*Quid est quod ius non sit, quod populus iubere aut vetare non possit?*

The Roots of ‘Constitutionality’ in Cicero’s *Pro Caecina*

There has recently been some debate over whether we can profitably speak of a Roman ‘constitution’ in the first century BCE. But before proceeding, I believe we must carefully distinguish between two possible uses of the terms constitution and constitutional. For my purposes here, I offer as a working definition that the term ‘constitution’ may be used either:

1. *Descriptively*, that is: as a *neutral or scientific* **account** of a set of rules and procedures that are universally (or near universally) respected and define the under which a government *does* operate in a given situation. Or
2. *Prescriptively*, that is: as a *moral, legal, or historical* **argument** put forward by an individual of what limits a legitimate government *ought to or must respect* in a given situation.

In the first, descriptive sense, it is clearly appropriate to refer to the rules of the Roman political order as a constitution, and this has attracted a great deal of scholarly attention – most recently the extremely valuable work of Andrew Lintott (1999). In this paper, however, I wish to examine Cicero’s discussion of Volaterran citizenship in the *Pro Caecina* as a *constitutional argument* in the second sense above. By doing so I have two goals: first, to show that we can indeed speak of *constitutional debates* in Rome as early as 79 BC, the date of Cicero’s successful defense of the woman of Arretium, and secondly, to postulate some of the historical circumstances which led to the development of this sort of argument in Cicero’s lifetime.

Cicero’s argument against Sulla’s law on the Volaterrans in the *Pro Caecina* (sections 95-102) is the first surviving articulation of a powerful new category in Roman law – the **unconstitutional**. From republican tradition and from the law itself, he explicitly argues (95) that “there is something” (*esse aliquid*) which “the people can neither command nor prohibit” (*quod populus iubere aut vetare non possit)*. This is a truly novel legal argument, for Cicero is here arguing that a particular statute (Sulla’s law on the Volaterrans) is in fact null and void. Because it is outside the bounds of traditional Roman government, as defined by Cicero, it is simply a legal nullity and of no account.

This is a new and uniquely Roman argument derived from the Roman historical and legal tradition. But I do not think Cicero is constructing this new constitutional argument *de novo*, but instead suggest that he is combining and developing two pre-existing strands of Roman legal thought: It was rooted in the concept of customary law, as it developed by the jurists, and the concept of political legitimacy, as it was articulated in the political disputes of the Roman Republic.

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