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THE INFLUENCE OF MARCUS TULLIUS CICERO
ON MODERN LEGAL AND POLITICAL IDEAS

Marcus Tullius Cicero is the father of modern law and politics(1). Cicero's influence was significant in the centuries following his death(2), throughout the middle ages(3), and during the renaissance of European culture(4), but never so much nor so directly as in the emergence of modernity and in the development of modern law and constitutional government(5). Emergent modernity differed from earlier (and subsequent) periods of European history in the depth of its fidelity to Cicero. The early moderns became the most faithful apostles of Cicero's thought and ideals because their world and political circumstances were in many ways closer to those of Cicero than those of any intervening centuries. The influence of Cicero's legal and political ideas on the modern world illustrates the decisive importance that the study of history can have on legal innovation and social change(6). The modern world would not have developed where

(1) For a collection of essays on Cicero's influence on modern law, see Richard O. Brooks (ed.), *Cicero and Modern Law*, to be published in 2009. For a broader study of Cicero's influence through the ages, see Thaddäus Zielinski, *Cicero im Wandel der Jahrhunderte*, Leipzig-Berlin 1929'. See also Richard Tuck, *The 'modern' theory of natural law*, in A. Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe*, Cambridge 1987, 99-119.

(2) Even Augustus is said to have conceded that Cicero was a great orator and a great patriot (Plutarch, *Cicero*, 49) See Paul MacKendrick, *The Philosophical Books of Cicero*, New York 1989, 258 ff. for Cicero's posthumous reputation.

(3) For a recent collection on this topic, see Virginia Cox - John O. Ward, *The Rhetoric of Cicero in its Medieval and Early Renaissance Commentary Tradition*, Leiden 2006, and also other chapters in this present volume of «Ciceroniana».

(4) See Hans Baron, *The Crisis of the Early Italian Renaissance: Civic Humanism and Republican Liberty in an Age of Classicism and Tyranny*, revised ed. Princeton 1993. Cf. Remigio Sabbadini, *Storia del Ciceronianismo e di altre questioni letterarie nell'età della Rinascenza*, Torino 1885.

(5) See M. N. S. Sellers, *The Sacred Fire of Liberty: Republicanism, Liberalism and the Law*, Basingstoke 1998. Cf. Charles Howard McIlwain, *Constitutionalism Ancient and Modern*, revised ed. Ithaca 1947; Martin van Gelderen - Quentin Skinner (eds.), *Republicanism and Constitutionalism in Early Modern Europe: A Shared European Heritage*, Cambridge 2005.

(6) See M. N. S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State*, Basingstoke 2003, 102 ff.

it did, when it did, nor as it did were it not for the life and the writings of Marcus Tullius Cicero(7).

1. *Ancients and Moderns*

Modernity requires definition, and has developed slightly different connotations in the many different fields which it has touched(8), but the central and most important distinction between the 'modern' sensibility and other ways of thinking has been the modern appeal to reason against arbitrary authority(9). This attitude was also the distinguishing characteristic of Cicero as a philosopher and as a lawyer(10). Cicero identified the law with *recta ratio* ('right reason')(11) and justified all legal and political authority in terms of its service to the *res publica* or common good of the people(12). Searching for the common good in this way is not uniquely modern(13). Plato(14) and Aristotle(15), had used similar vocabulary, and even Saint Augustine could accept and Christianize many of Cicero's definitions(16), making them familiar throughout the middle ages(17). Cicero's views were well known and respected for centuries, but they were also extremely corrosive to the

(7) Carlyle drew the line between the ancient and the modern at Cicero: Robert W. Carlyle – Alexander J. Carlyle, *A History of Mediaeval Political Theory in the West*, I, London 1903, 1 f. Cf. Robert Denoon Cumming, *Human Nature and History*, Chicago 1969.

(8) See e. g. Stephen E. Toulmin, *Cosmopolis: The Hidden Agenda of Modernity*, Chicago 1990; Jürgen Habermas, *Philosophical Discourse of Modernity: Twelve Lectures* trans. Frederick G. Lawrence, Cambridge, Mass. 1985; Jonathan I. Israel, *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man, 1670-1752*, Oxford 2006.

(9) Immanuel Kant, *Beantwortung der Frage: Was ist Aufklärung?* (1784) in *Was ist Aufklärung: Ausgewählte Kleine Schriften*, ed. E. Cassirer – H. D. Brandt, Hamburg 1999.

(10) See particularly M. Tullius Cicero, *Academica, De legibus, De republica, De natura deorum, and De officiis*. See also (among many others) J. G. F. Powell (ed.), *Cicero the Philosopher*, Oxford 1995; Neal Wood, *Cicero's Social and Political Thought*, Berkeley 1988; and Paul MacKendrick, *The Philosophical Books of Cicero*, New York 1989.

(11) *Cic. leg.* 1, 18. Cf. *Phil.* 2, 28.

(12) See e. g. *Cic. rep.* 1, 39.

(13) See e. g. Michael A. Smith, *Human Dignity and the Common Good in the Aristotelian-Thomistic Tradition*, Lewiston, New York 1995.

(14) *Plat. polit.* 1, 342e; *nom.* 4, 715b.

(15) *Aristot. polit.* 3, 4, 7.

(16) *Aug. civ.* 2, 21. Cf. *Cic. rep.* 2, 42.

(17) See e. g. Hans Baron, *Cicero and the Roman Civic Spirit in the Middle Ages and Early Renaissance*, «Bulletin of the John Rylands Library» 22, 1938, 72-97, revised in Id., *In Search of Florentine Civic Humanism: Essays on the Transition from Medieval to Modern Political Thought*, Princeton 1988; John E. Sandys, *A History of Classical Scholarship from the Sixth Century B. C. to the End of the Middle Ages*, Cambridge 1903.

legitimacy of unchecked power. What modern lawyers most appreciated in Cicero was his commitment to reason, his contempt for *regnum*, his lifelong battle against arbitrary authority, and his desire to advance and protect the public welfare through constitutional reform(18).

'Ancient' and 'modern' began as temporal terms, so that whatever is most recent is 'modern' in one sense, and will become 'ancient' with the passage of time(19). To speak of 'modernity' in a more timeless way, however, is to identify one of the great turning points of history. At various times in various disciplines and to differing degrees between the twelfth and eighteenth centuries (and to some extent before and afterwards) people began to order their lives, beliefs, laws, and politics by considering reason and the public good, rather than the dictates of religion, authority, power, or naked self-interest(20). Simply reciting this difference makes clear the extent to which premodern attitudes are still very much present and perhaps growing in strength in the 'postmodern' era(21). Separating 'modernity' from its purely temporal definition makes it easier to understand the extent to which the emergence of a 'modern' sensibility required the revival of 'ancient' ideals(22).

'Ancient' and 'modern' conceptions of law and government have much more in common with each other than either does with thought in the centuries that separate them. The Florentine Donato Giannotti repeated a commonly made distinction, when he mourned the destruction of ancient conceptions of law and government, which sought the common good, at the hands of Caesar and his successors, who pursued their own private interests(23). James Harrington at the time of the English Commonwealth(24) and John Adams, during the American Revolution(25), repeated and endorsed Giannotti's famous observation

(18) See e. g. John Adams, *A Defence of the Constitutions of Government of the United States of America*, I, London 1787, xvi-xix.

(19) The term 'modernus' seems first to have emerged in the fourth century to distinguish the new sensibility of the Christian era. Matei Calinescu, *Five Faces of Modernity*, Charlotte, North Carolina 1987², 14 and 41.

(20) See Martin van Gelderen - Quentin Skinner (eds.), *Republicanism: A Shared European Heritage*, Cambridge 2002.

(21) The postmodern turn towards superstition, self-assertion and violence is often marked by a recrudescence of citations to Friedrich Nietzsche.

(22) Cf. Thomas Chaimowicz, *Antiquity as Modernity: Freedom and Balance in the Thought of Montesquieu and Burke*, Edison, NJ 2008. First published as *Freiheit und Gleichgewicht im Denken Montesquieus und Burkes*, Wien 1985.

(23) Donato Giannotti, *Libro della repubblica de' Viniziani* (1540) in *Opere* I. p. 15. Cf. Tac. *ann.* 1, 1-2.

(24) James Harrington, *The Commonwealth of Oceana* (1656) ed. J. G. A. Pocock, Cambridge 1992, 8 f.

(25) John Adams, *Defence* cit., I. 126.

and joined him in seeking to revive what they called government 'de jure' or «the empire of laws and not of men»(26). The 'great question', as modern students of politics understood it, was «what combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefit of them, and be sure of their continuance»(27).

Leaping directly into the eighteenth century Enlightenment, in the person of John Adams, may seem somewhat premature in a discussion of modernity, which had its beginnings centuries earlier. The jump is justified because the French and American Revolutions were the most decisive moments in the triumph of modern law, and its conquest of European institutions(28). John Adams, the author of *Thoughts on Government* (1776), of the *Constitution of the Commonwealth of Massachusetts* (1780) and of the *Defence of the Constitutions of Government of United States of America* (1787-1788), reflected and institutionalized modern conceptions of law and government constructed solely (as he believed) «by use of reason and the senses»(29). When Adams set out to list the reading and the reasoning that produced the modern laws and constitutions of his era(30), he began with Cicero: «As all the ages of the world have not produced a greater statesmen and philosopher united in the same character, his authority should have great weight»(31). Modernity arose from imitation of the ancients, who seemed at first almost divine in their accomplishments, but true modernity (in any field) develops only when moderns begin finally to surpass the ancients in applying their reason to the world around them, and cease to depend so much on the ancient predecessors who inspired their first (and many subsequent) steps towards enlightenment.

2. Cicero on Law and Government

Cicero defined the law as 'right reason' (*recta ratio*) discerning what ought to be done, and forbidding what is harmful(32). He sought the

(26) *Ibid.*

(27) *Ibid.* I. 128.

(28) See R. R. Palmer, *The Age of Democratic Revolution: A Political History of Europe and America, 1760-1800*, Princeton 1959.

(29) Adams, *Defence* cit., I. XIII-XIV.

(30) *Ibid.* I. xv.

(31) *Ibid.* I. xvii.

(32) Cic. *leg.* 1, 18: *lex est ratio summa insita in natura, quae iubet ea, quae facienda sunt, prohibetque contraria. Eadem ratio cum est in hominis mente confirmata et confecta, lex est. itaque arbitrantur prudentiam esse legem, cuius ea vis sit, ut recte facere iubeat, vetet*

sources of law and justice in nature(33) and in the natural fellowship of humanity(34), discovered in detail through the application of reason, which should govern (and precedes) all positive enactments of the state(35). This is in itself a revolutionary doctrine, measuring positive law against the standard of justice, but Cicero went further, by trying to discover the institutional arrangements that would best secure and perpetuate justice for the people, through the structures of constitutional government(36). Cicero's six books on the republic were lost, for the most part, until the nineteenth century, but fragments enough remained to reveal how he had struggled to perfect the actual constitution of Rome, with artful checks and balances between the powers and magistrates of the state(37).

Cicero considered any true 'republic' (*res publica*) to be the property of the people (*res populi*), when the people band together to pursue shared justice and their common good(38). States exist to realize in fact the truths that philosophers try to capture in words(39). This could be attempted through various forms of government, but Cicero suggested that the most effective would be 'mixed' (*moderatus et permixtus*), combining and balancing the best aspects of various public institutions(40). 'Liberty' (*libertas*), for example, (*qua quidem nihil potest esse dulcius*) thrives best in a state where the people have ultimate power(41), and all citizens have equal legal rights(42), and the vote(43), but some decisions will still need to be made by experts, or by the expeditious action of a single authority(44). This balanced constitution (*constitutio*) will be more just, Cicero suggested, but also more stable than other forms of government(45).

delinquere. Cf. Phil. 2, 28: est enim lex nihil aliud nisi recta et a numine deorum tracta ratio imperans honesta, prohibens contraria.

(33) *Cic. leg. 1, 17.*

(34) *Ibid. 1, 16.*

(35) *Ibid. 1, 19.*

(36) *Ibid. 1, 20.*

(37) For the influence of these fragments of Cicero's *De republica*, see John Adams, *Defence* cit., I. xvii-xix.

(38) *Cic. rep. 1, 39: res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.*

(39) *Ibid. 1, 2.*

(40) *Ibid. 1, 45. Cf. 1, 69.*

(41) *Ibid. 1, 47.*

(42) *Ibid. 1, 49.*

(43) *Ibid. 1, 51.*

(44) *Ibid. 1, 55.*

(45) *Ibid. 1, 69. Cf. ibid. 2, 41: statu esse optimo constitutam rem publicam, quae ex tribus generibus illis, regali et optimati et populari, confuse modice...*

Cicero further endorsed certain very specific institutions, such as a congress (*comitia*) of the people and a 'senate' of leading men(46), whose joint approval would be required to confirm the laws(47). These and other key elements of his ideal constitution maintained the careful balance of rights, duties, and magistrates necessary to preserve the 'republic' intact(48). Cicero compared the well-balanced constitution to harmony in music and sought to establish justice through the measured reason of good institutions, similar to those which had developed over many generations in Rome(49). For Cicero the study of law and the institutions of justice was the highest form of science(50), since law and justice concern all peoples and derive from nature, which is accessible to anyone wise enough to contemplate and pursue the truth(51).

Taken to its logical conclusion, Cicero's theory of just laws and republican government condemned any unbalanced state as a 'tyranny' and worthy of revolution(52), whether it was dominated by a monarch, or some faction(53) or even by the people themselves(54). If a good life is only possible under balanced constitutional government(55), then all governments should become republics(56), in deference to universal truth(57), and nothing would be more foolish than to confuse the positive laws of a bad government with binding law or justice(58). Cicero asserted a universal right to justice, received by all human beings directly from

(46) *Ibid.* 3, 27 f.

(47) *Ibid.* 2, 56.

(48) On the importance of the magistrates, see *ibid.* 3, 12.

(49) *Ibid.* 2, 57. Cf. 2, 69: *ut enim in fidibus aut tibiis atque ut in cantu ipso ac vocibus concentus est quidam tenendus ex distinctis sonis, quem in mutatum aut discrepantem aures eruditae ferre non possunt, isque concentus ex dissimillarum vocum moderatione concors tamen efficitur et congruens, sic ex summis et infimis et mediis interiectis ordinibus ut sonis moderata ratione civitas consensu dissimillorum concinit; et quae harmonia a musicis dicitur in cantu, ea est in civitate concordia, artissimum atque optimum omni in re publica vinculum incolunitatis, eaque sine iustitia nullo pacto esse potest.*

(50) *Ibid.* 3, 4 f.

(51) *Ibid.* 3, 33: *Est quidem vera lex ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat.* Cicero goes on to explain that the foundations of law in human nature are valid for all nations and all times, and cannot be repealed, even by positive enactment. Cf. 1, 42.

(52) *Ibid.* 3, 43.

(53) *Ibid.* 3, 44.

(54) *Ibid.* 3, 45.

(55) *Ibid.* 5, 7.

(56) Cf. *ibid.* 6, 13.

(57) *Cic. leg.* 1, 14 f. Cf. *ibid.* 1, 23.

(58) *Ibid.* 1, 42.

nature, rather than by any positive enactment(59). Reason gives us all the ability to think, discuss, argue about, and discover the truth about justice, as about all other subjects of our senses and natural perceptions(60). All people in all nations everywhere have this capacity to reason, which Cicero calls the particular 'virtue' of humanity(61).

If Cicero's attitudes towards constitutional government, justice, and the laws would be particularly important to modernity, his writings on duties have had a striking influence in every era since they were written, almost to the present day. Private duties of justice and honesty are applicable under tyrannies and theocracy, as much as they are in republics, and therefore less threatening to the *status quo*. Yet Cicero's famous volume *De officiis* shares the fundamental assumptions of his other writings, and may have had a greater influence, even on modernity, because of its wider circulation. Here too Cicero stressed the search for truth as fundamental to every human endeavor(62), and found the truth in laws derived from nature, for the general good, which people have a natural duty to obey(63). Thus duty, like law, arises from nature, and the needs of human society(64), and virtue consists in seeking out and performing what truth, justice and reason require(65) of us, as participants in the universal society of mankind(66).

3. Pre-modern Attitudes Towards Cicero

Cicero's authority much preceded modernity, which makes it important to distinguish the 'modern' interest in Cicero from that of his earlier admirers. European recourse to Cicero became 'modern' when Europeans turned from imitating Cicero's rhetoric and style to considering his views on religion, law and politics(67). Where Europeans once accepted Tacitus' view that the checks and balances of republican law and

(59) *Ibid.* 1, 28: *nihil est profecto praestabilius quam plane intellegi nos ad iustitiam esse natos, neque opinione, sed natura constitutum esse ius.*

(60) *Ibid.* 1, 30.

(61) *Ibid.*: *nec est quisquam gentis ullius, qui ducem nactus ad virtutem pervenire non possit.* Cf. 1, 33: *quibus enim ratio natura data est, isdem etiam recta ratio data est, ergo et lex, quae ex recta ratio in iubendo et vetando; si lex, ius quoque; et omnibus ratio; ius igitur datum est omnibus.* Cf. also 1, 45: *est enim virtus perfecta ratio, quod certe in natura est.*

(62) *Cic. off.* 1, 13: *in primisque hominis est propria veri inquisitio atque investigatio.*

(63) *Ibid.*: *utilitatis causa iuste et legitime imperandi.*

(64) *Ibid.* 1, 15.

(65) *Ibid.* 1, 17. Cf. 3, 72.

(66) *Cic. off.* 3, 69. Cf. *leg.* 1, 23.

(67) On Cicero's influence in European rhetoric, see Thomas M. Conley, *Rhetoric in the European Tradition*, Chicago 1994, 34 ff.

government, while desirable, are fleeting and almost impossible to maintain(68), they later came gradually to share Cicero's optimism that reason (*ratio*) could find the right measure of checks and balances in government to achieve justice (*iustitia*) and harmony (*harmonia*) in public life(69). John Adams made explicit reference to both authors (and to the passages cited above) when he asserted his nation's renewed commitment to reason, to political science, and to a judicious balance of public powers(70), as capable of securing «the public interest, which is common right and justice»(71).

The full text of Cicero's dialogue on the republic was lost to modern authors, so it is striking how often they quote his most famous passages. Most of the excerpts from Cicero repeated by John Adams were fragments salvaged from the works of Saint Augustine(72), who wrote his immensely influential treatise on the City of God largely to counter contemporary *pagani*, who blamed Christianity for the weakness, decline, and ultimate sack of Rome(73). Augustine replied that wordly affairs had been a lost cause from the start(74). This led him into an elaborate digression on Cicero, who had seen Rome's republic fail four centuries before the calamities that troubled Augustine's contemporaries (and well before the birth of Christ)(75).

Christian fatalism (as regards the terrestrial world), and deferential quietism (as regards political authority)(76) led Augustine to disparage Cicero's view that any earthly power can ever aspire to justice. Where Cicero had embraced political checks and balances, as practical requisites for justice and state(77), Augustine insisted that true justice will never be possible on an earth in which humanity will always be inescapably polluted by sin(78). If Caesar's usurpation imposed servitude on Rome, as Cicero, Sallust, and many others insisted (and Augustine repeated)(79), then sinful humans would need to embrace a similar servitude to God, to raise themselves from their fallen condition. Augustine denied that human

(68) Tac. *ann.* 4, 33.

(69) Cic. *rep.* 2, 42.

(70) Adams, *Defence* cit., I. 1-11 and XVI-XVIII, also citing Cicero, *rep.* 2, 23.

(71) Adams, *Defence* cit., I. 127.

(72) See particularly his *Defence* cit., in the preface.

(73) Aug. *civ.* 1, 1 f.

(74) *Ibid.* 13, 13-17.

(75) *Ibid.* 2, 21.

(76) Cf. Matth. 22, 21.

(77) E. g. Cic. *rep.* 2, 69.

(78) Aug. *civ.* 19, 15.

(79) See Aug. *civ.* 2, 18 f. quoting a fragment from Sallust's *Histories* (1, 11).

reason could ever control human vices(80), and identified faith, not reason, as the only source of true justice. The pre-Christian Roman republic, and the infidels (such as Cicero), who inhabited it, deserved (he suggested) their ultimate fate of complete and utter destruction(81).

Augustine's preference for faith and authority over reason and deliberation became the guiding principle of European thought in the centuries between the fall of Rome and the emergence of modernity. Cicero, as the single greatest Roman authority on legal and political ideas, required detailed refutation, to make this new dispensation possible. Thus the careful arguments made against Cicero by Christian apologists had the paradoxical effect of preserving some of his most important ideas for posterity. Augustine immortalized Cicero's definition of a *res publica* as *res populi*(82), in which the people share a sense of justice and commitment to the common good of society as a whole(83). Augustine did so in order to demonstrate that there can be no republic without the dominion of God(84). He wanted to subordinate reason to God, but in so doing Saint Augustine preserved Cicero's encomium on reason, where future generations could find it.

4. Cicero the Revolutionary

When Patrick Henry stood before the Virginia Convention in March, 1775, to assert the rights of Americans against their king, he said that there was just one light by which his feet would be guided, «the lamp of experience». Henry knew, he said, «no way of judging the future but by the past»(85) and an essential part of Virginia's past, for Henry as for his audience, was their own childhood reading of Cicero's orations, and particularly of his orations against Catiline and the *Philippics*(86). So

(80) Aug. *civ.* 19, 21.

(81) Citing *Exodus* 22, 20.

(82) Aug. *civ.* 19, 21.

(83) Cic. *rep.* 1, 39: *res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.*

(84) Aug. *civ.* 19, 21.

(85) Patrick Henry, in the Second Virginia Convention, Richmond, March 23, 1775.

(86) On the importance of Cicero in the American Colonial curriculum, see Reinhold Meyer, *Classica Americana: The Greek and Roman Heritage in the United States*, Detroit 1984, and Id., *The Classic Pages: Classical Readings of Eighteenth-Century Americans*, University Park, Pennsylvania 1975. Cf. Richard M. Gummere, *The American Colonial Mind and the Classical Tradition*, Cambridge, Mass. 1963, 55 ff.

Henry concluded his own Philippic against George III with words that recalled the Cicero's defiance of Antony: «Give me liberty or give me death»(87). The analogy was not a new one: «Caesar had his Brutus», Henry had threatened ten years earlier, «Charles had his Cromwell ... and George the third may profit by their examples»(88). Henry saw his own fight for liberty as part of a centuries-old tradition of resistance to tyranny, that began with Cicero and Rome(89).

Many of the leaders of the revolutions that turned the world towards reason and modernity in politics were lawyers like Patrick Henry, who took Cicero as their personal model. Johan van Oldenbarnevelt and Hugo Grotius in the Netherlands, John Hampden and John Pym in England, John Adams and Thomas Jefferson in the United States, Camille Desmoulins and Pierre Vergniaud in France, were all lawyers who risked their lives to challenge arbitrary authority (or perceived themselves to be doing so), as Cicero had risked his life against Julius Caesar and Marcus Antonius in Rome. Desmoulins explained in his 'Secret History' of the Revolution, how the French first learned to love liberty and hate despotism by reading Cicero at school. «They brought us up in the schools of Rome and Athens», he complained, «to live under Claudius and Vitellius». Admiring the Roman past, young men had courage to hope for change in the present – and to risk their lives to achieve it(90).

Henry's posturing and Desmoulins' recollections confirm how important Cicero's direct influence could be on lawyers and other educated persons. Cicero (like Aristotle, Sallust and to some extent Tacitus) had been present in the schools and universities for centuries, and therefore moderated by subsequent interpretation, but each generation also had direct access to ancient authors, and could learn from their writings without mediation. This became increasingly true with each passing century, as more works of Cicero and his contemporaries were discovered, more were translated, and as the printing press and growing prosperity increased the numbers of Europeans with access to ancient learning. Many still believed, with Tacitus, that limited government under a balanced constitution, while admirable, was unrealistic, and almost impossible to maintain(91). Cicero's orations held out a more hopeful model, that

(87) Patrick Henry, in the Second Virginia Convention, Richmond, March 23, 1775. Cf. Cic. *Phil.* 8, 29: *aut libertas parata victori est aut mors proposita victo.*

(88) Patrick Henry, in the Virginia House of Burgesses, May 29, 1765, in the debate about the Stamp Act Resolutions.

(89) See William Wirt, *The Life and Character of Patrick Henry*, Philadelphia 1836, 54.

(90) Camille Desmoulins, *Histoire des Brissotins ou Fragment de l'histoire secrète de la révolution et des six premiers mois de la République*, Paris 1793.

(91) Tac. *ann.* 4, 33: *Nam cunctas nationes et urbes populus aut primores aut singuli*

arbitrary authority could be checked and controlled by eloquence, reason, and constitutional design, encouraging the vigilance and natural love of liberty of a united people(92).

Cicero died a horrible death, his hands and head cut off and nailed to the rostrum by the servants of Octavian and Marcus Antonius, as Plutarch recounted the story, to punish him for his *Philippics*(93). Many of Cicero's successors and imitators would suffer or even embrace a similar fate. Madame Roland, who, as the young Manon Phlipon smuggled her copy of Plutarch into church instead of a prayer-book(94), was executed by decapitation. So were Camille Desmoulins, Pierre Vergniaud, and many others who opposed the tyranny of Robespierre(95) Vergniaud wrote with his blood on the walls of his prison: «Potius mori quam foedari». Like Henry, he preferred an honest death to life under despotism(96). Algernon Sidney was also decapitated for his writings, which began by invoking Cicero(97), as also was Henry Vane, who «sealed» his service to the commonwealth «with blood»(98). «A better senator», John Milton wrote, «ne'er held the helm of Rome»(99). Even careful Oldenbarnevelt was beheaded in the end, for the threat his principles posed to arbitrary authority(100).

Not all those who died for the «old cause»(101) of law, reason, and constitutional government(102) deliberately chose to share the fate of Cicero, but all knew the dangers of provoking arbitrary authority, and persevered regardless. Cicero of the *Philippics* and orations against Catiline was just as important for the development of European law and

regunt: delecta ex iis et consociata rei publicae forma laudari facilius quam evenire vel si evenit, haud diuturna esse potest.

(92) Cic. *Catil.* 4, 15 f. Cf. 2, 25.

(93) Plut. *Cic.* 48, 4 - 49, 1.

(94) Marie-Jeanne Roland de la Platière, *Mémoires*, Paris 1820.

(95) Jean-Baptiste Louvet de Couvrai delivered a famous speech against Robespierre at the Convention Nationale (19 October, 1792) denouncing him in the manner of Cicero, as being another Catiline.

(96) Alphonse de Lamartine, *Histoire des Girondins*, VII. 47, Paris 1848, 47.

(97) Algernon Sidney, *Discourses Concerning Government*, London 1698, *Introduction*.

(98) Sir Henry Vane the younger, last speech, in James K. Hosmer, *The Life of Young Henry Vane*, Boston 1889, 540.

(99) John Milton, *To Sir Henry Vane the Younger* then adds: «when gowns not arms repelled», following Cicero (*cedant arma togae*).

(100) The Dutch Revolution against Spain will be slighted to some extent in this account, because of its 'premodern' preoccupation with religion. But the Dutch experience played an important role in the European turn to ancient models of government. See Jonathan Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750*, Oxford 2001.

(101) So styled by Algernon Sidney in his speech delivered to the sheriff on the scaffold before his execution (December 7th, 1683).

(102) *Ibid.*

government as the Cicero who wrote more measured treatises on laws and duties, because the forceful and defiant lawyer gave a model not only of eloquence but of action(103). The life and speeches of Cicero taught European lawyers and politicians not to fear death too much to fight for reason, that glory comes also to those who defend the law, that constitutional government is worth the struggle, and that arms and power may ultimately give way to reason and to the just procedures of a well-constructed legal system. *Cedant arma togae* remained the rallying cry of modern European law(104).

The modern appeal to reason and the rule of law against arbitrary authority faced two main antagonists in the many centuries between the death of Cicero and the political advent of modernity. First, claims to absolute authority by the emperors (and later kings) and second, claims to absolute authority by the Popes (and later Protestant divines). Pretensions to complete civil and religious control became separated to some extent in western Europe, and sometimes came into conflict, which opened a space into which direct appeals to reason, justice and balanced institutions could insert themselves. Religious leaders found it useful to support checks and balances against political power. Magistrates supported checks and balances against religious authority. And after the Protestant reformation, during the wars of religion, dissenters from the governing faction in every state and principality (irrespective of religion) had good reason to resist the arbitrary power of their rulers(105).

5. *The Seeds of Modernity*

Marcus Tullius Cicero was an admirer of Aristotle(106) and in fundamental agreement with him on many important points of ethics, law, and politics(107). Aristotle, like Cicero placed great importance on reason, the rule of law(108), a common-good conception of justice(109), and the

(103) See e. g. Charles-Louis de Secondat, Baron de la Brède et de Montesquieu, *Discours sur Cicéron* (1717), ed. Roger Caillois, Paris 1956.

(104) Cic. *off.* 1, 77. See for example the reference by Milton, above n. 99. Samuel Adams also gave the title *Cedant arma togae* to one of his essays against the British (1776).

(105) Richard Tuck, *Philosophy and Government, 1572-1651*, Cambridge 1993, contains numerous examples of ideas migrating from one side in European political and religious conflicts to the other, depending on local circumstances.

(106) See e. g. Cic. *Tusc.* 1, 7; 1, 22, etc.

(107) See e. g. Cic. *off.* 3, 35; *leg.* 3, 14.

(108) Aristot. *polit.* 3, 6, 13.

(109) Aristot. *polit.* 3, 4, 7; 3, 7, 1; 13.

study of public institutions(110). This raises the question why Cicero's influence on modernity was so much greater than that of his models. Partly this was because Cicero wrote in graceful Latin, which made him more accessible to the Latin West, but the translation and reintroduction of many of Aristotle's works into Western European discourse blunted this difference and led to a great awakening of learning, culminating in the writings of Thomas Aquinas and his followers. Aquinas sought to reconcile law, reason, and Christianity, by separating eternal law, natural law, human law and divine law(111), and granting that natural law is accessible to reason(112). This had the effect of preserving divine authority and therefore the authority of the Church, while accepting the value of reason and temporal justice in most earthly affairs(113).

The widespread reception of Aristotle into Christian circles, his interpretation by Aquinas, and the manipulation of his vocabulary by judicious translation, had the salutary effect of strengthening (on the theoretical level) the commitment of Christian Europe to laws founded on reason for the common good. At the same time, Christian submission to constituted authority, both civil and ecclesiastical, muted the practical effect of this revival of ancient learning, obscured Aristotle's commonalities with Cicero, and discouraged scholarly attention to the practical questions of constitutional architecture that might have been raised (for example) by Aristotle's *Politics*. So great was the assimilation of Aristotle's work to prevailing orthodoxy during this pre-modern period, that the rise of humanism appeared to many as the triumph of Ciceronian rhetoricians against retrograde Aristotelian scholastics(114). This antithesis only finally broke down with Leonardo Bruni's new translations of the *Ethics* and *Politics* into Ciceronian Latin in the early fifteenth century(115).

The turbulent circumstances of political life in Italy brought Bruni and others to consider the science of politics more carefully, and inaugurated a period of Florentine speculation that culminated in the writings of Niccolò Machiavelli(116). Later proponents of modern

(110) *Ibid.* 2, 3, 10 f.

(111) St. Thomas Aquinas, *Summa Theologiae* 2, 1 Question 91.

(112) *Ibid.* Question 91, second Article.

(113) See e. g. John F. Wippel, *Metaphysics*, in Norman Kretzmann - Eleonore Stump (eds.), *The Cambridge Companion to Aquinas*, Cambridge 1993, 85 ff.

(114) In fact, the relationship was not so clear cut, and the scholastic tradition made considerable contributions to emergent humanism. See Quentin Skinner *The Foundations of Modern Political Thought*, I, Cambridge 1978, 49 ff.

(115) On the importance of translations, see Richard Tuck, *Philosophy and Government* cit., 13.

(116) See Quentin Skinner, *Foundations* cit., 74 ff.

political science would credit Machiavelli with having been «the first who revived the ancient politics» (117). This cannot have been entirely true in a Europe which had been reading Cicero and Aristotle for centuries, but there does seem to have been a quantitative change at the beginning of the sixteenth century (118). Machiavelli's *Discorsi sopra la prima deca di Tito Livio* inaugurated a new conversation about how well-structured legal institutions might make men, if not good, at least useful to themselves and to society (119).

When proponents of modern political science set out in the late eighteenth century to furnish examples of the 'reading and reasoning' which inspired constitutional government (120), they began with Cicero (121), supported by excerpts from Tacitus (122), Aristotle (123), Polybius (124), and Livy (125), but then there was a great leap across the centuries to Machiavelli, concerning how Rome's constitutional checks and balances had (through the fortitous intervention of history), gradually worked their way towards perfection (126). Machiavelli remained a somewhat suspect figure, discredited by his writings on princes (127), but students of government took his proposals seriously (128), including his praise for the republican government of Rome (129).

Machiavelli's *Discorsi* on Livy made him to some extent the «great restorer of true politics» in Europe (130), but as the author of *Il Principe* he also vastly strengthened a rival style of government, based on the absolute power of princes. Machiavelli was frank in recognizing that princes will do what they must to maintain their power (131), and this encouraged a secular theory of absolute power, which threatened the modern rule of

(117) John Adams, *Defence* cit., I. 325. Cf. III. 210.

(118) Among the recent authors who shared this view is J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton 1975.

(119) John Adams, *Defence* cit., at I. 133 f.

(120) *Ibid.* I. xv.

(121) *Ibid.* I. xvi-xviii.

(122) *Ibid.* I. xvi.

(123) *Ibid.* I. 125.

(124) *Ibid.* I. 169 ff.

(125) *Ibid.* I. 125.

(126) *Ibid.* I. 141-147, quoting Niccolò Machiavelli, *Discorsi sopra la prima deca di Tito Livio* I 2, and especially I 2, 36: «ma rimanendo mista, fece una republica perfetta».

(127) John Adams, *Defence* cit., I. 325.

(128) *Ibid.* II. 241-250.

(129) *Ibid.* I. 147.

(130) *Ibid.* III. 210.

(131) See e. g. Niccolò Machiavelli, *Il Principe*, chapter VIII.

law(132). After the St. Bartholomew's Day massacre of August 24, 1572, the French Huguenot Innocent Gentillet did permanent damage to Machiavelli's reputation by pointing out in his *Discours sur les moyens de bien gouverner contre Nicolas Machiavel* the pernicious effects of separating a prince's interests from those of his subjects(133). Having revived the ancient conversation about the science of politics, Machiavelli damaged his legacy by supplementing his study of liberty with a manual for princes(134).

6. The Enemies of Liberty

Thomas Hobbes spoke for many in his famous attack on Cicero and Aristotle, when he said that «by reading of these Greek, and Latine Authors, men from their childhood have gotten a habit (under a falseshew of Liberty) of favouring tumults, and of licentious controlling the actions of their Sovereigns; and again of controlling those controllers, with the effusion of so much blood; as I think I may truly say, there was never anything so dearly bought, as these Western parts have bought the learning of the Greek and Latine tongues»(135). Hobbes wrote at the end of a great civil war, which led him to conclude that «without ... Arbitrary government, ... Warre must be perpetuall»(136). He denounced ancient advocates of the rule of law for their «pernicious error» and preferred the decisive power of rulers able to «kill or hurt» their disobedient subjects(137). Hobbes supported the arbitrary power of government, because he feared that «masterlesse men» will always be in «perpetuall war» with their neighbors(138).

Hobbes' reaction to the horrors of the English Civil War is significant for three reasons: first, because he confirms the great influence of Cicero (and Aristotle) against arbitrary governments; second, because Hobbes displayed a typical reaction to civil conflict, in his hope for peace at all

(132) See e. g. William Shakespeare *The Merry Wives of Windsor* (1602), Host: «Am I politic? Am I subtle? Am I Machiavel?».

(133) Innocent Gentillet, *Discours sur les moyens de bien gouverner et maintenir en bonne paix un Royaume ou autre Principauté contre Nicolas Machiavel Florentin*, Geneva 1576.

(134) See Niccolò Machiavelli, *Il Principe*, chapter I.

(135) Thomas Hobbes, *Leviathan, or the Matter, Forme, and Power of a Commonwealth Ecclesiasticall and Civill* (1651), ed. Richard Tuck, Cambridge 1996, chapter 21, 110 f. (p. 159-160).

(136) *Ibid.* chapter 46, 377 (p. 471).

(137) *Ibid.* 26, 137 (p. 183).

(138) *Ibid.* 21, 110 (p. 149). Cf. chapter 13, 62 (p. 88 f.).

costs; and third because Hobbes inaugurates a new stage in the defense of absolute government against the limitations of reason as applied to law. Conventional apologies for «absolute monarchy»(139) would have relied on divine election as the justification and source of all public offices(140). The Stuart kings claimed parental authority over their subjects(141), for which they declared themselves to be answerable to God alone(142). But Hobbes' *Leviathan* made very little use of religion in arguing for absolute government, and accepted the ancient starting point of nature in constructing civil society. Hobbes denigrated most claims of «right reason» as simple assertions of personal opinion(143), but still developed his own argument on a scientific basis(144). Hobbes differs from Cicero and Aristotle, not in the value that he places on reason(145), but rather in fearing the likely consequences of balanced government or 'liberty', when applied to law and political authority(146).

Like his Christian predecessors, Augustine and Aquinas, Hobbes challenged Cicero's influence by subverting his vocabulary. 'Liberty' for Cicero, as for most Europeans prior to Hobbes, signified subjection to no man, but only to just and equal laws, made for the common good of society(147). Hobbes redefined «liberty» as «the absence of externall impediments»(148). This meant either that all laws, just and unjust, are violations of liberty, or that none are(149), but in any case obscured the difference between free and despotic governments. 'Right' and 'Wrong', 'Justice' and 'Injustice', according to Hobbesian definitions, do not exist until there is law, and law itself does not exist without a dominant power to enforce it(150). *Leviathan* relies on the doctrine that «a kingdom divided in itself cannot stand» to disparage checks and balances in government(151). Hobbes accepted the ancient values of reason and the

(139) See e. g. James Stuart, *The Trew Law of Free Monarchies* (1598), ed. Johann P. Sommerville, Cambridge 1994, 64.

(140) *Ibid.* 81.

(141) *Ibid.* 65.

(142) *Ibid.* 81 f.

(143) Thomas Hobbes, *Leviathan* cit.

(144) *Ibid.* 5, 21 (p. 35).

(145) *Ibid.* 5, 22 (p. 36): «Reason is the *pace*; Encrease of *Science*, the way, and the Benefit of man-kind, the *end*».

(146) *Ibid.* 21, 110 (p. 149).

(147) For a collection of citations to Cicero on liberty, see M. N. S. Sellers, *The Sacred Fire of Liberty*, chapter 8: *Cicero's Conception of Liberty*.

(148) Thomas Hobbes, *Leviathan* cit. 14, 64 (p. 91).

(149) *Ibid.* 21, 109 (p. 147).

(150) *Ibid.* 14, 65 (p. 90).

(151) *Ibid.* 18, 93 (p. 127).

common good as the ultimate purposes of government and law(152), but relied entirely on the will and power of those in authority to secure as much reason and justice as they saw fit.

Hobbes was unusual among the enemies of liberty and constitutional government in his limited and eccentric reliance on religious authority(153). This restricted his immediate influence, but made him the father of a lasting and powerful school of European absolutists(154). Hobbes renewed and revised the old imperial claim that *princeps legibus solutus est*, without making any direct appeal to supernatural authority(155). More typical among Hobbes' contemporaries and immediate successors was Robert Filmer, whose *Patriarcha* established the 'natural power of Kings' on the basis of scripture and divine sanction(156). But otherwise their arguments were very much the same. Filmer feared the «fickleness» and «dissensions» of popular sovereignty which «shed an ocean of blood within Italy and the streets of Rome»(157). He argued that «the cruelty of all the tyrannical emperors that ever ruled in this city did ... [not] spill a quarter of the blood that was poured out in the last hundred years of her glorious commonwealth»(158). 'Tyrants', at their worst, Filmer argued, only oppress a few particular unfortunate men, because their self-interest prompts them generally to support the welfare of their subjects(159).

The English Civil War illustrates the great and continuing difficulty of moving from government by arbitrary power towards government by reason and the rule of law. Those with power will fight to maintain it, making the simple injustice of despotism seem mild in comparison to the greater misery of open warfare. Hobbes, Filmer, and Machiavelli sought justice from princes, knowing they could not expect it, because they feared the consequences of upsetting the established order. The English Civil War was a watershed of emergent modernity, because it clarified the central issues of modern law and politics. All sides now conceded that

(152) *Ibid.* 5, 22 (p. 36).

(153) *Ibid.* dedication to Francis Godolphin (p. 3).

(154) See e. g. Quentin Skinner, *Visions of Politics, III. Hobbes and Civil Science*, Cambridge 2002.

(155) Digest 1. 3. 31. Cf. Hobbes, *Leviathan* 26, 137 f. (p. 184).

(156) Sir Robert Filmer, *Patriarcha or the Natural Power of Kings*, London 1680. Filmer cited St. Ambrose and St. Augustine to support the proposition that kings are bound by no laws (at 3, 3). Following Ulpian's doctrine that *princeps legibus solutus est*. (at 3, 8).

(157) *Ibid.* chapter 2, II. Cf. 2, 14: «The blood hath been sucked up in the market places with sponges; the river Tiber hath been filled with the dead bodies of the citizens, and the common privies stuffed full with them».

(158) *Ibid.* 2, 15.

(159) *Ibid.*: «out of natural love to himself, every tyrant desires to preserve the lives and protect the goods of his subjects».

governments should apply reason to nature to secure the common good of their subjects. What remained in question was how (or whether) political science could best secure this result. The enemies of liberty drew a line at the science of politics. «For forms of government let fools contest; whate'er is best administer'd is best»(160).

7. *The English Revolution*

The prominence of Cicero in the European development of rhetoric, in humanism, and in the renaissance of European culture, set the stage for his influence on modern law(161), but Cicero's impact on European political institutions remained limited, until the breakdown of imperial power and the wars of religion opened a space for political speculation, and the possibility of political change. The 'Glorious Revolution' of 1688 can be seen on one level as the triumph of a Protestant people against their Catholic ruler at the tail end of religious reformation of Europe. From another standpoint, however, the ouster of James II signified the beginning of a new legal era of modern constitutionalism. The primary complaints of his subjects against the king concerned questions of constitutional law, and his successors accepted a constitutional settlement, as a condition of their tenure on the throne(162).

Cicero had argued for checks and balances in government, that could take advantage of monarchic, aristocratic and democratic elements in public administration to better advance the public interest(163). He wrote of 'mixed' (*permixtus*) government(164), as did Aristotle(165), and this had sufficient resonance in England (and elsewhere)(166) that Sir Thomas Smith understood the government of Elizabeth's England to be 'mixt' in 1565(167). Even the absolutist monarch King Charles I of England

(160) Alexander Pope, *Essay on Man*, London 1733, Epistle III: *Of the Nature and State of Man, with Respect to Society*. On which see John Adams, *Thoughts on Government* (1776): «Pope flattered tyrants too much».

(161) See the *Atti* of previous *Colloquia Tulliana*, and particularly *Cicerone nel Medioevo* («Ciceroniana» XI), Roma 2000, and *Cicerone nell'Umanesimo europeo* («Ciceroniana» IX), Roma 1996.

(162) *An Act Declaring the Rights and Liberties of the Subject and Setting the Succession of the Crown* (1689).

(163) Cic. *rep.* 1, 69. Cf. *ibid.* 2, 41.

(164) *Ibid.* 1, 45.

(165) Aristot. *polit.* 1265b, 35 ff.; 1294b, 13 ff.

(166) H. G. Koenigsburger (ed.), *Republiken und Republikanismus im Europa der frühen Neuzeit*, München 1988.

(167) Sir Thomas Smith, *De Republica Anglorum*, London 1583, book I, chapter 6. Cf. book II, chapter 1.

conceded under pressure that England's constitution was a 'mixture' of absolute monarchy, aristocracy and democracy with a 'balance' between the three estates(168). The innovation that followed England's revolution was not so much in the idea of 'mixture' as it was in the strengthened role of popular sovereignty, and the 'institution' of 'popular commonwealths' that had been so much feared and despised by Thomas Hobbes(169).

Hobbes' attack on the «specious name of Libertie»(170) evoked an immediate response from James Harrington, whose *Commonwealth of Oceana* (1656) set out to defend Cicero, Aristotle, and their «ancient prudence» of government in the public interest(171) against the implications of *Leviathan*, which seemed to encourage government in the interest of the rulers, or rather: an «empire of men and not of laws».(172) Securing the more desirable «empire of laws and not of men»(173) depended, Harrington suggested, on maintaining a deliberative senate(174), to control (as Cicero proposed) the natural intemperance of the *comitia*(175). Harrington cited Cicero's criticism of plebiscites(176) but also his insistence that no legislation could be valid, without a vote in the popular assembly(177). He disliked the excesses of England's unicameral Commonwealth Parliament, which ruled without checks and balances, as much as he feared Hobbes' despotic absolute monarch(178). Harrington pointed out (correctly) that neither Cicero nor Aristotle would have supported any such arrangement(179).

The 'old cause' of liberty and balanced government that Sidney praised on the scaffold(180), had been on the boil in England for most of the seventeenth century, fired by theories of law, government, and the constitution first lit by Cicero and his contemporaries in the last years of Rome's liberty, and shortly afterwards(181). Subsequent revolutions in

(168) Charles Stuart, *His Majesties Answer to Nineteen Propositions of Both Houses of Parliament* (1642).

(169) Thomas Hobbes, *Leviathan*, 21, 110 (p. 149 f.).

(170) *Ibid.* 21, 110 (p. 149).

(171) James Harrington, *The Commonwealth of Oceana* (1656), ed. J. G. A. Pocock, Cambridge 1992, preliminaries (p. 8).

(172) *Ibid.* 9.

(173) *Ibid.* 8.

(174) *Ibid.* 23 f.

(175) *Ibid.* 149, quoting Cic. *Flacc.* 9 ff.; 16.

(176) Harrington, *The Commonwealth of Oceana*, 74.

(177) *Ibid.* 16, citing Cic. *Planc.* 12-30.

(178) *Ibid.* 65.

(179) *Ibid.*

(180) Algernon Sidney, speech delivered to the sheriff on the scaffold (December 7, 1683).

(181) For some of the highlights in this tradition, see M. N. S. Sellers, *The Sacred Fire of Liberty* cit.

modern law would consult the tracts of these English disputes alongside Cicero, Sallust, Livy and Tacitus, because the subject-matter was the same(182). The question was how best to structure the «right constitution of a commonwealth» to avoid the «simple monarchy» and «absolute power» imposed by Caesar and his successors, and embraced by Hobbes(183).

James Harrington gave a very clear and succinct exposition of reason, law, and government, as applied to the constitution of England at the height of English interregnum(184). Harrington mourned the liberty «extinguished» by the «arms of Caesar»(185). He proposed that magistrates «should govern according to reason», secured by careful 'mixture' in the constitution of the state(186). This 'doctrine of the ancients' had been developed by the *senatus populusque Romanus*(187) according to the principle *censuere patres, iussit populus* described by Cicero(188). The checks and balances of a well-constructed government will bring forward «reason in the debate of the commonwealth», which is the law. And «if the liberty of a man consist in the empire of his reason, the absence whereof would betray him unto the bondage of his passions, then the liberty of a commonwealth consisteth in the empire of her laws, the absence whereof would betray her unto the lusts of the tyrants»(189). James Harrington considered this «equality of power» to be «the liberty not only of the commonwealth, but of every man» in it(190).

Cicero and his English successors sought a «common right, law of nature, or interest of the whole»(191), which is «right reason»(192). More important than recognizing this principle, however, was to construct such «orders of government» as would constrain the citizens and magistrates to take up «the common good»(193). English theorists proposed the election of a 'Senate', or second chamber in the legislature, with members chosen

(182) John Adams, *Defence*, III. 211 mentions James Harrington, John Milton, Algernon Sidney, John Locke, Benjamin Hoadley, James Trenchard, Thomas Gordon, Henry Neville, and Marchamont Needham.

(183) «A man, however unhappy in his temper, or detestable for his principles, equal in genius and learning to any of his contemporaries» (*ibid.*).

(184) The 'Preliminaries' to his *Oceana* are particularly lucid. James Harrington, *The Commonwealth of Oceana* (1656), ed. J. G. A. Pocock, Cambridge 1992.

(185) *Ibid.* 8.

(186) *Ibid.* 10.

(187) *Ibid.*

(188) *Ibid.* 14. Cf. *Cic. rep.* 2, 32 etc.

(189) James Harrington, *The Commonwealth of Oceana* cit., 19 f.

(190) *Ibid.* 20.

(191) *Ibid.* 21.

(192) *Ibid.* 22.

(193) *Ibid.*

«for their excellent parts», not to be «commanders», but «counselors» of the people(194). Both Harrington and Sidney endorsed Cicero's proposal that all legislation should be approved *auctoritate patrum et iussu populi*, by the authority of the Senate and order of the people, «which concurring make a law»(195). Both believed, citing Cicero, Plato and Aristotle, that the only purpose of all public officials «always and everywhere» is to do «justice and procure the welfare of those that create them»(196). Both defined law and justice to be, as Sidney put it (using Cicero's words), «sanctio recta, jubens, honesta, prohibens contraria»(197).

Algernon Sidney wrote his *Discourses* to counter the arguments of Filmer and Hobbes, and to vindicate the value of government that «proportion[ed] the powers of several magistracies» so that «they might all concur in procuring the publick good». Sidney wanted, like Cicero, to «divide the powers between the magistrates and people», so that «a well-regulated harmony might be preserved in the whole»(198). Where Hobbes and Filmer tried to threaten these doctrines of Cicero, Sidney defended them(199), arguing that «the Glory, Virtue, and Power of the Romans began and ended with their liberty»(200). Once Augustus destroyed the Roman constitution and usurped all law and justice for himself (*omnium jura in se traxerat*), then liberty was at an end, and the era of «miserable slavery» began(201). Sidney suggested that «Roman greatness» justified a close attention to «what passed among them», but only as to «what they did, said, or thought when they enjoyed that liberty which was the mother and nurse of their virtue», and «the laws were more powerful than the commands of men»(202).

Filmer's arguments against the rule of law and constitutional government had been primarily religious, and so were many elements of Algernon Sidney's response. Sidney compared James II to the French royal house of Valois (which had slaughtered the Protestants of France), to Philip II of Spain (who had slaughtered the Protestants of the Netherlands), and to the «sweetness and apostolical meekness of the Inquisition» (which made a general practice of slaughter)(203). This reflected the religious, as well as

(194) *Ibid.* 23.

(195) *Ibid.* 24. Cf. Algernon Sidney, *Discourses Concerning Government* (1698), ed. Thomas G. West, Indianapolis 1990, 2, 13 (p. 151).

(196) *Ibid.* 1, 20 (p. 70).

(197) *Ibid.* 3, 10 (p. 379). Cf. 3. 21 (p. 443).

(198) *Ibid.* 1, 1 (p. 6).

(199) *Ibid.* 1, 16 (p. 48).

(200) *Ibid.* 2, 12 (p. 144).

(201) *Ibid.* 3, 24 (p. 455), paraphrasing Tac. *ann.* 1, 2.

(202) Algernon Sidney, *Discourses Concerning Government* cit., 3, 26 (p. 472).

(203) *Ibid.* 3, 43 (p. 562).

the political, nature of the struggle. John Locke, who also wrote in response to Filmer, divided his argument into two books, the first of which rested almost entirely on the Bible(204). Locke too opposed the «slavery»(205) of «absolute power»(206) with «reason», (presented as the «Voice of God» in man)(207). Like Cicero, Aristotle, and Sidney, Locke identified the only purpose of political power as the «Publick Good»(208) and sought the public good through «Reason», which is the «Law of Nature»(209).

John Locke was a partisan of «our great Restorer», King William III(210), which inhibited his precision about the details of constitutional government(211), beyond his flat opposition to «Arbitrary Power»(212) and commitment to the sovereignty of the people(213). The Glorious Revolution established both of these principles, and their basis in «the Foundation and End of all Laws», which is «the publick good»(214), but could not shake the power of *regnum*(215) or the continuing importance of religious conformity. William and Mary invaded England «to save the Protestant religion»(216), and the «Declaration of Rights» which confirmed their succession concerned the safety of «the Protestant» religion as much as it did «the laws and liberties» of the kingdom(217). Thus although the rhetoric and result of the English Revolution very much advanced the cause of reason and balanced government in law, the English still had one foot in the premodern world of royalty and religious authority.

8. Reason, Religion, and the Law

The final steps towards modernity in European law and government took place, not so much in the «Glorious» Revolution itself(218), as in its

(204) John Locke, *Two Treatises of Government* (1690), ed. Peter Laslett, Cambridge 1988.

(205) *Ibid.* 1, 1 (p. 141).

(206) *Ibid.* 1, 2 (p. 141).

(207) *Ibid.* 1, 86 (p. 205).

(208) *Ibid.* 2, 3 (p. 268).

(209) *Ibid.* 2, 6 (p. 271). Cf. 2, 10 (p. 273): «right Rule of Reason».

(210) *Ibid.* Preface (p. 137).

(211) Benjamin Rush spoke for many when he identified Locke as useful for the 'principles', but not for the forms of government. *Observations Upon the Present Government of Pennsylvania*, Philadelphia 1777, 20. Cf. Adams, *Defence*, III. 365 f.; 370.

(212) Locke, *Two Treatises*, 2, 137 (p. 359).

(213) *Ibid.* 2, 149 (p. 367).

(214) *Ibid.* 2, 165 (p. 378).

(215) Sidney had been bolder, *Discourses* cit., at 3, 1 (p. 322).

(216) Letter of the 'Immortal Seven' to William of Orange (June 30, 1688).

(217) *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (1689).

(218) The phrase was coined by John Hampden, grandson of the Parliamentary hero. L. G. Schworer, *The Revolution of 1688-89: Changing Perspectives*, Cambridge 2004.

echoes and memory across Europe. The baron de Montesquieu, for example, admired the English of his time as «un peuple libre», formed by the principles of their constitution, which helped to shape the mores, manners, and character of the nation(219). The English Revolution had only positive effects «car les révolutions que forme la liberté ne sont qu'une confirmation de la liberté»(220). People living under such a constitution will love their liberty, Montesquieu believed, «parce que cette liberté serait vraie»(221). All citizens should have this freedom to think for themselves about religion, to embrace the faith of their choice, or none, and to be untroubled in their lives and goods and politics by the public involvement of religious authority(222).

Montesquieu's attitude towards law and religion, which he attributed to the English, reflected his early reading of Cicero, as it did among the English themselves. James Harrington insisted on liberty of conscience, citing Cicero's «most excellent book», *De natura deorum*(223). Montesquieu wrote that he too had read these pages of Cicero with pleasure, because they confounded the pretensions of all sects equally, without favoritism(224). Cicero was, for Montesquieu, among all the ancients, the one with the greatest personal merit, «et à qui j'aimerais mieux ressembler»(225). Reading Cicero inspired Montesquieu to eloquence and emulation of the great «libérateur de la patrie» and «défenseur de la liberté»(226), who made philosophy, like reason, available to everyone(227). Cicero formed our morals, Montesquieu reported, and showed us our duty to follow reason, without passion, despite the threat of certain death(228). «Nous leur devons ces beaux ouvrages qui seront admirés par toutes les sectes et dans toutes les révolutions de la philosophie»(229).

Roman policies concerning religion differed from those of other nations, as Montesquieu explained it, because the Romans had designed

(219) Charles-Louis de Secondat, baron de la Brède et de Montesquieu, *De l'Esprit des Lois*, Geneva 1748, ed. Robert Derathé, Paris 1973 at 19, 27 (p. 346) Cf. 11, 6.

(220) *Ibid.* 19, 27 (p. 348).

(221) *Ibid.*

(222) *Ibid.* 19, 27 (p. 351 f.). Cf. 25, 13.

(223) James Harrington, *The Commonwealth of Oceana* (1656) ed. J. G. A. Pocock, Cambridge 1992, Preliminaries, p. 40.

(224) Charles-Louis de Secondat, baron de la Brède et de Montesquieu, *Discours sur Cicéron* cit., 94.

(225) *Ibid.* 93.

(226) *Ibid.*

(227) *Ibid.* 94.

(228) *Ibid.* 95.

(229) *Ibid.* 97.

their religion to serve the state, and not their state to serve religion(230). Religion had no voice in public affairs, without permission of the magistrates(231), and religious questions were settled by considering the public good(232). By subordinating religious institutions to the public welfare (Montesquieu suggested), the Romans had succeeded in preventing «superstition» from oppressing the republic(233). Montesquieu did not disparage or oppose religion any more than Cicero had, but wanted religion to serve the public good(234). The aim in religious institutions, as in all other constitutional arrangements, should be civic harmony, «qui fait que toutes les parties, quelques opposées qu'elles nous paraissent, concourent au bien général de la société comme des dissonances dans la musique concourent à l'accord total»(235).

Montesquieu's conceptions of law, politics, religion and government followed and often paraphrased Cicero in seeking to apply reason, not only to the laws themselves, but to the structures that create and maintain the laws, through the checks and balances of constitutional government(236). Montesquieu did not seek (as some had) «l'accord du despotisme asiatique»(237), but rather the balanced concord of divided public powers, which check, control, and support each other(238). As soon as Romans changed their institutions, Rome failed, because the Romans had abandoned the principles that had made Rome strong(239). When the Christian emperors tried to strengthen the faith by coercion, they simply weakened the state, to the detriment of all citizens and ultimate ruin of their nation(240).

(230) Charles-Louis de Secondat, baron de la Brède et de Montesquieu, *Dissertation sur la politique des Romains dans la religion* (1716) in *Oeuvres Complètes* ed. Roger Caillois, Paris 1956, 81.

(231) *Ibid.* 82.

(232) *Ibid.* 83.

(233) *Ibid.* 89.

(234) Charles-Louis de Secondat, baron de la Brède et de Montesquieu, *Considérations sur les causes de la grandeur des Romains et de leur décadence* (1734), ch. 10: «Outre que la religion est toujours le meilleur garant que l'on puisse avoir des mœurs des hommes, il y avait ceci de particulier chez les Romains, qu'ils mêlaient quelque sentiment religieux à l'amour qu'ils avaient pour leur patrie».

(235) *Ibid.* ch. 9. Cf. Cic. *rep.* 2, 69.

(236) As illustrated for example, in the two passages compared in the previous footnote.

(237) Montesquieu, *Considérations*, ch. 9.

(238) *Ibid.* ch. 11: «Les lois de Rome avaient sagement divisé la puissance publique en un grand nombre de magistratures, qui se soutenaient, s'arrêtaient, et se tempéraient l'une l'autre...».

(239) *Ibid.* ch. 18: «Ce n'est pas la Fortune qui domine le monde. On peut demander aux Romains, qui eurent une suite continuelle de prospérités quand ils se gouvernèrent sur un certain plan, et une suite non interrompue de revers lorsqu'ils se conduisirent sur un autre».

(240) *Ibid.* ch. 20: «comme les anciens Romains fortifièrent leur empire en y laissant toute sorte de culte, dans la suite on le réduisit à rien en coupant, l'une après l'autre, les

Cicero's dialogue *de natura deorum* made the radical argument that justice has nothing to do with divinity, but only with the needs of human society and the community of mankind(241). The gods will not step in to regulate the world(242), and right and wrong are right and wrong in themselves, without need for gods make them so(243). Cicero suggested (through the character of Cotta) that the nature of divinity is necessarily obscure(244), despite its obvious utility in encouraging good behavior(245). Thus Hugo Grotius' famous statement that the basic principles of reason, law, and justice would remain the same, *etiamsi daremus* there was no God at all(246). Removing religious authority from government cast the responsibility for justice back onto reason, and to the guidance of whatever constitutional structure would best control and motivate the public powers to secure the common good of all those subject to the law(247).

9. The American Revolution

Cicero was primarily a lawyer, a politician, and a philosopher of law. His influence and authority arose, not from force of arms or military power, but from the force of argument and persuasion. With the growth of learning in Europe, the class of such men became larger. Johan van Oldenbarnevelt and Hugo Grotius set an example as political lawyers in the States of Holland that John Hampden and John Pym elaborated in England's Parliament, but always in the shadow of monarchy and religion. At the end of the seventeenth century Johan de Witt and Algernon Sidney still found themselves fighting a losing battle for Cicero's legal and constitutional ideals against latter-day Caesars in the Netherlands and

sectes qui ne dominaient pas. ... il crut avoir augmenté le nombre des fidèles; il n'avait fait que diminuer celui des hommes».

(241) Cic. *nat.* 3, 38.

(242) *Ibid.* 3, 85.

(243) *Ibid.* 3, 87 f.

(244) *Ibid.* 3, 93.

(245) *Ibid.* 1, 118.

(246) Hugo Grotius, *De iure belli ac pacis, libri tres, in quibus jus naturae et gentium, item juris publici praecipua explicantur*, revised ed., Amsterdam 1646, *Prolegomena* 11: «Et haec quidem quae jam diximus, locum aliquem haberent etiamsi daremus, quod sine summo scelere dare nequit, non esse Deum...». Grotius began his book with an appeal to Cicero (*Prolegomena* 2) against those who claim (*Prolegomena* 3) that: «regi aut civitati imperium habenti, nihil injustum quod utile».

(247) Charles-Louis de Secondat, baron de la Brède et de Montesquieu, *De l'Esprit des Lois* cit., 11, 4: «Pour qu'on ne puisse abuser du pouvoir, il faut que par la disposition des choses, le pouvoir arrête le pouvoir».

Great Britain(248). Only finally in the eighteenth century did European legal modernism finally shake off the shackles of the intervening centuries, to approach ideals that Cicero had advanced at the end of the liberty of Rome(249).

The triumph of Western legal modernism came first, not in the center of the European world, but on its extreme periphery, along the eastern littoral of British North America. American lawyers were products of the Glorious Revolution, but without the royal presence or the uniformity in religion that constrained their British contemporaries. James Trenchard and Thomas Gordon, writing as 'Cato' in England, had summarized the Whig consensus of their era, praising the principles of Cicero, and mourning the loss of his *Republic*(250). 'Cato' translated, quoted, and commented on correspondence of Cicero and Brutus, because «the same Principles of Nature and Reason that supported Liberty at Rome, must support it here and everywhere». Trenchard and Gordon knew that «the foundations of tyranny are in all countries, and at all times, essentially the same; namely...power without a balance»(251). But even Trenchard and Gordon felt it necessary to confirm their subservience to the King(252). Americans could aspire to the eloquence, principles, and policies of Cicero without sharing so immediately their English cousins' fear of punishment by the hereditary powers of the state(253).

American attitudes were steeped in the same classical readings and values that had formed the British 'Cato', but in a much purer and unadulterated form, because their libraries were smaller(254). British

(248) See Charles-Edouard Levillain, *William III's Military and Political Career in Neo-Roman Context, 1672-1702*, «The Historical Journal» 48, 2005, 321-350.

(249) For a history of the *nachleben* of Roman liberty, see M. N. S. Sellers, *The Sacred Fire of Liberty* cit. Cf. Quentin Skinner, *Liberty Before Liberalism*, Cambridge 1998.

(250) John Trenchard – Thomas Gordon, *Cato's Letters or Essays on Liberty, Civil and Religious, and Other Important Subjects* (1721), ed. Ronald Hamowy, Indianapolis 1995, letter no. 26, April 22, 1721 (p. 188 f.).

(251) *Ibid.* preface, p. 15.

(252) *Ibid.* preface, p. 13 f.

(253) Mercy Otis Warren, *History of the Rise, Progress and Termination of the American Revolution Interspersed with Biographical, Political and Moral Observations*, Boston 1805, ed. Lester H. Cohen, Indianapolis 1988, volume I, ch. 1, 5 (p. 5): «The love of domination and an uncontrollable lust for arbitrary power...prevailed...in the decline of Roman virtue, and in the dark pages of British story. It was these principles that overturned that ancient republic...It was resistance to them that brought one of their monarchs to the block, and struck another from his throne. It was the prevalence of them that drove the first settlers of America from elegant habitations and affluent circumstances, to seek an asylum in the cold and uncultivated regions of the western world. Oppressed in Britain by despotic kings, and persecuted by prelatial fury, they fled to a distant country, where the desires of man were bounded by the wants of nature...».

(254) David Ramsay, *The History of the American Revolution* (Philadelphia 1789), ed. Lester H. Cohen, Indianapolis 1990, chapter 1 (p. 29).

colonists were jealous of their liberty, when they considered it threatened, and defended themselves with legal, constitutional, and classical arguments, in conscious imitation of Cicero(255). Dr. Joseph Warren, the first great martyr of the American Revolution, killed at Bunker Hill in 1775, wore a «Ciceronian toga» into Old South Meetinghouse in Boston to declaim against the king(256), and James Otis rested his argument for American rights (in 1764) on Cicero's theory that «the superstructures and the whole administration [of government] should be conformed to the law of universall reason»(257). Otis argued that Britain's balanced constitution gave Britons the world's best form of government since the usurpation of Caesar destroyed «the Roman glory and grandeur», but that British politicians, like Caesar, had subverted the balance of government, and undermined the legitimacy of the state(258).

The American Revolution from the beginning opposed «kingcraft» and «priestcraft» (as Otis explained it), because arbitrary political or religious authority was inimical to «government [for] the good of mankind»(259). Americans followed Cicero in making the «law of nature and of reason» their final measure of the state(260). After the Declaration of Independence in 1776 they needed new forms of government to replace the discredited structures of colonial rule. Cicero provided a name ('republic'), a goal ('liberty'), and a technique (checks and balances) for the new American constitutions. John Adams promoted this template for the American state governments in a letter to Richard Henry Lee, published as *Thoughts on Government* in 1776, in which he insisted that «there is no good government but what is republican». Adams defined a republic as a «government of laws and not of men», arguing that whatever form of government best secures just and impartial laws, deserved to be established in the states. Adams suggested a bicameral government with a popular assembly, as in Rome, controlled by a second legislative chamber (the 'Senate') and an elected executive(261). «We shall learn to prize the checks and balances of a free government» (Adams later explained) «if we

(255) Stephen Botein, *Cicero as a Role Model for Early American Lawyers: A Case Study in Classical Influence*, «The Classical Journal» 73, 1978, 313-321.

(256) Rivington's *New York Gazetteer* (March 15, 1775).

(257) James Otis, *Rights of the British Colonies Asserted and Proved* (1764).

(258) *Ibid.*

(259) *Ibid.*

(260) *Ibid.*

(261) John Adams, *Thoughts on Government* (Boston, 1776), in Charles S. Hyneman - Donald S. Lutz (eds.), *American Political Writing during the Founding Era, 1770-1805*, I, Indianapolis 1983, 403 ff.

recollect the miseries...which arose» from trying to live without them(262).

The leaders of the American Revolution (and many of their supporters throughout Europe and elsewhere) believed that in their new constitutions the «theory and practice of government» had finally met and surpassed the standards set by the ancients, in the same way that other «arts» and «sciences» in general had progressed «during the three or four last centuries»(263). The «knowledge of the principles and construction of free government» had been (many believed) nearly at a standstill for two thousand years(264). Modern students of government confirmed the value of a «Senate» of the most «able» citizens as a «check to ministers, and a security against abuses»(265), they understood the necessity of an assembly of representatives chosen by the people, to communicate «the wishes of the nation»(266), and they endorsed the benefits of balancing both with a strong and independent *elected* executive power(267). John Adams claimed that «the United States of America have exhibited, perhaps, the first example of governments erected on the simple principles of nature: and if men are now sufficiently enlightened to disabuse themselves of artifice, imposture, hypocrisy, and superstition, they will consider this event as an aera in their history»(268).

For Americans «the use of reason» in securing justice and the common good of the people required them to view legislation in the same light as other «ordinary arts and sciences, only ...of more importance»(269). As wise architects consult «Vitruvio, Palladio, and all other writers of reputation in the art»(270), so students of constitutional government put aside the «monkery of priests, or the knavery of politicians»(271) to look to Cicero and Tacitus(272), perhaps to Polybius(273), but certainly not to the monarchical despotism of Europe(274) or the unbalanced unicameralism of primitive Germany(275)

(262) John Adams, *Defence*, I. iii.

(263) *Ibid.* I. i.

(264) *Ibid.* I. ii.

(265) *Ibid.* I. viii.

(266) *Ibid.* I. viii-ix. Cf. I. x: «There can be no free government without a democratical branch in the constitution».

(267) *Ibid.* I. xi.

(268) *Ibid.* I. xiii.

(269) *Ibid.* I. xiii-xiv.

(270) *Ibid.* I. xiv.

(271) *Ibid.* I. xv.

(272) *Ibid.* I. xvi-xix.

(273) *Ibid.* I. 98; 169-176.

(274) *Ibid.* I. xx.

(275) *Ibid.* I. xxi.

that had resulted in «the widespread miseries and final slavery of almost all mankind»(276). John Adams described the systems devised by legislators through the ages as «experiments» made on human life and manners(277). Rome and England provided the favorite models for modern constitution-writers(278) and Cicero the greatest guidance, when he said that «the laws, which are the only possible rule, measure and security of justice» can be just and protected only under the checks and balances of a democratic republic, with two branches in the legislature, and an elected executive power(279).

Americans engaged in the pseudonymous newspaper debates that heralded their Revolution presented themselves as 'Publius', 'Publicola', 'Junius', 'Brutus', 'Cato', 'Cincinnatus', 'Tullius', 'Cicero' and the like because they saw their challenges as essentially the same as those that had threatened the justice and stability of Rome(280): how to protect law, liberty, and the balanced constitution against the twin incursions of monarchy (leading to tyranny) on the one hand, and democracy (leading to anarchy) on the other(281). Eleven of the newly independent American states would adopt new constitutions between 1776 and 1780 and each constitution was more elaborate and carefully thought-out than the last. Of these, Virginia, Maryland, North Carolina, New York, South Carolina, and Massachusetts all had a 'Senate', and the other state legislatures were also bicameral, with the exception of Pennsylvania and Georgia, which added senates later to bring themselves into line with the rest(282).

When the newly independent American states finally perpetuated their union under a new federal Constitution in 1789, they adapted many of its most important attributes from the republican reforms proposed by Cicero for Rome. There was an elected 'Senate', sitting on the 'Capitol' hill, above the 'Tiber' river(283), with a second democratic chamber to express the will of the people, and an elected first magistrate. The chief executive could not act, in many instances, without the «advice and

(276) *Ibid.*

(277) *Ibid.* I. xx.

(278) *Ibid.* I. xix.

(279) *Ibid.* I. xvii-xviii.

(280) See M. N. S. Sellers, *American Republicanism*, chapter 2: *Republican Pseudonyms*.

(281) Adams, *Defence*, I. xx-xxi.

(282) See M. N. S. Sellers, *American Republicanism*, chapter 10: *The English and American Constitutions*.

(283) Mocked by Thomas Moore: «Where tribunes rule, where dusky Dari bow, and what was Goose Creek once is Tiber now». The poem is discussed in C. J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment*, Cambridge, Mass. 1994, 50.

consent» of the Senate(284), and the document as a whole sought to secure the 'Liberty' of the American people(285). George Washington, in assuming his duties as the first President of the United State, declared that «the preservation of the sacred fire of liberty, and the destiny of the republican model of the government, are justly considered as deeply, perhaps finally, staked on the experiment entrusted to the American People»(286).

10. *The French Revolution*

The French Revolution was the turning point in political and legal modernity, when the Ciceronian principles of law and government through reason finally escaped their ancient context, to overturn the politics of Europe(287). This meant that the French Revolution was also the last great political event to take its inspiration, iconography and institutions primarily from classical antiquity(288). Like the Americans, English, Italians, and Dutch, French revolutionaries depended on the ancient world for legal and political ideals, and the courage to apply them in practice(289). Classicism had been sapping the foundations of French absolutism for more than a century before the people of Paris finally stormed the Bastille in 1789(290). Camille Desmoulins, whose fiery rhetoric (according to his own account) precipitated the uprising of July 14, attributed the strike against despotism to the same sentiments that inspired patriotic reaction against Caesar at the end of Republican Rome(291).

Cicero played an important role in the rhetoric and ideals of the French Revolution, as he had in the United States, but not without

(284) See *Constitution of the United States* (1787) Article II, Section 2.

(285) *Ibid.* Preamble.

(286) George Washington, *The First Inaugural Speech*, in W. B. Allen (ed.), *George Washington: A Collection*, Indianapolis 1988, 462.

(287) The European Union is one symptom of this ever strengthening ideology. See e. g. *The Constitutional Heritage of Europe* (Publication of the Council of Europe for the European Commission for Democracy through Law), Montpellier 1997.

(288) Harold T. Parker, *The Cult of Antiquity and the French Revolutionaries: A Study in the Development of the Revolutionary Spirit*, Chicago 1937.

(289) Jacques Bouineau, *Les toges due pouvoir (1789-1799), ou, La révolution de droit antique*, Toulouse 1986.

(290) See e. g. François-Marie Arouet ('Voltaire'), his play *Brutus* (1730). There are numerous similar examples. See Robert L. Herbert, *David, Voltaire, Brutus and the French Revolution: An Essay in Art and Politics*, London 1972. Cf. L. Bertrand, *La fin du classicisme et le retour à l'antique dans la seconde moitié du XVIIIe siècle*, Paris 1898.

(291) Camille Desmoulins, *La France libre* (1789).

rivals(292). Gabriel Bonnot de Mably wrote influential *Observations sur les Romains* (1751), but also *Entretiens de Phocion* (1763) and *Observations sur l'histoire de la Grèce* (1766). French attitudes towards antiquity idealised Cicero and the Roman republic(293), but also Sparta and sometimes Athens(294), dividing French revolutionary ideology into two main tendencies, partially anticipated by Montesquieu and Rousseau(295). While the followers of Cicero emphasized the checks and balances of republican government and the rule of law(296), admirers of Greece stressed the necessity of virtue and the importance of popular sovereignty(297). Neither set of views directly contradicted the other, and most French revolutionaries would have found both somewhat congenial, but Rousseau and Mably cultivated a Spartan sensibility that could be somewhat at odds with Cicero's legal program of complicated checks and balances to control the assemblies and magistrates of Rome(298).

Mably and Jacques Turgot advocated simple assemblies, like the British Long Parliament, which contradicted Cicero's complicated theory of «harmony» in government(299). The National Constituent Assembly embraced Cicero's political agenda of the rule of law (*imperium legum*), popular sovereignty (*imperium populi*), and natural justice (*ius naturale*), embodied in the new French Declaration of Rights(300). But the French delegates would not accept a senate as proposed by the Assembly's constitutional committee under Jean-Joseph Mounier and the comte de Mirabeau(301). The French Constitution of 1791 established a single

(292) On Classical Influences on the French Revolution, see M. N. S. Sellers, *Classical Influences in the French Revolution*, in A. Grafton - G. Most - S. Settis (eds.), *The Classical Tradition*, Cambridge, Mass. 2009.

(293) Thaddäus Zielinski, *Cicero im Wandel* cit., 257-272.

(294) Harold T. Parker, *The Cult of Antiquity and the French Revolutionaries: A Study in the Development of the Revolutionary Spirit*, Chicago 1937.

(295) On Montesquieu, Rousseau, and the French Revolution, see Norman Hampson, *Will and Circumstance: Montesquieu, Rousseau, and the French Revolution*, London 1983.

(296) See M. N. S. Sellers, *The Roman Republic and the French and American Revolutions*, in H. Flower (ed.), *The Cambridge Companion to the Roman Republic*, Cambridge 2004. Cf. Claude Nicolet, *L'idée républicaine en France: (1789-1924)*, Paris 1982.

(297) See Erik Nelson, *The Greek Tradition in Republican Thought*, Cambridge 2004.

(298) On the Spartan tradition in European thought, see Elizabeth Rawson, *The Spartan Tradition in European Thought*, Oxford 1969, esp. 268 ff., and Harold T. Parker, *The Cult of Antiquity and the French Revolutionaries*, Chicago 1937.

(299) John Adams' *Defence of the Constitutions of Government of the United States of America*, was written primarily to respond to these criticism: see volume I. 3-8.

(300) Michael P. Fitzsimmons, *The Remaking of France: The National Assembly and Constitution of 1791*, Cambridge 2002.

(301) See Karen Fiorentino, *La seconde chambre en France dans l'histoire des institutions et des idées politiques: 1789-1940*, Paris 2008.

National Assembly and vested executive power in the King (302). This relic of *regnum* could not and did not last among a people fired with the recollection of Rome. If Cicero could kill Catiline to save the republic, if Cincinnatus could kill Maelius and Brutus could kill Caesar, why should not the Convention act just as firmly to save France? The death of Louis Capet inaugurated a lawless Terror more in keeping with the policies of Antony and Augustus than Cicero's visions of *concordia* and *harmonia* in Rome (303).

Maximilien Robespierre and Louis de Saint-Just, who presided over the French proscriptions, both embraced the Spartan view of law and government. Saint-Just explained in describing the *Esprit de la Révolution et de la Constitution de France* (1791) that free government was practically impossible, once virtue had decayed (304). Where Cicero, Polybius, Montesquieu and Adams studied the checks and balances through which 'ambition' could be harnessed to protect the public good (305), the 'Jacobin' party of Saint-Just and Robespierre attempted to purify the people, through a strict Laconian system of education, and strong government action to root out any 'corruption' among the people or the state (306). The violence of this Jacobin ascendancy shocked public opinion and confirmed the wisdom of neo-Roman checks and balances. The Constitution of the Year III included a senate of 'Anciens', to balance the popular assembly, and even a plural executive, as in Rome (307). Once again Cicero was in vogue (308). Critics mocked the commissioners for speaking so incessantly about Rome (309), but advocates of the Constitution clearly expected their language to be persuasive.

As Cicero fell before Augustus, so the French Republic succumbed to Napoléon Bonaparte by degrees, in a series of extra-constitutional manoeuvres, making Bonaparte 'first consul' in the Constitution of the year VIII, then 'Consul for Life' (pursuant to a *senatus consulte*), and

(302) *Constitution de 1791*, Titre III.

(303) See Ruth Scurr, *Fatal Purity: Robespierre and the French Revolution*, Basingstoke, 2006. Cf. Camille Desmoulins, *Le Vieux Cordelier*, numbers 3 and 4 (1793).

(304) Louis-Antoine-Léon Saint-Just, *L'esprit de la Révolution et de la Constitution de France*, Paris 1791.

(305) Lawrence M. Levin, *The Political Doctrine of Montesquieu's Esprit Des Lois: Its Classical Background*, New York 1936.

(306) See Patrice Higonnet, *Goodness beyond Virtue: Jacobins During the French Revolution*, Cambridge, Mass. 1998.

(307) On which, see Jean Bart - Françoise Naudin-Patriat (eds.), *La Constitution de l'an III, ou, L'ordre républicain*, Dijon 1998.

(308) Baudin des Ardennes, *Anecdotes et réflexions générale sur la constitution* (1795).

(309) Louis-Philippe de Ségur, *Reflétions sur le plan de constitution présentée par la commission des onze* (1795).

finally in the Constitution of the Year XII, the hereditary 'emperor' of France. Throughout all these changes the 'senate' and the 'tribunate' survived, as they had in Rome of the emperors, but without much power to influence affairs(310). The Revolution had run its full course, from Brutus to Domitian in less than fifteen years. The lessons and partisans of Cicero fell before the new empire in much the same way and for much the same reasons that Cicero himself had failed, because he could not control the army. But the primary legacy of the Revolution was to reaffirm the principles of the rule of law and government for the common good, which even Napoléon purported to maintain(311). The question of constitutional design was now open for discussion and for scientific inquiry, all across the continent of Europe(312).

The violence of the French Revolution, and its collapse into despotism, opened a schism in modernity between the partisans of Cicero, Montesquieu, and the balances of constitutional government on the one hand, and the partisans of Cato, Rousseau, and the direct rule of virtue on the other(313). Robespierre made the same mistake in France that the Stuarts had made in England, replacing the political reason of law in the state with his own private 'reason', which was (as it would be for any individual), excitable, self-serving and prone to mistakes. By ignoring the checks and balances proposed by Cicero, Robespierre first, and then Bonaparte, replaced the measured laws of constitutional government, with their own personal perceptions of justice. Almost all parties now recognized truth, reason, and the common good of the people as the ultimate justification and source of legitimacy in the state, but many in positions of political power still resisted the humility of constitutionalism, deliberation and social consensus, endorsed by Cicero for Rome.

(310) See Catharine Edwards, ed. *Roman Presences: Receptions of Rome in European Culture, 1789-1945*, Cambridge 1999, esp. V. Huet, ch. 3: *Napoléon I: a new Augustus*, p. 53 ff.

(311) See Napoléon-Louis Bonaparte, *Des Idées Napoléoniennes* (Brussels, 1839), translated by James A. Dorr, New York 1859, 46 ff. for an interesting commentary on the emperor's views and illustration of the continuing resonance of the old vocabulary.

(312) See Hadyn T. Mason - William Doyle (eds.), *The Impact of the French Revolution on European Consciousness*, Gloucester 1989; Ralph C. Hancock - L. Gary Lambert (eds.), *The Legacy of the French Revolution*, Lanham, Maryland 1996, esp. 189 ff.; Keith Michael Baker - François Furet - Colin Lucas (eds.), *The French Revolution and the Creation of Modern Political Culture*, III. *The Transformation of Political Culture 1789-1848*, New York 1980.

(313) John Adams, *Defence* cit., III. 505 criticised these «insinuations, that a certain celestial virtue, more than human, has been necessary to preserve liberty», arguing that «the virtues have been the effect of the well-ordered Constitution, rather than the cause».

11. *The Triumph of Modernity*

Marcus Tullius Cicero differed from Tacitus and from most of his other literary and political successors not in his devotion to liberty, reason and balanced government, but in his persistent expectation that such values could prevail, despite the frailties of human nature. Cicero presented the science of law and government as the search for truth about justice, but he also recognized, and insisted upon, the imperfect, incomplete and fallible nature of human understanding(314). Just as in the field of religion Cicero condemned the absurdities of dogmatism, in the face of limited knowledge(315), so too in law and politics he endorsed the search for truth and the approximation of truth, against bare assertions of truth or bald demands for obedience(316). Thus Cicero sought law in conformity with reason, despite the selfish tendency of human passions, and advocated a balanced ('republican') constitution, as the ultimate arbiter of reason in politics. The triumph of this attitude many centuries after Cicero's death marked the final emergence of modern law in Europe.

Modernity abhors arbitrary authority and Cicero offered Europeans an inspiring ideal of reason as the basis for law in practice. Cicero's legacy stood for three principles in subsequent European law and politics, against emperors, prelates, and would-be princes or dictators, for two thousand years. First, true law is «*recta ratio, jubens honesta et prohibens contraria*»; second, law exists to serve the common and collective good of all those subject to its rule; but third and decisively important in the emergence of modern law and politics, Cicero argued that the requirements of law and justice emerge most clearly, through the checks and balances of a *moderatus* and *permixtus* form of government. *Regnum* or the unchecked authority of any single person, or of a faction of the people, or even of the majority of the people, was tyranny to Cicero, but also deeply antithetical to the principles of modern law and justice, because unchecked power becomes unreasonable power, without the guidance of other powers to control it.

Machiavelli, Hobbes, and Robespierre seem 'modern' in many respects, including their devotion to reason and opposition to the pretensions of the clergy, but their doctrines tended to perpetuate the premodern notion that *princeps legibus solutus est*. All three merit attention, but obstructed in varying degrees the emergence of the

(314) Cic. *Acad.* 1, 16; 2, 66; 2, 110.

(315) *Ibid.* 1, 15.

(316) *Ibid.* 2, 7 f. Cf. 1, 44-46; 1, 42.

measured constitutionalism of balanced rights and duties that distinguishes modern law. The precocious modernity of Cicero is most evident in the extent to which his commitment to constitutional design surpassed his most perceptive successors. Modern lawyers trying to improve the legal institutions of their age found Cicero more useful, not only than enemies of liberty, such as Thomas Hobbes, but even than such heroes of «liberty and the rights of mankind» as John Locke(317), John Milton(318), and David Hume(319).

Reviewing Cicero's influence on European law from his death until the nineteenth century reveals the history of his constant importance, from the moment his head and hands hung rotting in the forum. The Roman emperors themselves never denied Cicero's fundamental premise that law rests on the common good of the people, even as the memory of Cicero and his strictures on *regnum* stood as a constant rebuke to the legitimacy of their rule. The growing power of the clergy supplied a basis for challenges to civil authority, providing arguments that others turned against the clerics themselves. First in Italy, then the Low Countries, England, France and all across Europe, lawyers, scholars and politicians turned to Cicero to imagine a world ruled by reason, without the slavery of arbitrary authority.

Successful revolutions usually begin as appeals to the past. Humans lack the imagination to consider, and the courage to attempt, dramatic innovations in law and society. Most changes happen incrementally, as they should, in the gradual evolution of principles and practices to the varying circumstances of the world. Cicero well understood and eloquently described two constant tendencies, implanted in human nature, that drive this evolution of the law. First, the desire for justice, applied to every member of society. Second, the desire for self-serving power, present in every human being. Cicero died protecting the first against the second, which he did with considerable success, despite his final encounter with the servants of violence and despotism. Yet even in death

(317) Whose constitutional ideas were 'a signal absurdity' according to John Adams in his *Defence* cit., at I. 365.

(318) *Ibid.* I. 368: «Can you read without shuddering this wild reverie of the divine immortal Milton?».

(319) It would be hard to justify Hume as belonging among the heroes of liberty, but Hume did possess a very clear-sighted and 'modern' sensibility in almost all other aspects of his thought (and a profound respect for Cicero). Hume's musings about government, however, despite his usual perspicacity, struck John Adams as tending towards «a complicated aristocracy» that would «soon behave like all other aristocracies», *ibid.* at I. 370. Adams also had some interesting observations on the constitutional proposals of Sir Thomas More, whose writings he valued as highly as Plato's *Republic*, which is to say, both seemed to him to be «as wild as the ravings of Bedlam». *Ibid.* at I. 365.

his writings and his memory survived. Modern lawyers would not have dared to challenge kings and princes, or to implement constitutional government in Europe, were it not for the example set by Cicero in Rome.

The defining characteristics of modern law and government include the appeal to reason, the limitation of arbitrary power, and a commitment to the welfare of the people as a whole. All three were present in Cicero. All three were rare after Caesar. All three remain precarious today. The modern age of law and politics began as lawyers, scholars, and politicians started to understand, to emulate, and eventually sometimes to surpass Cicero. 'Postmodern' legalism begins when reason, deliberation, and constitutional checks and balances lose their hold on lawyers, judges, and others in positions of public responsibility. The eloquence, example, and insight of Cicero have guided the development of law in Europe for centuries. So long as his memory survives, the presumptions of privilege and tyranny will never be entirely secure. *Cedant arma togae, concedat laurea laudi*(320).

(320) See Cic. *Phil.* 2, 20. Cf. *Pis.* 72 f.