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**Do the Origins of the Constitution Can Be Sought
in Roman Law? – A Few Comments on the Side Note
of the Cicero's and Polybius' Selected Sorks**

Keywords: constitution, political system, ancient Rome, Cicero

Słowa kluczowe: konstytucja, ustrój, starożytny Rzym, Cynceron

Abstract

In the presented article, I try to answer the question whether in the Roman state there is a possibility to find the roots of the constitution. In Roman state the constitution as a separate normative act did not exist, the separate jurisdiction of public law was not created, and a constitutional law was primarily based on the custom and political practice. However, in the preserved source material, among others, Cicero's and Polybius' statements can be found, which refer to the political issues. On the basis of their analyses, I try to prove that the ideas of constitutionalism and constitution, of course in a substantive sense, date back to the ancient Rome.

Streszczenie

**Czy genezy konstytucji można szukać w prawie rzymskim? – kilka
uwag na marginesie wybranych dzieł Cyncerona i Polibiusza**

W niniejszym artykule postaram się odpowiedzieć na pytanie czy w państwie rzymskim można odnaleźć korzenie konstytucji. W starożytnym Rzymie nie występowała wpraw-

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dzie konstytucja jako osobny akt normatywny, jak i nie stworzono osobnej juryspruden-
cji prawa publicznego a prawo konstytucyjne oparte było przede wszystkim na zwyczajach
i praktyce ustrojowej. To jednak w zachowanym materiale źródłowym można odnaleźć
m.in. wypowiedzi Cycerona i Polibiusza odnoszące się swoją tematyką do kwestii ustrojo-
wych. Właśnie w oparciu o ich analizę postaram się dowieść, że idee konstytucjonalizmu
i konstytucji, oczywiście w sensie materialnoprawnym, sięgają aż do starożytnego Rzymu.

I.

The constitution is primarily connected with the modern state. The term “constitution” itself (derives from the Latin word *constituere* – to create, to arrange, to shape), means “establishing”, “arranging”, “agreement”, “organization” and “structure”².

According to B. Banaszek, the constitution is a “legal act with the highest force of law in the state, which is expressed in a special mode of its adoption and change, and moreover in the name, defining the principles of the form of government, a sovereign and the ways of exercising his power, fundamental rights, freedom and duties of an individual, besides including provisions regarding the procedure for changing its standards”³.

In turn, in the Encyclopaedia of Law, the following definition of the constitution may be found: “constitution – a Basic Law, charter of the constitution, is a normative act which defines the basic principles of the political system and the socio-economic state, the structure and competencies of the central and regional organs of the state, and also the principles of relations between the citizens and the state, occupying the highest place in the hierarchy of the sources of law, which is expressed in its superiority over the other acts and all other types of normative acts”⁴.

These definitions do not differ in a significant way, which indicates that the concept of constitution does not raise major disputes in the doctrine, at

² J. Söndel, *Słownik łacińsko-polski dla prawników i historyków*, Cracow 1997, p. 212.

³ B. Banaszek, *Prawo konstytucyjne*, Warsaw 2004, p. 2.

⁴ *Konstytucja*, [in:] *Encyklopedia prawa*, ed. U. Kalina-Prasznica, Warsaw 2007, p. 318.

most differently emphasizes its individual elements or adds more features⁵. However, the constitution does not have to be considered only as a document, or a written legal act⁶. The reason for this is that the sociological and political view of the constitution can be also distinguished and related to the actual balance of the political forces present in a given state (actual constitution). Every country is in the possession of such a type of constitution, irrespective of existing political system and occurrence of a written constitution within a given state. In addition, the concept of the constitution is meant by the entirety of all the legal norms, concerning the political system of the state. Such a type of the substantive constitution occurs, e.g. in the United Kingdom.

The concept of a written constitution, the so-called basic law, originates from the Enlightenment vision, in which efforts had been made in order to regulate the basic principles for the operation of the state. The written constitution, adopted by the representation of citizens, appeared at the end of the 18th century, and was the opposite of the constitutions introduced by the ruler, e.g. the Constitution of the United States of 1787, the Constitution of France of 1791, or the Polish Constitution of 3 May 1791.

It seems, however, that the beginnings of the idea of the constitution can be traced back to the ancient times. Among others, in some Greek "cities-states", the legal acts of the special nature occurred, forming the foundations of government, comprising principles which governed a democratic order (*eunomia*) and referring to equality and justice (*isonomia*)⁷. Moreover, Encyclopaedia Britannica⁸ originates the concept of constitutionalism from the general norms,

⁵ L. Garlicki, *Polskie prawo konstytucyjne – zarys wykładu*, Warsaw 2008, pp. 32–33; A. Surowiecka, *Konstytucja – aspekty historyczne, definicyjne i współczesne kierunki rozwoju*, "PERSPEC+IVA Legnickie Studia Teologiczno-Historyczne" 2012, No. 2, pp. 158–172; M. Wróblewski, *Dyskurs konstytucyjny w Unii Europejskiej – pojęcie konstytucji i konstytucjonalizmu w porządku prawnym Unii Europejskiej*, [in:] *Konstytucja dla Europy. Przyszły fundament Unii Europejskiej*, ed. S. Dudzik, Cracow 2005, pp. 71–72; W.J. Wołpiuk, *Instytucja konstytucjonalizmu a prawo konstytucyjne*, [in:] *Instytucje prawa konstytucyjnego w dobie integracji europejskiej*, ed. J. Wawrzyniak, M. Laskowska, Warsaw 2009, pp. 14–22. E.W. Böckenförde, *Historyczny rozwój i różne znaczenia pojęcia konstytucji*, "Civitas" 1997, No. 1, p. 11–15.

⁶ *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2004, p. 23.

⁷ Z. Lewicki, *Greckie i rzymskie wzorce konstytucji Stanów Zjednoczonych Ameryki*, "Zeszyty Prawnicze" 2012, vol. 12.3, pp. 6–20.

⁸ *Constitution*, [in:] *The New Encyclopedia Britannica*, <https://www.britannica.com/topic/constitution-politics-and-law>.

expressed in the works of Aristotle, concerning Greek “city-state”⁹ theme. The mentioned theories of the system were subsequently transferred and expanded by the Romans. The constitution as a separate normative act was not known in the ancient Rome, as well as the Roman lawyers did not create a separate jurisprudence of public law, and a constitution law was mostly based on a custom and political practice. However, in the preserved source material, among others, the Cicero’s and Polybius’ statements referring to the political issues can be found. On the basis of their analyses, I try to answer to the title question whether in the Roman state, the genesis of the modern constitution can be found. Of course, I refer to a substantive sense, to be more precise, to the entirety of legal standards, concerning the political system of the state.

II.

In a preserved source material of the Roman law, the Roman state was originally referred to as *populus Romanus*, subsequently it was defined as *res publica*. The state being defined as an organized social community is still relevant today, however, the modern approach to this term differs from the ancient one. In Roman law, the populace was considered to be the substrate of the state, although not all its residents belonged to the mentioned category, the conditions were fulfilled only by the citizens.

Cic. de re publica, 1, 39; *Est igitur, res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus*¹⁰.

The state in a Roman law was not only an assembly of people, but also a community organized by law and mutual benefit, a certain community of rights. In the historical development, Rome was a monarchy, a republic, and an empire at the same time. There is not much information about the kingdom, especially about its beginnings, but it seems as if the king had unlim-

⁹ Arystoteles, *Polityka*, Wrocław 2005, fr. V, pp. 4–6.

¹⁰ *Cic. De re publica*, 1, 39: Well, then, a commonwealth is the property of a people. But “people” is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good; cf. also *Cic. De re publica*, 3, 43; 1, 49.

ited power. Then came the republic, which, however, has never had a democratic character, but an aristocratic one. Principate was the most interesting political concept, in which the idea of imperial power was created. The sovereign governed various republican offices, previously separated from each other, not only in respect of the content, but also in a personal way, which subsequently commenced to be understood as a uniform authority. In turn, the Dominate is a concept of the state power in the form of a uniform authority¹¹.

It therefore seems, that in the political system of the ancient Rome, many of the democratic elements cannot be found, but the sources of the modern idea of the separation of powers, attributed to Montesquieu, may be found in the Roman law, among others in the works of Cicero:

De re publica 2,23: *Statuo esse optime constitutam rem publicam, quae ex tribus generibus illis, regali et optumati et populari, confusa modice nec puniendo inritet animum inmanem ac ferum*¹².

Cicero claimed that the best political system is the one of a harmonious combination of the elements, which are included in the three forms of government, i.e. monarchy, rule of elites and democracy¹³. Cicero in his speech *de re publica* (which was translated into Polish as about a state, about a public thing, or about a common thing, or ultimately about a depicted pattern of a perfect mixed system based on the three elements: authority (*potestas*) concentrated in the hands of officials (*magistratum*), wisdom (*auctoriats*), which belonged to senate, and liberty (*libertas*) the right to the people (*populus Ro-*

¹¹ J. Zabłocki, A. Tarwacka, *Publiczne prawo rzymskie*, Warsaw 2011; A. Jurewicz, R. Sajkowski, B. Sitek, J. Szczerbowski, A. Świętoń, *Rzymskie prawo publiczne. Wybrane zagadnienia*, Olsztyn 2011; A. Dębiński, J. Misztal-Konecka, M. Wójcik, *Prawo rzymskie publiczne*, Warsaw 2010; *Rzymskie prawo publiczne*, ed. B. Sitek, P. Krajewski, Olsztyn 2006.

¹² *Cic. de re publica* 2,23: [I consider] the best constitution for a State to be that which is a balanced combination of the three forms mentioned, kingship, aristocracy, and democracy, and does not irritate by punishment a rude and savage heart.

¹³ *O państwie*, [in:] *Cycon, Pisma filozoficzne*, vol. II, *O państwie. O prawach. O powinnościach. O cnotach*, Warsaw 1960, pp. 15–189; K. Kumaniecki, *Literatura rzymska. Okres cyceński*, Warsaw 1977, p. 323; idem, *Cycon i jego współcześni*, Warsaw 1989; J. Zajadło, *Czy Cycon był prawnikiem?*, “Palestra” 2018, No. 11, pp. 32–38; idem, *Konstytucjonalizacja prawa międzynarodowego*. “Państwo i Prawo” 2011, No. 3, pp. 7–8; *Cicero and Modern Law*, ed. R.O. Brooks, London-New York 2009; R.T. Radford, *Cicero: A Study in the Origins of Republican Philosophy*, Rodopi, Amsterdam-New York 2002; *Cicero, On the Commonwealth and On the Laws*, ed. J.E.G. Zetzel, Cambridge 1999.

manu). Of course, Cicero was aware of the dangers, which are present in the political system of Rome.

Cic. De legibus III, 33–34: Proximum autem est de sufragiis, quae iubeo nota esse optimatibus, populo libera. (...) Atqui frater bona tua venia dixerim, ista sententia maxime et fallit imperitos, et obest saepissime rei publicae, cum aliquid verum et rectum esse dicitur, sed optineri id est obsisti posse populo negatur. Primum enim obsistitur cum agitur severe, deinde vi opprimi in bona causa est melius quam malae cedere. Quis autem non sentit omnem auctoritatem optimatum tabellariam legem abstulisse? Quam populus liber numquam desideravit, idem oppressus dominatu ac potentia principum flagitavit. Itaque graviora iudicia de potentissimis hominibus extant vocis quam tabellae. Quam ob rem suffragandi nimia libido in non bonis causis eripienda fuit potentibus, non latebra danda populo, in qua bonis ignorantibus quid quisque sentiret, tabella vitiosum occultaret suffragium. Itaque isti rationi neque lator quisquam est inventus nec auctor umquam bonus.

Cicero, in his third book *De legibus* (about rights), introduced a few moderate suggestions, which according to him were about to improve some political solutions, applicable in the Roman Republic. The purpose of the suggested changes had to be restoring and increasing political and legal stability in the Roman state, especially squashing the beef between senate (aristocratic element), tribunes and people's assembly (democratic element) e.g. by appropriate electoral solutions in terms of confidentiality or open ballot.

In case of necessity of an implementation of the rules of law, the writer raised this subject in his next speech:

Cic. Oratio pro Cluentio (53, 146): (...) Hoc enim vinculum est huius dignitatis qua fruimur in re publica, hoc fundamentum libertatis, hic fons aequitatis: mens et animus et consilium et sententia civitatis posita est in legibus. Ut corpora nostra sine mente, sic civitas sine lege suis partibus, ut nervis et sanguine et membris, uti non potest. Legum ministri magistratus, legum interpretes iudices, legum denique idcirco omnes servi sumus ut liberi esse possimus¹⁴.

¹⁴ *Cic. Clu. 146*: Although I should grant to you that it would be a scandalous thing (and the fact I will examine into presently,) still you must inevitably grant to me that it is a much more scandalous thing that the laws should be departed from in that state which is entirely held together by the laws; for this is the bond of this dignity which we enjoy in the republic, this is the foundation of our liberty, this is the source of justice. The mind, and spirit, and wisdom,

For the proper interpretation of the quoted fragment *Oratio pro Cluentio* a date and circumstances of its formation have its meaning, i.e. 66 BC in a criminal trial for a murder brought to Cicero's client – Aulus Cluentius Habitus. The speech was given before the creation of the republic *De re publica* and *De legibus*, which is dated back to 53–51 BC, at the beginning of the Cicero's political career. The Roman Republic, at that time, was not yet on the road toward dictatorship. It is the longest of the preserved (71st chapter) Cicero's speeches. Cicero, while defending Cluentius, with the help of clever rhetorical tricks and maybe contrary to the evidence, "pulled the wool over judges' eyes". For the analysis of the title problem, a quoted fragment is a crucial one, according to which: "Officials are the servants of law, judges are the translators of law, we all at the end are the slaves of the law, in order to be free. For the laws are the earnest of dignity, which is used in the Commonwealth, the fundament of liberty, the source of justice". Therefore, Cicero's political and legal system of the Roman Republic is based on the primacy of the rule of law¹⁵.

Polybius, in his *Histories*, also referred to the concept of the best political system. For the most valuable feature of the Roman Republic system, he did consider a combination of the three elements, about which the Cicero's had already mentioned, and in which an opportunity to the mutual deterioration of various authorities was given.

Polybius, *Histories* 6, 43–56: "As for the Roman constitution, it had three elements, each of them possessing sovereign powers: and their respective share of power in the whole state had been regulated with such a scrupulous regard to equality and equilibrium, that no one could say for certain, not even a native, whether the constitution as a whole were an aristocracy or democracy or despotism. And no wonder: for if we confine our observation to the power of the Consuls we should be inclined to regard it as despotic; if on that of the Senate, as aristocratic; and if finally one looks at the power possessed by the peo-

and intentions of the city are all situated in the laws. As our bodies cannot, if deprived of the mind, so the state, if deprived of law, cannot use its separate parts, which are to it as its sinews, its blood, and its limbs. The ministers of the law are the magistrates; the interpreters of the law are the judges; lastly, we are all servants of the laws, for the very purpose of being able to be freemen.

¹⁵ J. Zajadło, *Fragment Oratio pro Cluentio Cyclerona – pierwowzór idei rządów prawa*, "Przegląd Konstytucyjny" 2019, No. 1, pp. 24–39; idem, *Czy Cycleron...* pp. 32–38; idem, *Nie wiecie co znaczy rule of law? Sięgnijcie do Cyclerona*, "Monitor Konstytucyjny" 2019, No. 1.

ple, it would seem a clear case of a democracy. What the exact powers of these several parts were, and still, with slight modifications, are, I will now state”¹⁶.

In the Roman state, according to Polybius, there were three ordered and balanced components of the state power, to such level that it was difficult to state clearly whether the whole system is aristocratic, democratic, or also monarchical. Thus, in the system of the Roman Republic, the monarchical element was the consuls’ strong leadership. In turn, taking into the consideration senate’s power in public treasury management and jurisdiction for the worst *crimen*, the form of the Roman government may seem completely aristocratic. The third element of the system was *populus Romanus* with its prerogatives, and due to them it can be assumed that the form of the Roman government was a democratic one¹⁷.

Both Cicero’s and Polybius’ usage of, in the aforementioned fragments, the Latin term *constitutio*, and the original text of the Greek expression σύνταγμα, may indicate that the concepts of constitutionalism were also known by the Roman state. Of course, the term *constitutio* is primarily present in the Roman private law, in which during the period of the Roman state, the constitution was considered as an emperor’s legal act. Even though the ancient Rome had no constitution in a formal sense, it can be concluded that in the Roman Republic, the constitution was present in a materialistic sense *par excellence*. For the constitution thus understood consisted not only legal standards and the current political practices, but primarily given traditions and customs referred to us *mos maiorum*, in other words a common law. Contemporary historians and constitutionalists of the Roman system refer to Cicero, who is thought to be the first who had used the term *constitutio* in such a meaning¹⁸, in a direct way. It seems that for Cicero the term *constitutio* meant a set

¹⁶ <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0234%3A-book%3D6%3Achapter%3D11>; cf. Polibiusz, *Dzieje*, I, Wrocław 1957, pp. 320–325.

¹⁷ Polibiusz, *Dzieje*, VI, pp. 11–18; F.W. Walbank, *Polybius and the Roman Empire*, Cambridge 2009, pp. 239–260.

¹⁸ W. Ciszewski, *Republikańskie odczytanie Konstytucji Rzeczypospolitej Polskiej*, “Przeegląd Konstytucyjny” 2017, No. 4, pp. 5–32; R. Piekarski, *Co nie mieści się w dobrze pojętym republikanizmie. Wybrane narracje republikanizmu w cywilizacji Zachodu – od czasów antyku greckiego po czasy współczesne*, “Pieniądze i Więź” 2018, vol. 21, No. 2, pp. 19–32; A. Lintott, *The Constitution of the Roman Republic*, Oxford-New York 1999; J. Bleicken, *Die Verfassung der Römischen Republik. Grundlagen und Entwicklung*, Paderborn-München-Bonn-Zürich 1985;

of rules which were to determine the process of organization and functioning of the Roman state at all levels of the government. These rules were not only considered as legal norms, but primarily as unwritten customs (*mos maiorum*). Common law was highly appreciated by Cicero, for he perceived it as a law of nature, in Greek known as *recta ratio* (gr. *orthós logos*)¹⁹.

III.

In a brief summary, it can be concluded that the term constitution is not an invention of the modern era. The idea which brings a superior establishment in a given territory, and the legal act for the whole group of people, was already known in the ancient times, and has been changing over the centuries. The fact that in the ancient Rome the written constitution was not present, does not mean that the roots of the contemporary constitutionalism and the genesis of the modern constitution in a substantive sense, to be more precise, entirety of legal standards concerning the political system of the state, cannot be found in the Roman state. It is obvious, however, that only from the 18th century the term constitution was only and exclusively used in a reference to the legal act in a given state, which defines its political foundations. In this sense, the term occurs contemporary in the common understanding.

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¹⁹ *Recta ratio* – the definition of human intellect, which in the process of theoretical, practical and creative knowledge, guided by the truth, goodness and beauty of the acknowledged things, becomes a legal reason (*rectus*); sometimes the definition of the eternal law (divine), the law of nature or divine's ideas, which as a real (virtuous), the become indications to the proper function of mind. (<http://www.ptta.pl/pef/pdf/r/rectaratio.pdf> <https://www.yourdictionary.com/recta-ratio>).

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