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## THE CONSTITUTIONAL POSITION OF ODOACER AND THEODERIC

By A. H. M. JONES

Mommsen in his *Ostgotische Studien* (*Ges. Schr.* vi, 362 ff.) enunciated the theory that Odoacer and Theoderic were kings of their German followers, but ruled their Roman subjects as commissaries of the emperors, holding the office of *magister militum* with certain precisely defined additional powers. Stein (*Bas-Empire* II, 116 ff.) and Ensslin (*Theoderich der Grosse*) have considerably modified this theory, admitting that Theoderic acted as king of all his subjects. They nevertheless still maintain that he was at the same time *magister militum*, and that his powers were limited in certain respects by a formal concordat with the emperor. In my opinion Odoacer and Theoderic were kings pure and simple, in the same position as the other barbarian kings.

The received view is largely based on the fact that the consuls nominated by Odoacer and Theoderic were acknowledged in the East. It is argued that Zeno and Anastasius must have formally invested Odoacer and Theoderic with the power of nominating consuls, and thus have given them some explicit constitutional position. It is clear that Theoderic bestowed the consulship (Cass., *Var.* vi, 1, 'formula consulatus,' cf. II, 2-3; IX, 22-3, for actual appointments) and it is indubitable that the Western consuls were generally acknowledged by the emperors. But Procopius makes the Goths claim that they 'allowed the Romans each year to obtain the rank of consuls from the Emperor of the East' (*BG* II, vi, 20: προσθείη δ' ἄν τις ὡς καὶ τὸ τῶν ὑπάτων ἀξίωμα Γότθοι ξυνεχώρουσιν Ῥωμαίοις πρὸς τοῦ τῶν ἐφῶν βασιλέως ἐξ ἑκάστον ἔτος κομίζεσθαι). This can only mean that the men nominated by Theoderic as consuls were not *ipso facto* acknowledged as such by the emperors, but had to obtain *codicilli* from them, if they were to be recognized in the East. Some agreement must have been reached that the emperor would leave one of the consulships open and give favourable consideration to persons nominated at Rome, but the Emperor clearly did not give Theoderic formal authority to appoint one consul; on the contrary he appointed both. Eutharic's consulship in 519 was therefore not exceptional. His son in writing to Justinian naturally stressed the fact that the Emperor had bestowed the consulship upon him (Cass., *Var.* VIII, 1) but this was merely in order to emphasize the friendly relations which had prevailed between the Ostrogothic royal family and the emperors.

It would not seem that the acknowledgment of their consuls in the East can have been a matter of great moment to Odoacer or Theoderic. The men they appointed would naturally be recognized in their own kingdoms, and were in fact generally accepted in the other barbarian kingdom of the West. The question was important to the Roman nobility, who wished to figure in the *Fasti* as legitimate consuls, and it was no doubt the senators sent as envoys by the kings to Constantinople who pressed the matter and negotiated the working arrangement whereby they received a second codicil from the emperor which made them real consuls.

We know from Malchus that Odoacer proposed to Zeno that the latter should appoint him patrician (by which word is certainly meant the office held by Aëtius, Ricimer, etc.) and entrust him with the government of Italy (Malchus 10: καὶ δεῖσθαι τοῦ Ζήνωνος πατρικίου τε αὐτῷ ἀποστεῖλαι ἀξίαν καὶ τὴν τῶν Ἰταλῶν τούτῳ ἐφεῖναι διοίκησιν). But from the same passage we know that Zeno rejected the proposition; he may have given Odoacer the rank of patrician without the office of *magister militum* (as Stein interprets Malchus' words, καὶ βασιλείου γράμμα περὶ ὧν ἠβούλετο πέμπων τῷ Ὀδοάκῳ πατρικίου ἐν τούτῳ τῷ γράμματι ἐπωνόμασε, in *Bas-Empire* II, 46-7), but this of course gave Odoacer no powers. There is in fact no evidence that Zeno ever gave any kind of official recognition to Odoacer, except that Odoacer's consuls were acknowledged from 480 onwards, and this, I have argued, means nothing. Odoacer is always spoken of as king in the literary sources, and is officially so styled in the two surviving documents of his reign, both of which concern his Roman subjects. In his edict on papal elections the praetorian prefect Basilius is stated to be 'agens etiam vices praecellentissimi regis Odoacris' (*MG (AA)* XII, 445), and in his grant of lands to Pierius Odoacer styles himself 'Odoacer rex' (*FIR* III<sup>2</sup>, 99, 1, 10). In this document Odoacer behaves exactly

like an emperor, giving orders to 'Andromachum v. i. et magnificum magistrum officiorum, consiliario nostro' and 'Marciano v.c. notario nostro' (ib. II, 4). These officers are alluded to elsewhere in the document as 'v.c. adque magnificus magister officiorum et consiliarius d.n.' (I, 4) and 'v.c. notarium regni eius' or 'regiae sedis' or 'v.c. notarius d.n. praecellentissimi regis Odoacris' (I, 5; II, 7, 11).

The evidence about Odoacer is scanty, but for what it is worth it indicates that he was simply a barbarian king, who like the other barbarian kings assumed imperial powers and took over imperial institutions. There is much more evidence about Theoderic and one might reasonably expect to find some explicit allusion in it to the constitutional position which he is alleged to have held. According to the prevailing theory Athalaric ought not merely to have announced his accession to Justinian and asked for a continuance of the friendly relations hitherto prevailing between his grandfather and the Emperor, as he does in Cass., *Var.* VIII, 1. He surely ought to have requested the Emperor to bestow upon him the office of *patricius et magister militum* and confer other constitutional powers, such as the right to appoint magistrates; the sentence 'ut amicitiam nobis illis pactis, illis conditionibus concedatis quas cum divae memoriae domno avo nostro inclitos decessores vestros constat habuisse' can hardly cover so basic a question and must refer to normal treaty relations. Again if the Goths in their parley with Belisarius (Proc., *BG* II, vi) could have cited a formal treaty or grant authorizing Theoderic's rule over Italy, they surely would have done so.

Of the terms on which Zeno approved of Theoderic's invasion of Italy we have only the vaguest accounts in our authorities (Jordanes, *Get.* 290-2; *Rom.* 348; Proc., *BG* I, i, 10-11; II, vi, 16, 23-4). The most explicit (Anon. Val. 49, 'cui Theodoricus pactuatus est, et si victus fuisset Odoacar pro merito laborum suorum loco eius dum adveniret tantum praeregnaret') suggest that Theoderic was provisionally to be king. According to Malalas (383-4) Theoderic after conquering Odoacer and becoming king in his stead was reconciled to Zeno and thereafter did everything to please him; amongst other things he 'received the codicils of his major officers from the Emperor Zeno, notifying him whom he wanted to be promoted, and he received the rods of the consuls in the presence of the Emperor himself' (καὶ τὰ κωδικίλλια μὲν τῶν αὐτοῦ ἀρχόντων τῶν μεγάλων ἀπὸ τοῦ βασιλέως Ζήνωνος ἐδέχετο, μηνύων αὐτῷ τίνα ἤθελε προαχθῆναι· καὶ τοὺς σκιπίονας δὲ τῶν ὑπάτων ἐπὶ τοῦ βασιλέως αὐτοῦ ἐλάμβανεν). The second clause may be a confused description of some such arrangement about the consuls as I have suggested. The first clause is patently untrue as a description of what actually happened, but may represent the terms which Zeno laid down. This clause is strikingly parallel to one of the conditions which Peter the patrician, as plenipotentiary of Justinian, demanded of Theodatus (Proc., *BG* I, vi, 3: ἦν δὲ γε τῶν ὑπηκόων τινὰς ἐς τὸ τῶν πατρικίων ἢ ἄλλο βουλῆς ἀξίωμα Θεωδάτος ἀγαγεῖν βούληται, τοῦτο δὲ οὐκ αὐτὸν δώσειν, ἀλλὰ βασιλέα αἰτήσειν δίδοναι). It is a possibility that Peter, who was, as the fragments of his works in the *de Caerimonis* show, a great man for precedents, may have used Zeno's original terms to Theoderic as a model for the terms which he offered to Theodatus. In that case Zeno intended Theoderic to be a client king, who openly acknowledged the emperor as his suzerain, and had limited rights only over Roman bishops and senators, not being allowed to execute them or confiscate their property without the Emperor's consent, and had no power to appoint to the higher offices of state, but could only make recommendations to the Emperor.

As soon as he had defeated Odoacer in 490 Theoderic sent an envoy to Zeno, 'ab eodem sperans vestem se inducere regiam' (Anon. Val. 53). For some reason this embassy achieved no result. If my previous conjecture is correct, it might be inferred that Theoderic now repudiated the rather rigid conditions on which he had been offered the crown, and that Zeno was unwilling to yield. A second embassy was sent in 493, but Zeno died while it was still at Constantinople and 'Gothi sibi confirmaverunt Theodericum regem, non expectantes iussionem novi principis' (Anon. Val. 57). Thereupon Theoderic 'privatum habitum suaeque gentis vestitum reponens insigne regii amictus quasi iam Gothorum Romanorumque regnator assumit' (Jordanes, *Get.* 295). Later peace was made with Anastasius 'de praesumptione regni', and the Emperor returned to Italy the 'ornamenta palatii' which Odoacer had sent to Constantinople (Anon. Val. 64).

In all this there is no mention of anything save the kingship. As Theoderic had long been king of the Ostrogoths, the kingship in question was presumably (as Jordanes states) over the Romans. Ensslin's theory that Theoderic's title as king required reaffirmation because his original Ostrogothic subjects had by now been reinforced by other barbarians is not plausible and has been rejected by Stein. Theoderic apparently wished to receive the title from the Emperor, but not being able to get it on his own terms, allowed the Goths to proclaim him. Later, however, he secured Anastasius' recognition of his position. He appears to have attached particular importance to the right to wear the purple, unlike Odoacer, who was content with the title (*Chron. Min.* II, 159, 'nomenque regis Odoacar adsumpsit cum tamen nec purpura nec regalibus uteretur insignibus'). He presumably used the imperial regalia which he persuaded Anastasius to return. He never, however, claimed to be emperor, but only king (*Proc.*, *BG* I, i, 26, καὶ βασιλέως μὲν τοῦ Ῥωμαίων οὔτε τοῦ σχήματος οὔτε τοῦ ὀνόματος ἐπιβατεῦσαι ἤξιώσεν, ἀλλὰ καὶ ῥῆξ διεβίου καλούμενος).

This, in my view, was the correct constitutional position as agreed between Anastasius and Theoderic: Italy was no longer part of the empire and Anastasius recognized Theoderic as its king. Two Roman senators do not appear to have accepted this position. In an inscription set up by Caecina Mavortius Basilius Decius (*ILS* 827) Theoderic is styled 'd.n. gloriosissimus adque inclutus rex Theodericus victor ac triumphator semper Augustus'. The other inscription, set up by Valerius Florianus (*Bull. Comm. Arch. Com.* LXXIII (1949-50), 79, completing *ILS* 825), begins: 'salvis dominis nostris Anastasio perpetuo Augusto et gloriosissimo ac triumphali viro Theoderico.' Both inscriptions suggest that some senators at any rate wished to believe that they were still living under the Roman empire. The first crudely makes Theoderic emperor as well as king, ignoring Anastasius. The second is more subtle. Italy is assumed to be part of the united empire and Theoderic's position is discreetly veiled; he is styled neither king nor emperor, 'but is coupled with Anastasius under the heading 'domini nostri' in a way which suggests that he was his colleague.

Both inscriptions must be regarded as reflecting rather the wishful thinking of the Roman aristocracy than the official constitutional doctrine. In every other document Theoderic is styled simply king, and that Italy was not, even in the most formal sense, a part of the empire under Theoderic is revealed by one of the terms on which Justinian was willing to recognize Theodatus as king, that when the king was publicly acclaimed, the Emperor should be acclaimed before him, and when a statue was set up to the king, a statue of the Emperor should be set up on its right hand (*Proc.*, *BG* I, vi, 4-5). If Anastasius had regarded Theoderic as an imperial commissary, he would surely have insisted on these acknowledgments of his sovereignty.

The theory that Theoderic was concurrently a Roman *magister militum* is based on two facts, that he never appointed a *magister militum*, and that he used as his own an *officium* which appears to have been that of the *magister militum*. Neither argument is very cogent. Theoderic may well have refrained from giving the title for political reasons; in Italy the *magistri* had been in the past overpowerful subjects, and he preferred to keep his military commanders in a subordinate role. There was evidently no constitutional difficulty since his successor Athalaric did appoint *patricii praesentales* (*Cass.*, *Var.* VIII, 9-12; XI, I, § 16). The second point is disputable, but I would agree that it is correct.

Theoderic, through the mouth of Cassiodorus, several times mentions 'officium nostrum'. From *Var.* VI, 13, 'formula magistri scrinii quae danda est comitiaco quando permilitat,' it appears that members of the 'officium quod nostris iussionibus speciali sollicitudine famulatum est' were called *comitiaci*. In II, 28, an 'ex principe nostri officii' receives on retirement the *comitiva primi ordinis* with the rank of *spectabilis*. From VII, 21-2, it appears that there were *scriniarii nostri officii* and from VII, 31, that the *princeps cardinalis* of the *officium comitiacum* was in immediate attendance on the king (at Ravenna) and that he had a *vicarius* at Rome. From VII, 24-5, it appears the *princeps* of the *comes Dalmatarum* was sent him 'ex officio nostro'. In IV, 40, a summons to the king's court is executed 'per officium nostrae sedis', and in I, 8 (cf. IV, 5); I, 27; II, 10; V, 6, *comitiaci* act as royal *executores*.

These data best fit the hypothesis that 'officium nostrum' was the *officium* of the

*magister militum praesentalis*. His *officium* was headed by a *princeps* (*Not. Dig. Occ.* v, 276 ; vi, 87). It comprised *scriniarii* (implied by the *primiscrinius* of *Occ.* vi, 89 ; cf. *Or.* v, 72 ; vi, 75 ; viii, 59 ; ix, 54 ; and Joh. Lydus, *de mag.* iii, 57 ; τοῖς δὲ τῆς στρατηγίδος ἀρχῆς σκρινιαρίοις συναριθμούμενος). From it were seconded *principes* to the *officia* of the *comites rei militaris* and *duces* (*Not. Dig. Occ.* xxv, 38 ; xxvi, 22, etc.). The title *comitiacus* would seem appropriate to the officials of the *magister militum*, who was often known, particularly in the West, simply as *comes* ; according to Joh. Lydus, *de mag.* ii, 7, in the East also οἱ μὲν γὰρ λεγόμενοι στρατηλάται τὴν τῶν κομίτων ἔχουσιν ἐκ τῆς ἀρχαιότητος καὶ μόνην τιμὴν ταύτη καὶ κομιτιανούς τοὺς δευτεροστρατηλατιανούς ἢ παλαιότης οἶδε.

The constitutional significance of this fact is not, however, very evident. Odoacer had no doubt taken over the *officium* of the *magister praesentalis*, since he was *de facto* commander-in-chief, and Theoderic may well have followed his example, being in the same position ; alternatively he may have brought his own *officium* as *magister militum* with him when he invaded Italy and have retained it. In any case the use of this *officium* as his personal staff was a matter of administrative convenience rather than constitutional law.

It is furthermore alleged that in the 'capitulations' under which Theoderic was authorized to govern Italy two restrictions were placed on his powers. In the first place he was not authorized to enact *leges*, but only, like a praetorian prefect, to issue *edicta*. It is true that Theoderic did call his laws *edicta*, but this was probably a matter of policy. Shortly after his recognition by Anastasius Theoderic made an announcement to the Senate and People in which 'se omnia deo iuvante quod retro principes Romani ordinauerunt inviolabiliter servaturum promittit' (*Anon. Val.* 66). Later the Goths claimed (*Proc., BG* ii, vi, 17), οὕτω τοίνυν παραλαβόντες τὴν τῆς Ἰταλίας ἀρχὴν τοὺς τε νόμους καὶ τὴν πολιτείαν διεσώσαμεθα τῶν πρόποτε βεβασιλευκότων οὐδενὸς ἤσσον, καὶ Θεουδερῖχου μὲν ἢ ἄλλου ὁπουοῦν διαδεξαμένου τὸ Γόθων κράτος νόμος τὸ παράπαν οὐδεὶς οὐκ ἐν γράμμασιν, οὐκ ἄγραφός ἐστι. There seems no reason to doubt that Theoderic's action was, as stated, a spontaneous concession, designed to reassure and conciliate the Romans.

The second alleged restriction was that Theoderic was incapable of giving the Roman citizenship to Goths, and *a fortiori* of appointing them to Roman offices or making them senators, patricians or consuls : since Theoderic habitually appointed Goths as *comites rei militaris* and *duces*, these offices, though they carried the Roman ranks of *illustris* and *spectabilis*, are for the purpose of the theory not regarded as 'Roman', nor is the *comitiva patrimonii*, to which also Goths were sometimes appointed. It is true that Theoderic appointed no Goth as consul except his son-in-law Eutharic, and that he is not known to have created any Goth patrician : Athalaric did, however, bestow this rank on Tuluin (*Cass., Var.* viii, 9). Tuluin took his seat in the Senate (*Cass., Var.* viii, 10-11). It is not known if any Goths became senators under Theoderic, but many acquired the rank of *illustris*, which was the qualification for entry to the Senate (*Cass., Var.* iv, 12, 46, Marchedus ; i, 40 ; iii, 26 ; iv, 9 ; ix, 8 ; 9, Osuin ; v, 18 ; ix, 13, Willia ; iv, 16, 22-3, Arigern), and in one case, that of Arigern, Theoderic uses language which, taken at its face value, implies that he was a senator (*Cass., Var.* iv, 16, 'quem desideratum, sicut putamus, coetui vestro reddidimus').

It is true that Theoderic did in fact reserve the civil offices (except the *comitiva patrimonii*, which was a new creation) to Romans, and the Goths later claimed as evidence of their good rule over Italy that the Romans 'have continued to hold all the offices of state, and no Goth has participated in them' (*Proc., BG* ii, vi, 19). But there is no evidence that this was not merely a matter of policy. All the German kings employed Romans freely in civilian posts, partly because they were alone qualified to perform their functions, and partly no doubt to conciliate public opinion.

I would maintain then that Theoderic invaded Italy as *patricius et magister militum praesentalis* of Zeno, but in 493 having conquered Odoacer abandoned this office and had himself proclaimed king (of Italy) by the Goths (in *Anon. Val.* 49-54, he is called *patricius* up to this date, but never thereafter). In 497 he was recognized as such by Anastasius. Having a deep admiration for Roman civilization and wishing to conciliate his Roman subjects, and in particular the Senate, he announced that he would preserve the Roman law, thereafter modifying it only by *edicta*, maintained the existing administrative structure, and made it his consistent policy to appoint Romans to civilian offices. Goths were

appointed to the military offices (and to the *comitiva patrimonii*), and given the appropriate titles of rank ; if *illustres* they were perhaps enrolled in the Senate. He created no *magistri militum*, preferring to give his generals the more modest titles of *comes* or *dux*, and is not known to have conferred the patriciate on a Goth ; his successor, however, did not maintain these policies. He assumed the right of nominating a consul each year, but the Emperor did not regard his nominations as valid ; he did, however, informally agree himself to grant the consulship to Theoderic's nominees.

The peculiarity of Theoderic's position was not, I would maintain, the result of any formal concordat between him and the Emperor, but the fruit partly of his personal policy, partly of his exceptional position as ruler of Rome and Italy. It is evident from all our sources that he had a deep and genuine respect and admiration for Roman *civilitas*, and that he did his best to preserve it and to inculcate it among the Goths. But even if this had not been his personal preference, his practical position was very different from that of the other barbarian kings. The Vandals, Visigoths, Burgundians and Franks occupied outlying dioceses of the empire. They inherited only the provincial administration and there were relatively few senators among their subjects. Theoderic, and Odoacer before him, inherited the central government of the empire, and Rome itself, with its Senate. While the other barbarian kings improvised central governments of their own making, Odoacer and Theoderic, if only by force of inertia, maintained the ancient offices of the imperial *comitatus* and the praetorian prefecture. The other kings did not need to be over careful to placate the scattered senatorial families resident in their dominions. These senatorial families preserved, it is true, great social prestige and their members were often employed in high offices by the kings. But they did not constitute a privileged order. It is notable in the *Breviarium* of Alaric that scarcely any laws about the privileges, honours and precedence of senators are preserved. Senators are in fact mentioned only three times in the *interpretationes*. In *Cod. Theod.* II, xxxiii, 3 and 4, senators are forbidden to charge more than 6 per cent interest on loans, and in Marcian, *Nov.* v, they are permitted to marry women of low degree. In *Cod. Theod.* IX, xl, 10, where the original law gives a jurisdictional privilege to 'senatorii ordinis viri', the *interpretatio* changes this phrase to 'maiores personae aut alicuius dignitatis viri'.

Odoacer and Theoderic, on the other hand, were faced by the bulk of the senatorial order, including its most ancient and wealthiest families, and by the Senate itself, with its strong corporate tradition. It is in the circumstances hardly surprising that they should have been careful to grant to senators the offices and honours which they prized so highly, meticulously observed the protocol on which they set such store, treated the Senate as a corporation with deference, and in general avoided any unnecessary disturbance of the existing order.