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P. SULPICIUS' LAW TO RECALL EXILES, 88 B.C.

This brief enquiry concerns two main questions: how and why Sulpicius' law differed from a similar prior rogation of the same year, which he had vetoed; and the probable authorship of the latter.[1]

Despite some headway with her gravest difficulties over the past two years, early in 88 B.C. Rome was still in crisis. The state treasury was empty;[2] a praetor had recently been lynched by angry creditors;[3] huge Asiatic investments were known to be under threat from Mithridates of Pontus (the worst news was probably yet to come);[4] and despite widespread enfranchisement in Italy under the Lex Iulia of 90 and ancillary legislation, and despite the claims of the new consul L. Sulla (by spring 88 his exaggerations patent), rebellion in Italy smouldered on among the most formidable and determined of Rome's enemies, and might once more blaze up into another inferno at the least provocation[5]—not least in view of the inferior status of the New Citizens, which was by then beginning to rankle.[6] The need, then, to promote internal *concordia* in the Roman state remained as clamant as ever. Not that there had been any lack of endeavour in that regard. At the very start of the war at least some partisan hostilities (we are told) had been laid aside;[7] the murdered praetor of 89, Sempronius Asellio, had been attempting a solution to debt-problems;[8] the issue of jury-selection raised by the scandalous conviction of P. Rutilius Rufus had been at length for the moment settled by the conciliatory compromise of the Lex Plautia Iudiciaria,[9] and before that political infighting in the courts had been checked by the suspension of all judicial business except trials under the Lex Varia, and eventually, after condemnation of Varius himself under it, even of those.[10] Even the Lex Varia itself could be seen as a paradoxical and controversial attempt to rally patriotic fervour against rebel Italy. It was of course badly misguided, and compounded battle-casualties among Rome's officer-corps from the Italian war by further losses through exile of some of her most

[1] This piece began as a very brief note focused chiefly on the second question. I have to thank Professor John Richardson for insisting on more thorough probing of the first: he is not of course to blame for surviving slips or blunders.

[2] Appian, *Mith.* 22 (cf. 30); Oros. 5.18.22. Cf. Pliny, *N.H.* 33.46; 50; Cic. *leg. agr.* 2.80.

[3] Appian, *B.C.* 1.54.232–9; Livy, *Per.* 74; Val. Max. 9.7.4. E. Badian, *Historia* 18 (1969), 475ff. has a full exposition, though I do not wholly agree with his view of Asellio's actions.

[4] For exposition, particularly of chronology, A. N. Sherwin-White, *Roman Foreign Policy in the East*, ch. 5.4, pp. 121–4. News of the massacre and actual financial catastrophe (Cic. *de imperio Cn. Pomp.* 19 [cf. 16ff.]) will not have reached Rome before March 88, and perhaps came rather later.

[5] On Sulla's *aristeia* of 89, or his claims to it, Appian, *B.C.* 1.50–1.217–26; Liv. *Per.* 85; Vell. 2.17.3; Diod. 37.25; cf. Sulla, Fr. 10AP = Plut. *an seni ger. resp.* 6; Plut. *Sull.* 7 init.; Oros. 5.18.22. For rebellion persisting after Sulla's campaign of 89 in and around Samnium (e.g tying up no fewer than six legions at Nola), Lucania, and Bruttium, Diod. 37.2.8–14; Plut. *Sull.* 9; *Mar.* 35; Appian, *B.C.* 1.52–3.227–31; Liv. *Per.* 76, 79; Vell. 2.17.1, 18.2; Oros. 5.19; Gran. Lic. 16Fl.; Dio Fr. 102.7; Plut. *Sull.* 7.

[6] Appian, *B.C.* 1.49.211–15, 55.243–45, 64.287f., 65.293f., etc.; Vell. 2.20.1.

[7] Plut. *Sull.* 6.1–2; *Mar.* 32. [8] Above, n. 2.

[9] Ascon 79C. Not in my view a partisan measure, *pace* Badian (n. 3), pp. 465–75.

[10] Jurisdiction under Lex Varia only, Cic. *Brut.* 304; Varius himself condemned under it, *ibid.* 305; *N.D.* 81; Val.Max. 8.6.4; trials under that law too suspended, Ascon. 73C (by implication). In general, see (with some caution) the seminal discussion of Badian (n. 3); further discussion, citing other more recent literature, in J. G. Powell, *Historia* 39 (1990), 446–60.

talented potential leaders, of whom by 88 she stood sorely in need, and whose continued enforced absence was still doubtless a source of much bitterness.[11]

In this context, efforts to secure the restoration of at least some exiles were highly desirable and readily comprehensible. P. Sulpicius, however, who had recently become tribune (10 December, 89), when such a law was promulgated, interposed his veto. There has been much debate over why he did this, and which exiles can have been in question, all the more of a mystery since it is alleged that he later changed his mind and promoted 'the same law', defending his action with nothing more than a quibble about terminology. There is but a single source, but it requires careful interpretation. [Cic.] *Rhet. ad Herenn.* ii. 28.45 reads:

Item vitiosum est de nomine et vocabulo controversiam struere quam rem consuetudo optime potest iudicare; velut Sulpicius, qui intercesserat ne exules quibus caussam dicere non licuisset reducerentur, idem posterius, immutata voluntate, cum eandem legem ferret, aliam (v.l. alio) se ferre dicebat propter nominum commutationem; nam non exules sed vi eiectos se reducere aiebat. proinde quasi id fuisset in controversia, quo illi nomine appellarentur, aut proinde quasi non omnes quibus aqua et igni interdictum est exules appellentur. Verum illi fortasse ignoscimus si cum caussa fecit; nos tamen intellegamus vitiosum esse intendere controversiam propter nominum mutationem.

To translate, so far as is possible:

Again it is unsound practice to contrive an issue over (meanings of) terminology and wording—a matter best settled by reference to common usage. For instance, Sulpicius had used his veto to prevent the recall of exiles 'who had not been allowed to plead a case', yet the self-same man changed his attitude and in the course of carrying an identical law asserted that what he was proposing was a different one [*or, on a variant reading*: had a different purpose], basing his argument on altered wording. For he claimed that he was recalling not 'exiles', but 'persons who had been forcibly expelled'[12]—just as if the issue was how they should be designated, or just as if all persons interdicted from fire and water were not to be designated 'exiles'. Certainly we (can) perhaps excuse him if he did this for good reason, but even so let us be quite clear that it is unsound to press an issue on grounds of variable terminology.

By way of preliminary *caveat*, it is as well to remember that the purposes of the Auctor (or his source or sources) may not be the same as those of Sulpicius: we have to take into account the possibility, even likelihood, of selectivity, compression, and bias. Further, in the vocabulary itself, whether or not deliberately exploited by the parties concerned, there lurk ambiguities, especially between technical and more common parlance. Some points, however, emerge with virtual certainty. Whatever scope may remain for debate on his motives or on the category or categories of exiles in question, (i) Sulpicius did veto a proposal to recall exiles; and (ii) did carry a law of his own which closely enough resembled the one which he had thwarted to provoke the criticism that it was 'the same law'. In reply he (iii) maintained that he was recalling not 'exiles', but 'persons who had been thrown out by force' (i.e. unlawfully). Further, (iv) while the Auctor concedes that Sulpicius' action may have been excusable (he presumably means from a political standpoint), he still insists that it is bad rhetorical practice to base argumentation on contrived terminological pedantries which disregard established usage. Again, (v) whether or not the Auctor is right in claiming that there could be no serious debate about how to designate the prospective beneficiaries of both proposals, he certainly based his assertion that they would all in common parlance be designated *exules* on the supposition that they had all been

[11] Appian, *B.C.* 1.38.169.

[12] Of course, as will emerge below, by *vi eiectos* Sulpicius meant 'thrown out by *illegal* violence', but the Auctor would vitiate his own argument if he were to accept that view of the matter. Hence my ambivalent translation, clarified, I trust, below.

subjected to *aquae et ignis interdictio.* There is no good reason to doubt that this was true, not only of those among them who had evaded other penalties on being convicted by *quaestio* or comitial process, but also of any who had left Rome before conviction or had even failed to face trial altogether. Such was the procedure, for example, not only in 212 B.C., but also as late as 58 B.C.[13] Finally, (vi) it is clear that in view of the likely hostility of the source, or anyhow of the Auctor's need to make his point, we are not obliged to believe that in fact Sulpicius 'changed his mind', or that his counter-proposal really was, except perhaps superficially, 'the same law', either in wording or intent.

So much for virtual certainties. On further enquiry into the content and motivation of the original proposal, Sulpicius' veto and his substitute legislation, we confront multiple ambiguities in the clause *quibus caussam dicere non licuisset.* (1) For one thing, the semantics of the verb *licere* would allow this locution, out of context and simply as a form of words, to refer either (a) to persons who (had) lacked the legal right to plead their case in a Roman court; or (b) less technically, to those whose right to plead their case had *de facto* for whatever reason or on whatever pretext been denied them. (2) The subjunctive *licuisset* excludes attribution of either of the foregoing meanings to the Auctor (alone): whichever is meant must be assigned to one or both of the parties concerned in the actual controversy of 88 B.C. That is, the clause *quibus caussam dicere non licuisset* may be either (a) simply and solely part of the wording of the original proposal about exiles; or (b) what Sulpicius said about the proposal, true or false, apparently to justify his veto; or (c) both part of the rogation and Sulpicius' comment on it.[14]

Of the various permutations of these readings some at least are hard to reconcile with the known historical circumstances. It is difficult to imagine that the original rogation proposed recall of exiles deliberately and explicitly defining them as 'those who had lacked the legal right to plead their case' (sc. in a Roman court). Conceivably Sulpicius might have alleged, as technical grounds for veto, that this was what was implied, and that it was unacceptable, but who could such persons have been? Certainly not *cives Romani optimo iure Quiritium.* One might just possibly suggest *peregrini* ousted from Rome by the Lex Licinia Mucia (95 B.C.)[15] and other pressures of the later 90s who subsequently became entitled to claim Roman citizenship under the Lex Iulia or other enfranchising laws of 90/89 B.C. Yet even if we suppose that Sulpicius, whether as a former supporter of L. Crassus or on more general constitutional grounds, might wish to veto such an outcome, the theory is not in the least attractive. Even if they could by extremes of rhetorical contortion be termed 'exiles' who were to be 'recalled', there is no direct evidence that any such persons existed; a more contrived method of enfranchising them could hardly have been devised, nor a more contrived reason (if no other were offered) to reject a more general bill to recall exiles; nor indeed a more contrived theory to explain our evidence.

The more promising approach, as well as the more natural way to take the Latin of

[13] On Postumius of Pyrgi and fellow fraudsters Livy 25.3–4, esp. 4.9–11; cf. on Cn. Fulvius 26.2–3, esp. 3.10–12. On Cicero in 58, *MRR* ii., p. 196, esp. Vell. 2.45.1; Ascon 46C; Plut. *Cic.* 32; Dio 38.14–17. On *exul/exsilium,* Cic. *Caec.* 100.

[14] Regrettably, the possibility must also be admitted that the Auctor may be recording only a far from complete version in any case of either the rogation or comment upon it. However, we can only deal with the evidence as we have it, in full awareness that hypotheses in interpretation must remain provisional.

[15] *Ex hypothesi*: in fact the Lex Licinia Mucia is most unlikely to have required physical expulsion from Rome of non-Romans, Schol. Bob. p.129St ad Cic. *Sest.* 30 notwithstanding. For the correct view, E. Badian, *JRS* 63 (1973), 127f.

the *Ad Herennium*, is to suppose that the original rogation sought to restore exiles who had been denied their due right to plead a case. Only fictionally and retrospectively could these be deemed to include *peregrini* forced to leave Rome before 90/89 who subsquently had become potential citizens, and only with some difficulty persons (if there were any) who had been been denied justice by the closure of the courts—eventually even the Varian *quaestio*—during the Social War but none the less forced to leave Rome.[16] Even so, if the draft included *verbatim* the clause (*si*) *cuilquibus caussam dicere non licuit* or the like, Sulpicius could have criticized the very ambiguity of the wording *non licuit* and its possible implications, intended or not. More importantly, however, whether he did that or not, he could also justify his veto on various other grounds. For one thing, a proposal drafted in these terms looks far too narrow, for it excluded many exiles whose restoration was by 88 generally felt to be desirable but who *had* been able to plead—in particular, several victims of the Varian Quaestio. Admittedly this formula would have stated a just cause for recall and no doubt sought to evade invalidation on the grounds that lawfully delivered verdicts of *quaestiones* were inappellable, its author at this stage unwilling to attempt anything more radical. Even so, Sulpicius might object that it was too imprecise, for it left discretion—and therefore patronage and power in the hands of individuals—to the Roman authorities, whoever they might be deemed to be,[17] to decide what constituted 'disallowal to plead', and in particular cases whether it (and so consequent exile) had been legitimate or not . It therefore provided no certain remedy even for arguably deserving cases, like that of L. Bestia, who, it could be urged, had been terrorized into leaving Rome rather than answer charges before the Varian Quaestio.[18] Crucially, however, and most dangerously, the rogation by implication conceded the legality of convictions and exiles under the Lex Varia, and that of the Lex Varia itself—which, despite recent suspension of trials under it, left it technically possible to bring criminal charges against any newly enfranchised citizens who had previously been in rebellion, or who might have any dealings whatsoever with Italians who still were.[19] Other aspects of Sulpicius' policy towards the new citizens strongly suggest that he would have wanted to eliminate this danger.

However, only if we accept the assertion of the source—which is patently hostile and on this point hardly reliable—that Sulpicius' own subsequent proposal was 'the same law, purportedly in different terms' are we obliged to believe that he too failed to recall those exiled after trial under the Varian law, some of whom at least were his personal friends. True, their actual conviction and flight from Rome had not, so far as we know, been forced by any violence, but the original passage of Varius' law itself, according to Appian, most certainly had been, and that was ample pretext for one as well versed as Sulpicius in the arts of rhetoric to describe its victims as *vi eiectos*.[20] On this interpretation, it is perfectly possible to retain the old view that the intended beneficiaries of Sulpicius' law on the recall of exiles included at least those exiled under the Lex Varia, and perhaps potentially others too—while at the same time by

[16] Above, n. 10. [17] Perhaps more probably the consuls.

[18] Appian, *B.C.* 1.37.167. It would be a moot point whether *non licuit* applied in this case or not. It would be much easier to argue that he had been *vi eiectus*.

[19] Sulpicius might also perhaps have objected on grounds of the technical or literal meaning of the terms *exsullexsilium*, which originally implied voluntary departure from the Roman body politic (Cic. *Caec.* 100).

[20] On passage of the Lex Varia *per vim*, Appian, *B.C.* 1.37.166. On Sulpicius' rhetoric, e.g. Cic. *har. resp.* 41; *Brut.* 203. Note also that C. Cotta, one of the more prominent victims of the Varian witch-hunt (Appian, *B.C.* 1.37.167; Cic. *Brut.* 305) is described by Cicero not only as *expulsus* (l.c.), but also at *De Orat.* 3.11 as *eiectus . . . e civitate*—cf. *vi eiectos* ap. Auct. ad Herenn. 2.45.

implication he proclaimed the Lex Varia itself invalid, as well as verdicts reached under it.

Salutary it may have been in intention, but in the Livian Epitome this measure of Sulpicius is listed alongside his moves, allegedly all inspired by Marius, to redistribute new citizens and *libertini* among Rome's old thirty-five tribes and to appoint Marius to lead the war against Mithridates, all three measures regarded by the hostile original source as *leges perniciosae*.[21] That description of the law about exiles might be partly explained by its association with laws which, it was claimed, led to civil war, but Sulpicius could also be accused of stealing the credit for effective pursuit of this policy from the proposer of the earlier, much more tentative and less radical draft which he had vetoed—and in so doing had seriously impaired that worthy Roman's *dignitas*. Our sources do not reveal his identity, but it is not beyond the reach of reasonable conjecture.

Cicero expressly declares (i) that persons with whom Sulpicius had been on the most intimate terms in private life found that as tribune he set about robbing them of all *dignitas*; (ii) that folk were astounded and scandalized when as tribune he quarrelled in deadly hatred with the consul of 88, Q. Pompeius Rufus—'with whom he had been on the most intimate and friendly terms'.[22] One has only to reflect that the proposer of the bill vetoed by Sulpicius must have possessed the *ius agendi cum populo/plebe*—i.e. must have been aedile, tribune, praetor, or consul[23] and that consular *auctoritas* would have been highly desirable, if not essential, for such a measure—to be all but irresistibly tempted to conclude that the injured party was indeed the consul Q. Pompeius Rufus. Unfortunately there is no reliable indication of date within the year, nor whether this incident (or these incidents) should rank as a cause or rather a symptom or effect of Sulpicius' shift in the direction of populist politics.[24]

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[21] Livy *Per.* 77; cf. Plut. *Sull.* 8: *νόμους ἔγραφεν ἄλλους τε μοχθηροὺς καὶ τὸν διδόντα Μαρίῳ τοῦ Μιθριδατικοῦ πολέμου ἡγεμονίαν*; Vell. 2.18.2 *leges perniciosas*. Other main sources in Greenidge-Clay[2], pp. 162ff.

[22] Cic. *De Orat.* 3.11: *Sulpicius . . . quibuscum privatus coniunctissime vixerat, hos in tribunatu spoliare instituit omni dignitate.*; Id. *de amic.* 2: *Meministi . . . cum is* (sc. *Sulpicius*) *tribunus pl. capitali odio a Q. Pompeio qui tum esset consul dissideret, quocum coniunctissime et amantissime vixerat, quanta esset hominum vel admiratio vel querela.* Besides the close verbal parallels note in particular from the first passage *spoliare*—'to despoil', i.e. to his own political profit.

[23] Th. Mommsen, *Staatsrecht* I.191–209, 470, n. 3, II.102, III.304; A. H. J. Greenidge, *Roman Public Life*, pp. 96, 160f., 246.

[24] The only hint of date is that the Livian Epitome (77) includes Sulpicius' revised law, with his other legislation, among the *leges perniciosae*, proposed *auctore Mario*—so probably after news reached Rome of Mithridates' total dominance in Asia, and perhaps of his massacre of Romans there. The chronology of Sulpicius' tribunate is far from simple, but this is not the place to probe it—or the influence of Sulla's autobiography on the tradition. I hope to explore these matters elsewhere.