐλευθερία καὶ ἰσονομία.

In comparison with this exposition of democratic equality—obviously Greek in origin, and probably purely literary in purpose—the other testimonies concerning aequa libertas are of a different character; and the difference between them arises, as will presently be seen, from a different concept both of aequitas and, particularly, of libertas.

Copious and very instructive evidence concerning aequa libertas is to be found in Livy's account of the Early Republic, in which this phrase occurs in contexts that clearly show that a political meaning attaches to it. The views expressed in that portion of Livy's narrative, being either his own or those of his annalistic sources, represent to some extent the opinions current in the Late Republican period.

Livy summarizes the claims of the plebs which led to the setting up of the Decemvirate (III, 31, 7): "Si plebeiae leges displicerent,[1] at illi communiter legum latores et ex plebe et ex patribus, qui utrisque utilia ferrent quaeque *aequandae libertatis* essent, sinerent creari".

About their achievement in drafting the original ten Tables the Decemvirs are made to say: "Se...omnibus, summis infimisque, *iura aequasse*" (III, 34, 3).

Appius Claudius the Decemvir, when impeached after he had laid down his power, "commemorabat suum infelix erga plebem Romanam studium, quo *aequandarum legum* causa cum maxima offensione patrum consulatu abisset".[2]

The struggle for the right of conubium and the plebeian consulship is represented in similar terms (IV, 5, 1 ff.):

> Regibus exactis utrum vobis (sc. patriciis) dominatio an omnibus *aequa libertas* parta est.

And,

> Itaque ad bella ista..., consules, parata vobis plebes est, si conubiis redditis unam hanc civitatem tandem facitis, si coalescere, si iungi miscerique vobis privatis necessitudinibus possunt, si spes, si aditus ad

[1] See Livy III, 9, 2 ff. [2] *Ib.* 56, 9. Cf. III, 61, 6; 67, 9.

honores viris strenuis et fortibus datur, si in consortio, si in societate rei publicae esse, si, quod *aequae libertatis* est, in vicem annuis magistratibus parere atque imperitare licet.[1] Si haec impediet aliquis... nemo dimicaturus pro superbis dominis, cum quibus nec in re publica honorum nec privata conubii societas est.

Non posse *aequo iure* agi ubi imperium penes illos (patres) penes se (plebem) auxilium tantum sit; nisi imperio communicato nunquam plebem in parte pari rei publicae fore (VI, 37, 4).

It appears from the above instances that "aequa libertas", "aequum ius" and "aequae leges" mean the same thing, namely a law equally binding on patricians and plebeians, and the equality of the fundamental political rights which alone would ensure the Plebs an equal share in the common weal (consortium and societas rei publicae; in parte pari rei publicae esse). It will be observed that aequa libertas is used in these passages with regard to the Plebs as a whole, and not with regard to any individual.[2]

Since, as has been seen, libertas is a sum of rights, it is very significant that it should be identified with aequum ius, for the essence of aequum ius is that it is equally binding on all.[3] Livy declares that when Scipio Africanus was impeached in 187 B.C.,[4]

[1] The same idea occurs in the senatorial criticism of the Decemvirs, "qui comitia, qui annuos magistratus, qui vicissitudinem imperitandi, quod unum exaequandae sit libertatis, sustulerint", III, 39, 8. It is interesting that the last clause is reminiscent of Aristotle's ἐλευθερίας δὲ ἓν μὲν τὸ ἐν μέρει ἄρχεσθαι καὶ ἄρχειν, *Polit.* VI, 2, p. 1317b, 2. It is not impossible that Livy adopted this view from his sources, which projected back into the early days of Rome the propaganda of the homines novi of the Late Republic. A smattering of Greek ideas in the post-Gracchan period is not surprising.

[2] The *Thesaurus Linguae Latinae* records only two instances of aequa libertas used with regard to personal rights: Terence, *Adelphoe*, 181 ff. (the original is by Menander): *Aeschinus*. Nam si molestus pergis esse, iam intro abripiere atque ibi Usque ad necem operiere loris. *Sannio*. Loris liber? *Ae*. Sic erit. *Sa*. O hominem impurum! Hicin libertatem aiunt esse aequam omnibus? —and Quintil. *Declam.* 301, p. 185, 15 f. (Ritter): Si alio accusante dicerem causam, sciebam et expertus proxime eram esse nobis aequam etiam adversus divites libertatem; sed me quamquam indignissime petar, non tam lex, quam ratio prohibet a conviciis.

[3] Seneca, *Ep.* 107, 6: Aequum autem ius est non quo omnes usi sunt, sed quod omnibus latum est. Cf. *Ep.* 123, 16: Mors malum non est. Quid quaeris? Sola ius aequum generis humani.

[4] XXXVIII, 50, 4 ff. It is to be observed that Livy mentions Valerius Antias as his authority.

some regarded the impeachment as disgraceful ingratitude to a man who served his country so well, whereas others observed that:

Neminem unum tantum eminere civem debere ut legibus interrogari non possit; nihil tam aequandae libertatis esse quam potentissimum quemque posse dicere causam. Quid autem tuto cuiquam, nedum summam rem publicam, permitti, si ratio non sit reddenda? Qui ius aequum pati non possit, in eum vim haud iniustam esse.

It appears that equality before the law was considered the most essential characteristic of aequa libertas.[1]

Cicero's view of aequa libertas is in the highest degree illuminating. Cicero declared in his *De Re Publica* (I, 69) that the ideal form of government which he described offered "aequabilitatem quandam magnam qua carere diutius vix possunt liberi"; elsewhere he mentioned aequitas iuris as synonymous with libertas,[2] and stressed its importance;[3] he thought monarchy was unacceptable because it deprived the citizens of commune ius;[4] and, finally, he eloquently spoke about communis libertas.[5] Nevertheless, he strongly disowned the idea of complete equalitarianism (aequabilitas) for the reason that it disregarded dignitas.

Nam aequabilitas quidem iuris, quam amplexantur liberi populi (i.e. democratic equality), neque servari potest...eaque, quae appellatur aequabilitas, iniquissima est. Cum enim par habetur honos summis et infimis, qui sint in omni populo necesse est, ipsa aequitas iniquissima est (*De Rep.* I, 53).

And similarly,

Et cum omnia per populum geruntur quamvis iustum atque moderatum, tamen ipsa aequabilitas est iniqua, cum habet nullos gradus dignitatis (*Ib.* I, 43).

It is to be observed that dignitas is a pre-eminence which does not rest on laws, nor on privileges; it is the esteem a worthy personality

[1] See also Quintil. *Declam.* 301 quoted above, p. 11 n. 2; Cic. *De Off.* II, 85: Iuris et iudiciorum aequitate suum quisque teneat. Cf. Ascon. 84, 2 Clark.

[2] *Pro Planc.* 33: Ubi illa aequitas iuris, ubi illa antiqua libertas.

[3] *De Off.* I, 124: Privatum autem oportet aequo et pari cum civibus iure vivere, neque submissum et abiectum, neque se efferentem.

[4] *De Rep.* I, 43: Sed in regnis nimis expertes sunt ceteri communis iuris et consilii. Cf. *De Off.* I, 53; Livy III, 56, 10.

[5] *II in Verr.* V, 169 f.; ap. Dio Cass. XLIV, 33, 2: τῆς κοινῆς καὶ ἐλευθερίας καὶ ὁμονοίας. Cf. Brutus and Cassius in *Ad Fam.* XI, 2, 2; Val. Max. VI, 3, 2.

commands, "alicuius honesta et cultu et honore et verecundia digna auctoritas".[1]

Cicero's criticism of equalitarianism reveals a cardinal difference between the Athenian *eleutheria* and the Roman libertas. In fifth- and fourth-century Athens *eleutheria* was tantamount to democracy, which meant government by the people founded on complete equality of political rights (*isonomia* and *isegoria*);[2] obviously the democratic principle of complete equality was incompatible with regard for ἀξία.[3] On the other hand, at Rome the consummation of libertas was the Res publica which might, but need not, be a democracy. In fact, the Roman republic never was, nor, on the whole,[4] was meant to be, a democracy of the Athenian type; and *eleutheria* with *isonomia* and *parrhesia* as its chief expressions appeared to the Romans as being nearer licentia than libertas.[5]

Notionally, too, aequum ius is entirely different from the Athenian *isonomia*, and this difference throws much light on the meaning of the Roman concept. Uppermost in ἰσότης is the notion of parity, whereas in aequitas it is fairness, justice, equity.[6] *Isonomia*[7] is equality of rights and parity of standing interpreted in terms of extreme democracy, whereas aequum ius or aequae leges means above all equality before the law,[8] but not equality of political rights enjoyed by all the citizens. There is nothing to suggest that

[1] Cic. *De Invent.* II, 166. Needless to say free men only can have dignitas: Species ipsa tam gratiosi liberti aut servi dignitatem habere nullam potest, Cic. *Ad Q. Fr.* I, 2, 3.

[2] For the Greek concept of equality see Rudolf Hirzel, *Themis, Dike und Verwandtes, ein Beitrag zur Geschichte der Rechtsidee bei den Griechen*, Leipzig, 1907, pp. 228–320 and especially pp. 240 ff.

[3] See Arist. *Polit.* VI, 2, p. 1317a, 40–b, 4.

[4] The few possible exceptions will be discussed in the next chapter.

[5] Cic. *De Rep.* III, 23: Si vero populus plurimum potest omniaque eius arbitrio reguntur, dicitur illa libertas, est vero licentia. See also Cicero's criticism of the Greek Assemblies of the People, *Pro Flacco*, 15 ff.; and Phaedrus, I, 2, 1 f.: Athenae cum florerent aequis legibus Procax libertas civitatem miscuit Frenumque solvit pristinum licentia.

[6] See Cic. *Partit. Orat.* 130.

[7] Derived from ἴσα νέμειν rather than ἴσος νόμος, see Hirzel, *op. cit.* pp. 242 ff. Cicero probably had ἰσονομία in mind when he wrote "cum enim par habetur honos summis et infimis,... ipsa aequitas iniquissima est", *De Rep.* I, 53.

[8] Cic. *Topica*, 9; *De Off.* II, 41 ff.; *Pro Cluent.* 146.

the Romans had ever regarded the pecuniary circumstances required for the tenure of public offices as inconsistent with aequum ius or aequae leges. The plebeians knew from experience that one could be free and yet discriminated against, and therefore they attached great importance to equality before the law and to the fundamental rights of citizenship. But the right to govern was not considered a universal civic right. The Athenians sought to establish equality in respect of the right to govern, whereas the Romans sought to safeguard their rights against the power of the government. It is an interesting fact that whereas Cicero declared that the composition of the government determined the character of the constitution, Aristotle deduced the various types of constitutions from the various possible bases and extents of equality.[1]

The notion of res publica postulates for every citizen a fair share in the common weal; it postulates the participation of the people in State affairs; it postulates that the government should be for the people;[2] but it does not necessarily imply the principle of government by the people. Libertas primarily consists in those rights which (*a*) affect the status of the individual citizen, and (*b*) ensure that the State is a real res publica; the nominal right to govern is included among them, but its actual exercise is subject to the possession of auctoritas and dignitas—two qualities that played a remarkable part in Roman life, both private and public.[3] Libertas and dignitas are not essentially incompatible—as are, in Aristotle's view, *eleutheria* and *axia*—because libertas, with regard to an individual, is merely the *lower* limit of political rights.[4]

Therefore aequa libertas, with regard to Rome, does not imply the democratic *isonomia* of Periclean Athens. It implies equality, but on a different plane: at Rome aequa libertas indicates the repudiation of legal discrimination between citizens, such as the former discrimination against the Plebs. Privilegia, i.e. laws of personal exception,

[1] Cic. *De Leg.* III, 12. Arist. *Polit.* IV, 8, pp. 1294a, 19 f.; *Eth. Nic.* V, 3, pp. 1131a, 20 f.; *Polit.* III, 9, pp. 1280a, 7 f.

[2] Cic. *De Rep.* I, 39; 43; III, 43 f.; *Ad Att.* VIII, 11, 1–2.

[3] See R. Heinze, Auctoritas, in *Hermes* LX (1925); and H. Wegehaupt, *Die Bedeutung und Anwendung von dignitas in den Schriften der republikanischen Zeit*, Breslau Diss. 1932.

[4] Tac. *Ann.* XIII, 27, 3: Non frustra maiores, cum dignitatem ordinum dividerent, libertatem in communi posuisse.

were opposed; and, similarly, the law whereby front seats in the theatre were reserved for senators only is said to have been resented on the ground that it was inconsistent with aequa libertas.[1]

It appears, therefore, that aequa libertas means equality before the law, equality of all personal rights, and equality of the fundamental political rights; but it does not preclude differentiation beyond this sphere.

3. Libertas and Dignitas

If libertas is merely the minimum of political rights which in principle admit of various degrees of dignitas,[2] the right balance between libertas and dignitas is a matter of great importance. Cato the Elder said, "Iure, lege, libertate, re publica communiter uti oportet; gloria atque honore,[3] quomodo sibi quisque struxit".[4] A generation later, M. Antonius the orator wished "libertate esse parem cum ceteris, principem dignitate".[5] Such a position is attainable, if at all, only by means of moderation and consideration which alone can establish the balance between dignitas and libertas. He who claims dignitas for himself ought to be "haud minus libertatis alienae quam dignitatis suae memor", to use Livy's famous phrase.[6] This however reveals the real crux; libertas and dignitas do not exclude each other provided dignitas is toned down so as not to exceed the limit set by aequa libertas; but it is a grave problem whether untempered dignitas can be upheld without colliding with and trying to override aequa libertas. Is it at all possible to be—as Antonius wished—libertate par cum ceteris and princeps dignitate at the same time? Can one excel "praestantia dignitatis" without "transire aequabilitatem iuris"?[7] And, on the other hand, will not

[1] Livy XXXIV, 54, 5: Omnia discrimina talia, quibus ordines discernerentur, et concordiae et libertatis aequae minuendae esse. Cf. Mommsen, *Staatsrecht* III, pp. 519 ff.

[2] See above, p. 14 n. 4.

[3] Gloria and honos are the chief constituents of dignitas. Honos, in the sense of public office, engenders auctoritas.

[4] Malcovati, *Orat. Rom. Frag.* I, p. 218, no. 249.

[5] Cic. *Phil.* I, 34.

[6] Livy VII, 33, 3.

[7] Cic. *De Orat.* II, 209: Superioribus invidetur...si...aequabilitatem iuris praestantia dignitatis aut fortunae transeunt. See also Livy XLV, 32, 5; and the instructive anecdote in Diod. Sic. XXXVII, 10, 2.

the fortification of libertas be regarded as a challenge to dignitas?[1] There seems to be an inevitable tension between libertas and dignitas which may be mitigated if a proper balance is kept between them. But such a balance is neither simply nor easily achieved.

Adeo moderatio tuendae libertatis, dum aequari velle simulando ita se quisque extollit ut deprimat alium, in difficili est, cavendoque ne metuant, homines metuendos ultro se efficiunt, et iniuriam ab nobis repulsam, tamquam aut facere aut pati necesse sit, iniungimus aliis (Livy III, 65, 11).

There is another thing that made the harmonious coexistence of libertas and dignitas difficult. Socially and economically the Roman society was not homogeneous, and there was nothing to prevent the nobles from identifying dignitas with the distinctions and preserves of their own class. The result was that the nobles, irrespective of their own achievements, began to consider dignitas as something naturally due to them for the reason that it was well earned by their ancestors. Such a development could only nurse the seeds of discord, which rapidly developed into open strife accompanied with all the bitterness of social antagonism. And just as dignitas became a watchword of "vested interests" so could libertas be used as a battle-cry—sincere or feigned—of social reform.

The conflict between libertas and dignitas, "contentio libertatis dignitatisque", as Livy (IV, 6, 11) put it, was a salient feature of Roman domestic politics during the Republican period. This conflict was forced by certain individuals or groups whose exorbitant claims, based on dignitas and directed to dignitas, became incompatible either with the freedom of their fellow citizens, or the freedom of the State as a whole. It is well to bear this fact in mind so that the struggle for liberty at Rome may not be represented in terms of the issue "individual versus State" in which the practical problem is, in Mill's phrase, "how to make the fitting adjustment between individual independence and social control".[2] The Roman

[1] Livy III, 67, 9: Sub titulo aequandarum legum nostra iura oppressa tulimus et ferimus.

[2] J.S.Mill, *On Liberty* (Everyman's Library), pp. 68 f. Mill (*op. cit.* p. 131) asks "What, then, is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin? How much of human life should be assigned to individuality, and how much to society?" Such questions were not asked at Rome; and it seems that the third question only could have had a meaning there.

citizen sought to assert and safeguard his rights, not against the overriding authority of the State, or the tyranny of the majority, as it is sometimes called, but against other citizens who were stronger than himself, or against the officers of the State who, in the pursuit of their own private interests, might encroach upon his rights, abusing the power that had been entrusted to them. The crucial problem of libertas at Rome was how to make the fitting adjustment between the equality of the fundamental rights of all and the supremacy of some. This problem, as will be seen later, became very acute under the Late Republic, and the failure to solve it brought with it many dangers.

4. The Balance of Powers[1]

As has been said, the very existence of libertas depended on the rule of law. At Rome the law commanded wide respect independent to some extent of the sanctions which enforced it (witness, for example, the observance of the so-called imperfectae leges); nevertheless, since laws do not themselves rule in the literal sense, the rule of law could only be established if provision was made for (*a*) a power strong enough to enforce the law where necessary, and (*b*) means of preventing, if necessary, those who wield that power from abusing it. The vital dependence of libertas on the proper solution of these problems is too obvious to need stressing.

Three main organs made up the republican constitution at Rome: populus, magistratus, senatus. Separation of Powers was unknown, but there was at Rome a remarkable balance of Powers designed to prevent any of them from overriding the authority of the others and seizing complete control of the State. Although the concurrence of all the Powers was necessary for the smooth running of State affairs, it is characteristic of the Roman constitution that the power of the senior magistracies (imperium) was the pivot of the whole constitutional system.

The sovereignty of the People[2] was a cardinal principle of the

[1] Mommsen's *Römisches Staatsrecht* has been consulted throughout. References are given in cases of particular importance only.

[2] For the purpose of the present study, which is concerned with the later period of the Republic, the difference between Populus and Plebs may on the whole be disregarded, as the Lex Hortensia put plebiscita and leges on equal footing.

Roman republican constitution. The acceptance of this principle, however, did not produce the same results at Rome as, for example, at Athens, because the competence of the sovereign People and the manner in which the People exercised its sovereign rights were different from what was practised in the Athenian democracy.

The Populus Romanus was the ultimate source of power, the supreme legislature, and the final court of appeal. The Assembly of the People (comitia) elected the magistrates, enacted or repealed laws (leges), and, in the capacity of iudicium populi, confirmed or annulled sentences of death or flogging passed on Roman citizens in the courts of criminal justice.

These prerogatives were subject to certain indirect limitations: any Assembly to be lawful had to be convened and presided over by a competent magistrate, i.e. a magistrate who possessed the ius agendi cum populo, or, in the case of plebeian assemblies, cum plebe.

Further, the Assembly could not on its own initiative propose candidates for public offices, nor introduce bills and motions, nor put before the magistrate any questions. The People had to listen to what they were told, and to cast their votes according to the motion (rogatio) introduced by the magistrate. Private persons of distinction were on occasions called on by the presiding magistrate to address the Assembly,[1] but as a rule magistrates only spoke in the comitia and contiones. The citizen had a vote, but he had no right to make his voice heard: freedom of speech, in the sense that any citizen had the right to speak, did not exist in the Roman Assemblies.[2]

[1] Cf. Mommsen, *Staatsrecht* I[3], pp. 200 f.; III, pp. 300 f., pp. 394 f.

[2] Tenney Frank (Naevius and Free Speech, *Amer. Journ. Phil.* XLVIII (1927), pp. 105–10) and his pupil Laura Robinson (*Freedom of Speech in the Roman Republic*, Johns Hopkins University Diss. Baltimore, 1940) contend that the Romans under the Republic enjoyed freedom of speech and of criticism of the government. In the last resort, their thesis is based on the assumption that the Twelve Tables did not provide for action against slander, the provision "si quis occentavisset" (Cic. *De Rep.* IV, 12) being in their view a measure against casting spells, not slander. The thesis, however, in the form it was put forward by Prof. Frank and by Dr Robinson, seems to be unacceptable, mainly for the following reasons. First, the Twelve Tables distinguished between "malum carmen incantare", which means to cast a spell, and "occentare", which according to Festus *s.v.* (p. 191, ed. Lindsay) means "convicium facere". See Ed. Fraenkel, *Gnomon* I, pp. 187 ff.; Ch. Brecht, *s.v.* Occentatio in PW, XVII, cols. 1752 ff. and especially cols. 1754 f.; and A. Momigliano (reviewing L. Robinson's dissertation) in *J.R.S.* XXXII (1942), p. 121.

Another point of great consequence is intercessio.[1] As has been said, the Assembly could vote only on motions introduced by a competent magistrate. Until the actual voting took place the motion remained essentially an act of the magistrate, and as such was open to veto by par maiorve potestas. In theory intercessio overrode the authority of the magistrate only, not of the Assembly; but in practice it prevented the Assembly from exercising its sovereign rights.

Until the second half of the fourth century B.C. any law passed by the People, as well as the results of the popular elections, had to be ratified by a subsequent patrum auctoritas.[2] This limitation of the People's sovereignty was virtually removed by the Lex Publilia (of 339 B.C.) and Lex Maenia,[3] which provided that the patrum auctoritas should be given before the voting took place.

Secondly, Dr Robinson, *op. cit.* p. 4, argues that it would be amazing to find the Romans punishing verbal insult before the beginnings of conscious literature. She therefore concludes a priori that the repression of occentatio referred to magic, for the belief in magic belongs to a primitive stage of culture. This argument, however, misses among other things the vital point that slander need not be "conscious literature" nor any literature at all. Thirdly, even if it were true that the Twelve Tables did not provide for action against slander, there would still remain the question whether the absence of a libel law alone amounts to freedom of speech and criticism. For there is an essential difference between the right of free speech and the possibility of slandering with impunity. The line of demarcation is not always strict, yet it undoubtedly exists. Cf. Momigliano, *op. cit.* p. 123.

The plain fact, from a political point of view, is that the Roman People went to the Assemblies to listen and to vote, not to speak. Magistrates, leading senators and barristers enjoyed freedom of speech and made the most of it; but they cannot be identified with the Roman People. The People could show their approval or dissatisfaction in many ways (see, e.g., Cic. *Pro Sest.* 106 ff.), but they could make no constructive criticism.

[1] For the intercessio of rogationes see Mommsen, *op. cit.* I[3], pp. 283 ff. It is not necessary here to discuss obnuntiatio, since it was its abuse, rather than its proper use, that played a conspicuous part in obstructing the procedure of the Assemblies under the Late Republic. For obnuntiatio see T. Frank, *C.A.H.* VIII, p. 367; St. Weinstock, in PW, XVII, cols. 1726 ff.; Mommsen, *op. cit.* I[3], pp. 110 ff.

[2] It is not necessary here to discuss the question whether by patres all the senators or the patrician senators only were meant, cf. Mommsen, *op. cit.* III, pp. 1037 ff. Similarly, it is of little consequence for the present purpose whether judicial verdicts of the People had also to be ratified by patrum auctoritas or not, cf. *op. cit.* III, p. 1039.

[3] Of unknown date but probably not much later than 290 B.C. Cf. Mommsen, *op. cit.* III, p. 1042, and E. Weiss, PW, XII, col. 2396, *s.v.* Lex Maenia.

Suffrage was general at Rome, but it was not until the second half of the second century B.C. that it was freed from a kind of control. Originally voting was oral, and voters from the lower classes, if they were clients of some noble, were expected to vote in conformity with the auctoritas of their patron. The method of oral voting exposed the client to eventual victimization, if he did not pay due heed to the auctoritas of his patron. So long as this method prevailed, the franchise was denied its full effect, because it lacked freedom. This state of affairs was changed by the four Leges Tabellariae which provided for the secret ballot: the Lex Gabinia of 139 B.C., concerned with the election of magistrates; the Lex Cassia of 137 B.C., concerned with trials on appeal before the People; the Lex Papiria of 131 B.C., concerned with the enactment of laws; and, finally, the Lex Coelia of 107 B.C., which applied the ballot to trials for treason (perduellio).[1] The Lex Cassia is known to have encountered long-drawn opposition, and all the Ballot Laws were very much resented by staunch Optimates.[2] The Leges Tabellariae were regarded as a great achievement of the commons, and the ballot was called "the guardian of liberty".[3]

Whatever may have been the advantages gained by the Ballot Laws, they did not increase the competence of the Assemblies. Save for the judicial powers of the Assembly, the People possessed neither the right nor the means of controlling the Executive; the controls through the election of magistrates and through legislation were indirect and, in fact, slight. The People were given information concerning State affairs (contiones), but they had no say in outlining the policies (apart from the declaration of war) which the Executive pursued within the limits of its own competence.

The Senate also could be convened and presided over only by a competent magistrate, i.e. one who possessed the ius agendi cum senatu, as a rule one of the consuls. The senators were called on by the presiding consul in order of rank to state their opinion on the matter which he put before the House. Those who were thus called on were allowed to speak any length of time on any subject they

[1] See Cic. *De Leg.* III, 35 ff.

[2] See Cic. *Brut.* 97; *Pro Sest.* 103; *De Leg.* III, 34 and 36; *De Amic.* 41.

[3] Cic. *Pro Sest.* 103; *De Leg.* III, 34 and 39; *De Leg. Agr.* II, 4; *Pro Planc.* 16; *Pro Cornel.* ap. Ascon. 78, 1 C.

considered of importance with regard to public affairs.[1] It would, however, be an overstatement to consider freedom of speech a general principle of Roman parliamentarianism. As a rule a senator could not demand to speak, and the presiding consul was neither obliged nor expected ever to call on the "back-benchers" (pedarii) whose only opportunity of stating their views was a division of the House (pedibus in sententiam ire). There was freedom of speech in the Senate, but in fact not for all the senators.[2]

From a constitutional point of view the Senate was the advisory council of the Executive. It was, by convention, the duty of the senior magistrates—except commanders in the field—to consult the Senate before undertaking any action that under the existing laws and within the competence of the magistrate in question affected the community.[3] The counsel of the Senate was given in the form of a Senatus Consultum.

In theory the Senatus Consulta were merely recommendations to be followed by the magistrates, "if they deem it proper to do so" (si eis videatur). But a resolution of the Senate carried all the weight of auctoritas the senators possessed between them, and therefore no magistrate would without serious reasons leave it unheeded. Thus the Senate got control of the policies pursued by the Executive.

However great and decisive may have been the influence of the Senate on the Executive, it rested ultimately on auctoritas and custom rather than on statutory powers. So long as the Senate's authority was unchallenged its pre-eminence in Roman affairs was assured; but in principle it was challengeable, and when at last it was challenged, auctoritas senatus became the subject of a long controversy.

The striking feature of the Executive in the Roman Republic was the vast extent of its power and prerogatives. There is much truth in Cicero's and Livy's dicta that the power of the consuls was regal in character.[4] The mandate of the consuls was irrevocable before

[1] See Mommsen, *op. cit.* III, pp. 939 ff.

[2] *Ib.* p. 962.

[3] *Ib.* 1[3], p. 310. Such actions of the Executive as affected individuals only did not have to be referred to the Senate.

[4] Cic. *De Rep.* II, 56: Uti consules potestatem haberent tempore dumtaxat annuam, genere ipso ac iure regiam. Cf. *De Leg.* III, 8. Livy II, 1, 7: Libertatis

expiry; they were unimpeachable during their term of office; they commanded unconditional obedience, and possessed judicial and coercive powers. Such an Executive, if untempered and unchecked, might easily become dangerous for the liberties of its people.[1]

To provide against the contingency of the government becoming too strong for the freedom either of individual citizens or of the whole State, the Romans resorted, not to curtailment of the Executive's powers, but to a system of constitutional checks imposed on the duration and exercise of those powers.

Imperium and potestas were invariably granted "ad tempus", as a rule for one year, after which period, unless prorogatio imperii took place, they automatically expired.

With the exception of the dictator,[2] interrex, and praefectus urbi —all of them being emergency magistrates—all magistracies consisted of two or more colleagues of equal standing (par potestas), each colleague being empowered both to act alone and to oppose any action undertaken by his equals or juniors (intercessio by par maiorve potestas).[3]

Intercessio is in fact the most effective check imposed on the Executive during the tenure of office, for, as has been seen, neither the People nor the Senate could stop a magistrate from doing what

autem originem inde magis quia annuum imperium consulare factum est quam quod deminutum quicqam sit ex regia potestate numeres. Cf. IV, 3, 9; VIII, 32, 3. See also *Dig.* I, 2, 2, 16; Dion. Hal. VI, 65, 1; Polyb. VI, 11, 12. Several more instances are cited by Mommsen, *op. cit.* II^3, p. 93.

[1] Perhaps it is not inappropriate here to quote Abraham Lincoln's dictum, "It has long been a grave question whether any government not too strong for the liberties of its people, can be strong enough to maintain its existence in great emergencies" (10 Nov. 1864; *Select Speeches*, Everyman's Library, p. 221).

[2] Kloesel, *Libertas*, p. 31, asserts that dictator and magister equitum "eigentlich dasselbe ist wie zwei Konsuln; nur ist der Diktator letztlich ungebunden". This statement ignores the fact that the Master of the Horse had only praetorian rank, see Mommsen, *op. cit.* II^3, p. 176.

[3] For intercessio cf. Mommsen, *op. cit.* I^3, pp. 266 ff. Intercessio of par potestas was based on the principle "in re pari potiorem causam esse prohibentis" (*Dig.* X, 3, 28). Cf. the references cited in Mommsen, *op. cit.* I^3, p. 268 n. 2. Since the introduction of Bills and motions for senatus consulta were in the first place acts of a magistrate, they could be vetoed by par maiorve potestas, see Id. *op. cit.* I^3, p. 280 ff. For the purpose of this study it is of little consequence whether intercessio was prohibitive only or annulling as well, see Id. *op. cit.* I^3, p. 266 n. 4.

was in his competence to do. Intercessio was especially powerful in the hands of the tribunes, who for all practical purposes acted as if possessing maior potestas with regard to all magistrates, except the dictator.[1] The tribunate as a sacrosanct and overriding authority is the chief means of holding in check the vast imperium of the consuls.[2] Since its exercise depended mainly on the discretion of the intercessor, that right could easily be abused with the grave result of paralysing the work of government. The evil potentialities of the tribunician veto were nowhere more clearly recognized than in the Lex Sempronia de provinciis consularibus, carried by C. Gracchus, which exempted from tribunician intercession the assignment of consular governors to provinces. On the other hand, the tribunician intercession was, as will presently be seen, a most effective protection of personal rights.

As has been said, potestas ad tempus and par potestas, i.e. the limited tenure and collegiality of office, provided against the possibility of the Executive becoming permanently uncontrollable; and it is these two that were spoken of by the Romans as the beginning and the safeguards of political liberty.[3] The continuation of office beyond the statutory limits was denounced as regnum, the most invidious term of political invective in republican Rome.[4] And, as will be seen later, the resistance to extraordinary powers purported to champion the cause of freedom against its real or alleged suppressors.

It appears from what has been said that the working of the Roman constitution depended on the cooperation of the People, the Senate, and the Magistrates, especially the consuls and the tribunes. But a harmonious cooperation between them was not attainable without a large amount of goodwill. The limits of the particular powers were not always clearly defined, which was a potential source of friction. With the ascendancy of the Senate over the consuls, which took place during the Middle Republic,[5] the question could arise whether the Senate or the People was the supreme power in the State. What made this question a grave one was not only its

[1] See Mommsen, *op. cit.* I[3], p. 26 n. 1.

[2] See Cic. *De Rep.* II, 58; *De Leg.* III, 16; Appian, *Bell. Civ.* I, 1. Cf. Livy II, 33, 1; 54, 5; IV, 26, 10.

[3] Livy II, 1, 7; IV, 24, 4; Sallust, *Cat.* 6, 7. Cf. Livy III, 21, 2; IV, 5, 5.

[4] See, e.g., Livy VI, 41, 3; IX, 34, 16.

[5] Cf. T. Frank, *C.A.H.* VII, p. 818.

constitutional implications, but, and perhaps mainly, its social background; for however the issue may have been stated it was not at bottom a purely constitutional issue, nor was it fought out for purely constitutional ends.

5. The Rights of the Individual

All the institutions discussed in the previous section provided mainly against the possibility of the Executive becoming too strong for the freedom of the State, but, with the exception of the iudicium populi, did not provide direct protection for the liberties of the individual citizen. Such protection was essential in view of the fact that the Roman Executive possessed both judicial and coercive powers. It is characteristic of the Roman idea of freedom that some of the most effective checks imposed on the imperium and potestas derived from the desire to protect the rights of the individual citizen. In this connexion it may be well to consider separately the liberties of the private citizen.

> Nego potuisse iure publico, legibus iis quibus haec civitas utitur, quemquam civem ulla eiusmodi calamitate affici sine iudicio; hoc iuris in hac civitate etiam tum, cum reges essent, dico fuisse; hoc nobis esse a maioribus traditum; hoc esse denique liberae civitatis ut nihil de capite civis aut de bonis sine iudicio senatus, aut populi, aut eorum qui de quaqua re constituti iudices sint, detrahi posse (Cic. *De Dom.* 33).

Punishment without formal trial and conviction is a violation of freedom.[1] This principle of "nulla poena sine iudicio" lends particular importance to the independence of law-courts.[2]

> (Consules) ne per omnia regiam potestatem sibi vindicarent, lege lata factum est ut ab eis provocatio esset neve possent in caput civis Romani animadvertere iniussu populi; solum relictum est ut coercere possent et in vincula publica duci iuberent.[3]

Provocatio, which in civilian life protected the life and person of a Roman citizen, was regarded as the mainstay of freedom: "arx

[1] See Cic. *De Dom.* 43; 47; 77; *De Leg.* I, 42; Ascon. 41, 13 f. C; Livy III, 13, 4; 56, 10–13.

[2] Cic. *II in Verr.* II, 33 and V, 175.

[3] Pompon. *Dig.* I, 2, 2, 16. See also Cic. *De Rep.* II, 53; *De Leg.* III, 6; Livy II, 29, 10; IV, 13, 11. For the limits of provocatio see Mommsen, *op. cit.* III, pp. 352 ff.

tuendae libertatis" (Livy III, 45, 8); "unicum praesidium libertatis" (Id. III, 55, 4; cf. III, 53, 4–6); "vindex libertatis" (Id. III, 56, 6); "vindiciae libertatis" (Cic. *De Rep.* III, 44); "patrona civitatis ac vindex libertatis" (Id. *De Orat.* II, 199).

The right of appeal to the People was in fact an aspect of the right of formal trial, because the Assembly, acting as a iudicium populi, was a supreme court of appeal which revised the verdict of the magistrate,[1] and not merely a sovereign authority entitled to pardon the crime, or commute the sentence, without hearing the case.

Just as provocatio was regarded as a guardian of freedom so a civilian magistracy "sine provocatione" was regarded as tyranny, and the Plebiscitum Duillianum imposed the death penalty on anyone who left the Plebs without tribunes, or set up a magistracy not subject to provocatio.[2]

The Lex Valeria de provocatione was a so-called lex imperfecta, and a sanction was added to it by the Lex Porcia which exempted citizens from flogging "iniussu populi".[3] Hence the Lex Porcia is sometimes praised as a guardian of freedom: "Porcia lex virgas ab omnium civium Romanorum corpore amovit...Porcia lex libertatem civium lictori eripuit."[4]

Provocatio protected a citizen's life and person, but it did not apply to other personal rights. These could be protected against the arbitrary injustice of magistrates by (the tribunician) auxilium.

The object of the tribunate was the protection of the citizen—plebeian and patrician alike—who was wronged by the civil authorities in the city of Rome.[5] The tribune was entitled to succour (auxilium ferre) any citizen who appealed to him for that purpose (appellare tribunos), intervening on his behalf as maior potestas. As a matter of fact, auxilium is the intercessio of par maiorve

[1] See Mommsen, *op. cit.* III, p. 351. [2] Livy III, 55, 14.

[3] Cic. *De Rep.* II, 54; Livy X, 9, 4 ff.

[4] Cic. *Pro Rab. perd. reo*, 12; cf. ap. Ascon. 78, 1 C (lex Porcia): principium iustissimae libertatis. *II in Verr.* V, 163: O nomen dulce libertatis, o ius eximium nostrae civitatis, o lex Porcia legesque Semproniae (cf. *Pro Rab.* 12). See also Sallust, *Cat.* 51, 22; Ps.-Sallust, *In Cic.* 5.

[5] Cf. Ed. Meyer, Der Ursprung des Tribunats und die Gemeinde der vier Tribus, *Kl. Schr.* 1^2, pp. 335–61 (=*Hermes* XXX, 1895, pp. 1 ff.); Mommsen, *op. cit.* II^3, pp. 291 ff.; I^3, p. 278; I^3, p. 66; G. W. Botsford, *The Roman Assemblies* (1909), p. 263.

potestas lodged against a magisterial order in consequence of an appeal to the said potestas by the complainant,[1] and therefore any par maiorve potestas could be approached for this purpose.[2] The tribunes were the authority par excellence in that matter because the tribunate was set up for the purpose of auxilium,[3] and because the tribunes enjoyed for this purpose the standing of maior potestas even against the consuls.[4] The tribunate was therefore regarded as the protection of freedom,[5] and auxilium and provocatio were called "duae arces libertatis tuendae".[6]

Although provocatio and auxilium were often mentioned in the same breath, there is a great difference between them. Provocatio was the citizen's right. A sentence of death or flogging passed in the first instance could not without violation of the law be executed before the Assembly confirmed the verdict. The case is different with auxilium. Strictly speaking the citizen had no right to auxilium; he had only the right of appellatio, i.e. if he thought he was wronged by an order of a magistrate, he was entitled to seek the help of a tribune, or any par maiorve potestas, for the purpose of opposing that order.[7] The approach to the tribune ought not to be denied, as witness the laws prescribing that tribunes should not be absent from the city a whole day, nor lock their house doors at night.[8] Appellatio is absolutely necessary if auxilium is to take place at all; but it did not invariably result in auxilium. The reasons for that are, first, that auxilium could not be given in the case of decrees against which there was no appeal;[9] and, secondly, that the decision whether or not to intercede as requested by the appellant rested entirely with the tribune, who might well refuse to intercede, if he did not deem

[1] See Mommsen, *op. cit.* 1^3, p. 274 and p. 278.

[2] See, e.g., Caesar, *Bell. Civ.* III, 20.

[3] Cic. *De Leg.* III, 9: Plebs quos pro se contra vim auxilii ergo decem creavit, ei tribuni eius sunto. See also Livy III, 9, 11, and above, p. 25 n. 5.

[4] See above, p. 23 nn. 1 and 2.

[5] Sallust, *Hist.* III, 48, 12 M: Vis tribunicia telum a maioribus libertati paratum. Cic. *De Leg. Agr.* II, 15: Tr. pl. quem maiores praesidem libertatis custodemque esse voluerunt. Livy III, 37, 5: Tribuniciam potestatem munimentum libertati. Diod. Sic. XII, 25, 2: (Δήμαρχοι) φύλακες τῆς τῶν πολιτῶν ἐλευθερίας.

[6] Livy III, 45, 8. Cf. III, 53, 4.

[7] Cf. Mommsen, *op. cit.* 1^3, p. 274.

[8] See Id. *op. cit.* II^3, p. 291 n. 2, and Botsford, *loc. cit.*

[9] See Mommsen, *op. cit.* 1^3, pp. 278 ff.

it right to do so.[1] It is true that a tribune was expected to aid a wronged citizen—that was what tribunes were for—and it may be assumed that, as a rule, auxilium was given where it could and ought to have been given; but it was given as a result of the tribune's right to grant it, and not of the citizen's right to demand it. Auxilium was an institution of which the citizen could avail himself, but it was by no means his indefeasible right as was provocatio. The citizen's right was appellatio, whereas auxilium was the tribune's right.

We come now to the question how far the authority of the State extended over the private affairs of the citizens. As has been said, the Romans did not conceive of their freedom in terms of the issue Individual versus Society; it is not therefore surprising to find that the censorial cura morum, which extended over all the branches of public and private life,[2] and the Leges Sumptuariae were not on the whole considered to be an encroachment on personal liberty. The high regard for antiqui mores and the realization that the welfare of the community depended on the behaviour of its members probably went a long way towards reconciling the Romans to the censorial cura morum. There is no evidence of protests against this as such, but as to the Leges Sumptuariae there is some evidence of occasional misgivings. Thus the Lex Oppia of 215 B.C., which at the time of Hannibal's invasion imposed austerity standards on female attire and ornaments, and forbade women the use of carriages in the City and towns, caused an outburst of protests by the discontented women, and was repealed in 195 B.C. If Livy's account of the event (XXXIV, 1 ff.) is indicative of what the Romans thought on the subject of the Leges Sumptuariae, it would appear that their advocates believed that such laws arrested the differentiation in standards of living, and by preserving an outward uniformity strengthened the inner unity of society; their opponents, on the other hand, did not question the principle on which these laws rested, they only questioned the desirability of austerity in certain circumstances.

There is, however, some evidence which, if genuine, would go to prove that on occasions the very principle underlying the Leges

[1] For examples of denied auxilium see Livy III, 56, 5; Val. Max. IV, 1, 8; Pliny, *N.H.* XXI, 3, (6), 8 f. See also Livy IX, 34, 26.

[2] Cf. Mommsen, *op. cit.* II³, pp. 375 ff.

Sumptuariae was challenged in the name of libertas. According to Valerius Maximus:

> M. Antonius et L. Flaccus censores (97 B.C.)[1] Duronium senatu moverunt, quod legem de coercendis conviviorum sumptibus latam[2] tribunus plebis abrogaverat...: "Freni sunt iniecti vobis, Quirites, nullo modo perpetiendi. Alligati et constricti estis amaro vinculo servitutis: lex enim lata est quae vos esse frugi iubet. Abrogemus igitur istud horridae vetustatis rubigine obsitum imperium. Etenim quid opus libertate, si volentibus luxu perire non licet?"[3]

It would be hard to tell whether this protest, even if historical, was typical.

It is typical of the Roman's concern for personal freedom that the prohibition of the second tenure of an office was first applied to the censorship, and one case only is known of a man having been censor twice.[4]

By means of the censorship and the Leges Sumptuariae a very considerable control could—at least in theory—be exercised over the private life of the citizen. And if under the Republic the Romans did not have to endure too much hardship of regimentation, it was in part due to the discrepancy between the nominal rights and the actual means of control their government possessed, and in part to the character of the people who governed them.

As has been seen, the Romans had no freedom of public meetings: any gathering of the People had to be convened and presided over by a competent magistrate.[5] On the other hand, under the Republic they enjoyed wide freedom of association for religious, professional,

[1] See Münzer in PW, v, col. 1862 *s.v.* Duronius (3).

[2] Münzer, *loc. cit.*, supposes that the Lex Licinia of 103 B.C. is referred to.

[3] Val. Max. II, 9, 5. I owe this reference to Kloesel, *Libertas*, p. 13. Kloesel's comment seems to imply that the speech of Duronius, as it stands, was directed against the censorship ("gegen diese von starkem Ethos getragene Magistratur"). Unless one is inclined to think that the word "imperium" refers to the censorship, there is no other support for Kloesel's assumption. Imperium, however, refers to imperium legis not to imperium censoris, the latter expression being impossible as the censors possessed potestas only, not imperium. Duronius, as Valerius Maximus clearly says, proposed to repeal the law, not to depose the censors.

[4] See Mommsen, *op. cit.* I[3], p. 520, especially n. 2.

[5] See above, p. 18, and Livy XXXIX, 15, 11.

and political purposes. The right of association was granted to all, but it could be curtailed and suppressed by administrative procedure.[1]

Religious freedom in the modern sense was hardly known at Rome. The Roman religion was a State religion, and every citizen was expected to observe it as a matter of course. That religion, however, while it imposed on the citizen the observance of a certain form of worship, did not impose a creed. The observance of the State religion did not exclude the simultaneous observance of any other religions or cults, provided their rites were not repugnant to the accepted morality, or their tenets subversive in the eyes of established law. The ban on the Bacchic Orgies in 186 B.C. arose from moral, not theological, considerations.[2] It must also be remembered that till the times of Domitian there was no equivalent to the *graphe asebeias* at Rome, and that the maxim "deorum iniuriae dis curae" testifies to a sense of religious tolerance no less than of religious indifference. It would therefore seem that, although in theory religious freedom was not recognized, in practice the Romans enjoyed wide freedom in matters of religion. Needless to say, all this applies to Roman citizens only, aliens resident at Rome being in a different position.

The Romans, although they admitted the authority of the censors over the intimate affairs of their private homes,[3] had a clear concept of the sanctity of the home.[4] "Quid est sanctius", says Cicero (*De Dom.* 109), "quid omni religione munitius, quam domus unius cuiusque civium? Hic arae sunt, hic foci, hic dii penates; hic sacra, religiones, caerimoniae continentur; hoc perfugium est ita sanctum omnibus, ut inde abripi neminem fas sit." Cicero's view, which occurs again in his *In Vatinium*, 22, is confirmed by two eminent jurists of the Imperial period: "Gaius libro primo ad xii tab.: Plerique putaverunt nullum de domo sua in ius vocari licere, quia domus tutissimum cuique refugium atque receptaculum sit, eumque qui inde in ius vocaret, vim inferre videri" (*Dig.* II, 4, 18). And, similarly, "Paulus libro primo ad Edictum: Sed etsi is qui domi est

[1] Cf. Mommsen, *De Collegiis et Sodaliciis Romanorum*, Kiel, 1843, pp. 32–35; and *Staatsrecht* III, p. 1180.

[2] Cf. Livy XXXIX, 8 ff., and the S.C. de Bacchanalibus, Dessau, *I.L.S.* 18.

[3] Dion. Hal. XX, 13, 3. Cf. Mommsen, *op. cit.* II[3], p. 376.

[4] Cf. F. Schulz, *Prinzipien des römischen Rechts*, p. 109; R. v. Iherin *Geist des römischen Rechts*[3], II, 1, pp. 158 f.

interdum vocari in ius potest, tamen de domo sua nemo extrahi debet" (*Dig.* II, 4, 21).

It cannot be said that a Roman's home was entirely immune from encroachment, yet it provided a considerable measure of security and inviolability.

Cicero in his *Pro Caecina* (96 ff.) and *De Domo Sua* (77 ff.) declared that the freedom and citizenship of a Roman were indefeasible rights: "Maiores nostri...de civitate et libertate ea iura sanxerunt, quae nec vis temporum, nec potentia magistratuum, nec res iudicata, nec denique universi populi Romani potestas, quae ceteris in rebus est maxima, labefactare possit" (*De Dom.* 80). It may well be doubted whether this sweeping statement, and the arguments supporting it, is an expression of Cicero's considered opinion on the subject; rather it seems to be merely an expedient view advanced for the sake of the case in hand.[1] As a general rule this view is untenable, and Cicero himself elsewhere records several instances that disprove it.[2] From a purely legal point of view there was nothing to prevent even the enslavement of a citizen.[3] But, with regard to the Middle and Late Republic and for all practical purposes in ordinary circumstances, there is much truth in Cicero's saying. For after nexum had been abolished and banishment had fallen into disuse, and, on the other hand, before Sulla provided for voluntary exile in anticipation of condemnation, civitas and libertas were practically inviolable so long as the citizen remained at Rome.[4] And this meant that a Roman's "life, liberty, and property" were reasonably secure.

It appears from what has been said in the preceding pages that libertas, while it falls short of democracy and egalitarianism, means freedom from absolutism, and the enjoyment of personal liberties under the rule of law.

The following two chapters will trace the meaning and effectiveness of libertas in Roman politics during the crisis of Roman republicanism.

[1] Cf. Mommsen, *op. cit.* III, p. 43 n. 2 and p. 361 n. 1.
[2] See *De Orat.* I, 181.
[3] Mommsen, *op. cit.* III, p. 361 n. 1.
[4] *Ib.* pp. 42 ff.

CHAPTER 2

CIVIL DISCORD: OPTIMATES AND POPULARES

1. The Background of the Struggle

A salient feature of Roman domestic politics during the century or so preceding the final collapse of republicanism was the fierce antagonism between the so-called Optimates and Populares.[1] They opposed and sometimes fought each other, and often claimed—each side after its own fashion—to be the champions of libertas. It would therefore be worth while seeing whether the rival contentions of the Optimates and Populares affected the conception of political freedom during Rome's transition from the Republican form of government to the Principate. For this purpose the true character of the Roman constitution, and the manner in which it actually worked—as distinct from its underlying principles and inherent potentialities—needs to be considered.

The form of government between the Second Punic War and the Gracchi, which Polybius and Cicero described as a mixed constitution, was in fact an aristocratic republic in everything but name.[2] This fact was apparent to contemporaries, and even frankly

[1] These terms, after some aberrations of modern interpretation, have come into their own in recent times. See, above all, H. Strasburger, PW, XVIII, cols. 773 ff., *s.v.* Optimates, and M. Gelzer, Die römische Gesellschaft zur Zeit Ciceros, *N. Jhb. f. kl. Alt.* XLV (1920), p. 1 ff. For this and the subsequent sections the following were of great use throughout: H. Last, *C.A.H.* IX, chapters I–IV; R. Syme, *The Roman Revolution*, Oxford, 1939; M. Gelzer, *Die Nobilität der römischen Republik*, Leipzig, 1912; F. Münzer, *Römische Adelsparteien und Adelsfamilien*, Stuttgart, 1920; H. Strasburger, PW, XVII, cols. 785 ff. *s.v.* Nobiles; Id. *Concordia Ordinum, eine Untersuchung zur Politik Ciceros*, Frankfurt Diss. 1931; W. Kroll, *Die Kultur der ciceronischen Zeit*, Leipzig, 1933, vol. I, pp. 10 ff.

[2] Polyb. VI, 11 ff.; Cic. *De Rep.* It was apparently with reference to the theory of the mixed constitution that Tacitus remarked: "Cunctas nationes et urbes populus aut primores aut singuli regunt; delecta ex iis et consociata rei publicae forma laudari facilius quam evenire, vel si evenit, haud diuturna esse potest" (*Ann.* IV, 33, 1). So far as Rome is concerned there is no gainsaying this remark.

admitted by the very supporters of that régime.[1] It ought, however, to be added that the ascendancy of the nobility must have been established without straining the constitution, for observers so divergent in standpoint and opinion as Cicero and Sallust agree that the Middle Republic was, in the main, a period of concord and model government.[2]

Although all Roman citizens had the vote and, in theory at least, could vote as they would, there was not complete sovereignty of the People; for, as has been seen, it was only People and Magistrate together that constituted the sovereign electorate and legislative power. Furthermore, a great many plebeians were the clients of the nobles, and as such were expected to follow at the polls the auctoritas of their patrons, who, until the secret ballot was introduced, were in a position to exercise some pressure on the voting of their clients.[3] On the other hand, it seems that the power of the People became diminished by acquiescence no less than by usurpation. During the late third and early second centuries B.C. Rome had chiefly to face problems of warfare and foreign policy which, as a matter of established constitutional practice, had to be dealt with by the Senate and the senior magistrates; and, if these were properly handled, there was little or no need at all to refer such problems to an Assembly of the People. It is true the People had reserved to it the right of declaring war, but the history of the beginning of the Second Macedonian War shows how the People could be induced to follow senatorial policy.[4] The Senate passed its resolutions which the People did not always find it necessary to ratify, so that, by acquiescence, the decrees of the Senate obtained the force of law.[5]

Another factor that greatly contributed to the increase of the Senate's power was the transformation of the tribunate. When the Struggle of the Orders was over, the tribunes ceased to be the champions of the under-privileged, and became the allies of the

[1] Cic. *De Rep.* II, 56. Cf. Polyb. VI, 13, 8.

[2] Cic. *De Rep.* I, 34; 70; *De Leg.* II, 23; III, 12; *Pro Sest.* 137; Sallust, *Cat.* 9; *Jug.* 41; *Hist.* I, 11 M.

[3] Cf. above, p. 20.

[4] See Livy XXXI, 6 ff. Cf. M. Holleaux in *C.A.H.* VIII, pp. 164 f.

[5] Sallust, *Hist.* III, 48, 16 M: Magna illa consulum imperia et patrum decreta vos exequendo rata efficitis, Quirites, ultroque licentiam in vos auctum atque adiutum properatis. Cf. *ib.* I, 72 M. See also T. Frank in *C.A.H.* VIII, p. 359.

ruling class, to which indeed many tribunes belonged.[1] The tribunician veto served the Senate well as an effective check both on the Assembly and on the Executive, and, it must be added, it was the only really effective check the Roman constitution of the Middle Republic possessed.[2] From a constitutional point of view, the alliance between the Senate and the tribunate was perhaps the most solid foundation for the senatorial supremacy in the State. In view of the fact that plebiscita and leges were equally binding, it was of prime importance that bills introduced to the Concilium Plebis by the tribunes were previously discussed and approved by the Senate.[3] Thus the centre of power was gradually shifted to the advantage of the Senate. It is noteworthy that during the century between the tribunate of C. Flaminius in 232 B.C., who, without consulting the Senate and against its opposition, carried a plebiscitum which provided for the distribution of the Ager Gallicus to Roman citizens,[4] and the tribunate of Ti. Gracchus, there do not seem to have been attempts to challenge the authority of the Senate.[5] Hannibal's invasion and the wars in the East probably arrested the development of Rome towards democracy.

In so far as institutions are concerned, it was the Senate that ruled Rome at that time; but the counsels of the Senate itself were swayed by a comparatively small group of the nobiles, the aristocracy of office, prominent among whom were the consulars to whom the procedure of the Senate gave practical advantages.

The nobility of the Late Republic is sometimes described by modern scholars as "the privileged class".[6] This description is true

[1] See the interesting passage in Livy x, 37, 9 ff.

[2] See Cic. *De Leg.* III, 23; Livy IV, 48, 6. Cf. above, pp. 22 f.

[3] Cf. T. Frank, *C.A.H.* VIII, p. 367.

[4] See Polyb. II, 21, 7 f. Cf. T. Frank, *C.A.H.* VII, p. 806; and F. Münzer, PW, VI, col. 2496, *s.v.* Flaminius (2). See also Livy XXI, 63, 2 f.

[5] But there were in the second century B.C. attempts to challenge the position of the nobility, as for example by Cato the Elder (consul in 195, died in 149 B.C.) or C. Cassius Longinus (consul in 171 B.C.; for whom see Münzer, *Röm. Adelsparteien*, pp. 219 ff.). The Gabinian and Cassian Ballot Laws (of 139 and 137 B.C.) were also a blow to the aristocracy, see above, p. 20, and below, p. 50.

[6] See, e.g., W. Schur, Homo novus, *Bonner Jahrbücher*, CXXXIV (1929), pp. 54–5; H. Strasburger in PW, XVII, col. 1226, *s.v.* Novus homo. Mommsen's views are too well known to need particular references.

only in so far as "privilege" means advantage. If, however, "privilege" means superior legal status, the nobiles enjoyed no privileges, except such distinctions as the ius imaginum and the toga praetexta, which all the curule magistrates enjoyed,[1] and the front seats in the theatre, which were reserved for the senatorial and equestrian orders.[2] Unlike the nobility of some other countries who enjoyed privileges with little or no power, the Roman nobiles possessed power without privileges. The privileges that the old patriciate enjoyed were almost entirely swept away, only to make way for the formation of the new nobilitas, whose political and social supremacy was in many respects similar to the supremacy of the patriciate, largely because its social structure and habits of thought and conduct remained essentially the same.

The supremacy of the noble families rested in part on their wealth, their large followings (clientelae), and the alliances with their peers,[3] and in part on other less material but, at Rome, none the less tangible factors, namely, auctoritas, dignitas, and nobilitas.

As has been said in the previous chapter, libertas comprised the right to enact laws and elect magistrates, but, for all that is known, the Romans did not, as a rule, interpret this as the right actually to govern themselves.[4] It was a deep-rooted habit of thought and behaviour with the Romans to consult competent advisers before undertaking anything of importance, whether in private or in public

[1] For the ius imaginum see Mommsen, *Staatsrecht* 1^3, pp. 442 ff.; for the toga praetexta see 1^3, pp. 418 ff.

[2] See *op. cit.* III, pp. 519 ff.

[3] Cf. R. Syme, *op. cit.* p. 10 ff.; F. Münzer, *op. cit.* pp. 225 ff.; M. Gelzer, *Nobilität*, pp. 43 ff. and *N. Jhb. kl. Alt.* XLV (1920), pp. 1 ff. *Rhet. ad Herenn.* I, 8, deserves notice in that it seems to contain the propaganda of the Populares in a nutshell. See also E. Wistrand, Gratus, grates, gratia, gratiosus, *Eranos* XXXIX (1941), pp. 22 ff.; and K. Hanell, Bemerkungen zu der politischen Terminologie des Sallustius, *Eranos* XLIII (1945), pp. 263–76.

[4] The innovations of the Gracchi and some other people will be discussed later. Livy III, 39, 8 (vicissitudo imperitandi quod unum exaequandae sit libertatis), and IV, 5, 5 (aequae libertatis est in vicem annuis magistratibus parere atque imperitare), do not contradict the above statement: the first passage stresses the idea of annual, as opposed to permanent, imperium; the second refers to the right of the plebs, as a body, to a share in the government; neither implies that every citizen has a right to govern. Cf. above, p. 11 n. 1.

life.[1] Libertas is not so much the right to act on one's own initiative as the freedom to choose an "auctor" whose "auctoritas" is freely accepted.[2] The Roman, quite rightly, recognized as a matter of course that some people were better qualified than others to become auctores, that is to say that they were worthy and able to suggest to others what they ought to do,[3] and, so long as the acceptance of auctoritas was not exacted, he also did not consider it incompatible with his freedom to follow their lead. Such a frame of mind, combined as it was with the fact that a political career of any significance demanded the possession of considerable wealth, made the existence of a ruling oligarchy (in the original sense and without any odious connotation) inescapable. In his *De Re Publica* (I, 47) Cicero put into the mouth of an interlocutor a description of States in which everyone is nominally free (istae civitates in quibus verbo sunt liberi omnes): "The People cast votes, elect commanders and magistrates, are canvassed for votes, and have Bills proposed to them; but they grant only what they would have to grant even if they were unwilling to do so, and they do not themselves possess what others seek to obtain from them. For they have no share in the Executive, in deliberation on public affairs, and in the courts of selected judges, all of which are given on the basis of ancestral

[1] On one occasion the censors struck the name of a senator off the Senate roll because he divorced his wife without first taking advice, see Val. Max. II, 9, 2. The prerogative of the Senate derived from the duty of every magistrate to take advice before doing anything new. The resolutions of the Senate were styled "consulta" even when they became decrees, and a vetoed resolution was nevertheless an "auctoritas".

[2] On auctoritas see R. Heinze, Auctoritas, *Hermes* LX (1925), pp. 348–66, and *Von den Ursachen der Grösse Roms* (1921), pp. 32 ff. I have not been able to procure the dissertation of Fritz Fürst, *Die Bedeutung der auctoritas im privaten und öffentlichen Leben der römischen Republik*, Marburg, 1934.

[3] Val. Max. III, 7, 3: Nasica contrariam orationem ordiri coepit. Obstrepente deinde plebe, tacere, quaeso, Quirites, inquit, plus ego enim quam vos quid rei publicae expediat intellego. Qua voce audita omnes pleno venerationis silentio maiorem auctoritatis eius quam suorum alimentorum respectum egerunt. Indicative of the importance of auctoritas in public life is also the episode related by Ascon. 22, 5 ff. C: when M. Scaurus was accused of having caused the revolt of the Allies, he went to the Forum and declared "Q. Varius Hispanus M. Scaurum principem senatus socios in arma ait convocasse; M. Scaurus princeps senatus negat; testis nemo est: utri vos, Quirites, convenit credere?" Qua voce—adds Asconius—ita omnium commutavit animos ut ab ipso etiam tribuno dimitteretur.

birth and wealth." This description fits the Roman Republic very well. The common citizen could not hold public offices (honores), unless the Romans had followed democratic Athens in attaching salaries to them. The real question was, not whether few only should govern, but who should be those few. And, in deciding this, dignitas and nobilitas were of prime importance.

Dignitas,[1] in a political sense, signifies either a particular office, or the prestige a Roman acquires through the tenure of an office.[2] It contains the notion of worthiness on the part of the person who possesses dignitas,[3] and of the respect inspired by merit on the part of the people.[4] But unlike honos, which is limited in time, and gloria, which is transient, dignitas attaches to a man permanently, and devolves upon his descendants.[5] And it is dignitas above all other things that endows a Roman with auctoritas.[6]

In the Late Republic (which is the earliest period from which literary evidence for the meaning of dignitas is extant) dignitas often denotes not only the respect freely inspired by a person's merit, but also—and in the first place—a title[7] to be given, through office, the allegedly deserved opportunity of exercising one's auctoritas in the State.[8] Dignitas assumes the meaning of an

[1] See especially Helmut Wegehaupt, *Die Bedeutung und Anwendung von dignitas in den Schriften der republikanischen Zeit*, Breslau Diss. 1932. Although on some points this dissertation seems to adopt too purely literary an approach to historical problems, it is a very valuable study. For different views see R. Reitzenstein, Die Idee des Prinzipats bei Cicero und Augustus, *Gött. Nach.* 1917, pp. 432 ff.; V. Ehrenberg, Monumentum Antiochenum, *Klio* XIX (1925), pp. 200–7; E. Remy, Dignitas cum otio, *Musée Belge* XXXII (1928), pp. 113 ff.

[2] Wegehaupt, *op. cit.* pp. 22 ff.

[3] *Ib.* pp. 9 ff. and p. 19.

[4] *Ib.* pp. 17 ff.

[5] *Ib.* pp. 12 ff.; Heinze, *Ursachen*, p. 30; Cic. *Pro Sest.* 21; *Pro Mur.* 15 ff.

[6] Cic. *De Inv.* II, 166: Dignitas, alicuius honesta et cultu et honore et verecundia digna auctoritas. See also Wegehaupt, *op. cit.* p. 12.

[7] Sallust, *Jug.* 85, 37: Nobilitas...omnes honores non ex merito sed quasi debitos a vobis repetit. Pliny, *Paneg.* 69: Iuvenibus clarissimae gentis debitum generi honorem...offerres.

[8] See Caes. *Bell. Civ.* I, 7, 7; 9, 2; III, 91, 2; Cic. *Ad Att.* VII, 11, 1; *Pro Lig.* 18. Very illuminating is also Sallust, *Cat.* 35, 3–4. Cf. Reitzenstein, *op. cit.* p. 434. For a somewhat different view see Wegehaupt, *op. cit.* p. 37.

influential position; it epitomizes the achievement of a person, or a person's ancestors, and, at the same time, forms the basis for further aspirations.[1]

Being inheritable, dignitas is closely allied with nobilitas. In fact, nobilitas originally was nothing but the respect for a person's ancestral dignitas.[2] Nobilitas meant renown gained through the display of virtus,[3] and, obviously, one who was "well-known" (nobilis) on account of his own, or his ancestors', virtus was considered to possess the worthiness (dignitas) to conduct public affairs. Since nobilitas and dignitas were considered inheritable, birth and name, even apart from wealth and relations, were important factors in politics. Under the Empire a satirist might ask, Stemmata quid faciunt,[4] and a philosopher might aver that genealogical trees made people known rather than noble.[5] Not so under the Republic. Names and pedigrees counted for much. A famous name might sway an election,[6] and one's ancestral "images" might, as it were, stand surety for one's worthiness.[7] Even Cicero's mastery of words fell short of disguising the fact that he was ill at ease before the dignitas of Appius Claudius.[8] And was it just extravagance on his part when the quaestor Caesar—as he then was—reminded the Romans that his family (at the moment in partial eclipse), being descended from Venus, partook of the reverence due to the gods?[9] Caesar must have known the sentiments of his fellow citizens.[10]

The supremacy and pre-eminence of the nobility was traditional, and, as such, might have been acceptable to the rest of the people, were it not for the fact that at Rome prestige meant power, and the

[1] Wegehaupt, *op. cit.* pp. 37, 41, 45 f.

[2] Cic. *Pro Sest.* 21; Heinze, *Ursachen*, p. 30.

[3] Cic. *Ep. ad Hirt.* frag. 3 (Purser): Cum enim nobilitas nihil aliud sit quam cognita virtus. See also Sallust, *Jug.* 85, 17.

[4] Juvenal, VIII, 1.

[5] Seneca, *De Benef.* III, 28, 2.

[6] Cic. *In Pis.* 2; *II in Verr.* V, 180.

[7] Sallust, *Jug.* 85, 29. Cf. Cic. *De Leg. Agr.* II, 100.

[8] See the very illuminating *Ad Fam.* III, 7, 4–5.

[9] Suet. *Div. Jul.* 6, 1.

[10] It is also noteworthy that C. Gracchus—qui unus maxime popularis fuit, Cic. *De Dom.* 24—said in the Assembly (Schol. Bob. 81, 20 St. = Malcovati, *Orat. Rom. Frag.* II, p. 139, no. 44): Si vellem aput vos verba facere et a vobis postulare, cum genere summo ortus essem...nec quisquam de P. Africani et Tiberi Gracchi familia nisi ego et puer restaremus, ut pateremini hoc tempore me quiescere ne a stirpe genus nostrum interiret, etc.

ambitious desire to enhance one's prestige gradually destroyed the harmony between the dignitas of some and the libertas of all.

All the nobiles had in common a strong impulse towards the assertion of their own dignitas. And since dignitas rested in the last resort on the tenure of public offices, the latter became the goal of that ambition, and the nobiles came to look upon the whole structure of the State from the standpoint of the honores. Cato the Elder, a self-made man, maintained that "Iure, lege, libertate, re publica communiter uti oportet; gloria atque honore, quomodo sibi quisque struxit".[1] The frame of mind of the younger Africanus, Cato's rival, must have been totally different, for he said: "Ex innocentia nascitur dignitas, ex dignitate honor, ex honore imperium, ex imperio libertas."[2] This libertas is not the libertas communis founded on aequae leges, but a sectional and exclusive libertas belonging to a Scipio and his like, to whom the attainment of honores and imperia was freedom, their own freedom, of course. And if that is how the nobles conceived of the relation between dignitas and libertas, the question arises whether in the long run the dignitas of the nobles could remain compatible with the communis libertas and aequae leges of the Roman People. For power was increasingly concentrated in the hands of the nobles, and "all power tends to corrupt".

During the second century the nobles held the chief magistracies, the military commands, the provinces, the treasury, the law-courts.[3] They enriched themselves by hook or by crook, evicted small holders from their land, and mismanaged public affairs. Although nobilitas originally meant distinction through service and merit, not blue blood, and as such its ranks could not in theory be closed, it hardened into an exclusive, arrogant, and complacent clique, jealous of its possessions, and determined to retain its power and to perpetuate its rule. Their dignitas came to mean reckless and unjust domination.[4]

Opposed to the rule of such an oligarchy were many of the dispossessed, who longed for economic security; many of the plain

[1] Malcovati, I, p. 218, no. 249.
[2] *Ib.* p. 241, no. 22. Cf. Cic. *De Off.* I, 13.
[3] See, e.g., Sallust, *Jug.* 31, 20; 41, 7; *Cat.* 39, 1 f.
[4] See C. Gracchus frag. 27, 45, 46 (Malcovati, II, pp. 133, 140); Sallust, *Jug.* 31; 41; 85; *Cat.* 11 ff.; Plut. *Ti. Gracchus* 8; Cic. *II in Verr.* V, 175.

citizens, who longed for an efficient and civil government; the more ambitious members of the rising Equestrian Order, who longed for political power; and such aristocrats as had fallen on evil times, or were for some reason or other at variance with those in power, and longed for dignitas.

When their power and the title to it were challenged, the ruling oligarchy, perhaps with complacent self-praise, or in an attempt to give their social and political supremacy an air of moral superiority, were pleased to consider and call themselves Optimates;[1] their opponents contemptuously called them Pauci, Factio paucorum, and the like.[2] Around the core of the nobilitas there were gathered together various supporters of the established order; nevertheless, they did not form a party in the modern sense of the word, nor had they a political programme distinctively their own.[3] Yet the majority of the Optimates had a common cause, and the identity, in the last resort, of their interests produced among them a certain cohesion despite all personal frictions, and a certain continuity of policy amid all the inconsistencies of a deliberate opportunism.[4]

The Populares were even less cohesive and less possessed of a common political programme than their opponents the Optimates. The name of Populares was given in antiquity to all manner of people with different, and sometimes divergent, aims and motives: reformers[5] and adventurers, upstarts and aristocrats, moderates and

[1] The earliest instance of "optimates" in a political sense is *Rhet. ad Herenn.* IV, 45. For the date of this treatise see W. Warde Fowler, *Journ. Phil.* X (1882), pp. 197 ff., who assigns it to the mid-eighties of the first century B.C. H. Strasburger's assumption (PW, XVIII, col. 774) that the words of C. Gracchus "Pessumi Tiberium fratrem meum optimum interfecerunt" (Charis. *G.L.* I, 240, 16 = frag. 16, Malcovati, II, p. 130) presuppose the currency of "optimates" as a political term, is probable but not certain. The antithesis in the quoted sentence may be self-contained, "pessumi" being evoked by "optimum" without at the same time foreshadowing the term optimates.

[2] C. Gracchus, frag. 52 (Malcovati, II, p. 142); Sallust, *Cat.* 39, 1; *Jug.* 31, 1–4; 42, 1; *Hist.* III, 48, 3 and 6 M; Cic. *Pro Sest.* 96.

[3] In his *Pro Sestio* Cicero, for obvious reasons, stretches unduly the meaning of Optimates, and neither his explanation of the term nor the exposition of policy can be accepted at their face value.

[4] See Cicero's remarks on opportunism in *Ad Fam.* I, 9, 21, and *Pro Planc.* 94. They would apply to many a politician in Cicero's times.

[5] Although the difference between them and the other Populares since Marius is only too obvious, the Gracchi cannot, for that reason, be excluded

extremists. What they all had in common was their tactics, namely, to seek the support of the Populus, hence their name. The episode of the Gracchi showed that the Popular Assembly could be a weighty counterpoise to the power of the nobility, entrenched as it was behind the authority of the Senate. But unlike the Gracchi who were, to some extent, genuine—even if misguided—democrats, the Populares on the whole thought of the People as a means, and not an end.[1] Their prime object was to break the monopoly of power of the ruling oligarchy. Hence the incessant invective against the dominatio, potentia, superbia, and libido of the pauci, the factio potentium, and the appeal to the People to restore its freedom.[2] The Optimates, for their part, countered their opponents with the assertion that it was they who protected freedom and republicanism.[3]

For the present purpose there is no need to follow the tortuous and chequered politics of Rome in their entire length. They will be discussed here only in so far as they bear, directly or indirectly, on the idea of libertas, and may conveniently be grouped under several major heads.

2. Major Points at Issue

(a) *Senatus Auctoritas*

A very illuminating piece of evidence for the character of the constitution the Optimates had in mind when they professed to defend the Republic is contained in Cicero's *Pro Sestio* (96–143). Accepting the provocative challenge "quae esset natio optimatium?"

from among the Populares, as they are by H. Last, *C.A.H.* IX, pp. 96, 114, 137, because in antiquity the Gracchi were regarded as model Populares; Cic. *De Dom.* 24: C. Gracchus qui unus maxime popularis fuit; *Pro Sest.* 105: Gracchos aut Saturninum aut quemquam illorum veterum qui populares habebantur. It is noteworthy that Cicero, *Pro Sest.* 103, begins his account of the Populares with L. Cassius, the initiator of the Lex Cassia Tabellaria (137 B.C.). Likewise, Sallust places the Gracchi at the beginning of the "mos partium et factionum", *Jug.* 41–2.

[1] Cf. H. Last, *C.A.H.* IX, pp. 137 ff.; W. Ensslin, Die Demokratie und Rom, *Philologus* LXXXII (1927), p. 327.

[2] See, e.g., Sallust, *Jug.* 31; 41–2; 85; *Hist.* I, 55; III, 48 M. More about those slogans will be said later.

[3] Sallust, *Hist.* III, 48, 22 M: Neque eos (sc. factionem nobilitatis) pudet, vindices uti se ferunt libertatis. Cic. *Pro Sest.* 136: Concludam illud de optimatibus eorumque principibus ac rei publicae defensoribus. Cf. also *Pro Sest.* 98.

Cicero outlined an idealized version of the political programme of the Optimates, a version, no doubt, calculated, as it were, for external consumption but nevertheless equally revealing by virtue of its contents and omissions.

Two passages of this lengthy exposition deserve especial attention:

Quid est igitur propositum his rei publicae gubernatoribus, quod intueri, et quo cursum derigere debeant? Id quod est praestantissimum, maximeque optabile omnibus sanis et bonis et beatis: cum dignitate otium. Hoc qui volunt, omnes optimates; qui efficiunt, summi viri et conservatores civitatis putantur.... Huius autem otiosae dignitatis haec fundamenta sunt, haec membra, quae tuenda principibus et vel capitis periculo defendenda sunt: religiones, auspicia, potestates magistratuum, senatus auctoritas, leges, mos maiorum, iudicia, iuris dictio, fides, provinciae, socii, imperii laus, res militaris, aerarium (98).

Concludam illud de optimatibus eorumque principibus ac rei publicae defensoribus.... Haec est una via, mihi credite, et laudis et dignitatis et honoris: a bonis viris sapientibus et bene natura constitutis laudari et diligi; nosse discriptionem civitatis a maioribus nostris sapientissime constitutam, qui cum regum potestatem non tulissent ita magistratus annuos creaverunt ut consilium senatus rei publicae praeponerent sempiternum, deligerentur autem in id consilium ab universo populo, aditusque in illum summum ordinem omnium civium industriae ac virtuti pateret; senatum rei publicae custodem, praesidem, propugnatorem collocaverunt; huius ordinis auctoritate uti magistratus, et quasi ministros gravissimi consilii esse voluerunt; senatum autem ipsum proximorum ordinum splendorem confirmare, plebis libertatem et commoda tueri atque augere voluerunt. Haec qui pro virili parte defendunt optimates sunt, cuiuscumque sunt ordinis; qui autem praecipue suis cervicibus tanta munia atque rem publicam sustinent, hi semper habiti sunt optimatium principes, auctores et conservatores civitatis (136–8).

The main points of this tendentious statement reveal a consistent line of thought: the goal of the Optimates is otium cum dignitate,[1] otium for the people, dignitas for the aristocrats;[2] the propertied classes are the supporters of this otiosa dignitas—an echo, no doubt,

[1] A closer examination of this phrase must be reserved for later notice.

[2] *Pro Sest.* 104: Nunc iam nihil est quod populus a delectis principibusque dissentiat; nec flagitat rem ullam neque novarum rerum est cupidus, et *otio suo et dignitate optimi cuiusque* et universae rei publicae gloria delectatur. Cf. *De Rep.* 1, 52: Quibus (*sc.* optimatibus) rem publicam tuentibus beatissimos esse populos necesse est, vacuos omni cura et cogitatione aliis permisso otio suo, quibus id tuendum est neque committendum ut sua commoda populus neglegi a primoribus putet. Cf. also *Pro Sest.* 137.

of the concordia ordinum[1]—and the Senate its chief constitutional instrument. It is noteworthy that freedom of the people is either entirely ignored, as in the enumeration of the foundations on which the otiosa dignitas rests (98), or perfunctorily mentioned (137), and even so it is made to depend on the authority of the Senate, whereas the celebrated guardians of freedom, the tribunicium auxilium and provocatio, are not so much as mentioned. The description of the Roman *patrios politeia*—civitas a maioribus nostris sapientissime constituta (137)—is also very significant: the Senate is represented as always having been the dominating element of the constitution;[2] it is the guardian and champion of the State, the annual magistrates are its ministers, and the plebs is dependent on it for its liberty and welfare. In Cicero's view, the constitution of the free State centred round and depended upon the authority of the Senate.

Essentially the same tendency is present in Cicero's *De Re Publica* and *De Legibus*.[3] In the *De Re Publica* Cicero asserts that the vetus res publica attained the ideal of a mixed form of government,[4] the nature of which consists in "an even balance of rights, duties, and functions (ius, officium, munus), so that the magistrates have enough potestas; the council of eminent citizens, enough auctoritas; and the people, enough libertas".[5] But when Cicero translates the theoretical typology of governmental forms into practical terms of Roman constitutional law, and illustrates it with a historical example, the "even balance" becomes a preponderance of the Senate. For this is how he describes the vetus res publica:

> Tenuit igitur hoc in statu senatus rem publicam temporibus illis, ut in populo libero pauca per populum, pleraque senatus auctoritate et instituto ac more gererentur, atque uti consules potestatem haberent tempore dumtaxat annuam, genere ipso ac iure regiam (II, 56).

Here, as in the *Pro Sestio*, the centre of gravity of the whole system is to be found in the Senate. Likewise, in the *De Legibus* (III, 10) Cicero lays down "eius (*sc.* senatus) decreta rata sunto".

[1] Cf. H. Strasburger, *Concordia Ordinum*.

[2] Cf. *De Dom.* 130, where auctoritas senatus means gubernatio senatus.

[3] More will be said of Cicero's political writings in the subsequent chapter. For the present, the barest outline will suffice.

[4] *De Rep.* I, 70; *De Leg.* II, 23.

[5] *De Rep.* II, 57. Cf. I, 45; 69.

It is worth pointing out that Cicero's description of the Roman constitution, and particularly that found in the *Pro Sestio*, bears a remarkable resemblance to Sulla's constitution. Sulla invested the Senate with the supreme control of the State,[1] and his Lex Cornelia de xx quaestoribus gave the Senate that representative character to which Cicero attached great importance.[2]

There is also another point to be observed. In theory the advantage of the mixed form of government is that it combines the merits of the three simple forms and at the same time prevents the degeneration of monarchy into tyranny, aristocracy into oligarchy, democracy into ochlocracy (*De Rep.* I, 69). But the whole tenor of the *De Re Publica* seems to suggest that Cicero's true motive in advocating what he believed to be a mixed constitution was the realization that that form of government was the only practical compromise which, on the one hand, allowed for a strong government while keeping absolutism at bay, and, on the other, made it possible to keep the people satisfied while it precluded democracy.[3] In fact, democracy is to be eliminated at all costs,[4] for behind the rule of the sovereign people lurks the would-be tyrant.[5]

It seems, therefore, to judge from the *Pro Sestio* and the *De Re Publica*, that Cicero's ideal constitution was meant to be, in the first place, an aristocratic republic, centred round the pre-eminent Senate, and hostile to absolutism and democracy alike. And if this is true of the moderate Cicero it is, with one proviso, a fortiori true of the extremist Optimates. Cicero, as a consistent homo novus, maintained that the ruling class represented in the Senate should be

[1] See H. Last, *C.A.H.* IX, pp. 280 ff. and pp. 286 ff.

[2] See *C.A.H.* IX, p. 287; PW, IV, col. 1559, 53 ff. Cic. *Pro Sest.* 137: Deligerentur autem in id consilium ab universo populo. *De Leg.* III, 27: Ex iis autem qui magistratum ceperunt, quod senatus efficitur, populare sane neminem in summum locum nisi per populum venire sublata cooptatione censoria.

[3] *De Rep.* I, 52: Sic inter infirmitatem unius temeritatemque multorum medium optimates possederunt locum, quo nihil potest esse moderatius.

[4] *Ib.* II, 39: Quod semper in re publica tenendum est ne plurimum valeant plurimi. And:...neque excluderetur (multitudo) suffragiis, ne superbum esset, nec valeret nimis, ne esset periculosum.

[5] *Ib.* I, 65 ff., particularly 68: Ex hac nimia licentia (populi), quam illi solam libertatem putant, ait ille (Plato) ut ex stirpe quadam existere et quasi nasci tyrannum.

drawn from all quarters according to personal merit,[1] whereas the Optimates, on the whole, showed an intransigent exclusiveness. But the difference between Cicero and the ruling nobility concerns the composition, not the function, of the Senate. The Senate was, and was looked upon as, the stronghold of the aristocracy in their struggle to retain their power.

It is a remarkable thing that, although its social background was by no means uniform, the Senate, on the whole, remained largely pro-Optimate in sentiment, except on such occasions as those on which the membership of the Senate was drastically changed, as for example by Cinna. It is perhaps not unduly cynical to say that two senators, one of whom sided with the Optimates and the other with the Populares, had more in common than two Populares, of whom one was a senator and the other was not.[2] It is therefore not at all surprising that the alliance between the Optimates and the Senate remained firm, and throughout the period the Optimates went on invoking the senatus auctoritas,[3] just as the Populares invoked the libertas populi Romani.

(*b*) *Leges Agrariae*

The social reform of the Gracchi was in many respects relevant to freedom, but the state of the available evidence makes it almost impossible to ascertain to what extent and in what manner "libertas" figured in the advocacy of the various proposals.[4] It would seem a reasonable assumption that the Leges Agrariae and Frumentariae (and perhaps also the Leges Iudiciariae[5]) were championed in the name of aequitas and aequum ius which, as has been seen, form an essential aspect of libertas but lend themselves to various interpretations.

[1] *Pro Sest.* 137; *De Rep.* I, 51. Cf. below, pp. 52 ff.

[2] In this respect it may be of interest to compare Cic. *Phil.* X, 3.

[3] See, e.g., Sallust, *Hist.* I, 77 M (Oratio Philippi); Cic. *Pro Rab. perd. reo*, 2; *Pro Sest.* 98; 137; 143; and the *Philippics*, *passim*. See also Cic. *Brut.* 164. It is noteworthy that Livius Drusus "ob eximiam adversus Gracchos operam 'patronus senatus' dictus", Suet. *Tib.* 3, 2. For Livius Drusus the younger see Cic. *Pro Mil.* 16; *De Orat.* I, 24; Diod. Sic. XXXVII, 10.

[4] Kloesel, *Libertas*, pp. 42–4, maintains that in the struggle for the Leges Agrariae "libertas" was the watchword of the plebeians, but the ancient authorities he cites, besides being partly irrelevant, fall short of proving his statement beyond doubt.

[5] See Flor. II, 1.

The underlying idea of the economic measures proposed by the Gracchi was that the people were entitled to a share in the common property, be it the State domain or the treasury. Tiberius Gracchus is said to have argued that it was only just that common property should be divided between the citizens—τὰ κοινὰ κοινῇ διανέμεσθαι.[1] In like manner the poor Romans complained that they were robbed of their share in the very land that had been acquired by their military exploits.[2] This coincides with the speech of Tiberius Gracchus—summarized by Plutarch, *Ti. Gracchus* 9, 5 f. —in which he complained that "the men who fight and die for Italy have a share in the air and light, but nothing else... they fight and die for the luxury and wealth of others, and, while they are called masters of the world, have not a single clod of their own".[3] The claim that a citizen was entitled to a home on the land he helped to acquire is perhaps echoed in Sallust, "Nam quid a Pyrrho Hannibale Philippoque et Antiocho defensum est aliud quam libertas et *suae cuique sedes* neu cui nisi legibus pareremus?" (*Hist.* I, 55, 4 M).

A faint echo of the propaganda of the Gracchi is perhaps heard, through Livy, in Florus (II, 1):

> Inerat omnibus (sc. legibus agrariis, frumentariis, iudiciariis) species aequitatis: quid tam iustum enim quam recipere plebem sua a patribus, ne populus gentium victor orbisque possessor extorris aris ac focis ageret? Quid tam aequum quam inopem populum vivere ex aerario suo? Quid ad ius libertatis aequandae magis efficax quam ut senatu regente provincias ordinis equestris auctoritas saltem iudiciorum regno niteretur?

[1] Appian, *Bell. Civ.* I, 11.

[2] *Ib.* I, 10, 4.

[3] F. Taeger, *Untersuchungen zur römischen Geschichte und Quellenkunde: Tiberius Gracchus*, pp. 16 ff., who maintains that Tiberius's speech reflects the tenets of Stoicism which Tiberius learned from Blossius, seems to read too much into Plutarch's text. The main point of the speech is not that "es ist... ein grauenhafter Verstoss gegen die goettliche Weltordnung wenn die 'bestiae Italiae' die einfachsten, also gottgewollten Rechte geniessen, nicht aber die Buerger der Weltherrin Rom" (*op. cit.* pp. 17 f.), but that the citizens who fight and die for the Italian land "have not a single clod of earth that is their own" whereas all the fruits of their exploits fall to the rich. Had Gracchus really to look to the Stoic ethic for the idea of elementary justice which forms the essence of the very notions aequum ius and res publica? And as to Blossius, grave doubts about the Stoic origin of his democratic views have been expressed by D. R. Dudley, Blossius of Cumae, *J.R.S.* XXXI (1941), pp. 95 ff., who traces Blossius' democratic views to the Campanian tradition rather than to Stoicism.

All this perhaps goes farther back than to Livy's own reflections, since Livy, in some form or other, was acquainted with the pronouncements of the Gracchi.[1]

In so far as the Leges Agrariae and Frumentariae involved the distribution of common property, and not the improvement of civic rights, it was entirely in keeping with the ideas of res publica and aequum ius, if aequitas rather than libertas was paramount in the advocacy of the new measures.[2] But in view of the scarcity of first-hand evidence nothing can be asserted with certainty. If, however, the above conjecture concerning the Leges Agrariae is right, libertas in the propaganda of the Populares would seem to have had a purely political meaning.

The Optimates, no doubt, were unwilling to contemplate a reform of the tenure of the ager publicus because they and their followers held most of it. Gracchus must have known the sentiment prevalent in the Senate, and he probably knew that he could not expect a favourable reception for his Land Bill there. This may be the reason why he sought advice privately[3] but did not submit his Bill to discussion in the Senate prior to its introduction in the Assembly. This departure from the established constitutional practice, which was a blow at the senatus auctoritas, may have been one of the reasons why the Senate opposed the Bill. Gracchus made a last attempt to conciliate the Senate by submitting his proposals to it for discussion.[4] But the attempt failed, and Gracchus resorted to extreme means.

[1] Compare Flor. II, 2, 3, with Plut. *Ti. Gracchus* 9, 5 f.

[2] It is true that economic independence is a necessary prerequisite of freedom but if one applies this statement to the Late Roman Republic and infers from it the possible phraseology used by the advocates of the Leges Agrariae—as does Kloesel, *op. cit.* p. 43, following Poehlmann—the question arises whether or not this is projecting modern ideas into antiquity. As has been seen, the elementary meaning of libertas at Rome was the status of a person who is not a slave and who is a Roman citizen. And it is doubtful whether in the Gracchan period, when, on the one hand, nexum had already been abolished, and, on the other, the poorest citizen enjoyed rights denied to the richest foreigner or freedman, the interdependence between economic welfare and libertas would be as easily grasped as it is nowadays.

[3] Cic. *Acad. Prior.* II, 13; Plut. *Ti. Gracchus* 9, 1.

[4] Plut. *Ti. Gracchus* 11, 1–4.

(c) *Popular Sovereignty*

To crush the unyielding opposition of Octavius, Tiberius Gracchus resorted to an unheard-of measure: he had Octavius deposed by a vote of the Concilium Plebis. A few points of the speech in which he justified his conduct before the people are preserved in Plutarch, *Ti. Gracchus* 15 (cf. Appian, *Bell. Civ.* 1, 12), and call for attention.

Two main arguments stand out in this speech: (*a*) A tribune is sacrosanct only in so far as he serves the people; therefore, should he wrong the people, he deprives himself of his office and of inviolability (§ 2). (*b*) Since it is the people who invest the tribune with power, the people can also divest him of his power, if he acts against the people's will, and they can transfer the power to another person (§§ 7–8).[1]

This theory, even if it were—as it presumably could not be—confined to the tribunate and the Concilium Plebis, would have sufficed, if adopted, to revolutionize by virtue of its two far-reaching implications the entire system of government at Rome.

As has been seen, the essential feature of the Roman magistracy was that while the magistrate was elected by popular vote he was not obliged to act as a delegate of the electorate. The moment a magistrate entered upon his office he acted, within the limits set by the constitution, by magisterial prerogative, and not by popular consent. The People chose the man, but they could not control his actions. The Senate, in later times, could express its opinion that a certain action was "contra rem publicam", but the People never could pass a vote of censure on a magistrate. Now the deposition of Octavius by popular vote, on the ground that he acted contrary to the will of the People, implied that the tribune at least was henceforward to be a mere delegate of the People. Government by the will of the

[1] It is apparently under the influence of F. Kern's "Gottesgnadentum und Widerstandsrecht" that Taeger, *op. cit.* pp. 18 ff. (see also p. 125 n. 162), finds in the speech of Gracchus the theory of "Widerstandsrecht". But obviously Gracchus mentioned Tarquin's expulsion, as well as the penalty inflicted on unchaste Vestals, only to adduce examples and precedents of disregarding sanctity in the case of wrongdoers, and not to propound the right of resistance to tyrants. He was concerned with the formal deposition of an inviolable magistrate who acted within his prerogative, which is a case entirely different from resistance to unjust rule.

sovereign Assembly would have been substituted for government by magisterial prerogative supported by the senatus auctoritas. And in view of the fact that the tribunes had the standing of maior potestas with regard to all magistracies except the dictatorship,[1] the implications of this innovation for the entire system of government were far-reaching indeed.

Secondly, the principle of par potestas was interpreted in the way that if colleagues disagreed the No was always stronger than the Aye.[2] If, however, a tribune could override the veto of another tribune by a decision of the sovereign Assembly, the institution of par potestas, with regard to the tribunate at any rate, was undermined. It may be that Tiberius did not attack the principle of par potestas explicitly,[3] but whatever he said or meant, his action undermined that principle.

Overriding decision by the People was unusual, but not new. In 148 B.C. Scipio was elected consul contrary to the Lex Annalis, and entrusted by popular vote with the command in Africa contrary to the provision that the "provinciae" were to be distributed by lot.[4] But there is a cardinal difference between the procedure in 148 and 133 B.C. In the former case the People—with the connivance of the Senate—suspended the law, whereas in the latter, they deposed a magistrate. And if the People always had the power to enact or repeal laws, they never had the right to interfere with the magisterial prerogative, except by means of general laws. The government of Rome, although elected by all the full citizens, was essentially non-democratic because, once in power, it was largely independent of the popular will. And this is why Gracchus's measure was regarded as revolutionary.

Similarly, the idea that the tribunes were obliged always to follow the People's will was obsolete rather than new.[5] But by reviving this old principle in new circumstances, and by using it as a justification for the deposition of a tribune, Gracchus introduced a new

[1] See above, p. 23. [2] See above, p. 22 n. 3.

[3] As Plutarch, *Ti. Gracchus* 11, 6, seems to suggest. Cf. H. Last, *C.A.H.* IX, p. 27.

[4] Appian, *Lib.* 112.

[5] Polyb. VI, 16, 5: ὀφείλουσιν ἀεὶ ποιεῖν οἱ δήμαρχοι τὸ δοκοῦν τῷ δήμῳ καὶ μάλιστα στοχάζεσθαι τῆς τούτου βουλήσεως. But this applies to the period of the Struggle of the Orders.

element into the constitutional practice. It is hard to say whether or not his conduct was lawful, but it certainly was new and revolutionary, a nova res indeed.

Without the slightest sympathy for his opponents, one cannot help thinking that there was, in a sense, some truth in their allegation that Gracchus was seeking a "regnum". For if the Assembly was to be sovereign in the full sense of the word; if it was to have power over laws and tribunes alike; and if tribunes could be re-elected for any indefinite number of successive years, a tribune enjoying the favour of the urban populace would possess an incalculable and uncontrollable power.

In subsequent years several measures closely allied to the principle of popular sovereignty were proposed or passed. Gaius Gracchus introduced (and withdrew at his mother's request to spare Octavius) a measure providing that if the People deposed a magistrate, such magistrate should not be allowed to hold another office.[1] L. Cassius Longinus, tribune in 104 B.C., "plures leges ad minuendam nobilitatis potentiam tulit, in quibus hanc etiam ut quem populus damnasset cuive imperium abrogasset in senatu ne esset".[2] In the same year the Lex Domitia de sacerdotiis provided that Pontiffs and Augurs should be elected by a special Assembly and not, as hitherto, merely coopted by the colleges.[3] It is noteworthy that Sulla repealed this law, and Caesar had it re-enacted.[4] In 100 B.C., Antonius, pleading for C. Norbanus who was accused of high treason, said "Si magistratus in populi Romani potestate esse debent, quid Norbanum accusas, cuius tribunatus voluntati paruit civitatis?"[5] That was not the orthodox Roman view. In 67 B.C., Gabinius, when his proposal to grant Pompey a command against the Pirates was vetoed by a fellow tribune, resorted to the measure that Tiberius Gracchus applied against his opponent Octavius. Gabinius put to the vote a proposal to depose his unyielding colleague, who withdrew his veto only after seventeen Tribes had already voted for his deposition (Ascon. 72 C). About the same time, the tribune Cornelius introduced a bill (ne quis nisi per populum legibus solveretur) which, if passed in its

[1] Plut. *C. Gracchus* 4, 1–2.
[2] Ascon. 78, 10 f. C.
[3] See Cic. *De Lege Agr.* II, 19, and Ascon. 79, 25 f. C.
[4] See *C.A.H.* IX, pp. 163 f., 288, 487.
[5] Cic. *De Orat.* II, 167.

original form might have reasserted popular sovereignty in respect of proposals to give dispensation to individuals (Ascon. 58, 3 ff. C).[1]

(*d*) *Leges Tabellariae*

In view of the fact that the Assembly proved to be for the Populares a valuable instrument with which to attack the power of the Optimates, great importance was attached to the secret ballot, which was designed to secure the independence of the voters. It appears from Cicero—our chief authority for the Leges Tabellariae—that the secret ballot was championed in the name of libertas.[2] Cicero himself, realizing on the one hand that the secret ballot had an adverse effect on the predominance of the nobility, and on the other that the People considered secrecy of voting as an essential constituent of their freedom, proposed in his *De Legibus* (III, 33 f.) a naïve compromise to the effect that voting by ballots should continue but the ballots should be shown "optimo cuique et gravissimo civi" before they were cast. He added that that procedure would give the people "an appearance of liberty" while the auctoritas bonorum would be secured. Cicero's attempt to deal with the problem shows the importance that the People attached to the secret ballot[3] and the unwillingness of the Optimates to concede it. The Optimates opposed the Leges Tabellariae because uncontrolled voting might put an end to their influence on the electorate.[4] Presumably for the very same reason, the Populares insisted on uncontrolled voting.[5]

(*e*) *Tribunicia Potestas*

The careers of the Gracchi and of Saturninus—to quote only the most notable names—proved that the tribunate might become a formidable opponent of the Senate and the nobility. Once again,

[1] The idea of popular sovereignty is also vaguely expressed in Sallust, *Jug.* 31, 11 and 20; *Hist.* I, 55, 11 and 24 M; III, 48, 15–16 M; Cic. *Pro Rab. perd. reo*, 5.

[2] Cic. *Pro Sest.* 103; *De Lege Agr.* II, 4; *De Leg.* III, 39. The agitation for free suffrage is reflected to some extent in Livy II, 56, 3; IV, 3, 7; IV, 43, 12; VI, 40, 7.

[3] Cf. also Cic. *Pro Planc.* 16; *Pro Corn.* ap. Ascon. 78, 2 C.

[4] Cic. *Pro Sest.* 103; *Brut.* 97; *De Amic.* 41; *De Leg.* III, 34 and 36.

[5] Plut. *Marius* 4; Cic. *De Leg.* III, 35 and 38.

as during the Struggle of the Orders, the tribunate was looked upon as a revolutionary magistracy, and the Optimates imputed to it all the troubles of civil strife.[1] It was, therefore, naturally an essential part of Sulla's settlement to render the tribunate harmless. Sulla crippled the tribunate in two ways: first, by enacting that the tenure of the tribunate should permanently disqualify from holding any other office, he made the tribunate unattractive to enterprising and ambitious politicians. Secondly, he limited the scope of the tribunician intercessio,[2] and either restricted or abolished the right of the tribunes to initiate legislation.[3] By so doing, Sulla secured the position of the Senate, but at the same time he provided the opponents of his settlement with an appealing catchword for their agitation. For just as Sulla's measures concerning the tribunate were not isolated enactments but part of a comprehensive scheme, so the struggle of the Populares for the restoration of the tribunician prerogative aimed at the overthrow of Sulla's entire system.

In regard to the restoration of the tribunician powers there was, as might be expected, much talk about libertas and servitium on the part of the Populares.[4] But their agitation on that occasion shows that the freedom of the people was not the real aim of the Populares.

Licinius Macer agitated in 73 B.C. for the restoration of the tribunician power on the ground that it was "the guardian of all the rights of the Plebs".[5] This description of the tribunate is traditional,[6] but it usually applied to the ius auxilii, of which Sulla did not deprive the tribunes, not to political power. The tribunate originally was the guardian of personal rights, but Macer dismissed the idea that personal rights sufficed to constitute freedom.[7] His real object was "opes nobilitatis pellere dominatione" and he regretted that he held

[1] Sallust, *Hist.* I, 77, 14 M; Cic. *De Leg.* III, 19–22; Flor. II, 1, 1.

[2] Cic. *II in Verr.* I, 155. Cf. H. Last, *C.A.H.* IX, p. 292.

[3] See Livy, Epit. LXXXIX; Cic. *De Leg.* III, 22; *C.A.H.* IX, p. 293.

[4] See especially the speech of the tribune Licinius Macer, Sallust, *Hist.* III, 48 M. And also *ibid.* I, 55 and II, 24.

[5] Sallust, *Hist.* III, 48, 1 M: Vindices paravisset (plebs) omnis iuris sui tribunos plebis. *Ib.* § 12: Vis tribunicia, telum a maioribus libertati paratum.

[6] See above, p. 26.

[7] Sallust, *Hist.* III, 48, 26 M: Verum occupavit nescio quae vos (sc. Quirites) torpedo...cunctaque praesenti ignavia mutavistis, abunde libertatem rati, scilicet quia tergis abstinetur et huc ire licet et illuc, munera ditium dominorum.

but "a shadow of a magistracy".[1] He obviously wished for the unrestricted intercessio and ius agendi, but he spoke of the people's freedom. Similarly, Aemilius Lepidus, who started the agitation for the restoration of the tribunician powers in 78 B.C., is said to have stated that the choice lay between servitium and dominatio.[2] The frequent appeals to freedom on the part of the Populares seem to have been an expedient which served to stir up the passions of the People, who were reluctant to plunge into political strife.[3] It is also unlikely that the demand to restore the pristine powers of the tribunes was meant to further the power of the People.[4] It is noteworthy that Cicero, whose personal experience made him no friend of the tribunate, argued that, on balance, it was in the interests of the Senate to retain the tribunician powers undiminished,[5] and there is much to be said for this view.

It would, therefore, seem that the insistence of the Populares on the restoration of the tribunician powers was in the first place a move to gain an instrument for their struggle for political power with a view to overthrowing senatorial hegemony. They deliberately misrepresented the issue as if the rights of the plebs were at stake. Although their agitation was successful,[6] it is doubtful whether they expressed the genuine feeling of the People. But, at any rate, they made the slogan vindicatio libertatis a household phrase in the political struggle of the closing period of the Republic.

(*f*) *Equality of Opportunity for the Homines Novi*

The issue over the question whether the consulship should be equally accessible to the nobiles and homines novi,[7] or reserved for the nobiles only, was a prominent feature in the controversy between

[1] *Ib.* §3: inanis species magistratus. For the manner in which the tribunate was employed after the full restoration of its powers, see Sallust, *Cat.* 38, 1.

[2] Sallust, *Hist.* I, 55, 10 M: Hac tempestate serviundum aut imperitandum, habendus metus est aut faciundus, Quirites.

[3] The attitude of the People towards the political rivalries during the Late Republic will be discussed in the next chapter.

[4] As the passage in Sallust, *Hist.* III, 48, 15 M, would suggest.

[5] See *De Leg.* III, 23. Cf. Livy II, 44.

[6] See Ascon. 67, 1 f. C. But see Sallust, *Hist.* III, 48, 8 M.

[7] On the significance of this term see J. Vogt, *Homo novus, ein Typus der römischen Republik*, Stuttgart, 1926; W. Schur, Homo novus. Ein Beitrag zur Sozialgeschichte der sinkenden Republik, *Bonner Jahrbücher* CXXXIV (1929),

the Optimates and Populares.[1] Libertas, it is true, is not explicitly mentioned in the claims and arguments advanced by the homines novi; nevertheless it is directly involved in the issue. For although the controversy waxed hottest over the particular question of eligibility to the consulship, it resulted in the formulation of the general principle that access to all offices should depend in the first place on the personal qualities of the candidate, and not on his origin and social standing.

The homines novi laboured under a social handicap, not under legal discrimination. Neither Cicero nor Sallust[2] base the case for the homines novi on their formal right to hold the consulship, for, in fact, no one denied that right. Since the fourth century all citizens of appropriate age, character, and past office, where this was required, were eligible for all the offices that constituted the normal cursus honorum.[3] But despite the formal position in law, the nobles, as a rule, exerted all their influence to debar the homines novi from the consulship.[4] They maintained that descendants of consulars only, or, at least, sons of senators,[5] were fit for the consulship, whereas other people were "unworthy"—indigni[6]—of the honour, disqualified by reason of birth. It was, therefore, not a question of right but of worthiness or, as the Romans would say, dignitas.[7]

In the face of the attempt on the part of the Optimates to shut out the homines novi from the exclusive clique of the nobilitas, the

pp. 54–66; H. Strasburger, in PW, XVII, col. 1223–8, *s.v.* novus homo; M. Gelzer, *Die Nobilität der römischen Republik*, pp. 22 f., 27 f., 40 f.

[1] See H. Last, *C.A.H.* IX, p. 138.

[2] *Jug.* 85. Schur's statement (*op. cit.* p. 55) that Sallust offers nothing but a stylistically remodelled version of Cicero's utterances seems a gratuitous assumption.

[3] Exceptis excipiendis: plebeians only were eligible for the tribunate; likewise, certain special offices, as for example the office of interrex, could be held only by patricians.

[4] Cic. *De Lege Agr.* II, 3; Sallust, *Jug.* 63, 6.

[5] See Gelzer, *op. cit.* p. 28. Cf. Vogt, *op. cit.* p. 24 n. 4. As Gelzer, pp. 40 f., has shown, only fifteen homines novi are known to have attained the consulship during the three hundred odd years between the consulate of L. Sextius (366 B.C.) and that of Cicero (63 B.C.).

[6] Sallust, *Cat.* 35, 3: Non dignos homines honore honestatos videbam (Catiline complains). Cf. *Cat.* 23, 6 and *Jug.* 63, 7.

[7] See Livy IV, 3, 7; Cic. *Pro Mur.* 15 f. Cf. M. P. Charlesworth, Pietas and Victoria, *J.R.S.* XXXIII (1943), p. 2, and the inscriptions there cited.

homines novi claimed that personal merit, and not ancestry, should be the criterion of a person's worthiness for all offices, including the consulship; that in respect of access to the honores proved ability should count for as much as inherited nobility.[1]

Livy, projecting the propaganda of the homines novi into a fictitious speech by Canuleius, brings in the question of free suffrage.[2] In a sense, Livy may have been right: the freedom of suffrage is curtailed if there is no reasonable freedom to nominate candidates. But it is very doubtful whether Livy realized this at all. In fact, the statement that liberum suffragium means "ut quibus velit (populus Romanus) consulatum mandet" is true only in so far as it applies to the choice between recognized and qualified candidates. If, however, it was meant literally, it is a misrepresentation of the Roman practice, and entirely out of tune with the real wishes of the homines novi. For when Cicero said (*De Lege Agr.* II, 3) that in electing him despite his novitas the People had triumphed over the nobles, he was only paying a flattering compliment to the electorate; otherwise he never represented the issue as one between the nobility and the people. He clearly indicated that it was an issue between those who, from the day of their birth, found their place ready for them, and those who aspired to make their position.[3] The nobility tended to narrow down the limits of the ruling oligarchy, whereas the homines novi sought to broaden the ranks of the governing class: they strove to break the exclusiveness of the nobility, not its pre-eminence. It was Cicero's belief that the tenure of the consulship put him on equal footing with the nobles.[4] For all their hostility to the nobiles of their own time, the homines novi were by no means opposed to nobilitas as such. But while the Optimates wished to see the nobilitas as an exclusive clique perpetuating its own hereditary position, the homines novi wished for a broadened nobility drawn from all quarters according to merit. They demanded an equal opportunity for new aspirants to dignitas and nobilitas, not an egalitarian levelling down of the nobility.

[1] Moribus non maioribus, Cic. *In Pis.* 2. Cf. H. Last, *C.A.H.* IX, pp. 138 f.

[2] Livy IV, 3, 7.

[3] Cic. *In Pis.* 2 f.; *De Lege Agr.* II, 100; *II in Verr.* III, 7; IV, 81; V, 180 f. Cf. Sallust, *Jug.* 85.

[4] *Ad Fam.* III, 7, 5.

From the standpoint of the res publica the importance of the claims of the homines novi lies in the fact that they resulted in the advocacy of equal opportunity regardless of ancestry—a truly Roman idea harmonizing with the aequum ius and aequae leges—and, judged by the prevalent views in the Republican period, in a new conception of nobilitas, namely aristocracy of merit, not of birth, or as Cicero put it "nobilitas nihil aliud...quam cognita virtus".[1]

The new or rather the renewed original concept of nobilitas propounded by Cicero and Sallust[2] was to gain a firm foothold under the Early Empire when the principal ideas of the homines novi prevailed.[3] Cicero, for all his expressed opinions, found it presumably quite impossible, or undesirable, to call "nobilis" anyone except the descendants of consulars;[4] Velleius Paterculus described Cicero as a "vir novitatis nobilissimae",[5] an expression that, strictly speaking and judging by Cicero's own usage, is an oxymoron. Marius was said to have laboured under the lack of ancestral imagines;[6] Seneca, a man "equestri et provinciali loco ortus",[7] roundly declared that "Non facit nobilem atrium plenum fumosis imaginibus. Nemo in nostram gloriam vixit, nec quod ante nos fuit nostrum est. Animus facit nobilem, cui ex quacumque condicione supra fortunam licet surgere."[8] And two generations after Seneca the new concept of nobility was set out in Juvenal's eighth Satire, the gist of which, in Juvenal's own words, is "Tota licet veteres exornent undique cerae Atria, nobilitas sola est atque unica virtus" (l. 19 f.)—a fitting motto, strongly reminiscent of Cicero and Sallust, for the new imperial nobility.

(g) *Senatus Consultum Ultimum*

A particular and long-standing issue in which senatus auctoritas and libertas were matched against each other was the dispute between the Optimates and Populares over the implications and

[1] See above, p. 37 n. 3. Cf. Sallust, *Jug.* 85, 17. [2] *Jug.* 85, 29–30.

[3] This fact appears nowhere more clearly than in the Fasti Consulares of the Early Empire. See, e.g., the list of consuls in Syme's *Roman Revolution*, pp. 525 ff.

[4] Gelzer, *op. cit.* pp. 22 ff. and 26 ff.

[5] Vell. Pat. II, 34, 3. [6] Sallust, *Jug.* 85, 25.

[7] Tac. *Ann.* XIV, 53, 5. [8] *Epist.* 44, 5. Cf. *De Benef.* III, 28, 2.

effects of the Senatus Consultum de Re Publica Defendenda, commonly known as the S.C. Ultimum.[1]

The S.C. Ultimum was a measure designed to meet grave domestic emergencies. Until the end of the third century B.C. recourse was had in cases of emergency to the dictatorship. But it was probably no fortuitous coincidence that the dictatorship fell into disuse about the same time as the Senate gained ascendancy.[2] For although constitutional practice now subjected it to the provocatio,[3] and perhaps to other limitations too,[4] the dictatorship remained a formidable power, and the appointment of a dictator, despite the specification of the task set before him, meant that for six months—unless he deemed fit to resign sooner—the whole State was subjected to a temporary autocracy instituted at the discretion of one consul, or, if rarely, by popular vote.[5] Cicero's pronounced dislike of the "Sullanum regnum", and the opposition of the Optimates to the proposal that Pompey be made dictator, or sole consul, are indicative of the Senate's attitude towards the dictatorship.[6]

To avoid recourse to this distasteful and uncontrollable magistracy, the Senate resorted to another expedient: it passed a decree advising the magistrates, in the first place the consuls, to defend the State "lest harm befalls it". The passage of a S.C. Ultimum by itself raises no constitutional problems. As any other Senatus Consultum, the S.C. Ultimum was, strictly speaking, a resolution, not a law, and, unless the motion was vetoed by par maiorve potestas, the Senate might pass any resolution it wished. It is therefore quite in keeping with Roman constitutional practice that no one ever questioned the right of the Senate to pass a S.C. Ultimum. On one occasion Caesar

[1] For a detailed discussion of its formal wording and legal implications see above all G. Plaumann, Das sogenannte senatus consultum ultimum, die Quasidiktatur der späteren römischen Republik, *Klio* XIII (1913), pp. 321–86. Also Mommsen, *Staatsrecht* III, pp. 1240 ff., and H. Last, *C.A.H.* IX, pp. 82 ff.

[2] The last dictator before Sulla was appointed in 202 B.C., see Mommsen, *op. cit.* II³, p. 169, and also Plaumann, *op. cit.* p. 355. Sulla's dictatorship "legibus scribundis et rei publicae constituendae", as well as the dictatorship of Caesar, resembled the power of the Decemvirs rather than of the dictators "rei gerundae causa".

[3] See Festus, *s.v.* optima lex (p. 216, ed. Lindsay). Cf. Mommsen, *Staatsrecht* II³, p. 164; Plaumann, *op. cit.* p. 353.

[4] Namely par potestas, see Plaumann, *loc. cit.*

[5] See Livy XXVII, 5, 16 f.; and above, n. 3.

[6] Cf. below, pp. 61 ff.

(*Bell. Civ.* I, 7, 5 f.) argued that the situation did not justify the passage of a S.C. Ultimum, but even so he did not question the Senate's right to pass such a resolution.

Strictly speaking the Senate could not impose upon the magistrates any course of action; in theory the consuls were not bound to obey the S.C. Ultimum any more than any other Senatus Consultum, and there is even some likelihood that a S.C. Ultimum was passed, or at least moved, in 133 B.C., but the consul to whom it was addressed refused to implement it.[1] The value of a S.C. Ultimum lay not in its being a peremptory injunction, but in something different.

A S.C. Ultimum was a declaration by the Senate that the State was in real danger and that therefore unusual measures for its protection were justified. Moreover, as any other S.C., the S.C. Ultimum could only be passed after the consul had laid the matter before the House and had it discussed,[2] and the debate in the Senate was mentioned in the preamble of the S.C. Ultimum as the reason why it was passed at all.[3] Therefore, even if the Senate did not supplement its S.C. Ultimum with a declaration stating that specified persons committed specified acts "contra rem publicam", the S.C. Ultimum itself, despite the fact that as a rule no names were mentioned in it, pointed out the quarters from which the State was threatened, and implied that certain citizens, having adopted a hostile attitude towards the State, should be treated as hostes. A specific declaration that so-and-so "contra rem publicam fecit" and thereby made himself an enemy of his country (hostis) is only an elaboration of an element present in the original, and as a rule unspecified, S.C. Ultimum,[4]

[1] See Val. Max. III, 2, 17; IV, 7, 1; Plut. *Ti. Gracchus* 19, 3 f.; *Rhet. ad Herenn.* IV, 68; Mommsen, *Staatsrecht* III, p. 1242; Plaumann, *op. cit.* p. 359.

[2] Verba de r. p. facere; de r. p. referre. See Plaumann, *op. cit.* p. 341.

[3] De ea re ita censuere, Cic. *Phil.* VIII, 14. See also *Phil.* V, 34; and Plaumann, *op. cit.* p. 340.

[4] Cf. Mommsen, *Staatsrecht* III, pp. 1242 ff.; and H. Last, *C.A.H.* IX, pp. 87 ff. A different view of the relation between the S.C. Ultimum and the indication of specified hostes is advanced by Plaumann (p. 344) who concludes: "Mit der Hostis-Erklärung hat das S.C. de re publica defendenda systematisch und seinem Ursprunge nach nichts zu tun." Yet even he admits that "die beiden Akte häufig innig verbunden sind" and that "das S.C. de r. p. defendenda sich de facto ja meist gegen eine bestimmte Person richtete" (p. 343). The reason he offers for the separation of measures intrinsically

since the only justification for passing such a decree is the presence of hostes within the State.[1]

In theory the S.C. Ultimum does not infringe any existing laws nor violate the freedoms of the citizens, because, in theory, it is directed against people who by their own acts have placed themselves beyond the pale of Roman citizenship. But, in practice, a clear-cut line could rarely be drawn between hostes and cives, and on occasion there was much to be said for the view that on the strength of the S.C. Ultimum the magistrates arrogated to themselves unconstitutional powers, and, in contravention of the rights of formal trial and appeal, put to death the political opponents of the government of the day. Since the Populares were apt to be the victims of such treatment, it fell to them to combat the implications of the S.C. Ultimum.

The peculiar character that the issue over the S.C. Ultimum assumed was due to the fact that the direct responsibility for any unconstitutional act committed on the strength of a S.C. Ultimum rested with those who committed such acts, whereas the ultimate responsibility rested with the Senate which passed the Last Decree. Therefore, if a S.C. Ultimum resulted in acts of violence, its opponents could indict the persons who committed such acts on a charge of violation of civic rights, whereas its supporters could defend them with the plea that they acted for the safety of the State and on the authority of the Senate. And thus it came about that, although no Roman questioned the right of the State to defend itself, the long-standing issue over the S.C. Ultimum was fought out under the banner of senatus auctoritas on the part of the Optimates, and in the name of libertas on the part of the Populares. In this respect three instances are of particular interest: the trial of Opimius in 120 B.C.; the last stage of the trial of Rabirius in 63 B.C.; and the debate on the punishment of Catiline's associates in the same year.

Cicero summarized the arguments for the prosecution and the defence of Opimius as follows: Carbo, for the defence, admitted the

belonging together is that "man kommt zu keinem systematischen Verständniss dieser Massregel, wenn man sie nicht von den historischen Begleitumständen loslösst". The soundness of his method in this particular case may safely be considered a matter of opinion.

[1] An example of a motion for a S.C. Ultimum is the speech of Philippus, Sallust, *Hist.* I, 77 M, especially § 22.

act of putting C. Gracchus to death, but justified it on the ground that it was committed "pro salute patriae" and "ex senatus consulto";[1] whereas Decius, for the prosecution, argued that on no account and under no circumstances do the laws allow a citizen to be put to death without trial.[2] So far as Cicero's summary goes, it appears that the prosecution did not raise the question whether there really existed a danger to the State. The issue was represented as one between higher legality based on reasons of State and backed by the authority of the Senate, on the one hand, and personal liberty resting on civic rights, on the other.

Cicero's largely extant speech in defence of Rabirius is valuable in that it states Cicero's view of the political implications of the trial of Rabirius, and provides some clues for the reconstruction of the arguments put forward by the prosecution. Between the lines of Cicero's direct retort to Labienus, the prosecutor, some of the latter's arguments can be read (§§ 11–13). It would seem that Labienus dwelt on the provisions of the Lex Porcia and Lex Sempronia concerning provocatio, and on libertas. Cicero, for the defence, stated that the indictment of Rabirius was a blow at the senatus auctoritas, and an attempt to deprive the State of means of protection in grave emergencies.[3] And although Hortensius, the other counsel for the defence, sought to refute the charge of complicity in the murder of Saturninus, Cicero admitted that Rabirius was in possession of arms with a view to killing Saturninus (18–19), but he argued that Rabirius was right in doing so, since he complied

[1] It is noteworthy that Scipio Africanus, when interpellated by Carbo about the murder of Tiberius Gracchus, replied "iure caesum videri", see Cic. *De Orat.* II, 106; Livy, Epit. LIX; Vell. Pat. II, 4, 4. It seems that "iure" in this context means "justifiably" rather than "legitimately".

[2] Cic. *De Orat.* II, 106 and 132; *Partit. Orat.* 104 ff.

[3] *Pro Rab. perd. reo*, 2 ff.; 35; cf. *Orator*, 102, and also Dio Cass. XXXVII, 26, 1–2. E. G. Hardy, Political and Legal Aspects of the Trial of Rabirius in *Some Problems in Roman History*, Oxford, 1924, pp. 102 and 106, is of course right in maintaining that the impeachment of Rabirius was not an attack on the validity and legality of the S.C. Ultimum. Needless to say, no lawcourt could pronounce upon the validity and legality of a duly passed S.C. But the question which the trial of Rabirius raised, although by circuitous methods, was whether a S.C. Ultimum, however valid and legal, justified the execution without trial of seditious citizens. It is for this reason, above all, that Hardy's statement that Cicero misrepresented the nature of the trial requires qualification.

with the S.C. Ultimum (20 ff.). It seems therefore that, in so far as the S.C. Ultimum is concerned, the arguments put forward by Labienus and Cicero were of the same character as those put forward by the prosecution and defence of Opimius some sixty years before, namely civic rights versus reasons of State and the authority of the Senate.

Caesar's criticism of the implications of the S.C. Ultimum—in his speech on the punishment of Catiline's associates, as reported by Sallust, *Cat.* 51—went deeper than that of his predecessors.

Summary punishment on the strength of a S.C. Ultimum was an innovation—so Caesar argued—incompatible with the Roman constitution (§§ 8; 17; 41), a timely reminder to those who represented it as a mos maiorum. But he did not leave the matter at opposing reasons of State with claims of legality, as Decius and Labienus seem to have done. He admitted that whatever was done to the conspirators would be justified (§ 26, cf. §§ 15, 17, 23), but he raised the fundamental question whether in resorting to unconstitutional measures for its own protection the State was not courting graver disasters than those it sought to encounter.

The implications of the S.C. Ultimum have two aspects, one concerning magisterial power, and the other, civic rights, and Caesar dwelt on both. Once the practice is established that on the strength of a S.C. Ultimum the consul may assume unlimited power over the life and death of citizens, there is nothing left to stop the consul from proscriptions (§§ 25–36). The value of the Lex Porcia and its like lies in the fact that they stand between the citizen and political vindictiveness, and for this reason, above all else, he disapproves of the proposed dispensation (§§ 40–1).[1]

It seems, therefore, that Caesar did not insist on legality for its own sake, but pointed out that the State could not afford to dispense with the established checks on magisterial power, nor with the safeguards of personal freedom. Without the safeguards of freedom the State would drift to arbitrariness and lawlessness.[2]

[1] Cf. Cic. *In Cat.* IV, 10. It may be worth while quoting here Thomas Paine's saying: "He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."

[2] Cicero's banishment may be passed over as of little consequence from the standpoint of the controversy about the S.C. Ultimum. For although Cicero

There is ample reason to assume that the attacks of the Populares on the S.C. Ultimum were inspired by considerations other than idealistic; nevertheless, it seems that nothing in their platform justified their claim to be the champions of freedom better than their insistence on the inviolability of the provocatio as against magisterial action supported or instigated by the auctoritas of the Senate.

(*h*) *Potestates Extraordinariae*

The controversy over extraordinary executive powers was perhaps the most important feature of domestic politics in the Late Republican period. The Republican constitution contained elaborate rules concerning the tenure of offices,[1] which, as has been seen, were considered an essential check on magisterial power, and thereby an effective safeguard of freedom.[2] A potestas extraordinaria is either a special office conferred by a special law, or a regular office attained or exercised contrary to, or through dispensation from, any of the existing rules concerning the tenure of offices, as, for example, the Lex Annalis.[3]

Cicero's remark that "extraordinarium imperium populare atque ventosum est, minimeque nostrae gravitatis, minime huius ordinis" (*Phil.* XI, 17), in so far as it expresses the attitude of the Optimates and Populares to extraordinary powers, is in the main true; for whatever their motives, the Optimates were on the whole opposed to extraordinary potestates and imperia.

It was doubtless in the interests of the Senate and the ruling class to prevent any member from becoming so strong as to be independent

went into self-imposed exile as a consequence of the Clodian plebiscite which outlawed anyone who condemned a citizen to death without trial, the privilegium that subsequently banned Cicero gave as pretext the forgery of a S.C., not the execution of citizens without trial. It may, however, be mentioned in passing that Cicero's enemies inveighed against his "regnum", *Ad Att.* I, 16, 10 and *Pro Sulla*, 21 and 25; his "tyranny", *Pro Sest.* 109 and *De Dom.* 75 and 94; and his arbitrary power, Plut. *Cic.* 23, 2; cf. also Ps.-Sallust, *In Cic.* 5. Perhaps his own experience was at the back of Cicero's mind when in his *De Leg.* III, 8 he laid down with regard to the consuls "ollis salus populi suprema lex esto".

[1] Cic. *De Lege Agr.* II, 24; *Dig.* L, 4, 14, 5.

[2] Cf. Livy XXXIX, 39, 6: Nec iure ullo nec exemplo tolerabili liberae civitati aedilis curulis designatus praeturam peteret.

[3] See Cic. *Brut.* 226; *De Harusp. Resp.* 43. Cf. Mommsen, *Staatsrecht* I[3], pp. 20 ff.

of the Senate and the nobility. They were therefore opposed to the continuation and iteration of offices, and Cato the Elder about the year 151 B.C. supported a measure "ne quis consul bis fieret".[1] But with the expansion of the Roman empire and the increasing demand for commanders and administrators, it became on occasions necessary to dispense with the rigid rules that regulated the tenure of offices, as for example in the case of Scipio's unconstitutional election to the consulship and to the command against Carthage, or Marius' successive commands granted to avert the danger of the invasion of the Cimbri and Teutones.[2]

Since the Gracchi and Marius, with the growing power of the popular vote and the advent of a professional army, there was present in an extraordinary power, especially if it was a military command, the danger of personal government. The holder of an imperium extraordinarium was placed in power by the popular will and then largely left free to act according to his own notion of expediency. And since the armies owed their allegiance in the first place to their commanders to whom they looked to secure for them grants and the equivalent of pensions, the position of the government, the Senate, and constitutional republicanism became insecure. Inasmuch as there were no effective means of control, extraordinary power might easily become inordinate power, incompatible with freedom and savouring of autocracy. This fact explains the choice of terms that were used in the agitation against extraordinary powers. Tiberius Gracchus was accused of having wished for a "regnum".[3] Similar allegations were made about Saturninus.[4] Cinna's régime was called dominatus and tyrannis.[5] Sulla's dictatorship was considered a dominatio, tyrannis, servitium, and regnum.[6]

Sulla sought to eliminate extraordinary and uncontrollable powers, hence the importance that he—and also Cicero—attached to the

[1] Malcovati, *op. cit.* I, p. 200, cf. *ibid.* pp. 71 ff., and Mommsen, *op. cit.* I^3, p. 521 n. 1.

[2] Appian, *Lib.* 112; Cic. *De Prov. Cons.* 19.

[3] Cic. *De Amic.* 40; Flor. II, 2, 7; Sallust, *Jug.* 31, 7; Plut. *Ti. Gracchus* 14, 3.

[4] Flor. II, 4, 4.

[5] Cic. *Phil.* I, 34; II, 108; Sallust, *Hist.* I, 64 M; Ascon. 23, 24 C.

[6] Sallust, *Hist.* I, 31; 55, 1, 7; 57; III, 48, 1, 9 M; Cic. *De Lege Agr.* I, 21; II, 81; *Phil.* II, 108; V, 44; *Ad Att.* VIII, 11, 2; Appian, *Bell. Civ.* I, 3.

Lex Annalis.[1] But events proved stronger than his constitution. When in 77 B.C. objection was raised to entrusting Pompey, a mere knight at that time, with a proconsular command against Sertorius, it was found that there was no alternative, and he was sent to Spain, as Philippus said, "pro consulibus".[2] By so doing the Optimates themselves made a breach in Sulla's provisions, and the question of extraordinary commands again became acute. In 74 B.C. a "curatio infinita totius orae maritimae" was conferred on the praetor M. Antonius in order that he might wage war against the pirates.[3]

A decisive turning-point in the struggle against the extraordinaria imperia came in 67 and 66 B.C. In 67 there was passed, despite resistance by senatorial leaders, the Lex Gabinia, which conferred far-reaching powers upon Pompey to suppress piracy, and in the next year there followed the Lex Manilia, which entrusted him with an equally great command to end the war with Mithridates. Cicero, at that time speaking for the Populares, represented the opposition to these laws as opposition to the will of the People.[4] But this was far from being the case. The Optimates opposed the laws on the ground that so strong a power in the hands of one man was too strong for the liberty of the State: Q. Catulus "dissuadens legem (*sc.* Gabiniam) in contione dixisset esse quidem praeclarum virum Cn. Pompeium, sed nimium iam liberae fieri rei publicae, neque omnia in uno reponenda".[5]

The term regnum with regard to extraordinary power crops up again in Cicero's speeches against the Agrarian Bill of Rullus in 63 B.C. He calls the special commission proposed by that Bill a "regnum decemvirale".[6] Soon afterwards Cicero himself was subjected to abuse as "rex" on account of having illegally executed Catiline's associates.[7] Cato the Younger did not cease to inveigh

[1] See H. Last, *C.A.H.* IX, pp. 288 f.; Cic. *De Leg.* III, 9.

[2] Cic. *De imp. Cn. Pompei*, 62; *Phil.* XI, 18.

[3] Ps.-Ascon. 259, 6 Stangl; Vell. Pat. II, 31.

[4] Cic. *De imp. Cn. Pompei*, 63 ff.

[5] Vell. Pat. II, 32, 1. Cf. Cic. *ibid.* 52 and 60; Plut. *Pomp.* 30.

[6] Cic. *De Leg. Agr.* I, 24; cf. II, 8, 15, 20, 24, 33, 43, 54, 57, 75, 99. It is interesting that the emperor Claudius described as "decemvirale regnum" the rule of the Decemvirs, see Dessau, *I.L.S.* 212, col. I, l. 33. Livy employed similar terms: decem regum species erat, III, 36, 5, cf. III, 38, 2 and 39, 7–8.

[7] See above, p. 60 n. 2. Catiline himself is also said to have aimed at a "regnum", see Sallust, *Cat.* 5, 6.

against extraordinary powers even under the Triumvirate,[1] and the nobles were unwilling to grant extraordinary powers to Pompey.[2] Feeling against extraordinary power must have been strong, if Caesar, in order to reassure his opponents, declared on entering Rome in 49 B.C. "se nullum extraordinarium honorem appetisse" (*Bell. Civ.* I, 32, 2). It is, indeed, a noteworthy fact—sometimes overlooked by the advocates of "Pompey's Principate"—that Cicero described as a "regnum" not only Caesar's régime but also that contemplated by Pompey.[3]

It appears that throughout the Late Republic, with the exception of Sulla's dictatorship, the Optimates were opposed to the establishment of the extraordinariae potestates which were championed with popular support by the Populares. This struggle is the background against which the various descriptions of such powers must be placed. The odious term regnum signifies a power, or a position, which, even if formally legal, is incompatible with the spirit of the republican constitution, but not necessarily monarchy.[4] As a term of political invective arising from the controversy between the Optimates and Populares it was not used in the literal sense. And therefore, incidentally, unless there are other cogent reasons for believing that Caesar wanted to establish a monarchy, this cannot be properly deduced from the mere fact that he was called "rex", and his régime, "regnum".

From all that has hitherto been said it appears that no new ideas or principles were developed in the course of the contest between the Optimates and Populares. Certain aspects of libertas were on occasion stressed by either side, and consequently gained prominence. But there was nothing in the doctrines, or rather pleas, of either side that was not present, explicitly or implicitly, in the traditional conception of freedom. There can be no doubt that principles were

[1] Cic. *De Sest.* 60. Cf. *De Dom.* 22.

[2] Cic. *Ad Att.* I, 19, 4; IV, 1, 7; *Ad Q. Fr.* III, 8, 4 and 9, 3; Brutus ap. Quintil. *Inst.* IX, 3, 95.

[3] See, e.g., *Ad Att.* VIII, 11, 2.

[4] See Cic. *II in Verr.* V, 175; Livy II, 41, 5–9; III, 58, 5; VI, 41, 3. The odious connotation of the term regnum derives from its association with Tarquin, see Cic. *De Rep.* I, 62: Quid? tu non vides unius inportunitate et superbia Tarquinii nomen huic populo in odium venisse regium? And also Livy VI, 40, 10: Tarquinii tribuni plebis, with which cf. 40, 7 and 41, 3.

involved in the controversy, but it is in the highest degree doubtful whether those principles were championed for their own sake. It would rather seem that with very few exceptions—Ti. Gracchus, Cato and Cicero—each side strove for power, and for power alone, while constitutional principles and institutions were means and not ends. Sallust's verdict was right:

> Quicumque rem publicam agitavere, honestis nominibus, alii sicuti populi iura defenderent, pars quo senatus auctoritas maxuma foret, bonum publicum simulantes pro sua quisque potentia certabant.[1]

But the struggle between the Optimates and Populares, although it contributed no new ideas to the conception of libertas, proved to be a factor of immense importance in its history, for the very reason that it was a struggle for power devoid of higher motives. That struggle shattered the institutions on which libertas rested, as well as the confidence of the Romans in those institutions, and thereby it contributed greatly to the disintegration of the old form of government which was the embodiment of Roman libertas.

[1] *Cat.* 38, 3. Cf. *Jug.* 41; Tac. *Hist.* II, 38; *Ann.* III, 27, 1–28, 1.

CHAPTER 3

THE DECLINE OF THE TRADITIONAL FORM OF GOVERNMENT

1. The Struggle of the Italians for Civic Rights

Of the two cardinal notions that Roman libertas comprised, namely the republican constitution and the rights inherent in Roman citizenship, the former, on the showing of the extant evidence, was by far the more prominent in the presentation of libertas by politicians and political writers at Rome during the Late Republican period. Except on such occasions as those on which the Populares upheld the civic right of provocatio against magisterial action supported by a S.C. Ultimum,[1] libertas as a political watchword in the struggle of factions in Rome meant in the first place a form of government, and not the rights and liberties of the individual citizen. This tendency in the conception of libertas is due, not to a slackening of the appreciation of personal freedom, but to the fact that, while the rights inherent in Roman citizenship seemed firmly established, the traditional form of republican government underwent a severe test, and as time went on it became more and more doubtful whether that form of government was adequate, and whether it would continue at all.

But unlike the politicians in the city of Rome who regarded libertas as a certain form of government, the Latins and Allies who rose against Rome to assert their freedom seem to have had in mind civic rights above all else. In the extant sources, and particularly the Latin ones, which view the issue mainly from the Roman standpoint, the Allies are represented as having simply demanded civitas.[2] Since however various things go under that head, viz. social status, personal rights, political rights, it would be more illuminating to know, if possible, for what purpose the Allies sought Roman

[1] See above, pp. 55 ff.

[2] See Appian, *Bell. Civ.* I, 21, 87; 34, 152; 49, 213; Vell. Pat. II, 14, 1; 15, 2; Flor. II, 6, 3; *Liber de Vir. Illustr.* (ed. Pichlmayr), 66, 11; Ascon. 67, 23 f. C; Plut. *Cat. Min.* 2, 1; Diod. Sic. XXXVII, 2, 2; 11.

citizenship. Granted that there were other contributory causes, what was the immediate motive of the rising of Fregellae in 125 B.C. and of the Social War that began in 91 B.C.? Was it national independence or political freedom? For the Romans, although they had one word—libertas—for both notions,[1] did not fail to see that independence and freedom were separable and distinctively different things.[2]

To begin with the second question. The chief of the Samnites at the battle of the Colline Gate (82 B.C.) is said to have declared "numquam defuturos raptores Italicae libertatis lupos, nisi silva in quam refugere solerent esset excisa".[3] If this dictum is authentic, —and there is no good reason to impugn its authenticity—what does "Italica libertas" mean? The Samnites, and especially those who fought at the Colline Gate, may well have interpreted libertas as complete independence,[4] but in so far as the Social War was fought for, or in the name of, libertas,[5] it is unlikely that all the Allies meant libertas in the sense of independence. For although the secessionists formed an Italian confederacy with a capital of its own, national independence was not what the Allies desired most, nor was it an end in itself. They seceded because they despaired of being peacefully granted Roman citizenship, that is to say they broke away from Rome because she would not admit them into the Roman State, and not because they wanted to stay out.[6] This conclusion is supported both by the manner in which the Italian problem was finally settled, namely by admitting the Italians to Roman citizenship, and by the fact that before the war broke out the Allies demanded citizenship, not national sovereignty, and after the outbreak of the

[1] Independence is sometimes described as suis legibus vivere or esse, see Livy XXV, 16, 7; 23, 4; XXX, 37, 1; XXXIII, 31–32; XXXVII, 54, 26.

[2] For a detailed discussion of the enfranchisement of Italy see H. Last in *C.A.H.* IX, pp. 41 f., 45 f., 78 f., 174 f., 201 f.; A. N. Sherwin-White, *The Roman Citizenship*, Oxford, 1939, pp. 126 f.; R. Gardner, *C.A.H.* IX, pp. 185–200.

[3] Vell. Pat. II, 27, 2.

[4] Cf. H. Last, *C.A.H.* IX, p. 273; Sherwin-White, *op. cit.* p. 126.

[5] As Strabo, V, 4, 2, (241), says it was: δεόμενοι τυχεῖν ἐλευθερίας καὶ πολιτείας μὴ τυγχάνοντες ἀπέστησαν καὶ τὸν Μαρσικὸν καλούμενον ἐξῆψαν πόλεμον.

[6] Cic. *Phil.* XII, 27: Non enim ut eriperent nobis socii civitatem, sed ut in eam reciperentur petebant.

war many stopped fighting as soon as they were offered Roman citizenship.

The much-desired Roman citizenship[1] was sought, as will presently be seen, for the sake of two things: safeguards for personal liberty, and equal partnership in the res publica. Of these two objects the former could be, and eventually was, achieved without national independence, whereas the latter was, in view of the Roman idea of res publica, clearly inconsistent with national separatism; it was however in the end combined with municipal autonomy.

Shortly before the rising of Fregellae in the year 125 B.C., M. Fulvius Flaccus introduced a bill "de civitate *Italiae* danda et de provocatione ad populum eorum qui civitatem mutare noluissent".[2] The proposal that those who did not wish to have Roman citizenship should be granted the ius provocationis instead shows, among other things, that the Roman citizenship was sought, not only for its own sake, i.e. as a recognition of status, but because it carried with it the protection of personal liberty against the Roman magistrates. If subjection to the unchecked imperium of Roman magistrates could result in such outrageous maltreatment of Italian citizens as in the incidents which C. Gracchus related in a public speech,[3] no wonder the fasces were looked upon by the unenfranchised as a symbol of a cruel subjection.[4] It is noteworthy that in 123 B.C. Livius Drusus the elder proposed a measure the object of which, according to Plutarch (*C. Gracchus* 9, 5), was ὅπως μηδ' ἐπὶ στρατιᾶς ἐξῇ τινα Λατίνων ῥάβδοις αἰκίσασθαι. If Plutarch is right, Drusus proposed to grant the Latins a right the Romans themselves did not enjoy, commanders in the field not being as a rule bound by the laws concerning provocatio.[5] It may be that one reason, among others, for introducing this proposal was the belief, or hope, that the Latins would not insist on full Roman citizenship if they were exempt from corporal punishment.

The proposal of Flaccus deserves especial notice; for although it came to nothing, it marks the first attempt in Roman history to

[1] See Ascon. 67, 23 f. c. and Diod. Sic. XXXVII, 2, 2.

[2] Val. Max. IX, 5, 1. [3] Ap. Gell. *N.A.* X, 3, 3 f.

[4] Diod. Sic. XXXVII, 12, 3: οὐ γάρ εἰμι 'Ρωμαῖος ἀλλ' ὅμοιος ὑμῶν ὑπὸ ῥάβδοις τεταγμένος περιστονῶ τὴν 'Ιταλίαν, said a Latin to Italians.

[5] Cic. *De Leg.* III, 6. Cf. Mommsen, *Staatsrecht* III, pp. 352 ff.

recognize the ius provocationis—the mainstay of personal freedom —as a right of all free Latins and Italians, and not an exclusive privilege of Roman citizens. Needless to say, this proposal falls short of recognizing the Rights of Man, even if Man means a free man and not simply a human being; but in spite of the fact that the idea of the Rights of Man, in the modern sense, was not so much as known at Rome in the second century B.C., and that personal rights were regarded as privileges of citizenship or concessions ad personam in the case of strangers, Flaccus recognized the need of making the safeguards of a person's life and dignity available to all free Italians regardless of Roman citizenship, and in recognizing this he was far ahead of his own times. It would probably be an error to suppose that Flaccus was inspired by any theories; what he sought was a practical compromise; but that seems to be precisely how Rome made almost all her great discoveries in the sphere of public law—in a quest for workable compromises.

The other thing the Allies hoped to gain by the acquisition of full Roman citizenship was equal partnership in the State and the empire, or, as Appian (*Bell. Civ.* I, 34, 152) put it, ἐπιθυμεῖν τῆς Ῥωμαίων πολιτείας ὡς κοινωνοὺς τῆς ἡγεμονίας ἀντὶ ὑπηκόων ἐσομένους. The Allies, while they bore more than their due share in building up the strength of Rome and her empire, were denied the right of equal partnership,[1] and were regarded in Rome as strangers liable at any time to be expelled from the city by consular decree.[2] The violent controversy that raged after the Social War over the question whether the enfranchised Allies should be enrolled in all the thirty-five tribes or in eight of them only, or perhaps form a group of either eight or ten new tribes which should vote last,[3] shows that the Allies were not content with a formal recognition of equal status but demanded a man-for-man equality with the Romans. That is why they would not agree to be segregated in a small number of tribes,

[1] Vell. Pat. II, 15, 2; Flor. II, 6, 3.

[2] Cic. *Pro Sest.* 30; Ascon. 67, 20 ff. C.

[3] Appian, *Bell. Civ.* I, 49, 214 f.; 53, 231. Vell. Pat. II, 20: Cum ita civitas Italiae data esset ut in octo tribus contribuerentur novi cives, etc. According to the different meanings of the verb contribuo Velleius' statement may mean that the Allies were either to be incorporated into eight (existing) tribes or to be united so as to form eight (new) tribes, cf. *Thes. Ling. Lat.*, *s.v.* contribuo, col. 777, 47 ff. See also Appian, *Bell. Civ.* I, 55, 243 and Livy, Epit. LXXVII.

since in view of the Roman system of voting, whereby each tribe voted separately and for the purpose of establishing the final majority each tribe counted as one vote regardless of the number of actual voters it comprised, such a segregation meant that despite their superiority in numbers the Allies would be outvoted by the Romans.[1]

There is also another thing to be observed. On admission to Roman citizenship the Allies did not cease to retain their separate and partly autonomous municipal form of organization. Indeed, as the bill of M. Fulvius Flaccus shows, some of the Allies were unwilling to acquire Roman citizenship in 125 B.C., probably for fear that their incorporation into the citizen body of Rome would mean the end of their own municipal communities as political entities.[2] Their determination to retain their own municipal "commonwealths" shows, among other things, that in demanding admission to Roman citizenship the Allies aimed at partnership, not in the communal life of the city of Rome, as the selfish urban populace thought they did, but in the res publica universa, as Cicero called it,[3] of which Rome itself was only to be the capital.

It appears therefore that in the opinion of the Allies, at least as it is represented from the Roman point of view, Roman citizenship meant in the first place safeguards of personal liberty, and a share in the res publica. And if this is what they meant by libertas, they were quite in tune with the Roman tradition.

2. Subversive Factors

The transformation of the Populus Romanus which resulted from the extension of Roman citizenship to all free Italians was a decisive turning point in Roman history; since however it was not supplemented by any measures, as for example a different system of popular voting, that would meet the needs of the new situation, Rome herself, from a constitutional point of view, failed to benefit by the advantageous potentialities latent in the enfranchisement of

[1] See the passages cited in the previous note and also Appian, *Bell. Civ.* I, 64, 287.

[2] See H. Last, *C.A.H.* IX, pp. 46 f. There was in certain Italian towns opposition to the fusion of citizenship even after 89 B.C.; see Cic. *Pro Balbo*, 21.

[3] *Ad. Q. Fr.* I, 1, 29; cf. *De Leg.* II, 5.

Italy, and the forces that were slowly but persistently undermining the traditional republican constitution remained unchecked. Chief among those forces during the last century of the Republic were the Popular Assembly, on the one hand, and those politicians who sought by popular support and with military backing to establish their own pre-eminence in the State, on the other.

In Roman constitutional law the Popular Assembly and the People are identical, and the power of the Assembly as a constitutional organ rested entirely on the assumption that the Assembly actually was the People in corpore. So long as the Assembly could in practice be approximately co-extensive with the Populus Romanus Quiritium the constitutional theory had a factual foundation, and, what is still more important, in the Assembly a substantial portion of the citizen body could within certain limits bring their will to bear on public affairs, if they so desired. During the Late Republican period, however, the situation underwent a complete change. After the franchise had been extended to all Italians south of the Po, it was for practical reasons no longer possible that even a substantial portion of the populus Romanus universus should regularly attend the Assemblies at Rome, the only place where lawful comitia Populi Romani or concilia plebis Romanae could be convened. On occasions of particular importance voters might flock to Rome even from distant regions, but as a rule the Assemblies were largely attended by voters who lived at Rome or near by. This state of affairs was particularly harmful because, roughly since the end of the second century B.C., the metropolitan population was by no means representative of the interests and sentiments of the municipales and country folk. A considerable portion of the plebs urbana consisted of the so-called proletarii, who possessed little more than a vote for hire, and cared for little else than the cheap corn doled out by the government and the free entertainment provided by the munificence of magistrates—"panem et circenses". And in so far as the traditional form of republicanism was in the Roman view equivalent to political freedom, the greater the power of the plebs urbana the more real the danger to libertas. For if the Assembly which was both the electorate and the supreme legislature consisted to a large extent of people unschooled in politics, ignorant of the real issues at stake, and demoralized and venal at that, a daring and successful demagogue

might obtain from the Assembly the sanction of almost anything. From a constitutional point of view, the Late Republican Assemblies, by virtue of their readiness to delegate extraordinary magisterial powers or to enact Bills of doubtful legality, became a subversive and disruptive factor.

It would be idle to vindicate the actions of the Popular Assemblies in the Late Republic on the alleged ground that after all they voiced the will of the sovereign People. For if about the middle of the second century B.C. there was a measure of truth in Polybius' statement that the Popular Assembly constituted a democratic element in the Roman constitution,[1] this was no longer so in the first century, at any rate after the enfranchisement of Italy. After that date the Assemblies voiced the opinion of the majority of the Roman People very seldom, if at all. It was a political calamity that a gulf should exist between "tota Italia", which really was the Populus Romanus Quiritium, and the Popular Assembly at Rome, which acted as if it alone were the Roman People—a function of which the Assembly was no longer worthy or capable.[2] The Assembly became less and less an organ of government, and more and more an instrument of factious bickering; and as such it provided many opportunities for jobbery and demagogy, but few, if any, for genuine democracy.

Therefore, to regard the Populares as progressives or democrats on the ground that they sought the support of the Assembly rather than of the Senate is to misconceive both the Populares and the Assembly. The motive of the Populares in seeking the support of the Assembly was political expediency, not concern for democracy. The fact that they were wont to speak of the Populus Romanus, its rights and its liberty, should deceive no one. To call the Assembly Populus Romanus was, by republican usage, correct; but every contemporary knew what was behind that appellation, and, as a matter of fact, neither the Optimates nor the Populares had much respect for the plebs urbana. Cicero says that in 63 B.C. the popularis Rullus commended to the Senate his Agrarian Bill declaring that the plebs urbana had to be "drained away" from the city because its

[1] Polyb. VI, 11, 12; 14, 3 f.

[2] See Cicero's biased but not unfounded remarks in his *De Dom.* 89 f.

influence on State affairs was too great.[1] Since Cicero's statement is contained in a speech against Rullus addressed to the People, it is uncertain whether Cicero reported Rullus' own words without wilful distortion; but it is by no means unlikely that Rullus actually advanced such an argument, even if presumably not in those words.[2] Cicero himself wrote about the Land Bill proposed by the tribune Flavius in 60 B.C. that he thought it might "bail out the bilge-water of the City".[3] But agrarian reform, in so far as it was meant to remedy the anomalous position of the plebs urbana, may have relieved the evil but did not remove it. An idea of the voting power that "illa contionalis hirudo aerarii, misera ac ieiuna plebecula"[4] possessed can be gained from the fact that by the time of Caesar's dictatorship the number of those who received corn at public expense swelled to 320,000 and was reduced by the dictator to 150,000.[5] Even the latter figure points to some 25,000 potential voters. And Caesar's first consulate and Clodius's tribunate show in what manner and for what purpose the urban populace might be employed. Thus the fact that the constitutional function of the Populus Romanus devolved to a large extent on the "faex Romuli"[6] jeopardized libertas, in the sense of constitutional republicanism, for in those circumstances direct democracy of necessity became demagogy which provided the aspirants for dominatio with an appearance of legality.

If the Popular Assembly might give the would-be potentates a legal sanction, the army gave them a backing of strength. The fact that, after the creation by Marius of an almost professional army, Rome failed to inspire her fighting men with a sense of unwavering loyalty to the State and the lawful government of the day proved to be a disaster, especially for political freedom. Within a generation after the new form of army organization had been established Rome was taken by a Roman army; and the same happened several times during the following years. It is significant for the state of mind at

[1] Cic. *De Lege Agr.* II, 70: Urbanam plebem nimium in republica posse; exhauriendam esse.

[2] If the second *Epistula ad Caesarem senem de Republica* were written at its dramatic date, the passage, chap. 5, 4 ff., would be of great interest in respect of the attitude of the Populares to the plebs urbana.

[3] *Ad Att.* I, 19, 4.

[4] *Ib.* I, 16, 11.

[5] Suet. *Div. Jul.* 41, 3.

[6] Cic. *Ad. Att.* II, 1, 8.

Rome, and for what the Romans expected of the army commanders, that shortly before Pompey's return from the East in 62 B.C. it was rumoured that he would march on Rome and substitute his own arbitrary rule for the constitution of the Free State.[1] The Romans must have felt that they were at the mercy of the army and its commanders.

As dictator, Sulla had sought to eliminate the dangers both of the army and of the Popular Assembly by imposing checks on the legislative initiative of the tribunes and the legislative powers of the Assembly, on the one hand, and by subjecting the army commanders to senatorial control, on the other.[2] But, as has been seen, his measures did not last long, and after the year 70 B.C. the situation was much the same as it had been before Sulla's constitutional settlement.

The growing menace of domination by self-seeking politicians inspired Cicero during his consulship to advocate the "concordia ordinum", an alliance between the Senate and the Equestrian Order, and its broader version the "consensus omnium bonorum", an alliance of all law-abiding citizens for the purpose of preserving the established order and protecting it against any unconstitutional designs.[3] He also tried to win over Pompey for the Senate,[4] no doubt in order that constitutionalism might have the support of his prestige and his veterans. But in 60 B.C. the concordia ordinum was shattered,[5] and Pompey, frustrated by the Senate and alienated from it,[6] entered a compact with Caesar and Crassus to have their own way over the head of the Senate.

3. Contentio Libertatis Dignitatisque

The First Triumvirate was a decisive turning point in the history of libertas for more reasons than that it was—as Cicero and Asinius Pollio rightly observed[7]—the ultimate source of the Civil War. It

[1] Vell. Pat. II, 40, 2; Plut. *Pomp.* 43; Dio Cass. XXXVII, 20, 4 f.

[2] On the scope of Sulla's measures see H. Last, *C.A.H.* IX, pp. 288–98.

[3] See H. Strasburger, *Concordia Ordinum*, especially pp. 13 f., 39, 59 f., 71 f.

[4] *Ad Att.* I, 19, 7; II, 1, 6.

[5] *Ib.* I, 18, 3; II, 1, 8.

[6] Dio Cass. XXXVII, 49; Appian, *Bell. Civ.* II, 9; Plut. *Pomp.* 46, 3–4; *Cato Min.* 31, 1; Cic. *Ad Att.* I, 19, 4; II, 1, 6; I, 18, 6.

[7] Cic. *Ad Fam.* VI, 6, 4. For Pollio's view see Horace, *Odes* II, 1, 1 f., and R. Syme, *The Roman Revolution*, p. 8.

is true that at the time of the Triumviral domination the régimes of Marius, Cinna, and Sulla were well within living memory; but, unlike the military despotism of Cinna and of Sulla, the Triumvirate enjoyed, at any rate at the beginning, the support of the army, the urban populace, and those who, like many of the Equites, were discontented with senatorial rule.[1] Besides, the Senate had never before faced an opponent as powerful as the Triumvirate, whose grip on the State was none the less firm for the absence of proscriptions. "Tenemur undique," wrote Cicero in 59 B.C., "neque iam quominus serviamus recusamus."[2]

There was also another difference between the position of the Triumvirs and that of Cinna or Sulla: the latter, each in his turn, emerged victorious in a civil war; the former established their domination by a secret compact between themselves—dominatio ex fide, as Florus called it[3]—and the fact that three politicians could enter a compact with the view of forcing their own idea of effective government on the State,[4] and subsequently realize their design with comparatively little trouble, showed the weakness of the State and the ineffectiveness of its institutions in domestic affairs. No wonder, therefore, that a constitutionalist like Cicero, when he realized what the situation was, spoke of the State on a note of despair, "Vincere incipit timorem dolor sed ita ut omnia sint plenissima desperationis";[5] and, "De re publica quid ego tibi subtiliter? tota periit".[6] The only hope for restoration, Cicero thought, was an eventual breach in the coalition[7]—a view, right in itself, that all too clearly shows the precarious existence of the free constitution when power was with those who were out of humour with the established order.

But although the constitution was flouted by the Triumvirs, public opinion was not suppressed, and the centuries-old tradition of political freedom inspired a vocal, if politically powerless,

[1] Cic. *Ad Att.* II, 21, 1; 16, 2; 9, 2, with which cf. I, 18, 3 and II, 1, 8.

[2] *Ib.* II, 18, 1. [3] Flor. II, 13, 13.

[4] Suet. *Div. Jul.* 19, 2: Societatem cum utroque iniit, ne quid ageretur in re publica quod displicuisset ulli e tribus. Cf. Dio Cass. XXXVII, 57. Suetonius seems to be essentially right although of course he does not record the agreement in its actual phrasing.

[5] *Ad Att.* II, 18, 2 (59 B.C.).

[6] *Ib.* II, 21, 1 (59 B.C.).

[7] *Ib.* II, 7, 3 (59 B.C.): Una spes est salutis—istorum inter istos dissensio.

opposition. Bibulus, Caesar's colleague in the consulship, publicly attacked both Caesar and Pompey in his edicts, which were very popular.[1] Varro launched against the Triumvirate a pamphlet entitled *The Three-Headed Monster* (*Tricaranus*).[2] The elder C. Curio in his speeches assailed Caesar's private and public life,[3] and his son gained popularity by open opposition to the Triumvirate.[4] There were also other signs of disapproval and dissatisfaction.[5] Public opinion turned against the potentates,[6] but this had hardly any appreciable effect except that it angered Pompey and Caesar,[7] and possibly, among other reasons, induced Caesar to intimidate his opponents: armed men were posted about in the Forum;[8] when Cicero in the course of a speech in defence of his former colleague C. Antonius made some critical remarks about the condition of the State,[9] Caesar promptly assisted Clodius's traductio ad plebem,[10] and in the next year Clodius as tribune paid off old scores and had Cicero outlawed and banished;[11] Cato was sent on a mission to Cyprus whereby his "free tongue was plucked out".[12]

In 56 B.C., when there appeared signs of dissension in the Triumvirate, hopes ran high for a while, only to give way, after the Conference at Lucca, to utter despair:

> Quae (res communes) quales sint non facile est scribere. Sunt quidem certe in amicorum nostrorum potestate, atque ita ut nullam mutationem umquam hac hominum aetate habitura res esse videatur.[13]
>
> Quid multa? Tenent omnia idque ita omnis intellegere volunt.[14]

[1] *Ad Att.* II, 14, 1; 15, 2; 19, 2 and 5; 20, 4 and 6; 21, 4; Plut. *Pomp.* 48; Suet. *Div. Jul.* 9, 2; 49, 2.

[2] Appian, *Bell. Civ.* II, 9. Cf. C. Cichorius, *Römische Studien* (1922), p. 211.

[3] Suet. *Div. Jul.* 9, 2; 49, 1; 52, 3; Cic. *Brut.* 218 ff.

[4] *Ad Att.* II, 18, 1; cf. 8, 1; 12, 2.

[5] The young C. Cato in a public speech called Pompey "privatus dictator", *Ad Q. Fr.* I, 2, 15. For other instances of discontent see *Ad Att.* II, 19 and 21.

[6] *Ad Att.* II, 19, 2; 20, 4.

[7] *Ib.* II, 19, 3; 21, 4.

[8] Plut. *Caes.* 14; Cic. *Ad Att.* II, 24, 4.

[9] Suet. *Div. Jul.* 20, 4; Dio Cass. XXXVIII, 10, 4.

[10] Cic. *De Dom.* 41; *De Prov. Cons.* 45–6; *Ad Att.* II, 12, 1–2.

[11] For detailed evidence for Cicero's banishment see T. Rice Holmes, *The Roman Republic* I, pp. 317 f., 328 f.; and E. Meyer, *Caesars Monarchie und das Principat des Pompejus*[3] (1922), pp. 95 ff.

[12] Cic. *De Dom.* 22; *Pro Sest.* 60.

[13] *Ad Fam.* I, 8, 1 (Jan. 55 B.C.).

[14] *Ad Q. Fr.* II, 7, 3 (Feb. 55 B.C.).

Amisimus, mi Pomponi, omnem non modo sucum atque sanguinem sed etiam colorem et speciem pristinae civitatis. Nulla est res publica quae delectet, in qua quiescam.[1]

Angor, mi suavissime frater, angor nullam esse rem publicam.[2]

Under the Triumviral régime, Cicero, and doubtless not he alone, realized that many things he must have been wont to take for granted were gone: he lost his auctoritas, his dignitas, his freedom of speech; and even his personal safety became precarious.[3] In 59 B.C. Cicero expressed his fear that not only private persons but even magistrates would no longer be free,[4] and subsequent events confirmed his gloomy outlook.[5] The coalition of the powerful statesmen destroyed the power of the Senate,[6] and endangered its freedom. It is noteworthy that in 56 B.C., while speaking about the assignment of the consular provinces, Cicero told the Senate that, although the consul (Marcellinus) argued "ne citerior Gallia nobis invitis alicui decernatur... perpetuoque posthac ab iis qui hunc ordinem oppugnent populari ac turbulenta ratione teneatur", he (Cicero) would not for a moment suspect that Caesar "per quem ordinem ipse amplissimam sit gloriam consecutus ei ne libertatem quidem relinquat".[7] It seems that the view was expressed in the Senate that the continuous presence of Caesar's army in Gaul jeopardized the freedom of the Senate, and it is a stroke of irony that Cicero, the untiring champion of the Senate, was compelled, possibly against his better judgement, to cast doubts on the soundness of that view.

What, in the opinion of contemporaries, caused the Triumviral compact and the Civil War that in the end was to be its outcome when a coalition of three became a rivalry of two? All ancient authorities agree that the motive was the desire for power and pre-eminence, or, as the Romans would say, potentia and dignitas. "Caesare dignitatem conparare, Crasso augere, Pompeio retinere cupientibus, omnibusque pariter potentiae cupidis, de invadenda re publica facile convenit", says Florus of the First Triumvirate.[8]

[1] *Ad Att.* IV, 18, 2 (54 B.C.).
[2] *Ad Q. Fr.* III, 5 and 6, 4 (Oct. or Nov. 54 B.C.).
[3] *Ad Fam.* I, 8, 3–4; *Ad Att.* IV, 5, 1; IV, 6, 1–2; *Ad Q. Fr.* III, 5 and 6, 4.
[4] *Ad Att.* II, 18, 2.
[5] See Cic. *In Vat.* 22.
[6] Cic. *Ad Fam.* VI, 6, 4.
[7] *De Prov. Cons.* 39.
[8] Flor. II, 13, 11. Cf. Dio Cass. XXXVII, 55, 3–56, 4. Cf. also Suet. *Div. Jul.* 50, 1 (Pompey's "potentiae cupiditas").

After the death of Crassus in 53 B.C. two dynasts, each suspicious of the other and jealous of his own dignitas,[1] shared all power, and the situation of republicanism—which now became the most prominent aspect of libertas—was such that concord between the two meant suppression of the Senate, while discord meant civil war.[2] As the ancients saw it, the Civil War was a struggle for dignitas: Pompey would tolerate no equal, Caesar would not brook a superior.[3] Caesar himself admitted that he valued his dignitas more than his life, and that it was in defence of his dignitas that he appealed to armed force.[4] Cicero was convinced that Caesar and Pompey alike strove for nothing else but power, and absolute power at that. Each of them fought for his own aggrandizement at the expense of the State.[5] Thus dignitas, which was pursued without regard for

[1] Flor. II, 13, 14: Iam Pompeio suspectae Caesaris opes et Caesari Pompeiana dignitas gravis.

[2] Cic. *Ad Fam.* VI, 6, 4; *Phil.* II, 23. Cf. *Ad Fam.* VIII, 14, 2.

[3] Lucan I, 125: Nec quemquam iam ferre potest Caesarve priorem Pompeiusve parem. Flor. II, 13, 14: Nec ille (Pompey) ferebat parem, nec hic (Caesar) superiorem. Dio Cassius (XLI, 54, 1) transposes it: Πομπήϊος μὲν οὐδενὸς ἀνθρώπων δεύτερος, Καῖσαρ δὲ καὶ πρῶτος εἶναι ἐπεθύμει. Caesar, *Bell. Civ.* I, 4, 4: Ipse Pompeius...quod neminem dignitate secum exaequari volebat totum se ab amicitia (Caesaris) averterat. Vell. Pat. II, 33, 3: Nam neque Pompeius ut primum ad rem publicam adgressus est quemquam omnino parem tulit et in quibus rebus primus esse debebat solus esse cupiebat. Cf. also Quintil. *Inst.* XI, 1, 80: Ligarium...non pro Cn. Pompeio, inter quem et Caesarem dignitatis fuerit contentio...stetisse.

[4] *Bell. Civ.* I, 9, 2: Sibi semper primam fuisse dignitatem vitaque potiorem. *Ib.* I, 7, 7: Hortatur (Caesar milites) ut eius existimationem dignitatemque ab inimicis defendant. Cf. *ib.* III, 91, 2. And also Cic. *Ad Att.* VII, 11, 1; *Pro Lig.* 18; *Pro Marc.* 25; *De Off.* I, 26; Hirtius, *Bell. Gall.* VIII, 52, 4; 53, 1; Suet. *Div. Jul.* 30, 5; Plut. *Anton.* 6, 3.

[5] *Ad Att.* VII, 3, 4: De sua potentia dimicant homines hoc tempore periculo civitatis; VIII, 11, 2: Dominatio quaesita ab utroque est....Genus illud Sullani regni iampridem appetitur, multis qui una sunt cupientibus....Sed neutri σκοπός est ille ut nos beati simus; uterque regnare vult. See also X, 4, 4. Flor. II, 13, 14: sic de principatu laborabant. Seneca, *Ep.* 14, 13: "Quid tibi vis, Marce Cato? Iam non agitur de libertate; olim pessumdata est. Quaeritur utrum Caesar an Pompeius possideat rem publicam. Quid tibi cum ista contentione?" *De Benef.* II, 20, 2: Ubi viderat (viz. Brutus) tot milia hominum pugnantia non an servirent, sed utri. Tac. *Hist.* I, 50, 3: Prope eversum orbem etiam cum de principatu inter bonos certaretur, etc.; *Hist.* II, 38, 1: Post quos (viz. Marius and Sulla) Cn. Pompeius, occultior non melior, et nunquam postea nisi de principatu quaesitum.

other people's libertas, proved to be a destructive factor in Roman public life.

Difficile autem est, cum praestare omnibus concupieris, servare aequitatem, quae est iustitiae maxime propria. Ex quo fit ut neque disceptatione vinci se nec ullo publico ac legitimo iure patiantur, existuntque in re publica plerumque largitiones et factiosi ut opes quam maximas consequantur, et sint vi potius superiores quam iustitia pares.[1]

Quidquid eiusmodi est in quo non possint plures excellere in eo fit plerumque tanta contentio ut difficillimum sit sanctam servare societatem. Declaravit id modo temeritas C. Caesaris, qui omnia iura divina atque humana pervertit propter eum quem sibi opinionis errore finxerat principatum.[2]

In fact, a "contentio libertatis dignitatisque"—to use a phrase of Livy[3]—became the dominant feature of Roman domestic politics, and dignitas of a kind incompatible with libertas prevailed.

4. The Foundation of Freedom in Cicero's Theory of Government

What follows is concerned to examine some salient features of Cicero's *De Re Publica* and *De Legibus* against the background of his times and in the light of his own political experience with a view to ascertaining whether Cicero's political doctrine bore on the problem of political freedom in the last decades of the Republican period, and if so, in what manner.

In spite of the general terms that he occasionally used in the *De Re Publica*, it is obvious that in that treatise Cicero did not theorize on statecraft in general but rather sought to remedy the evils that beset the Roman State of his own times.[4] This intention can be read between the lines of the *De Re Publica* itself, notably the preface to book v, and it also appears from the fact that in the *De Legibus*, the avowed purpose of which is to draw up a code of

[1] Cic. *De Off.* I, 64.

[2] *Ib.* I, 26. Cf. *In Cat.* III, 25.

[3] IV, 6, 11.

[4] Cf. V. Pöschl, *Römischer Staat und Griechisches Staatsdenken bei Cicero* (1934), especially pp. 171 ff. Pöschl, however, interprets Cicero's *De Re Publica* as a philosophical forerunner of the Principate inspired by Plato's *Republic*. See also K. Sprey, *De M. Tullii Ciceronis Politica Doctrina*, Zutphen, 1928, pp. 258 ff.

laws to suit the form of government that he described in the *De Re Publica*,[1] Cicero deals, specifically and exclusively, with the laws of Rome.

The *De Re Publica* was composed between the years 54 and 51 B.C. with the experience under the First Triumvirate and the effect of the Conference at Lucca fresh in Cicero's mind. The *De Legibus* was in part composed after the Civil War under Caesar's autocratic régime, and very much with Cicero's own career and fortunes in mind.[2] At the time Cicero wrote the *De Re Publica* the familiar system of government was no longer its own self: the dynasts, for the sake of their own dignitas, seized almost all power, and conducted public affairs according to their own view of efficient government; the constitution was partially disregarded, freedom was curtailed, and on the whole the interests of those in power prevailed. Even so, Cicero did not lose faith in the vitality of the traditional constitution which he believed to be the best form of government,[3] and he attributed the decline of the excellent "vetus res publica", not to any deficiency of the system itself, but to the failure of the Romans to maintain their good old institutions.[4] With such convictions, and with the lessons drawn from recent history in his mind, Cicero approached the question what the best form of government ought to be.

Cicero began his disquisition by defining "res publica" as "res populi", "populus" being a "coetus multitudinis iuris consensu et utilitatis communione sociatus".[5] The full implications of this definition appear in a passage of book III (43 ff.) in which Cicero

[1] See *De Leg.* I, 15; 20; II, 14; 23; III, 4; 12–13. And also *ib.* I, 37: Ad res publicas firmandas et ad stabiliendas urbes sanandosque populos omnis nostra pergit oratio. The *De Legibus* was perhaps less topical than the *De Republica*, see *De Leg.* III, 29.

[2] For detailed evidence for the dates of composition see H. W. How, Cicero's Ideal in His *De Republica*, *J.R.S.* XX, pp. 25 ff., and C.W. Keyes in his edition of the *De Rep.* and *De Leg.* (Loeb), pp. 2 ff. and 289 ff.

[3] *De Rep.* I, 70; II, 56; *De Leg.* II, 23.

[4] *De Rep.* V, 2.

[5] *De Rep.* I, 39. For a discussion of the Stoic sources of this definition see M. Pohlenz, Cicero De Re Publica als Kunstwerk, *Festschrift Richard Reitzenstein*, 1931, pp. 82 f., and Id. *Antikes Führertum*, 1934, p. 5 n. 2; and R. Stark, *Res Publica*, Göttingen Diss. 1937, pp. 5 ff. For a somewhat different view of the literary sources of this passage in Cicero see Pöschl, *op. cit.* pp. 10 ff. Cicero's sources are also discussed by Sprey, *op. cit.* pp. 116 ff.

lays it down on the strength of the above definition that a State governed by a despot, or an oligarchy, or the multitude, is in fact not a res publica at all, because it ceases to be a res populi.[1] It appears, therefore, that in Cicero's view the very notion of res publica postulates that the State should be the common weal of the entire people, not of any section only; further, that all the people should have a share in the conduct of State affairs; and, finally, that the State should be based on an agreed acceptance of laws equally binding on all. This, however, is not to say that, if it is to be a genuine res publica, the State ought to be a democracy; for in Cicero's opinion democracy had the ring of ochlocracy,[2] and was therefore in principle as sectional as oligarchy or despotism. In the opinion of the present writer, Cicero's intention may be better explained by a passage of the *De Officiis*, I, 85:

> Omnino qui rei publicae praefuturi sunt duo Platonis praecepta teneant: unum, ut utilitatem civium sic tueantur ut quaecumque agunt ad eam referant, obliti commodorum suorum; alterum, ut totum corpus rei publicae curent ne, dum partem aliquam tuentur, reliquas deserant.... Qui autem parti civium consulunt, partem negligunt, rem perniciosissimam in civitatem inducunt, seditionem atque discordiam. Ex quo evenit ut alii populares, alii studiosi optimi cuiusque videantur, pauci universorum. Hinc apud Athenienses magnae discordiae; in nostra re publica non solum seditiones sed pestifera etiam bella civilia.

On the strength of the passages of the *De Re Publica* and *De Officiis* just mentioned it may be concluded that, if a State is to be a genuine res publica and immune against civil strife, no sectional interest should be allowed to dominate the State. It would even seem that the notion of res publica postulates respect for interests other than one's own, just as libertas postulates respect for rights other than one's own.[3] And, if that is so, the similarity is not

[1] *De Rep.* III, 43: Ubi tyrannus est ibi non vitiosam...sed...nullam esse rem publicam. *Ib.* 44: Vides igitur ne illam quidem quae tota sit in factionis potestate posse vere dici rem publicam. *Ib.* 45: Cum per populum agi dicuntur et esse in populi potestate omnia, cum de quocumque volt supplicium sumit multitudo...potesne tum, Laeli, negare rem esse illam publicam?...Tum Laelius: Ac nullam quidem citius negaverim esse rem publicam quam istam quae tota plane sit in multitudinis potestate.

[2] See *De Rep.* I, 65 ff. and III, 45.

[3] Cf. above, p. 8.

accidental; for is not the res publica the political expression of libertas and, conversely, is not libertas the essence of res publica?[1]

Provided the argument is sound so far, the doctrine of the mixed form of government in Cicero assumes a significance beyond the purely academic sphere. The "mixed form of government" is only a terminological pattern which epitomizes the distribution of power in the State (as distinct from the Separation of Powers). The essential feature of the excellent vetus res publica was a balance of rights, duties, and functions as a result of which the government had enough executive power (potestas), the Senate enough authority, and the people enough freedom.[2] Such a balance of rights, duties, and functions that are matched against each other, and it alone, can prevent the establishment of despotism, or oligarchy, or ochlocracy, all of which, each in its own way, represent the domination of a sectional interest. Cicero was convinced that only a mixed form of government with its system of checks and balances can secure freedom. He made it quite clear that, good though monarchy and aristocracy may be, they are incompatible with the freedom of all, because they deprive a section of the polity of a share in the conduct of public affairs.[3] It seems, therefore, that in Cicero's view all can be free only in a State in which power is distributed between all (needless to say a right is power in a constitutional sense). It is true that Cicero does not accord to all elements in the State an equal amount of power,[4] but this is by no means inconsistent with the Roman concept of freedom, which includes equality before the law but not

[1] The passage *De Rep.* III, 43 ff. is interpreted by R. Stark, *Res Publica*, pp. 44 ff., as implying that a res publica must be a "Rechtsstaat". This is no doubt true, but at the same time it is obvious that the idea of a "Rechtsstaat" does not by itself suffice to explain Cicero's idea of a genuine res publica. For a "Rechtsstaat" may exist under any form of legitimate and constitutional government, whereas a res publica, in Cicero's opinion, is wedded to one particular constitution. Stark declares that "über die Verfassungsform besagte der Terminus (viz. res publica) an sich nichts" (p. 33) which shows that he must have missed the constitutional significance of the notion. V. Pöschl, *op. cit.* pp. 132 ff. (and to some extent also Pohlenz, *Reitzenstein Festschrift*, p. 95), interprets the same passage in the light of Plato's idea of justice. Whatever the merits of that interpretation, it falls short of explaining the political significance of Cicero's statement.

[2] *De Rep.* II, 56–7. Cf. I, 69.

[3] *Ib.* I, 69; III, 46–7; I, 55; II, 43.

[4] Cf. above, p. 42. See also K. Sprey, *op. cit.* pp. 222 ff.

complete egalitarianism of rights.[1] The essential thing is to have, not equal rights, but enough rights on which to found freedom. And the system of checks and balances which results from distribution of power is the only way to secure concern for all interests and respect for all rights, and therefore it is the only way to maintain freedom. For only in a State in which power is not concentrated in the hands of one person, or a sectional group of persons, can there be rule of law equally binding on all, upon which in the last resort freedom rests.[2]

But if this is the case, several questions arise. What is the nature of those laws on which freedom can be founded? What is the source of law? What is it that makes laws binding?

In Rome all popular enactments (populi iussa and plebis scita) were leges, and in all matters, save matters divine,[3] the legislative power, i.e. the populus or plebs with the concurrence of a competent magistrate, was above the law, in the sense that it had the power to repeal any law or to amend it by a new enactment.[4] But if the people is the lawgiver and the ultimate source of law, and if all valid laws are equally binding, a grave antinomy seems inevitable: Is everything just that was placed on the Statute book?

> Iam vero illud stultissimum, existimare omnia iusta esse, quae sita sint in populorum institutis aut legibus. Etiamne si quae leges sint tyrannorum? Si triginta illi Athenis leges inponere voluissent, aut si omnes Athenienses delectarentur tyrannicis legibus, num idcirco eae leges iustae haberentur? Nihilo, credo, magis illa quam interrex noster tulit, ut dictator, quem vellet civium, aut indicta causa, inpune posset occidere.[5]

Further, is every valid enactment absolutely binding regardless of its content?

[1] Cf. above, pp. 9 ff. and especially pp. 13 ff.

[2] Cf. above, pp. 7 ff. For a somewhat similar view of Cicero's doctrine see J. Kaerst, Scipio Aemilianus, die Stoa und der Prinzipat, in *N. J. f. Wiss.* v (1929), pp. 661 f.

[3] See Mommsen, *Staatsrecht* III, 335.

[4] Livy VII, 17, 12: In XII tabulis legem esse ut quodcumque postremum populus iussisset id ius ratumque esset. Cf. the caput tralaticium de impunitate in the Lex de Imperio Vespasiani. On the repeal of laws see Cic. *Ad Att.* III, 23, 2; 15, 6; *Cum Senat. Grat.* 8.

[5] *De Leg.* I, 42. The law referred to is that of L. Valerius Flaccus concerning Sulla's dictatorship. Cf. *De Lege Agr.* III, 5 and *II in Verr.* III, 82.

Quid, quod multa perniciose, multa pestifere sciscuntur in populis? quae non magis legis nomen adtingunt quam si latrones aliquas consensu suo sanxerint. Nam neque medicorum praecepta dici vere possunt, si quae inscii inperitique pro salutaribus mortifera conscripserunt, neque in populo lex, cuicumodi fuerit illa, etiamsi perniciosum aliquid populus acceperit.[1]

But if some laws are good and others bad, what is the criterion to judge them by? And if bad laws are not laws at all, despite the fact that they were formally enacted by the legislature, what is it that makes good laws binding and bad ones null and void? Some such questions must have exercised Cicero's mind, for, as will presently be seen, his statement of the nature and the force of law offers an answer to such questions. Seeking to explain the nature of law, Cicero introduced into Roman political thought what appears to be a new, though not original, theory, namely the doctrine of natural law, which is expounded at some length in book II of the *De Legibus*, and with which Cicero must have dealt to some extent in the *De Re Publica*, as witness the fragment § 33 of book III.

Following the teaching of the Stoics, Cicero asserts that the various laws peoples possess derive their power from the primal, everlasting, and immutable law which is divine or natural reason;[2] that Law is the distinction between things just and unjust made in agreement with Nature, which is the standard of all human laws;[3] and that the purpose of true laws is the safety of citizens, preservation of States, and the tranquillity and happiness of human life.[4]

It is not necessary here to discuss the merits, or lack of them, of Cicero's doctrine of natural law. For the present purpose the significance of this doctrine in Cicero's theory of government lies in the fact that it testifies to his desire to find a firm basis for the rule of law and thereby for the commonwealth and freedom. There is in the *De Legibus* a remark that throws much light on Cicero's intention. Immediately before the beginning of his proposed code of laws he stated that natural law could be neither repealed nor abrogated, and that the laws he was about to propose would be of the kind that

[1] *De Leg.* II, 13.
[2] *Ib.* II, 8–9, 11, 13–14; *De Rep.* III, 33.
[3] *De Leg.* II, 13. Cf. II, 11 *ad fin.* and also I, 28.
[4] *Ib.* II, 11.

would never be repealed.[1] Cicero seems to have been aware of the conflict between the conceptions of law as will and law as reason, and he tried to resolve the conflict by making natural law (i.e. law as reason) the formative and controlling standard of statutory law (i.e. law as will). If Cicero really believed that the code he proposed was an embodiment of natural law, it was a somewhat naïve belief. But even if naïve, his assertion is in the highest degree significant, because it means that in Cicero's opinion the fundamental laws of Rome ought to be unalterable, that is to say, the fundamental laws, i.e. the constitution, ought to be above the ordinary legislative power.[2]

It seems that the political experience both of his own and of the preceding age led Cicero to the conclusion that legality did not alone suffice to secure the freedom and well-being of the State and its citizens. He thought the constitution ought to have a moral basis and a moral purpose, and, as such, it ought to have permanent validity irrespective of political expediency or the changing moods of the people. It may well be doubted whether the doctrine of natural law provided the best solution of the problem that confronted Cicero, but it certainly provides a solution in that it makes human laws depend on absolute values independent of man. For if indeed "legum idcirco omnes servi sumus ut liberi esse possimus"(*Pro Cluent.* 146) we must have the assurance that the laws will be a just and enlightened master.

However, as Aristotle pointed out, good laws, if they are not obeyed, do not constitute good government.[3] During Cicero's own lifetime illegality became almost endemic, and he did not fail to see that that was due, not to a shortcoming of the laws, but to a failure of men, "nostris vitiis non casu aliquo rem publicam verbo retinemus, re ipsa iam pridem amisimus" (*De Rep.* v, 2). Rome had, so Cicero thought, the best constitution a State could have; nevertheless he agreed with Ennius that her true strength was the quality of her

[1] *Ib.* II, 14: Lex autem illa, cuius vim explicavi, neque tolli nec abrogari potest.—Q. Eas tu igitur leges rogabis videlicet, quae numquam abrogentur? —M. Certe, si modo acceptae a duobus vobis erunt.

[2] For similar interpretations of Cicero's view see C. W. Keyes, Original Elements in Cicero's Ideal Constitution, *A.J.Ph.* XLII (1921), p. 311; F. Cauer, *Ciceros politisches Denken*, Berlin, 1903, pp. 28 ff.; Sprey, *op. cit.* pp. 217 ff.

[3] *Polit.* IV, 8, p. 1294a, 3.

people, "Moribus antiquis res stat Romana virisque". And the moral decay of the people brought about the decline of Rome's excellent constitution.[1]

The source of trouble was the all too ambitious pursuit of dignitas.[2] Excessive dignitas became a destructive factor, because in its pursuit the moral basis on which dignitas must rest was disregarded. Cicero's indignation at the news of Caesar's advance after the outbreak of the Civil War is worth quoting:

> Quaeso, quid est hoc? aut quid agitur? Mihi enim tenebrae sunt. Cingulum, inquit, nos tenemus; Anconem amisimus; Labienus discessit a Caesare. Utrum de imperatore populi Romani, an de Hannibale loquimur? O hominem amentem et miserum, qui ne umbram quidem umquam τοῦ καλοῦ viderit! Atque haec ait omnia facere se dignitatis causa. Ubi est autem dignitas, nisi ubi est honestas? Honestum igitur habere exercitum nullo publico consilio, occupare urbes civium quo facilior sit aditus ad patriam, χρεῶν ἀποκοπάς, φυγάδων καθόδους, sexcenta alia scelera moliri?[3]

It would be unfair to Cicero to attribute his moral indignation wholly and solely to the impact of the news. It is noteworthy that of all Republican writers Cicero alone conceived dignitas as a sense of unselfish and unconditional duty, and not merely as a title to respect and political pre-eminence.[4] This is all the more important in view of what Cicero says in the fifth and sixth books of his *De Re Publica* about the princeps civitatis, the Elder Statesman, whose wisdom and moral authority should guide the State. It seems from the scanty fragments of those books that, on the one hand, Cicero expected the people to show honour to the princeps,[5] but, on

[1] *De Rep.* v, 1 ff. A similar view is expressed by Sallust, *Cat.* 9 f.; 52, 19; *Hist.* 1, 7, 11–12, 16 M. Cf. Horace, *Odes* III, 24, 35.

[2] *De Off.* 1, 26 and 64, quoted above. Cf. Sallust, *Hist.* 1, 7 M: Nobis primae dissensiones vitio humani ingenii evenere, quod inquies atque indomitum semper inter certamina libertatis aut gloriae aut dominationis agit.

[3] *Ad Att.* VII, 11, 1.

[4] See *Pro Cluent.* 150; *Pro Sest.* 48; *Ad Att.* VII, 17, 4; *Phil.* 1, 14 f. This aspect of dignitas in Cicero's writings is fully discussed by H. Wegehaupt, *op. cit.* pp. 24 f. Wegehaupt, however, does not seem to be right in his criticism (p. 38) of R. Reitzenstein, *Gött. Nach.* 1917, p. 434, who stressed the other aspect of dignitas, namely a title to respect and honour, which is very prominent in Caesar.

[5] *De Rep.* v, 9.

the other, he demanded of him devotion to duty and unselfish service to the commonwealth,[1] the reward for such service being in his opinion, not worldly aggrandizement, but everlasting fame and eternal bliss in after life, as foreshadowed in Scipio's Dream.[2] This seems to be what Cicero thought the pursuit of dignitas ought to be.

Therefore, it seems that far from being an advocacy and theoretical justification of an institutional principate[3] of the kind that was established by Augustus and allegedly coveted by Pompey,[4] the *De Re Publica* is a vindication of the vetus res publica and a call to the statesmen of the day for a change of heart; it is not the harbinger of the approaching Principate, but, with the *De Legibus*, the swan-song of Republican constitutionalism based on the idea that "libertas in legibus consistit". As Cicero himself realized, the leading figures in Roman politics did not share his moral idealism.[5] Although there is evidence that the *De Re Publica* had a warm reception,[6] Cicero's was a voice crying in the wilderness.

5. Libertas under Incipient Autocracy

As a phase in the history of political freedom at Rome Caesar's dictatorship can, and should, be approached from two different points of view: the character of that régime is one, the attitude of the republicans towards it is the other.

A tradition which has outlived its originators describes Caesar as a virtual, or at least a would-be, monarch. But, speculations on his aims apart, Caesar's "regnum" was essentially no more regal than the "regnum Sullanum".[7] As has been seen,[8] "regnum" was a derogatory term of political invective, and was profusely used after the Gracchi. It had no doubt its roots in the aversion to kingship that prevailed in Republican Rome ever since the expulsion of the

[1] *Ad Att.* VIII, 11, 1. Cf. *De Off.* I, 85. [2] *De Rep.* VI, 13 and 29.

[3] It is noteworthy that in *Ad Q. Fr.* III, 5 and 6, 1, Cicero defines the subject of his *De Re Publica* as "de optimo statu civitatis et de *optimo cive*".

[4] As asserted by E. Meyer, *Caesars Monarchie und das Principat des Pompeius*[3], pp. 177 ff. Sprey, *op. cit.* pp. 191 ff., thoroughly refuted Meyer's theory.

[5] *Ad Att.* VII, 11, 1; VIII, 11, 1 f. [6] *Ad Fam.* VIII, 1, 4.

[7] See F. E. Adcock, *C.A.H.* IX, pp. 718–35, esp. 727.

[8] Above, pp. 62 ff.

last Tarquin, but with regard to Roman domestic politics in the Late Republic "regnum" connoted unconstitutional power rather than institutional kingship. But although Caesar's position was not altogether unprecedented, it was none the less anomalous and inconsistent with the traditional concept of a free State. A dictatorship for life with its overriding powers and unlimited scope could not but paralyse the whole Republican system, no matter what pains were taken to preserve its form. Par potestas and potestas ad tempus were the chief exponents of republicanism and political freedom at Rome.[1] It is true that occasions on which one man held all power were within living memory,[2] but in the case of Caesar such power was granted for life; this was unprecedented and, in the eyes of constitutionalists, an arrogation of despotic power.[3]

To the strict republicans Caesar, for all his clemency and friendliness, was an oppressive tyrant, who destroyed the republican institutions and suppressed freedom.[4] They killed Caesar in the name of libertas and for the purpose of restoring the res publica. Thanks especially to Cicero's correspondence, it is possible to form some idea of what res publica and libertas meant to a Roman of Cicero's social standing and political persuasion.

The impression one gains from the Latin literature of the Republican period in general, and from Cicero's writings in particular, is that to a Roman senator the res publica was at the same time a form of government and a way of life. Free political activity among his equals was as a rule considered to be the senator's vocation and his aim in life. The display of one's abilities and free competition for honour and glory were felt to be the life-blood of republicanism.[5]

[1] See above, pp. 22 ff.

[2] Cic. *Phil.* v, 17: Cinnam memini, vidi Sullam, modo Caesarem: hi enim tres post civitatem a L. Bruto liberatam plus potuerunt quam universa res publica. Cf. also *ib.* II, 108.

[3] *Ib.* I, 3: Dictaturam quae vim iam regiae potestatis obsederat.

[4] E.g. *Ad Att.* X, 4, 2: Nec iam recusat sed quodam modo postulat ut, quem ad modum est, sic etiam appelletur tyrannus. Cf. *Phil.* I, 4, 6, 13, 15; II, 34, 64, 87, 96, 108, 110, 117; *De Off.* III, 83.

[5] Cic. *Phil.* XIV, 17: Magnus est in re publica campus, ut sapienter dicere Crassus solebat: multis apertus cursus ad laudem. Seneca, *Ep.* 98, 13: Honores reppulit pater Sextius, qui ita natus, ut rem publicam *deberet* capessere, etc. Cf. also Cic. *Pro Archia*, 29.

People who held such views could, to some extent, be conciliated by Caesar's clemency only so long as they hoped that he would use his enormous power for the purpose of reconstituting the shattered Republic,[1] and that they would be called on to act at least as masons, if not as architects, in the work of reconstruction.[2] But evidence was mounting that Caesar did not intend to reconstitute the State, to say nothing of restoring the old order. It must have been rumoured at Rome that he said the res publica was a sham not worth having;[3] he certainly acted alone without paying much attention even to the advice of his associates.[4]

One might publish with impunity laudations of Cato, the martyr of freedom,[5] but freedom of speech in the Senate was gone,[6] and participation in the debates—a thing that to many a senator must have seemed a most important element in Roman government—became useless.[7] Caesar wanted people to cooperate but made it clear that he would not gladly listen to advice that was not in tune with his intentions.[8] The dictator was no longer a magistrate socially equal to members of the senatorial class: it was difficult to see him,[9] it was tiresome to entertain him as guest.[10] He was given unusual honours verging on the superhuman; he did not show due respect to the Senate;[11] he gave offence, perhaps inadvertently, by appointing a consul suffect for one day;[12] and the episode of Laberius may have been a painful reminder that the dignity of a Roman knight was not secure against degradation by a whim of the autocrat. There was truth in Laberius' line, "Porro, Quirites, libertatem perdimus".[13]

[1] See Cic. *Pro Marcello*, and *Ad Fam.* IV, 4, 3; VI, 10, 5; IX, 17, 2; XIII, 68, 2.

[2] Cic. *Ad Fam.* IX, 2, 5.

[3] Suet. *Div. Jul.* 77.

[4] Cic. *Ad Att.* X, 4, 9; *Ad Fam.* IV, 9, 2.

[5] To Cicero's "Cato" and other "Catones" that followed it Caesar replied with the pen only, see Tac. *Ann.* IV, 34, 7.

[6] See *Ad Fam.* IV, 9, 2; IX, 16, 3 (46 B.C.); IV, 14, 1 (46 B.C.).

[7] *Ib.* IX, 15, 4.

[8] As happened in the case of Cicero's συμβουλευτικός, see E. Meyer, *op. cit.* pp. 438 ff.

[9] Cic. *Ad Att.* XIV, 1, 2; 2, 3; *Ad Fam.* IV, 7, 6; VI, 13, 3; 14, 2.

[10] Cic. *Ad Att.* XIII, 52, 2.

[11] Suet. *Div. Jul.* 78, 1.

[12] Cic. *Ad Fam.* VII, 30.

[13] See Macrob. II, 7, 1–4. Cicero seems to have recalled the opening lines of Laberius' poem—Necessitas, cuius cursus transversi impetum Voluere multi effugere, pauci potuerunt, Quo me detrudit paene extremis sensibus!—in his *De Off.* I, 114: Sin aliquando necessitas nos ad ea detruserit quae nostri

Autocracy lay heavily on the Roman nobility because it cut to the heart of their cherished notions and way of life. What Brutus the tyrannicide expounded, probably in 53 B.C., by way of principle, became grim reality under Caesar: "Praestat enim nemini imperare quam alicui servire: sine illo enim vivere honeste licet, cum hoc vivendi nulla condicio est."[1] Even Epicureans like Cassius found that they could not, under Caesar's autocracy, remain in quietist aloofness from politics.[2] It is noteworthy that Cassius went Epicurean in 46 B.C., the year when there was hope of conciliation with a kind master.[3] But apparently it did not take him long to discover that escapism was not the course for a Cassius to take: "C. Cassius in ea familia natus, quae non modo dominatum sed ne potentiam quidem cuiusdam ferre potuit."[4] The letters of M. Brutus to Cicero and to Atticus in which he speaks of Cicero's attitude to Octavian reveal indirectly his own attitude to autocracy.[5] He hates domination that is above the law.[6] He cannot bear to think that his safety should depend on the goodwill of anybody;[7] was not the purpose of the rising against the dynast to prevent such an existence?[8] To live a precarious life, to endure submission and to suffer insults is worse than exile, worse even than death.[9] It appears from those letters, as well as from his dictum quoted above, that Brutus was inspired by

ingenii non erunt. The whole episode must have impressed him, although he wrote at that time (*Ad Fam.* XII, 18, 2): Equidem sic iam obdurui ut ludis Caesaris nostri animo aequissimo viderem T. Plancum, audirem Laberi et Publili poemata.

[1] In a speech De Dictatura Pompei, quoted in Quintil. IX, 3, 95. See also Asinius Pollio, in *Ad Fam.* X, 31, 3 (16 March 43 B.C.): Cuius facti iniustissima invidia erudire me potuit quam iucunda libertas et quam misera sub dominatione vita esset. Ita si id agitur ut rursus in potestate omnia unius sint, ei me profiteor inimicum, nec periculum est ullum quod pro libertate aut refugiam aut deprecer.

[2] See A. Momigliano, *J.R.S.* XXXI (1941), pp. 151 ff.

[3] In 45 B.C. when Caesar went to war in Spain, Cassius wrote to Cicero, *Ad Fam.* XV, 19, 4: Peream nisi sollicitus sum ac malo veterem et clementem dominum habere quam novum et crudelem experiri.

[4] Cic. *Phil.* II, 26.

[5] *Ad Brut.* I, 16 and 17. For a discussion of the authenticity of these letters —which is accepted here—see R. Y. Tyrrell and L. C. Purser, *The Correspondence of Cicero*, vol. VI, pp. CXI ff.

[6] *Ib.* 17, 6 and 16, 5.

[7] 16, 1.

[8] 16, 4.

[9] 16, 1 *ad fin.* and 6.

the realization that existence under tyranny can be bought only at the price of personal freedom and dignity.[1]

Such sentiments as those described above do not explain all the motives that inspired the conspiracy against Caesar, but they go some way towards explaining the spirit in which the conspiracy was conceived.

If it was hoped that the removal of the autocrat would by itself restore republican freedom, disillusionment soon set in. "Quem ad modum tu praecipis," wrote Cicero to Atticus in April 44, "contenti Idibus Martiis simus, quae quidem nostris amicis, divinis viris, aditum ad caelum dederunt, libertatem populo Romano non dederunt."[2] And again: "Equidem doleo quod numquam in ulla civitate accidit, non una cum libertate rem publicam recuperatam."[3] There was more truth than he realized in Cicero's judgement that the assassination of Caesar was undertaken with much courage and little wisdom.[4] The liberation of the Republic was doomed to fail, not because, as Cicero thought, the liberators failed to strike down Antony, but because they failed to perceive that Caesar's régime was a result of the disintegration of the old Republic, not its cause.

6. Freedom versus Order and Security

Owing to the character of our literary sources we have some acquaintance with the views and sentiments of leading personalities, whereas what the ordinary people thought is largely a matter of conjecture and generalization. But since, apart from enforced collaboration or bought sympathies, the support freely given by the people to either cause was by no means a negligible factor in the political struggle of the Late Republic and may have appreciably affected its outcome, it is essential to ascertain so far as possible what the people in general really wanted, so that we can better appreciate the stand they took in the matter of republicanism and political freedom. The evidence for this is unfortunately very scanty and largely indirect; nevertheless it throws some light on the question.

In some passages of Sallust and Cicero that may fairly be regarded as specimens of propagandist statements either of the Populares or

[1] 16, 5 *ad fin.*, 17, 6. Cf. 17, 5.
[2] *Ad Att.* XIV, 14, 3.
[3] *Ib.* XIV, 4, 1.
[4] *Ib.* XIV, 21, 3; XV, 4, 2.

the Optimates, an undercurrent of rebuke to their followers for insufficient support occasionally runs alongside of the invective against their acknowledged opponents. That rebuke, as will presently be seen, arose from the fact that while politicians agitated for libertas or dignitas the ordinary and less politically-minded people desired peace, order, security, tranquillity.

Aemilius Lepidus, who fomented a movement against the Sullan régime in the year 78 B.C., is credited with the following statements:

> Itaque illa quies et otium cum libertate quae multi probi potius quam laborem cum honoribus capessebant, nulla sunt: hac tempestate serviundum aut imperitandum, habendus metus est aut faciundus, Quirites.

And:

> Quae [viz. the Sullan settlement] si vobis pax et composita intelleguntur, maxuma turbamenta rei publicae atque exitia probate, adnuite legibus inpositis, accipite otium cum servitio... Mihi... potior visa est periculosa libertas quieto servitio.[1]

Licinius Macer, who in 73 B.C. agitated for the restoration of the tribunician power, is said to have addressed the people in a similar vein:

> Quod ego vos moneo quaesoque (Quirites) ut animadvortatis neu nomina rerum ad ignaviam mutantes otium pro servitio appelletis. Quo iam ipso frui, si vera et honesta flagitium superaverit, non est condicio; fuisset, si omnino quiessetis.

And:

> Verum occupavit nescio quae vos torpedo, qua non gloria movemini neque flagitio, cunctaque praesenti ignavia mutavistis, abunde libertatem rati, scilicet quia tergis abstinetur et huc ire licet et illuc.[2]

It seems that the attempts to foment a popular rising collided with the people's desire of otium, and therefore the demagogues represent otium as an indolent acceptance of servitium or as neglect of libertas. But this is not the case. Otium means leisured life or a course of life avoiding active participation in politics,[3] but it also

[1] Sallust, *Hist.* I, 55, 9–10 and 25–6 M.
[2] *Ib.* III, 48, 13 and 26. Cf. *Jug.* 31, 2.
[3] *Hist.* I, 55, 9; Cic. *Pro Cluent.* 153; *Pro Rab. Post.* 17.

means a state of security[1] and peace,[2] and it approaches in meaning to pax and tranquillitas, with which it is often coupled.[3]

That the people were concerned above all for otium, in the sense of peaceful security, is also borne out by Cicero. In his speeches against the Land Bill of Rullus Cicero said: "Etenim, ut circumspiciamus omnia, quae populo grata atque iucunda sunt, nihil tam populare quam pacem, quam concordiam, quam otium reperiemus."[4] And: "Quis enim umquam tam secunda contione legem agrariam suasit, quam ego dissuasi?...Ex quo intellegi, Quirites, potest, nihil esse tam populare quam id, quod ego vobis in hunc annum consul popularis affero, pacem, tranquillitatem, otium."[5] With every allowance for exaggeration and deliberate confusion of the issues, it seems that Cicero would not have spoken as he did had he not felt that he knew the true sentiments of his listeners. Further, on the eve of the Civil War, Cicero wrote: "An faeneratores, an agricolas (bonos putas), quibus optatissimum est otium? Nisi eos timere putas, ne sub regno sint, qui id numquam, dummodo otiosi essent, recusarunt."[6] And again, shortly after the outbreak of the War: "Multum mecum municipales homines loquuntur, multum rusticani. Nihil prorsus aliud curant nisi agros, nisi villulas, nisi nummulos suos."[7] It appears therefore that the ordinary people wanted peace and security; if possible, "cum libertate"; if not, they seem to have been inclined to prefer otium to what was considered to be libertas.

A similar mood must have existed also among senators who by reason of their social standing were expected to show much concern for their dignitas. In his *Pro Sestio*, and elsewhere, Cicero stated that the ideal of the Optimates was "cum dignitate otium".[8] In that phrase "otium" may mean private leisure, as it does in fact in the

[1] See Horace, *Odes* II, 16, 1–4.

[2] Caes. *Bell. Civ.* I, 5, 5; Cic. *Phil.* I, 16; II, 113; VIII, 11; *Ad Att.* XIV, 21, 2; XV, 2, 3; *Ad Brut.* I, 15, 4.

[3] E.g. Cic. *De Lege Agr.* II, 102; *Phil.* V, 41; *Pro Mur.* 78; 86. Some fine remarks on the Roman idea of peace will be found in Harald Fuchs, Augustin und der antike Friedensgedanke, *Neue philologische Untersuchungen*, 3. Heft, Berlin, 1926, pp. 182–205.

[4] I, 23.

[5] II, 101 ff.

[6] *Ad Att.* VII, 7, 5 (Dec. 50 B.C.).

[7] *Ib.* VIII, 13, 2 (1 March 49 B.C.).

[8] *Pro Sest.* 98. Cf. *Ad Fam.* I, 9, 21.

preface to the *De Oratore* (I, 1, 1). But the long list of the essentials of the "otiosa dignitas" which he gives in the *Pro Sestio* (98) clearly shows that what Cicero had in mind, in that speech at any rate, was, in the first place, otium in the sense of public peace and order, not private leisure. And as regards dignitas he states clearly that it is the object of the aristocrats (optimi cuiusque) while otium is the advantage of the people in general.[1] It seems therefore that in the *Pro Sestio* otium cum dignitate means peace for all and distinction for some.[2] In regard to this ideal of otium cum dignitate Cicero, with an obvious allusion to recent events, says:

> Maioribus praesidiis et copiis oppugnatur res publica quam defenditur, propterea quod audaces homines et perditi nutu impelluntur... boni nescio quo modo tardiores sunt et...ad extremum ipsa denique necessitate excitantur; ita ut nonnumquam cunctatione ac tarditate, dum otium volunt etiam sine dignitate retinere, ipsi utrumque amittant.[3]

Just as the Populares sought to persuade the People that otium without libertas was not otium at all, so Cicero tried to convince some of the ruling class that an accommodation at the price of their dignitas is no accommodation at all, for if they surrender their dignitas for the sake of otium they will not have otium either. Like the Popularis Licinius Macer, who scornfully remarked that the People mistook slavery for otium, Cicero said in his second *Philippic*:

> Quam volent illi cedant otio consulentes, tamen a re publica revocabuntur. Et nomen pacis dulce est, et res ipsa salutaris. Sed inter pacem et servitium plurimum interest. Pax est tranquilla libertas.[4]

From all that has been said it would appear that there were people, both senators and ordinary citizens, who during the difficult period

[1] *Pro Sest.* 104. Cf. above, p. 41.

[2] In this sense he uses otium and dignitas in *Phil.* x, 3: Cur, cum te et vita et fortuna tua ad otium et ad dignitatem invitet, ea probas...quae sint inimica et otio communi et dignitati tuae? See also E. Remy, Dignitas cum otio, *Musée Belge* XXXII (1928), pp. 113 f., who interprets dignitas in the sense of dignitas imperii rather than dignitas optimi cuiusque. For an entirely different interpretation of "otium cum dignitate" see H. Wegehaupt, *Die Bedeutung und Anwendung von dignitas*, pp. 53–60.

[3] *Pro Sest.* 100. Cf. *ib.* 98: Neque ullum amplexari otium quod abhorreat a dignitate. And also *Ad Fam.* I, 7, 10 *ad fin.*

[4] *Phil.* II, 113. Cf. *Phil.* VIII, 12: Sed quaeso, Calene, quid tu? Servitutem pacem vocas?

of civil discord wished for peace and security above all else. And this circumstance may partially explain why the attempts to maintain the traditional form of government failed.

Cicero's assertion to the contrary notwithstanding,[1] it is on the whole true that after the assassination of Caesar the Roman People showed little enthusiasm for the cause of republican freedom. Why did this happen? There was no doubt much weariness and indifference resulting from the Civil Wars and the long years of domestic strife. But it would be an over-simplification of the issue to ascribe the lack of enthusiasm for the cause of freedom solely to a failure of nerve. After all, the people responded when Italy was, or seemed to be, in danger; but they failed to respond when republicanism was in danger. The reason for this seems to be that gradually the conviction struck root that what was offered under the name of libertas was not worth fighting and dying for. Such a view may have been inspired by certain considerations which deserve notice.

It has already been said that during the Late Republican period libertas as a political watchword meant in the first place republicanism. The tenacity with which the Romans adhered for centuries to the republican form of government derived not from an ideological preference for any form of government but from the fact that at Rome republican institutions not only prevented the establishment of monarchy but provided effective guarantees of personal liberty. During the closing period of the Republic, however, republicanism and personal freedom were no longer allied in the same sense as they were before. Republicanism came more and more to mean a wild competition for power, a pursuit of dignitas with complete disregard for other people's rights. The defenders of republicanism were primarily concerned for the auctoritas senatus and the constitutionalism of the imperia and potestates. But to the lives of ordinary people it was of slight moment whether the Senate was or was not free, or whether the magistracies did or did not conform to the standards of rigorous constitutionalism. It was in the lawcourts and in the smooth working of the rapidly growing system of civil law that the interests of personal liberty really lay, but it was only too obvious that without peace and order freedom became nugatory, or

[1] *Ad Fam.* x, 12, 4; *Phil.* III, 32.

to use Cicero's own words, "libertas sine pace nulla est".[1] At Rome the rule of law was, and was considered to be, the foundation of freedom. But although the republican form of government was designed to establish the rule of law and order, during the closing decades of the Republic the rule of law became precarious, and at times it was replaced by the law of the stronger. Freedom without the rule of law was inconceivable at Rome, but the laws could no longer be relied upon, "invalido legum auxilio quae vi, ambitu, postremo pecunia turbabantur".[2]

Roman republicanism had sought to secure distribution of power in a manner that admitted of a strong government and at the same time safeguarded personal freedom. But, for reasons that have been discussed above, the system of checks and balances broke down, and Rome was faced with the grave fact that the form of government considered to be the embodiment of political freedom was ill suited to secure law and order. The conflict between libertas, in the sense of republicanism, and order lasted too long to be seen as a transitory crisis, and gradually people may have come to the conclusion that, since distribution of power failed to secure law and order, it was worth looking for other means to achieve the same end. Those who lived to see recurrent civil wars as inescapable concomitants of the old form of government may have thought that a new dispensation that would ensure peace was worth having even at the price of the old constitution.[3] And this may be one of the reasons why the Romans, for all their love of freedom, accepted in the end a form of government the salient feature of which was permanent concentration of power in the hands of one man. "Omnem potentiam ad unum conferri pacis interfuit."[4]

[1] *Ad Brut.* II, 5, 1.

[2] Tac. *Ann.* I, 2, 2. Cf. Cic. *Phil.* VIII, 11; *Pro Mil.* 18; Lucan I, 171–82; Tac. *Ann.* III, 27, 1–28, 2 ("non mos non ius").

[3] Favonius, the intimate friend of Cato, thought χεῖρον εἶναι μοναρχίας παρανόμου πόλεμον ἐμφύλιον, Plut. *Brut.* 12, 3.

[4] Tac. *Hist.* I, 1, 1.