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## DILECTUS AND FAMILY IN THE REPUBLICAN PERIOD. LEGAL ASPECTS

*Sabino Perea Yébenes*

Through Aulus Gellius, a writer from the 2nd century AD, we have information about some fragments of the lost works of Lucius Cincius, a polygrapher and jurist, who wrote various works in the time of Augustus, of which we know some of the titles: *De fastis*, *De officiis iurisconsulti*, *De comitiis*, and *De consulum potestate*. The legal fragments of Cincius are gathered in the work of Huschke / Seckel / Kübler, 1908. Also due to his hand is a work of historical grammar, in the Varronian style, entitled *On Ancient Words* (*De verbis priscis*), and a treatise on military matters or *De re militari*, of at least six books, to which Gellius refers in XVI, 4, and of which hardly any second-hand fragments are known.

Gellius, who is an antiquarian encyclopaedists, does not paraphrase Cincius' text, but, when he is interested in what was written by this author, he transcribes it *expressis verbis*. This is the case regarding *dilectus*, that is, the recruitment of soldiers by conscription, in times past for him. Due to his vocation as an antiquarian writer, he is referring to the 3rd or 2nd centuries BC, a time to which he refers for other matters in that same book *De re militari*, for example regarding the oath that was required of conscript soldiers at that time of Laelius (in Gellius, XVI, 4, 2).

The fragment we want to analyze comes from Cincius, *De re militari* V (in libro eiusdem Cincii *de re militari quinto*, in Huschke / Seckel / Kübler, Vol. 1, 1908, fragm. 13) (= Gellius, XVI, 4, 3-4):

(3) *Militibus autem scriptis dies praefinibatur, quo die adessent et citanti consuli responderent; deinde ita concipiebatur iusiurandum, ut adessent, his additis exceptionibus: «nisi harunce quae causa erit: funus familiare feriaeve denicales, quae non eius rei causa in eum diem conlatae sint, quo is eo die minus ibi esset, morbus soticus auspiciumue, quod sine piaculo praeterire non liceat, sacrificiumue anniversarium, quod recte fieri non possit, nisi ipse eo die ibi sit, uis hostesve, status conductusue dies cum hoste; si cui eorum harunce quae causa erit, tum se postridie,*

*quam per eas causas licebit, eo die venturum aditurumque eum, qui eum pagum, vicum, oppidumve delegerit». (4) Item in eodem libro verba haec sunt: «Miles cum die, qui prodictus est, aberat neque excusatus erat, infrequens notabatur».*

(3) Moreover, when soldiers had been enrolled, a day was appointed on which they should appear and should answer to the consul's summons; then an oath was taken, binding them to appear, with the addition of the following exceptions: «Unless there be any of the following excuses: a funeral in his family or purification from a dead body (provided these were not appointed for that day in order that he might not appear on that day), a dangerous disease, or an omen which could not be passed by without expiatory rites, or an anniversary sacrifice which could not be properly celebrated unless he himself were present on that day, violence or the attack of enemies, a stated and appointed day with a foreigner; if anyone shall have any of these excuses, then on the day following that on which he is excused for these reasons he shall come and render service to the one who held the levy In that district, village or town.» (4) Also in the same book are these words: «When a soldier was absent on the appointed day and had not been excused, he was branded as a deserter.»

(Translation by John C. Rolfe, Loeb)

When dealing with the topic of «roman soldier and family», it is obvious that we are now interested in this interesting text, especially, in what the author indicates as the primary cause for avoiding the *dilectus* on the day that the consul has set for the community or town: that the call-up has to attend a family funeral or purification ceremonies for the family of the deceased that for another reason have been moved to that day and that prevent them from being there on the indicated day (*funus familiare feriaeue denicales, quae non eius rei causa in eum diem conlatae sint, quo is eo die minus ibi esset*).

It is only a temporary excuse, a 24-hour parenthesis that is granted to the future soldier if he does not want to be considered a deserter (Gellius, XVI, 4, 4). A single day of delay, although another reason for the delay is the so-called *feriae denicales* — mentioned there — which could last several, since the sources refer to this festival in the plural. Thus, Paulus Festus (p. 61L) indicates that they were religious rites intended for the

purification of the house and the family: *Denicales feriae colebantur, cum hominis mortui causa familia purgabatur. Graeci enim νέκυν mortuum dicunt* («The Denicales days was celebrated when the family was purified by the death of a person. The Greeks also call it νέκυν, festival of the dead»). More explicit is Cicero in *De leg.* 2, 55:

Nor would the days of purification (*denicales*), which derive their name from death (*nece*) because they are celebrated for the dead, be referred to as holidays in common with the days of rest in honour of the celestial gods, unless our ancestors had desired that those who depart this life should be included among the gods. It is the law that those holidays are to be placed at such times that they shall not coincide with other public or private holidays. This whole body of pontifical law shows deep religious feeling and a respect for the solemnity of religious ceremony. It is unnecessary for me to explain when the period of family mourning is ended (*Neque necesse est edisseri a nobis, quae finis funestae familiae*), what sort of a sacrifice is offered to the Lares, in what manner the severed bone is buried in the earth what are the rules in regard to the obligation to sacrifice a sow, or when the grave first takes on the character of a grave and comes under the protection of religion.

(Translation by C. W. Keyes, Loeb)

Funeral ceremonies are governed by customary pontifical law, and it seems that this custom took precedence over call-ups in the army. At a particular level, during the first nine days of mourning, the family had to refrain from taking legal action in relation to the inheritance or wills. From the ninth day onwards, sacrifices and a banquet were made.

We must not overlook the second reason why a man summoned to the *dilectus* may miss the appointed day: epilepsy, an enigmatic disease that Cincius calls *morbis sonticus* and which is also known, mainly, as *morbis comitalis* for an explicit reason: if during a popular political assembly (*Comitia*) someone had an epileptic seizure, the assembly had to be suspended, as indicated by Suetonius in the *Vita Iulii* 45, 1. When Caesar had two sudden attacks, *comitali quoque morbo bis inter res agendas correptus est*, sufficient cause to interrupt it. Festus explicitly refers to *sonticus morbus* as a sudden illness or attack that exempted the sufferer from his obligations or occupations: *Insons extra culpam, a quo dici morbus quoque existimatur sonticus, quia perpetua noceat* (Festus,

p. 99 L). It seems strange that being epileptic is not a sufficient cause of rejection for those called to military service, at least in Republican times. By the imperial era there was legislation that recognized the incapacity of epileptics for certain acts or occupations, because it was considered that, although it did not manifest itself continuously with outbreaks, it was a latent disease, as we read in the *Digest*, 21, 1, 53: «Those who are attacked by tertiary or quartan fevers, or gout, or those who suffer from epilepsy, will not be said to be healthy even in those days when they are free of the disease». In *Digest* 21, 1, 65, 1, the *sonticus morbus* is mentioned as an impeding disease because it is incurable, although at the same time it is recognized that in other cases it is transitory. The rule of *Digest* 50, 16, 113 is clear: *Morbus sonticus est, qui cuique rei nocet* (««Morbus sonticus» <or impeding disease> is when evil is an obstacle to something»). This explains the fact that a declared epileptic cannot join the army.

On the other hand, the text of Macrobius in his *Saturnalia* is very interesting, where he talks about the disastrous days and the religious taboos that the Romans had at the time of starting a combat. He is not advised, for religious fear, to start the war in the *Feriae Latinae*, nor at the time of *Saturnalia*.

«It is a sacrilege,» he says, «to take up battle during the opening of the infernal world» (*Sat.* I, 16, 16-17), but to start the war «when the jaws of Pluto are closed» (*quia nec Latinarum tempore, quo publice quondam induciae inter populum Romanum Latinosque firmatae sunt, inchoari bellum decebat, nec Saturni festo, qui sine ullo tumultu bellico creditur imperasse, nec patente Mundo, quod sacrum Diti patri et Proserpinae dicatum est: meliusque occlusa Plutonis fauce eundum ad praelium putaverunt*).

The *mundus* is the founding well of Rome, drilled by Romulus. It was a hemispherical well in which first fruits were placed for the *Dii Inferi*, the underground gods. The ceremony was repeated at the founding of the Roman colonies, where the founders (veteran soldiers) threw in a handful of earth from the country of each of their new inhabitants (cf. Ovid. *Fasti*, IV, 821-834; Plut. *Rom.* XI 1-4). The opening of the *mundus* took place three times a year: July 24, October 5 and November 8 (cf. Festus, pp. 154-155 L).

Speaking of the same, Varro, in a fragment possibly taken from his *Divine Antiquities*, reproduced by Macrobius (*Sat.* I, 16, 18), says: «When the *mundus* is opened, the door of the sinister divinities and those of Hell. For this reason, it is a sacrilege not only to engage in combat, but even to raise troops to wage war and advance the troops, to begin a voyage or to marry to have children». Macrobius himself, who is reading Latin antiquarian writers, indicates that when making the *dilectus*, the Romans avoided «days marked by calamities, they even avoided festivals», bringing up a fragment from Varro, in this time from his work *On Omens*, where he says: «It is not advisable to recruit men during festival days. If it has been done, atonement must be made».

It seems clear that, during the Republican era, these religious taboos were very much in mind with the start of the war, and the beginning of the soldiers' careers, that is, the moment of *dilectus*. The shocking thing is that, in some texts in which negative or «polluting» acts are cited, family funerals are cited (in Gellius), or getting married and having children (Varro in Macrobius).

More texts can be added regarding *dilectus*, and the need, rather requirement, of contaminating acts or of people contaminated by an impure act. Referring to the call to the ranks, Polybius, VI, 26, 4 indicates:

The tribunes having thus organized the troops and ordered them to arm themselves in this manner dismiss them to their homes. When the day comes on which they have all sworn to attend at the place appointed by the consuls each consul as a rule appointing a separate rendezvous for his own troops, since each has received his share of the allies and two Roman legions none of those on the roll ever fail to appear, no excuse at all being admitted except adverse omens or absolute impossibility.

(Traslation by W.R. Patton, Loeb)

Let us pay attention to the last lines of the fragment in this translation here are the last lines of Polibius' text: ... θεῖσι πλὴν ὀρνιθείας καὶ τῶν ἀδυνάτων. The verb ἐξορκίζω, which does not mean «to have an omen» or divine warning, but rather to receive a spell or a curse; and the aforementioned ὀρνιθεία refers to the fact of observing the flight of birds; the term acquires a negative meaning when preceded by the conjunction πλὴν. That is, it must be interpreted as «receiving a bad omen» after observing the flight of birds. In this text by Polybius, ὀρνιθεία means