

A 'Constitution' in Crisis: Cicero after Exile

Most work on the concept of constitutionality in Rome (dating back to Mommsen's Staatsrecht) has focused on cataloguing the complex rules of the Republic, namely, tracing the evolving relationships between the various legal and political institutions of the Roman state (see also Lintott 1999, Taylor 1966). But is that all there is to a constitution? In a recent article, Straumann has criticized this sterile, seemingly 'objective' view of Roman constitutionality. He suggests, instead, a model composed of hierarchically ordered norms, first among them a form of 'popular sovereignty': that, citing Livy, "the latest command of the Roman People (the *populus* in their Assemblies) shall have the force of binding law." I will argue that this proposed model fails to account, however, for the true nature of constitutional argument at Rome. For Cicero on multiple occasions argues the very opposite: that the People's command was not always the final word on an issue. Instead he defends the idea that the power of the People's Assemblies is constitutionally limited – that there were things outside the jurisdiction of the People's Assemblies. And that should the Assemblies transgress these boundaries, such laws would simply be null and void, thereby articulating a Roman proto-version of 'judicial review.' In this way, he carved out in his orations a space for real individual rights in the Roman state, rights that, he argued, were free from state interference.

We most clearly see Cicero deploying this notion of a limiting, rights-granting constitution in his speeches following his return from exile in 57 BC (the *Post Reditum Orations*). For at that time the Roman Republic was in the midst of a genuine 'constitutional crisis.' Politicians on all sides had begun to question the validity of legislation and various *acta magistratum*. Thus Caesar's legislation and all the Clodian laws were continually challenged on 'constitutional' grounds. For Cicero, the most consequential of these debates centered on the

validity of his exile by the ‘false’ tribune Clodius, his later recall, and the restoration of his *domus*. In such an uncertain constitutional environment, no one could be completely sure of the legal, or even the proper, way to proceed. Instead, they were forced to hash that out as they went along. Since this idea of a ‘constitution’ was subject to such heated debate, arguments proliferated over which laws were legitimately passed, and which passed through violence; over which laws represented the true will of the people and which were merely the result of hired gangs and bribery.

Thus I propose to examine these constitutional arguments as they are employed by Cicero and demonstrate their centrality to his political program. Furthermore, I will attempt to fit this into the recent scholarly debate over the extent of Roman ‘democracy’ (see Millar 1998, Wiseman 2009), by emphasizing the democratically contested nature of ‘constitutional rights’ at Rome. Thus concepts such as citizenship, due process, *religio*, and legislative sovereignty were subject to continued debate to determine their appropriate place within Roman society. Finally, I will look at this constitutional argument as a means of establishing legitimacy in Roman politics, and how demonstrating one’s adherence to the rules and traditions of the Roman political game was a powerful rhetorical appeal to community, belonging, religious tradition, and above all patriotic devotion to the *res publica*. Thereby I will illustrate how this Roman ‘constitution’ was necessarily an evolving set of conceptions subject to public debate, and how Cicero’s *post reditum* speeches are an important attempt to intervene in that debate.

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