LIBERTAS
AS A POLITICAL IDEA AT ROME
DURING THE LATE REPUBLIC
AND
EARLY PRINCIPATE

BY
CH. WIRSZUBSKI, M.A., Ph.D.

CAMBRIDGE
AT THE UNIVERSITY PRESS
1968
PROLEGOMENA

1. Libertas—a Civic Right

Freedom, comprising as it does two different concepts, namely “freedom from” and “freedom to”, neither of which admits of any but general definitions, is a somewhat vague notion. This is also true of the Latin “libertas”. Libertas primarily denotes the status of a “liber”, i.e. a person who is not a slave, and comprises both the negation of the limitations imposed by slavery and the assertion of the advantages deriving from freedom. In view of its twofold meaning, liberty can perhaps more easily be explained if slavery, its direct opposite, is explained first.

Without entering into detailed discussion, the salient characteristics of slavery in Roman law can be described as follows: slavery at Rome is a legal institution whereby one person is subjected to the mastery (dominium) of another person; slaves are almost entirely rightless and can neither be entitled to possess or do anything, nor to contract liabilities: a slave is always “in potestate” and “alieni iuris”. Broadly speaking, therefore, slavery consists in rightlessness and subjection to dominion.

It appears from these characteristics of slavery that the term “persona sui iuris”, which signifies the status of complete personal freedom, implies that to be free means to be capable of possessing rights of one’s own, and this is possible only if one is not subjected to someone else’s dominium (or patria potestas). Libertas therefore consists in the capacity for the possession of rights, and the absence of subjection. Obviously, the positive and negative aspects of libertas, though notionally distinct, are essentially interdependent and complementary.

1 See Th. Mommsen, Römisches Staatsrecht, iii, p. 62.
2 For a full discussion of this subject see W. W. Buckland, The Roman Law of Slavery (1908) (=Slavery), pp. 1 ff.; Id. A Text-Book of Roman Law (1921) (=Text-Book), pp. 62 ff.
3 Gai Inst. 1, 57; Inst. 1, 3, 2; Dig. 1, 5, 4, 1.
4 Servile caput nullum ius habet, Paulus, Dig., iv, 5, 1. Cf. Inst. 1, 16, 4; Dig. 1, 17, 22 pr.; xlviii, 8, 1 pr. See also Buckland, Slavery, p. 3.
5 Gai Inst. 1, 48–52 = Inst. 1, 8 pr. sq. = Dig. 1, 6, 1 pr. sq.
6 Subjectio dominium causes ipso facto the extinction of all the rights and liabilities of a freeman and, on the other hand, release from dominium (i.e. manusmission) causes ipso facto a slave to acquire rights and to contract liabilities.
The negative aspect of libertas, as any other negative concept, is self-defined (although, of course, it is of necessity ill-defined). On the other hand, the definition of the positive aspect presents some problems. For if, positively, freedom means the capacity to enjoy certain rights of one's own, two questions arise: First, whence does that capacity spring? Is it innate or acquired? Secondly, what is the character and extent of the rights in which freedom consists? To answer these questions we must inquire into the nature and foundation of libertas, and may well start with the definition of freedom in the Digest.

"Libertas est naturalis facultas eius quo quicque facere libet, nisi si quid vi aut iure prohibetur. Servitus est constitutio iuris gentium qua quis dominio alieno contra naturam subiciatur." If, as this definition lays down, freedom is a natural faculty, everyone is originally free; and, since the positive institution of slavery is contrary to nature, it follows that freedom is a natural right innate in every human being. But noble though it is, this concept of freedom was foreign to Roman law under the Republic and the Early Principate. The theory concerning freedom and slavery prevalent in that period may be gathered from the legal practice, most clearly perhaps from the pecular institution whereby Roman citizenship, and not freedom only, was bestowed on slaves manumitted in due form. This institution did not arise from generosity on the part of the Romans; had manumission effected merely release from dominica potestas, the slave would have become a res nullius, not a free man, because to be free means to be a member of a civic body. A Roman citizen who by being made a slave is excluded from any polity suffers extinction of all his rights, personal and political, whereas a slave admitted to Roman citizenship by manumission "vindicta aut censu aut testamento" acquires full freedom.

The essentially civic character of libertas can also be seen from the status of foreigners at Rome. The Roman State recognized and protected the freedom of those foreigners alone who were citizens of States which concluded a treaty with Rome. All other foreigners, although not necessarily treated as actual slaves, were, while in Roman territory, in the legal position of a servus sine domino, which meant that they were considered rightless and the Roman State would not protect them if they were deprived of their freedom.

It is therefore clear that the Romans conceived libertas as an acquired civic right, and not as an innate right of man.

2. LIBERTAS AND CIVITAS

We must now consider the extent of libertas. At Rome and with regard to Romans full libertas is coterminous with civitas. A Roman's libertas and his civitas both denote the same thing, only that each does it from a different point of view and with emphasis on a different aspect: libertas signifies in the first place the status of an individual as such, whereas civitas denotes primarily the status of enjoyed de facto freedom while considered as de iure slaves; see Tac. Ann. xiii. 27, 4: "quos vindicata patronus non liberaverit velut vinculo servitutis attonit." Cf. also Buckland, Servites, p. 445. The compromise resulting in the creation of the so-called Latinus Iulianus was an innovation of the Early Empire. For the date of the Lex Iulia see Buckland, Servites, pp. 534 f. and C.A.H. x, p. 888 ff. For a recent discussion of manumission see D. Daube, Two Early Patterns of Manumission, J.R.S. xxxvi (1946), pp. 17 ff.


1 This is the so-called Capitini Dominatio Maxima.

an individual in relation to the community. Only a Roman citizen enjoys all the rights, personal and political, that constitute libertas.

The so-called Capitis Deminutiio Media whereby a Roman loses citizenship while retaining freedom does not contradict this conclusion. For Capitis Deminutiio Media means loss of Roman citizenship as a consequence of the acquisition of a different citizenship. And, besides, the freedom which one retained after the loss of Roman citizenship was qualitatively different from that which one had enjoyed before, for libertas ex iure Quiritium is freedom in respect of private and public law alike, whereas the libertas of a person who was not a Roman citizen (Quirini) was freedom in respect of private law only.

If then the libertas of a Roman is conditioned by his civitas, the amount of freedom a Roman citizen possesses depends upon the entire political structure of the Roman State. In Rome—as elsewhere—freedom of the citizen and internal freedom of the State are in fact only different aspects of the same thing. Therefore libertas civis Romani or libertas ex iure Quiritium must be defined in terms of libertas populi Romani Quiritium.

3. Libertas Populi Romani

With regard to peoples or States libertas is used in either of the following two senses:

(a) Sovereign independence and autonomy, the prominent feature of which is "suae leges", a term equivalent to the Greek autonomia. The opposite of a populus liber is populus stipendiarius or subjectus. This aspect of libertas need not be

1 See Mommsen, Freiheitsrecht, p. 255.
2 Gai Inst. 1, 161; Inst. 1, 16, 22; Ulp. Reg. 11, 12.
3 Festus, s.v. deminuta (p. 67, ed. Lindsay): Deminutus capite appellatur qui civitate mutatus est. Mommsen, Staatsrecht, 43 f., pointed out that loss of citizenship was as a rule a consequence of mutatio soli.
4 On the practical interpretation of freedom and autonomy in Roman foreign policy in the East, see A. H. M. Jones, Civitates Liberae et Immunes in the East, Anatolian Studies presented to W. H. Buckler, Manchester, 1939, pp. 105 ff. See also M. Grant, From Imperium to Auctoritas, Cambridge, 1946, pp. 338 ff., 346 ff., 401 ff.
5 Carthago libera cum suis legibus est, Livy xxxvii, 34, 36; Liberos, immunes, suis legibus esse iubet Corinthii, xxxiij, 35, 5.
6 See Jones, loc. cit.

(b) Republican form of Government. In this respect the opposite of libertas is regnum which, if used in its proper sense, invariably implies absolute monarchy. The relation between king and people is considered to be analogous to the relation between master and slaves. Consequently monarchy is called dominatio; and subjection to monarchy servitus. Freedom enjoyed by a State negatively means absence of dominatio, just as freedom enjoyed by an individual negatively means absence of dominium. But in respect of States, just as in respect of individuals, the negative aspect of freedom does not alone constitute complete liberty. Tacitus voiced a deep-seated conviction of the Romans when he said that the Armenians, who had expelled their queen, were "incerti solutiae et magis sine domino quam in libertate"; for mere removal of dominatio may eventually result in anarchy, whereas libertas consists in rights which rest on positive institutions.

The Romans dated their own freedom from the abolition of monarchy and identified it with the republican constitution of the commonwealth. The res publica populi Romani Quiritium is the practical embodiment of libertas populi Romani, just as civitas Romana is the embodiment of libertas civis Romani. Ultimately, therefore, the nature and extent of libertas are determined by the nature and form of the Roman constitution.

1 When Porcenna sent an embassy to Rome urging the restoration of Tarquin (cum ille peteret quod contra libertatem populi Romani esset) the Romans replied: Non in regno populum Romanum sed in libertate esse. Ius induxisse in animum, hostibus portas portas quam regibus patreaceret; esse vasa omnium ut qui libertati erit in illa urbe finis, idem urbi sit (Livy 11, 15). This passage is typical of the republican attitude towards monarchy. For regnum is a somewhat loose term of political invective implying domination rather than monarchy, see below, pp. 63 ff.
2 Ann. 11, 4, 3.
3 See Ad Hellen. iv, 66; Sallust, Cat. 7, 2–3; Cic. Pro Flacco, 25; Livy 1, 17, 3; 63, 31 ii, 1, 1–2; viii, 34, 31; Pliny, Paneg. 55, 157; Tac. Ann. 1, 1, 1; Hist. 1, 16. For a detailed examination of the notion res publica see Rudolf Stark, Res Publica, Göttingen Diss. 1937.
4 This is the description used on formal occasions; see Varro, De Ling. Lat. (ed. Goetz–Schoell) vi, 86; Livy viii, 9, 8.
4. The Object of this Study

But the Roman constitution is not itself a constant. The Romans were well aware that their republican constitution was the result of long and gradual development. And libertas, while identified with the republican constitution during the Republican period, continued to be a popular slogan and a constitutional principle under the Principate. The question therefore arises, whether the political content of Roman libertas changed according as the Roman constitution was transformed.

It is proposed in this study to describe the meaning of libertas as a political idea at Rome during the two hundred odd years between the Gracchi and Trajan, a period in which the Republican constitution gradually gave way and was finally superseded by the Principate which, in its own turn, considerably changed during the first century A.D.

In the period at which this study begins, Roman republicanism had already reached its highest stage of development. In the long course of that constitutional development certain general principles were laid down, and certain practices established. Those principles form the constitutional background of the political struggle which resulted in profound constitutional changes. In order to avoid the confusion that may arise from mistaking political programmes for constitutional principles, or vice versa, it is desirable in the first of the subsequent chapters to determine and isolate those general principles which from a theoretical point of view constitute Roman republicanism and Roman political liberty.

1 See Cato the Elder’s remark in Cic. De Rep. 11, 1-2. See also Polyb. vi, 11, 2 f.

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. In fact, it is the notion of restraint and moderation that distinguishes libertas from licentia, whose salient feature is arbitrariness; and libertas untempered by moderation degenerates into licentia. 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 renunciation 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 servirsumus 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 omnem”, that is to say, it would result, not in the enjoyment of complete freedom, but in its self-

---

² Quint. Inst. vii, 3, 5: Lex omnis aut tribuit aut debit aut vetat aut permitit. Cicero in De Leg. iii, 10 uses “ius et verita” in the sense of “leges”.
³ Livy xxiv, 25, 8: Es natura multitudinis est: aut servit humilitat sua superbe dominatur; libertatem, quae media est, nec struere modice nec habere scient. Cic. Pro Planc. 94: libertatem...non in pertinacia, sed in quadam moderatione posimatur. Cf. Tac. Dial. 23, 21, 22.
⁴ Cic. Pro Flacco, 16: illa vetus (Graeciae)...hac uno malo conside, libertate immoderata ac licentia contionum. Livy xxiii, 2, 11: Licentia plebis sine modo libertatem exercentem; xxxiv, 49, 8: Libertate modice utatur: temperatam eam salubrem et singulium et civitatis esse, nimium et aliis gravem et ipsius qui habeat effronatum et praecipitem esse.
⁵ 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 sophrophone 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 institutum patrum, 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? Pordes vivendi ut velis", or "(Libertas) culia propria 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 stultis 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 seneam, non magistratus, non leges, non mores maiorum, non institutum 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. 11, i, 23 and iv, 1, 1. Dio Chrys. Or. xiv, 3 ff., examines and refutes this definition of freedom.
4 See R. von Hüning, Geist des römislichen Rechts,1 i, 1, pp. 219 f.
5 Livy xxiv, 12, 9, puts into the mouth of a Carthaginian the remark: Si retiecam, aut superbus aut ossibus videam: quorum alterum est hominis alienae libertatis oblitum, alterum, suae. vn, 33, 3: Haud minus libertatis alienae quam dignitatis suae memor. Cf. also ii, 10, 8; Cic. De Off. i, 124.

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 (1, 47) is credited with the following view:

I tamen nulla alia in civitate, nisi in qua populi potestas summa est, ulterior domicilium libertas habet; qua quidem certe nihil potest esse ducibus, et quae, si aequa non est, ne libertas quidem est. Qui autem aequa potest esse, omittet dicere in regno, ubi non obscurum quidem est aut dubia servitus, sed in iis civitatis in quibus verbo sunt liberi omnes? Ferunt enim suffragia, mandat imperia, magistratus, ambivltra, reagunt, sed ea dant, quae, etiam ni nolint, danda sint, et quae ipsi non habent, unde alii perueunt; sunt enim expetere imperii, consili publici, iudicii decius; iudicus, quae familiarium vestrarum ext aut pecuniarum ponderantur. In libero autem populo, ut Rhodii sunt, ut Athenienses, nemo est civium, qui...
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 aqua libertas would coincide with the Greek ἀνεκτάρεια καὶ ἱστορία.

In comparison with this exposition of democratic equality—obviously Greek in origin, and probably purely literary in purpose—the other testimonies concerning aqua 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, libertas.

Copious and very instructive evidence concerning aqua 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 Decemvirs (III, 31, 7): "Si plebeiae leges dispercerent, et illi communiter legum laores et ex plebe et ex patribus, qui utrisque utilia ferrent quaeque aquae et aquae libertatis essent, sinerent creari".

About their achievement in drafting the original ten Tables the Decemvirs are made to say: "Se... omnibus, summis infimusque, ista aquae" (III, 34, 3).

Appius Claudius the Decemvir, when impeached after he had laid down his power, "commemorabat suum infelix erga plebem Romanam studium, quo aquae et aquae libertatem causam cum maxima offensione patrum consultu abisset".2

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

Regibus exactis utrum vobis (sc. patricii) dominatio an omnibus aqua libertatis pars est.

And,

Itaque ad bella ista..., consules, parata vobis plebes est, si conubii redditis unus hanc civitatem tandem facitis, si coalescere, si lunghi misereri vobis privatis necessitudo possunt, si spes, si aditus ad

1 See Livy III, 9, 2 ff.
3 En compluribus and in consilio, sed in societate rei publicae esse, si, quod aequa libertatis est, in eodem urbe magistratibus parere aequa imperiatur liceat. Si haec impediat alicuius... nemo dimicaturus pro superbis dominiis, cum quisque nec in re publica honorum nec privata conubii societates est.

Non posse aqua iure agi ubi imperium penes illos (patres) penes se (plebeum) auxilio tantum sit; nisi imperio communicato nunquam plebe in parte pari rei publicae fore (V, 37, 4).

It appears from the above instances that "aqua libertatis", "aequum ius" and "aqua legis" 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 aqua libertas is used in these passages with regard to the Plebs as a whole, and not with regard to any individual.3

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 annos magistratus, qui vicissitudinem imperant, quod unus exaequalibus sit libertatis, suuslerint", III, 39, 8. It is interesting that the last clause is reminiscent of Aristotle's ἀναφερόμενος κυρίως τοις ἐκ των μεγαλείρων ἀρχαῖοι πόλεις, ἔτη συναρμολογεῖτο. 2 Ref. Livy X, 2, p. 1347 b. 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.
3 The Thesaurus Linguae Latinae records only two instances of aqua libertatis used with regard to personal rights: Terence, Adelphoe, 181 ff. (the original is by Menander): Aequum... mane eentius aequae et aequae. Nam si metus novissimae esse, iam intro scripserit aequum ius Usque ad necem operatoe loris. Sermo. Locius liber? De. Sic esse. Sc. O hominum imparum Hicin libertatem attulit esse aquae omnium?---and Quintil. Inst. 301, p. 189, 15 f. (Ritter): Si alio accussante dicerec causa, scribam et expertus proxime eram esse nobis aequam etiam adversus divites libertatem; sed me quia quomquam indignissime petar, non tam lex, quam ratio prohibet a convicis.
GENERAL CHARACTERISTICS OF LIBERTAS

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 aequandas libertatis esse quan potestissimum quemque posse dicere causam. Quid autem tuto cuilibet, nedum summam rem publicam, permittit, si ratione non sit reddenda? Quis ius aequum pati non possit, in eum vim haud inustam 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 (1, 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 (aequalitatis) for the reason that it disregarded dignitas.

Nam aequabilitas quidem iuris, quam amplexantur liberi populi (i.e. democratic equality), neque servari potest...aeque, quae appellantur aequabilitas, iniquissima est. Cum enim par habetur honos summus et infimus, qui sint in omni populo necesse est, ipsa aequitas iniquissima est (De Rep. 1, 53).

And similarly,

Et cum omnia per populum geruntur quamvis iustum atque moderatum, tamen ipsa aequabilitas est iniqua, cum habet nullos gradus dignitatis (ib. 1, 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 person


² Pro Planc. 33: Ubique saluit aequitas, ubi illa antiqua libertas.

³ De Off. 1, 144: Privatum autem oporetur aequo et pari cum civibus iure vivere, neque submissium et abiectum, neque se efferentem.


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);⁶ obviously the democratic principle of complete equality was incompatible with regard for δίκαιος.⁷ 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,⁸ was meant to be, a democracy of the Athenian type; and eleutheria with isonomia and parthesia as its chief expressions appeared to the Romans as being nearer licentia than libertas.⁹

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 τοις is he notion of parity, whereas in aequitas it is fairness, justice, equity. Isonomia⁷ 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,⁴ 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 nullum potest, Cic. Ad Q. Fr. 1, 2, 3.

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


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

⁵ Cic. De Rep. iii, 23: Si vero populus plurimum potest omniique et legibus arbitrio regnare, dictur illa libertas, est vero licentia. See also Cicero's criticism of the Greek Assembly of the People, Pro Flacco, 15 ff.; and Phaedrus, 1, 2, 19 f.: Athenaeum cum florentem aequinis legibus Procula libertas civitatee miscuit Frenique solvit pristinum licentiam.

⁶ See Cic. Orat. 130.

⁷ Derived from αἴθρος rather than ἀθροῦς, see Hirzel, op. cit. pp. 240 ff. Cicero probably had inovous in mind when he wrote "cum enim par habetur honos summus et infimus,...ipsa aequitas iniquissima est" (De Rep. 1, 53).

⁸ Cic. Tusc. 9; De Off. ii, 44, 11; Pro Client. 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 auctoritates and dignitates—two qualities that played a remarkable part in Roman life, both private and public.³ Libertas and dignitates are not essentially incompatible—as are, in Aristotle’s view, eleutheria and axis—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,

⁵ See R. Heinze, Auctoritas, in Hermes IX (1915); and H. Weighe, Die Bedeutung und Anwendung von dignitas in den Schriften der republikanischen Zeit, Breslau Diss. 1932.

There are nooppoested; 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.⁴

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 dignitates,⁵ the right balance between libertas and dignitas is a matter of great importance. Cato the Elder said, “Iure, lege, libertate, re publica communitur uti oportet; gloria atque honore, quomodo sibi quisque struxit”.⁶ A generation later, M. Antonius the orator wished “libertate esse pararem cum ceteris, principem dignitatem”.⁷ 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 memore”, to use Livy’s famous phrase.⁸ 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 ceteris et princeps dignitate at the same time? Can one excel “praestantia dignitatis” without “transire aequabilitatem iuris”? And, on the other hand, will not

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.
⁵ Cic. Phil. 1, 34.
⁶ Livy VII, 33, 3.
⁷ Cic. De Orat. III, 109: Superioribus invindicatur... si... aequabilitatem iuris praestantia dignitatis aut fortunae transeunt. See also Livy XLV, 32, 7; and the instructive anecdote in Diod. Sic. XXVII, 10, 2.
the fortification of libertas be regarded as a challenge to dignitas. 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 aquari velle simulando ita se quisque exullit ut deprimat alium, in difficili est, cawdeno ne metuant, homines metuendo ultro se efficiunt, et inuriam ab nobis repulsam, quam aut facere aut pari necessa sit, intungimus alis (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 nourish 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". The Roman

1 Livy III, 67, 9: Sub titulo sequendorum legem 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.

4. The Balance of Powers

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 was a cardinal principle of the
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 judicium populi, confirmed or annulled sentences of death or freeing 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, 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 Tommy Frank (Naevisius and Free Speech, Amer. Journ. Phil. xxviii (1927), pp. 105–10) and his pupil Laura Robinson (Freedom of Speech in the Roman Republic, Johns Hopkins University Diss. Baltimore, 1900) 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 omnecentwisset" (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 incantaret", which means to cast a spell, and "omnecantaret", which according to Festus s.v. (p. 191, ed. Lindsay) means "convicium facere". See Ed. Frenkel, Grænæmon 1, pp. 187 ff.; Ch. Brecht, s.v. Omnecantatio in PW, xvii, cols. 1712 ff. and especially cols. 1714 f.; and A. Momigliano (reviewing L. Robinson's dissertation) in J.R.S. xxvii (1927), p. 121.

Another point of great consequence is interestio. 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 maiore potestas. In theory interestio 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. This limitation of the People's sovereignty was virtually removed by the Lex Publilia (of 339 B.C.) and Lex Maeniana, which provided that the patrum auctoritas should be given before the voting took place.

Secondly, Dr. Robinson, op. cit. p. 6, 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 expression of omnecantatio 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. 132.

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.

2 For the interestio of rogationes see Mommsen, op. cit. 11, pp. 283 ff. It is not necessary here to discuss omnecantatio, since it was its abuse, rather than its proper use, that played a conspicuous part in obstructing the procedure of the Assemblies under the Later Republic. For omnecantatio see T. Frank, C.A.H. viii, p. 167; St. Weinstock, in PW, xvi, cols. 1722 ff.; Mommsen, op. cit. 11, pp. 110 ff.
3 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 to also be ratified by patrum auctoritas or not, cf. op. cit. iii, p. 1039.

Of unknown date but probably not much later than 390 B.C. Cf. Mommsen, op. cit. iii, p. 1047, and E. Weiss, PW, xii, col. 2396, s.v. Lex Maeniana.
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). The Lex Cassia is known to have encountered long-drawn opposition, and all the Ballot Laws were very much resented by staunch Optimates. The Leges Tabellariae were regarded as a great achievement of the commons, and the ballot was called "the guardian of liberty".

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 considered of importance with regard to public affairs. 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.

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. 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. The mandate of the consuls was irrevocable before 1 See Mommsen, op. cit. 111, pp. 339 ff.
2 Ib. p. 962.
3 Ib. 11, p. 310. Such actions of the Executive as affected individuals only did not have to be referred to the Senate.
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 magistrates 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 consularis factum est quod dominum quasi quinque et rex regia potestate numeros. Cf. IV 3, 5, 1; VIII 32, 3. See also D. 2, 2, 16; Dion. Hal. v, 5, 1; Polyb. vi, 11, 12. Several more instances are cited by Mommsen, op. cit. 11, p. 93.

¹ Perhaps it is not inappropriate here to quote Abraham Lincoln's dictum, "It is not 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" (to Nov. 1864; Select Speeches, Everyman's Library, p. 221).

² Kloesel, Libertas, p. 31, asserts that dictator and magister eburnum "eigentlich dasselbe ist wie zwei Konun; nur ist der Diktator letztlich ungebunden". This statement ignores the fact that the Master of the Horse had only prætorian rank, see Mommsen, op. cit. 12, p. 176.

³ For intercessio cf. Mommsen, op. cit. 11, pp. 266 ff. Intercessio of par potestas was based on the principle "in re pari potestas causam esse prohibentis" (D. x, 3, 28). Cf. the references cited in Mommsen, op. cit. 1, p. 283 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. 11, 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. 1, 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.⁴ The tribunate as a sacrosanct and overriding authority is the chief means of holding in check the vast imperium of the consuls.⁵ 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 Sempronius de provincis 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.⁶ The continuation of office beyond the statutory limits was denounced as regnum, the most invidious form of political invective in republican Rome.⁷ 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 ascendance of the Senate over the consuls, which took place during the Middle Republic,⁸ 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. 17, p. 26 n. 1.
² See C. De Rep. 11, 58; De Leg. 111, 16; Appian, Bell. Civ. 1, 1. Cf. Livy ll, 13; 14, 54; 52 IV, 10, 10.
³ Livy 1, 13, 74; 34, 4; Sallust, Cat. 6, 7. Cf. Livy 11, 21, 2; IV, 5, 5.
⁴ See, e.g., Livy vii, 36, 3; viii, 34, 16.
⁶
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.

§. 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 judicium 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.

Negro potuisse iure publico, legibus ipsius haec civitas utitur, quernquam cives eum consociavit calamitate affici sine iudicio; hoc iuris in hac civilitate etiam tum, cum reges essent, dico fuisse; hoc nobis esse a maioribus traditum; hoc esset edique 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. This principle of "nulla poena sine iudicio" lends particular importance to the independence of law-courts.

(Consules) ne per omnia regiam potestatem sibi vindicarent, lege lata factum est ut ab eis provocatio esset neque possent in caput civis Romani animadvertere iniussu populi; solum relictum est ut coevere possent et in vincula publica duci inibere.

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

1 See Mommsen, op. cit. 111, p. 351.
2 Cic. De Rep. 11, 544; Livy x, 9, 4 ff.
3 Cic. Pro Rab. perd. ree, 32; cf. ap. Ascon. 78, 1 c (lex Porcia); principium iustissimae libertatis. H in Verr. v, 163; O nomen dulce libertatis, o ius eximium nostrae civitatis, o lex Porcia legesque Sempronii. (cf. Pro Rab. 11).
4 See also Pallat. 51, 22; Ps-Sallust, In Cis. 5.
GENERAL CHARACTERISTICS OF LIBERTAS

potestas lodged against a magisterial order in consequence of an appeal to the said potestas by the complainant, and therefore any par maiore potestas could be approached for this purpose. The tribunes were the authority par excellence in that matter because the tribunate was set up for the purpose of auxilium, and because the tribunes enjoyed for this purpose the standing of maius potestas even against the consuls. The tribunate was therefore regarded as the protection of freedom, and auxilium and provocatio were called “duas areas libertatis ruendae”.

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 maiore potestas, for the purpose of opposing that order. 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. 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; 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 it right to do so. 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, 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 (XXIV, 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 See Mommsen, op. cit., 1, p. 274 and p. 278.
2 See e.g. Caesar, Bell. Civ. iii, 30.
3 Cic. De Leg. iii, 9: Plebis quos pro se contra vim auxilium ergo decem creavit, ei tribuni eius surno. See also Livy iii, 9, 15, and above, p. 25 n. 5.
4 See above, p. 23 nos. 1 and 2.
6 Livy iii, 45, 8. Cf. iii, 53, 4.
7 Cf. Mommsen, op. cit. 1, p. 274.
8 See id. op. cit. 1, p. 193 n. 2, and Botsford, loc. cit.
9 See Mommsen, op. cit. 1, pp. 278 ff.

---

1 For examples of denied auxilium see Livy iii, 56, 11; Val. Max. iv, 1, 8; Pliny, Nat. Hist. xii, 3, (6), 8 ff. See also Livy ix, 34, 26.
2 Cf. Mommsen, op. cit. iv, 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 Duronius senatu moverunt, quod legem de coerendis conviviorum sumptibus latam tribunus plebis abrogaverat...: “Freni sunt in pictis vobis, Quirites, nullo modo perpetrandi. Alligati et constricti estis amaro vinculo servitiis: lex enim lata est quae vos esse frugi iubes. Abrogemus iagrum istud horridae vetustatis rubigine obscurum imperium. Etenim quid opus libertate, si volentibus luxu perire non licet?”²

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.³

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, and political purposes. The right of association was granted to all, but it could be curtailed and suppressed by administrative procedure.⁶

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.⁷ 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 iuriae 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,⁸ had a clear concept of the sanctity of the home.⁹ “Quid est sanctius”, says Cicero (De Dom. 109), “quid omni religione munitus, quam dominus unius cuiusque civium? His ara sunt, hic foci, hic divi penetres; hic sacra, religiones, caerimoniae continenter; hoc perfugium est is sanctum omnium, 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 dominus tutissimum cuique perfugium atque receptaculum sit, eumque qui inde in ius vocaret, vim inferre videri” (Dig. 11, 4, 18). And, similarly, “Paulus libro primo ad Edicum: Sed esti qui domini est

¹ See Münzer in PW, v, col. 1852 a.v. Duronius (3).
² Münzer, loc. cit., supposes that the Lex Licinia of 103 B.C. is referred to.
³ Val. Max. xi, 9, 1. I owe this reference to Kloesel, Liberatia, p. 12. 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. 13, p. 529, especially n. 3.
⁵ See above, p. 18, and Livy xxxix, 15, 11.
⁶ See Münzer, op. cit. 13, p. 520, especially n. 2.
⁷ See Münzer, op. cit. 13, p. 529, especially n. 2.
¹⁸ See above, p. 18, and Livy xxxix, 15, 11.
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 Caelio* (96 B.C.) and *De Domus Sua* (77 B.C.) declared that the freedom and citizenship of a Roman were indefeasible rights: “Maiores nostri...de civitate et libertate ea iura inerunt, quae nec vis temporum, nec potestia magistratuum, nec res judicata, nec denique universi populi Romani potestas, quaer e 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 nemo 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.


² Mommsen, *op. cit.* iii, p. 45 n. 2 and p. 361 n. 1.
³ Mommsen, *op. cit.* iii, p. 361 n. 1.
⁴ *Ib.* pp. 42 ff.
admitted by the very supporters of that régime. 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.

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. 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. 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.

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 ruling class, to which indeed many tribunes belonged. 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. 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 plebsica 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. 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, and the tribunate of Ti. Gracchus, there do not seem to have been attempts to challenge the authority of the Senate. 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 nobles, the aristocracy of office, prominent among whom were the consuls 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." This description is true

---

2 Cie. De Rep. i. 347; 70; De Leg. ii. 23; iii. 11; Pro Sest. 137; Sallust, Cat. 91. Jug. 41; Hist. i. 11 m.
3 Cf. above, p. 20.
5 Sallust, Hist. ii. 48, 16 M. Magis illa consulum imperia et patrum decreta vos exequendo rata efficitis, Quirites, ultroque licentiam in vos auctum aequum adiutum properatis. Cf. ib. i. 72 m. See also T. Frank in C.A.H. viii. p. 359.
6 See e.g., W. Schur, Homo novus, Bonner Jahrbücher, cxxxiv (1939), 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 nobles 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 nobles possessed power without privileges. The privileges that the old patriates 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 patriate, 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 (clientae), 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 life.5 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.6 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 (1, 47) Cicero put into the mouth of an interlocutor a description of States in which everyone is nominally free (isae 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 For the ius imaginum see Mommsen, Staatsrecht 1, pp. 442 ff.; for the toga praetexta see 1, p. 478 ff.
2 See op. cit. 1, pp. 519 ff.
4 The innovations of the Gracchi and some other people will be discussed later. Livy iii, 39, 8 (vicissiduo imprimandqu eum unam exaequandae sit libertatis), and iv, 5, 5 (aeque libertatis est in vicau unius magistratibus paree reque imperante), 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.
5 On auctoritas see R. Heine, Auctoritas, Hermer LX (1925), pp. 348–66, and Von den Ursachen der Größen Römis (1931), 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.
6 Val. Max. i, 7, 12: Nasica contrariam orationem orditi coepit. Ostentarae deinde plebe, tacere, quiesco, Quirites, inquit, plus ego enim quam vos qui rei publicae expedire intellego. Qua voce audita omnes pleno veneracionis silentio maiorum auctoritatis eius quam suorum alimentorum respectum eguerunt. Indicative of the importance of auctoritas in public life is also the episode related by Asconius 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. Scaurus princem senatus sociis in arma sitt convoca; M. Scaurus princeps senatus negat; tibis nemo est: utri vos, Quirites, convenit credere?" Qua voce—ad Asconius—ita omnium communat animos ut ab ipso etiam tribunum dirimiteret.
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, in a political sense, signifies either a particular office, or the prestige a Roman acquires through the tenure of an office. It contains the notion of worthiness on the part of the person who possesses dignitas, and of the respect inspired by merit on the part of the people. But unlike honos, which is limited in time, and gloria, which is transient, dignitas attaches to a man permanently, and devolves upon his descendants. And it is dignitas above all other things that endows a Roman with auctoritas.

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 to be given, through office, the allegedly deserved opportunity of exercising one’s auctoritas in the State. Dignitas assumes the meaning of an 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.

Being inheritable, dignitas is closely allied with nobilitas. In fact, nobilitas originally was nothing but the respect for a person’s ancestral dignitas. Nobilitas meant renown gained through the display of virtus, 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, "Si nobilitas quid facit?" and a philosopher might aver that genealogical trees were made people known rather than noble. Not so under the Republic. Names and pedigrees counted for much. A famous name might sway an election, and one’s ancestral "images" might, as it were, stand surety for one’s worthiness. Even Cicero’s mastery of words fell short of disguising the fact that he was ill at ease before the dignitas of Appius Claudius. 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? Caesar must have known the sentiments of his fellow citizens.

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 See especially Helmut Weghaupt, Die Bedeutung und Anwendung von dignitas in den Schriften der republikanischen Zeit, Berlin 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, Göt. Nach. 1917, pp. 432 ff.; V. Ehrenberg, Monumentum Antiocchenum, Klio xix (1925), pp. 200-71; E. Ramy, Dignitas cum olio, Musae Belge xxxix (1928), pp. 113 ff.

2 Weghaupt, op. cit. pp. 22 ff.

3 He. pp. 9 ff. and p. 19.

4 Id. pp. 17 ff.

5 Id. pp. 13 ff.; Heinze, Ursauchen, p. 30; Cic. Pro Sest. 21; Pro Marc. 15 ff.

6 Cic. De Inv. ii, 165: Dignitas, aliquis honesta et cultu et honore et verecundia digna auctoritas. See also Weghaupt, op. cit. p. 12.

7 Sallust, Jug. 85, 37: Nobilitas... omnes honores non ex merito sed quasi debito a vobis repetit. Pliny, Paneg. 69: Iuniusbelus clarissimae genius debitum genere hominum... offerere.

8 See Caes. Bell. Civ. 1, 7; 71; 9; 23; 91, 2; Cic. Ad Att. viii, 11, 13; Pro Lig. 18. Very illuminating is also Sallust, op. cit. 35, 3-4. Cf. Reitzenstein, op. cit. p. 434. For a somewhat different view see Weghaupt, op. cit. p. 37.
ambitious desire to enhance one’s prestige gradually destroyed the
harmony between the dignitats of some and the libertas of all.

All the nobles had in common a strong impulse towards the
assertion of their own dignitats. And since dignitats rested in the last
resort on the tenure of public offices, the latter became the goal of
that ambition, and the nobles 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 si quisque
struit.”¹ The frame of mind of the younger Afranius, 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
aeque 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 dignitats and
libertas, the question arises whether in the long run the dignitats of
the nobles could remain compatible with the communis libertas and
aeque 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 dignitats came to mean reckless and unjust
domination.⁴

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

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 dignitats.

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:
reformers⁵ and adventurers, upstarts and aristocrats, moderates and

¹ The earliest instance of “optimates” in a political sense is Rhet. ad
Heron. iv. 45. For the date of this treatise see W. Ward, Fowler, Journ.
Phil. x (1882), pp. 197 ff., who assigns it to the mid-eighnties of the first
century B.C. H. Strasburger’s assumption (PWV, xvii, col. 772) that the words
of C. Gracchus “Pessimi libertati fratrum meum optimum interfectum”
(Charis. G. L. 6, 142, 16—frag. 16, Malcavati, ii, p. 139) presuppose
the currency of “optimates” as a political term, is probable but not certain.
The antithesis in the quoted sentence may be self-contained, “pessimi” being evoked
by “optimatum” without the same time foreshadowing the term optimates.

² C. Gracchus, frag. 52 (Malcavati, ii, p. 142) Sallust, Cat. 39, 11, Jug. 31,
14, 43, 15, Hist. 11, 43, 3 and 6 43; Cic. Pro Sext. 96.

³ In his Pro Sesto Cicero, for obvious reasons, strangles unlucky 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. 1, 9, 21, and Pro
Planc. 94. They would apply to many a politician in Cicero’s times.

⁵ Although the differences between them and the other Populares since
Marius is only too obvious, the Gracchi cannot, for that reason, be excluded
D
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. Their prime object was to break the monopoly of power of the ruling oligarchy. Hence the incessant inquest against the dominatio, potestia, superbia, and libid of the pauci, the facio potestium, and the appeal to the People to restore its freedom. The Optimates, for their part, countered their opponents with the assertion that it was they who protected freedom and republicanism.

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 optimatum?” 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. 101: Grachos aut Saturninum aut quemquam illorum veterem 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 Tabelaria (137 B.C.). Likewise, Sallust places the Gracchi at the beginning of the “mos partium et factionum”, Jug. 41–2.


2 See, e.g., Sallust, Jug. 31; 41–2; 85; Hist. 1, 53; 111, 48 m. More about those slogans will be said later.

3 Sallust, Hist. III, 48, 22 m.: Neque eos (sc. factionem nobilitatis) puget, vindices ut se forunt libertas. Cic. Pro Sest. 136: Condudam illud de optimatibus eorumque principibus ac rei publicae defensoribus. Cic. also Pro Sest. 98.

CICERO DISCORD: OPTIMATES AND POPULARES

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 iturgit propositum his rei publicae gubernatoribus, quot intueri, et quo cursum derigerre debent? Id quod est praestantisimum, maximeque optabile omnibus sanis et bonis et beatis: cum dignitate optimata. Hoc qui volunt, omnes optimates; qui efficient, summi virti et conservatores civitatis putantur. . . . Huius autem otiotis 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, scenarium (98).

Condudam illud de optimatibus eorumque principibus ac rei publicae defensoribus . . . Haec est una via, milii credite, et laudis et dignitatis et honoris: a bonis viris sapientibus et bene natura constitutuis laudari et diligi; nosse discriptionem civitatis a maioribus nostris sapientissime constitutiam, qui cum regum potestate non tulissent ita magistratus annuos creaverunt ut consilium senatus rei publicae praeposenter sempiternum, deligerentur autem in id consilium ab universo populo, aditusque in illum sumnum ordinem omnium civium industriae ac virtut pateret; senatum rei publicae custodem, praeidem, propagatorem collocaverant; huius ordinis auctoris uti magistratibus, et quasi ministros gravissimi consili esse voluerunt; senatum autem ipsum proximorum ordinum splendorem comprobare, plebis libertatem et commoda tueri atque augere voluerunt. Haec qui pro virili parte defendunt optimates sunt, cuiuscumque sunt ordinis; qui autem praepos qui suis ceditibus tanta munia atque rem publicam sustinent, hi semper habitu sunt optimatium principes, auctores et conservatores civitatis (135–8).

The main points of this tendentious statement reveal a consistent line of thought: the goal of the Optimates is optimat cum dignitate, otiot for the people, dignitas for the aristocrats; the property classes are the supporters of this otiota dignitatis—an echo, no doubt,
of the concordia ordinum—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 (58), 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 tribunici auxilia and provocatio, are not so much as mentioned. The description of the Roman patriae politiae—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; 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. In the De Re Publica Cicero asserts that the vetus res publica attained the ideal of a mixed form of government, 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". 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 liberae paucia per populum, plenearum senatus auctoritate et instituto ac more gererentur, atque ut consules potestasem haberen tempore dumtaxat annuum, genere ipsae ac ture regiam (11, 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 (ac senatus) decreta rata sunt".

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, and his Lex Cornelia de xx quaeatioribus gave the Senate that representative character to which Cicero attached great importance.

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. 1, 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. In fact, democracy is to be eliminated at all costs, for behind the rule of the sovereign people lurks the would-be tyrant.

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. 18, pp. 280 ff. and pp. 286 ff.
3 De Rep. 1, 52: Sic inter infrimentum unius temeritarumque multorum medium optimates posserentur locum, quo nihil potest esse moderatus.
4 Ib. 11, 39: Quod semper in re publica tendem est ne plenum valentium plenumque fuerit (multius) suffragiis, ne superbus esset, nec valeret, nisi, es esset periculosum.
5 Ib. 1, 65 ff., particularly 68: Ex lac nimia licentia (populi), quam illi solam libertatem putant, sit ille (Plato) ut ex stirpe quaedam existere et quasi nasci tyrannum.
drawn from all quarters according to personal merit, 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. 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, 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. It would seem a reasonable assumption that the Leges Agrariae and Frumentariae (and perhaps also the Leges Judiciae) 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. 1, 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. 1, 77 m (Oratio Philippa); Cic. Pro Rab. perd. 160, 2; Pro Sest. 98; 137; 143; and the Philippicæ, passim. See also Cic. Brut. 164. It is noteworthy that Livius Drusus "ob extremam adversam Gracchos operam "patronus senatus' dictus", Suet. Tib. 3, 2. For Livius Drusus the younger see Cic. Pro Mil. 16; De Orat. 1, 24; Diod. Sic. xxxvi, 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.

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 κοινά κοινῇ διαισθασθή." 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. 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 coid of their own." 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 Pythyro Hannibale Philippoque et Antioco defensum est aliud quam libertas et sua cuique sedes neu cui nisi legibus pareremus?" (Hist. 1, 55, 4 M).

A faint echo of the propaganda of the Gracchi is perhaps heard, through Livy, in Florus (11, 1):

Inerat omnibus (ac. legibus agraribus, frumentariis, judiciae) species aequitatis: quid tam tustum enim quam recipere plebem sua a patribus, ne populus gentium victor orbisque possessor aequum aequi aequo nisi ac focius aequo? Quid tam aequum quam inopem populum vivere ex aerario su? Quid ad ius libertatis aequanque magis efficax quam ut senatu regente provincias ordinis aequitatis salutem iudiciorum regno nitereat?

1 Appian, Bell. Civ. 1, 11.
2 Tib. 1, 10, 4.
3 F. Taegter, 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 "...eine grausamhaft Verstoß gegen die gothhische Weltordnung wenn die "bestiae Italiae" die einfachsten, also gottgeschwollen Rechte geniessen, nicht aber die Bürger der Weltherrin Rom" (op. cit. 17 f.), but that the citizens who fight and die for the Italian land "have not a single coid of earth that is 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 ius publica? And as Bloßius, greatly doubts about the Stoic origin of his doctrine views have been expressed by D. R. Dudley, Bloßius of Cuma, J.R.S. xxxi (1941), pp. 95 ff., who traces Bloßius's democratic views to the Cumaean 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. 11, 3, 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 Kloeßel, 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, nemum 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. 11, 13; Plut. Ti. Gracchus 9, 1.

Civil Discord: Optimates and Populares

(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 Täger, 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 magistrates except the dictator, 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. 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, 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. 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. 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 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. L. Cassius Longinus, tribune in 104 B.C., "plures leges ad munendam nobilis-
tatis potentiam tulit, in quibus hane etiam ut quem populus damnas-
set cuive imperium abrogasset in senatu ne esset". 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 college. It is noteworthy that Sulla repealed this law, and Caesar had it re-enacted. 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 voluntari paruit civitatis?" 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
original form might have reasserted popular sovereignty in respect of proposals to give dispensation to individuals (Ascon. 58, 3 ff. c).  

(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. 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 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 cultu et gravissimo civi" before they were cast. He added that that procedure would give the people "an appearance of liberty" while the auctoritas honorum would be secured. Cicero's attempt to deal with the problem shows the importance that the People attached to the secret ballot 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. Presumably for the very same reason, the Populares insisted on uncontrolled voting.  

(e) Tribunicia Potassas

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,  

The idea of popular sovereignty is also vaguely expressed in Sallust, Juv. 71, 22; Hist. 1, 55, 11 and 24 m; III, 48, 15-16 m; Cic. Pro Rab. perd. 100, 5.  
1 Cic. Pro Sest. 103; De Leges Agr. 11, 4; De Leg. III, 39. The agitation for free suffrage is reflected to some extent in Livy 11, 56; 31 IV, 3; 42, 64, 43, 12; VI, 40, 7.  
2 Cf. also Cic. Pro Planc. 26; Pro Corn. ap. Ascon. 78, 2 c.  
3 Cic. Pro Sest. 103; Brut. 97; De Amic. 41; De Leg. III, 34 and 36.  

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. 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 intercession, and either restricted or abolished the right of the tribunes to initiate legislation. 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. 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". This description of the tribunate is traditional, but it usually applied to the ius auxillii, 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. His real object was "opes nobilitatis pellere dominatione" and he regretted that he held  

1 Sallust, Hist. 1, 77, 14 m; Cic. De Leg. III, 19-23; Flor. II, 1, 1.  
3 See Livy, Epit. XXXIV; De Leg. III, 124; C. A. H. VII, p. 293.  
4 See especially the speech of the tribune Licinius Macer, Sallust, Hist. III, 48 m. And also ibid. 1, 55 and 11, 24.  
5 Sallust, Hist. III, 48, 1 m: Vindicat passissum (plebe) omnis iuris sui tribunos plebis. Ib. § 12: Vis tribunicia, timuit a maioribus liberatis patrum.  
7 Sallust, Hist. III, 48, 26 m: Verum occupavit nescio quae vos (se Quirites) torpedo...cunctaque praetori ignavia musivatis, abunde libertatem rat, silet qui tergis absit neque et luci licet et illuc, munera ditum dominores.
but “a shadow of a magistracy.” He obviously wished for the unrestricted intercessio and its 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. 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. It is also unlikely that the demand to restore the pristine powers of the tribunes was meant to further the power of the People. 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, 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, 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 nobles and homines novi, or reserved for the nobles only, was a prominent feature in the controversy between

1 B. 51: inaequus species magistratus.
2 For the manner in which the tribunate was employed after the full restoration of its powers, see Sallust, Cat. 38, 1.
3 Sallust, Hist. I, 55, 10: Haec testamento servitiandum aut imperandum, habendus metus est aut faciendus, Quirites.
4 The attitude of the People towards the political rivalries during the Late Republic will be discussed in the next chapter.
5 As the passage in Sallust, Hist. III, 49, 13, M, would suggest.
7 See Ascon. 67, 1 L. C. But see Sallust, Hist. III, 48, 8 M.
8 On the significance of this term see J. Vogt, Homo novus, ein Typus der römischen Republik, Stuttgart, 1925; W. Schur, Homo novus. Ein Beitrag zur Sozialgeschichte der sinkenden Republik, Bonner Jahrbücher LXXIV (1939),

the Optimates and Populares. Liberras, 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 on 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 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. But despite the formal position in law, the nobles, as a rule, exerted all their influence to debar the homines novi from the consulship. They maintained that descendants of consuls only, or, at least, sons of senators, were fit for the consulship, whereas other people were “unworthy” —indigni—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.

In the face of the attempt on the part of the Optimates to shut out the homines novi from the exclusive clique of the nobilities, the
hominis 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 mander" 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 Leg. Agr. 11, 7) 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 nobles 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.

² Livy vii, 3, 7.
³ Cic. In Pis. 2 f.; De Leg. Agr. 11, 100; II in Ver. iii, 7; iv, 81; v, 180 f.
⁴ Cf. Sallust, Jug. 85.
⁵ Ad Fam. iii, 7, 5.

CIVIL DISCORD: OPTIMATES AND POPULARES

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 equum ius and acueae 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".⁶

The new or rather the renewed original concept of nobilitas propounded by Cicero and Sallust⁷ was to gain a firm foothold under the Early Empire when the principal ideas of the homines novi prevailed.⁸ Cicero, for all his expressed opinions, found it presumably quite impossible, or undesirable, to call “nobilitis” anyone except the descendants of consuls.⁹ Velleius Paterculus described Cicero as a “vir novitatis nobilissimae”, 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 ornus”,⁷ roundly declared that “Non factit nobilem atrium plenum famous imaginibus. Nemo in nostrum gloriari vixit, nec quod ante nos finit nostrum est. Animus factit nobilium, 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 exornet undique cæra Atria, nobilitas sola est quæ 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. 545 ff.
⁴ Gelzer, op. cit., pp. 22 ff. and 26 ff.
⁵ Vell. Pat. 11, 34, 3.
⁶ Sallust, Jug. 85, 25.
effects of the Senatus Consultum de Re Publica Defendenda, commonly known as the S.C. Ultimum.  

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 dictator. But it was probably no fortuitous coincidence that the dictatorship fell into disuse about the same time as the Senate gained ascendancy. For although constitutional practice now subjected it to the provocatio, and perhaps to other limitations too, 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. 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. 

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 betrays 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 maiore 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 Quasidikatur der späteren römischen Republik, Klio xiii (1913), pp. 321–86. Also Mommsen, Staatsrecht iii, pp. 1340 ff., and H. Last, C.A.H. ix, pp. 82 ff.

\[1\] The last dictator before Sulla was appointed in 202 B.C., see Mommsen, op. cit. 13, p. 169, and also Plaumann, op. cit. p. 355. Sulla’s dictatorship “legibus scribendi et rei publicae constituen” as well as the dictatorship of Caesar, resembled the power of the Decemvirs rather than of the dictator

\[3\] See Festus, s.v. optimas lex (p. 216, ed. Lindsay), Cf. Mommsen, Staatsrecht iii, 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.

(C. Bell. civ. 1, 7, 5 ff.) 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. 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, 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. 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.
since the only justification for passing such a decree is the presence of hostes within the State.\footnote{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 dives, 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 130 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 Verständnis dieser Massregel, wenn man sie nicht von den historischen Begleitumständen loslässt”. The soundness of his method in this particular case may safely be considered a matter of opinion.\footnote{1} An example of a motion for a S.C. Ultimum is the speech of Philippus, Sallust, Hist. 1, 77 m, especially § 22.

\footnote{2} It is noteworthy that Scipio Africanus, when interpellated by Carbo about the murder of Tiberius Gracchus, replied “jure caesarem videt”, see Cic. De Orat. ii, 106; Livy, Epit. lix; Vell. Pat. ii, 4, 4. It seems that “jure” in this context means “justifiably” rather than “legitimately”.

\footnote{3} Cic. De Orat. ii, 105 and 132; Partit. Orat. 104 ff.

\footnote{4} Pro Rab. peric. ren., 2 ff.; 35; cf. Orator, 102, and also Dio Cass. xxxvii, 36, 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 sedition citizens. It is for this reason, above all, that Hardy’s statement that Cicero misrepresented the nature of the trial requires qualification.

act of putting C. Gracchus to death, but justified it on the ground that it was committed “pro salute patriae” and “ex senatus consulto”\footnote{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.\footnote{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 (§§ 12-3). It would seem that Labienus dwelt on the provisions of the Lex Porcia and Lex Sempronius 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.\footnote{2} 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 compiled
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 con-
stitution (§§ 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 (§§ 35–36). 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, it dis-
approves 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 safe-
guards 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 pre-
cedent that will reach to himself."

2 Cicero's unanswerable may be passed over as of little consequence from the
standpoint of the controversy about the S.C. Ultimum. For although Cicero
went into self-imposed exile as a consequence of the Clodian plebiscite which
outlawed anyone who condemned a citizen to death without trial, the privilege
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 "regnium", Ad At. 1, 16, 10 and
Pro Sulla, 21 and 25; his "tyranny", Pro Sest. 109 and De Div. 75 and 94;
and his arbitrary power, Plut. Cic. 23, 21; cf. also P. Sallust, In Cir. 5. Perhaps
his own experience was at the back of Cicero's mind when in his De Leg. 111, 8
he laid down with regard to the consuls "oillis salus populi suprema lex esto".

3 Cf. Livy xxviii, 39, 6: Ne iure ullo nec exemplo tolerabiles liberae civitati
aedilis curulis designatus praetoriam petetet.

4 See Cic. Bruc. 226; De Hortisp. Resp. 43. Cf. Mommsen, Staatsrecht 1,
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 135 B.C. supported a measure "ne quis consul his feret". 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.

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". Similar allegations were made about Saturninus. Cinna's régime was called dominatus and tyrannis. Sulla's dictatorship was considered a dominatio, tyrannis, servitium, and regnum.

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

2 Appian, Lib. 112; Cic. De Prov. Cons. 19.
3 Cic. De Amic. 40; Flor. 11, 3, 7; Sallust, Jug. 24, 7; Plut. Ti. Gracchus 44, 7.
4 Flor. 11, 4; 4.
5 Cic. Phil. 1, 34; 11, 108; Sallust, Hist. 1, 64 M; Ascon. 23, 24 C.
6 Sallust, Hist. 1, 31; 55, 4, 7; 57; III., 48, 1, 9 M; Cic. De Lege Agr. 1, 21; II., 81; Phil. 11, 108; Aug. 44; Ad Att. viii. 11, 2; Appian, Bell. Civ. 13, 3.
against extraordinary powers even under the Triumvirate, and the
nobles were unwilling to grant extraordinary powers to Pompey. Fe-
ing against extraordinary power must have been strong, if
Caesar, in order to reassure his opponents, declared on entering
Rome in 49 B.C. “se nulnum extraordinarium honorem appetisse”
(Bell. Civ. i, 52, 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.

It appears that throughout the Late Republic, with the exception
of Sulla’s dictatorship, the Optimates were opposed to the estab-
lishment of the extraordinariae potestates which were championed
with popular support by the Populares. This struggle is the back-
ground 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. 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 con-
ception of freedom. There can be no doubt that principles were

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 agitare, honestis nominibus, ali sicuti
populi iura definderent, pars quo senatus auctoritas maxima forer,
honor publicum simulantes pro sua quisque potestas certarent.

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 govern-
ment which was the embodiment of Roman libertas.

1 Cíc. De Sest. 60. Cf. De Dom. 22.
2 Cíc. Ad Att. i, 19, 4; iv, 1, 7; Ad Q. Fr. iii, 8, 4 and 9, 3; Brutus ap.
Qüintill. Inst. ix, 3, 95.
3 See, e.g., Ad Att. viii, 11, 2.
4 See Cíc. II in Porr. v, 175; Livy ii, 45, 5–9; iii, 58, 5; iv, 41, 3. The odious
connotation of the term regnum derives from its association with Tarquin,
see Cíc. De Rep. 1, 62: Quid tū non videis utius inopportunitate et superbia
Tarquinii nomen huic populo in odium venisse regum? And also Livy vi, 40, 10: Tarquinii tribuni plebis, with which cf. 40, 7 and 41, 7.