

The Censors between Public and Private: An Antiquarian Perspective*

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I

In the course of the Roman Republic, the main functions of the censors concerning the operation of the census were the assessment of the Roman people and their allocation to different subdivisions according to their wealth and domicile. It was through the census and the concluding ceremony of purification, the *lustrum*, that the Roman community came into existence. Every five years, at least in principle, the censors revised their list of citizens, exercised the *regimen morum*, and carried out the *lectio senatus*.

When, in the mid-first century BCE, Varro discusses the etymology of the censors, he provides a rather original etymology, not widely shared by his contemporaries.

My aim is to explore what Varro is truly saying and what he is, in fact, doing when he puts forward his etymology of the censors at the time he does. When set in its historical context, just after the implementation of the *lex Clodia de notione censoria*, and in dialogue with Cicero's work, and in particular with his *de legibus*, it is possible to understand fully what Varro means by saying that the name censors derive from *censere* that is tantamount to *arbitrari*.

By the first century BCE, in works that adopt an antiquarian mode of analysis, which gives considerable prominence to the investigation of etymology, the intellectual and political protagonists of the time focus their discussion about the implementation of the *regimen morum* on the best censorial system to enact exclusion. By making sure that all members of the civic community (including all senators) conform to the moral standards shared by the whole people as interpreted and applied by the censors, these magistrates, Varro implicitly claims, virtuous men who act in the name of fairness, call into existence the public community, the *populus Romanus*, at whose core must reside the private morality of each individual citizen called into assembly.

II

Once the census has been performed, there used to take place the *lustrum*, a ceremony of purification. Although between 70 and 28 BCE no *lustrum* took place, in his *de lingua Latina* in the mid-40s, starting from the etymology of

inlicium. Varro cites some of the procedure of the *lustrum* from the censorial records.

Mentioning that he had found the word *inlicium* in the writings of Marcus Junius Gracchanus, one of the first antiquarians of the mid-second century,¹ Varro explains that the word derives from *inlicere* 'to invite, entice.'² *Licium*, which is reasonably well attested, means 'thread' or 'cord' and Mommsen understood it as the metaphorical girdle, within which the assembly takes place.³ It follows that, as de Melo observes, *in licium uocare* means 'to call into the girdle, into the space where the assembly takes place,'⁴ a space, Varro specifies, within which 'the voice of the man calling them to the assembly can be heard.'⁵

One of the cases of *inlicium* Varro discusses is the invitation to the people for a *lustrum* at the end of the *census populi*. Quoting from the *tabulae censoriae*, he reports that first, by night, the censor took the auspices in the *templum*, and then, if favourable, he commanded the herald to call the men to assembly according to the following formulation: 'May this be good, fortunate, happy, and salutary for the Roman people (*populus Romanus*), the Quirites, and the commonwealth of the Roman people (*res publica populi Romani*), of the Quirites (*res publica Quiritium*), and for me and for my colleague, for our trustworthiness and for our office.' The formula continues specifying the subdivision of the people who, responding to the *inlicium*, should convene in assembly: 'all the Quirites, cavalry and infantry, under arms and the private citizens as the superintendents of all the tribes (<*equites*,> *pedites*, *armatos*, *priuatosque*, *curatores omnium tribuum*), if anyone wishes a reckoning to be given for himself or for another.'⁶

After this invocation to the prosperity of all members of the community, here thought about as army members in line with the archaic function of the census,⁷ as well as to the prosperity of the whole community, the censors, the scribes

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Wissowa, RE 10 (1917) 1031-33, s.v. "Iunius (68).

² Varro *Ling. Lat.* 6.95. Cf. Paul. Fest. 101L.

³ Mommsen 1887, 398-9.

⁴ de Melo *comm. ad loc.* (6.94).

⁵ Varro *Lig. Lat.* 6. 94.

⁶ Varro *Ling. Lat.* 6.86: *Quod bonum fortunatum felix salutareque siet populo Romano Quiritibus reique publicae populi Romani Quiritium mihique collegaeque meo, fidei magistratuique nostro: omnes Quirites pedites armatos, privatosque, curatores omnium tribuum, si quis pro se sive pro altero rationem dari volet, voca inlicium huc ad me.*

⁷ Varro *Ling. Lat.* 6.93. Nicolet 1980, 31-63 remains the best introduction to the functions of the census in a historical perspective.

and the magistrates were anointed with mirth and ointment, and the censors drew lots to decide who would have celebrated the *lustrum*, the ceremony of purification.⁸ Having ordered the army into centuries, the presiding magistrate performed the expiatory sacrifice of a bull, a ram and a boar, the *suovetaurilia*, on the Campus Martius.⁹ Men with propitious names (*bonis nominibus*) led these animals in a circular procession around the people gathered in assembly three times. Before sacrificing them to Mars, to whom that field was consecrated,¹⁰ the scribe recited the formula of prayer for the greatness of the Romans from the public tables. In its original formulation, the prayer, which being read out from public documents, acquired the force of power and transformed a sacrifice in a religious act, asked the gods to make the *res populi Romani* better and greater (*meliores amplioresque*), and, after Scipio Aemilianus' emendation of the tables, to keep it safe in perpetuity.¹¹ Then, behind a standard, the presiding magistrate led the citizens in procession back into the city. This ritual was so striking that a Greek observer like Dionysius of Halicarnassus could comment that, to his days, at the end of each census operations, the Romans still carry out this expiatory ritual as a form of purification, which they call *lustrum*.¹²

As Samuel Sigere has observed,¹³ through the operations of the census, the Roman people came to be formed as a political, religious, and juridical community by three complementary processes: first, the assessment of the citizens' wealth and moral behaviour, the Servian *gradus dignitatis fortunaeque*,¹⁴ and the related assignment to a class and *centuria*, which acted as a process of identification and hierarchisation of the Roman community. Second, the procession of the sacrificial animals around the assembly, led three times by men with auspicious names, which delineated a spatial sacred circle that distinguished the Roman people from the world outside, marking off spatially the Romans as a purified unit from which evil was excluded. Third, the recitation of the religious formula that, taking place in a *templum* and articulating the demand for the prosperity of the new Roman community, establishes a dialogue between the newly formed association of people and the

⁸ On the *lustrum* Ogilvie 1961; Piéri 1968, 77-98.

⁹ Varro, *Rust.* 2. 1. 10; Livy 1. 44. 2; Acta fr. Arv. p. 143 Henzen. See also Festus 372.22; cf. Cato, *Agr.* 141. On *lustratio* ThesCra (Thesaurus Cultus et Rituum Antiquorum) Volume I 2004.

¹⁰ On *bona nomina* Cic. *div.* 1.102

¹¹ Val. Max. 4.1.10a. On the importance to read prayers from official tables see Meyer 2004, esp. 77.

¹² Dion. Hal. 4.22.

¹³ Sigere 2023, 87-105 with an emphasis on the religious dimension.

¹⁴ Liv. 1.42.4-5.

gods. As the *dies lustricus* for a new-born baby, when on their eighth or ninth day a name was bestowed upon them, marking their entry into the Roman community, so the *lustrum* at the end of each census marked the formation and beginning of a new community, whose prosperity they beseeched through divine intervention.¹⁵ Although, in the *de oratore*, Cicero attests that, in the first century BCE, the relation between the validity of the census and the *lustrum* was a subject for debate,¹⁶ it seems that the *lustrum* provided the census with the power to enact this new reality and confer upon it juridical validity: in the case of the *census populi* (but not in the case of the *lectio senatus* and the *recognitio equitum*), if the *lustratio* ceremony was not performed, the people's classification would revert to the status recorded in the previous census.¹⁷

If, on the one hand, the census established the position of the individual citizen, which determined his financial, military, and political participation in the life of the community, shaping its identity, on the other, the community came into being through the *lustrum*, which functioned as a process of creation. Through these three distinct moments, the civic and religious rituals that make up the census transformed the individual Roman citizens into a political, military, and religious community. 'Hence', as Claude Nicolet put it, 'the ritual and formalistic character of the series of solemn obligations by which the city – in abstract theory an aggregate of equal and independent legal agents – becomes an organic and rational structure, every member of which receives a designation assigning him his proper place in a system of reciprocal relationships.'¹⁸

By gathering all individual Roman citizens, that is all *singuli cives*, the *Quirites*, into a *templum* and by celebrating the religious ritual in a spatially defined place and with the recital of prayers to the gods, the censors transformed that aggregation of individual citizens into a political community that was the sum of all its citizens. 'In the most literal sense, the citizen did not even exist until the community, represented for this purpose by the censors, had taken cognizance of his physical and biological reality, expressed in a declaration which included particulars regarding age, sex, parentage, gens and family, civil status (wardship etc.), domicile, tribal membership and property.

¹⁵ Otto 1916, 37-8; Piéri 1968, 85 ff. On *dies lustricus* Macr. *Sat.* 1, 16, 36

¹⁶ Cic. *de orat.* 1.183 where the issue concerns when the freedom of a manumitted slave could be considered enacted either when enrolled by the censors or after the performance of the *lustrum*. On the importance of the *lustrum* see Cic. *ad Att.* 18(1. 18). 8, 21(2. 1). 11, 85(4. 9). 1; cf. also 89 (4. 16). 8 (*lustrum* despaired of in July 54).

¹⁷ Pieri p. 82 ff.; Wiseman 1969, 62-65; Linderski 1986, 2187-2188. *Contra* Brunt 1971, 104 ff and 700 ff. See *fr. Dos.* 17 which attests the dispute amongst experts and conclude that the *lustrum* confirmed all the work done during the census.

¹⁸ Nicolet 1980, 51.

On the strength of this declaration, made public and duly verified, the City solemnly conferred on him a place in a complex organization which determined his rank and dignity and thereby gave him a precise part to play in the manifold relationships of civil life ...¹⁹

In the formula adopted by the censors to gather the people, and cited by Varro from the *tabulae censoriae*, the prosperity of the Roman people (*populus Romanus*) is immediately followed by the specification 'the *Quirites*', as the prosperity of the commonwealth of the Roman people (*res publica populi Romani*) is immediately followed by the specification 'the commonwealth of the *Quirites*' (*res publica Quiritium*). While the description of the *Quirites* as citizens in arms is perfectly in line with one of the main original functions of the census, the reference to the collective Roman people followed, probably in apposition, by the reference to the individual citizens who make up the *Quirites* may indicate two conceptually (if not chronologically) distinct moments:²⁰ the *populus Romanus* is to be understood as the sum of the individual members of the community, conceptualised as a unity gathered in assembly (most likely, in this context, the *comitia curiata*),²¹ while the *Quirites* are indeed all the *singuli cives Romani*, each entitled to his own share in the partnership of the commonwealth, and understood in their individuality.²² Thus, through the civic ritual of the census and the religious ceremony of the *lustrum*, the censors transformed the individual citizens into a political community and, in the process, constituted the *populus Romanus*.²³

III

According to Benveniste,²⁴ the root of the verb *censere* is *kens- that means 'to speak with authority a truth that therefore will become a legal reality.' This *auctoritas*, which, according to most scholars, is at the foundation of being able to give orders and is essential for the transformation of the uttered word into law, does not indicate the power to augment (*augere*), but rather the divine

¹⁹ Nicolet 1980, 317.

²⁰ De Melo *comm. ad loc.* following Voigt 1878, states that 'The *Quirites* are not an entity separate from the Roman people, but rather a simple apposition.' Thanks to Llewelyn Morgan and Antonino Pittá for the insights on this passage.

²¹ Cf. Gell. 5.19.9 on the formula of the *adrogationes* in the *comitia curiata*.

²² See Mommsen 1887, III, 6.n.2, Orestano 1968, 204 ff; Catalano 1974, 100ff. Cf. Varro *Ling. Lat.* 6.68. For similar archaic religious formulae see Liv. 8.9.7-8 (*devotio*); Gell. 1.12.14 (Vestal); 10.24 (Compitalia).

²³ On the hierarchical as well as egalitarian nature of this construction see Nicolet 1980, 49ff. and Arena 2018.

²⁴ Benveniste 1969, ii, 143-51.

force to call into existence (skr. *Ojah*).²⁵ Therefore, it means something akin to ‘to conjure up in speech’, ‘to call something into existence by naming it.’ By analysing the Sanskrit *śam* ‘s, ‘to speak solemnly’ from which the Indo-European root **k’ens-* ‘to announce’ may be inferred, Dumézil, whose insights Benveniste develops, states that at the beginning *censere* must have been a religious concept that meant ‘to situate a person, an act or an opinion in their appropriate hierarchical place, with all the practical consequences that such a placing entails, and does so by virtue of a correct public evaluation, a solemn praise or blame.’²⁶ It follows that the technical meaning of *censere*, that is the assessment and registration of Roman citizens, was one of its primary meanings, present *in nuce* from its very inception. However, this technical sense was intrinsically tied to situating each person in a hierarchy, hierarchy that was achieved by way of a public assessment of the individual’s wealth and morals. Therefore, *censere* comes to mean also evaluating, assigning the proper value of each individual, and, combining the basic meaning of ‘invoking, pronouncing solemnly’ with the idea of praising, it comes to assume the sense of valuing and praising.²⁷ As Dumézil put it, *censere* means recognising the status, the merits, the virtues, the strength, the wealth and the generosity of a man (or a god) who is in an eminent position amongst his peers by way of making a public and solemn praise.²⁸ This public evaluation was carried out by the censors, who, applying the values shared by the whole community, dispensed praise or blame and by this consensual process, established the hierarchical structure of the community and revised - and purified - it, at least in principle, every five years. In doing so, the censors called into being the citizenship of the individual members of the Roman community, that citizenship constituted by a strictly related correspondence between rights and duties, embedded in the centuriated system. By assigning each citizen to the hierarchical station of this system, the censors enabled the citizens’ exercise and enjoyment of their rights and duties and, thereby, almost call into being their very citizenship.²⁹

It is interesting that, in the second half of the first century BCE, more specifically between the 50s and 40s, Varro repeatedly proposed his etymology

²⁵ For the connection between *censere* and *auctoritas* see also Brugmann 1907, according to whom the root **kens-* conveyed the meaning of ‘give an order based on one’s authority.’

²⁶ Dumézil 1943, 188; Benveniste 1969, 145. Contra Pisani, 1929, V, 220 ff.: linking *census* to *kent-tu-s*, meaning hundreds, he took *censere* to mean ‘counting by hundred.’ See also de Vaan 2008 s.v. *censere* and Garcia- Ramón 1993.

²⁷ Benveniste 1969, 148. See also Nicolet 1980, 50.

²⁸ Dumézil 1943, 88-9. See also Piéri 1968, 87.

²⁹ Nicolet 1980, 52.

of the word *censor* and provided an explicative meaning of the verb *censere*. In his *Antiquitates rerum humanarum*, Varro took an original stance proposing the etymology of the censorial magistrates: their magistracy derives its name from the verb *censere*, however, Varro underlines, this should not be understood so much as ‘assessing’ in a technical sense, but rather as ‘judging’, since *censere* means *arbitrari*.³⁰ Contrary to the case of the etymology of *consul* where he changes his opinion,³¹ in the case of the *censor* Varro remains consistent, claiming, few years later in the *de lingua Latina*, that the *censor* was the one at whose *censio* ‘assessment,’ that is, *arbitrium* ‘judgment,’ the people *censeretur* ‘should be assessed.’³² Yet again, in 43/2 BCE, in the *de vita populi Romani*, a work that Antonino Pittá has described as ‘a sort of appendix to the *Antiquitates rerum humanarum et divinarum*,’³³ Varro states that, in origin, the censors received this name ‘because they established them as judges of the people: in fact the verbs *censere* and *arbitrari* have the same meaning.’³⁴

The Varronian etymology of the censors is rather curious: it would have been much more obvious for Varro to claim, in line with the majority of ancient etymologies for the censorship, that the magistracy *censor* derives from *census*.³⁵ Instead, he makes the decision to emphasise the fact that, if the censors derive their name from the main function that qualifies this magistracy, that of *censere*, it should be borne in mind that this does not mean carrying an assessment in the census, but rather judging, *arbitrari*.

As de Melo notes, Varro needs to provide this gloss for his use of *censere*, since its equation to *arbitrari* was not widely spread, and, by the mid-first century BCE, *censere* had come to indicate mainly the technical performance of the *census*, assuming as a dominant meaning that of ‘carrying out the assessment in the census.’³⁶

³⁰ Varro, *Ant. Rer. Hum.*, fr. 11 Mirsch, l. 20: *quod verbum censeo et arbitror idem poterat ac valebat*.

³¹ Arena 2021.

³² Varro *Ling. Lat.* 5.81: *censor ad cuius censionem, id est arbitrium, censetur populus*. See Ranucci 1972, 107-137. Zetzel 2018, 34 places the dates of composition between 45 and 43 BCE. de Melo 2019, 14-5 is broadly in agreement, suggesting a composition date between 47-43 BCE.

³³ Pittá 2015, 10.

³⁴ Varro *de vita pop. Rom.*, fr. 68 Pittá 68 (= 69 R; 384 S): *itaque quod hos arbitros instituerunt populi, censores appellarunt: idem enim valet censere et arbitrari*.

³⁵ See, for example, Liv. 4.8.7: Liv. 4, 8.7: *Papirium Semproniumque ... censui agendo populus suffragiis praefecit. Censores ab re appellati sunt; 65 censio aestimatio unde censores* (cf. 54). See Malby 1991 s.v. *censor* and for interesting parallels Salvatore 2004, 97. However, in line with Varro’s etymology see Nonius 836.21-31.: *censere et arbitrari cognatione quodam socia et similia verba essere volerunt*, who preserves two of the three Varronian attestations.

³⁶ De Melo 2019 comm. ad loc.

It seems, therefore, that of the three meanings associated to the word *censere*, that is to 'estimate', 'express an opinion, and 'appreciate', in the context of the *census* and its presiding magistrates, in the first century BCE, the essential function of providing an evaluation, an assessment, was still the dominant meaning, as it was at its origins. What had changed in the late Republic, at least as far as the *census populi* was concerned, were the criteria adopted to carry out this evaluation. By the mid-first century the status of an individual in the hierarchical structure of the Roman community - on which taxation (until 167 BCE, but then again in 43 and 42BCE),³⁷ military commitment (although no longer military recruitment as such), and political voice depended- was now assessed primarily, if not exclusively, on the basis of wealth and domicile, and no longer, or so it might have seemed, on the basis of moral standards.³⁸

As it is often emphasised, by the first century BCE the censorship was no longer as effective as it used to be, it was a magistracy that to later observers may appear in crisis.³⁹ The expansion of Roman citizenship to large parts of the Italian peninsula rendered the supervision of the morals of the whole community simply impossible to manage, the establishment of *quaestiones perpetuae* dealt with some of the offences previously fallen under the remit of the censors' supervision, and, finally, Sulla's introduction of senate members at his will, his making the election to the quaestorship the automatic requirement for senatorial membership, and his increasing the number of quaestors and praetors (that is ultimately of ex-magistrates who were customarily accorded a seat in the senate) reduced considerably the discretionary powers of the censors in the composition of the senate. For about a decade after Sulla censors were not elected, and when in 70 BCE they were elected, they were the last one to complete their work during the Republic.⁴⁰ None of the censors who followed in 65, 64, 61, 55 and 50 BCE completed their work and celebrated the *lustrum*,

³⁷ Cic. *ad Brut.* 23.6-9 (I.15 SB); Cic. *Fam.* 417 [12.30], Cass. Dio 46.31.3-4; 32.1; 47.16.4. García Morcillo 2020 and for the relation of taxation and census to the idea of justice in Cicero Monson 2023.

³⁸ Cf. Ps. Asc. 248St with reference to *censi* as those who possess *centum milia sestertium*. Interestingly both *Glossae Placidi grammatici* and Isidorus connect the notion of *censere* with that of *iudicare*, however, in both cases the connection is explicitly referred to a judgment within the context of patrimony: Lindsay, *Glossaria Latina* IV, 12-35: *ensorium per i scribimus, non per e. Est autem censorius, qui dignus est, ut sit censor uel qui iam fuit. Apud ueteres enim Romanos magnum erat nomen censoris et dignitas, id est iudicis tam patrimoniorum quam morum. Censere enim iudicare est. Isidorus 9, 4.13: est enim nomen censoris dignitatis iudicialis; censere enim iudicare est. item censors sunt patrimoniorum iudices, a censu aeris appellati.*

³⁹ For a different perception on the part of the contemporaries, Astin 1982.

⁴⁰ Livy, *Per.* 98; Cic. *Clu.* 117-35; Dom. 123-24; Ascon. p. 84C; cf. Plut. Cic. 17. 1; Dio 37. 30.

even if those elected in 55, Valerius Messala and Servilius Vatia Isauricus, and those elected in 50, Appius Claudius Pulcher and Calpurnius Piso Caesoninus, managed to carry out some of the tasks under the censorial remit.⁴¹ In addition, the local censuses taking place throughout the peninsula, as attested, for example, by the *Tabula Heraclensis*, gave the final blow to the enactment of the censors' *regimen morum* and in 46BCE Caesar's *recensus* registered and classified Roman citizens solely as property owners and on the basis of their residence, without any consideration of their moral conduct.⁴²

In this wider historical context, Varro takes an important stance, intervening in a contemporary debate on the role of the censors: they ought to act as judges, so he seems to say, that is they ought to exercise the *regimen morum*, something whose acute importance was most manifested in the *lectio senatus*. In line with one of the most cherished antiquarian methods of investigation, etymological research, Varro seems to claim that the main task of the censors is *censere*, that is *arbitrari*, which he takes to mean 'to express a judgment', 'to take a decision', as it is clear from his discussion of the etymology of the *adcensi*. In *de lingua Latina*, in fact, Varro states that 'Cato writes that the *adcensi* 'supernumeraries' are attendants. This may be from *censio* 'opinion,' that is, from *arbitrium* 'decision'; for he is there to carry out the decision of the man whose attendant he is.'⁴³

To understand fully the nature of this decision and, thereby, what Varro means and does when he says that the original function of the censors was to act as *arbitri*, we should turn to what it meant to act as an *arbiter* in the late Roman Republic.

Although in 63BCE, marvelling at how people of great intellect can still spend so much of their time wondering whether they should say 'two days later' or 'the day after tomorrow,' or 'judge' or 'arbitrator,'⁴⁴ Cicero gives the impression that by the late Republic there was no longer a meaningful distinction between a *iudex* and an *arbiter*, the two figures that at their origin, were distinct.

⁴¹ See Astin 1982; 1988; Clemente 2016; for an overview see Clemente 2022.

⁴² Crawford 1996, I, 358: the decentralised census meant an effective 'end to the moral role of the censors.'

⁴³ Varro *ling. Lat.* 7.58: *adcensos ministratores Cato esse scribit. Potest id <ab censione, id est> ab 'arbitrio'; nam adest ad arbitrium eius cuius minister.* As de Melo points out (comm. ad loc.), *ab censione id est* is a necessary addition by Götz and Schöll, justified by semantic relation between *censio* and *arbitrium*. See Varro *Ling. Lat.* 6.88-89 for a derivation from *accio*; *de vita pop. Rom.* 3.84 Pittá (= 87 R; 403S) for a derivation from *accenseo*, *Ant. rer. hum.* Fr. 10Mirsch *accerso*.

⁴⁴ Cic. *Mur.* 27: 'I never cease to wonder that so many intelligent men are still after all these years unable to decide whether they should say "two days later" or "the day after tomorrow," "judge" or "arbitrator," "case" or "suit" (*utrum "diem tertium" an "perendinum," "iudicem" an "arbitrum," "rem" an "litem" dici oporteret*).' See the confusion at Cic. *Off.* 3.16 and 17.70. Cf. *Dig.* 4.8.13.2 (Ulp. 13 ad ed.).

However, just a few years earlier, most likely in 66 BCE, in his *pro Roscio comoedo*, Cicero deals with the case that has already been before an *arbiter* (incidentally the same C. Piso who is now acting as a *iudex*) who had settled, or so it seems, the entity of the claim, and is now being presented with this issue as a *iudex*, who should decide whether this amount should be settled.⁴⁵ Opposing Fannius' claim against Roscius, Cicero undermines his argument by claiming that Fannius had adopted the two legal procedures in an improper manner: 'a judgement is one thing, arbitration is another (*aliud est iudicium, aliud est arbitrium*),' Cicero states, 'a judgement deals with a definite sum, arbitration with an indefinite sum. We come before a judge on the understanding that we either gain or lose the suit entirely; we come before an arbitrator with the expectation, neither of losing everything nor of getting as much as we asked ... What is the formula in a judgement? It is precise, severe, and simple: IF IT IS SHOWN THAT 50,000 SESTERCES OUGHT TO BE PAID ... What is the formula in arbitration? It is mild and moderate: AS MUCH AS IT SEEMS FAIR AND JUST SHOULD BE GIVEN. Others, when they perceive that their cause is likely to fail before a judge, have recourse to an arbitrator, but Fannius has ventured to apply to an arbitrator from a judge!'⁴⁶

Contrary to a *iudex* whose judgment was tied by a strict juridical framework, severe and precise, as Cicero put it, and that did not leave any room for the exercise of freedom or personal interpretation, the *arbiter* applied a notion of fairness and equity through means of *bona fides* to express his opinion about a case.⁴⁷ As Seneca puts it when discussing the nature of a benefit, which should not be sued for at law, 'a judge is restricted by the formula of instructions, which sets definite bounds that he cannot exceed, whether the other [the arbitrator] has entire liberty and is hampered by no bonds (*libera et nullis adstricta vinculis religio*): he can lessen the value of some fact or augment it, and can regulate his opinion not according to the dictates of law or justice, but according to the promptings of humanity or pity (*non prout lex aut iustitia suadet, sed prout humanitas aut misericordia impulit*).'⁴⁸ Thus, while the *iudex*

⁴⁵ Cic. *pro Rosc. com.* 10-13.

⁴⁶ Cic. *Rosc. com.* 12-3.

⁴⁷ Cic. *Rosc. com.* 12: 'why you accepted an arbitrator and made your claim in such a manner that it might be fixed how much it "seems fair and just" should be given or promised (*quantum aequius et melius sit dari repromittique*) on the other side ... Did you allow the same man unlimited freedom of action and also tie him down to the narrowest formula of the agreement (*eidem et infinitam largitionem remittebas et eundem in angustissimam formulam sponsionis concludebas*)? Who ever obtained all that he claimed before an arbitrator? Nobody ; for he only claimed what it seemed fair and right should be given him (*quantum enim aequius esset sibi dari, petiit*).' See also the treatment in Roebuck and Bruno de Loynes de Fumichon 2004; Rampazzo 2013; Bablitz 2016; Boóc 2023.

⁴⁸ Sen. *ben.* 3.7.

must operate within the strict confine of the law, the *arbiter* has complete freedom to exercise his judgment according to his values and temperament. This, however, is not tantamount to say that the *arbiter* was expected to act in a completely erratic behaviour, rather he is expected to act as a *bonus vir*, who dispenses his judgment not by virtue of technical juridical expertise, but rather *bona fides*, adhering to a shared system of values and customs, which would secure that his judgement is not whimsical.⁴⁹

According to Benveniste, 'what characterizes the *arbiter* is the extent of his power, which Festus defines ... *pontifex maximus, quod iudex et arbiter habetur rerum divinarum humanarumque* and elsewhere *arbiter dicitur iudex quod totius rei habeat arbitrium*, "the *iudex* is called *arbiter* because he has the decision in the whole matter." In effect, the *arbiter* makes his decision not according to formulas and the laws but by a personal assessment and in the name of equity. The *arbiter* is in fact a *iudex* who acts as an *arbiter*, he judges by coming between the two parties from outside like someone who has been present at the affair without being seen, who can therefore give judgment on the facts freely and with authority, regardless of all precedent and in the light of the circumstances. This connection with the primary sense of "witness who did not form a third party" makes comprehensible the specialization of the sense of *arbiter* in legal language.'⁵⁰ This invisible witness, who had the capacity to impart judgment in judicial actions,⁵¹ was not expected to collect all the evidence and ascertain the truth about the case in hand. His role was rather to provide an estimate, an assessment of the case on the basis of good faith and it was expected that all parties involved trusted him, a *bonus vir*, who embodied the shared ideal of fairness.⁵² The *arbiter*, who was not a professional officer and was appointed either by the praetor or by the parties in dispute, once he had rendered his award, 'ceased to exist.'⁵³

⁴⁹ Cato *de agr.* 144.2: 'Ladders are to be returned in as good condition as when they were issued, except those which have been broken because of age; if they are not returned, a fair deduction will be made by arbitration of an honest man (*virī boni arbitrātū*)' and 148.1 on wine tasting *virī boni arbitrātū*. See also Plaut. *Rud.* 1041-5.

⁵⁰ Benveniste 1969, 'Ius and oath in Rome,' 325. For a different etymology see Martino 1986, 59 ff. who connects *arbiter* to the Punic '*rb*', 'guarantor and mediator (in trade activities)', which reached Rome through the trade exchange in the Mediterranean via the Etruscan emporia. See Martino 1986, 11-26 for scholarly review of previous etymologies (including from the compound *ad* ('towards') + *baeto-bito* ('go') + *ter* ('one who goes to' a place, looks into or examines as an eye-witness, and act as 'a judge with equity')).

⁵¹ On the original meaning of *arbitrari* as 'to witness' as well as 'to judge' see de Vaan 2008 s.v. *arbitrari*.

⁵² See, for example, Cato *de agr.* 144.2 and 148.1. Cf. Cic. *de fato* 17.39 where Chrysippus is described as an *arbiter* in his attempt to strike a compromise.

⁵³ *Dig.* 4.8.19.2 (Paul. 13 ad ed.): *arbiter esse desierat*.

If we return to Varro's etymology of the censors as those magistrates who should *censere*, that is, Varro tells us, to act as *arbitri*, the function of these magistrates that Varro emphasises may gain a new significance.

While *censere* and *arbitrari* belong to the same semantic field,⁵⁴ in the late Republic, within the context of the census, the verb *censere* had preserved and further reinforced its technical meaning of assessment,⁵⁵ and the verb *arbitrari* had come to assume the meaning of passing judgment as dominant, and, in judicial contexts, the rather specialised meaning of doing so in the capacity of an *arbiter* (as opposed to *iudex*).

Contrary to Greenidge's opinion, according to whom by means of etymology Varro emphasises the discretionary power of the censors in assigning their duties to the citizens,⁵⁶ when situated in its historical context, Varro's curious etymology can be understood as an intervention in the contemporary debate on the judicial powers of the censors in the context of the *regimen morum*.

IV

As noted by Bur, towards the end of the second century BCE, as an outcome of the synergy between the difficulty of the censorship in keeping up with times, the internal conflicts within the Roman elite, and the developments of new crimes falling under the remit of *infamia*, in the Roman system a transition to something that could be thought about as an 'normative *infamia*' took place, that is an *infamia* based on normative rules and court pronouncements, rather than on the arbitrary judgment of the censors.⁵⁷

The *quaestiones* that combined together the court system with the punishment for the infringement of the *mos maiorum* (and, more in general, the shared moral code of the time), a previously a censorial prerogative,⁵⁸ came to

⁵⁴ García 2024.

⁵⁵ For an understanding of *censere* as making decisions in institutional contexts see, for example, Liv. 1.32.12. Cf. Nonius 267, 17L: *censere nunc significat putare, nunc decernere*; Festus 43,7L *censere nunc significat putare, nunc decernere*. Iavolenus Priscus in Dig. 50.16.111: *censere est constituere et praecipere. Unde etiam dicere solemus, 'censeo hoc facias' et 'semet [conjecture senatum] aliquid censuisse'. Inde censoris nomen videtur esse tractum.*

⁵⁶ Greenidge 1894, 61: 'In the etymology of the word lurks the idea of the arbitrary assignment of burdens or duties. Varro defines census as *arbitrium*, and derives the name *censores* from the position of these magistrates as *arbitri populi*. This original idea of 'discretionary power' was never entirely lost; although ultimately it came to be more intimately associated with the appreciation of morals than with the assignment of burdens.'

⁵⁷ Bur 2018, 328ff. On *arbitrium* as a feature of the censorship see Liv. 4.8; 29.15.

⁵⁸ Zon. 7.19: although endowed with discretionary powers, the censors intervened against any act that, according to the oath they took, was against 'the advantage of the commonwealth' and the well-being of the whole community, rejecting any personal

act as the main venue for that *regimen morum* that the censors were no longer able to exercise.

It is, therefore, not surprising that, in his attempt at reforming the censorship, in 58BCE Clodius operated within a juridical logic by proposing and ultimately enacting a system that transformed the traditional censorial practice into a judicial-like procedure.⁵⁹ This law, known as the *lex Clodia de notione censoria* (from *notio* 'action of becoming aware') imposed a limitation on the discretionary powers of the censors regarding the *lectio senatus* by establishing, most probably, the requirement of a formal accusation by a third party, the opportunity for the senator threatened with exclusion to articulate his defence and perhaps even to resort to a patronus before the censors, and the need for the censors to act in concert with one another when passing their judgment.⁶⁰ Following Tatum's interpretation, this innovative reform established for the first time the senators' right to hear charges against them and provided them with an opportunity to defend themselves before the censors could strike them out of the *album sanatorium*.⁶¹ Transforming, therefore, the *lectio senatus* from a rather time-efficient business conducted behind closed doors by the censors exercising their full discretionary powers, into a judicial-like affair, with the possibility to articulate one's own defence, to present supporting witnesses, and, in case, receive a final condemnation by a *sententia*, Clodius provided the censorial exercise of the *regimen morum* with an image of a public procedure, in line with the concerns expressed by Cicero less than ten years earlier.⁶²

Attesting the intellectual framework within which the censorial role in regulating the community's *mores* was discussed at the time, in his defence of Cluentius, in 66BCE, Cicero had observed how the *nota censoria* did not impose a permanent punishment of *infamia*, which could solely derive from a sentence in a *iudicium publicum*, but rather procured only a blow on the person, which could blemish temporarily his name.⁶³ The main thrust of Cicero's argument was based on the distinction between the censors' judgment, which, dealing with morality, did not require the use of evidence, and the judicial sentence, where decisions were based on the hearing of the case, the analysis of the evidence,

enmity or favouritism.

⁵⁹ Clemente 2010; Arena 2016; Bur 2018, 52 ff.

⁶⁰ Asc. in Pis. 8 (Clark); Dio 38,13; Sch. Bob. 132St. For this reading see Calderini 1941, 43-44 and Bur 2018, 55.

⁶¹ Tatum 1990 and 1999, 133-5.

⁶² See Val. Max. 6.2.8. on the procedure applied to L. Scribonius Libo, who had been denounced by Helvius Mancius during the censorship of 55, when the *lex Clodia* was in force, and whose procedure closely resembles Asconius' account.

⁶³ Cic. Cluent. 119-35; rep. 4.6.

and the supporting statements of the witness.⁶⁴ As also shown by the tribunes' success at preventing the censors' *lectio senatus* in 64-63BCE,⁶⁵ the contemporaries, Bur underlines, had come to reject or, at least, to be very uncomfortable with the arbitrary decision of the censors, and had come to equate the expulsion from the Senate to the condemnation in a juridical court, mainly the *iudicia publica*.⁶⁶

Calling into question the censors' arbitrary power over the composition of the senate and, in particular over the expulsion from the curia, Clodius' measure established a procedure akin to a court trial and, in the process, transformed the censors into something comparable to the judges of the *quaestiones*.

While this law, which was repealed in 52BCE, was still in force, for the first time Varro proposed his etymology concerning the censors, which he would repeat at least two more times in the 40s, taking part in a dialogue whose terms had been set by Clodius and in which also Cicero was an interlocutor.

When read in its historical context, by stating that the censors derive their name from their main function *censere*, which is, ultimately, *arbitrari*, it seems that Varro is responding to Clodius' new procedure and is stating that the censors should not act as *iudices*, but rather as *arbitri*. They should act, Varro seems to imply, as those *boni viri* who should not operate within the constraints of the law, listening to witnesses and assessing evidence. Rather, they should operate with complete liberty in exercising their own judgment, which, however, they are expected to dispense with great fairness by virtue of *bona fides*, operating within the contours of those moral values widely shared by the whole community. It remains, however, that, if this interpretation is correct, Varro is not dispensing of the juridical framework that, in those days, had become the general guidelines within which to discuss the role of the censors in the *regimen morum*. By casting his proposal in terms of a return to a remote past, Varro states that the assessment of the senators' conduct (and of the whole citizenry) should be carried out by the censors through something akin to an arbitration. In this context, the censors, acting like *arbitri*, would assess the general terms of the case, and probably offer their advice, but, perhaps, if read alongside Cicero's proposal, it is not inconceivable that they would not be expected to issue a final, legally binding, decision - and, if the analogy with the *arbiter* in the juridical context were to be pushed down to smaller details, they were expected to be in charge only until their task was completed.

⁶⁴ Cic. *Cluent.* 117-35; *Sest.* 55; *Dom.* 134, 137; *har. resp.* 58; *prov. cons.* 46; *Pis.* 9-10.

⁶⁵ Dio Cass. 37.9.4.

⁶⁶ Bur 2018, 53.

At about the same time as Varro's writing, in his *de legibus*, a work that, as Dyck notes, belongs to the antiquarian tradition, Cicero implemented a series of reforms whose aim was to re-establish firmly the censors' duty of assessment and expulsion.⁶⁷

Alongside a reiteration of the traditional duties of the censors – such as compiling the list of citizens, and taking charge of temples, streets, aqueducts and the public treasury – Cicero makes some significant alterations, which, he claims, are necessary for the *res publica* (*rei publicae necessariae*). First of all, as opposed to the customary eighteen months, 'the censors shall be in office for five years, [whilst] the other magistrates shall hold office for one year.'⁶⁸ In addition to their customary duties, 'the censors shall have charge of the official text of the laws (*censoris fidem legum custodiunto*). When officials leave office, they will refer their official acts to the censors, but will not receive exception from prosecution thereby.'⁶⁹ It seems that, according to Cicero, the censors, along the lines of the Greek *nomophulakes*, should supervise the text of the laws, as well as observe men's acts and recall them to the obedience to the laws.⁷⁰ Since the Roman censors are expected to oversee the actions of individuals, it is possible to infer that Cicero is granting them the function to check the legality of the acts of the magistrates while they are in office.⁷¹ If this were the case, the provision that poses a check on the magistrates in office would naturally lead to the next one, according to which the censors will act as preliminary auditors concerning the acts of retiring magistrates, an institutional practice of accountability calibrated along the lines of the Greek *euthune*.⁷² According to Cicero, the censors will render a preliminary *iudicium* (*praeiudicare*) on the actions of the retiring magistrates, who would lay their official journals (*commentarii*) before them and explain their conduct in office. 'In Greece', Cicero continues, 'this is attended to by publicly appointed prosecutors, but as a matter of fact it is unreasonable to expect real severity from accusers unless they act voluntarily. For that reason, it seems preferable for official acts to be explained and defended before the censors, but for the official to remain liable to the law, and to prosecution before regular court.'⁷³

Writing after 52BCE, that is at the time when Clodius' law had been repealed, Cicero attempted to elaborate a reform of the system of accountability, one of

⁶⁷ Dyck 2004, 10. On Cicero's attitude towards the censorship see Astin 1985.

⁶⁸ Cic. *leg.* 3.7.

⁶⁹ Cic. *leg.* 3.11.

⁷⁰ Cic. *leg.* 3.46.

⁷¹ On the relationship of Cicero with Demetrius of Phalerus on this point see Gehrke 1978.

⁷² Harrison 1971, 28-31

⁷³ Cic. *leg.* 3.47.

the most salient aspects of the *regimen morum*,⁷⁴ within the framework of the judicial system, first elaborated by Clodius, and away from the traditional complete freedom of the censors. Following the model of the Greek *euthynoi* who would conduct the first account of public or private wrongdoing and then, if wrongdoing was found, forwarded the case to a court,⁷⁵ Cicero does not propose to replace entirely the existing legal procedure, but added to it a further component, which combined two successive moments, first the censorial *iudicium* brought by a private prosecutor,⁷⁶ along the lines of Clodius' measure, and then the final judgment in a proper court.

Although in *de legibus* he proposed the end of senatorial co-option on the part of the censors, de facto an historical reality by his time of writing, Cicero gave prominence to the censors' duty of assessment and expulsion, since the censors 'shall regulate the morals of the people, they shall allow no guilty of dishonourable conduct to remain in the senate.'⁷⁷ As Astin notes, about one-third of all Cicero's references to the censorship allude to the concern with *mores*, as, for him, the censors' main responsibility was the regulation of the senatorial behaviour. It follows that, in this writing, Cicero emphasised the expulsion of those senators who did not conform to a suitable conduct as the censors' main role.⁷⁸ Having to assess the conduct of the magistrates at the conclusion of their term of office, the censors, in Cicero's *de legibus*, acting like *iudices* (as opposed to *arbitri*) should be in office for five years with a guaranteed continuity between successive censors.

Responding to contemporary needs, Clodius, Varro, and Cicero attempted to reform what they perceived as the most salient role of the censors, their assessment of the senators' (as well as of all Roman citizens') adherence to the community's shared morals, which the censors could no longer dispense by way of traditional means. They attempted to reform it operating within the juridical framework that distinguished (or not) the censorial role from the pronouncement of the judge, along the lines Cicero formulates it in 66BCE, and within this way of thinking they advanced their distinct views.

In 58BCE Clodius implemented a measure that established a judicial-like mechanism with a third party putting forward the accusation, the censors acting as judges in agreement with one another, and the senators able to

⁷⁴ For its prominence in Cicero's thought of the censorial function see Astin 1985.

⁷⁵ Plat., *leg.* 945d-e ff.

⁷⁶ This is also attested in the Greek context Fröhlich, 2004, 305-319, 424-436, and Rubinstein, 2004. On the system of the *euthynoi* in Athens see Arist. *Ath. Pol.* 48.3-5; 54.2; *Dem.* 18, 117; 19, 211.

⁷⁷ Cic. *leg.* 3.7.

⁷⁸ Cic. *Cluent.* 119, 129; *Fam.* 76 (3. 13). 2; *pros. cons.* 46; *Pis.* 9. See Astin 1985, 236.

provide their own defence, with witnesses that could be heard, and evidence gathered and analysed.

In 55/4 BCE, although they succeeded in carrying out some of their tasks, Valerius Messalla and Servilius Vatia Isauricus, the first censors to operate under the constraints of the *lex Clodia de notione*, did not complete their full mandate and did not manage to perform the *lustrum*.⁷⁹ It seems that they were hindered from doing so by the tribunes of the plebs, who, perhaps afraid of being removed from the senate, vitiated days for business.⁸⁰ Most interestingly, alongside the actions of the tribunes, Cicero seems to allude to the fact that the juridical disputes arising from the *lex Clodia de notione* were currently slowing down the censorial operations linked to the *lectio*, and, therefore, considering its excessive prolongation, the *lustrum* was now despaired of.⁸¹ The following censors, in 50 BCE, after the repeal of the *lex Clodia*, could operate according to traditional procedures.⁸² Appius Claudius Pulcher, one of the two presiding magistrates, exercised the *regimen morum* with particular zeal, expelling, amongst others, all freedmen (as well as Sallust).⁸³

The expulsion of the unworthy members from the senate was one of the fundamental issues of the time. In advancing an etymology of the censors that equates their main function to the *arbitri*, Varro is responding to Clodius' measure, whose detrimental effects he could observe first hand. By making, and repeating on various occasions, this statement, Varro is putting forward a distinct proposal according to which the censors should not be acting as *iudices*, but rather as *arbitri*, that is as *boni viri* who express their assessment on the basis of *bona fides* and who, once they fulfil their function, depose their role. At the time when Varro was repeating this etymology in *de lingua Latina* and *de vita populi Romani*, Cicero was writing or had composed the third book of *de legibus*. There, he seems to follow Clodius' idea of a form of a censorial *pre-iudicium*, distinct from the arbitrator suggested by Varro, followed by a decision of a court trial.⁸⁴

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⁷⁹ Cic. Att. 89 (4.16).8; *ILLRP* I² n. 496.

⁸⁰ Wiseman 1969 argues that the main reason for the lack of completion of the census was the prevention of the registration of numerous new citizens whose votes could not easily be controlled. *Contra* Brunt 1971, 104 ff. and 700 ff.

⁸¹ Cic. Att. 85 (4.9).1; 89 (4.16).8.

⁸² Dio 40.57.1-3.

⁸³ Dio 40. 63-64; Cic. Fam. 97 (8.14).

⁸⁴ Although purely in the realm of hypothesis, perhaps the idea of an extension of the censors' mandate to five years might have been in response to Varro's proposal, whose *arbitri* were in charge until the task was completed.

In the course of the late Republic, the emphasis of the role of the censors in regard to the constitution of the community, their original remit as attested in the formula of the censorial *inlicium*, came to be placed on the expulsion of its members considered unworthy, rather than on the inclusion of those considered worthy.

By putting forward a distinctive etymology of the noun *censores*, Varro takes part in an institutional debate on the constitutive components of the civic community and the systems of control of its membership. By casting his proposal in the terms of a remote past, Varro advances the idea that the true meaning of the censors, assigned to them by the first name-givers, in Rome the law-givers, and to whom they should conform, is that of acting as *arbitri*, not judges, of the community's *mores*. In doing so, he underlines the fundamental requirement for the censors to act as *boni viri*, exercising their complete liberty by virtue of *bona fides*.

What is needed, Varro seems to claim, is to address the moral question that, in his opinion, is at the foundation of the crisis of the Republic, the fountain, as he put it, of all discord. The decline of the moral standards should not be addressed by the recourse to a judicial system that applies a punitive system, but rather by the exercise of the *virtus* of its elite members.

It follows that, in this tradition of thought, the membership of the Roman community is based on the assessment of the citizens' private morality carried out by elected magistrates, who act as *arbitri* in accordance with a shared system of values. The *populus Romanus* was, therefore, made of the sum of the *Quirites* whose individual and private behaviour conformed to the expectations of the rest of the community that were interpreted, implemented, and enforced by the censors.

At the very foundation of the community was the *gradus dignitatis fortunaeque*, which structured the whole community in a hierarchical arrangement based on wealth as well as *dignitas*, which required a certain behaviour and morality adherent to the timocratic station where the censors had placed the citizen. As Nicolet observed, commenting on Dumézil's etymology of *censere*, 'an individual's status does not depend solely on objective criteria, even as defined by a law or regulation, but largely on the assent of the community expressed by its competent magistrates in a solemn declaration expressed in words of praise or blame and summed up in a designation.'⁸⁵

⁸⁵ Nicolet 1980, 53.

Since through the course of the Republic the exercise of the *regimen morum* had been subject to profound changes, by the first century BCE the political discussion focused on the most appropriate system that the censors should implement to supervise the behaviour of the members of the community, and in particular that of the senators. Their *regimen morum*, which aimed at re-establishing the correct hierarchical structure, was not, as Humm puts it, a punitive, but rather a corrective system.⁸⁶

In response to Clodius' *lex de notione censoria* and in dialogue with Cicero, Varro put forward a proposal that was pragmatically effective, as the system of the arbitrator seemed to be more agile than the *iudicium*-like apparatus of Clodius' measure, and, in principle, should not have given rise to those long disputes that most likely ended up stalling the censors' work in 55BCE - but it was also ideologically programmatic. At the foundation of the Roman community, the *populus Romanus*, composed of the sum of the *singuli cives* called into assembly by the censors, there is or should be a system, Varro implicitly claimed, that was regulated by virtue and not by law, based on shared values and consensus. From the private morality of the individual Roman citizens, the *Quirites*, the public community of the Roman people, the *populus Romanus*, came to be constituted and, ultimately, regulated by *boni viri* exercising their own judgment in the name of fairness.

⁸⁶ Humm 2019, 314.