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Saving the “Republic”

Roman ideas on the permanence of the state.

“Republicanism” is an invention of the Moderns. The Romans themselves were unaware that they lived in a Republic.

This claim might sound provocative, but it is the only possible conclusion to be drawn from a contextualized reading of Roman political thought. Cicero’s meditations on government, and a variety of normative discourses, embodied in the practice of actual administration, in institutions and inscriptions, make this clear.

For Cicero, as for part of the senatorial elite, the *res publica* had become a kind of hypostasis, a supreme entity, an *idea* able to justify exceptional actions and new norms. In the two words of the expression “*res publica*”, - literally “public thing” - the most important was probably “public”. To define the public sphere as a superior principle made it possible to think about not only its permanence but also its unity: to create, in other words, a condition for consensus. Consensus was not a reality in ancient cities, as so many historians since Moses Finley have insisted, but an ideology, an operation of thought, to paraphrase Nicole Loraux.

Caesar was right in saying (if Suetonius’ account is accurate) that in his time *res publica* was just a name without body or form. It had, in fact, become an abstraction, in whose name it was possible to urge citizens to take up arms, to define some citizens as enemies, or to declare one’ own legitimacy. This trend is

also confirmed by the appearance of textual and visual allegories of the *res publica* in use during that period and by later imperial uses of the concept.

It was not, however, a vision of the *res publica* which was universally accepted among the senatorial elite, even among those who had assassinated Caesar in 44 BCE. In his letters of April-June 43, Marcus Brutus severely criticized the position of Cicero who attempted to oppose the despotism of Mark Antony by supporting Octavian. In the name of the *res publica*, he said, one can descend into slavery. For him, it is clear *res publica* was not just a name. It had to be connected to law, freedom, citizenship, to the regular working of institutions and courts. For Brutus and many others, including on occasions Cicero himself, the *res publica* was nothing other than a name for legitimate government. He could therefore claim when he was in the East with Cassius, that the “public thing” was not in Rome. It was now where they, the legitimate magistrates, were.

These two conceptions marked a striking deviation from another use of the notion, which carries no sense of legitimacy, or unity. According to this conception, the world of the *res publica* was nothing other than the world of the “material goods and affairs” (*res*) that concerned the plurality of citizens (this is the literal meaning of *res populi*, “the thing of the people”, that we find in Plautus). As in other fields of social experience, *res* has here a procedural connotation¹: it unifies all matters (or goods) *which are the subject of debate, litigation or conflict*.

The conception of the political that emerges from these differing versions is a very concrete one and underlines the all-important role which conflict played in any definition. The “public thing” is only that set of issues under debate between a plurality of the actors; it is that thing which exists in

common between them without being consensual. In opposition to all other conceptions, the expression “the public thing” remains neutral and vague.

It is also clearly the case that the notion of *res publica* never gave rise to an articulated doctrine that might be called “ancient republicanism”, in exactly the same way as there was never any single definition of liberty. Moreover, the several conflicting definitions of the *res publica* and their related experiences depended on the political actors who employed the term, and on the issues at stake. This is why *res publica* has to be studied not as a universal, but as an historical category with multiple facets : these facets may conflict with each other but they also coexist. By analyzing both coexistence and conflict of meaning we will be in a better position to understand the historicity of the notion.

The question of the permanence of states is at the heart of the political debate on the best constitution, and the role of Virtue or Fortune in history. But it also addresses the issue of what makes a group or a community. The *Dream of Scipio*, which occurs at the end of Cicero’s *De Republica*, belongs to this tradition. It describes the destiny of those who have deserved well of their country. The virtuous citizen, writes Cicero, is one who seeks to increase and "to save the city."

“But still, Africanus, so that you may be the readier to defend the *res publica*, know this: for all who have preserved their fatherland, saved it, enriched it, there is in heaven a sure and allotted abode, where they may enjoy an immortality of happiness. For nothing happens in the world more pleasing to that supreme Deity, who governs all the universe, than those gatherings and unions of men allied by law, which are called cities. From this place do their rulers and guardians set out, and to this place do they return." (*The Dream of Scipio* 13:)

In what follows, I would like to examine the idea of “*saving the city*”. This will acquire very considerable political importance under the Principate. A large number of inscriptions begin with the words. “the *res publica* having been saved”. For instance, an inscription from 31 BCE, immediately after the battle of Actium, honoring Octavian, the future Augustus, reads:

“The Senate and the People of Rome to the Imperator Caesar, son of the deified Iulius, consul, consul designated for the sixth time, acclaimed imperator for the sixth time, after the *res publica* having been saved”².

Similarly the formula “*for saving the citizens*” surrounded by the civic crown, appears on Augustan coins from 27 BC³, then on the senatorial sesterces in 23 BC⁴ and on the golden coins from 19-18 BC.⁵ Finally the title “*savior of the country*” or “*savior of the res publica*,” appear, from the time of Tiberius, in public homages paid to the Emperors⁶. What is the exact meaning of these formulas? To which events do they refer? And what is this “eternity” of the *res publica* (and of Rome or Italy), which the decrees of the Roman Senate and the imperial texts are claiming to preserve?

As Cicero phrases it in the *De Officiis* (1,17) the universe is eternal and subjected to an endless race. How then can there be any hope of saving the state, when the earthly world, is subject to constant instability and mortality, and when even the memory of men - which for some had seemed to be a participation in immortality - is itself subject to time?

The Romans knew that “cities can die” in the words of the fifth century poet AD Rutilius Numatianus⁷, just as they have a beginning⁸. The physical destruction of cities, for instance, raised a massive juridical question: did it terminate the city’s legal existence⁹? For the Greeks, the answer was no, as is evidenced by the case of Plataea and many others.¹⁰ The question also concerned the Jews in the sixth century BCE with the first destruction of their

Temple, followed by the Babylonian exile, and again after the sack of Jerusalem by Roman troops in AD 70. Did destruction and deportation in these cases mean that the community then ceased to exist?

The Romans provided a number of different answers. A city might still stand, yet lose its *res publica* as happened to Capua in 211 when it was punished for having defected to the Carthaginian leader Hannibal¹¹; or it might be moved physically but still keep the same *res publica*, with the same name. This is why, after the sack of the city by the Gauls in the fourth century BCE, the Romans had planned, for a while, to move Rome to the nearby town of Veii¹². Finally a city might be completely destroyed, body and soul, as happened to Carthage in 146, and to many other cities.

The question raised by Cicero in the *Dream*, however, was not exactly this one. His question was not about the destruction and displacement of a population, but about the conditions that ensure the permanence of the state in a world which is itself subject to change. To think this paradox theoretically Cicero needed to represent it as a dream, in the same way as the *Paradoxes of the Stoics* helped him to think about the extreme conditions of the Sage or of the free man. Dreams and paradoxes allow one to think beyond the limits of traditional experience; and especially to present unexpected answers as truths.

On the permanence of the states

Several times in the *De Republica* Cicero returns to the idea that we have to invent a *res*, a public thing that is immortal, eternal, unchanged, and perpetual¹³. The vocabulary suggests a distinction between two different questions: that of institutional change, which, in the Polybian tradition, concerns the stability of the *res publica*¹⁴; and that of continuity, which concerns its identity, and its permanence¹⁵. The first question concerns the forms of

government, and the second the nature of the thing itself, in much the same way as in architecture it is possible to distinguish between facade and structure.

In Roman thought, “eternity” and “perpetuity” have the sense of “permanence”, and “continuity” and suggest either no precise time limit, or a longer duration than that of human life. For example, the legal texts say that an action is “perpetual” when it lasts beyond the temporal limits of a public charge, as opposed to what is valid *for a certain time*, i.e. during that charge.¹⁶ This is also the meaning of the imperial slogan, the “eternity of Rome”. The emperors did not guarantee to Rome the eternity to which they believed that they would themselves have access, in the form of new gods, once they were dead; they meant only that during their lifetime they would ensure the duration of the city, that is to say, its uninterrupted transmission, by linking the imperial House to the goddess Vesta as Augustus did, or, under the emperor Vespasian, by dynastic succession¹⁷. (The concept of eternity that appears at the time of Hadrian, in the second century, however, has an entirely different meaning, and one which is closer to that of divine immortality. But until the reign of Trajan the old meaning prevails, and it is that which was current under the Republic.)

1-Continuity and identity of a thing

Various answers, philosophical and legal, were given in ancient times to the all-important question of the continuity of the state, of which Cicero’s is more or less an echo so it is important first to analyze their content.

Permanence in the structure

Aristotle had already asked the question in Book III of his *Politics*:

"People are wondering when the city acts and when it does not, for example when moving from an oligarchy or a tyranny to democracy. Some refuse to fulfill the commitments made, under

the pretext that it is not the city, but the tyrant who took the decisions. This question is similar to the following problem: under what conditions a city remains the same or is no longer the same, but another one? "(III , 3, 1276 a10 -b1).

Without responding directly, Aristotle explains that the *polis* is not defined by its territory, nor by the men who live on it, but by its constitution (*politeia*), which is its form (*eidos*). The form is the substance of the thing, consistent with its purpose, as opposed to physical accidents, which can be affected without harming it.¹⁸ When the *politeia* changes, it is a community of citizens, which replaces the previous one, because - and this is the lesson to be drawn from the *Metaphysics* - if its form changes, then so does its identity (*Metaphysics* Delta 26 1024 a 6)¹⁹. Aristotle, then adds an important consideration:

“For, since the state is a partnership, and is a partnership of citizens in a constitution, when the form of government changes, and becomes different, then it may be supposed that the state is no longer the same, just as a tragic differs from a comic chorus, although the members of both may be identical. And in this manner we speak of every union or composition of elements as different when the form of their composition alters; for example, a scale containing the same sounds is said to be different, accordingly as the Dorian or the Phrygian mode is employed.”²⁰

Thus, the form, for a city like that of any composite thing (*synthesis*)²¹, is the organization of its elements, that is to say its structure. We find the same idea in the *Topics*²². The essence of each compound, is not that it is made with this or that element, but that it is arranged in such and such manner.

The view that form, that is to say structure, determines identity illuminates the Aristotelian doctrine of power (*to kurion*). This is virtually the lifeblood of the city: in fact it is the *politeuma*, the form of the government (i.e., whether power lies with a single man, an elite or the people) which defines the *politeia*, and thus the identity of the city. The government *is* so to speak the

*politeia*²³. Hence a revolution does not determine a change of condition, but a change of nature, a reversal of the world, because it destroys the organizing principle which is the very principle of life of the city²⁴.

Aristotelian thinking on the nature of form had, directly or indirectly, a marked influence on the Roman legal thought. At the end of the Republic, the Roman jurists seized upon these categories in order to think, in a positive and pragmatic manner, the permanence of collective identities. But at the same time they essentially changed the direction of the question.

The legal identity of the collective bodies

The first example is found in Alfenus Varus, consul in 39 BCE and a famous jurist, whose reports may interpret those of his master Servius Sulpicius Rufus, who was an exact contemporary of Cicero. The case with which Varus is concerned is the nature of a court. The question is: if, in the course of a trial, some of the judges have changed does the court and its judgment remain the same? (D.5.1.76=Alf.6 Dig.)²⁵

“The following case was suggested. Certain judges were appointed to hear the same action, some of them having been excused after it was tried, others were appointed in their stead; and the question arose whether the change of some individual judges left the case in the same condition, or placed it in a different one? I answered that not only one or two might be changed, but all of them as well, and that the action would continue to be the same that it was previously, and in fact this was not the only case in which it happened that though the parts were changed, still the thing itself was considered to be the same, but this occurred in many other instances. For a legion is considered to be the same, even though many of those belonging to it may have been killed, and others put in their places; and the people are deemed to be the same now as they were a hundred years ago, although not one of them may at present be living; and also,

where a ship has been so frequently repaired that not even a single plank remains which is not new, she is still considered to be the same ship. And if anyone should think that if its parts are changed, an article would become a different thing, the result would be that, according to this rule, we ourselves would not be the same persons that we were a year ago, because, as the philosophers inform us, the very smallest particles of which we consist are daily detached from our bodies, and others from outside are being substituted for them. Therefore, where the outward appearance of anything remains unaltered, the thing itself is considered to be the same.”²⁶

According to Varus, even if all its jurors were to be changed, a court would still be the same thing (*res*) and so, therefore, would its judgments. Like Aristotle, he seems, he takes the view that a body whose parts (*partes*) changes retains its identity, if its form (*species*), that is to say its structure and purpose, do not change.²⁷

What Varus is concerned with, however, is not so much the nature of a composite thing as Aristotle had been, but the permanence of an entity in relation to its component parts, which themselves can change. To make his position clearer, he refers implicitly - as is clear from his three examples²⁸, the legion, the ship and man - to the theory of the three bodies developed by the Greek physicists, and the Stoics after them²⁹.

The Stoics make a distinction between unified bodies, "controlled by a single attraction"³⁰ - a man for instance - bodies existing by contact, whose constituents are related by the simple contact of the surface and do not undergo any substantial change in the effect of juxtaposition - such as ship - and finally, collective bodies (a people, a flock, an army), which exist by the meeting of separate things³¹, where a change in one part has no influence on any of the others.

This theory of the three bodies allowed Alfenus to refute the so-called “growing argument” of the Academicians, according to which an addition to, or subtraction from, a thing (a man grows or shrinks, a boat has his parts changed etc.) would seem to change its identity³².

In particular, it allowed him to postulate that within the collective body, the whole is of a different nature from the parts and has a different temporality – something which was extremely important from a legal point of view. Thus, he argued, the people remains the same while the individual citizens of which it is composed perish.

The reference to philosophical debates form the background of Alfenus’ legal reasoning, but does not in any way constitute its end. The statement about the permanence of the thing in his text is not a philosophical, but a legal one. Alfenus reports what the jurists “estimate”, (*existimant*). This is not a metaphysical truth, but a legal construction, as well as a linguistic and social fact.³³ By means, therefore, of a species of fiction, duration is introduced into human time, and permanence into a world where everything changes and perishes. Law has somehow come to the aid of nature.

The distinction between the intimate composition of a thing (the form) and its *parts* becomes, after Alfenus, an important distinction in private law. It makes it possible, for example, to address the problem of dominion over a thing whose form has changed (bronze becomes a statue, grapes become wine)³⁴ or has deteriorated³⁵, and as a consequence changes on its name³⁶. A good example is in a text by Pomponius a jurist of the second century, who wonders "whether a mixture of different things interrupts usucaption that applies to each of them". His response is that the answer depends on the nature of the thing. He then summarizes the Stoic tripartite division of things:

“There are three kinds of things which can be divided; first, those which are included in a substance of the same nature, [...] that is to say united, as a slave, a piece of timber, a stone, and other property of this kind. Second, things which are joined by contact, that is to say, which have coherence, and are connected, as a house, a ship, a cupboard. Third, such as are formed of distinct objects, as different bodies, which are not united but are included under a single appellation, for instance, a people, a legion, a flock.”³⁷

Each body has a specific principle of unity. For the first group, it is the “breath” (*spiritus*), the equivalent of the Stoic *pneuma*; for the second it is the junction between the various parts; and for the third, it is the name (the *nomen*)³⁸. This last produces two effects: first it creates, as a concept, a new entity bringing together scattered things under the same designation without affecting the nature of its components; second it gives to that entity legal meaning and existence. The name denotes not only the designation of the thing, but also the artificially constructed thing itself³⁹, whose existence is therefore independent of its parts⁴⁰. What remains to be known then, is in what legal cases is the entity to be considered and in what its components⁴¹.

The reasoning of Pomponius was apparently influenced by Stoic casuistry, which Seneca had translated into Latin in the previous century⁴². Questioning the nature of the good and trying to explain why good can only be found in things unified by a single breath (*spiritus*), Seneca had described the three kinds of bodies in terms very similar to those used by Pomponius. The third group, he said, is composed of “bodies made of distant things (*ex distantibus*) and unified by law or function (*iure aut officio*)”⁴³ “Those who are such sets are set in law or by their function, but by their nature they are separated from each other.” As for Pomponius, the name in both law and function acted not only as a binder between the elements but, more

interestingly, was capable of creating an autonomous thing without changing the nature of its components.

All these texts bear the embryonic concept of legal personality. Fiction or not, the thought of the abstract body, separate from its concrete elements and designed to last beyond the natural life of its members, was therefore thinkable in Rome and allowed for a large number of otherwise incomprehensible situations⁴⁴. There might, for instance, be slaves that belonged to the community, not to its individual members, a freedman might bring an action against the city to which his patron belonged without harming the interests of the latter, or a senate would remain the same while its individual members died or were changed.⁴⁵ Thus, these compound bodies (a people, a senate, a court) could make a claim to permanence regardless of the change, addition or deletion of their elements. The law gave them a legal existence separate from the natural existence of the parties that made them.

2- Cicero, de re publica

The notion of legal society (societas iuris)

One cannot fail to relate these philosophical and legal considerations to political debates. The question of the continuity of the public thing, the Augustan claim to have ensured its restoration raised the same issues, and were thought through with the similar categories.

More specifically, the definition by Cicero of the people and of the city as a legal association (*societas iuris*), shares the same intellectual approach (*De Rep.* I.39).

“*Res publica* is the thing of the people. The people, however, is not every association of men, however congregated, but the association of a multitude, bound together by the compact of justice, and the share of utility.”

I do not have time here to go over the discussions raised by this definition nor to the details of my own commentary. My interpretation is the following one: what Cicero offers here is the definition of the people (the *populus*) as a community distinct from its members, and whose unity is defined by the law. This is not a theory of social contract, but rather a kind of “corporation” theory - if I may use this expression.

It is this definition of the people that helps to understand Cicero’s description of the *res publica* as “the thing of the people”: although lexically this locution is not new (the expression is attested to in Plautus as early as third century BCE, for example), semantically it is totally different from its original meaning. Here are the most important aspects of Cicero’s conception and goals:

1) Cicero’s purpose is to understand the *nature* of the “public thing”. He therefore seeks to qualify the thing itself before declining its forms. To qualify the thing is not to describe its content, but to define abstractly, *a priori*, that which constitutes its identity and unity. *Res publica* is for him a "concept", not an historical category⁴⁶.

2) *Res publica* does not characterize a political regime (a monarchy can have a *res publica*); but it is opposed to tyranny. Under a tyrant, the public thing, being "occupied", "possessed" by an individual or a faction, disappears. This is where the idea of a “corporation” is relevant: the *res publica* being the thing of the people belongs to nobody in particular, it only concerns the legally-constituted entity - the people. One could almost say, as the imperial lawyers

will say about corporations, that this “thing” is at the same time related to no one and related to the people as a community. This is also why Cicero can say that the magistrates not only act *for* but act *as if they were* the *res publica*.

3) It is only because the “thing” does not “belong” to anybody in particular, that private property can also be preserved. Under a tyrant, by contrast, all the categories are blurred, so that private property is at his mercy. The condition of the preservation of private property is thus the existence of a separate and autonomous public sphere.

4) The definition of the people as a “corporation” is also the condition of the *res publica*’s permanence. This is the meaning of book II of the *De Republica* - its archaeology, so to speak - where Cicero explains that through the succession of generations and of forms it had known, with the exception of the last king (Tarquin the Proud : II , 23, 44), the *res publica* had remained unchanged until his own time. A people and its *res publica* could be assured to last as long as their juridical structure was maintained, i.e. as long as their unity remained, whatever the concrete organization of its powers.

Here we can see the difference between Cicero and Aristotle. For Aristotle it is the place of the sovereign (*kurion*) that defines the nature of the city and its composition (*sunthesis*); Cicero, in contrast, places the emphasis on the importance of the legal nature of its structure.

Cicero, however, does not say exactly the same as the jurists, since what he is seeking is not a juristic definition, but the true nature of the thing. Moreover, the law is not enough to ensure the permanence of the *res publica*. When there is a risk of destruction, another discourse comes into being which makes an appeal, over and above the theory of corporation, to natural law, or divine reason for Jupiter is the savior of cities, who favours nothing else on earth besides human associations based on law. This is also why the reward of those

who ensure the continuity of cities is immortality on the island of the blessed. In the *De Republica*, Cicero offers in fact two discourses: one focuses on justice and law, the other, which is present mainly in the *Dream*, on the good and the virtues; one seeks the truth, the other political efficacy. This second discourse is not a mere theory and Cicero was not alone in opposing it. After the assassination of Caesar, in 44, during the conflict with Marc Antony, he wrote to the tyrannicides Brutus and Cassius who had been sent by the senate to govern the eastern provinces - telling them that all their actions, even those they had taken on their own, without consulting the senate, or respecting the laws, were good because they were legitimate⁴⁷. Above all, he thundered in the Senate, in his *Philippic* XI, Cassius' fight against Marc Antony's faction in the East, was right because he was inspired by divine reason (*Phil.* XI.28):

“Jupiter himself has sanctioned, that every thing which was advantageous to the republic should be considered legal and just. For law is nothing but a correct principle drawn from the inspiration of the gods, commanding what is honest, and forbidding the contrary. Cassius, therefore, obeyed this law when he went into a province which belonged to another, if men were to abide by the written laws; but which, when these were trampled under foot, was his by the law of nature.”

The second discourse: the appeal to natural law

The appeal to natural law generally occurs when the existence of the *res publica*, is confronted with a threat to its immortality from an internal enemy. In many Ciceronian texts of the 50s and 40s, the same idea that the *res publica* will perish or has perished is repeated again and again. And his correspondence shows that it was a current theme in this period⁴⁸. We may note that the Latin words used by Cicero to describe the destruction of the *res publica* are legal

terms (not “death”, for instance, which is too much of a biological category). What disappears when the *res publica* perishes is its existence as a legal body.

A passage attributed to Book III of the *De Republica* and cited by Augustine, in the *City of God* offers a more precise understanding of this idea:

LAELIUS: Those afflictions, which even the hardest spirits smart under—poverty, exile, prison, and torment—, private individuals seek to escape from by an instantaneous death. But for cities, the greatest punishment (*poena*) of all is that death, which to individuals appears a refuge. A city should be so constituted as to live forever. For a *res publica*, there is no natural dissolution, as there is for a man, to whom death not only becomes necessary, but often desirable. And when a state once decays, is suppressed and falls, it is so utterly revolutionized, that, if we may compare great things with small, it resembles the final wreck of the universe. (*De Rep* III, 28, 40, fr. 2)

To this, Augustine adds an explanation:

“Cicero said this because he, with the Platonists, believed that the world would not perish. It is therefore agreed that, according to Cicero, a state should engage in war for the safety, which preserves the state permanently in existence though its citizens change; as the foliage of an olive or laurel, or any tree of this kind, is perennial, the old leaves being replaced by fresh ones. For death, as he says, is no punishment to individuals (rather it delivers them from all other punishments), but it is a punishment to the state.”⁴⁹

These two texts both express the same abhorrence of the death of a city, as cities do not die natural deaths, and both state the distinction between the city as a whole, which ensures its permanence, and its component parts which change. The image of the tree makes clear how the entity may remain despite the succession of generations. Here we find the contribution of legal and

philosophical traditions on the permanence of collective entities, their – to use Hannah Arendt’s phrase - "potential immortality"⁵⁰. But between Laelius and Augustine, there is an interesting shift : Laelius proposes a legal structure that allows the city in accordance to the idea of “corporation” to endure. Augustine, however, explains that the city needs war for its own salvation. The question then is: which best expresses the opinion of Cicero, or rather what is the relation between the two? Do they not reveal the tension between the beginning of the *De Republica* and the *Dream of Scipio*, between the *societas iuris* and the call to arms, between the ideal, utopia (a city in peace), and the real , unthinkable political conflict, which must, in the end be punished by a struggle unto death?

Why do cities die?

Laelius echoes a Stoic idea: the destruction of a city is the effect of divine punishment, and it is this which also inspires terror. In other texts, Cicero, for example in the *De Natura Deorum* III.38-39 follows the idea of the skeptical Academician Carneades, that the gods do not take care of human affairs and let men destroy cities.⁵¹ As illustrated by the case of Tarquin the Proud, or of Tiberius Gracchus, “who threatened *the immortality of the res publica*”⁵², the cause of political evil —which leads to tyranny - is the fault of men⁵³. Obviously in this context, the virtuous man can only take up arms and devote himself to saving his city. This is a recurrent theme in the *De Republica*.

Like Machiavelli’s *Prince*, the *De Republica*, especially *the Dream of Scipio*, is, both a discussion about the best form of government, and a war speech, making it a very original text, compared to most of the Greek political treaties. We can see therefore how virtue (and natural law) are used to resolve the

opposition between law and war, an opposition that since the Gracchi, in the second century BCE, had become a major political issue in the city.

Cicero's defense of war is the theorization of a long political process. Since the second half of the second century, a part of the senatorial elite, in an increasingly radical resistance to any internal conflict, had gradually built up the defense of the *res publica* as a norm for action. On repeated occasions, the Senate had, for example, urged magistrates to use all their powers against citizens thought to be seditious, "so that the *res publica* not be damaged,". In 63, Cicero himself, as consul, used these powers against Catilina and ordered his supporters to be murdered in their prison cells. The main problem here, was that the decrees of the senate contradicted a number of laws voted by the people, which protected Roman citizens from any condemnation to death without trial. As Cicero said, the question was "whether the defense of the *res publica* was able to transform an action which was illegal according to the strict sense of the law (*iure*) into one for which there was "just cause" (*recte*).

This opposition between legal and just⁵⁴ dominated much of the political debate in the last century of the Roman republic. The legal (*iure*) and the just (or good) (*recte*) are not based on the same conception of law; neither do they have the same relation to time. For: while the first refers to past legal decrees, the second is a response, inspired by natural law, to present issues⁵⁵. What is also at stake was a further opposition between statutes and senatorial decrees, between legal norms and political decisions (although the defense of the *res publica*, first defined as an exception, will become progressively a norm), and the disconnection of the *res publica* from the collectivity of its citizens.

Within this debate, Cicero clearly established what he believed to be the following truths: first that the survival of the *res publica* is more important than everything else, and war may be justified in its defence. Second, that anyone

who plots against the city is no longer a citizen, so that he may be sentenced to death by a political court, in place of a judicial one.

But the problem of course is who is it who decides at what point a citizen become an enemy? According to Brutus, the tyrannicide, for example, a citizen was always a citizen, and the *res publica* could not exist without the respect for judicial procedure, and the double control of the people and the senate. Both Cicero and Brutus defended the *res publica*, but they did not share the same understanding as to how it should be defined, nor the same conception of the place of conflicts in the public space.

¹ See Yan Thomas for the link between the notion of *res* and the judicial space.

² Dessau, *Inscriptiones Latinae Selectae* 79 (31 : cos III)

³ RIC 277 = BMC 656 ; RIC 549=BMC 737 (où il est daté plus tardivement).

⁴ RIC 549=BMC 737

⁵ RIC 29a ; 75a ; 78 ; 302 ; 322 etc.

⁶ CIL XI 3872 ; ou simplement *conservator*: II 2038 ; on trouve aussi *conservator generis humani* (Trajan : CIL II 2054), ou encore au I^{er} siècle : *conservator reipublicae et omnium provincialium* (CIL V 8073), ou *conservator militum et provincialium* (CIL V 8061, 8063, 8066, 8073) ; cf DE, II, sv. Conservator ; cf ILS 159 : Tibère, 32-33 ap. JC : *conservator patriae*.

⁷ *De re ditu suo*, v.414.

⁸ Les municipes et colonies, par exemple, sont instituées par une *lex data*, les collèges par une autorisation officielle qui peut aussi bien leur être retirée (Suét.*Div.Jul.*42, 4).

⁹ Ainsi trouve-t-on chez Modestin, juriste du III^e siècle, cette question : « Si un usufruit a été légué à une cité et qu'on la traverse avec une charrue, elle cesse d'exister, comme cela s'est passé à Carthage. Dès lors elle cesse d'avoir l'usufruit, comme si elle était morte (*quasi morte*). » (Modestin 3 *Diff.* = Dig.7.4.21, cité par E.Chevreau, « Quelques remarques sur la continuité des personnes juridiques », dans *Mélanges en l'honneur d'Anne Lefèvre-Teillard*, Paris, 2009, p. 217-231 : 224).

¹⁰ J.M. Bertrand, « Sur le concept de *politeia* dans la *Politique* d'Aristote : l'identité de la cité », dans C.Moatti et M.Riot Sarcey éd., *La république dans tous ses états*, Paris, 2009, p.320-335 : « Les Platéens dont la ville fut détruite en 427 par les Thébains, furent accueillis par Athènes qui leur donna le droit de citoyenneté. Ils constituaient dans la ville une communauté unie et particulière. En 421, les Athéniens leur donnèrent le territoire de Skionè dont ils avaient exterminé les habitants, puis Sparte les en chassa en 404 mais pour faire pièce à Thèbes les ramena en 386 sur le site ancien de leur ville. Les Thébains les expulsèrent à nouveau en 373 et ils revinrent à Athènes qui avait conservé aux

descendants des exilés de 427 leurs droits de bourgeoisie ; enfin ils rentrèrent chez eux en 336 quand Thèbes eut été détruite par Alexandre. Il était, ainsi, possible d'assurer matériellement et symboliquement la continuité d'un État malgré les nombreux changements d'implantation des hommes le constituant et la succession des générations déracinées." » Voir aussi sur cette histoire L. Prandi, *Platea : momenti e problemi della storia di una polis*, Padoue, 1988 ; N. G. L. Hammond, « Platea, relations with Thebes, sparta and Athens », *JHS*, 112, 1992, p. 143-150.

¹¹ Tite Live, 26, 16, 7.

¹² Tite Live 5, 24.

¹³ *de rep* I, 21 ; III 22 ; III 5 ; 25.

¹⁴ Les réponses à la question de savoir comment éviter les *commutationes* ou révolutions sont multiples : choix du site (II, 3, 5), religion (II, 7, 12-13), institutions (23, 42 suiv) sont tour à tour invoqués et constituent autant d'explications données par la tradition.

¹⁵ Une question reprise dans les *Paradoxes des Stoïciens*, où Cicéron affirme que sous le tribunat de Clodius, la cité avait disparu, si bien que lui, Cicéron, n'avait pas été exilé, mais que Clodius, tout en étant à Rome, s'était, lui, exilé de la cité : "qu'est-ce en effet qu'un cité ? toute réunion de gens furieux et forcenés ? [...] Non assurément, diras-tu ! Ce n'était donc pas une cité, lorsque chez elle, les lois n'avaient pas de force, lorsque les tribunaux étaient à terre, lorsque la coutume de nos pères avait succombé [...], que le nom du sénat n'existait plus dans l'Etat" (*Paradoxes* IV, 27).

¹⁶ Autre exemple dans D.33.1.20 (Scaevola 18 *Dig.*) : une testatrice a chargé son héritier de donner après sa mort un revenu aux prêtres, aux gardiens et aux affranchis d'un temple ; Cervidius Scaevola explique que le bénéficiaire étant le temple, la somme devra être attribuée chaque année *in perpetuum*, c'est-à-dire non seulement aux personnes en fonction au moment du testament mais à leurs successeurs.

¹⁷ H. Mattingly et E.A. Sydenham, *Roman Imperial Coinage*, volume 2, Londres, 1926, 28 et 39 ; cf M.P. Charlesworth, « Providentia et Aeternitas », in *Harvard Theological Review*, vol.29, 2, Apr.1936, 107-132.

¹⁸ Aristote, *Politique* III, 3 1276 b. M.H. Hansen *Polis and City-State. An ancient concept and its modern equivalent. Acts fo Copenhagen Polis Center*, vol. 5, Copenhague, 1998, p. 53 suiv.

¹⁹ De la même façon, dira-t-il, le monde est éternel, même si ses dispositions changent : cette idée aristotélicienne d'un *mundus* éternel malgré le changement des éléments constituera l'un des référents de l'idée médiévale que l'Empire ne meurt pas, tout en étant en constant mouvement, comme l'a montré E. Kantorowicz, *Les deux corps du roi*, tr.fr. Paris, Gallimard, 1989, p. 217.

²⁰ And if this is true it is evident that the sameness of the state consists chiefly in the sameness of the constitution, and it may be called or not called by the same name, whether the inhabitants are the same or entirely different. It is quite another question, whether a state ought or ought not to fulfill engagements when the form of government changes (Aristote, *Politique* III, 3 1276 b).

²¹ Comme le dit Chr. Meier, *La naissance du politique en Grèce ancienne (Die Entstehung des politischen bei den Griechen*, Francfort, 1980), tr.fr. Paris, 1995, p. 187-88.

²² *Topiques* 6,13, 150b22 ; 151a 30 : "un composé est une composition (*sunthésis*) ou rien".

²³ Voir Ed. Lévy, « *Politeia* et *Politeuma* chez Aristote » dans *Aristote et Athènes*, éd. M. Piérart, Paris, 1993, p. 65-90.

²⁴ De même la simple croissance d'une partie du composé au détriment des autres transforme la communauté. Selon C. Vasoli, Aristote étend ainsi à la *polis* la physique des corps mixtes qui rejoint la tradition hippocratique sur l'équilibre biologique des corps : il y a entre les deux théories une affinité qui vient d'une présupposé biologique de la conception aristotélicienne des institutions. D'où l'affinité entre le langage médical et le langage politique qu'on retrouve aussi chez Polybe avec sa conception d'une naturelle transformation des régimes. (« La « naturalezza » dello stato e la sua « patologia » nella tradizione politica aristotelica », dans *Pensiero Politico*, 26, 1993, n.2, p. 3-13 ; cf aussi C.H. Mc Ilwain, *The growth of Political Thought in the West*, New York, 1932, p. 76-81).

²⁵ Voir M. Bretonne, *Fondamenti del diritto romano*, Bari-Rome, 1999, p. 82 suiv. ; Y. Thomas, « L'extrême et l'ordinaire. Remarques sur le cas médiéval de la communauté disparue », dans *Penser*

par cas, éd. J.C.Passeron et J. Revel, 2005, p. 45-73 ; en dernier lieu D.Mantovani. « Lessico dell'identità », dans A.Corbino, M. Humbert, G.Negri (a cura di), *Homo, caput, persona. La costruzione giuridica dell'identità nell'esperienza giuridica romana*, IUSS Press, 2009, p.1-48.

²⁶ *Proponebatur ex his iudicibus, qui in eandem rem dati essent, nonnullos causa audita excusatos esse inque eorum locum alios esse sumptos, et quaerebatur, singulorum iudicum mutatio eandem rem an aliud iudicium fecisset. Respondi, non modo si unus aut alter, sed et si omnes iudices mutati essent, tamen et rem eandem et iudicium idem quod antea fuisset permanere: neque in hoc solum evenire, ut partibus commutatis eadem res esse existimaretur, sed et in multis ceteris rebus: nam et legionem eandem haberi, ex qua multi decessissent, quorum in locum alii subiecti essent: et populum eundem hoc tempore putari qui abhinc centum annis fuissent, cum ex illis nemo nunc viveret: itemque navem, si adeo saepe refecta esset, ut nulla tabula eadem permaneret quae non nova fuisset, nihilo minus eandem navem esse existimari. Quod si quis putaret partibus commutatis aliam rem fieri, fore ut ex eius ratione nos ipsi non idem essemus qui abhinc anno fuissemus, propterea quod, ut philosophi dicerent, ex quibus particulis minimis constitueremus, hae cottidie ex nostro corpore decederent aliaeque extrinsecus in earum locum accederent. Quapropter cuius rei species eadem consisteret, rem quoque eandem esse existimari.*

²⁷ Les historiens du droit ont souvent débattu pour savoir si Alfenus s'inspirait d'Aristote ou des Stoïciens (sur la bibliographie concernant cette question, voir D.Mantovani, *op.cit.*). Il est vrai que la notion de *species* chez Alfenus n'a peut-être pas la même définition que chez Aristote, même si le lien entre identité et *species* est tout à fait remarquable. On peut toutefois aussi s'interroger sur la connaissance que les Romains avaient d'Aristote à cette époque. Sur ce sujet, voir en particulier P.Morau, *D'Aristote à Bessarion. Trois exposés sur l'histoire de la transmission de l'aristotélisme grec*, Laval, 1970 ; *Die Aristotelismus bei den Griechen, 1 : Die Renaissance des Aristotelismus im 1 Jh.v. Ch.*, Berlin-New York, 1973 ; "Les débuts de la philologie aristotélicienne", dans G.Cambiano éd., *Storiografia e dossografia nella filosofia antica*, Turin, 1986, p. 127-147.

²⁸ La tripartition des corps, par exemple, aura aussi une grande fortune chez les juristes impériaux. Voir en dernier lieu D. Mantovani, *ibid.*, n.46 avec la bibliographie afférente.

²⁹ Renonçant au dualisme matière/forme, les Stoïciens avaient aussi introduit un changement important dans la façon de poser la question de l'unité et de l'identité. Voir V.Goldschmidt, *Le système stoïcien et le temps*, Paris (1953), 4^e éd.1989, p. 17 suiv. : "la substance est pour eux l'être concret, à la formation duquel concourent une matière inerte (le substrat ou *hypokeimenon*, dit Chrysippe) et une qualité déterminante (*to idiôs poion*)", tous deux de nature corporelle, tous deux inséparables sans pour autant être identiques. Cette qualité individualisante est selon eux le "principe actif et "pneumatique", qui permet d'établir l'identité d'une chose à travers le temps. Il reconnaissent aussi deux autres modes (manières d'être et manières d'être relatives), mais ils ne se placent pas au même niveau : ce sont les manifestations de la substance, « des événements, tant physiques que psychiques » (Goldschmidt, *ibid.*, p. 23).

³⁰ Sext. Empiricus, *adv. Math.*, VII, 102 = *adv.Dogm.I*, 102 ; voir aussi Simplicius, *Sur les catégories d'Aristote* 214, 237 (SVF II, 391) = A.A. Long et D.N.Sedley, *Les philosophes hellénistiques*, II. *Les Stoïciens*, Paris, tr.fr., 2001, p. 33 M.

³¹ Sext. Empiricus, *Adv. Math.* IX, 78-80 ou *adv.Dogm.III*, 78 suiv.

³² Sur « l'argument croissant », voir A.A.Long et D.N. Sedley, *op. cit.* p. 39 suiv.; voir aussi D.Mantovani, *ibid.*, p. 18-28.

³³ R.Orestano, *Il problema delle « persone giuridiche » in diritto romano*, I, Turin, 1968.

³⁴ Différentes sortes de transformation sont prises en compte : par *alluvio* (l'identité des choses que la rivière draine depuis les rives et rassemble), par *specificatio* (transformation du raisin en vin, d'olives en huile, du bronze en statue) etc. Le problème juridique qui se pose est de savoir qui a le *dominium* sur une chose ainsi transformée ? cf M. Madero, *Tabula picta. La peinture et l'écriture dans le droit médiéval*, Paris, 2004, ch.1.

³⁵ D.10.4.9.3 = Ulp.24 *ed.* Dans ce dernier cas, dit Ulpien, la forme ayant changé, celui qui l'a détériorée a presque détruit la substance même de la chose (*mutata forma prope interemit substantiam rei*). Sur ce texte et sa réception au moyen âge, voir aussi M. Madero, *op.cit.* p.49 suiv.

³⁶ Voir aussi Cassius Longinus, 27 L. (Paul, 12 ed., Dig.6.1.23.5).

³⁷ D.41.3.30 *pr. Pomponius libro trigensimo ad Sabinum : tria autem genera sunt corporum, unum quod continetur uno spiritu et grece benomenon vocatur, ut homo tignum lapis et similia ; alterum quod ex contingentibus, hoc est pluribus inter cohaerentibus constat, quod sunemmenon vocatur, ut aedificium navis armarium ; tertium quod ex distantibus constat, ut corpora plura [non] soluta sed uni nomini subiecta veluti populus legio grex.* (Sur le problème que pose le *non* dans *non soluta*, voir P. Bonfante, *Corso di diritto romano*, vol. 2. *La proprietà* I, 1926 [reprint Milan, 1966], p.130 ; cité par M. Madero, *op. cit.*, p.54).

³⁸ On retrouvera cette idée dans un texte où Ulpien fait l'hypothèse de la disparition de tous les décurions d'une cité sauf un : dans ce cas, "il est généralement admis que la cité peut agir ou être actionnée en justice puisque le droit de tous se concentre sur un seul et l'universalité a continué d'exister nominalement" (*stet nomen universitatis*) : D.3.4.7.2=Ulp. 10 ed. cité par E. Chevreau, art. cité n.4, p.225-226.

³⁹ R. Orestano, *op.cit.*

⁴⁰ Ulpien dit la même chose à propos du corps des décurions ou de quelque *universitas* que ce soit (D.3.4.7.2 = 10 ad ed) : « si le corps est réduit à une seule personne, il est généralement admis qu'elle peut agir ou être actionnée en justice puisque le droit de tous se concentre sur un seul et l'universalité a continué d'exister nominalement (*stet nomen universitatis*) ».

⁴¹ En ce qui concerne le troisième genre, Pomponius dit précisément que l'*usucapio*, pas plus que la *possessio*, ne s'applique à l'ensemble des biens "même si la nature de cette chose est telle qu'elle demeure [la même] par l'adjonction de corps nouveaux" : *Etsi ea natura eius est, ut adiectionibus corporum maneat, non item tamen universi gregis ulla est usucapio, sed singulorum animalium sicuti possessio, ita et usucapio.*

⁴² Une glose médiévale mentionne le texte de Sénèque aux mots *uno spiritu*. Cf.M. Madero, *Tabula picta*, 2004, p. 55. Pour un commentaire de cette attribution, voir A. dell'Oro, *Le cose collettive nel diritto romano*, Milan, 1963, p. 7.

⁴³ *Epist.*102, 6 - *Nisi aliquid praedixero, intellegi non poterunt quae refellentur. Quid est quod praedicere uelim? quaedam continua corpora esse, ut hominem; quaedam esse composita, ut nauem, domum, omnia denique quorum diuersae partes iunctura in unum coactae sunt; quaedam ex distantibus, quorum adhuc membra separata sunt, tamquam exercitus, populus, senatus. Illi enim perquos ista corpora efficiuntur iure aut officio cohaerent, natura diducti et singuli sunt. Quid est quod etiamnunc praedicere uelim?* A moins de quelques préliminaires, ma réfutation ne serait pas comprise. Et quels préliminaires veux-je présenter ? Qu'il est des corps continus tels que l'homme ; des corps composés, comme un vaisseau, une maison, enfin tout ce qui forme unité par l'assemblage de diverses parties ; des corps divisibles, aux membres séparés, tels qu'une armée, un peuple, un sénat : car les membres qui constituent ces corps, sont réunis par droit ou par devoir, mais distincts et isolés par nature. Que faut-il encore que j'avance ? Que, selon nous, il n'y a pas de bien où il y a solution de continuité ; vu qu'un même souffle doit contenir et régir un même bien, l'essence d'un bien unique est une.

⁴⁴ Comme l'a rappelé Emmanuelle Chevreau, l'histoire de cette notion oppose deux conceptions qui eurent une longue postérité et qu'on retrouve encore au XIXe siècle : ceux pour qui la pensée du corps juridique n'est qu'une fiction, ce qui correspondrait à la pratique du droit romain, et ceux pour qui elle est une réalité, ce qu'elle devint sous l'impulsion de la pensée juridique médiévale (art.cité n.4, p.217-218)

⁴⁵ voir note 36.

⁴⁶ cf *pro Ligario*, 22 : *rei publicae nomen sanctissimum ; Paradoxes* 4.25 ; *de rep.* III.33.45 *non video qui magis in multitudinis dominatu rei publicae nomen appareat...* ;

⁴⁷ *À Brutus*, 2 : 43 : *en envahissant la Chersonèse, facis ex tua dignitate et ex re publica.*; *Fam.* XII.2 à Cassius : *totu ira bien sin id minus, res tamen publica per uos breui tempore ius suum reciperabit. Fam.XII, 7 : j'ai dit au sénat que vous n'attendriez pas les décrets du sénat pour défendre la rép.*

⁴⁸ Tacite *Ann* I.2 : *nulla publica arma après la mort de Brutus et Cassius ; Quotus est reliquus qui rem publicam vidisset ? ; cf aussi Hist.* I.50 : *mansuram fuisse sub Pompeio Brutoque rem publicam.* Pour autant il ne faut pas traduire par « république », la *questino* de la mort de la *res publica* renvoyant tout simplement à l'apparition de la tyrannie.

⁴⁹ XXII 6 : *boc ideo dixit Cicero, quia mundum non interiturum cum Platonis sentit. constat ergo eum pro ea salute voluisse bellum suscipi a ciuitate, qua fit ut maneat hic ciuitas, sicut dicit, aeterna, quamuis morientibus et nascentibus singulis. sicut perennis est opacitas oleae uel lauri atque huiusmodi ceterarum arborum singulorum lapsu ortuque foliorum. mors quippe, ut dicit, non hominum singulorum, sed uniuersae poena est ciuitatis, quae a poena plerumque singulos uindicat.* Le texte se poursuit en ces termes: « Ainsi l'on peut demander avec raison si les Sagontins firent bien d'aimer mieux que leur cité périt que de manquer de foi aux Romains, car les citoyens de la cité de la terre les louent de cette action. Mais je ne vois pas comment ils pouvaient suivre cette maxime de Cicéron: qu'il ne faut entreprendre la guerre que pour sa foi ou son salut, Cicéron ne disant pas ce qu'il faut faire de préférence dans le cas où l'on ne pourrait conserver l'un de ces biens sans perdre l'autre. En effet, les Sagontins ne pouvaient se sauver sans trahir leur foi envers les Romains, ni garder cette foi sans périr, comme ils périrent en effet. Il n'en est pas de même du salut dans la Cité de Dieu : on le conserve, ou plutôt on l'acquiert avec ta foi et par la foi, et la perte de la foi entraîne celle du salut. C'est cette pensée d'un coeur ferme et généreux qui a fait un si grand nombre de martyrs, tandis que Romulus n'en a pu avoir un seul qui ait versé son sang pour confesser sa divinité. »

⁵⁰ H. Arendt, *Qu'est-ce que la politique ?* Paris, tr.fr., 1995, p.98

⁵¹ J.L.Ferrary, *Philhellénisme et impérialisme, Aspects idéologiques de la conquête romaine du monde hellénistique, de la seconde guerre de Macédoine à la guerre contre Mithridate*, BEFAR 271, Rome, 1988, p.426 suiv.

⁵² *De rep.* III, 42 : *perseueravit in civibus, sociorum nominisque Latini iura neclaxit ae foedera. quae si consuetudo ac licentia manare coeperit latius, imperiumque nostrum ad vim a iure traduxerit, ut qui adhuc uoluntate nobis oboediunt, terrore teneantur, etsi nobis qui id aetatis sumus euigilatum fere est, tamen de posteris nostris et de illa immortalitate rei publicae sollicitor, quae poterat esse perpetua, si patriis uiveretur institutis et moribus.* « exemple pernicieux car il méprisa des traités avec les alliés ; si l'empire dès lors est gouverné par la force, et non par le droit, alors on peut craindre au sujet de *l'immortalitas rei publicae* ».

⁵³ cf le poète par rapport au peuple : *cum poeta transilire lineas impune possit* (Varro, LL IX.4-5)

⁵⁴ D'autres interprétations existaient : cf. Val Max III.2.17 ; Plut, *Tib.Gracch.* 19.

⁵⁵ Voir C.Moatti, -« De la chose publique à la chose du peuple », C.Moatti et M. Riot Sarcey éd., *La République dans tous ses états*, Editions Payot-rivages, Paris, 2009, p.251-282.