

# THE CONSTITUTION OF THE ROMAN REPUBLIC

ANDREW LINTOTT



CLARENDON PRESS OXFORD

# The Constitution of the Roman Republic

ANDREW LINTOTT

OXFORD  
UNIVERSITY PRESS

*This book has been printed digitally and produced in a standard specification  
in order to ensure its continuing availability*

**OXFORD**

UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide in

Oxford New York

Auckland Bangkok Buenos Aires Cape Town Chennai  
Dar es Salaam Delhi Hong Kong Istanbul Karachi Kolkata  
Kuala Lumpur Madrid Melbourne Mexico City Mumbai Nairobi  
São Paulo Shanghai Taipei Tokyo Toronto

Oxford is a registered trade mark of Oxford University Press  
in the UK and in certain other countries

Published in the United States  
by Oxford University Press Inc., New York

© Andrew Lintott 1999

The moral rights of the author have been asserted

Database right Oxford University Press (maker)

Reprinted 2002

All rights reserved. No part of this publication may be reproduced,  
stored in a retrieval system, or transmitted, in any form or by any means,  
without the prior permission in writing of Oxford University Press,  
or as expressly permitted by law, or under terms agreed with the appropriate  
reprographics rights organization. Enquiries concerning reproduction  
outside the scope of the above should be sent to the Rights Department,  
Oxford University Press, at the address above

You must not circulate this book in any other binding or cover  
and you must impose this same condition on any acquirer

ISBN 0-19-815068-7

## Preface

---

THE study of the constitution should be central to the study of the Roman Republic, as I argue more fully in the Introduction. One object of this book is to provide a work in English to which teachers of ancient history can refer pupils on this topic. However, I have also sought to rescue Roman constitutional studies from the stigma of being old-fashioned, smelling of the attic of nineteenth-century scholarship, and out of tune with modern approaches to the analysis of society. It is of course true that the constitutional approach is not the unique route to understanding the way ancient societies worked, but that was recognized by Mommsen, when he was writing the *Staatsrecht* — a work that is much less narrowly legalistic than is often supposed. And the same may be said of earlier constitutional studies reaching back to Machiavelli and indeed to Polybius.

I am extremely grateful to the many scholars, largely outside the United Kingdom, who have helped me by sending books and offprints. In England I owe a special debt to John Crook and Duncan Cloud, who read the book in typescript, saved me from a number of errors, and made many interesting suggestions. The British School at Rome elected me their Hugh Last Fellow and provided me with a valuable base at an important stage in my research. My study of the Republican constitution began and has reached a conclusion at Oxford, and it is a pleasure to be once again publishing under the imprint, especially as this book will soon be accompanied by a second edition of *Violence in Republican Rome*, where the reader will find a fuller discussion of certain issues raised in it.

Worcester College, Oxford  
May, 1998

A.L.

## Abbreviations

---

Abbreviations of periodicals in general follow the system of *L'Année Philologique*, with one important exception: ZSS for *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*.

Abbreviations of papyri in general follow those in E. G. Turner, *Greek Papyri: An Introduction* (Oxford, 1980), pp. 159 ff.

|                 |  |
|-----------------|--|
| ANRW            | <i>Aufstieg und Niedergang der römischen Welt</i> , Festschrift J. Vogt, ed. H. Temporini and W. Haase (Berlin and New York, 1972– )     |
| Braund, AN      | D. C. Braund, <i>Augustus to Nero: A Sourcebook on Roman History 31 BC–AD 68</i> (London/Sydney, 1985)                                   |
| Bruns           | G. Bruns and O. Gradenwitz, <i>Fontes Iuris Romani Antiqui</i> (7th edn., Tübingen, 1919)  |
| CAH             | <i>Cambridge Ancient History</i>   |
| CIL             | <i>Corpus Inscriptionum Latinarum</i>  |
| De Martino, SCR | F. de Martino, <i>Storia della costituzione romana</i> , 5 vols. (Naples, 1958–67)   |
| EJ <sup>2</sup> | V. Ehrenberg and A. H. M. Jones, <i>Documents Illustrating the Reigns of Augustus and Tiberius</i> (2nd edn. with addenda, Oxford, 1975) |
| FGH             | F. Jacoby, <i>Die Fragmente der Griechischen Historiker</i> , 3 parts, 11 vols (Berlin and Leiden, 1923–58)                              |
| FIRA            | S. Riccobono, <i>Fontes Iuris Romani Anteiustiniani</i> (2nd edn. Florence, 1968)  |
| HRR             | H. Peter, <i>Historicorum Romanorum Reliquiae</i> 2 vols. (2nd edn., Stuttgart, repr. 1993)  |
| IG              | <i>Inscriptiones Graecae</i>   |
| IGRR            | R. Cagnat et al., <i>Inscriptiones Graecae ad Res Romanas Pertinentes</i> , 3 vols. (Paris, 1906–27)                                     |
| ILLRP           | A. Degrassi, <i>Inscriptiones Latinae Liberae Rei Publicae</i> , 2 vols. (2nd edn., Florence, 1966)                                      |
| ILS             | H. Dessau, <i>Inscriptiones Latinae Selectae</i> , 4 vols. (Berlin, 1892–1916, repr. 1954)   |
| Imp.Rom.        | A. Lintott, <i>Imperium Romanum: Politics and Administration</i> (London and New York, 1993)   |

|                           |   |
|---------------------------|---|
| <i>Inscr.Ital.</i>        | A. Degrassi, <i>Inscriptiones Italiae, xiii Fasti et Elogia</i> , 3 vols. (Rome, 1947–63)   |
| JRLR                      | A. Lintott, <i>Judicial Reform and Land Reform in the Roman Republic</i> (Cambridge, 1992)  |
| MRR                       | T. R. S. Broughton, <i>The Magistrates of the Roman Republic</i> , vols. i and ii. (2nd edn., New York, 1960); vol. iii (Atlanta, 1987) |
| OGIS                      | W. Dittenberger, <i>Orientalis Graeci Inscriptiones Selectae</i> , 4 vols. (Leipzig, 1903, repr. Hildesheim, 1960)                      |
| ORF                       | H. Malcovati, <i>Oratorum Romanorum Fragmenta</i> , 2 vols. (4th edn., Turin, 1976–9)   |
| RE                        | Pauly-Wissowa, <i>Real-Encyclopaedie der classischen Altertumswissenschaft</i>  |
| RDGE                      | R. K. Sherck, <i>Roman Documents from the Greek East</i> (Baltimore, 1964)  |
| RRC                       | M. H. Crawford, <i>Roman Republican Coinage</i> , 2 vols. (Cambridge, 1974)   |
| RS                        | M. H. Crawford, ed. <i>Roman Statutes</i> , 2 vols. (London, 1996)  |
| SEG                       | <i>Supplementum Epigraphicum Graecum</i>  |
| Smallwood, GCN            | E. M. Smallwood, <i>Documents Illustrating the Principates of Gaius, Claudius and Nero</i> (Cambridge, 1967)                            |
| <i>Staatsr.</i>           | Th. Mommsen, <i>Römisches Staatsrecht</i> , vols. i and ii, 3rd edn., vol. iii, 1st edn. (Leipzig, 1887–8)                              |
| <i>Strafr.</i>            | Th. Mommsen, <i>Römisches Strafrecht</i> (Leipzig, 1899)  |
| <i>Syll.</i> <sup>1</sup> | W. Dittenberger, <i>Sylloge Inscriptionum Graecarum</i> <sup>3</sup> , 4 vols. (3rd edn., Leipzig, 1915; repr. Hildesheim, 1960)        |
| VRR                       | A. W. Lintott, <i>Violence in Republican Rome</i> (Oxford, 1968)  |

The following legal texts may be referred to without further reference:

|                      |   |
|----------------------|---|
| <i>Frag.Tar.</i>     | <i>Fragmentum Tarentinum</i> , R. Bartoccini, <i>Epigraphica</i> 9 (1947), 3–31; RS i. 8  |
| <i>Lex agr.</i>      | <i>Lex Agraria</i> , CIL i <sup>2</sup> . 585; FIRA i. 8; JRLR, pp. 17ff.; RS i. 2.   |
| <i>Lex Ant.Term.</i> | <i>Lex Antonia de Termessibus</i> , CIL i <sup>2</sup> . 589; FIRA i. 11; RS i. 19  |
| <i>Lex de Delo</i>   | <i>Lex Gabinia Calpurnia de insula Delo</i> , CIL i <sup>2</sup> . 2500; RS i. 22; C. Nicolet, ed. <i>Insula Sacra</i> (Rome, 1980) |
| <i>Lex Gen.Urs.</i>  | <i>Lex Coloniae Genetivae Ursonensis</i> , CIL i <sup>2</sup> . 594; FIRA i. 21; RS i. 25   |
| <i>Lex Irn.</i>      | <i>Lex Irnitana</i> , J. Gonzalez, <i>JRS</i> 76 (1986), 147–243  |
| <i>Lex Iul.agr.</i>  | <i>Lex Iulia agraria</i> (or <i>Mamilia Roscia Peducaea Alliena Fabia</i> ), FIRA i. 12; RS ii. 54                                  |
| <i>Lex lat.Bant.</i> | <i>Lex latina tabulae Bantinae</i> , CIL i <sup>2</sup> . 582 (cf.i.2.iv <sup>2</sup> (1986), pp. 907–8); FIRA i. 6; RS i. 7        |

---

|                           |  |
|---------------------------|--|
| <i>Lex mun.Mal.</i>       | <i>Lex municipii Malacitani</i> , CIL ii. 1964; FIRA i. 24   |
| <i>Lex osca Bant.</i>     | <i>Lex osca tabulae Bantinae</i> , FIRA i. 16; Bruns, 8; new fragment, D. Adamesteanu and M. Torelli, <i>Arch.Class.</i> 21 (1969), 1–17; RS i. 13         |
| <i>Lex portorii Asiae</i> | H. Engelmann and D. Knibbe, 'Das Zollgesetz der provincia Asia. Ein neues Inschrift aus Ephesus', <i>Epig.Anat.</i> 14 (1989), 1–206                       |
| <i>Lex prov.praet.</i>    | <i>Lex de provinciis praetoriis (de piratis)</i> , FIRA i. 9; new fragments, M. Hassall, M. Crawford, J. Reynolds, <i>JRS</i> 64 (1974), 195–220; RS i. 12 |
| <i>Lex rep.</i>           | <i>Lex Repetundarum</i> , CIL i <sup>2</sup> . 583; FIRA i. 7; <i>JRLR</i> , pp. 88 ff.; RS i. 1   |
| <i>Lex Rubr.Gall.</i>     | <i>Lex Rubria de Gallia Cisalpina</i> , CIL i <sup>2</sup> . 592; FIRA i. 19; RS i. 28   |
| <i>SC Asclep.</i>         | <i>Senatus Consultum de Asclepiade</i> , CIL i <sup>2</sup> . 588; FIRA i. 35  |
| <i>SC Bacch.</i>          | <i>Senatus Consultum de Bacchanalibus</i> , CIL i <sup>2</sup> . 581; FIRA i. 30   |
| <i>SC Calvisianum</i>     | FIRA i. 68, v (pp. 409–14); <i>SEG</i> ix. 8   |
| <i>Tab. Heracl.</i>       | <i>Tabula Heracleensis</i> , CIL i <sup>2</sup> . 593; FIRA i. 13; RS i. 24  |

# Contents

---

|  |     |
|--|-----|
| <i>Abbreviations</i>                               | ix  |
| I Introduction                                     | 1   |
| Sources of Legal Authority                         | 3   |
| II A Roman Political Year                          | 9   |
| III Polybius and the Constitution                  | 16  |
| IV The Story of the Origin of the Constitution     | 27  |
| V The Assemblies                                   | 40  |
| <i>Comitia, Contio, and Concilium</i>              | 42  |
| Assembly Procedure                                 | 43  |
| The Organization of the Different Assemblies       | 49  |
| Obstruction, Abrogation, Annulment                 | 61  |
| The Nature of Roman Legislation                    | 63  |
| VI The Senate                                      | 65  |
| Membership of the Senate                           | 68  |
| The Place and Time of Meetings                     | 72  |
| Procedure  | 75  |
| The Authority of the Senate                        | 86  |
| Appendix — The So-Called Last Decree               | 89  |
| VII The Higher Magistrates and the Pro-Magistrates | 94  |
| The Nature of the Magistrate's Power               | 94  |
| The Functions of Magistrates                       | 104 |
| VIII Tribunes, Aediles, and Minor Magistrates      | 121 |
| Tribunis Plebis                                    | 121 |
| Aedilis  | 129 |
| Quaestor   | 133 |
| Minor Magistrates                                  | 137 |
| The <i>Cursus Honorum</i>                          | 144 |



---

|      |   |     |
|------|---|-----|
| IX   | Criminal Justice  | 147 |
|      | The Early Republican Background                               | 149 |
|      | The Development of the Law in the Later Republic              | 157 |
| X    | The Influence of Society and Religion                         | 163 |
|      | Aristocratic Families and their Values                        | 164 |
|      | Plebeian Connections and Dependence                           | 176 |
|      | Religion  | 182 |
| XI   | The Balance of the Constitution                               | 191 |
|      | The Magistrates   | 192 |
|      | The Senate and the Aristocracy                                | 196 |
|      | The Power of the People                                       | 199 |
|      | Changes in the Balance  | 208 |
| XII  | The Mixed Constitution and Republican Ideology                | 214 |
|      | The Mixed Constitution in Classical Greece and in<br>Polybius | 214 |
|      | Cicero's <i>De Re Publica</i>                                 | 220 |
|      | Cicero's <i>De Legibus</i>                                    | 225 |
| XIII | The Republic Remembered                                       | 233 |
|      | The Middle Ages   | 235 |
|      | Machiavelli   | 236 |
|      | The Antiquarians  | 244 |
|      | The Roman Republic and the English Revolution                 | 247 |
|      | Montesquieu and the Founding Fathers                          | 251 |
|      | <i>Bibliography</i>   | 256 |
|      | <i>Index of Ancient Sources Cited</i>                         | 269 |
|      | <i>General Index</i>  | 293 |

## 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?

(Polybius, 1. 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 (*isēgoria*) 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.<sup>1</sup> 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.<sup>2</sup> 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

<sup>1</sup> Hdt. 1. 65–8; 5. 77–8; Thuc. 2. 36. 4–37; Plato, *Rep.* 2. 373d–374a. Herodotus' point about Athenian democracy was picked up approvingly by Machiavelli, *Discorsi*, 1. 58. 30.

<sup>2</sup> Livy, *Praef.* 9. In Sall. *Cat.* 7. 3 success follows the founding of the Republic. For *mores* see e.g. Sall. *Cat.* 9. 1; *Jug.* 41. 2; *Hist.* 1. 11M; for divine favour Cic. *Mur.* 75 (referring to a speech of Scipio Aemilianus); *RDGE* 34, lines 11 ff. (the letter of the praetor Messalla to Teos).

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,<sup>3</sup> 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?

<sup>3</sup> Pol. 6. 9. 10–14, 10. 12–14.

### Sources of Legal Authority

By the second century BC 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.<sup>4</sup> 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?<sup>5</sup> 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 senate-meetings, after a decree had been made and had not been vetoed by tribunes (those vetoed were on occasion written down,<sup>6</sup> 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 BC and the imperial decree found at Larinum forbidding senators and *equites* to become gladiators.<sup>7</sup>

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.'<sup>8</sup> Polybius reports that the people had the right to make or rescind any law (6. 14. 10) 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.

<sup>4</sup> *Lex rep.*, lines 65–6 (*JRLR*, p. 104); *frag. Tar.* (*RS i.* 8), 14; *Tab. Heracl.* (*RS i.* 24), 16. See also *Jos. AJ.* 19. 291.

<sup>5</sup> Harris, 1989, 164 ff., 206 ff.; Williamson, 1987, 160–83.

<sup>6</sup> *Cic. de Orat.* 3. 5; *Fam.* 1. 2. 4, 7. 4; 8. 8. 4–8; *Att.* 5. 2. 3.

<sup>7</sup> *CIL i.* 581 = *FIRA i.* 30; Levick, 1983.

<sup>8</sup> *RS ii.* 63 (= Frontinus, *de aquis*, 129). This—from an Augustan law—is the only complete prescript of a Roman statute surviving; for fragments of Republican prescripts see *JRLR*, p. 202.

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.<sup>9</sup> 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.<sup>10</sup> However, this parallel cannot be pressed, for one reason in

<sup>9</sup> Cic. *Att.* 9. 9. 3; also *Div.* 2. 42, 73; *Dom.* 39 on augural commentaries, from which Marcus Messala would have derived his book, *De Auspiciis* (Gell. 13. 15. 3–16. 3). On Tuditanus' commentaries see *ibid.* 13. 15. 4; *HRR* i. 146–7, frs. 7–8. Note also Iunius Gracchanus' *de potestatibus* (*Dig.* 1. 13. 1. *pr.* (Ulpian); F. B. Bremer, *Iurisprudentia Antehadriana* I, p. 37 ff.).

<sup>10</sup> Pocock, 1987; Weston, 1991. See also Nippel, 1980, 230–6.

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 tradition—Claudius' marriage to his niece—justified by the need to accommodate *mos* 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.'<sup>11</sup>

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 of the *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

<sup>11</sup> Tac. *Ann.* 11. 24; *ILS* 212, col. I, 24ff.; Tac. *Ann.* 12. 6; Cic. *Imp. Pomp.* 60 (in the '*praeteritio*' the argument is emphasized by being passed over).

arguments by citing ancient tradition, if other circumstances were favourable.<sup>12</sup>

Jochen Bleicken has tried to create a theoretical model for the development of *mos*,<sup>13</sup> 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*).<sup>14</sup> 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 non-capital 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*.<sup>15</sup> Moreover, in the revolutionary period which followed, when aristocratic consensus was fragile,

<sup>12</sup> Livy, 27. 8. 4–10. See also Sall. *Cat.* 51. 37–40 for the argument that tradition was expected to change, deployed in the speech assigned to Julius Caesar.

<sup>13</sup> Bleicken, 1975, 368 ff.

<sup>14</sup> RS ii. 40, *Tab.* IX. 1–2 = Cic. *Leg.* 3. 11 and 44; cf. Livy, 26. 2. 7–3. 9. See Lintott, 1987, 44–8.

<sup>15</sup> See e.g. Livy, 26. 3. 8. One might usefully compare here the process whereby English Common Law developed from being simply the law regularly enforced by the King's courts to something distinct from the law of statutes (Pollock and Maitland, 1968, i. 176–8).

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).<sup>16</sup> The consequence was that *mos* 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 *senatus consultum ultimum*.<sup>17</sup>

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 élite learnt about the constitution. Occasionally, they might have referred to the text of a law or *senatus consultum* 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 in the works of the early Roman historians (c.200 BC), contained stories of political 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

<sup>16</sup> See VRR 139–40; JRLR 243–4.

<sup>17</sup> See e.g. Cic. *Cat.* 1. 27–8; 2. 3.



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 *Römisches 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 VII), 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.