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The Growth of Plebeian Privilege at Rome

BY the secession to the Sacred Hill in B.C. 494, the Roman *plebs* gained recognition as a constituted order with assemblies and magistrates of its own, and right of corporate action on its own account. The earliest *plebiscita* are represented, by the universal consent of our authorities, as being self-governing enactments,¹ valid only as regards the concerns of the members of the corporation. We hear of no claim on the part of the founders of the order to exercise any portion of the functions of sovereignty, or to legislate in any way for the whole community.

The history of the later Roman republic presents us with a widely different picture. When we reach the period of contemporary historians, in the age of the Punic wars, we find that the whole power of sovereignty has been delegated to the plebeian assembly. The old sovereign, the *populus*, has not indeed resigned; it retains its full prerogative, but side by side with it is a new sovereign, the *plebs*, exercising by a delegated authority precisely the same powers. The sovereign power might be exercised by the plebeians in their own exclusive *concilium*, under their own exclusive magistrates, the tribunes, and by their own peculiar forms of procedure, as effectively as by the assembly, the magistrates, and the procedure of the sovereign people itself.²

All the legal writers, our best authorities on such a point,

¹ E.g. Pomponius (in *Digest*, I. ii. 2, § 8): 'Evenit ut plebs in discordiam cum patribus perveniret, et secederet, sibi que jura constitueret, quæ jura Plebiscita vocantur.'

² 'Et ita factum est ut inter plebiscita et legem species constituendi interessent, potestas autem eadem esset.'—Pomponius, *ib.*

ascribe the delegation of these enormous powers to a law of the dictator Hortensius, B.C. 287, six years before the war with Pyrrhus.

Now it is impossible to suppose that the assembly of the *plebs* advanced at a single step from the meeting of a private corporation to be the delegated *alter ego* of the sovereign *populus Romanus*. We may be sure that the right of the *plebs* to legislate for the nation was accorded under checks and qualifications, long before they were invested with this absolute authority.

We find, in fact, two occasions prior to the Hortensian law on which the legislative competency of the *plebs* is said to have been recognised. The first of these is the Valerio-Horatian law of B.C. 449, the year after the decemvirate, the second the law of the dictator Publilius Philo, B.C. 339. Unfortunately the historians describe these laws in words which merely repeat the contents of the Hortensian law: *Ut plebiscita omnes Quirites (or universum populum) tenerent; ut quod tributim plebs jussisset, populum teneret* (Livy, iii. 55, viii. 12). It is hopeless to attempt to draw any inference from mere verbal differences in these descriptions. Some modern writers have been disposed to get over the difficulty by the conjecture that the laws of Publilius Philo and Hortensius were only re-enactments of that of Valerius and Horatius, and that the full powers of the *plebs* date back to the year B.C. 449. Mommsen's arguments against this view appear to me conclusive. Why should the jurists universally refer the powers exercised by the *plebs* to a mere re-enactment, rather than to the original source of their authority? Is it not absurd to suppose that, at a time when every plebeian was excluded from even the humblest magistracy of the Roman people, the assembly of the *plebs* should nevertheless have exercised the full sovereign powers of that Roman people? Again, the possession of such a power at this time is inconsistent with the most essential features of the history of the party struggles preserved to us. How could the consulship have remained closed to the plebeians for nearly a century after the decemvirate, if the mere decree of the *plebs* sufficed at this period to constitute a law? It may, perhaps, be answered that in the later republic the powers of the *plebs*, though unlimited in law, were in practice found ineffective against the senate and the nobles of that day. But the two cases are not really parallel. The later nobility was as much plebeian as patrician, and the magistrates of the *plebs* were generally 'tribunes if you will, but nobles first of all.' No wonder, then, that the powers vested in the plebeian assembly and the plebeian magistrates only worked out obedience to the great ruling families. But in the face of such powers nobility, from which the plebeians were excluded, could not have maintained its position for a single year.

The opinion that the *plebs* had early some part in legislation,

but that this part was at first limited by the attributes of some of the other powers of the state, is confirmed by a glance at the history previous to the Hortensian law. We find in this period numerous laws called by the names of the tribunes who proposed them, and clearly regarded by Livy as having been passed in the plebeian assembly, which nevertheless relate to subjects of national concern and are quite outside the widest sphere attributable to the self-regarding ordinances of the *plebs*. Such, to take a single instance, was the proposal to remove the habitation of the Roman people to Veii after the burning of Rome by the Gauls. Most of these laws fall in the century that elapsed between the Valerio-Horatian law and that of Publius Philo (B.C. 449-339). But two—the Terentilian proposal, *de legibus conscribendis*, which led to the codifying of Roman law in the Twelve Tables, and the *Lex Icilia de Aventino publicando*—are previous to the earliest of our three epochs. On the other hand, if the authorised version of Roman history is to be regarded as of any weight whatever, it is evident that the patricians must have had some means of retarding the progress of these tribunician measures, scarcely any of which were carried without a protracted contest.

The question remains, what were these checks and provisos with which the earlier laws hedged about the legislative competency of the *plebs*? Niebuhr and Mommsen have both given answers to the question, and I shall venture to offer a third.

Niebuhr believes that the law of Valerius and Horatius gave the *plebs* legislative authority, subject to the consent of a sort of upper house, the general assembly of the patrician body; he identifies this assembly with the *comitia curiata*, and its decrees with the *patrum auctoritas*. The law of Publius Philo (such is his conjecture) substituted for this *patrum auctoritas* the decree of the senate, as the sanctioning power requisite to give legislative force to the resolutions of the *plebs*, while the law of Hortensius abolished the necessity for this confirmation altogether. Special criticism on this particular 'divination' would be easy, but is unnecessary, as the explanation is bound up with Niebuhr's now utterly exploded theory of the exclusively patrician character of the *comitia curiata*.

Mommsen's method of dealing with the question requires more elaborate discussion. Both the Valerio-Horatian law and that of Publius Philo are struck by him out of the series of enactments relating to the *plebs*. He believes that both these laws regulated the proceedings of the *comitia populi tributa*, and are transferred by a mere blunder of our authorities to the *concilium plebis tributum*.¹ There is no question that this *concilium plebis* was in later times (equally with the assembly of the *populus Romanus* in order of tribes²)

¹ *Römische Forschungen*, i. 165.

² This was the assembly which elected the minor officers of the Roman People,

called in common talk *comitia tributa*, and that this loose¹ expression found its way into the writings of Livy and Cicero, just as did the similar use of *lex* for *plebiscitum* and of *populus* for *plebs*. There is nothing then violently improbable in the supposition that Livy may have misinterpreted laws which dealt with the true *comitia tributa*, the minor assembly of the *populus Romanus*, and may have imagined them to refer to the plebeian assembly which he was accustomed to miscall by that name. But the supposition of a possible blunder is too small a foundation on which to establish such an explanation. Besides, though this device helps us over the stumbling-block of the three identical laws, it positively aggravates the other and no less serious difficulty of the enormous disproportion between the earliest and the latest powers of the *plebs*. We should expect a gradual development of these powers; yet we are asked gratuitously to give up measures which are stated to have dealt with these powers, and which may all represent stages in their gradual development.

Mommsen's second point is, that the recorded facts indicate that a certain qualified power of legislation belonged to the *plebs* at least as early as the Terentilian bill (introduced B.C. 462, thirteen years before the consulship of Valerius and Horatius). Coupling this with the absence of any exercise of this right during the first thirty years after the secession, he conjectures that the advance is due to the popular tribune of B.C. 471, Publilius Volero, and he recognises no change in the legislative power of the *plebs* between his time and that of Hortensius, 184 years later. Between the time, then, of Volero and the time of Hortensius, the *plebs* had legislative power, but power subject to certain restrictions. What were these restrictions? The 'answer to the riddle' is to be found, according to Mommsen,² in the words in which Appian describes Sulla's law

the curule ædiles and quæstors (Aulus Gellius, xiii. 14), and was employed indifferently with the *comitia centuriata* for passing laws on the proposal of a consul or prætor. The distinction between these two assemblies (*comitia populi tributa* and *comitia populi centuriata*) is of importance in two respects only; when the *Populus Romanus* assembled for the election of consuls, prætors, and censors, or for the trial of appeals in capital causes from the sentences of magistrates, it was necessarily convoked in order of centuries, not in order of tribes. Compare Cæsar's irregular action as dictator: 'Qui comitiis tributis esset auspicatus (for the election of quæstors), centuriata habuit' (to elect a consul for one day).—Cic. *ad Fam.* VII. xxx.

¹ That the expression was not strictly correct is clear from the words of Lælius Felix quoted by Aulus Gellius, xv. 27: 'Is qui non universum populum sed partem aliquam adesse jubet, non comitia sed concilium edicere debet.' The *Plebs* was only a 'pars populi,' as we see from the definition in Aulus Gellius, x. 20: 'Plebem autem Capito in eadem definitione a populo divisit, quoniam in populo omnis pars civitatis omnesque ejus ordines contineantur. Plebs vero ea dicitur in qua gentes civium patriciæ non insunt.' The essential and permanent separation of the two corporations, the *populus* and the *plebs*, in spite of the accident that the former sometimes assembled by tribes (as the *plebs* always did), has been fully brought out by Mommsen in his *Römische Forschungen*.

² *Röm. Forsch.* i. 211.

about the powers of the tribunes (Bell. Civ. i. 59): *εἰσηγούντο μὴδὲν ἔτι ἀπροβούλευτον ἐς τὸν δῆμον ἐσφέρεισθαι, νενομισμένον μὲν οὕτω καὶ πάλαι παραλελυμένον δ' ἐκ πολλοῦ*. Mommsen takes this passage to mean that, in forbidding for the future any measures to be brought before the *plebs* without consent of the senate, Sulla revived a definite law which had existed in early times, that is to say, before the dictatorship of Hortensius.

I venture to think that this view is not correct. Appian's historical reference more naturally applies, not to the days of the early republic, but to the century after the reconciliation of the two orders, to the times of the wars with Pyrrhus, with Carthage, and with Macedon. During this period the senate had asserted, not by positive enactments but by indirect means, a customary and constitutional right to be consulted before any magistrate proposed a measure for the acceptance either of the *populus* or the *plebs*. Its claim had been enforced for generations by means of the tribunician veto. This was the machinery by which a check was placed on the legal power possessed by every magistrate to throw the state into confusion. The machinery had been thrown out of gear (*παραλελυμένον*) by the act of Tiberius Gracchus in setting aside the veto of his colleague. Since that act the safety-valve of the constitution had ceased to work. Sulla was taught by the record of Gracchus, of Saturninus, and of Sulpicius, that the employment of the veto was an insufficient sanction. It had repeatedly failed to guard this most necessary prerogative of the senate against the attacks of a popular tribune. Sulla, therefore, naturally wished to establish the constitutional claim of the senate on the firmer basis of definite enactment. But Appian's reference to an ancient precedent is abundantly justified by the usage on which Tiberius Gracchus trampled, and such a usage agrees precisely with the word employed, *νενομισμένον*. As the passage of Appian may thus be explained by a practice of which we have ample evidence, it is surely against all sound principles of criticism to invent for its explanation a supposed legal right otherwise unknown to us. The silence of Cicero in the treatise *de Republicâ* as to any such legal right enjoyed by the senate before the Hortensian law is a very strong negative argument against Mommsen's theory.

I believe that, for the purpose of showing how the legislative power of the *plebs* may gradually have established itself, the known powers of the sovereign *populus*, of the magistrates of the Roman people, and of the senate, will supply us with sufficient material; and that the assumptions of the German historians are therefore unnecessary. I think that it may be shown how the *plebs* could have a substantial share in legislation, without our supposing that the exclusive power of enactment residing in the

sovereign *populus* was formally infringed until the time of the Hortensian law.

We are not much aided in discussing this question by an examination of the detail of the early struggles between patricians and plebeians as recorded in the pages of Livy or—with one notable exception—of Dionysius. In almost every case these writers aim at giving a picturesque account of each contest, coloured with personal incidents and individual traits of the various party leaders, and furnished out with speeches and arguments adapted to the supposed moral and political situation. In filling in such details the historians borrow freely from the features of the party struggles of the *optimates* and *populares* in the last century of the republic. They present us with a masquerade of the later commonwealth, not with a picture of the earlier.

All that we can really gather from Livy is that there were actually votings in the assembly of the *plebs* on motions proposed by the tribunes. Without assuming this much the whole story as told by Livy becomes absurd, and beyond this he does not commit himself to much of definite assertion on points of law. Fortunately this simple fact is the only one which it is necessary to prove from Livy, for the rest of the process of legislation in early times has been preserved to us in a single instance in which Dionysius has followed the account derived by him from an ancient document. The case is that of the *Lex Icilia de Aventino publicando* (B.C. 456), an interlude in the long struggle over the Terentilian law. This *Lex Icilia* was preserved, as Dionysius¹ tells us, on a brazen column in the temple of Diana on the Aventine. It seems unlikely that the original tablet in such a situation should have survived the burning of the city by the Gauls. Yet a record so important to the *plebs* would doubtless be at once restored, and the restoration would show at least the belief prevalent at this very early period (B.C. 389) as to the proper procedure in case of such a law.

'Icilius,' says Dionysius (x. 31), 'approached the consuls then in office and the senate, and requested them to pass the preliminary decree for the law that he proposed, and to bring it before the people.' By threatening to arrest the consuls he compelled them to assemble the senate, and Icilius addressed the senate on behalf of his bill. Finally the senate consented; ἔδοξε δίδοναι τῷ δήμῳ τὸν τόπον (Dionys. x. 32). Then, after auspices and sacrifices, 'the law was passed by the *comitia centuriata*, which were convened by the consuls.'

It is clear then that what follows the *probouleuma* of the senate is not, as Mommsen's theory would require, a decree of the *plebs*, but a law of the sovereign *comitia* under the presidency of the

¹ Dionys. x. 32: ὅς ἐστιν ἐν στήλῃ χαλκῇ γεγραμμένος, ἣν ἀνέθεσαν ἐν τῷ Ἀδεντίνῳ, κομίσαντες εἰς τὸ τῆς Ἀρτέμιδος ἱερὸν.

consuls. It is further to be noticed that in the story of the Icilian law, from the time when the tribune approaches the consuls to the final command of the *populus Romanus* in the *comitia centuriata*, there is no place where the voting by the *plebs* can harmoniously fit in. It would seem to follow that this voting by the *plebs* must be placed at the very beginning, before the detail of Dionysius's story begins. Icilius must have been already armed with the petition of the *plebs* when he demanded to plead their cause before the senate.

Now here we have an order of proceeding under which the *plebs* have a practical initiative in legislation, and in which, nevertheless, each of the powers of the state acts in a perfectly natural and constitutional manner. There is no call for the intervention of any *deus ex machina* in the shape of a special prerogative, such as both Niebuhr and Mommsen invent to suit the supposed exigencies of the particular case. The formal legislative power lies solely with the *populus Romanus*. The vote of the corporation of the *plebs* is not then in early times strictly a legislative process at all. It is merely a strong and formal petition, an appeal to the sovereign assembly to grant their request.¹ But this sovereign assembly can only be convened and the question put to it by a consul. If the consuls are unfavourable to the bill, they can refuse to put it to the vote at all. In any case, unless, like Sp. Cassius, they were themselves revolutionists, they would not think of doing so save on the recommendation of their authorised advisers.

Thus the consultation of the senate, not as a necessary legal formality, but as a means of stimulating the official action of the consul, becomes a point on which the reformers are bound to insist. To bring it about the tribunes must use their powers of compulsion over the consul. The oath of the *plebs* binds them all to common resistance and revenge against every enemy of their order, and thus they may try and condemn an obstinate consul as soon as he goes out of office.² Or again the tribune may take advantage of the sanctity of his person to lay actual hands on the consul. If the latter uses force in resisting, every plebeian is allowed and bound by the sacred laws to avenge the outrage by taking his life. By the use of such pressure Icilius was enabled to compel the consul to introduce his bill to the notice of the senate.

This brings us to the next stage of the proceedings. The senate is assembled and freely discusses the law. An adverse vote justifies the consuls in their resistance. Then follow tedious manœuvres. The senate treat with members of the college of tribunes

¹ Somewhat in the same way the 'bills' of the English commons were originally only petitions to the crown to formulate legislation on a particular matter; but the commons were necessary parties to legislation, whose assent to the proposed law might be implied from the fact that they asked for it.

² Livy, ii. 52, 54, 61, iii. 13.

to procure their veto; they urge the necessity of a military expedition, or, as a last resource, advise the appointment of a dictator. Such is the general picture we get from Livy's story. If by these means they can tide over the tribune's year of office, the whole process has to be gone through again. The senate have the chance of a lucky accident in getting one of the new tribunes subservient to them; or sometimes (as in the case of the proposal to remove to Veii) they may persuade the *plebs* itself to throw out the tribunician *rogatio* when again introduced (Livy, v. 30). On the other hand the tribunes may bring to bear their reserved power of impeding all public business; and the *ultima ratio* lies with the plebeians, who have the power of secession in their hands.

In practice, however, the senate is nearly always wise enough to yield before the *plebs* is driven to play this its last card. Their yielding is expressed by their backing the petition of the *plebs* and recommending the consuls to put the question of its acceptance to the *populus*. With this recommendation on the part of the senate the struggle is generally at an end. It is still in the strict right of the consuls to refuse to put the question to the *comitia*. Livy (iii. 19) gives us one instance in the matter of the Terentilian law, when the senate is disposed to yield, and the consul *non in plebe coercendâ quam senatu castigando vehementior fuit*. But a consul so insisting on his right would incur enormous personal responsibility, and expose himself, unsheltered by public opinion, to the vengeance of the *plebs* when he went out of office.

When the consul too has yielded, and the question is actually put to the vote of the sovereign (generally in its *comitia centuriata*), the controversy has been long ago thoroughly threshed out. Though it is only at this stage that legislation in the strict sense of the word commences, yet no instance is recorded of a refusal on the part of the sovereign people to assent to the petition of the *plebs* backed by the recommendation of the senate. The final stages are commonly summed up by Livy in general words, e.g. of the Licinian bills of B.C. 367: *per ingentia certamina dictator senatusque victus, ut rogationes tribunicia acciperentur* (Livy, vi. 42).

In the foregoing sketch of the progress of a legislative proposal no power is ascribed to any person or body in the state, excepting such as from independent sources of information we know that they possessed. The *plebs* and its tribunes only petition, the senate only advises, the consuls only propose, the sovereign *comitia* alone enacts. Yet by this process the plebeians and their tribunes assert the power of initiating measures, and they are practically in a position to carry them through.

Now my conjecture is that the three laws, which are roughly described in our authorities as giving legislative power to the *plebs*, simply assisted or gave formal sanction to certain stages of this

process. The mere right of petition required no special enabling law, and Icilius, as we have seen, could force his bill to the next stage by using or abusing the means of coercion conferred on the tribunate at its institution. I imagine then that the law of Valerius and Horatius simply recognised *de jure* the power which Icilius had exercised *de facto*: that is to say, it ordered the consul to bring any petition of the *plebs* at once to the notice of the senate, and empowered the tribune to plead his cause before the senate; perhaps it went further and deprived the consul of his right of arbitrarily refusing to accede to the recommendation of the senate, if such were given, and directed that he should in such case convene the *comitia* and submit the proposal to its vote. If this restriction of the power of the consul removed the first obstacle in the way of tribunician bills supported by the vote of the *plebs*, another facility still remained to be given. The consul might be deprived of the opportunity of sheltering himself behind the moral responsibility of the senate. Does it not suggest itself as a plausible conjecture that the law of Publilius Philo struck out the intervening senatorial deliberation and compelled the consul to bring the petition of the *plebs* immediately before the *comitia populi Romani*?

If such were the tenor of the Publilian law, it would be only a very slight inaccuracy to describe it as conferring legislative power on the *plebs*. It must be remembered that the voters in the assembly of the *populus* were, except for the addition of a handful of patricians, the same persons who had already voted in the assembly of the *plebs*. The reference of the proposal already passed by the latter to the former would be the mere repetition of a foregone conclusion, except so far as the manipulation of the auspices might enable the consuls to cause obstruction at this stage.

The Hortensian law which formally transferred the sovereign power to the *plebs* would thus be a change greater *de jure* than *de facto*. In formal law it was a mighty revolution. We might compare it with the change which would be effected in the English constitution if the appointment of ministers were transferred from the king to the speaker of the house of commons, and if the power of giving the royal assent to acts of parliament were formally vested in the prime minister. It was natural and even necessary that the jurists should refer to this law as the source of the legislative competency of the *plebs*. On the other hand, historians and literary men would equally naturally refer the change to the time when it practically took place, to the time, that is, when a vote of the *plebs* really decided the fate of a measure beyond the possibility of effective appeal. This power, if the theory put forward in these pages be correct, was placed within the reach of the plebeians by the law of Valerius and Horatius, and was fully secured to them by the law of Publilius Philo.

J. L. STRACHAN-DAVIDSON.