Introduction

> Who is there so feeble-minded or idle that he would not wish to know how and with what constitution almost all the inhabited world was conquered and fell under the single dominion of Rome within fifty-three years?
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> (Polybius, I. 1. 5)

Polybius' association of Rome's phenomenal military success with the excellence of her constitution may surprise twentieth-century readers, but it was almost self-evident for a Greek intellectual from within the governing class in his period. It was Herodotus who first made the connection between political systems and their military capacities. In his view an important result of the reforms (eunomia) of Lycurgus was the victory of the Spartans over their neighbours; again, when the Athenians acquired democracy (isegoria) through Cleisthenes, the immediate consequence was their victory over the Boeotians and Chalcidians. This is of course also the theme of Pericles' funeral oration, as reported by Thucydides. In Plato's Republic the starting-point of the discussion of the ideal constitution (as opposed to the utopian primitivism first described in Book 2) is the need for the city to be victorious in war.' As far as I know, there is no specific text of this kind in our Roman sources: the closest parallel is in Livy, who ascribes Roman success to their skills in civil and military affairs (artes domi militiaeque) as well as their way of life (vita and mores). For other Romans their military success was the outcome of good mores and the favour of the gods.' Nevertheless, the Livian narrative of the Second Punic War, for example, places in relief not only the effectiveness of Roman political activity but also the constitutional innovations that the war brought about. We shall see in the next chapter how political activity is used in a later book of Livy to frame the story of military success.

Nowadays, when historians study the republican constitution, it is not so much because it is the key to understanding Roman success abroad, but because they wish to evaluate Roman politics and society in this period. The fact that the constitution was, as Polybius saw, a natural growth,' rather than the creation of a legislator at a specific point in time, arguably justifies us in treating it as a true reflection of forces in Roman society and of Roman ideology concerning the conduct of politics, although even here there may have been a conflict between traditional norms and current practice (I shall have more to say about this later). In the study of Roman history understanding of the constitution is also helpful in various ways. Politics in the Republic were a game played according to complex rules. Without knowledge

of these it is hard to grasp the behaviour of the contestants. Moreover, knowledge of constitutional norms may help us to choose between accounts given by ancient (or modern) authorities or to fill gaps in our evidence. Again, a proper understanding of constitutional norms is a safeguard against anachronistic political judgements based on subjective principles. How otherwise can we properly evaluate the deaths of Tiberius Gracchus and Julius Caesar or Cicero's actions against the Catilinarians? There is a further justification of a quite different type. Polybius' and Cicero's view of the Republic as a mixed constitution, in which, at its acme, the balance of elements produced harmony and stability, has had an important effect on Renaissance and post-Renaissance political theory (see Chapter XIII). It may be, however, that recent generations have been more impressed by the myth than the reality. Without an attempt to grasp the reality, this cannot be assessed.

The fact that the Republic was a natural growth creates also the fundamental problem in analysing it. It was not a written constitution, nor was it entirely unwritten. Two questions may make the problem clearer. First, how could Romans during the Republic find out what was proper constitutional practice in any particular political situation? Secondly, what were the sources of law, i.e. what was the authority which sanctioned a given constitutional practice?

Sources of Legal Authority

By the second century sc the Romans were regularly publishing copies of statutes on bronze in public places, probably `in a position where it can be correctly read from ground level', as the texts of the statutes themselves say, when referring to the publication of essential notices.' Copies were also kept on tablets or papyrus in the treasury or its associated record-office. The purpose of publication has been much discussed recently. To what extent was it merely symbolic, to what extent genuinely intended for information?5 Clearly, in a certain sense it was the assertion of the law's existence. At the same time it is unlikely that the majority of the Roman people had the capacity to read, still less to understand legal texts. Nevertheless, men with skill in legal language could have understood them and told the others, and those in public office were obliged to read either the public copies on bronze or those in the treasury. The same is true of senatus consulta, the minutes of senatemeetings, after a decree had been made and had not been vetoed by tribunes (those vetoed were on occasion written down,6 but it is unlikely that they were ever displayed in public places). We have copies of a number of senatorial decrees published for diverse reasons in what is intended to be a readable form. Especially important were those which urged magistrates to penalize certain kinds of activity, such as the decree about the Bacchanals of 186 sc and the imperial decree found at Larinum forbidding senators and equites to become gladiators.'

The authority behind a law was that of the populus Romanus or plebs Romana voting in an assembly: `Titus Quinctius Crispinus the consul lawfully asked the people, and the people lawfully resolved." Polybius reports that the people had the right to make or rescind any law (6.14. to) and, he implies, no other body. The authority behind a senatus consultum under the Republic was different and less absolute. The decree stated the senate's view on a question put to it, usually recommending a certain course of action to the magistrate who consulted it and perhaps to other magistrates as well. In executing the decree the magistrate enjoyed the legal and moral standing consequent on senatorial approval. Although it was dangerous to consider a decree of the senate to be a justification for overriding a law, if there was no conflict with a law, a magistrate, who executed a decree of the senate, added to it his authority as one elected by the people, and this had obvious implications for those subject to him.

A source of public law which was less defined, but essential, was tradition and precedent. Many of the fundamental rules of the constitution were not based on written statutes, for example, the annual election of two consuls, the convening of different types of assembly for different purposes, the very existence and functions of the senate. However, although these elements of the constitution were not based on specific legislation, they may well have been referred to in written laws or senatus consulta as existing institutions. They would also have been mentioned in the books of the religious colleges, especially those of the augurs, which were concerned with rules for assemblies. When Cicero was considering in March 49 BC the elections which Caesar planned to hold, he refers to the authority of books ('nos autem in libris habemus . . .') for his assertion that while consuls could preside over the elections of consuls or praetors, praetors could not preside over the election of either consuls or praetors. These books are generally and plausibly identified with augural commentaries, which collected previous augural decisions. There were also the commentaries on constitutional practice written in the later second century Bc by C. Sempronius Tuditanus, which would not have any special authority in themselves but doubtless exploited augural lore. Hence we have evidence in the late Republic for written exegesis and consolidation of unwritten constitutional tradition a In other words, there were rules which were written down but did not derive their authority from the writing in which they were recorded.

Constitutional tradition (instituta, mos, consuetudo) had under the Republic an enormous spectrum ranging from basic unwritten laws- ius, even if not scriptum-to what one may term mere mos, the way things happened to be done at the time. We may be reminded of the English Common Law, especially in so far as this was held to be the charter for a particular relationship between the crown, parliament, and the people.10 However, this parallel cannot be pressed, for one reason in

particular, that, by contrast with Common Law for which a clearly defined antiquity was a necessary qualification, Roman mos was regarded as something in continuous development. 'This also will become established, and what we now defend by precedents (exempla) will itself join the ranks of precedents.' So Tacitus in his version of the emperor Claudius' speech on the Gallic senators-and the emperor himself in the preserved text of his speech had included constitutional changes in his panorama of Roman growth. Furthermore, we find in the next book of the Annals a much more serious breach of traditionClaudius' marriage to his niece-justified by the need to accommodate trios to the times. This sort of argument was treated as commonplace by Cicero in 66 Bc when replying to those who claimed that Pompey's proposed command under Manilius' bill was a breach of precedent and the practices of their ancestors: 'I will not point out here that our ancestors have always followed precedent in peace, but expediency in war and have always adapted the ideas of new policies to suit changing circumstances.'"

The ambiguous nature of mos is best illustrated by an incident from the period of the Second Punic War. In 209 BC the pontifex maximus Publius Licinius Crassus forced a dissolute and prodigal young man, Gaius Valerius Flaccus, to be inaugurated as flamen Dialis (an ancient priesthood subject to numerous taboos). The latter, the story goes, immediately threw off his wicked ways and then claimed a seat in the senate in respect of his priesthood-a tradition which had fallen into disuse, allegedly because of the poor calibre of previous incumbents. He was expelled from the senate by Lucius Licinius Crassus, the brother ofthe pontifex maximus, who happened to be praetor at the time, and in consequence he appealed to the tribunes. The praetor's argument was that `law did not depend on obsolete precedents from ancient annals but on the usage established by all the most recent customs'. However, the tribunes decided that `it was equitable that the negligence of previous holders of the priesthood should detract from them and not from the status of the priesthood itself', and they brought Flaccus back into the senate amid the approval of both the senators inside and the crowd outside. The implication of the praetor's conduct was that recent precedent tended to prevail over what was more remote and that mos was expected to change. The young flamen Dialis, however, showed that one could win arguments by citing ancient tradition, if other circumstances were favourable.12

Jochen Bleicken has tried to create a theoretical model for the development of mos," which is usefully provocative, even if it cannot do justice to all the complexities. For him the early Republic was a period, in which lex-written law, such as the Twelve Tables-and mos were not in conflict, but were complementary aspects of an aristocratic regime based on consensus-a golden age, one might say. Mos and consuetudo described simply practice-whatever was done for whatever

reason with whatever authority. We may object immediately that it is doubtful if such a golden age ever existed. Bleicken's picture of an ideal consensus, social unity, and internal peace does not correspond well with the Romans' own conception of the early Republic. However, for the sake of argument at least, we may concede that there was a time when there was no essential conflict between written statute (lex) and unwritten tradition.

Bleicken's second stage is one in which drastic changes in law (ius) were required in order to cope with the ever more complex demands on the regime. New norms tended to be introduced by statute (lex), but, when this did not occur, recent mos came to supplement, even supplant, earlier mos. Bleicken's example is the process by which the capital trials for treason (perduellio) laid down by the Twelve Tables were supplemented by tribunician prosecutions for a fine (multa)." I myself am not sure that prosecutions by a magistrate for a fine were not envisaged in the Twelve Tables. However, what does seem to have been an important development in this field, not dependent on statute, is the regular appearance of the tribune as the prosecutor in both capital and noncapital cases, which must have been the result of the evolution of the tribune into an element of the government from the fourth century onwards.

By this time mos appears as something which is separate from and hence potentially may be in conflict with lex.15 Moreover, in the revolutionary period which followed, when aristocratic consensus was fragile, it became the norm to deal with new needs by legislation (when this was resisted, we find legislators even requiring oaths of obedience from magistrates and senators)" The consequence was that trios by contrast came to be regarded as preponderantly ancient tradition, idealized by conservatives as a counterpoise to new developments which, in their view, were rooted in corrupt statutes. This point of view lies at the heart of Tacitus' sketch of the growth of legislation in Annals 3. 27-8, where the Twelve Tables are the end of equitable law, and legislation subsequent to them is inspired by ambition and jealousy with a view to self-promotion or injury to rivals. Custom tended to become a conservative catchword in so far as it was used to describe actions in opposition to the populares, even those taken after new expedients like the senates consulturn ultimurn."

It should be clear from this that the constitution of the Republic was not something fixed and clear-cut, but evolved according to the Romans' needs by more means than one. It was also inevitably controversial: there were frequently at least two positions which could be taken on major issues. What must also be evident is the most likely way that young Romans from the elite learnt about the constitution. Occasionally, they might have referred to the text of a law or senatus consulturn or

part of a religious commentary, but for the most part they would have learnt from the daily practice of political life and from what was said by orators on controversial issues. A further source of education for them from the early second century BC onwards was the annals of Rome, which, even inthe works of the early Roman historians (c.200 BC), contained stories ofpolitical crises, some of which seem shaped, if not invented, to explain difficult constitutional problems. This to a great extent foreshadows how scholars since the Renaissance have studied the Republic. We read the texts of laws and decrees of the senate, we study the fragments of learned commentaries to be found in antiquarian sources, but frequently our best guide to constitutional practice is to read in ancient narratives what actually happened over a period, and, where there was conflict, to discover, as far as we can, in what terms the issues were formulated at the time.

It may be helpful to differentiate between possible approaches to the constitution of the Republic. One is an analysis of how things worked in the last two centuries of the Republic, which can be achieved by a positivistic study of political history. A second is to trace developments from their origins in the early Republic or even before. This will inevitably have a large component of myth, as it does in our basic sources, Livy and Dionysius of Halicarnassus, both on account of the lack of sound information available to the earliest Roman annalists and because those who wrote history tended to have a contemporary political agenda. A third approach is to theorize about the nature of the constitution. Whatever the merits of his actual achievement, Polybius deserves the credit for being the first to have actually attempted to put Roman political behaviour in a conceptual framework. Without such a framework we are likely to lose our way in a mass of data; with the aid of one we may make fruitful comparisons with other constitutions. It is significant that the best known and fundamental modern attempt to give an account of the constitution, Theodor Mommsen's Romisches Staatsrecht,is highly theoretical, in spite of the assembly of source-material in the footnotes.

All three approaches will be used in what follows. In view of the uncertainties about the origins of the Republic, I will commence the story, homerically, in the middle-that is, in the first half of the second century BC, where one can tread on fairly solid ground, thanks to the existence of Polybius' analysis and of a major part of the annalistic tradition in surviving books of Livy.

Additional Note: Because this is a book about politics and public life I do not discuss here what were for lawyers important sources of private law-the edicts of magistrates and the legal opinions of those skilled in the law (responsa prudentium). Regarding the former, in addition to the general freedom conferred on magistrates to exercise their authority in the public interest (to be discussed in

Chapter V11), at an ill-defined point in the middle Republic a lex Aebutia seems to have conferred on praetors the right to adapt the legal processes laid down in the Twelve Tables and later statutes and to create new legal actions. However, there is no equivalent to this authority under the Republic in public matters.