

THE *LEGES CLODIAE* AND *OBNUNTIATIO*

One of four laws passed by Clodius early in 58 B.C. in some way modified the regulations governing *obnuntiatio*, the right possessed by magistrates and augurs to obstruct proceedings of the popular assemblies through announcement of unfavourable omens. The precise nature of the change is obscured by the fact that our main source, Cicero, describes it, as he does all of Clodius' legislation, in hyperbolic and polemical terms, alleging that it wholly abolished the right of *obnuntiatio*, a claim contradicted by other evidence in his writings, which provide many examples of its continuing use.<sup>1</sup> The later ancient sources repeat the substance of Cicero's main allegations and, accordingly, do little to help disentangle the facts from the hyperbole.<sup>2</sup> Inadequate information about the earlier regulations relating to *obnuntiatio*, which were contained in two laws of the mid-second century, the *Leges Aelia et Fufia*, further hampers the search for the precise terms of Clodius' amendment.<sup>3</sup>

None of this, however, has discouraged speculation. The problem has exerted a peculiar fascination and has generated a succession of careful studies. Five main hypotheses have emerged: that the right of *obnuntiatio* was taken from curule magistrates; that it was taken from curule magistrates, but only in relation to legislative *comitia*; that it was taken from both curule magistrates and tribunes, but only in relation to legislative *comitia*; that it was abolished entirely, but soon restored by senatorial annulment of the reform; that it was left intact, but the assemblies were empowered to disallow it on any given occasion.<sup>4</sup>

None of these solutions, however, is wholly compatible with the evidence for the use of *obnuntiatio* subsequent to 58. Several passages in Cicero indicate that curule magistrates retained the right after Clodius' tribunate and that it could be exercised in the case of legislative as well as electoral assemblies.<sup>5</sup> The idea that Clodius' law was soon annulled by the senate is contradicted by a statement in the *De Provinciis Consularibus* that clearly implies Clodius' legislation was still accepted as valid.<sup>6</sup> Besides, if the senate had found reason to invalidate any law of Clodius, it is certain that Cicero, who was diligently assembling in the fifties every conceivable argument against the legitimacy of Clodius' tribunate and all its *acta*, would have loudly heralded the decision at every opportunity. The view that the people were empowered to disallow *obnuntiatio* on any occasion is similarly unsupported by any ancient

<sup>1</sup> Cf. *Post. Red. in Sen.* 11, *Sest.* 33, 56, *Har. Resp.* 58, *Vat.* 18, *Prov. Cons.* 46, *Pis.* 9–10.

<sup>2</sup> Cf. Asconius 9 (Clark), Dio 38.13.6. Asconius describes the substance of Clodius' bill as follows: *ne quis per eos dies quibus cum populo agi liceret de caelo servaret*. His language echoes that of Cicero and, with regard to this particular matter, he seems to have accepted Cicero's version. Dio's account is essentially the same as that of Asconius.

<sup>3</sup> The evidence for the *Leges Aelia et Fufia* and *obnuntiatio* has been analysed by Th. Mommsen, *Römisches Staatsrecht* (Leipzig, 1887) i.3 111ff.; M. J. Valeton, 'De iure obnuntiandi comitiis et conciliis', *Mn.* N.S. 19 (1891), 74–113, 229–70; S. Weinstock, *RE*, s.v. *obnuntiatio*; G. V. Sumner, 'Lex Aelia, Lex Fufia', *AJP* 84 (1963), 337–58; A. E. Astin, 'Leges Aelia et Fufia', *Latomus* 23 (1964), 421–45; E. Weinrib, 'Obnuntiatio: two problems', *ZSS* 87 (1970), 395–425.

<sup>4</sup> Cf. A. H. J. Greenidge, 'The repeal of the *Lex Aelia Fufia*', *CR* 7 (1893), 158–61; W. McDonald, 'Clodius and the *Lex Aelia Fufia*', *JRS* 19 (1929), 164–79; Sumner, *op. cit.*; J. P. V. D. Balsdon, 'Three Ciceronian problems. I. Clodius' "repeal" of the *Lex Aelia Fufia*', *JRS* 47 (1957), 15–16; S. Weinstock, 'Clodius and the *Lex Aelia Fufia*', *JRS* 27 (1937), 215–22.

<sup>5</sup> Cf. *Sest.* 78–9, 129, *Phil.* 2.81.

<sup>6</sup> *Prov. Cons.* 46. Cf. *Vat.* 18.

evidence or by any indication that the power was ever invoked. It is further questionable if, in a matter affecting the public auspices, such authority could properly be vested in the people.<sup>7</sup>

The solution to the problem obviously lies in finding a clear difference in the functioning of *obnuntiatio* before and after the implementation of Clodius' law in 58. The discussions referred to above have all attempted to find that difference either in the persons holding the right or in the occasions on which they might exercise it. They have largely ignored a third possibility, that Clodius' concern was solely with the manner in which *obnuntiatio* could be exercised, and that he left unchanged the issue of who could use it and when. Yet this is the possibility most clearly indicated both by the political background to the bill and by the description of the uses of *obnuntiatio* in the years following Clodius' tribunate.

There is general agreement that the appearance of a bill in 58 to reform the regulations governing *obnuntiatio* was a consequence of the obstructive tactics employed by Bibulus against Caesar in the preceding year and was chiefly designed to prevent a recurrence of such tactics in the future. Bibulus had set out determinedly in 59 to block all legislative initiatives of Caesar and his allies. He had begun his course of obstruction by appearing in the forum on the day of the voting on Caesar's first land bill with the purpose of ending the proceedings by use of *obnuntiatio* or *intercessio*. When that effort failed through the forceful intervention of Caesar's supporters, who kept him from reaching the platform and eventually ejected him forcibly from the forum, he had continued his resistance by attempting to exercise *obnuntiatio* from the seclusion of his home by announcements, whenever assemblies were summoned, of the formula *se de caelo servasse*. The tactic was imitated by three of the tribunes, who similarly retired to their houses and kept publishing similar notices that they had watched the sky for omens. Caesar chose to ignore the announcements and held his assemblies, as did his henchman, the tribune P. Vatinius.<sup>8</sup>

There resulted a legally obscure situation, but one that exposed Caesar to charges of having violated the auspices and that left in dispute the validity of all the laws of 59.<sup>9</sup> Bibulus' attempt to maintain a continuous *obnuntiatio* in obvious disregard of the religious basis of the institution was extreme and, to the best of our knowledge, unprecedented: his action could be held to represent political manipulation of the auspices on a scale that warranted Caesar's decision to ignore it. But such arguments could hardly be conclusive from a legal standpoint, or effective on any level in a society where political manipulation of religion was commonplace and broadly tolerated. A more solid justification for Caesar's course could be made on the grounds that Bibulus

<sup>7</sup> One would expect the power to have been invoked to overcome some notorious uses of *obnuntiatio* recorded for 57. Cf. below, notes 12 and 13.

<sup>8</sup> Dio 37.6, Suetonius, *Jul.* 20, Plutarch, *Caes.* 14.6, *Cat. Min.* 32, *Pomp.* 48, *Cic. Vat.* 5, 16, 21, *Sest.* 113, *Dom.* 40, *Har. Resp.* 48. For the precise meaning of the formula *se de caelo servasse* cf. R. G. Nisbet, *M. Tulli Ciceronis De Domo Sua Oratio* (Oxford, 1939), 202–3.

<sup>9</sup> The legal subtleties of the situation that emerged in 59 are difficult to disentangle because of the lack of information about the *Leges Aelia et Fufia* and the strange absence from our sources of any account of earlier uses of *obnuntiatio*. Cicero makes vague statements to the effect that the *Leges Aelia et Fufia* had often checked tribunician madness, surviving without violations through almost a hundred years, even in the midst of the turmoil generated by the Gracchi, Saturninus, Sulpicius, Cinna and Sulla (*Pis.* 10, *Vat.* 18, 23), but no specific instance of the use of *obnuntiatio* in relation to *auspicia impetrativa* can be documented before 59. It seems likely, therefore, that it had been sparingly used and never on the scale attempted by Bibulus. It is also likely that no previous magistrate had persisted in holding an assembly in the face of an announcement by a colleague *se de caelo servasse*, and that Caesar's course was similarly new.

and the tribunes had failed to make a formal announcement of unfavourable omens in person to the presiding officer of the assembly and that, in the absence of such notification, no complete or valid act of *obnuntiatio* had taken place. But it is clear that this too was very much a moot point in 59, and that there was no undisputed basis in augural discipline, or in law or precedent, on which it could be securely argued. The Augurs, or at least some of them, made a public pronouncement about the matter, declaring at a *contio* that it was unlawful to bring a motion before the people *cum de caelo servatum sit*, and that laws passed in such a circumstance were invalid. In other words, the statement by a competent magistrate *se de caelo servasse* was taken to imply that an unfavourable sign had been seen, and it was deemed sufficient, without any further notification of bad omens, to halt comitial proceedings. This was certainly the attitude taken by Cicero and the *boni* in general in relation to the effects of Bibulus' action. Cicero had a special personal interest in claiming that Caesar's *acta*, which included the adoption of Clodius, were invalid, but the other conservative *principes* reacted similarly and, throughout the fifties, held fast to the claim that the laws of 59 had been passed in violation of the auspices and could not be given acceptance unless re-enacted with due regard for the auspices. Bibulus himself and the tribunes who supported him also obviously believed their course was sufficiently in accordance with the law to have a worthwhile impact. In view of all this, it must be accepted that, under the laws and practices prevailing in 59, Bibulus' action in seeking to maintain a continuous *obnuntiatio* by edict could be argued to be a legitimate exercise of the powers vested in the auspices of magistrates and to constitute a valid impediment to all legislative activity.<sup>10</sup>

This novel exploitation of the auspices created a disquieting situation for all reformist politicians. It made *obnuntiatio* a far more formidable barrier to the aims of *populares* than *intercessio*, which, up to 59, had been the main mode of obstruction with which radical legislators had to contend. *Intercessio* had to be exercised in person and addressed to the presiding magistrate in the course of the proceedings against which it was directed. This made it possible to inhibit or prevent its use by a variety of means, ranging from simple persuasion to the form of open force that had thwarted Bibulus' initial attempt at obstruction in 59 in relation to Caesar's first land law.<sup>11</sup> But faceless edicts issued from the security of a magistrate's home were subject to no such restraints, and the prospect of a repetition of Bibulus' tactics by opponents insulated from the coercive methods central to Clodius' political strategy was surely the tribune's main worry in regard to *obnuntiatio* and the eventuality he was concerned to forestall as he prepared to introduce his ambitious programme of legislation in 58.

<sup>10</sup> *Dom.* 39–40, *Har. Resp.* 48, *Prov. Cons.* 45–6. It is worth noting that it was Clodius who was responsible for securing the public ruling from the Augurs. When he was briefly at odds with Caesar in 58, he launched a public campaign to show Caesar's laws were invalid because of Bibulus' action. Clodius was seeking to put pressure on his ally, and the method he chose provides further evidence that Caesar was considered vulnerable on this issue and that there was an arguable case that Bibulus' mode of *obnuntiatio* was legitimate. If an actual announcement of the omens in person had ever been explicitly prescribed in law as a requirement for the exercise of *obnuntiatio*, it had obviously become so overlain by a convention that the formula *se de caelo servasse* was sufficient as to have lost its effect. J. Linderski, 'Constitutional aspects of the consular elections in 59 B.C.', *Historia* 15 (1965), 425–6 maintains otherwise, but he ignores the contemporary response to Bibulus' action and appeals to procedures followed in 57, which, as will be argued later, should not be taken to apply in 59.

<sup>11</sup> For *intercessio* and the procedures governing its use cf. Th. Mommsen, op. cit. i.266–92; A. H. J. Greenidge, *Roman Public Life* (London, 1911), 176–80. On the whole, *intercessio* had proved a manageable obstacle for *populares*, rarely successful in preventing legislation that had strong popular backing.

He had no need to outrage the oligarchy by seeking to abolish a prerogative of special significance to them. It was sufficient to place *obnuntiatio* on the same footing as *intercessio*, subject to the same constraints of force or subtler forms of persuasion or intimidation. This meant enshrining in law an explicit requirement that the announcement of unfavourable omens be made in person to the presiding magistrate at an appointed time and place.

That this was the substance of Clodius' reform in 58 is confirmed by allusions in Cicero to uses of *obnuntiatio* in the very next year. He records that the tribune P. Sestius used *obnuntiatio* in the course of 57 to block an action of the consul, but to do so went down to the forum at great risk to his safety to make the announcement in person.<sup>12</sup> Later in the year there was a more dramatic instance of *obnuntiatio*, when the tribune Milo attempted to block the aedilician elections. Cicero describes how Milo went to the Campus Martius before midnight and remained there until the following noon, preventing the consul, Metellus Nepos, from conducting the elections. Nepos, in an attempt to trick Milo and get the proceedings started before the *obnuntiatio* was made, asked the tribune to report the omens to him next day in the forum and save himself the trouble of going to the Campus. Milo duly appeared in the forum before dawn, but Nepos, instead of keeping the appointment, attempted to get secretly to the Campus by the back streets. Milo, however, realised what was happening and overtook him before he reached his destination. The elections were again prevented.<sup>13</sup>

Both of these accounts emphasise the efforts made to announce the omens in person, and the elaborate manoeuvring of Nepos to prevent such an announcement and of Milo to deliver it would seem to show beyond question that this procedure was accepted in 57 as an absolute necessity. This presents a striking contrast with the situation in Caesar's consulship. The mode of obstruction employed by Bibulus and so strongly upheld by the *boni* as a valid exercise of *obnuntiatio* in 59 was no longer used or deemed legitimate two years later. Clodius' law had intervened and provides the obvious reason for the well-marked change.

One other allusion to *obnuntiatio* by Cicero in relation to the events of 57 adds further support to these conclusions. In referring to a bill proposing his recall, which was placed before the people by the tribune Fabricius on 23 January, he says: *si obnuntiasset Fabricio is praetor, qui se servasse de caelo dixerat, accepisset res publica plagam*. Cicero here distinguishes between the declaration that the heavens had been watched and the actual announcement of the omens, and clearly indicates that the latter had to happen before there were any effects. In other words, he casually accepts as required procedure in 57 what he would vehemently deny in relation to the events of 59.<sup>14</sup>

The argument presented above does involve rejecting Cicero's references to Clodius' bill as gross misrepresentations. But his readiness to engage in distortion of such a magnitude in recounting the *acta* of his arch-enemy can be seen in his description of another Clodian reform, this time dealing with the censorship. We know from other sources that the censorship bill involved only a moderate change, mostly procedural, prescribing that the *ensoria nota* should not be used unless the alleged offender had been given a hearing before the censors and had been condemned by the verdict of both of them. Yet Cicero repeatedly alleged that the law totally abolished the

<sup>12</sup> *Sest.* 79.

<sup>13</sup> *Att.* 4.3.4–5.

<sup>14</sup> *Sest.* 78. The text of this passage had been called into question by McDonald, *op. cit.* 174, but without justification, as is shown by Weinstock, *op. cit.* 219.

censorship, using phrases such as *censuram exstinxit*, and *censura sublata est*.<sup>15</sup> There is no reason to disbelieve that he indulged in similar exaggerations in his polemical references to the reform of *obnuntiatio*. Cicero's relentless defamation of the man who drove him into exile, and his particular skills in the forms of slander and misrepresentation characteristic of Roman invective, have often been allowed to obscure Clodius' abilities as a statesman and the moderate and sensible character of much of his legislation.

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<sup>15</sup> Asconius 8 (Clark), Dio 38.13.2, *Schol. Bob.* 132 (St.), *Har. Resp.* 58, *Pis.* 9–10, *Sest.* 55, *Prov. Cons.* 46.