‘Popular Sovereignty in the late Roman Republic: Cicero and the Will of the People’

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I

This chapter is concerned with the development of Cicero’s conception of the relationship between popular sovereignty and aristocratic government from the *de re publica* to the *de legibus*. When placed in its political and intellectual contexts, this development represents a significant strengthening of its aristocratic bias - specifically when considering Cicero’s proposed reforms to the institutions of the senate and censorship as well as to the right to vote and the tribunate. The most striking conceptual outcome of this development is a transformation, to use Cicero’s own terms, of real liberty into an empty ‘*species libertatis*’.

While some modern commentators have interpreted these two theoretical works as complementing one another, others have described the form of government resulting from Book 3 of the *De legibus* as a ‘strengthened control from the top’, to use Dyck’s expression, often denouncing Cicero’s blind conservatism and the resulting political system as almost an anecdotal curiosity.[1]

Intervening in the contemporary political and intellectual debate on the censorship and in dialogue with his Platonic model, Cicero re-elaborates the notion of popular sovereignty as formulated in the *de re publica*. In the *de legibus* he advances not only an institutional re-ordering of the commonwealth, but rather a different conception of the commonwealth, characterised by a ‘quasi-alienation’ of the people’s sovereignty.

II

In the *de re publica* Cicero argues that a *res publica* is a legitimate form of commonwealth if, and only if, the people are the sovereign power and entrust their sovereignty into the capable hands of the

[1]Among representatives of the first group see C.W. Keyes, ‘Original Elements in Cicero's Ideal Constitution’, *American Journal of Philology* 42 (1921), pp. 309-23; E. Rawson, ‘’The Interpretation of Cicero’s De Legibus’ *Aufstieg und Niedergang der römischen Welt* I.4 (1973), pp. 334-56 = Ead. *Roman Culture and Society* (Oxford: Oxford University Press, 1991), pp. 125-48; J.-L. Ferrary, ‘The Statesman and the Law in the Political Philosophy of Cicero’, in A. Laks and M. Schofield (eds.), *Justice and Generosity: Studies in in Hellenistic Social and Political Philosophy* (Cambridge: Cambridge University Press, 1995), pp. 48-73 and E.M. Atkins, ‘Cicero’, in C. Rowe and M. Schofield (eds.), *The Cambridge History of Greek and Roman Political Thought* (Cambridge: Cambridge University Press, 2000), pp. 498-501. For the opposing view see L. Perelli, *Il pensiero politico di Cicerone* (Firenze: La Nuova Italia, 1990), pp. 113-36 and A. Grilli, ‘L’idea di stato dal *de re publica* al *de legibus*’, in *Ciceroniana* 7 (1990), pp. 249-62 and Id., ‘Populus in Cicerone’. in G. Urso (ed.), *Popolo e potere nel mondo antico* (Pisa: ETS 2005), pp. 123-39.

elite.[2] At the beginning of the constitutional debate, in response to Laelius' question ('What, then, is the *res publica*'), Scipio begins by providing a definition of the object under investigation. '*Res publica*, then, is the property of a people (*res populi*). A people, further, is not just any gathering of humans assembled in any way at all; it is a gathering of people in large number associated into a partnership with one another by a common agreement on law (*iuris consensu*) and a sharing of benefits (*utilitatis communione*).'(1.39)

The construction of the definition of a *res publica* as *res populi* in terms of a property metaphor, fully exploited by Cicero in Book 3, allows him to state that in any legitimate form of government the *populus* should own its own *res*.[3] It follows that, for the *populus* to possess its own *res* in any meaningful way, it is necessary that it should also possess the right over its management and administration; this, in turn, is tantamount to the possession of the value of liberty and the ability to exercise it. This notion is expressed in negative terms in Book 3 of the *de re publica*, where Scipio shows that a *populus* has no liberty if its *res* is taken into the possession of a tyrant or a faction. When, in the light of the discussion of justice, Scipio refines and slightly alters his definition of a commonwealth, Laelius agrees with him that neither under a tyranny nor under an oligarchy could a commonwealth be considered as a 'property of the people', since in both constitutional forms those in power, either a tyrant or a faction, do not adequately consult and take into account the interests of the people, but rather conduct the people's affairs as if they were their own. Under the tyrant Dionysius of Syracuse, 'nothing belonged to the people and the people itself belonged to a single man' (3.43), and when the Thirty Tyrants governed Athens most unjustly (*iniustissime*), the 'property of the Athenian people' was nowhere to be found. It could also not be found, Scipio proceeds, when the *decemviri* ruled Rome and the people rose in revolt to recover their property and with it their liberty (3.43-4). In the speech in favour of democracy, its supporters claim that only when the *populus* are the masters of laws, courts, peace, war, treaties, the life or death of an individual and money, is it possible to talk about a true *res publica*. This is the only case, they are said to claim, when the *res* belongs truly to the people and the citizens are endowed with true political liberty: 'if the people would maintain their rights (*ius suum populi teneant*), they say no form of government would be superior either in liberty or happiness (*liberius*, *beatius*) for they themselves would be masters of the laws and the courts, of war and peace, of international agreements, and of every citizen's life and property; this government alone, they believe, can rightly be called a commonwealth, that is "property of the people" … they indeed claim that … when a sovereign people is pervaded by the spirit of harmony and tests every measure by the standard of their own safety and liberty, no form of government is less subject to change or more stable' (1.48). It follows that, according to Cicero, a certain degree of liberty was necessary for any legitimate form of government to function properly, that is for the *populus* to possess its own *res*, hence to be the repository of sovereign power in the commonwealth.

[2] On which the seminal work by M. Schofield, 'Cicero's definition of *res publica*', in Id., *Saving the City. Philosopher-King and other Classical Paradigms* (London-New York: Routledge, 1999), pp. 178-229.
[3] On the metaphors attracted by the notion of *res publica* see H. Dexter, 'Res Publica', *Maia* 9 (1957), pp. 247-81 and 10 (1958), pp. 3-37.

In Book 2, tracing the development of the Roman constitution as the historical incarnation of the best form of government, the mixed and balanced constitution described in the previous book by Scipio, Cicero shows how through a process of trial and error Rome had come to acquire that matrix of civic and political rights (such as the citizens' right to *provocatio*, to *suffragium*, and the set of rights subsumed under the powers of the tribunes of the plebs, *auxilium*, *intercessio* and *ius agendi cum plebe*) that were essential to the establishment of the citizens' status of liberty (that is, the ability to pursue one's own wishes without being subjected to the arbitrary will of anybody else).[4]

In this historical account, alongside the right to *provocatio* – which 'forbade any magistrate to execute or scourge a Roman citizen in the face of an appeal'[5], and which, Cicero reports, had already been in place in monarchical time according to the *libri pontificales* and *augurales*[6] – the people are reported to have progressively gained a certain degree of political participation in virtue of the establishment of the tribunate of the plebs. Under the consulship of Postimius Cominius and Spurius Cassius, Cicero's account continues, 'the people, freed from the domination of kings, claimed a somewhat greater measure of rights (*plusculum sibi iuris*)', and through two consecutive secessions – first to the Sacred Mount and then to the Aventine Hill – obtained the establishment of the tribunate of the plebs. This magistracy, Cicero shows, came to represent the people's liberty, as it was purposely set up to counterbalance the power of the consuls as well as to diminish the supremacy of the senate, in the active pursuit of the people's interests (as, initially, by the enactment of legislation that alleviated the pressure of debt on the people).[7] This allowed the commonwealth to achieve that balance of rights, duties, and functions, which provided the magistrates with enough power, the counsel of the eminent citizens with enough influence, and the people with enough liberty, to render the commonwealth stable.[8]

It follows that in the *de re publica* Cicero assigns an essential function to the tribunate of the plebs as one of the institutional tools whereby the people were enabled to exercise a certain degree of political participation. It was this participation, however constrained by the numerous limitations inherent in the very nature of the magistracy (such as its collegiality, its temporary limit to one year, and, most of all, the people's entrusting the enactment of their wishes to the good will of an individual), which acted as *conditio sine qua non* for the preservation of the citizens' liberty, and as such provided the people with the institutional means to exercise their rights of management of their own property, the commonwealth. Since at their most basic level the powers of the tribunate were universally understood as a necessary means to guarantee the status of liberty, even the fiercest denouncers of its ills never proposed the abolition of this magistracy *tout court*. As I shall discuss later, they debated the limitations that should be imposed on its powers, but never its very existence.

The third and most important means to guarantee the liberty of the citizens as well as that of the commonwealth is the right to *suffragium*. Considering Scipio's definition of *res publica* in Book 1 and

[4] V. Arena, *Libertas and the Practice of Politics in the Late Roman Republic* (Cambridge: Cambridge University Press, 2012), pp. 48-72.
[5] Cic. *rep*. 2.54.
[6] Cf. Cic. *rep*. 2.50.
[7] Cic. *rep*. 2.58-9.
[8] Cic. *rep*. 2.58.

his constitutional considerations in Book 3, it is apparent that, by providing the people with a certain degree of political participation, the citizens' right to vote guaranteed that the people were *de facto* owners of their own property which they could administer as they wished – in other words were the sovereign power in the commonwealth.

Claiming that the mixed and balanced constitution was the best form of government, as it preserved the liberty and the splendour of the commonwealth, Cicero attributes the reason for its superiority to two main factors. First, this form of government is the only one that is truly fair; and second, by virtue of its very fairness, it is the most stable: 'for there should be a supreme and royal element in the commonwealth, some power also ought to be granted to the leading citizens, and certain matters should be left to the judgment and desires of the masses. Such a constitution, in the first place, offers in a high decree a sort of equality (*aequabilitatem quandam magnam*), which is the thing free men can hardly do without for any considerable length of time, and, secondly, it has stability.'[9]

This stability, Scipio continues, finds its roots in the very notion of *aequabilitas*, since 'there is no reason for a change when every citizen is firmly established in his own station (*in suo quisque est gradu firmiter collocatus*)' (1.69). This is best exemplified by the description of the Servian centuriate system, which divided the people into five classes of census in such a way as to ensure that 'the greatest number of votes belonged not to the common people, but to the rich' – upholding the principle, which ought always to be adhered to in a commonwealth, that 'the greatest number should not have the greatest power' (2.39). However, Scipio underlines that in this system it was very important that the large majority of citizens was not deprived of their right to vote, as this would have been tyrannical, that is, it would have deprived them of their liberty[10]. Servius' organisation should therefore be praised, since, on the one hand, it guaranteed that 'no one was deprived of the suffrage, [while, on the other, it ensured that] the majority of votes was in the hands of those to whom the highest welfare of the commonwealth was the most important.'[11] Informed by the Pythagorean ideal of *logismos* as elaborated by Archytas of Tarantum, Scipio's ideal form of government embodied the ideal of both corrective and distributive justice. On the one hand, geometric equality guaranteed that those who had more at stake in the commonwealth were also in a position of political predominance. And on the other hand, arithmetic proportion ensured that everyone was equally entitled to vote – that is, everyone possessed equally the

[9] Cic. *rep*. 1.69. On *aequabilitas* see E. Fantham, '*Aequabilitas* in Cicero's political theory and the Greek tradition of proportional justice' *Classical Quarterly* 23 (1973), pp. 285-90, who interprets *aequitas* as equality that falls short of a higher concept of fairness. A.R. Dyck 'On the interpretation of Cicero *de re publica*', *Classical Quarterly* 48 (1998), pp. 564-8 underlines that what distinguishes *aequitas* from *aequabilitas* is not a higher or lower concept of fairness, but rather that the former is the description of a specific situation (*aequitas* [*sc*. *honorum*]), while the latter is a principle of governance. Contrast the commentary of J.E. Zetzel (ed.), *Cicero de republica: Selections* (Cambridge: Cambridge University Press, 1995) *ad loc*. Later references to *aequabilitas* in the *de republica* (1.69, 2.42, 2.43, 2.57, 2.62) clearly suggest the proportional equality of the mixed constitution.

[10] *Superbus* is the typical quality of a tyrant that often refers to him almost by metonymy. See Y. Baraz, 'From vice to virtue: the denigration and rehabilitation of *superbia* in ancient Rome' in I. Sluiter and R.M. Rosen (eds.), *Kakos: Badness and anti-value in Classical Antiquity* (Leiden-Boston: Brill, 2008), pp. 365-97.

[11] Cic. *rep*. 2.40. Similarly Livy 1.43.10–11. 173 Dion. Hal. *Ant. Rom*. 4.19.3.

most basic political right, which allows them to play a role in the management and administration of the people's property, the commonwealth.[12]

By virtue of this combination of corrective and distributive justice, Cicero guarantees that at the heart of the best form of commonwealth lies a fundamental recognition of popular sovereignty. The powers of this sovereignty are to be entrusted to an elected aristocracy, which will conduct the affairs of the people whilst keeping in mind the common advantage and in accordance with a common sense of justice – Scipio's requirements for the formation of a *populus* (1.41-3).[13] As in Polybius, therefore, in Cicero's *de re publica* the best form of government is a mixed and balanced constitution whose equilibrium favours the preponderance of the aristocratic element, as it confers upon the senate, its institutional body, the administration and management of its own property.[14] In this form of government, the people, the ultimate repository of sovereignty, choose those to whom they entrust the management of their own property, whose duty will be to administer it on behalf and in the interests of the people (1.42).[15]

In the *de legibus*, which Cicero had begun if not to compose, then at least to conceive, in the late 50s,[16] Cicero had set himself the task of providing the code of law that should govern the best form of government described by Scipio in the *de re publica*. As Ferrary notes, Cicero's explicit intention in the *de legibus* is to provide the complementary treatment which Tubero requests from Scipio at the end of the second book of the *de re publica*, to describe 'by what training, customs or laws (*qua disciplina, quibus moribus aut legibus*) we shall be able to establish or to preserve the kind of commonwealth you yourself recommend' (2.64).[17]

In the *de legibus*, Cicero replies to Quintus' comments that his law code concerning religion (Book 2) and magistracies (Book 3) almost coincide with the actual laws of Rome – albeit with a few innovations. He responds that 'since Scipio in my former work on the Republic offered a convincing proof that our early commonwealth was the best in the world, we must provide that ideal commonwealth with laws that are in harmony with its character' (2.23).[18] As a result it is natural to infer that those institutional provisions which Cicero lays out in Book 3 of the *de legibus*, usually referred to as *de magistratibus*, are those necessary to implement and maintain aristocratic prevalence in the mixed and balanced constitution delineated by Scipio in the *de re publica*. It is therefore surprising to observe that,

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[12] Even in the monarchical period, the people are described as playing a crucial role in electing the kings see Cic. *rep*. 2.25, 2.31, 2.33, 2.35, 2.37–8; cf. 2.23, 2.43. On the historical development of Book 2 see T.J. Cornell, 'Cicero on the Origins of Rome' in North and Powell, *Cicero's Republic*, pp. 41-56.

[13] Schofield 'Cicero's definition of res publica' and Atkins, 'Cicero', pp. 492–3.

[14] On Polybius see Arena, *Libertas*, pp. 89-97.

[15] The most explicit notion of the people entrusting the administration of their own property to a group of people is in the passage in support of aristocracy as the best form of government at 1.51. Cf. Cic. *Sest*. 137.

[16] On the date of composition see P.L. Schmidt, *Die Abfassungzeit der Ciceros Schrift über die Gesetze* (Roma: Centro di Studi Ciceroniani, 1969); A. Grilli, 'Data e senso del *de legibus* di Cicerone', *Parola del Passato* 45 (1990), pp. 175-87; A.R. Dyck, *A Commentary on Cicero, de legibus* (Ann Arbor: the University of Michigan Press) pp. 5-7; and S. Pittia, 'La dimension utopique du traité Cicéronien De legibus' in C. Carsana and M.T. Schettino (eds.), *Utopia e utopie nel pensiero storico antico* (Rome: L'Erma di Bretschneider, 2008), pp. 27-48.

[17] Ferrary, 'The statesman'. On the relation between the two theoretical works see J.G.F. Powell, 'Were Cicero's Laws the Laws of Cicero's *Republic*?' in J.A. North and J.G.F. Powell (eds.), *Cicero's Republic* (London: Institute of Classical Studies, 2001), pp. 17-40.

[18] See also Cic. *leg*. 3.12 on the laws *de magistratibus* as a reflection of the commonwealth described by Scipio in the *de re publica*.

of those rights considered essential to the preservation of the liberty of the citizens as well as of the commonwealth, those belonging to the tribunes of the plebs and the citizens' right to *suffragium* come to be the subject of significant reforms which ultimately altered their deepest political significance. In addition, Cicero introduces a number of very important reforms concerning the censors and senate that strengthen further the political power of the elite. To understand these reforms, we must first turn to Cicero's intellectual debt to Plato as well as the immediate intellectual and political context of contemporary Roman debates about the censorship.

III

In seeking to understand how Cicero transformed the mixed and balanced constitution described by Scipio, it is useful to observe the role played by Plato's *Laws* as a model for Cicero's *de legibus*. Cicero openly declares that he is following Plato's example: 'I think I should follow the same course as Plato, who was at the same time a very learned man and the greatest of all philosophers, and who wrote a book about the Republic first, and then in a separate treatise described its Laws' (2.14).[19] When also declaring his independence from Plato (*plave esse vellem meus*) (2.17), Cicero *de facto* declares that he adopted Plato's *Laws* as a source of inspiration and point of reference but did not follow it slavishly.[20] As Annas clearly shows, despite the obvious differences between the two texts, not only does Cicero refer to Plato's *Laws* for points of details, but also has it in the background all the way through his work. Alongside other influences, it inspires some of the most fundamental assumptions of the *de legibus*.[21]

It follows that it will not be surprising that the reform of the right to *suffragium*, which plays a vital role in the reconfiguration of the mixed and balanced constitution with aristocratic predominance into a different constitutional entity, and which has long puzzled commentators, may have its inspirational origin in Plato's elaborate system of election of the *nomophulakes*, the guardians of the laws.[22] To elect them, Plato establishes a rather complicated method which combines a written vote with one that is publicly known. It is worth reporting Plato's text in full:

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[19] The other places where Plato is mentioned in *de legibus* are 1.15; 2.6, 14, 16, 38, 39, 41, 67, 68; 3.1, 5, 32. See J. Galbiati[us], *De fontibus M. Tulii Ciceronis librorum qui manserunt de R.P. et de legibus quaestiones* (Milan: U. Hoepli, 1916), esp. pp. 263-87; T.B. DeGraff, 'Plato in Cicero', *Classical Philology* 35 (1940), pp.143-53 for the complete list in Cicero's works. See also P. Boyancé, 'Le Platonisme à Rome, Platon et Cicéron' in *Actes du Congrèès Budé de Poitiers* (Paris: 1953), pp. 195-221 and A. A. Long, 'Cicero's Plato and Aristotle' in Powell (ed.), *Cicero the Philosopher* (Oxford: Oxford University Press, 1995) pp. 37-62 for Cicero's attitude towards Plato.

[20] On the relationship between Plato's *Laws* and Cicero's *de legibus* see more recently J. Annas, 'Plato's *Laws* and Cicero's *de legibus*' in M. Schofield (ed.), *Aristotle, Plato and Pythagoreanism in the First Century BC* (Cambridge: Cambridge University Press, 2013), pp. 206-24 and I. Gildenhardt, 'Of Cicero's Plato: Fictions, Forms, foundations', in *idem*, pp. 225-75.

[21] Cic. *leg*. 2.45 and Pl. *Laws* 955e - 956b, Cic. *leg*. 2. 67- 68 and Pl. *Laws* 958 d-e; Cic. *leg*. 3.5 and Pl. *Laws* 701b-c,Cic. *leg*. 2.41 and Pl. *Laws* 716d-717a . See Annas, 'Plato's Laws.' *Contra* Rawson, 'Interpretation', p. 343.

[22] C. Nicolet, 'Cicéron, Platon et le vote secret', *Historia* 19 (1970), pp. 39-66. *Contra* Rawson, 'Interpretation', pp. 351-2 and Ferrary, 'The Statesman' 1995.

> 'the election shall be held in whatever temple the state deems most venerable, and every one shall carry his vote to the altar of the God, writing down on a tablet the name of the person for whom he votes, and his father's name, and his tribe, and ward; and at the side he shall write his own name in like manner. Anyone who pleases may take away any tablet which he does not think properly filled up, and exhibit it in the Agora for a period of not less than thirty days. The tablets which are judged to be first, to the number of 300, shall be shown by the magistrates to the whole city, and the citizens shall in like manner select from these the candidates whom they prefer; and this second selection, to the number of 100, shall be again exhibited to the citizens; in the third, let anyone who pleases select whom he pleases out of the 100, passing between slain victims, and let them choose for magistrates and proclaim the seven and thirty who have the greatest number of votes.'[23]

As Nicolet emphasises, the most remarkable aspect of this complex system is not so much its three stages, criticised by Aristotle,[24] but rather the adoption of a voting tablet on which the names of the candidate as well as the name of the voter should appear, and the publicity to which the tablet, placed on the altar for a month, should be exposed to allow its full examination. This Platonic passage and Cicero's reform in *de legibus* are the only two instances of this peculiar combination of written and public vote. More importantly here, though, the justification that Plato adduces for this system of election is echoed in Cicero's reasoning for his institutional adaptations. Plato claims that 'the mode of election which has been described is in a mean between monarchy and democracy, and such a mean the state ought always to observe' (756b). This mean, which alone preserves cities from civil seditions, Plato continues, can be achieved by combining two different notions of equality, the arithmetic, which apportions honours on the basis of number, and the geometric, 'which is better and of a higher kind, … and it gives to the greater more, and to the inferior less and in proportion to the nature of each; and, above all, greater honour always to the greater virtue, and to the less less …. And this is justice, and is ever the true principle of states.' However, Plato laments, although the legislator should always follow this latter notion of equality, in order to avoid internal dissension, it is necessary, at times, for the law-giver to grant some concessions to the ideal of arithmetic equality, which 'although it is an infraction of the perfect and strict rule of justice' will nevertheless preserve harmony, *philia*, within the commonwealth. Given the concession of the equality of lot, associated with liberty, and the recognition of virtue, associated with wisdom, this political system will achieve its goal of implementing the harmonious mean between a monarchical and a democratic constitution.

[23] Pl. *Laws* 753 c-d. On *nomophulakes* and other institutional arrangements in G.R. Morrow, *Plato's Cretan City. A Historical Interpretation of the Laws* (Princeton: Princeton University Press 1960), esp. pp. 195-214 and R.F. Stalley, *An Introduction to Plato's Laws* (Oxford: Blackwell, 1983), esp. pp. 112-20.
[24] Arist. *Pol*. 1266a 1-30.

These are indeed the principles of *politeia*-construction that Plato has previously argued, in his historical survey of Book 3, are necessarily to be maintained if a political community wants to achieve health and stability.[25] In his historical excursus, whose function is to show the kind of constitutional system that could be applied generally to political communities, Plato shows that when Sparta, Persia, and Athens were most successful (Sparta at the time of Lycurgus, Persia under Cyrus, and Athens at the time of the Persian invasion), each had a political system that embodied wisdom, liberty, and friendship in a balanced manner. Although they differed in the way in which each system mixed wisdom and liberty, these three historical examples attest that the success of a political community in any historical circumstance is attained when its constitution succeeds in achieving social harmony (*philia*) by virtue of its balance between wise authority (*phronesis*) and popular liberty (*eleutheria*).[26]

The idea that in a political organisation that gives prominence to the wisdom of the senate it is necessary to concede something to the notion of arithmetic equality in order to preserve social harmony is paralleled in Cicero's justification for his compliance with the use of the *tabella* and the preservation of the tribunate of the plebs.[27] Both institutions are ultimately tolerated as a necessary concession to the liberty of the people. The reforms *de magistratibus* of Book 3 of the *de legibus* allow Cicero to find a form of conciliation between the values of *auctoritas* and *libertas,* identified respectively in the *de re publica* as the aristocratic and the democratic element. As he says, commenting on the aim of his reform of voting rights, this measure aims at reconciling the *auctoritas* of the *boni*, the members of the elite, and the granting of liberty (or at least an appearance of *libertas*) to the people, so as to eliminate any reason for *contentio* (3.38).

Discussing his law concerning the legislative power of the senate, Cicero makes an important statement: 'if the senate is recognised as the leader of public policy (*senatus dominus sit publici consilii*), and all other orders defend its decrees, and are willing to allow the highest order to conduct the government by its wisdom, then this compromise, by which supreme power is granted to the people (*potestas in populo*) and actual authority to the senate (*auctoritas in senatu*) will make possible the maintenance of that balanced and harmonious constitution (*moderatus et concors civitatis status*) which I have described'.[28] Through his reforms he has transformed Scipio's mixed and balanced constitution based on 'an equitable balance in the state of rights and duties and responsibilities (*aequabilis compensatio iuris et officii et muneris*) so that there is enough power in the hands of the magistrates (*potestatis satis in magistratibus*), enough authority in the judgment of the aristocrats (*auctoritatis in*

[25] M. Schofield, 'The Laws' Two Projects', in C. Bobonich (ed.), *Plato's Laws. A Critical Guide* (Cambridge: Cambridge University Press, 2010), pp. 12-28.
[26] On Sparta Pl. *Laws* 3.691d-2b and 693b-4b; cf. 701d; on Athens Pl. *Laws*.698a-99d and 700a; on Persia, Pl. *Laws* 3.694b-6b and 3.697c-8a. The most interesting parallel with Rome is given by Athens, or at least Plato's representation of Athens here: see Cic. *Cluent*. 146 'we are slaves of the laws so that we may be free.' For an analysis of this historical excursus as a response to Thucydides, see the illuminating piece by C. Farrar, 'Plato, Thucydides, and the Athenian politeia', in M. Lane and V. Harte (eds.), *Politeia in Greek and Roman Philosophy* (Cambridge: Cambridge University Press, 2013), pp. 32-56.
[27] On the issue of necessity for these institutions see J. L. Ferrary, 'L' archéologie du De Re Publica (2.2.4-37.63): Cicéron entre Polybe et Platon', *Journal of Roman Studies* 74 (1984), pp. 87-98.
[28] Cic. *leg*. 3.28.

principum consilio) and enough freedom in the people (*libertatis in populo*)',[29] and thereby produced a commonwealth where there must be a compromise which guarantees that *potestas* is granted to the people (*potestas in populo*) and actual authority to the senate (*auctoritas in senatu*) as this will make possible the maintenance of the balanced and harmonious constitution (*moderatus et concors civitatis status*).

Although both passages refer to the same ideal form of commonwealth,[30] in the *de legibus* the third pole (the magistrates) of the trinomial of senate, assembly and magistrates in the *de re publica* disappears. The notion of *potestas* originally associated with the magistrates is reassigned to the people, whose ideal of *libertas*, in turn, is subsumed under this heading.[31] Although commentators have often interpreted this as Cicero abandoning Polybius' tripartite model to embrace the binomial form *populus-senatus* much more in line with Roman political reality, when read in its full political and intellectual context this binary reading of the Roman mixed and balanced constitution is better interpreted as a product of Cicero's debt to Plato. Through a system of calibrated reforms that attempts to recapture the spirit and informing principles of Plato's institutional arrangements in the *Laws*, Cicero is trying to establish a form of government that embodies Plato's idea of the necessary principles for a healthy and stable commonwealth in the *Laws*: wisdom, liberty, and friendship.[32]

Accordingly, and in line with the principles that for Plato in the *Laws* should be active to ensure the greatest success to a constitution, Cicero claims that the best possible form of government is preserved in harmony (*concordia*/*philia*) when it takes the form of a mixed constitution, where the *auctoritas* of the senate, as the repository of public wisdom (*consilium*/*phronesis*), and the *potestas* of the people (that is expression of the active sense of *libertas*/*eleutheria*) are in balance with one another.

However, the concessions to the democratic notion of liberty and arithmetic equality in Plato's *Laws* constitute a genuine compromise, as nearly all magistrates were chosen through elections involving the whole citizen body. The elaborate system of election, especially with regard to the selection of the *nomophulakes* mentioned above and of those responsible for auditing the accounts, is a sign of the importance that Plato attaches to the problem of political participation and his commitment to it.[33] Although in Plato's *Laws* the people are not sovereign, as only the *nous* could count as such, and do not administer power, in the Platonic political system the citizens are nevertheless responsible for the selection of those considered competent to hold a magistracy. As we shall discuss later, in Cicero any concession made to the people's liberty is immediately deprived of any practical significance. Thus, whilst the *politeia* of Plato's *Laws* could be fairly described as 'an aristocracy with the approval of the people', borrowing Plato's expression from the *Menexenus*,[34] the institutional arrangements described

[29] Cic. *rep*. 2.57.
[30] *Temperatio*, *moderatus*, and *concors* (Cic. *leg.* 3.28) are also all qualifying traits of Scipio's ideal form of commonwealth, see *rep*. 1.45; 2.69. Cf. 1.69.
[31] Ferrary 'L'archéologie', p. 92.
[32] Pl. *Laws* 693b. M. Schofield, 'Friendship and Justice in the *Laws'* in G. Boys-Stones, D. El Murr, and C. Gill (eds.), *The Platonic Art of Philosophy* (Cambridge: Cambridge University Press, 2013), pp. 283-98.
[33] A. Laks, 'The Laws', in Rowe and Schofield (eds.), *Cambridge History of Greek and Roman Political Thought*, pp. 278-84.
[34] Laks, 'The Laws', p. 281 emphasises that citizens choose their magistrates.

in Cicero's *de legibus* implement an aristocracy with a formal, but ultimately specious popular approval, since the aristocracy preserves the right to interfere with the people's choice. If Cicero could show, as he emphasises at 3.28, that the people gladly accept this interference, and that they spontaneously grant and support the leadership of the senate, it would follow that the institutional arrangements of the *de legibus* would represent a tighter aristocracy in essence still in line with the political system described in the *de re publica*.

However, as is apparent from the discussion of the role of the tribunate and the right to vote, which we shall discuss later, the people were not prepared to renounce willingly those rights that guaranteed their true liberty. Hence Cicero elaborated an institutional escamotage to ensure an appearance of freedom to appease the people in the hope of preserving social cohesion. The form of government that resulted from the implementation of Cicero's reforms *de magistratibus* was no longer Scipio's mixed and balanced constitution of the *de re publica*.

IV

In trying to assess why Cicero modified the institutional structures of his ideal commonwealth, it is important to consider the condition of political chaos, violence, and anarchy of the late 50s in Rome. At the very beginning of 52BC Clodius, Cicero's personal and political enemy, had been murdered and Milo, a representative of the traditional aristocracy, was accused of his assassination by means of using violent gangs; the curia had been burnt; no consuls had been elected and no interrex appointed; as a result, no meeting of the senate had been convened and no regular political transactions had been carried out. It was a situation of actual anarchy.[35] It is not implausible to imagine that within this political climate Cicero, who at that time was writing the *de legibus* and meditating on Plato's *Laws*, was induced to elaborate, at least theoretically, a political system that could guarantee the curbing of popular forces.

However, Cicero's elaboration in the *de legibus* of a very intricate institutional framework that guarantees the prevalence of the aristocratic component of the commonwealth is not merely an ideological reflex of his senatorial prejudice before the mob's violence of the 50s.[36] Despite the limitations caused by its fragmentary state, the *de legibus* stands out as a rather complex theoretical work that actively intervenes in the political and intellectual debates of the time. It appears evident that by the 50s many members of the Roman elite shared a general perception of the decline of the traditional *res publica*. One of the main points of concern, which was the subject of extensive debate at the time and attempted reforms, was the function of the censorship, in Cicero's own words, the most illustrious of Roman magistracies. In the 80s, Sulla had seriously weakened their role, not only by introducing a certain number of members in the senate at his own will, but also by increasing the number of quaestors

[35] For a detailed account of the events of 52BC see J. Ruebel, 'The Trial of Milo in 52BC: A Chronological Study', *Transaction of the American Philological Association* 109 (1979), pp. 231-49.
[36] On mob violence in Rome see J.L. David, 'Les règles de la violence dans les assemblées populaires de la République romaine', *Politica Antica* 3 (2013), pp. 11-29.

and praetors, that is ultimately of ex-magistrates who were customarily accorded a seat in the senate. Given the traditionally capped number of senatorial seats, the increased total of magistrates, therefore, accentuated the automatic mechanism of accession to the senate, while in the process further curbed the censors' powers. If the censorship of 70BC tried to reassert its role by implementing an unprecedented severity that resulted in the expulsion of 64 senators and, in the process, terrified the elite, the censorships that followed were either particularly problematic or ineffectual, to the extent that the successful elections of the censors in 50BC was hailed as a return to the *mos maiorum*.[37]

It is therefore relatively unsurprising that, in an attempt to address a situation of perceived institutional decline, Clodius presented a law concerned with a reform of the censorship during his tribunate in 58BC. This law, known as the *lex Clodia de notione censoria*, imposed a limitation on the discretionary powers of the censors regarding the *lectio senatus* by establishing the requirement of a formal accusation (or a preliminary sentence) on the part of both censors, who were explicitly required to act in concert with one another.[38] According to Tatum's interpretation, this innovative reform established for the first time the senators' right to hear charges against them and provided them with an opportunity to defend themselves before the censors could strike them out of the *album sanatorium*. Acting like a 'prudent legislator carrying a timely practical scheme',[39] in 58 BC Clodius addressed the same concerns about the censorship that Cicero had voiced in his defence of Cluentio in 66BC.[40]

It may well be that, as Tatum argues, Clodius' first and more immediate aim was to win over political support amongst the senators who were anxious at the excessive powers of the censors and might feel threatened by a potential expulsion. The law undoubtedly diminished the *censoria potestas* by asking the censors to articulate a full justification for their decision on a senatorial expulsion and by forcing them to sit through the defendant's arguments and the reactions of the public, which attended these newly instituted *iudicia*. However, at least in ideological terms, this reform also established a very important principle, whose importance did not escape Cicero. By severely curbing the censors' power over the composition of the senate (*lectio senatus*), Clodius' measure reinforced a principle that in the first century BC had become, at least partially, a reality: the idea that the senate had to be, and actually was, composed of individuals who had acquired the right to sit through popular elections to their magistracy.[41] From Clodius' measure it followed that exclusions from the senate had to be justified and

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[37] A.E. Astin, 'Censor ship in the late Republic', *Historia* 34 (1984), pp. 175 ff. and G. Clemente, 'Cicerone, Clodio e la censura: la politica e l'ideale', in E. Dovere (ed.) *Munuscula. Scritti in ricordo di Luigi Almirante* (Edizioni Scientifiche Italiane: 2010), pp. 51-73.

[38] On Clodius' law: Asc. *Pis*. 8; cf. Sch. Bob. 132St and Dio Cass.38.13. See also J. Tatum, 'The *Lex Clodia de censoria notione*', *Classical Philology* 85 (1990), pp. 34 ff. and Id. *The Tribunician Tribune Publius Clodius Pulcher* (Chapel Hill and London: University of North Carolina Press), pp 133-5 and Clemente, 'Cicerone, Clodio e la censura.'

[39] Tatum, 'The lex Clodia', p. 41.

[40] On the analogy between Cicero's arguments in the *pro Cluentio* and Clodius' reform see Clemente, 'Cicerone, Clodio e la censura'.

[41] For a conceptualisation of magistracies as a *beneficium* received from the people see J. L. Ferrary, 'Le idee politiche a Roma nell'epoca repubblicana', in L. Firpo (ed.), *Storia delle idee politiche economiche e sociali* (Torino: Unione Tipografico Edizione Torinese, 1982), pp. 724-804 and Arena, *Libertas*, pp. 61-2.

could no longer be left in the hands of those magistrates, the censors, who were traditionally perceived as the repository of the most aristocratic values.[42] In other words, the underlining principle behind Clodius' reform was an affirmation of the fundamental ideal of popular sovereignty.[43] Cicero was aware that the working of the censorship had been severely hampered by Sulla's reforms as well as by those laws that in the late second century had established the loss of senatorial *dignitas* and exclusion from the list of judges as a result of a conviction in a *iudicium publicum*. [44] Most of all, he fully understood that, if the abolition of the censorial *lectio senatus* was now a matter of fact, Clodius' measure, and those institutional developments of which it was a result, conceptually placed an emphasis on the notion of popular sovereignty to the detriment of traditional aristocratic values. This is the reason why in his code of law he inserts the initially puzzling law according to which, 'the senate should be composed of ex-magistrates' (3.27), while immediately registering his displeasure at such a measure. It is a *popularis* law, he claims, that establishes the principle that political power lies with the people who confer it on individuals through elections. It is manifest that here Cicero is intervening in a contemporary debate that is concerned not only with the institutional nature of the powers of the censors, but also with different ways of conceptualising the *res publica*.

By making the censorship the magistracy subject to the most innovative reforms in the *de legibus*, Cicero is clearly responding to a state of affairs concerned with the malfunctioning of the censorship, while also directly opposing Clodius' law on the censors, which was rather revealingly repealed in 52BC, the time when Cicero was at work on the *de legibus*.[45]

However, although 'some of the major innovations Cicero proposes can be seen as a direct response to Clodius' program',[46] behind the personal animosity of Cicero's personal relationship with Clodius manifested in the hyperbolic comments against his measure,[47] lay the conceptualisation of deeply different notions of *res publica*. Opposed to the notion of the prevalence of the popular will within the commonwealth expressed through elections, in the *de legibus* Cicero tries to re-establish the idea of the aristocratic *mos* as the guiding principle of moral nature that should govern the senators and the magistrates, hence the *res publica*. It follows that, in trying to counteract the censors' loss of the *lectio senatus* based on the *cura morum*, Cicero implements a series of reforms whose aim is to re-establish firmly the censors' duty of assessment and expulsion.[48]

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[42] Astin, 'Censorship ' and J. Suolahti, *The Roman Censors: a Study on Social Structure* (Helsinki: Suomalainen Tiedeakatemia, 1963).
[43] For a discussion of this tradition of thought in Rome see Arena, *Libertas*, pp. 116-68.
[44]See M. H. Crawford (ed.), *Roman Statutes* (London: Institute of Classical Studies, 1996), 1.98ff. on the Gracchan *lex repetundarum*. See Asc. *Corn*. 69C on the *lex Cassia* of 104 BC that established the ineligibility of those condemned in a *iudicium populi* or of those whose *imperium* had been abrogated by popular vote.
[45] On Cicero's concerns over the functioning of this magistracy see Cic. *Cluent*. 119-35 and *rep*. 4.6. On the reasons for its repeal see Dio 40.57.1-3; Cic. *Att*. 4.16.14. Cf. Cic *Att*. 4.9.1 and 6.1.17.
[46] Dyck, *Commentary*, 17.
[47] Cic. *Sest*. 55; *Pis*. 9; *Dom.* 130; *Har. Resp*. 58; *Prov. Cons*. 46.
[48] A.E. Astin, 'Cicero and the Censorship', *Classical Philology* 30 (1985), pp. 233 ff., esp. 236.

V

Having examined the political and intellectual context of Cicero's reforms of Book 3 of the *de legibus*, I now turn to analyse their nature and political significance.

Whilst in the *de legibus* the right to *provocatio* remained essentially unaltered from the *de re publica* and very much in line with Roman practices,[49] the tribunate of the plebs was the subject of a rather more complex treatment in the *de legibus*. In terms of constitutional prerogatives, strictly speaking, this magistracy does not seem to differ from its traditional functions, adumbrated also in the *de re publica*.[50] However, replying to Quintus, who is represented reciting the traditional arguments against the evils of the tribunate of the plebs, Cicero (apparently out of character) defends this magistracy on two grounds: first, the tribunate is not evil in itself, but rather its nature depends on the individuals who assume it; second, it is so dear to the people that it could not be combatted (*nec perniciosam et ita popularem, ut non posset obsisti*) (3.26). Additionally, he claims that this magistracy serves the function of restraining the more cruel and violent power of the people (*vis populi multo saevior multoque vehementior*), by providing it with an institutional channel that will inevitably deprive it of its revolutionary force (3.23). However, provided that there are institutional means to restrain this magistracy's power – such as the tribunate's collegiality and the power of *intercessio* that any tribune could use to halt any measure perceived to be detrimental to the commonwealth – the true reason why the tribunate should be accepted is because it provides 'a measure of compromise which made the more humble believe that they were accorded equality with the nobility (*temperamentum, quo tenuiores cum principibus aequari se putarent*), and such a compromise was the only salvation of the commonwealth' (3.24). The tribunate, in Cicero's opinion, fulfilled three functions: first, it provided the people with the impression that they possessed the same amount of rights as the nobility, thereby guaranteeing that the people no longer fought for their rights (*plebes de suo iure periculosas contentiones nullas facit* 3.25). Second, it provided the people with a certain amount of liberty, necessary *de facto* and not only in words (*re non verbo*) for any constitution that was not a monarchy. Third, and very importantly, it ensured that 'this liberty was granted in such a manner that the people were induced by many excellent provisions (*multis institutis*) to yield to the authority of the nobles (*quae tamen sic data est, ut multis institutis praeclarissimis adduceretur, ut auctoritati principum cederet*)' (3.25) Thus, whilst in the *de re publica* the tribunate of the plebs is represented as a plebeian conquest which constituted an important step

[49] Cic. *leg*. 3.9 and 27. On the suspension of this right *domi militiae* see A. H. M. Jones, *The Criminal Courts of the Roman Republic and Principate* (Oxford: Blackwell, 1972), p.2; A.W. Lintott, 'Provocatio. From the Struggle of the Orders to the Principate', *Aufstieg und Niedergang der römischen Welt* I.2 (1972), pp. 251 ff.; Id. *The Roman Constitution* (Oxford: Clarendon Press, 1999), pp. 225-32, and F. Fontanella, 'Introduzione al *de legibus* di Cicerone.II' *Athenaeum* 86 (1998), pp. 181-208, esp. 191-5.

[50] Cic. *leg*. 3.9. On Cicero's analysis of the tribunate of the plebs see L. Perelli, 'Note sul tribunato della plebe nella riflessione ciceroniana', *Quaderni di Storia* 10 (1979), pp. 285 ff and Id. *Il pensiero politico di Cicerone*, 78 ff; K.M. Girardet, 'Ciceros Urteil über die Entstehung des Tribunates als Instituion der römischen Verfassung,' in A. Lippold (ed.), *Festgabe J. Straub* (Bonn: Nikolaus Himmelmman, 1977), pp. 179 ff.; Ferrary, 'L'Archéologie du De re publica', pp. 87 ff. and Fontanella, 'Introduzione al de legibus', pp. 205-7.

towards the creation of a mixed and balanced constitution, by providing an essential counterbalance to the power of the senate and the consuls, in the *de legibus* the same magistracy is perceived as the necessary means (*quid necessarium* 3.26) for providing the people with the bare minimum of liberty required in any non-monarchical commonwealth, whose effective outcome is the people's yielding to the *auctoritas* of the nobility.[51]

Most interestingly, Cicero uses the same argument in support of his reform regarding the citizens' right to vote: 'when elective, judicial, and legislative acts of the people are performed by vote, the voting shall not be concealed from citizens of high rank, and shall be free to the common people (*nota esse optumatibus, populo libera*)' (3.10). As previously in the discussion of the tribunate of the plebs, although initially Cicero appears to disagree with his interlocutors in the dialogue, Quintus and Atticus, he then claims to share their view that the introduction of the secret ballot has undermined the *auctoritas* of the nobility, and that 'no method of voting could be better than that of open declaration (*nihil ut fuerit in suffragiis voce melius*)' (3.33).[52]

However, Cicero argues that since the people hold the *tabella* so dear, the best possible voting measure is that 'the people have their ballots as safeguard of their liberty, but with the provision that these ballots are to be shown and voluntarily exhibited to any of our best and most eminent citizens, so that the people may enjoy liberty also in this very privilege of honourably winning the favour of the aristocracy (*habeat sane populus tabellam quasi vindicem libertatis … ut in eo sit ipso libertas, in quo populo potestas honeste bonis gratificandi datur*) (3.39).[53] By this system Cicero guarantees that a certain amount of *libertas* is granted to the people, but that this is done in such a way as to ensure that the aristocracy shall have great influence and the opportunity to use it (*ita libertatem istam largior populo, ut auctoritate et valeant et utantur boni*) (3.38). The aim of the reform is, on the one hand, to provide that people retain the written vote of which they cannot be deprived, since they find great satisfaction in possessing it; and, on the other, to ensure that at the same time they are governed by the influence and favour of the nobility (*auctoritas et gratia*) to which, once free from bribery, they will submit (3.39). 'Hence this law grants the appearance of liberty, preserves the influence of the aristocracy, and removes the causes of dispute within the commonwealth (*quam ob rem lege nostra libertatis species datur, auctoritas bonorum retinetur, contentionis causa tollitur*)' (3.39). Hence, as in the case of the tribunate, in the discussion of the reform of the right to vote the *de legibus* maintains that

[51] On the provisions that deprive the tribunes of their powers see Ferrary, 'Le idee politiche a Roma,' p. 785.
[52] On the debate about secret voting see Arena, *Libertas*, pp. 56-60. See also C. Wirszubski, *Libertas as a Political Idea at Rome* (Cambridge: Cambridge University Press 1950), p. 50. On this passage R. Feig Vishnia, 'Written ballot, secret ballot and the *iudicia publica*: a note on the *leges tabellariae* (Cicero, De legbius 3.33-39)', *Klio* 90.2, pp. 334-46. For an overview on the *leges tabellariae* see F. Salerno, *Tacita Libertas: l'introduzione del voto segreto nella Roma repubblicana* (Naples: Edizioni Scientifiche Italiane, 1999).
[53] An interesting, but ultimately unconvincing, reading of this law draws a distinction between the votes of the *optimates* , which should be publicly known, and the voting of the people, which should instead be taken in secrecy: L. Troiani, 'Sulla *lex de suffragiis* in Cicerone *de legibus* III.10', *Athenaeum* 59 (1981), pp. 180 ff; Id., 'Alcune considerazioni sul voto nell'antica Roma a proposito di Cic. *Leg*. III.10', *Athenaeum* 65 (1987), pp. 493 ff.

a certain amount of *libertas* has to be granted. However, this liberty will consist in gratifying the members of the nobility and following their *auctoritas*.

The significance of liberty in the *de legibus* is very different from that articulated in *de re publica*. Although even in the *de legibus* liberty still implies an active participation by the people in the commonwealth, such participation ought to take the form of a submission to the senatorial nobility, regardless of the actual wishes of the people. Thus, as Cicero himself is prepared to admit, when the ideal of liberty contains a form of submission, it is robbed of its core meaning, the ability to live according to one's own wishes unimpaired by the arbitrary will or interference of someone else. What is left is simply an appearance, a *species libertatis*.

If Cicero could show that these reforms were not imposed on the people, but rather upheld by the people's own accord – that is, if he could show that the people spontaneously submitted to the *optimates* – and also that these reforms were enough to ensure that those in command adequately consulted the people's interests, then the form of commonwealth depicted in the *de legibus* would be a variation of the best form of government described by Scipio in the *de re publica*. This is to say that, if Cicero could show that his reforms *de magistratibus* would not abuse or infringe the rights of the people to administer their own property, the form of commonwealth resulting from their implementation could still be described as a mixed and balanced constitution, albeit with an even sharper aristocratic bias, 'a strengthened control from the top' in Dyck's formulation.[54]

However, it appears that Cicero is at odds with himself. He is forced to admit that the people were not favourable to any reform that interfered with these rights, to the extent that they are represented as being not only deeply attached to the tribunate of the plebs – a magistracy which, he claims, they would never let go – but that they were also unprepared to accept any reversal of the method of the written ballot to a system of oral voting.

As in the discussion of the right to vote, the difference in this regard with the *de re publica* is striking, and concerns not only the political rights of citizens. In order to strengthen the political power of the elite further, Cicero also introduces a number of important reforms concerning the censors and senate.[55] If overall these are mainly a formal implementation of the *de facto* situation in Rome at the time, the most innovative institutional change that he advances in the *de legibus*, which alters traditional Republican practices significantly, regards the role of the censors.[56]

Alongside a reiteration of the traditional duties of the censors – such as compiling the list of citizens, and taking charge of temples, streets, aqueducts and the public treasury – Cicero makes some significant

[54] Dyck, *Commentary*, p. 15.
[55] Alongside those discussed here see also Cic. *leg.* 3.11 and 40.
[56] It is possible that, alongside the most immediate political context, Cicero's enhanced role of the censors may have found inspiration in the role Plato assigns to the *nomophulakes* given their function of registering citizens according to their property qualifications and overseeing their moral fibre, Pl. *Laws* 6.745d-e. On the presence of this institution in many Hellenistic contemporary cities see E. Ziebarth, s.v. 'Nomophylakes', *Realencyclopädie der classischen Altertumswissenschaft* 17.1 (1936), 832.

alterations, which, he claims, are necessary for the *res publica* (*rei publicae necessariae*).[57] First of all, as opposed to the customary eighteen months, 'the censors shall be in office for five years, [whilst] the other magistrates shall hold office for one year.' (3.7)[58] In addition to their customary duties, 'the censors shall have charge of the official text of the laws (*censoris fidem legum custodiunto*). When officials leave office, they will refer their official acts to the censors, but will not receive exception from prosecution thereby' (3.11). The first of these two provisions is rather cryptic (*custodire fidem legum*) and seems to require that the censors should act as the Roman equivalent of the Greek *nomophulakes*, and hence not only supervise the text of the laws, as was formerly the case at Rome, but also observe men's acts and recall them to obedience to the laws (3.46). According to Cicero, at Rome there is 'no guardianship of the laws, and therefore they are whatever our clerks want them to be; we get them from the commonwealth copyists, but have no official records.' Since in Rome laws were kept both in the *Atrium Libertatis* as well as in the *aerarium*, it seems that Cicero places the censors in charge of the *aerarium* and refers to the need for the circulation amongst the magistrates of the official copies of laws consistent with those held in the official archives.[59] Since the Roman censors, apparently like the Greek *nomophulakes* have to oversee the actions of individuals, it is possible to infer that Cicero is granting them the function to check the legality of the acts of the magistrates while they are in office.[60] If this were the case, the provision that poses a check on the magistrates in office would naturally lead to the next one, according to which the censors will act as preliminary auditors concerning the acts of retiring magistrates, an institutional practice of accountability calibrated along the lines of the Greek *euthune*.[61] 'Magistrates, after completing their terms, are to report and explain their official acts to these same censors, who are to render a preliminary decision in regard to them. In Greece this is attended to by publicly appointed prosecutors, but as a matter of fact it is unreasonable to expect real severity from accusers unless they act voluntarily. For that reason it seems preferable for official acts to be explained and defended before the censors, but for the official to remain liable to the law, and to prosecution before a regular court.' (3.47) Through what appears to be a series of minor adjustments, then, Cicero strongly reinforces the role of the censors as an instrument of the elite's self-regulation, once again moving to deprive the people of any real power.

As far as the reforms of the senate are concerned, the most important measure establishes the principle that 'its decrees shall be binding (*eius decreta rata sunto*). But when an equal or higher authority than the presiding officer shall veto a decree of the senate, it shall nevertheless be written out

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[57] Cic. *leg.* 3.46. For a list of traditional duties see Cic. *leg*. 3.7. See Fontanella, 'Introduzione al *de legibus*', pp. 185-6 and Dyck, *Commentary*, *ad loc*.

[58] On an ancient precedent within Roman tradition see Liv. 4.24.5; 9.33.6; Zon. 7.19 and Soulahti, *Roman Censors*, p. 27.

[59] E. Rawson, 'The Interpretation' pp. 353 ff. See also C. Nicolet, *La mémoire perdue: à la recherche des archives oubliées, publiques et privées, de la Rome antique* (Paris: La Sorbonne, 1994). .

[60] Fontanella, 'Introduzione al *de legibus*', p. 187 attributes the innovation to Philochorus Jacoby, *F. Gr. Hist*. 328F 64b.

[61] On Demetrius of Phalernus as Cicero's source on this institution see Keyes, 'Original Elements', p. 316. Rawson, 'Interpretation', p. 352 discusses the potential influence of Theophrastus, Aristotle and Zaleucus. For a list of Greek philosophical influence on Cicero's *de legibus* Book 3 see Cic. *leg*. 3.14.

and preserved' (3.10). Not only were all decisions concerning foreign policies assigned to the senate and expected to be ratified by the people, as was traditional practice in the Republic, and all minor magistrates expected to 'do whatsoever the senate shall decree',[62] but also, and most importantly, all senatorial decrees were expected to have a legally binding force on the whole community. Although it seems that, at least in part, this was already the practice in the late Republic in matters of religion, finance, and international relations (where the content of the *senatus consulta* became the subject of popular laws),[63] Cicero seems to be more innovative and appears to grant actual legislative power to the senate – power that could be subjected, in standard Roman practice, to the *intercessio* of magistrates of *par* or *minor potestas* and the tribunes.[64] Nor would this measure be significantly counterbalanced by the provision according to which 'the senate is to consist exclusively of ex-magistrates' (3.10 and 27). Although apparently new and *popularis* in character, insofar as it requires that 'no one shall enter that exalted order except by popular election' and deprives the censors of their right to choose senators (*adlectio senatus*), this measure not only established *de iure* a *de facto* state of affairs,[65] but, within the context of Cicero's legal code, was also based on the premise that such a popular election would operate by means of an elaborate system that, by preserving the written vote but making it publicly known to the aristocracy, ensured the influence of the nobility within the commonwealth (3.27). Ultimately, all the measures concerning the senate that Cicero presents in the *de legibus* aim at strengthening its role and rendering it the dominant power in the commonwealth.

Thus, whereas in the *de re publica* liberty is an essential means to establish a mixed and balanced constitution that is the best form of commonwealth, in the *de legibus* through proposals for the reform of the citizens' rights to *suffragium*, the reductive interpretation of the powers of the tribunate, and an enhancement of the powers of the senate and censors Cicero transforms the value of liberty into what he himself calls 'an appearance of liberty.' It follows that not only is this form of commonwealth less stable, but it also does not uphold the ideal of *aequabilitas*, as it deprives some people of their rights in the administration of their property – in other words, it deprives them of some of the essential means to achieve and secure their status of liberty. In fact, adapting the formula used in Plato's *Menexenus* to describe the ancestral constitution of Athens, this form of commonwealth could be described as an aristocracy with (formal) approval of the people.[66] However, if one emphasises the reduction of the value of liberty to only an appearance of it, what Cicero calls the *species libertatis*, rather than the preservation of a form of *libertas*, then it is a rather short step from reading the form of government depicted in the third book of the *de legibus* as an aristocracy with (formal) approval of the people, to seeing it as an outright aristocracy, if not an actual oligarchy. Nevertheless, according to Scipio's

[62] Respectively Cic. *leg*. 3.10 and 6.
[63] G. Crifó, 'Attivitá normative del senato in etá repubblicana', *Bullettino dell'Istituto di Diritto Romano* 71 (1968), pp. 52 ff and Y. Thomas, 'Cicéron, le Sénat et les tribuns de la plebe, *Revue Historique de Droit Français et Éntrager* 1.5 (1977), pp. 189-210.
[64] *Contra* Fontanella, 'Introduzione al *de legibus*', pp. 200-1 underlines Cicero's continuity with Republican customs.
[65] See Suolahti, *Censors*, pp. 25 ff and Astin, 'Cicero and the Censorship', pp. 233 ff.
[66] On the use of this label to describe Plato's *Laws* see. Morrow, *Plato's Cretan City*, pp. 229-32.

discussion in the third book of the *de re publica*, an oligarchy is not a corrupt form of government; rather, it is not a commonwealth at all. An oligarchy is not a legitimate form of commonwealth for two main reasons: because under this form of government those who rule do not adequately consult and take into account the affairs of the people, the *res populi*; and because the society under an oligarchy does not contain the shared sense of justice that should be mirrored in its institutional arrangements. Coming very close to depriving citizens of the rights that guarantee their status of liberty, the form of commonwealth that would result from Cicero's legal code of Book 3 in the *de legibus* is a 'quasi-oligarchy', that is, a 'quasi-illegitimate' form of government.

VI

To conclude, whilst in the *de re publica* the powers of the community lie in the senate and are exercised by its magistrates to whom the community has entrusted them, in the *de legibus* these political powers are not delegated in any meaningful manner, but rather involve a form of 'quasi-alienation' of popular sovereignty.

By depriving the people's judgment of their autonomy and imposing on them an attitude of submission to the *optimates*, Cicero ultimately abused if not infringed the right of the people to administer their own property. In other words, he curbed the liberty of Roman citizens, so that in a commonwealth regulated by the laws *de magistratibus* of the *de legibus*, the citizens would no longer be able to enjoy a status in which they could live according to their own wishes without being subject to others' whims or preferences.[67]

It seems that Cicero never finished the *de legibus* and certainly never published it. It is not inconceivable that one of the reasons for his dissatisfaction with the work lay in the perception that his law code, originally formulated for the mixed and balanced constitution at aristocratic preponderance, had come to create an aristocracy with only the formal approval of the people. This new political entity did not consist of a community where sovereignty lay entirely with the people, but one where popular sovereignty is 'quasi-transferred' to the members of the senate. This new conception of the commonwealth creates, at least theoretically, the first signs of a gap between the powers of the people, understood as the members of the community at large, and those of the members of the political elite, now conceived as almost a distinct authority, although not yet in impersonal terms.

[67]Arena, *Libertas*, pp. 14-44.