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THE LEGAL VALUE OF *MOS MAIORUM* IN CICERO

1. INTRODUCTION TO *MOS MAIORUM*. DEFINITION OF ITS CONTENTS

Tradition is constantly changing, following the political and social evolutions¹. Its extremely flexible nature makes it possible for the ruling class to manipulate it. In the late-Republican period, citizens wonder more about tradition, whose definition of «model» is not appropriate, due to its constant changeability. In the late-Republican period, the deeply complex and destabilized socio-political context led citizens to evoke tradition, guarantor of the ancient political balance of the Rome of the *maiores*, in the hope of restoring to the *res publica* its ancient political stability². However, Cicero is aware of the need to subject tradition to a critical review process in its time. The evolution of tradition is also necessary in the legal sphere, precisely because of the remarkable social and political evolutions present from the 3rd century BC, evolutions that deepen in the late-Republican era. Respect for tradition and awareness of the need for renewal of it are two opposing trends that complement each other and that characterize the end of the Republican age.

Quoting Claude Moatti's definition, the «*mos maiorum* is a peculiar form of the *consuetudo* that concerns the *maiores*»³. The *mos maiorum* is based on *vetustas* and collective *consensus*⁴. It has legal value, although it is not fixed in

¹ I dedicate this article to my Father.

² About the political context of the late-Republican era, I refer to R. Syme, *The Roman Revolution*, Oxford 1939; K.A. Raaflaub, *Stages in the Conflict of the Orders. Social Struggles in Archaic Rome. New Perspectives on the Conflict of the Orders*, Berkeley 1986.

³ C. Moatti, *La raison de Rome: naissance de l'esprit critique à la fin de la République (II^e-I^{er} siècle avant J.-C.)*, Paris 1997, p. 321.

⁴ M. Bettini, *Le orecchie di Hermes: studi di antropologia e letterature classiche*, Torino 2000, p. 273. In regard to the legal value of the custom, I refer to F. Gallo, *Interpretazione e formazione consuetudinaria del diritto. Lezioni di diritto romano*, Torino 1993; A. Burdese,

writing but rests on orality and memory. The repeated application of the principles that constitute tradition allows the latter to impose itself in the society⁵. The *mos maiorum* is not absolute. In fact, the tradition is not constituted by predetermined principles, but by «special cases of application», to quote Claude Moatti⁶. According to Orestano's definition of the notion of custom, the latter exists when a community applies principles, although they are not fixed in writing⁷. The tradition is constituted of the norms of conduct of *familiae* and of the patrician *gentes*. The social structures that make up the custom have a broader scope when what is defined by Orestano as the «order-community» coincides with the «order-state». The *consensus* of the ruling class is necessary for this process to occur. However, in archaic Rome, the principles that constituted the custom were already formed before the Roman State was instituted. The «order-state» was assimilated to the «order-community» even before the formation of the Roman State⁸. The *instituta* and the *mores*, foundations of the management of Roman civic life, were the prerogative of the patricians⁹. The ruling class had the hegemony in terms of knowledge and interpretation of law. It was constituted by patricians first, and afterward, by the patrician-plebeian *nobilitas*¹⁰. Until the drafting of the law of the XII Tables, the law was not written and was therefore not certain. The fixing in writing of the law is the result of the claims of the plebes to know the right. However, although the drafting of the law of the XII Tables was decisive, the publication of the rules of legal procedure takes place only in 304 BC¹¹.

Diritto romano e interpretazione del diritto, Napoli 1990; A. Magdelain, *La loi à Rome. Histoire d'un concept*, Paris 1978; F. Schulz, *History of Roman Legal Science*, Oxford 1953; F. Schulz, *Principles of Roman Law*, Oxford 1936.

⁵ H. Rech, *Mos maiorum: la tradizione a Roma*, V. Vernole (ed.), Roma 2006, p. 21.

⁶ C. Moatti C., *La raison de Rome...*, pp. 30-33; M. Bettini, *Le orecchie di Hermes...*, p. 277.

⁷ R. Orestano, *I fatti di normazione nell'esperienza romana arcaica*, Torino 1967, pp. 136-137.

⁸ *Ibidem*, pp. 154-155.

⁹ F. Serrao, *Cicerone e la lex publica*, (in:) F. Serrao (ed.), *Legge e società nella Repubblica romana*, Vol. 1, Napoli 1981, pp. 409-411; F. Serrao, *Classi, partiti e leggi nella Repubblica Romana*, Pisa 1974, p. 36. The priestly colleges, in particular that of the pontiffs, were the only ones to be able to know and interpret the *ius civile* essentially founded on the *mores*. A. Magdelain, *Le ius archaïque*, (in:) A. Magdelain, "Jus, Imperium, Auctoritas. Études de droit romain", Rome 1990, No. 133, pp. 341-383; M. Talamanca, *Lineamenti di storia del diritto romano*, Milano 1979; M. Talamanca, *Istituzioni di diritto romano*, Milano 1990.

¹⁰ M.A. Levi, *Patres, plebs e populus nella Roma arcaica*, "Atti dell'Accademia Nazionale dei Lincei Classe di Scienze morali, storiche e filologiche" 1996, p. 447; R. Develin, *Mos maiorum mutatus. Tradition and the Basis of Change in the Roman Constitution, 287-201 B.C.*, Ann Arbor 1983, p. 4; F. Serrao, *Classi, partiti e leggi nella repubblica romana*, Pisa 1974, p. 36; P. De Francisci, *Primordia Civitatis*, Vatican City 1959, p. 150.

¹¹ P.A. Brunt, *Conflicts sociaux en République romaine*, M. Legras Wechsler (transl.), Paris 1979, p. 75; M. Bretone, *Storia del diritto romano*, Roma-Bari 2008, pp. 68-106. According to Eder, the laws of the XII Tables can be conceived as a "uniform code of conduct" of the patricians.

The pontiffs made their declarations through the *responsa*. The latter were formulated in an oracular way because they were considered as revelations of secret truths known only by the pontiffs. The *patres* turned to the pontiffs to know what verbal and gestural conduct they were to follow. Such rules of conduct concerned relations between family groups¹².

The hegemony of the Pontifical College is challenged by the members of the patrician-plebeian *nobilitas* who devote themselves to the study of law. The *iurisprudentia*, secular juridical doctrine, is affirmed in the third century BC¹³. However, even when the secular *iurisprudentia* is affirmed, the pontiffs remain the only ones to know the judicial formulas¹⁴.

The power of the ruling class is therefore based on the knowledge and interpretation of tradition, a source of oral law extremely flexible. The oral nature of tradition and the fact that the knowledge and interpretation of it are exclusive prerogatives of the ruling class, allow the ruling class to easily manipulate it to serve its political interests of the moment¹⁵.

The written fixation of the law based on custom responds to the need of the ruling class to prevent the uncontrolled development of customary law. W. Eder, *The political significance of the Codification of Law. Archaic societies: an Unconventional Hypothesis*, (in:) K.A. Raaflaub (ed.), *Social Struggles in Archaic Rome. New Perspectives on the Conflict of the Orders*, Berkeley 1986, pp. 263-300. About the XII Tables I refer to F. D'Ippolito, *Le XII Tavole: il testo e la politica*, (in:) A. Momigliano, A. Schiavone (eds.), "Storia di Roma", 1, Torino 1988, pp. 397-413; M. Humbert, *Les XII Tables, une codification?*, "Droits" 1988, issue 27, pp. 87-111; M. Humbert, *La codificazione decemvirale, tentativo d'interpretazione*, (in:) M. Humbert (ed.), *Le dodici tavole; dai Decemviri agli Umanisti*, Pavia 2005, pp. 3-50; F. D'Ippolito, *Questioni decemvirali*, Napoli 1983.

¹² The *responsa* pronounced by the pontiffs did not establish general rules, but were valid for the specific case. Before making a decision, the pontiffs confronted the case submitted to their attention with the opinions previously formulated. V. Arangio Ruiz, *Storia del diritto romano*, Napoli 1942, pp. 111-113.

¹³ It enrolls in the process of secularization of the right that occurs at this time. V. Arangio Ruiz, *Storia...*, pp. 122-133; F. D'Ippolito, *Giuristi e sapienti in Roma Arcaica*, Bari-Roma 1996; M. Bretone, *Tecniche e ideologie dei giuristi romani*, Napoli 1982; W. Kunkel, *Die römischen Juristen. Herkunft und soziale Stellung der römischen Juristen. Nachdruck der Ausgabe von 1967*, Köln-Weimar 2001, p. 48.

¹⁴ P. De Francisci, *Primordia...*, p. 150. Only then will the monopoly of the pontiffs be questioned and full autonomy be granted to the jurist.

¹⁵ A. Iacoboni, *Il significato politico del mos maiorum in Cicerone*. Proceedings of the XIII International Meeting of the *Collegium Politicum* "Rethinking Cicero as a Political Philosopher", Bologna University, "Etica e Politica", University of Trieste 2014, No. 2, pp. 284-306, <https://www.openstarts.units.it/bitstream/10077/10710/1/IACOBONI.pdf> (visited May 11, 2019); A. Iacoboni, *Mos maiorum, aequitas, aequabilitas; principes à la base du pouvoir des optimates*, (in:) P.A. Deproost (ed.), "Extra-vagances. Écarts et normes dans les textes greco-latins", Louvain-la-Neuve, May 16-17, 2013, Paris-Montréal 2014; A. Iacoboni, *La crise de la res publica romaine et la reformulation de la notion de mos maiorum chez Cicéron*, Proceedings of the Conference "Exemples et modèles de l'ED" 1, Mondes Anciens et Médiévaux, Université de Paris IV Sorbonne,

1. 1. THE MOS AND THE *CONSUETUDO* AS A SOURCE OF LAW IN CICERO

The *mos* and the *aequitas* are two sources of unwritten law that fill gaps in written law based on *lex*. In *Partitiones oratoriae*, Cicero distinguishes the human right from the divine one. Later, Cicero cites *mos maiorum* and *aequitas* as expressions of human law as opposed to divine law¹⁶.

The *aequitas* is assimilated to the *ius civile*; it is set up to give the citizens what is theirs, *ad res suas obtinendas*. In this sense, the *aequitas* has a regulatory function of society and has an indirect conservative sense, allowing the best citizens to maintain their prerogative¹⁷. Later, the author evokes the distinction between laws that rest on a text and principles that are *sine litteris*. The *mos maiorum* and the *ius gentium* are the expressions of the precepts *sine litteris*¹⁸.

Atque haec communia sunt naturae atque legis: sed propria legis, et ea quae scripta sunt et ea, quae sine litteris aut gentium iure, aut maiorum more, retinentur (...) quae autem scripta non sunt, ea aut consuetudine, aut conventis hominum, et quasi consensu obtinentur. Atque etiam hoc in primis ut nostros mores legesque tueamur, quodam modo naturali iure praescriptum est¹⁹.

“Camenuiae” 2015, No. 13, pp. 1-22, <http://lettres.sorbonne-universite.fr/IMG/pdf/IACOBONIbat.pdf> (visited May 11, 2019); A. Iacoboni, *Le sens de la libertas au sein du mos maiorum chez Cicéro*, Proceedings of the International Conference “La question du sens”, Université Paris-Sorbonne, E. A. 4081 Rome et ses Renaissances, June 28-29, 2012, “Camenuiae”, 2014, No. 11, pp. 1-16, <http://lettres.sorbonne-universite.fr/IMG/pdf/05IacoboniBatDEF.pdf> (visited May 11, 2019).

¹⁶ Cic., *Part.*, 130.

¹⁷ Cic., *Top.*, 2, 9. *Ius civile est aequitas constituta eis qui eiusdem civitatis sunt, ad res suas obtinendas; eius autem aequitatis utilis est cognitio; utilis ergo iuris civilis scientia*. “The civil law is a system of equity established between members of the same state for the purpose of securing to each his property rights; the knowledge of this system of equity is useful; therefore the science of civil law is useful”. G. Ciulei, *L'équité chez Cicéron*, Amsterdam 1972, p. 9; A. Watson, *Law Making in the Late Roman Republic*, Oxford 1974, p. 25; A. Biscardi, *Riflessioni minime sul concetto di aequitas*, (in:) A. Guassari, G. Gualandi, U. Gualazzini (eds.), *Studi in memoria di Guido Donatuti*, Milano 1973, p. 139.

¹⁸ Cic., *Part.*, 130. Cicero illustrates two forms of *aequitas*. *Aequitatis autem vis est duplex, cuius altera directae veri et iusti, et, ut dicitur, aequi et boni ratione defenditur; altera ad vicissitudinem referendae gratiae pertinet, quod in beneficio gratia, in iniura ultio nominatur*. “Equity again has a twofold meaning, one of which rests on the straightforward principle of truth and justice, of the »fair and good«, as the phrase is, while the other concerns the interchange of repayment, which in the case of a kindness is called gratitude and in the case of an injury retaliation”.

¹⁹ Cic., *Part.*, 130. “These things belong in common to nature and to law; but peculiar to law are written rules of conduct and also the unwritten rules preserved by the law of nations or by ancestral custom”.

The unwritten law, *sine litteris*, consists of the *ius gentium* and the *mos maiorum*. Collective *consensus* and *vetustas* legitimate the custom. Cicero makes a subtle distinction between *mos maiorum* and the *consuetudo*. The *mos maiorum* is an expression of the unwritten right, *sine lege*. It is through the *consuetudo*, the *conventa hominum* and the *consensus* that the *mos maiorum* is formed as a customary law and imposes itself more extensively in civil society. The repeated application over time of customary principles and legitimized by collective *consensus* constitute tradition. The *mos maiorum* has effective legal value like the *lex*, since the observance of the laws and the *mores* is prescribed by the natural law. Cicero connects *aequitas* and *mos* also in *Topica*. The author evokes a bipartite and tripartite view of *aequitas*²⁰. Interestingly, according to the Cicero's tripartite conception of *aequitas*, there is a form of *aequitas* that is founded on *mos*, since it is *moris vetustate firmata*²¹. There is also an *aequitas legitima*, made up by the laws, and another called *conveniens*, based on the compacts²².

Both in the *Partitiones oratoriae* and in *Topica*, the value of *mos* as a source of effective law is affirmed by Cicero, since the *sine litteris* principles made up by *mos maiorum* have a dignity equal to right based on laws. According to Cicero, both *aequitas* and *mos* are sources of law at the same level as *lex*. In addition, there is an *aequitas* that is not only related to *mos*, but is founded on it.

In *Topica*, Cicero further deepens his reflection on *aequitas*. The author states that there are three forms of *aequitas*. The *aequitas* that concerns the gods is called *pietas*, the *aequitas* that affects the *manes* is *sanctitas*, and finally the *aequitas* among men is assimilated by Cicero to justice²³. The assimilation of *aequitas* to justice is also present in Cicero's *De Officiis*²⁴. *Aequitas* provides for the attribution to every citizen of what he deserves, the *ius cuique tribuere*. This principle justifies the greater power of the citizens who make up the ruling class.

²⁰ As regards the conception of bipartite *aequitas* there are *loci aequitatis* founded on nature and on the institutions.

²¹ Cic., *Top.*, 90. *Cum autem de aequo et iniquo disseritur, aequitatis loci conligentur. (...) Institutio autem aequitatis tripartita est; una pars legitima est, altera conveniens, tertia moris vetustate firmata.* "When, however, right and wrong are being discussed, the topics of equity will be brought together (...) the institutions affecting equity are threefold: the first has to do with law, the second with compacts, the third rests on long continued custom".

²² *Ibidem*.

²³ *Ibidem*. *Atque etiam aequitas tripartita dicitur esse, una ad superos deos, altera ad manes, tertia ad homines pertinere. Prima pietas, secunda sanctitas, tertia iustitia atque aequitatis nominatur.* "Equity is also said to have three parts: one pertains to the gods in heaven, the second to the spirits of the departed, the third to men. The first is called piety, the second respect, the third justice or equity".

²⁴ Cic., *Off.*, 1, 64. *Difficile autem est, cum praestare omnium concupieris, servare aequitatem quae iustitiae maxime propria.* In this passage, Cicero refers to men who impose themselves by resorting to violence, thus violating justice, assimilated to *aequitas*.

The relations between the *consuetudo*, the *mos* and the *aequitas* are evoked by Cicero in the *De Inventione* and in the *Partitiones oratoriae* and also by the author of *Rhetorica ad Herennium*²⁵.

In both *Partitiones Oratoriae* and *Topica*, Cicero considers *aequitas* as the foundation of human right in opposition to divine right, the latter represented by religion²⁶.

The concept of *mos* is often associated with that of *consuetudo*. However, *mos* denotes the customary law legitimated by *vetustas* and the collective *consensus* of a community²⁷.

Both the author of *Rhetorica ad Herennium* and Cicero consider the custom as a source of law *sine lege* but that is *legitimum*, a term that denotes the fact that it has equal value to the law. The *consuetudo*, denoting customary law, is legitimized by its repeated application over time.

The author of *Rhetorica ad Herennium* evokes the constituent elements of the *ius*²⁸.

Constat igitur ex his partibus: natura, lege, consuetudine, iudicato, aequo et bono, pacto. Natura ius est, quod cognationis aut pietatis causa observatur (...) lege ius est id, quod populi natura iussu sanctum est (...) consuetudine ius est id, quod sine lege aequae ac si legitimum sit, usitatum est²⁹.

²⁵ *Rhetorica ad Herennium* was written between 86 and 82 BC, a time when a lively debate between eloquence and politics was present in Rome. In this period, Cicero wrote *De Inventione*. L. Bove, *La consuetudine in diritto romano. Dalla Repubblica all'età dei Severi*, 1, Napoli 1971, p. 25. Bove quotes A. Michel, *Rhétorique et philosophie chez Cicéron. Essai sur les fondements philosophiques de l'art de persuader*, Paris 1960, p. 72; F. Adorno, *La filosofia antica*, Milano 2, 1992, p. 15; B. Riposati, *Problemi di retorica antica*, (in:) E. Bignoni (ed.), *Introduzione alla Filologia Classica*, Milano 1951, pp. 657-787.

²⁶ Cic., *Part. Or.*, 129. *Quod dividitur in duas primas partes, naturam atque legem, et utriusque generis vis in divinum et humanum ius est distributa, quorum aequitatis est unum, alterum religionis.*

²⁷ Serv., *In Aen.*, 7, 601, reports Varro's conception according to which the *mos*, *inveteratus*, and thus legitimated by the *vetustas* and by the collective *consensus*, becomes *consuetudo*. *Varro de moribus morem dicit esse in iudicium animi, quem sequi debeat consuetudo*. Varro's conception is also reported by Macrobius, *Sat.*, 3, 8, 9 e 12. *Mos ergo praecessit et cultus moris secutus est, quod est consuetudo*. M. Bettini, *Le orecchie di Hermes...*, p. 273.

²⁸ L. Bove, *La consuetudine...*, p. 24-25. Bove quotes M. Schanz, C. Hosius, G. Krüger, *Geschichte der römischen Literatur bis zum Gesetzgebungswerk der kaisers Justinian 1. Die römische Literatur in der Zeit der Republic*, München 1979, p. 50; G. Calboli, *Cornificiana 2. L'autore e la tendenza politica della Rhetorica ad Herennium*, estr. Atti Acc. Bologna, Memorie 51-52, 1963-1964, Bologna 1965, pp. 1-114.

²⁹ *Rhet. Her.*, 2, 13, 19. *Rhétorique à Herennius*, Paris 1989, p. 49. "The constituent departments, then, are the following: nature, statute, custom, previous judgements, equity, and agreement. To the law of nature belong the duties observed because of kinship or family loyalty. In accordance with this kind of law parents are cherished by their children, and children by their parents. Statute law is that kind of law which is sanctioned by the will of the people; for example,

The natural right is the *φύσις*³⁰. *This form of law is the ius gentium*. To the latter opposes the *ius civile* concerning the city³¹. The right based on the custom is instead the *Συνήθεια*³². *The aequum et bonum* represents equity.

The *consuetudo* is considered by the author of *Rhetorica ad Herennium* as a source of law parallel to nature, the *lex*, the *iudicatum*, the *aequum et bonum* and the *pactum*. The *lex* is what is *populi iussu sanctum*. The *consuetudo* is instead a source of right that is not based on the law. The customary right is *usitatum*, founded on the practice, but it is *legitimum*, and that is, it has a legal value equal to the *lex*.

As the author of *Rhetorica ad Herennium*, Cicero considers the custom as a source of law in the *De inventione*.

Utriusque aut etiam omnibus (...) ius ex quibus res constet, considerandum est. Initium ergo ab natura ductum videtur; quaedam autem ex utilitatis ratione aut perspicua nobis aut obscura in consuetudinem venisse; post autem adprobata quaedam a consuetudine aut vero utilia visa legibus esse firmata³³.

Cicero says that the right comes from nature. Later, the author evokes two forms of custom. There are principles that are introduced into the custom thanks to a criterion of *utilitas* for more and less clear reasons. The precepts legitimated by *consuetudo* or actually recognized as corresponding to the criterion of *utilitas* are instead enshrined in the *consuetudo*. In this passage the *consuetudo* denotes the customary right opposed to the *lex*.

Consuetudine autem ius esse putatur id, quod voluntate omnium sine lege vetustas comprobarit. In ea autem quaedam sunt iura ipsa iam certa propter vetustatem³⁴.

The customary law is *sine lege* and is based on *voluntas omnium* and *vetustas*. Some customary principles are *certa*, they have full legal value, thanks to their *vetustas*. The *consensus* of the community and the *vetustas* legitimate the *consuetudo*. The *consuetudo* is not imposed by laws, but is based on the *vetustas* and the collective *consensus*. The latter constitute principles of legitimization of the

you are to appear before the court when summoned to do so. Legal custom is that which, in the absence of any statute, is by usage endowed with the force of statute law; for example, the money you have deposited with a banker you may rightly seek from his partner”.

³⁰ *Rhétorique...*, note n. 59 p. 49.

³¹ M. Ducos, *Les Romains et la loi*, Paris 1984, p. 243. The *lege ius* is the νόμος.

³² *Rhétorique...*, note n. 62 p. 50.

³³ Cic., *Inv.*, 2, 22, 65. “Both parties (or all parties...) must consider the sources from which law arises. Its origin seems to be in nature. Certain principles either obvious or obscure to us have by reason of advantage passed into custom; afterward certain principles approved by custom or deemed to be really advantageous have been confirmed by statute”.

³⁴ Cic., *Inv.*, 2, 22, 67. “Customary law is thought to be that which lapse of time has approved by the common consent of all without the sanction of statute”.

custom, allowing customary principles to become customary law having dignity equal to the law.

Cicero further deepens his analysis of the legal value of customary law.

Consuetudine ius est, quod aut leviter a natura tractum aluit et maius fecit usus, ut religionem; aut si quid eorum, quae ante diximus, ab natura profectum maius factum propter consuetudinem videmus, aut quod in morem vetustas vulgi adprobatione perduxit; quod genus est pactum, par, iudicatum. (...) Lege ius est, quod in eo scripto, quod populi expositum est, ut observet, continetur³⁵.

There is a form of law based on the custom that comes from nature but develops thanks to the *usus*, a term that denotes the continuous application of customary principles. Cicero also mentions a form of *consuetudo* that is constituted by precepts that become *mos* thanks to *adprobatio vulgi* and *vetustas*. As the author of *Rhetorica ad Herennium*, Cicero considers the law as a written principle regulator of civic life, and an expression of it³⁶. The concept of *par* denotes the concept of fairness and is the equivalent of the *aequum et bonum* present in the passage we mentioned of *Rhetorica ad Herennium*³⁷. Cicero highlights the close correlation between fairness and custom. Fairness can be considered an expression of customary law³⁸.

In *De Inventione*, Cicero distinguishes the *consuetudo* and the *mos*. The *mos* denotes customary law, the custom that has been legitimated by *vetustas* and *adprobatio vulgi*. *Par*, which denotes equity, is a constitutive element of customary law. Cicero underlines the link between equity and *mos*. The *lex* and the custom are two categories of positive law legitimated by the *ratio utilitatis*³⁹.

Both *aequitas* and *mos* have legal value equal to the law. The *vetustas* and the *consensus* not of all citizenship, but of the ruling class, are the basis of legitimization of the tradition.

³⁵ *Ibidem*, 54, 162. “Customary law is either a principle that is derived only in a slight degree from nature and has been fed and strengthened by usage – religion, for example – or any of the laws that we have mentioned before which we see proceed from nature but which have been strengthened by custom, or any principle which lapse of time and public approval have made the habit or usage of the community. Among these are covenants, equity and decisions (...). Statute law is what is contained in a written document which is published for the people to observe”.

³⁶ *Rhet. Her.*, 2, 13, 19. *Lege ius est id, quod populi natura iussu sanctum est.*

³⁷ *Ibidem*.

³⁸ *Cic., Inv.*, 2, 22, 67. *Quaedam autem genera iuris iam certa consuetudine facta sunt, quod genus pactum, par, iudicatum.*

³⁹ L. Bove, *La consuetudine...*, p. 135.

2. THE EVOLUTION OF TRADITION AND LAW IN THE LATE-REPUBLICAN PERIOD

The law is the foundation of the ruling class power, first made up by the patricians and then by the patrician-plebeian *nobilitas*. The deep social and political changes affecting Rome from the 3rd century onwards make it necessary to renew the right. Respect for the model of previous deliberations and the need to renew the ancient legal tradition are the two opposing tendencies that guide the *prudentes* in the exercise of their functions.

From the 8th to the 4th century BC, in the period called archaic of the law, the term *ius* denoted the *mores maiorum*. These were the basis of the life of the *civitas* and governed the relations between the *gentes* and the patrician *familiae*⁴⁰.

Between the 5th and 4th centuries BC the *interpretatio pontificum* was affirmed. The *ius legitimum vetus* is complementary to the *ius quiritium*. This form of law imposes itself upon the struggles for political equality carried out by the wealthy plebeians⁴¹.

The pre-classical period of law is that of *res publica*. This period goes from the mid-4th century to the end of the 1st century BC. The *ius civile vetus* characterizes the right of the pre-classical period of the law. This *ius* is elaborated by the «secular» jurisprudence, constituted by *nobilitas*. The *ius civile vetus* is founded on the *mores maiorum* of the *ius quiritium*, on the *leges* of the *ius legitimum vetus*, and on the *interpretatio prudentium*⁴². The *prudentes* lead to every situation back to the ancient *mores*. In exercising their jurisprudential functions, the *prudentes* take as a model the deliberations issued previously, while at the same time trying to innovate the right to respond to the new needs of their time. In formulating *responsa*, lay lawyers follow the principles of *utilitas*, *ratio iuris* and *aequitas*. The memory of their *responsa* is passed down to the noble families⁴³.

⁴⁰ For a distinction in periods of Roman law, I refer to A. Guarino, *Diritto privato romano*, Napoli 2001, pp. 87-89; V. Arangio Ruiz, *Storia...*, p. 4; V. Arangio Ruiz, *Istituzioni di diritto romano*, Napoli 1942, p. 2; P. Bonfante, G. Crifò, *Istituzioni di diritto romano*, Milano 1987, pp. 9-10; M. Kaser, *Das Römisches Privatrecht*, München 1971, p. 129.

⁴¹ *Ibidem*, p. 91. A. Guarino, *La rivoluzione della plebe*, Napoli 1975, p. 13.

⁴² A. Schiavone, *Ius. L'invenzione del diritto in Occidente*, Torino 2005, p. 5. The “secular” *iurisprudencia* is imposed in the second half of the 4th century BC. In fact, in this period a clearer distinction between religion and rights appears. A. Schiavone, *Giuristi e nobili nella Roma repubblicana. Il secolo della rivoluzione scientifica nel pensiero giuridico antico*, Rome-Bari 1987; F. Serrao, *Ius e lex nella dialettica costituzionale della prima repubblica. Nuove riflessioni su un vecchio problema*, (in:) F. Gallo, S. Romano (eds.), *Nozione, formazione e interpretazione del diritto dall'età Romana alle esperienze moderne. Ricerche dedicate al Professore F. Gallo*, Napoli 1997, pp. 279-317; A. Schiavone, *Linee del pensiero giuridico romano*, Torino 1994.

⁴³ G. May, *Éléments de droit romain*, Paris 1913, p. 32; A. Schiavone, *La nascita della giurisprudenza. Cultura aristocratica e pensiero giuridico nella Roma tardo-repubblicana*, Roma-Bari

In the 3rd century BC the society underwent profound changes. The *ius civile vetus* is no longer appropriate in a totally changed social context. The law is the result of the activity of the *praetor peregrinus*, the *praetor urbanus* and other magistrates responsible for the jurisdiction. The new systems of right appearing at this time are the *ius legitimum novum* or *ius publicum*, the *ius civile novum* or *ius gentium* and, finally, the *ius praetorium* or *honorarium*⁴⁴. The *ius civile novum* is established in 242 BC, the date on which the *praetor peregrinus* is instituted. This right is elaborated to meet new social needs that derive from contact between Rome and foreign peoples⁴⁵. The *ius honorarium* appears in the 2nd century BC. The *praetor urbanus* applies the method followed by the *praetor peregrini* to the processes among the Roman citizens⁴⁶. In the exercise of its jurisdictional functions, the *praetor* follows the criterion of *aequitas*⁴⁷.

1976, p. 105; F. D'Ippolito, *I giuristi e la città: ricerche sulla giurisprudenza romana della Repubblica*, Napoli 1978. The jurist's activity consists in *respondere, cavere* and *agere*. Cic., *orat.*, 1, 42, 191.

⁴⁴ E. Betti, *La creazione del diritto nella iurisdictio del pretore romano*, extracted from B. Betti (ed.), *Studi di diritto processuale in onore di Giuseppe Chiovenda nel venticinquesimo anno del suo insegnamento*, Padova 1927, p. 28. Regarding the value of the custom in Roman law, I refer to L. Vacca, *Contributo al metodo casistico nel diritto romano*, Milano 1982, pp. 50-56; J.-P. Coriat, *Le prince législateur. La technique législative des Sévères et les méthodes de création du droit impérial à la fin du principat*, Rome 1997; U. Vincenti, *Res iudicatae e diritto giurisprudenziale romano*, (in:) *Nozione, formazione e interpretazione del diritto. Dall'età romana fino alle esperienze moderne*. Ricerche dedicate al Professore Filippo Gallo, Napoli 1997, pp. 567-582.

⁴⁵ The *praetor peregrinus* has the task of *ius dicere* in the proceedings between citizens and *peregrini* or between the latter. *Legis actiones* cannot be applied to settle conflicts between *peregrini*. In the exercise of its jurisdictional functions, the *praetor* follows the precedent. *Ibidem*; F. Gallo, *Interpretazione...*, p. 24. The criterion implemented by a *praetor* are a model to which the next *praetor* is inspired by F. Gallo, *L'officium del pretore nella produzione e applicazione del diritto. Corso di diritto romano*, Torino 1997, p. 30. Pomponius mentions the institution of the *praetor peregrinus*. Pomp., 1, *Sing. Ench.*, D., 1, 2, 2, 28. A. Guarino A., *Diritto Privato...*, p. 99. This *ius gentium* is valid for both Roman citizens and foreigners. F. De Martino, *La giurisdizione nel diritto romano*, Milano 1937, p. 63.

⁴⁶ The *ius civile* is no longer suitable to meet the needs of the time. F. Gallo *L'officium del pretore...*, p. 17.

⁴⁷ Gaius, *Inst.*, 4, 126-129. F. Gallo, *L'officium del pretore...*, pp. 17-18. In the mid-2nd century BC, the *lex Aebutia* states that citizens may not resort to the ancient *legis actio* procedure, considered by the Romans too formalistic. The *Lex Iulia iudiciorum privatorum* of 17th BC repeals the *legis actiones* and makes the process mandatory. A new legal system is founded, the *ius praetorium*, also called *ius honorarium*. Gallo quotes Pap., D., 1, 1, 7, 1. *Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam, quod et honorarium dicitur ad honorem praetorum sic nominatum*. When the *praetor* is instituted, the only existing law was the civil law founded on the *leges* and *mores*. It is not correct to say that the *praetor* applies the *ius honorarium* when he cannot resort to *ius civile* because the

Tradition, even in the juridical field, undergoes important evolutions starting from the 3rd century before Christ following the social and political changes that cross Rome. The conception of *mos maiorum* knows a deep crisis in the late-Republican age. A «historicist» tendency develops. It is based on the awareness of the value of memory and history. Antiquarian research is the result of this current. One of the objectives pursued by antiquarian research is the definition of tradition. This work of systematization is carried out in various fields, in the legends of foundation, in the religious uses, and in the civic traditions⁴⁸.

The multiplication of the laws that occurs especially in the 2nd century BC expresses the need of the Romans to define the tradition. This phenomenon becomes even more accentuated in the 1st century BC and shows the difficulty for the Romans to follow the tradition. From the 2nd century before Christ onwards there is the need to define more institutions. This tendency gives rise to a literature of constitutional law that aims precisely to fill the gaps of the unwritten right⁴⁹. The *mos maiorum* is the foundation of the power of the ruling class, first constituted by the patricians and, then, by the patrician-plebeian *nobilitas*⁵⁰. This political force appears as a result of the political achievements obtained by the wealthy plebeians during the 4th century BC⁵¹. In the late-Republican period the *mos maiorum* is subjected to a critical revision process, as it is no longer adapted to the needs of society⁵².

A *res publica* of which only the name of state remains has been replaced by the glorious Rome of the era of the *maiores*. Moreover, the citizens who make

former appears in a period later than the second. F. Gallo, *L'officium del pretore...*, p. 36. E. Betti, *La creazione...*, p. 68.

⁴⁸ C. Moatti, *La raison de Rome...*, pp. 34-41, 109-111. M. Zecchini, *Cesare e il mos maiorum*, Stuttgart 2001, p. 36.

⁴⁹ *Ibidem*, pp. 112-113.

⁵⁰ According to Mommsen's definition of *nobilitas*, it consists of the descendants of the patricians who did the *transitio ad plebem* and of the patricians who have held judiciary such as the *dictator*, the *magister equitum*, the *ensor*, the *consul*, the *praetor* and the *aedilis curulis*. They have the *ius imaginum*. The other citizens are called *novi*. P.A. Brunt, *Nobilitas and Novitas*, "Journal of Roman Studies" 1982, No. 72, pp. 1-17. According to Gelzer, the *nobilitas* is made up of the men of the consular families, at the time of Cicero.

⁵¹ W. Blösel, *Die Geschichte des Begriffes mos maiorum von den Anfängen bis zu Cicero*, (in:) B. Linke, M. Stemmler, *Mos maiorum, Untersuchungen zu den Formen der Identitätsstiftung und Stabilisierung in der römischen Republik*, Stuttgart 2000, pp. 25-97. The claim of political equality pursued by the rich Plebeians culminates in 366 BC. In this period the *Liciniae-Sextiae* laws are drafted which allow the plebeians to enter the consulate. T. Mommsen, *Histoire Romaine*. Books 1-4. *Des commencements de Rome jusqu'à la guerre civile*, C. A. Alexandre (transl.), Paris 1995, pp. 179-180; L. Homo, *Les institutions politiques romaines de la cité à l'État*, Paris 1970, p. 83; G. Bloch, J. Carcopino, *Histoire ancienne. Histoire Romaine. La république romaine de 133 à 44 avant J.-C. Des Gracques à Sulla*, 2, Paris 1940, p. 26.

⁵² *Cic., rep.*, 5, 1 and 2.

up the ruling class are not up to the *maiores*, able to defend the tradition. The Romans of the end of the Republic appeal to the tradition in the hope of returning to the political stability of the Rome of the *maiores*. However, this political project cannot be realised because of the extreme political disunity of the ruling class and the marked tendency towards individualism in the late-Republican period.

2. 1. THE CRITICAL REVISION OF THE *MOS MAIORUM* IN CICERO

The Ciceronian conception of *mos maiorum* evolves between *De Oratore* and *De Republica*. In *De Oratore*, Cicero exalts the *prudentia maiorum*, but also has a critical conception of the prestige of the *maiores*. In *De Republica*, the author advocates the renewal of the *lineamenta rei publicae*. In *De Legibus*, Cicero's notion of *mos maiorum* becomes more complex⁵³.

Cicero considers it necessary to renew the ruling class of *optimates* on a moral basis⁵⁴. In *Pro Sestio*, the author cites the *mos maiorum* as one of the foundations (*fundamenta, membra*) of the ideal of *otium cum dignitate*, which must be pursued by *optimates*. Cicero evokes religious (*religiones et auspicia*), legislative (*potestates magistratum, senatus auctoritas*), and judiciary power (*leges, iudicia, iuris dictio*)⁵⁵. The *mos maiorum* is a foundation of legitimation of the power of the *optimates*. However, in the *Pro Sestio*, Cicero goes beyond the distinction in classes between citizens and appeals to the *optimi cives*, a definition that has a moral meaning. The *nobilitas* is founded on the *maiorum imitatio*. The *dignitas* is not inherited from the *maiores* for blood bond, but it is gained by the descendants for their individual merits, *ingenio ac virtute*⁵⁶. In the period in which Cicero wrote *Pro Sestio*, the 63 AC, the author had replaced the political ideal of *concordia ordinum* with the broader conception of *consensus omnium bonorum*.

⁵³ E. Lepore, *Il princeps ciceroniano e gli ideali politici della tarda repubblica*, Napoli 1954, p. 218; Cic., *Orat.*, 1, 197; Cic., *rep.*, 5, 2.

⁵⁴ E. Lepore, *Il princeps ciceroniano...*, pp. 227-229.

⁵⁵ Cic., *Sest.*, 98. *Huius autem otiosae dignitatis haec fundamenta sunt, haec membra, quae tuenda principibus et vel capitis periculo defendenda sunt: religiones, auspicia, potestates magistratum, senatus auctoritas, leges, mos maiorum, iudicia, iuris dictio, fides, provinciae, socii, imperi laus, res militaris, aerarium.* "Now this »peace with dignity« has the following foundations, the following elements, which our leaders ought to protect and defend even at the risk of life itself: religious observances, the auspices, the powers of the magistrates, the authority of the Senate, the laws, ancestral custom, criminal and civil jurisdiction, credit, our provinces, our allies, the renown of our sovereignty, the army, the treasury".

⁵⁶ E. Lepore, *Il princeps ciceroniano...*, p. 155; Cic., *leg.*, 2, 40.

However, both of these political projects fail because the ruling class is not united politically. On the other hand, Cicero does not consider tradition as a «model», as it is extremely variable. In his *De Republica*, the author underlines the incessant changes in custom not only between different peoples but also in Rome itself.

Genera si velim iuris institutorum morum consuetudinumque describere, non modo in tot gentibus varia, sed in una urbe, vel in hac ipsa, milliens mutata demonstrarem⁵⁷.

Cicero evokes the link between moral decadence and political crisis of society⁵⁸.

Mos has an identitarian value, because the political stability of Rome comes from the presence of strong moral basis. Cicero praises the choice of Romulus to found Rome on the banks of the Tiber. In doing so, Rome avoided the typical *vitia* of the cities of the coast by enjoying the advantages deriving from the proximity of the Tiber. Exchanges with foreign peoples affecting the coastal cities cause the introduction of new customs and innovations also in the linguistic field.

Multa invitamenta pernicioso ad luxuriam involve corruption - corruptio ac mutatio morum.

Est autem maritimis urbibus etiam quaedam corruptela ac demutatio morum; admiscuntur enim novis sermonibus ac disciplinis et inportantur non merces solum adventiciae, sed etiam mores, ut nihil possit in patriis institutis manere integrum⁵⁹.

From a Roman point of view, Cicero uses a metaphor, relating the sea in which the customs and institutions of the ancestors float to the moral and political decadence of the Greek coastal cities. As in the passage of *De Republica* previ-

⁵⁷ Cic., *rep.*, 3, 17. "But if I wished to describe the conceptions of justice, and the principles, customs, and habits which have existed, I could show you, not merely differences in all the different nations, but that there have been a thousand changes in a single city, even in our own, in regard to these things". Philus recalls that practices that are considered normal in Rome are considered negatively in other peoples. In the Roman and Greek temples the representations of the gods were permitted, while these are considered sacrilegious by the Persians. Xerxes makes the temples of Athens fire for this reason. Alexander legitimises the war against the Persians on the pretext of avenging this act. The difference in custom is cited here as a pretext that legitimises such a war.

⁵⁸ Cic., *rep.*, 2, 8. *Multa etiam ad luxuriam invitamenta pernicioso civitatibus sudpeditabantur mari, quae vel capiuntur vel inportantur; atque habet etiam amoenitas ipsa vel sumptuosas vel desidiosas inlecebras multas cupiditatum. (...) Quid dicam insulas Graeciae, quae fluctibus cinctae natant paene ipsae simul cum civitatum institutis et moribus?* "Many things too that cause ruin to states as being incitements to luxury are supplied by the sea, entering either by capture or import. And even the mere delightfulness of such a site brings in its train many an allurement to pleasure through either extravagance or indolence. (...) Why should I speak of the islands of Greece? For surrounded as they are by the billows, not only they themselves but also the customs and institutions of their cities can be said to be afloat".

⁵⁹ *Ibidem*, 7. "Maritime cities also suffer a certain corruption and degeneration of morals; for they receive a mixture of strange languages and customs, and import foreign ways as well as foreign merchandise, so that none of their ancestral institutions can possibly remain unchanged".

ously quoted, the *mores* and the *patrum instituta* are mentioned as foundations of Rome.

Cicero considers it necessary to implement a selection within *mos maiorum*. In *De Legibus*, Cicero reports the episode of the Athenians who consult the oracle of Apollo Pythius. The Athenians ask what religious practices to follow. The oracle indicates those of the ancestors. Cicero evokes the law of Zaleuchus, according to which the gods must be honored according to the ancestral law, because the practices of the ancestors are the best. However, *antiquum* is not considered by Cicero as *optimum* in itself. It is the *optimum* that is the measure of the *antiquissimum et deo proximum*. According to the author, the *mos maiorum* is not a unique model, but citizens have to choose the *mos maiorum optimus*, that is that *antiquissimus et deo proximus*⁶⁰.

De quo cum consulerent Athenienses Apollinem Pythium, quas potissimum religiones teneret, oraculum editum est “eas quae essent in more maiorum”. Quo, cum iterum venissent maiorumque morem dixissent saepe esse mutatum, quaesissentque quem morem potissimum sequerentur e variis, respondit “optimum”. Et profecto ita est ut id habendum sit antiquissimum et deo proximum, quod sit optimum⁶¹.

Cicero also states that neither the *mos maiorum* nor the *maiores* constitute a model. The author warns citizens about the necessity of not imitating the *vitia* of the *maiores*. Cicero pushes beyond his critical conception of tradition. According to the author, the imitation of the *maiores* by the descendants may not occur because of a difference of individual nature. This critical view is expressed in *De Officiis*. The author cites the example of the son of Scipio Africanus, who is not able to imitate the model of his father because of his *infirmitas valetudinis*⁶².

Cicero appeals to the tradition to return to the Rome of *maiores*. In *De Republica*, the author mentions *mos maiorum* as the foundation of Rome. Cicero evokes the verse of Ennius. *Moribus antiquis res stat Romana virisque*⁶³. According to Ennius’s definition, the political stability of Ancient Rome was founded on the union of illustrious men and noble customs.

Cicero states that the Rome of the *maiores* was *morata*, in the sense that it was founded on tradition. This was added to the fact that distinguished citizens were

⁶⁰ Cic., *leg.*, 2, 40.

⁶¹ *Ibidem*. “For when the Athenians consulted the Pythian Apollo on this point, as to what religious rites they should by preference retain, the oracle answered: »Those which were among the customs of your ancestors«. And when they came a second time and, saying that their ancestors’ customs had undergone many changes, asked which custom they should follow by preference out of the many, the answer was, »the best«. And it is assuredly true that it is to be considered most ancient and nearest to God which is the best”.

⁶² Cic., *off.*, 1, 121.

⁶³ Enn., *Ann.*, 500 V.

able to defend the tradition. A silent dialogue between noble customs and *illustri, praestantes viri*, had made the Rome of the past a model of political balance.

Nam neque viri, nisi ita morata civitas fuisset, neque mores, nisi hi viri praefuissent, aut fundare aut tam diu tenere potuissent tantam et tam fuse lateque imperantem rem publicam. Itaque ante nostram memoriam et mos ipse patrius praestantes viros adhibebat et veterem morem ac maiorum instituta retinebant excellentes viri⁶⁴.

Cicero actualizes the verse of Ennius at his time and wonders what remains of the *res publica*. Significant is the fact that in this passage Cicero mentions the *mos* first, and then refers more clearly to the *mos maiorum*. He compares the state to a wonderful painting that has lost not only the colors he had at one time, but even the line of his contours.

Nostra vero aetas cum rem publicam sicut picturam accepisset egregiam, sed iam evanescentem vetustate, non modo eam coloribus eisdem, quibus fuerat, renovare neglexit, sed ne id quidem curavit, ut formam saltem eius et extrema tamquam liniamenta servaret⁶⁵.

The citizens have lost the sense of *mos maiorum* in the late Republican age. The deep cause of the state crisis is not the forgetfulness of the *mos maiorum*, but the *penuria virorum*, the lack not of men in a general sense, but of illustrious citizens. Cicero emphasizes the centrality of the men, and in particular of the members of the ruling class of his time, responsible for the moral and political crisis. *Res publica* is totally disrupted in the late Republican age, and the ruling class is not able to defend the moral basis of Rome.

The *mos maiorum* is the foundation and identity of the Roman state, since the moral decadence of Rome causes the political crisis of *res publica*. Cicero appeals to the customs of the ancestors in the hope of returning to the political stability of the ideal Rome of the *maiores*. The call to *mos maiorum* as the principle guarantor of political balance fails as both the *optimates* and *populares* evoke this value in order to realise the interests of the moment in an adversarial sense⁶⁶.

The citizens of Cicero's time do not pursue the good of the *res publica*, a principle that guided the political action of the *maiores*. If tradition is invoked in the

⁶⁴ Cic., *rep.*, 5, 1. "For neither men alone, unless a State is supplied with customs too, nor customs alone, unless there have also been men to defend them, could ever have been sufficient to found or to preserve so long a commonwealth whose dominion extends so far and wide. Thus, before our own time, the customs of our ancestors produced excellent men, and eminent men preserved our ancient customs and the institutions of their forefathers".

⁶⁵ Cic., *rep.*, 5, 2. "But though the republic, when it came to us, was like a beautiful painting, whose colours, however, were already fading with age, our own time not only has neglected to freshen it by renewing the original colours, but has not even taken the trouble to preserve its configuration and, so to speak, its general outlines".

⁶⁶ A. Iacoboni A., *Le sens de la libertas...*

hope of rediscovering in it a regulatory principle of the state and a guarantor of its political balance of the day, the call to ancient values is based on individualism. Tradition is cleverly manipulated in an individualistic way by members of the different political forces.

Cicero blames the moral crisis and the ensuing political crisis of *res publica* on the citizens of his time, unable to match the ancestors. However, the author has an innovative and lucid vision. In fact, he foresees the need to subject the tradition itself to a critical review, making a selection of the best tradition. In this sense, it cannot be considered an immutable model. On the other hand, tradition is subject to a process of revision and evolution also in the legal sphere, in the light of the changed social and political conditions, starting from the 3rd century BC. This process of revision of the legal tradition deepens further in the late-Republican era, in a further dynamic socio-political context.

Individualism is the deep cause of the state's moral and political decadence. Cicero believes that only *nobilitas* based on individual *virtus* can save the *res publica*. The nobility based on individual *virtus*, which must be replaced by the «blood» nobility, allows to restore the ancient dialogue between tradition and illustrious citizens capable of honoring and defending it, giving back to the *res publica* its ancient political stability. The «human», «individual factor» has a double and opposite meaning in Cicero. It results in a confidence in the ability of citizens with individual *virtus* to restore the ancient prestige of the *res publica*. However, this «human factor» also has a pessimistic aspect when it turns into individualism, that is, when the citizens of Cicero's time exploit the noble ancient values by serving them to their personal interests.

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Summary

The tradition is constituted by the norms of conduct of the *gentes* and the patrician *familiae*. The right is the foundation of the ruling class power of the patricians first, of the patrician-plebeian *nobilitas* then. The hegemony of the pontiffs in the juridical field is subsequently questioned by the *iusprudentia*, starting from the 3rd century BC. We examine the legal value of *mos* and *consuetudo* as sources of law in Cicero. Afterwards, we evoke the crisis of tradition and the evolution of right caused by changing social and political conditions. The *mos maiorum* knows the maximum crisis in the late-Republican age. Cicero considers it necessary to implement a critical revision of the *mos maiorum*. However, the individualism present at the time of the author makes the moral and political rebirth of Rome impossible.

KEYWORDS

mos maiorum, mos, consuetudo, nobilitas, populares, optimates

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