

## THE RULE OF REASON IN CICERO'S PHILOSOPHY OF LAW

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'Law is the highest reason, rooted in nature, which commands things that must be done and prohibits the opposite. When this same reason is secured and established in the human mind, it is law.' (*Leg.* I.18)<sup>1</sup> So writes Cicero in his work *On the Laws*, ascribing this view approvingly to 'most learned men.' Although this particular formulation echoes the Stoics, Cicero's understanding of law is founded on a deeper principle deriving from Plato: *the rule of reason* (cf. *Leg.* I.55, III.14). In the sphere of politics this principle implies that a regime is legitimate insofar as power is exercised in a rational manner. It is opposed to what may be called *the rule of will*, that a regime is legitimate insofar as power is exercised in conformity to the will of the community (whether it is the will of all, of the majority, or of some, or the 'general will' as understood by Rousseau).

Although the rule of reason was anticipated by Presocratic philosophers such as Xenophanes, Heraclitus, and Anaxagoras, Plato was the first to articulate it through a series of principles:

*The principle of order:* A thing is in a correct condition if, and only if, it exhibits proper order (cf. *Gorgias* 506e).

*The principle of natural rule:* A thing exhibits proper order if, and only, some part of it is the natural ruler over its other parts (cf. *Phaedo* 79e-80a).

*The principle of the rule of reason:* The rational part is the natural ruler over the nonrational part (cf. *Rep.* IV.441e).

The rule of reason is a central theme in Plato's major political dialogues. In the *Republic* rational rule is exemplified by Socrates' ideal state with its ruling class of philosopher kings. In the *Statesman* it is embodied by the ruler who possesses the expert knowledge of ruling and the absolute power to impose it; since, however, such a ruler does not appear, the second-best procedure is to establish laws and to allow nobody to act contrary to them. In the *Laws* the ideal constitution cannot be realised, but the legislator should keep it in view and find the constitution which most closely resembles it, namely one in which the citizens are 'willing slaves of the laws.'<sup>2</sup>

The rule of reason is also the central theme of Cicero's *On the Commonwealth* (*De republica*) and *On the Laws* (*De legibus*), two dialogues which were explicitly modelled after Plato's *Republic* and *Laws* (*Leg.* I.15, II.14). *On the Commonwealth* deals with justice and the best constitution, important topics in Plato's *Republic*. The dramatic date is 129 BC (over two decades before Cicero's birth), and the cast of

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<sup>1</sup> Translations are from Cicero, *On the Commonwealth and On the Laws* (James Zetzel trans, Cambridge University Press, 1999). The translation is revised slightly in many places for the sake of consistency or greater literalness. Abbreviations: *Rep.* for *De republica* (*On the Commonwealth*) and *Leg.* For *De legibus* (*On the Laws*).

<sup>2</sup> I discuss these dialogues in the following articles: 'Plato on the Rule of Reason' (2005) 43 *The Southern Journal of Philosophy* 50-83; 'The Rule of Reason in Plato's *Statesman* and the American *Federalist*' (2007) 24(2) *Social Philosophy & Policy* 90-129; and 'The Rule of Reason in Plato's *Laws*' in Jonathan Jacobs (ed), *Reason, Religion, and Natural Law: Historical and Analytical* (Oxford University Press, 2012) 31-56.

characters includes leading players in the Roman politics who are also versed in philosophy. They include the host Scipio (Publius Cornelius Scipio Africanus Aemilianus, the general who destroyed Carthage, an opponent of the Gracchi's populist program to redistribute property, and a friend of the historian Polybius and the Stoic philosopher Panaetius), and several of Scipio's friends, including Laelius (Gaius Laelius, Scipio's former military subordinate, a former consul and another opponent of the Gracchi, who combined an interest in philosophy with a practical cast of mind), Philus (Lucius Furius Philus, another former consul with philosophical interests), Tubero (Quintus Aelius Tubero, Scipio's nephew, who was a Stoic philosopher), and Rufus (Publius Rutilius Rufus, a jurist and Stoic, who is the ostensible narrator). Scipio plays the major role in the dialogue and he is generally taken to represent Plato's views.<sup>3</sup> After some preliminary remarks on philosophy and politics, there is a theoretical discussion regarding which constitution is best leading to an examination of the evolution of the Roman mixed constitution. Book III is mainly devoted to disputation over whether a state can succeed with or without justice, with Laelius and Philus defending opposing positions. After a fourth book which includes a critique of Plato's ideal state in the Republic, the last two books discuss the statesman and conclude with the Dream of Scipio. Though widely read in antiquity the work was lost with the fall of the Roman Empire except for the Dream of Scipio, which was copied in a work by Macrobius, a fifth century Neoplatonist, and some famous fragments on law which were recorded by the Christians Lactantius and Augustine. A fourth-century manuscript was discovered in the early nineteenth century in a palimpsest which included a substantial portion of the first two books and some scraps from books III, IV, and V.

*On the Laws* has a more realistic dramatic setting with Cicero himself carrying on (and largely dominating) a dialogue with his younger brother Quintus Tullius Cicero and his friend and correspondent Titus Pomponius Atticus. (Cicero's full name was Marcus Tullius Cicero. His character in the dialogue is referred to as 'Marcus', distinguishing him from his brother Quintus and keeping some interpretative distance between the author and his character.) Book I discusses natural law and its relation to positive law and then turns to justice and virtue. Book II continues the discussion of law and then begins outlining a legal code for religious practices followed by a code for magistrates in book III. The work breaks off, and it was most likely never finished. It is reasonable to interpret these two dialogues in concert because *On the Laws* identifies Marcus as the author of *On the Commonwealth* and characterizes the former as the sequel to the latter (*Leg.* I.15, 20).

In these two dialogues Cicero addresses the same main issues as Plato regarding the rule of reason: (1) What entitles reason to rule? (2) If reason rules what should be its aims? (3) How should rational rule be exercised? (4) How is the rule of reason related to the rule of law? In the process Cicero does not merely retrace Plato's steps. As will be seen Cicero makes some significant contributions of his own and presents some new problems for the rule of reason. The four issues will be considered in turn.

## I WHAT ENTITLES REASON TO RULE?

Cicero takes reason to be the universal and distinctive trait of human beings: '[R]eason (*ratio*), the one thing by which we stand above the beasts, through which we are capable of drawing inferences, making arguments, refuting others, conducting

<sup>3</sup> Whether Scipio is merely a mouthpiece is debatable. For example, Scipio's elevation of the philosophical life above the political life seems at variance with Cicero's own views (compare *Rep.* I.26-29 and III.6a).

discussions and demonstrations – reason is shared by all, and though it differs in the particulars of knowledge, it is the same in the capacity to learn.’ (*Leg.* I.30) He takes over two analogies from Plato. The first, advanced in *On the Commonwealth*, is a psychological analogy reminiscent of Plato’s argument that reason should rule over the nonrational part of the soul (*Republic* IV.441c-444a). Scipio reasons that ‘if there is a kind of royal power in men’s souls, there will be one dominant element, namely judgment (that is, of course, the best part of the soul); and when judgment is dominant, there is no place for lust, none for anger’. Scipio and Laelius join in approving of having all the parts of the soul under the monarchy of judgment. Scipio goes on to argue that the same holds for a commonwealth, where ‘the rule of a single expert, so long as he is just, is best’. By analogy, ‘it is better to entrust a ship to one helmsman (*gubernator*) and a sick man to one doctor (assuming that they are competent in their professions) than to many people’. (*Rep.* I.59-62) This comparison helps to explain his later claim that the authentic statesman is ‘good and wise and knowledgeable about the interests and the reputation of the state, almost a guardian (*tutor*) and manager of the commonwealth; that, in fact, is the name for whoever is the director and helmsman of the state. Make sure you recognize this man; for he is the one who can protect the state by his judgment and efforts.’ (*Rep.* II.51)<sup>4</sup>

The second analogy, adumbrated in *On the Commonwealth* but presented more fully in *On the Laws*, is cosmological, recalling Plato’s *Laws* X.888e-907b as well as Zeno the Stoic (*De natura deorum* II.21). In his preamble to his laws concerning religion Marcus argues that ‘since all things endowed with reason are superior to those which lack reason, and since it is wrong to say that anything is superior to the natural universe, it must be admitted that the universe has reason.’ (*Leg.* II.16)<sup>5</sup> He equates the law with ‘the power of command (*imperium*), without which no home or state or nation or the whole race of mankind can survive, nor can nature or the world itself. The world obeys god, and land and sea obey the world, and human life follows the commands of the supreme law’. (*Leg.* III.3) A basis for the analogy can be found in Scipio’s dream, where his deceased grandfather Scipio Africanus (the Elder) reveals that ‘just as the eternal god moves the universe, which is partly mortal, so too does the eternal soul move the fragile body’. (*Rep.* VI.26; cf. Plato *Phaedrus* 245c-246a) The stationary earth is surrounded by eight heavenly spheres, the outermost of which is ‘the highest god himself protecting and limiting the rest, and in it are fixed the eternal revolving courses of the stars’. The lower spheres contain five planets, the moon, and sun. Of these the most important is ‘the Sun, the leader (*dux*), chief (*princeps*), and guide (*moderator*) of the remaining celestial bodies, the mind (*mens*) and balance of the universe’. (*Rep.* VI.17) The celestial realm thus possesses a fixed and perpetual order which depends on an intelligent ruler. In the dream political rule is not merely analogous to but sustained by divine rule: ‘There is nothing that can happen on earth that is more pleasing to that leading god who rules the whole world than those councils and assemblages of men associated through law which are called states; the guides and preservers of these have set out from here, and here they return.’ (*Rep.* VI.13; cf. II.51; cf. Plato *Republic* VII.539e-540a)

The psychological and cosmological analogies are brought together to support the rule of the best people in a political context in a fragment from book III of *On the*

<sup>4</sup> The term *gubernator* (equivalent to the Greek *kubernētēs*) applies, as here, metaphorically in the sense of governor in the political context. The English term ‘governor’ derives from *gubernator*. Also, the term *tutor* recalls Plato’s guardian (*phulax*): cf. *Republic* IX.576d, 580b-c, 588a-592b.

<sup>5</sup> Scipio seems to make a similar claim though the passage is fragmentary: ‘Men who, through their investigation of the universe, have recognized that this whole world [is ruled] by [a single] mind.’ (*Rep.* I.56)

*Commonwealth*: ‘Do we not see that the best people are given the right to rule by nature herself, with the greatest benefit to the weak? When then does god rule over man, the soul over the body, reason over desire, anger, and the other flawed portions of the soul?’ (III.36) Marcus also declares that ‘since there is nothing better than reason, and it is found both in humans and in god, reason forms the first bond between human and god’. (*Leg.* I.23) Consequently, ‘virtue is the same in human and god, and it is found in no other species besides; and virtue is nothing else than nature completely developed and taken to its higher level. There is, therefore, a similarity between human and god’. (*Leg.* I.25)

Scipio’s comparison of the statesman to a helmsman and a doctor recalls Socrates’ claim that politics is a craft (*politikē technē*) which he alone has mastered (Plato *Gorgias* 521d), and the political craft is a theme which Plato dilates upon in the *Statesman* and *Laws*. Scipio calls ‘the service and administration of the commonwealth’ the greatest craft (*maxima ars*), which Cicero describes as ‘the study (*ratio*) of civil society and the organization of peoples’ in his introduction to book III of *On the Commonwealth* (*Rep.* I.36, III.4). At times Scipio speaks as if the political art is a science like astronomy, which studies the eternally revolving heavenly spheres described in his dream, when he can hear the harmony of the spheres which is ordinarily inaudible to human beings. ‘Its harmony is based on uneven intervals, but the inequality of the intervals is proportional and based on reason, and by blending high notes with low itself causes balanced music.’ (*Rep.* VI.18) Earlier in the dialogue Philus and Scipio discuss how Gaius Sulpicius Gallus (a former consul), Pericles (leader of the Athenian democracy and friend of the philosopher Anaxagoras), and others with astronomical knowledge were able to explain the occurrence of eclipses and thereby relieve people of their superstitious fears. (*Rep.* I.21-25) Astronomy becomes a sort of prototype for politics, which will study the course of political events. Scipio declares, ‘There are remarkable revolutions and almost cycles of changes in commonwealths; to recognize them is the part of a wise man, and to anticipate them when they are about to occur, holding a course and keeping it under his control with governing, is the part of a truly great citizen and nearly divine man.’ (*Rep.* I.45) Again, in describing the fall of the tyrannical king Tarquinius Superbus: ‘At this point you will see the political circle turning; you should learn to recognize its natural motion and circuit from the very beginning. This is the culmination of civic practical wisdom (the topic of our entire discussion): to see the paths and turns of commonwealths, so that when you know in what direction any actions tends, you can hold it back or anticipate it.’ (*Rep.* II.45) A major function of practical wisdom (*prudentia*) is thus the prediction and control of political events.

In treating politics as a craft, however, Scipio departs from Plato in an important way. In Plato’s *Republic* a craftsman copies a model or pattern (*paradeigma*). Thus Socrates fashions his Kallipolis (‘beautiful city’) in speech, a city which may exist only in thought guided by the Form of the Good, a transcendent, eternal, immutable and imperceptible but intelligible object. In contrast, in his quest for the best commonwealth Scipio uses as his frame of reference the Roman Republic which he regards as the best commonwealth of all (*Rep.* II.42, *Leg.* II.23): ‘I will have an easier time in completing my task if I show you our commonwealth as it is born, grows up, and comes of age, and as a strong and well-established state, than if I make up some state as Socrates does in Plato.’ (*Rep.* II.3; cf. I.70) Scipio begins by recounting the founding of the Roman commonwealth by Romulus. ‘The location of a city is something that requires the greatest foresight in the establishment of a long-lasting commonwealth, and Romulus picked an amazingly advantageous site.’ (*Rep.* II.5) Scipio also says that Romulus established a body of elders which later became the Senate because he ‘recognized and approved the same policy that Lycurgus at Sparta had recognized slightly earlier, that states are guided and ruled better under the sole

power of a king if the authority of the most responsible citizens is added to the monarch's absolute rule'. (*Rep.* II.15) It would have been obvious that Scipio was offering a fictionalized account of the founding of Rome. Laelius points out that Scipio is employing 'a new kind of analysis, something to be found nowhere in the writings of the Greeks'. Scipio ascribes discoveries of laws and institutions to historical actors rather than constructing the state to suit his own ideas (like Plato) in a manner 'totally alien to human life and customs'; and he identifies a reason (*ratio*) for what was done by Romulus by chance or necessity. And it does this by tracing the development of a single commonwealth. Scipio does not attempt to provide a literally accurate rendition of the development of the Roman state. Instead, he offers a rational reconstruction of that history, providing the reason (*ratio*) for making certain decisions, such as where to locate the city of Rome, even if these were in fact the result of chance or necessity. (*Rep.* II.20-21)<sup>6</sup>

Scipio later spells out the difference between his method and that of Plato, who 'created a state more to be desired than expected; one as small as possible, not one that could exist, but one in which the reason (*ratio*) underlying civic organization could be discerned. But if I can do it, I will try to use the same principles that he observed, not in the shadowy image (*imago*) of a state but in the greatest commonwealth, so as to appear almost to touch with my pointer the case of each public good and ill.' (*Rep.* II.52) Scipio's reference to the reason (*ratio*) for a political decision seems to recall and confirm Laelius' earlier description of his method. (*Rep.* II.20-21)

When Scipio is criticized by Tubero for changing the subject and praising the Roman Republic 'although Laelius had asked you not about our commonwealth but about commonwealths in general', Scipio explains his method further: 'As to my use of our state, that was not in order to define the best condition – I could do that without any example (*exemplum*) – but so that we might see concretely in the greatest state just what sort of thing I was describing in reason and speech. But if you are looking for the type of the best state without the example (*exemplum*) of any specific people, then we must make use of an image (*imago*) given by nature . . .' (*Rep.* II.64, 66) This brief account of Scipio's method seems to involve several distinct elements. First, there is the definition of the ideal state in reason and speech of 'the best condition', presumably of the state in general, which involves the principle of the rule of reason. Second, there is the image or model (*imago*) which may take either of two forms: existing 'in shadow', i.e. only in one's fancy, or given by nature. By the latter he probably means the cosmic order ruled by reason, as described above. Third, there is the example (*exemplum*) involving a specific people, namely, the Roman Republic, which illustrates the principles inherent in the image or model.<sup>7</sup> The basis has already been laid for this method in earlier discussions comparing philosophy and politics beginning with Cicero's introduction to book I of *On the Commonwealth*. He dismisses the claim that wise men should involve themselves in politics only in emergencies.

<sup>6</sup> Zetzel, above n 1, 39 n. 23 says that 'Cicero, through Laelius, draws attention to the implausibility of his own account of Roman constitutional development'. Though Cicero's authorial intent is perhaps debatable, this can scarcely have been Laelius' meaning because he applauds Scipio's method and urges him to continue. An alternative interpretation is that Scipio is seeking a way to reconcile reason with chance and necessity.

<sup>7</sup> On the image drawn from nature see *ibid* 55 n. 80. On the interpretation of *exemplum* compare J. G. F. Powell, 'Were Cicero's Laws the Laws of Cicero's Republic?' in J. G. F. Powell and J. A. North (eds), *Cicero's Republic* (Bulletin of the Institute of Classical Studies Supplement 76, 2001) 28-29. Jed Atkins treats *exemplum* and *imago* as synonyms, translating both as 'model', which seems to obscure the distinction between the second and third elements, in *Cicero on Politics and the Limits of Reason: The Republic and Laws* (Cambridge University Press, 2013) 64-65. Otherwise, however, Atkins' interpretation of Scipio's method is very illuminating.

‘They make a habit of saying openly, and even boasting, that they have neither studied nor taught anything about the methods of organizing and preserving commonwealths, and they think that such knowledge belongs not to wise and learned men but to men of practical experience in these areas.’ How, then, could they help the state in a crisis? Putting them in charge would be like turning over the helm during a storm to somebody who has never studied the nautical arts. Even if their claim were true, they should not neglect knowledge of public administration in order to prepare themselves to take command if need be. (*Rep.* I.11) Soon after Scipio expresses his admiration for Greek philosophical wisdom about the eternal and divine realm, he expresses dissatisfaction with the writings on politics of the greatest and wisest of the Greeks (obviously including Plato) when compared with the developed skill of governance which Scipio inherited from his Roman forebears. He states that he will neither neglect the learning of the Greeks nor defer to them particularly on this subject but will speak as a Roman citizen educated by practical experience. (*Rep.* I.35; cf. III.4-5) Hence, after setting out a general typology and analysis of constitutions leading to the mixed constitution, which owes much to Plato, he states that he will use the Roman commonwealth as his example (*exemplum*). (*Rep.* I.70) In this undertaking Scipio not only uses his practical skills but, also, and perhaps more importantly, draws on the political and legal history of Rome, in order to explicate principles of statecraft. (*Rep.* II.27)

## II IF REASON RULES, WHAT SHOULD BE ITS AIM?

The proper aim of politics according to Cicero is to follow our natural impulse ‘to try to increase the resources of the human race’ and ‘to make human life safe and better by our plans and efforts’. (*Rep.* I.3) Building on the aforementioned craft analogies, Scipio avers, ‘As a helmsman aims at a good voyage, a doctor at saving his patient, a general at victory, so this guide of the commonwealth aims at the blessedness of the life of the citizens, that they should be solid in their resources, rich in property, well endowed with glory, honourable in virtue.’ (*Rep.* V.8a) Because virtue, like reason, is ‘nature fully developed’, virtue receives special emphasis (*Rep.* I.3, *Leg.* I.24, 32, 58; cf. *De finibus* V.58-66). Likewise, ‘it is generally agreed that laws were invented for the well-being of citizens, the safety of states, and the calm and happy life of humans’. (*Leg.* II.11) Scipio maintains that the promotion of ‘the citizens’ shared association (*societas*) in a happy and honorable way of life’ is ‘the first cause of their coming together, and it ought to be accomplished on the authority of the commonwealth in part through institutions and in part through laws.’ (*Rep.* IV.3a) Among such institutions Scipio would include the education of free children but of his discussion of this topic unfortunately precious little survives. By the ‘first cause’ Scipio means the final cause or purpose for which humans enter into society, and he is echoing Aristotle’s observation that ‘the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life.’ (*Rep.* I.39a; Aristotle *Politics* I.2.1252b27-30). According to Scipio a mere assemblage of individuals cannot be a people (*populus*) unless there is agreement and association among them, which implies a bond of justice (*ius*). (*Rep.* III.43) He connects this with the *commonwealth*, a key concept in Cicero’s political thought: ‘The commonwealth is the property of the people, but a people is not any group of men assembled in any way, but an assemblage of some size associated with one another through agreement on justice (*ius*) and association for common advantage.’ (*Rep.* I.39a) *Res publica*, the Latin term translated ‘commonwealth’, means literally (albeit misleadingly) ‘public property’, which Scipio equates with ‘the property of the people’ (*res populi*). He explains this by contrasting commonwealth with tyranny. When Dionysius was tyrant

of Syracuse, 'nothing belonged to the people, and the people itself belonged to a single man'. Since the state is the property (*res*) of the tyrant not of the people, it is a mistake even to call tyranny a bad commonwealth—strictly speaking, it does not qualify as a commonwealth at all. (*Rep.* III.43; cf. I.48) And the same can be said for oligarchy, democracy, and any regime in which a particular faction rules for its own advantage at the expense of others. (*Rep.* III.44-45) It is noteworthy, then, that in the passage explicating commonwealth, 'agreement on justice' is conjoined with 'association for common advantage'. (*Rep.* I.39a) Finally, the commonwealth should be such that it is capable of lasting for a long time, which, Scipio assures us, 'takes greater judgment than anything in nature'. (*Rep.* III.7) In sum, in the realm of politics reason should have as its aim the establishment and maintenance of an enduring commonwealth whose members agree on justice and associate for mutual advantage.

### III HOW SHOULD RATIONAL RULE BE EXERCISED?

The answer to this question is implicit in the arguments that reason is entitled to rule. 'The Sun, the leader, chief, and guide of the remaining celestial bodies, the mind and balance of the universe' (*Rep.* VI.17) is the prototype of the statesman, the primary agent of political rule. Like the city's director and helmsman, the true ruler is 'good and wise and knowledgeable about the interests and reputation of the state, almost a guardian and manager of the commonwealth', which he is able to protect by his wisdom and efforts (*Rep.* II.51, quoted above).

Although Scipio sometimes speaks of the ruler as a monarch (e.g. *Rep.* I.62), it seems likely that a class of wise men can satisfy Scipio's definition. Regarding the legislator he explicitly favours the latter approach, agreeing with Cato that the organization of the Roman Republic was superior to that of the Greek city-states, because the Greek constitutions were founded or refounded by individuals (e.g. Lycurgus in Sparta and Solon and Cleisthenes in Athens), while the Roman commonwealth 'was not shaped by one man's talent but by that of many; and not in any person's lifetime, but over many generations'. According to Cato 'there never was a genius so great that he could miss nothing, nor could all the geniuses in the world brought together in one place at one time foresee all contingencies without the practical experience afforded by the passage of time.' (*Rep.* II.2) Cato's insight explains Scipio's method of tracing the history of the Roman commonwealth rather than following Socrates in creating a constitution out of whole cloth. Cicero here marks another major departure from Plato's view of legislation. Rather than viewing political reason as operating top down with one or a few legislators creating a constitution for future generations, he sees it as functioning bottom up involving the collaborative effort of many innovative statesman over many generations in a process which is open ended and always open to improvement. (cf. *Rep.* II.37)

Scipio adds more analogies regarding the work of the statesman. The first is a rather droll comparison with a mahout atop an unwieldy elephant. The statesman must have practical wisdom or foresight (*prudentia*) like one who 'sits on a huge and destructive creature, keeps it in order, directs it wherever he wants, and by a gentle instruction or touch turns the animal in any direction'. Likewise, he says, the part of the soul called the mind (*mens*) must control the many savage beasts within. (*Rep.* II.67) Scipio then adds two more interrelated analogies: the statesman should urge his fellow citizens to imitate him by offering himself as a mirror to reflect the brilliance of his soul and life. He compares the result of this imitation to a musical harmony produced by the proportionate blending of dissimilar voices. 'So too the state, through the reasoned balance of the highest and the lowest and the intervening orders, is harmonious in the concord of very different people. What musicians call harmony with

regard to song is concord in the state ...'. (*Rep.* II.69a) (This anticipates and complements the description of celestial harmony in Cicero's dream (at *Rep.* VI.18, quoted above). Scipio adds that social concord can never exist without justice (*iustitia*). This sets the stage for an extended debate over justice in book III which survives in only a fragmentary condition. Two issues are debated: whether a government cannot exist without injustice, and whether a government cannot exist without strict injustice. Philus very reluctantly presents the case against justice, drawing on Plato's *Republic* and *Laws* as well as Carneades' sceptical arguments against the Platonic theory of justice. Laelius responds with the opposing case in behalf of justice, insisting that it is based on the 'right reason' of god and is, therefore, eternal, invariant, and independent of human dispensation.

Scipio discusses in detail the institutions by means of which the commonwealth exercises reason. 'Every commonwealth', he says, 'must be ruled by some sort of deliberation (*consilium*) in order to be long lived.' His point of departure is the classical theory of constitutions (*Rep.* I.41-45) in which deliberation may be assigned to one person, or a few, or everyone. When the state is ruled by one person he is called a king, when by a few they are called the 'best' citizens, and when by all the state is called 'popular'. This corresponds to the kingship, aristocracy and democracy in the schemes of Plato and Aristotle. Although these three pure forms have their attractions, each has its flaws. In kingship almost everybody is excluded from the administration of justice and deliberation, in aristocracy the masses lack liberty (*libertas*) because they are excluded from power, and in democracy there is equality without equity because it recognizes no degrees of status – i.e. it fails to recognize and reward those who are superior in virtue (cf. *Rep.* I.53). But their greatest pitfall is that each too easily deviates into its opposite: kingship into tyranny, aristocracy into oligarchy, and democracy into ochlocracy (mob rule). The forms can also change into one another in an erratic process. 'They snatch the form of the commonwealth from one another as if it were a ball: tyrants from kings, aristocrats or the people from them, and from them oligarchies or tyrants. No form of commonwealth is ever maintained for very long.' (*Rep.* I.68) This leads Scipio to recommend a fourth form of commonwealth, which is 'blended and mixed' from the first three (*Rep.* I.45, 69; II.57) In a mixed constitution, as Scipio understands it, part of the government is monarchical, part of it aristocratic, and part popular. It is more stable than the pure forms because each person has a stake in at least some part of the government. The idea of a mixed constitution was previously proposed by Plato (*Laws* III.693c-e, VI.756e) and Aristotle (*Politics* IV.7-8 and 13) but they understood it differently.<sup>8</sup> Scipio remarks that Sparta had a mixed constitution but maintains that Rome's is the best example. It is on this basis that his review of Roman constitutional history belongs to the study of the best commonwealth. (*Rep.* II.42, 65-66)

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<sup>8</sup> A constitution was 'mixed' for Cicero when its different parts (e.g. Senate and assembly) represented different constituencies, whereas it was mixed in all of its parts for Plato and Aristotle (for example, by combining different modes of election and eligibility for office). See Andrew Lintott, 'The Theory of the Mixed Constitution in Rome' in Jonathan Barnes and Miriam Griffin (eds), *Philosophia Togata II* (Oxford University Press, 1997) 70-85.



## IV HOW IS THE RULE OF REASON RELATED TO THE RULE OF LAW?

Marcus announces that it is his aim 'to preserve and protect that form of commonwealth which Scipio showed was the best in the six books of *On the Commonwealth*, and since all the laws must be fitted to that type of state, and since morals must be planted and we should not rely on the sanctions of written laws, I will seek the roots of justice in nature, under whose leadership our entire discussion must unfold'. (*Leg.* I.20) Thus the earlier dialogue sets the stage for the examination of natural law in *On the Laws* and would be incomplete without it. Indeed, the subject of natural law is already broached in a passage from *On the Commonwealth* (*Rep.* III.33):

True law (*vera lex*) is right reason (*recta ratio*), consonant with nature, spread through all people. It is constant and eternal, it summons to duty by its orders, it deters from crime by its prohibitions. . . . We cannot be released from this law by the Senate or the people, and it needs no exegete or interpreter like Sextus Aelius. There will not be one law at Rome and another at Athens, one now and another later; but all nations at all time will be bound by this one eternal and unchangeable law, and god will be the one common master and commander (so to speak) of all people. He is the author, expounder, and mover of this law, and the person who does not obey it will be in exile from himself. Insofar as he scorns his nature as a human being, by this very fact he will pay the greatest penalty, even if he escapes all the other things that are generally recognized as punishments. (*Rep.* III.33)

This celebrated passage, preserved in the Christian Lactantius' *Institutes* VI.8.6-9, has been widely regarded as a locus classicus for natural law theory. However, it is questionable, as will be seen, whether it represents Cicero's own considered view. The passage evidently appears in Laelius' response to the arguments retailed by Philus that justice is variable and therefore conventional rather than natural (*Rep.* III.13-18) and that justice is incompatible with wisdom. (*Rep.* III.24-28) It is possible that Cicero intended Laelius' formulation to be somewhat exaggerated so as to represent the opposing view.<sup>9</sup>

In any case, in *On the Laws* Marcus espouses his own view of universal justice (*ius*) and law (*lex*) 'so that what we call "civil law" (*ius civile*) will be limited to a small and narrow area. We must discuss the nature of justice, and that needs to be looked for in human nature; we must consider the legislation through which states ought to be governed; and then we must deal with the laws and decrees of peoples as they are composed and written, in which the so-call civil laws of our people will not be left out'. (*Leg.* I.17). This ambitious project remained largely incomplete, as was mentioned above, and the focus here will be on the first stage: Marcus' account of the nature of justice.

Marcus goes on to observe that 'the most learned men' have defined law (*lex*) as 'the highest reason, rooted in nature, which commands things that must be done and prohibits the opposite'. (*Leg.* I.18) This recalls the definition of Laelius (*Rep.* III.33) and seems to hearken back to the Stoic Chrysippus' view of law. Marcus adds, 'When this same reason is secured and established in the human mind, it is law. And therefore they think that law is practical wisdom (*prudentia*), the effect of which is such as to order people to behave rightly and forbid them to do wrong.' Although the Stoics speculated that *nomos*, the Greek word for law, derives from *nemein*, to distribute, Marcus thinks that *lex*, the Latin equivalent, derives from *legere*, to choose, because law involves choosing what is just and correct. (*Leg.* II.18-19)

Accepting the Stoic account as generally correct, Marcus sums up its three main doctrines: 'law is a power of nature, it is the mind and reason of the practically wise

<sup>9</sup> See Atkins, above n 7, 33-42 on the difficulties presented by Laelius' speech.

person, it is a rule for justice and injustice.’ (*Leg.* I.19) These three theses define the agenda for Marcus’ account of the nature of justice. There soon after follows a fourth, cosmopolitan thesis: ‘the whole world is the common state of gods and humans’. (*Leg.* I.23) The argument for these claims does not appear in a single place. It consists, rather, of several separate threads which appear and later reappear to be interwoven in different ways in separate passages. When assembled, however, they provide a justification of Marcus’ four theses which may be viewed as the fundamental argument of *On the Laws*. The argument for each thesis will be reconstructed in turn as follows:

*Thesis 1: Law is a force of nature. (Leg. I.22-23, 33; II.8-11; III.3)*

- 1.1 The divine mind is the ruler of all of nature, comprising heaven and earth.
- 1.2 True law is the right reason of god commanding good and prohibiting evil.
- 1.3 Human beings alone among mortal creatures also have reason from nature.
- 1.4 Human reason when completely developed is right reason.
- 1.5 Human law is right reason commanding individuals to do good actions and prohibiting crimes.
- 1.6 Therefore, human beings derive law from nature.

Premises (1.1) and (1.2) are echoes the opening of Chrysippus’ treatise *On Law*: ‘Law is king of all things human and divine. Law must preside over what is honourable and base, as ruler and as guide, and thus be the standard of right and wrong, prescribing to animals whose nature is political what they should do, and prohibiting them from what they should not do.’<sup>10</sup> This forms the basis for the argument for thesis 2, but the latter also involves a teleological conception of law:

*Thesis 2: Law is the intelligence and reason of the wise person. (Leg. II.8)*

- 2.1 Laws aim at the common good: the well-being of citizens, the safety of the state, and the calm and healthy life of humans. A statute is properly called a ‘law’ only if it promotes these ends.
- 2.2 Humans have law from nature in order to invent prescriptions and prohibitions which promote the common good (cf. 1.2).
- 2.3 ‘Just as the divine mind [i.e. right reason] is the highest law, so too when it is completely developed in a human being, [it resides] in the mind of a wise person [i.e. who is capable of interpreting these prescriptions and prohibitions]’ (cf. 1.1-2).
- 2.4 Therefore, ‘the law which the human race has received from the gods [i.e. from nature] . . . is the reason and mind of a wise person suited to command and prohibition’ (cf. 1.6).

Premises (2.1) and (2.2) describe the aims of political reason, as discussed above, and (2.3) reiterates the cosmological analogy discussed above. The conclusion (2.4) underscores the role of the wise person (*sapiens*) as legislator for the human

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<sup>10</sup> Translated in *The Hellenistic Philosophers* ed. A. A. Long and D. N. Sedley 67R=SVF III.314. See also *De natura deorum* II.16=Long and Sedley 54E=SVF2.1012.

state.<sup>11</sup> This recognition of the legislator's role suggests that Laelius' description of 'true law' in *On the Commonwealth* III.33 was overstated when he maintained that the higher law is totally transparent ('it needs no exegete or interpreter') and that it is promulgated to mankind and enforced directly by god with no need of human mediation. Building on the first two theses, Marcus argues for the third.

*Thesis 3: Law is a rule for justice and injustice. (Leg. III.2, I.33)*

- 3.1 The law involves the power command (*imperium*), involving a choice between acts which promote the common good and those which do not (cf. 1.5, 2.2)
- 3.2 Just actions promote the common good, unjust actions impede it (cf. *Rep.* I.39).
- 3.3 Therefore, the law distinguishes between justice and injustice by the power of command.
- 3.4 Therefore, those who partake of law partake of justice.
- 3.5 Therefore, since humans have received law from nature, they have also received justice from nature (cf. 1.6).

Just as the argument has Stoic foundations, so it also has a Stoic corollary: the cosmopolitan doctrine of the world-state.

*Thesis 4: The whole world is a common state of all humans and gods. (Leg. I.22-23)*

- 4.1 Reason exists in the mind of god, and it is the most divine thing in heaven and earth (cf. 1.1).
- 4.2 Reason is found only in humans among mortal beings (cf. 1.3; cf. *De officiis* I.50).
- 4.3 Therefore, the primary association of man with god is in reason.
- 4.4 Those who share in reason also share in right reason (cf. 1.4).
- 4.5 Human beings are subject to the right reason of god.
- 4.6 Right reason is law (cf. 1.2, 1.5).
- 4.7 Therefore, law is common to gods and humans.
- 4.8 Those who share in law also share in justice (cf. 3.4).
- 4.9 Those who share in justice are members of the same state, even more so if they obey the same commands and powers.
- 4.10 Therefore, the whole world is the common state of god (cf. *Rep.* I.19).

The conclusion (4.10) that the *mundus* (world) is a *civitas* (state) recalls the Greek Stoic view that the *kosmos* is a *polis* (cf. *De natural deorum* II.154). However, Cicero does not agree with early Stoics like Zeno and Chrysippus who held that the only citizens of such a state are virtuous persons or sages (Diogenes Laertius VII.32-33; Cicero *Academica* II.136) and that the higher laws nullified the statutes and customs of conventional states including prohibitions against cannibalism and incest.<sup>12</sup> He infers from the cosmopolitan principle instead that a good, wise, and law-abiding person does

<sup>11</sup> Though Cicero often distinguishes *sapiens* in the sense of theoretically wise from *prudens* in the sense of practically wise, it is equivalent to *prudens* in this context.

<sup>12</sup> Diogenes Laertius VII.32-33; Cicero *Acad.* II.135; Plutarch, *On Stoic Self-Contradictions* 1044F-1045A; Sextus Empiricus, *Outlines of Pyrrhonism* III.247-248.

not overlook his duty to his state and is willing to die for it. (*De finibus* III.64) Our duty to our fatherland is our highest social obligation and second only to our duty to the immortal gods. (*De officiis* I.157, 160) Cicero seems to view the world-state as like a federation which includes legitimate local states: although the law of the world-state is supreme, it implies that we should obey the laws of our own particular states. In *On the Commonwealth* Scipio showed that the best commonwealth has a mixed constitution. In *On the Laws* Marcus is a universal legislator, laying down a system of laws appropriate for such a constitution. Although he believes that the Roman constitution most fully realizes this ideal, the laws he proposes are intended ‘for all free peoples’ and ‘for all good and established peoples’. (*Leg.* II.35, III.4)

## V CONCLUSION

Cicero follows in Plato’s footsteps in endorsing the rule of reason in politics. He views reason as a divine, transcendent principle of nature, to which he adds the Stoic idea that right reason is expressed in the form of commands and prohibitions. Like Plato he regards the statesman as a practitioner of political science and the law as a codification of reason which is based on the ideal of natural reason.

Cicero deliberately departs from Plato in his method. Instead of fabricating the best city in imagination or thought, Cicero combines ideal theory with his own practical political experience and with the empirical historical study of an existing state of the sort carried out by Polybius. (*Rep.* II.3, 21-22, 52, 64)<sup>13</sup> His Scipio offers a rational reconstruction of Rome’s development into a strong and well established commonwealth with a mixed constitution. This method leads to valuable insights. One taken from Cato is that political reason is better exercised not top-down by a single legislator but bottom up by many individual innovators over time. Another is that chance and contingency play an unavoidable role in politics. In some instances developments occur by chance which would have been rationally selected, such as the favorable location of Rome. (*Rep.* II.4, 22) In other instances, fortune comes to the aid of sound judgment. (*Rep.* II.30) Finally, when circumstances warrant it may be advisable to pay attention not only to what is best but to what is necessary, which is why Pompey restored the power of the tribune in 70 B.C. (*Leg.* III.26).

This raises the problem of what to do when the ideal theory and practical considerations pull in different directions. When Marcus turns finally to the question about Roman law in particular, he says that ‘our obligation is to think and speak about the law independently, but to say about the law of the Roman people what has been handed down’. (*Leg.* III.49) At this juncture the text of *On the Laws* as we have it breaks off, leaving serious questions unanswered: Should legal decisions then be based solely on precedent? What is the relation between, on the one hand, divine law as right reason, and, on the other hand, human legislation whether for the ideal state or the everyday world? Could Cicero bridge the gap between theory and practice? Commentators are divided on these questions. Some maintain that Cicero simply fails to bridge this gap and even conjecture that this failure may explain why he never completed *On the Laws*.<sup>14</sup> Against this, however, Jed Atkins has recently argued persuasively that ‘Marcus’ law code is not a direct expression of natural law, but rather

<sup>13</sup> That does not mean that Scipio agrees with Polybius on everything. On important differences between Scipio and Polybius, see Atkins, above n 7, 85-119.

<sup>14</sup> Cicero, above n 1, xxiii; Brad Inwood, ‘Cicero’ in Fred D. Miller (ed), *Treatise of Legal Philosophy and General Jurisprudence*, vol. VI: *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (Springer, 2007) 140-147; Elizabeth Asmis, ‘Cicero on Natural Law and the Laws of the State’ (2008) 27 *Classical Antiquity* 1-33.

is the closest approximation to natural law once this law has been modified and adapted to suit human necessities.<sup>15</sup> On this interpretation Cicero is in the final analysis an 'approximist' rather than a mere pragmatist, since for him the mixed constitution subject to the rule of law is the best attainable commonwealth and the Roman Republic is the best example in human history of this attainable ideal. If this is a correct reading, Cicero may suggest how the theory of the rule of reason may still have relevance to modern political and legal practice.<sup>16</sup>

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<sup>15</sup> Atkins, above n 7, 220.

<sup>16</sup> It is with great pleasure that I dedicate this article to Dr. Suri Ratnapala in recognition of his distinguished career as professor and scholar of jurisprudence.

