Premessa

Con la pubblicazione di questo secondo volume di *Miscellanea Senatoria* si intende dare continuità alla diffusione dei risultati dell'attività seminariale e di ricerca sviluppata in margine al progetto PAROS e ad iniziative di ricerca ad esso interconnesse.

Nelle pagine che seguono sono raccolti scritti di varia natura, in alcuni casi relativi a segmenti di percorsi di ricerca ancora in atto, ma tutti tesi a valorizzare aspetti e problemi della ricerca sul senato di epoca repubblicana e imperiale. Ma allo stesso tempo non è trascurata la riflessione sul metodo, sempre necessaria per un approccio maturo ai testi antichi.

Come già nel precedente volume (apparso in questa collana con il numero B.4), le pagine che seguono sono articolate in due sezioni, *Forme e tecniche* e *Fonti e contenuti*.

La prima sezione accoglie due scritti. Il primo, di Carlo Pelloso, riconsidera il lento percorso verso l'*exaequatio* dei *plebiscita* alle *leges* mediante un riesame dello strumento della *auctoritas patrum*. Aldo Petrucci esamina invece il ruolo del senato nelle procedure di conferimento del trionfo in epoca repubblicana, evidenziando la funzione di «filtro istituzionale» svolta dall'assemblea senatoria.

Nella seconda sezione sono accolti invece quattro saggi che, prendendo le mosse da fonti di tradizione manoscritta, ricostruiscono il portato di alcune delibere senatorie.

Prendendo le mosse da Plin. *nat.* 8.64, Annarosa Gallo esamina una serie di testimonianze liviane relative all'evoluzione della normativa (editti pontificali, delibere senatorie e il plebiscito Aufidio) in materia di importazione e impiego nei *ludi* di belve africane, anche alla luce del dibattito politico del primo quarto di II secolo a. C.

Francesca Pulitanò esamina un celebre brano di Tacito (*ann.* 4.62), ricostruendo un senatoconsulto del 27 d. C. in materia di anfiteatri, la cui approvazione è narrata strumentalmente da Tacito per criticare la condotta di Tiberio. Si tratta dunque di una interessante *Fallstudie* della tecnica di lavoro dello storico senatorio e dell'uso in chiave argomentativa degli *acta senatus* e dei deliberati senatori.

I saggi di Macarena Guerrero e Immacolata Eramo colmano invece una lacuna dei volumi, precedentemente pubblicati in questa collana (B.3 e B.6), relativi alla rappresentazione e uso dei senatoconsulti nelle fonti letterarie. Permettono infatti di esaminare l'uso dei senatoconsulti rispettivamente nel *De aquaeductu* (con particolare riguardo a un caso specifico) e negli *Stratagemata* del poliedrico senatore di età flavia e della prima età antonina Sesto Giulio Frontino.

Orazio Licandro riconsidera infine un passaggio dell'anonima opera Περὶ πολιτικῆς ἐπιστήμης, contenuta nel manoscritto *Vat. gr.* 1298 (Anon. *de scient. pol.* 5.63–64), alla luce del quale riflette sul ruolo dei senatori nella *forma rei publicae* elaborata da Cicerone nel *De re publica*. Mette infatti a sistema il testo dell'Anonimo con testimonianze relative alla prima età imperiale sul lavoro del senato in commissione evidenziando così come le riforme augustee, costituissero un anello di congiunzione tra l'organizzazione dei poteri pubblici teorizzata da Cicerone e la speculazione in tema da parte dei giustinianei.

Questo volume è stato consegnato alle stampe in tempi difficili, nel pieno di una pandemia che mette a rischio le vite di molti e rende più complesso il quotidiano di tutti. Piccolo segno tangibile del maggior vigore dello studio rispetto alle contingenze umane.

Münster, agosto 2020 A. G., S. L., P. B.

Forme e tecniche

CARLO PELLOSO

Along the Path Towards *Exaequatio*

Auctoritas Patrum and *Plebisscita* in the Republican Age

I. Introduction

Roman jurists of the 1st and 2nd century AD provided numerous, yet similar, definitions of *plebisscitum*, depicting a legal reality that – it has been assumed – was current from the beginning of the 3rd century BC[1].

On the one hand, Capito and Gaius – who shared ideas that are implicitly represented in the works of Laelius Felix – focus on the existing differences between the Roman people, as a whole, and plebeian society as a part of this whole. Consequently, these jurists are inclined to further emphasise in their definitions of *plebisscitum* the composition of the tribal assemblies of the *plebs*, as opposed to the popular assemblies: if *lex est quod populus iubet atque constituit*, so *plebisscitum est quod plebs iubet atque constituit*[2]. In other words, the noted resolution of the *plebs* refers to a bill (*rogatio*) brought before the *plebs* (i. e. an *aliqua pars* included in the

---

1 Gell. 10.20.5 (*'Plebisscitum' … est … lex, quam plebes, non populus, accipit* [Ateius Capito]); Gell. 15.27.4 (*ita ne 'leges' quidem proprie sed 'plebisscita' appellantur quae tribunis plebis ferentibus accepta sunt. plebes autem ea dicatur in qua gentes patriciae non insunt* [Laelius Felix]); Gai. 1.3 (*lex est quod populus iubet atque constituit. Plebisscitum est quod plebs iubet atque constituit. plebs autem a populo eo distat, quod populi appellatione universi cives significantur, connumeratis etiam patriciis; plebis autem appellatione sine patriciis ceteri cives significantur*); Pomp. *l. s. ench.* D. 1.2.2.12 (*ita in civitate nostra … plebi scitum, quod sine auctoritate patrum est constitutum*). Cf. Fest. s. v. *scita plebei* (Lindsay 293: *scita plebei appellantur ea, quae plebs suo suffragio sine patribus iussit, plebeio magistratu rogante*).

2 This definition implies a clear-cut distinction between *plebs* and *populus* (see De Martino, *Storia della costituzione romana* I 1972², 371); on the contrary, in the literary sources, there is no consistency in the use of these two denominations, which often appear to be interchangeable (see Maddox, *The binding plebiscite* 1984, 88; Biscardi, *'Auctoritas patrum'* 1987, 99 f.; Sandberg, *The concilium plebis* 1993, 78).

totum), voted for, and finally accepted: the patricians thus remained debarred from participation in such 'fractional assemblies', which were accordingly labelled as *concilia* and not as *comitia*[3].

On the other hand, the jurist Verrius Flaccus uses as a source for his entry on *scita plebis*, like Laelius Felix, introduces a further proviso. The process aimed at passing plebiscites, in fact, was initiated by the proposal of a tribune, and was carried out under the presidency of the same plebeian magistrate, that is, an officer who was not entitled to summon the patricians to vote on such matters[4].

As such, Pomponius, listing the 'formants' of the Roman legal system in the 2nd century BC – so long as one does not conceive of the term *auctoritas* as a synonym for *iussus* (that is 'final vote', 'final resolution', 'approval of *rogatio*'), which seems rather unpersuasive – appears to add an interesting element to this process: Pomponius records that plebeian statutes would come into force – as the jurist wants to make it clear – without the authorisation (*auctoritas*) of the patrician senators (*patres*)[5].

---

3 Gell. 15.27.4. Indeed, Cicero and Livy do not use these two terms (*comitia* and *concilia*) in accordance with the idea expressed by the imperial jurist, as already demonstrated by Botsford, *The Roman Assemblies* 1968, 119 ff., and Farrell, *The Distinction between Comitia and Concilium* 1986, 407 ff. Thus, either we must suppose that there was a tradition which preserved the strict distinction between *comitia* and *concilium*, as mirrored in Laelius Felix's definition, or agree that this jurist makes a mistake, at least, as the quotation stands (see Taylor, *Roman Voting Assemblies* 1966, 60 ff. and 138, nt. 5; Develin, *Comitia tributa plebis* 1975, 306 ff.; Sandberg, *The concilium plebis* 1993, 78 ff.; Pelloso, *Ricerche sulle assemblee quiritarie* 2018, 329 ff.).

4 Such nuance implies that assemblies were not autonomous actors in Rome, but totally dependent on those who were given *ius agendi*. The people and the *plebs* could accomplish their (judicial, legislative, electoral) tasks only on the initiative of a curule magistrate or, respectively, of an officer of the *plebs*. Accordingly, even if law-making was formally a popular or plebeian prerogative, in practice it substantially consisted in a magisterial and tribunician activity, since assemblies could neither initiate, nor could they answer the *rogationes* other than by providing a 'yes or no' answer (see Mommsen, *Römisches Staatsrecht* III.1 1887, 303 f.)

5 In these terms, see Biscardi, *'Auctoritas patrum'* 1987, 101 f. (but see also p. 238); against this reading, see the persuasive remarks of Guarino, *L'"exaequatio legibus' dei 'plebisscita'* 1951, 460: "l'interpretazione è troppo azzardata. Se anche ad essa non si rifiuta il termine *auctoritas*, isolatamente preso, vi si ribella, considerata nel suo complesso, la locuzione *auctoritas patrum*, che è, sino a prova contraria, squisitamente tecnica". Even if the passage from Pomponius' Enchiridion, as it stands, is deeply interpolated and, at some point, even syntactically incorrect (cf. *Index interpolationum* ad h. l.), much of the information can be considered authentically classic and part of a consistent narrative (see Bretone, *Tecniche* 1982, 226 ff., even if this author agrees with Biscardi and states that "la frase *quod sine auctoritate patrum est constitutum* significa che il *plebisscitum* 'è stato creato', come fonte di produzione giuridica, senza il consenso dei patrizi, non che la procedura necessaria per porlo in essere prescinda dall'intervento senatorio").

However, most of these sources, while covering the current legal status of the *plebisscita* from different perspectives, fail – at least as they stand – to include in their definitions any reference to a particular feature which diachronically played a fundamental role in the history of the struggle of the orders and, thus, in the subsequent political relationship of the *patricii* and *plebei* during the 5th, 4th, and 3rd centuries BC. I refer, of course, to the problem of the extent of the binding force of the rules which were enacted solely by the plebeians. If the *plebs* flourished and stood as a distinct civic group (*ordo*) within the republic, it is natural to assume that, initially, *plebisscita* were binding only to those who accepted the rules as proposed by the bill at stake. However, this does not appear to have been the legal status, as implied by the jurists: any enactment by the *plebs* – as can be gathered from context, as opposed to the legal definitions of *plebisscitum* provided during the era of the Principate – was binding for the Roman community at large.

As far as the issue of plebiscitarian validity is concerned, general consensus – albeit articulated into varying degrees – seems to exist among modern scholars only with regard to the last step on the path which led to the final *exaequatio*: ever since the dictator Q. Hortensius forced the centuriate assembly to pass his famous *rogatio de plebisscitis*, the resolutions of the *plebs* were given *per se* a legal status which they continued to enjoy in the later Republic and the early Empire[6], with the exception of the period in which Sulla's reform was valid[7]. It was only in 287 BC that the tribal councils of the plebeians, gathered and presided over by their chiefs, obtained the power to introduce measures without conditions, which had automatic general validity and, accordingly, endowed a binding force among the *universus populus*. In other words, due to the acceptance of Hortensius' reform by the entire *populus Romanus*[8], the resolutions of the *plebs* had the same standing as the *leges populi Romani*. As Gaius himself maintains, when describing the events that led up to that which occurred in 287 BC, prior to the enactment of the *lex Hortensia,* the *patricii* could refuse to recognise the *plebisscita "quae sine auctoritate eorum facta essent"* ('which were passed without their approval'). However, as a result of the *exaequatio* introduced by law, from 287 BC they could no longer challenge

---

6 See Gell. 15.27.4 (*quibus rogationibus ante patricii non tenebantur, donec Q. Hortensius dictator eam legem tulit, ut eo iure, quod plebs statuisset, omnes Quirites tenerentur* [Laelius Felix]); Gai. 1.3 (*unde olim patricii dicebant plebisscitis se non teneri, quae sine auctoritate eorum facta essent; sed postea lex Hortensia lata est qua cautum est ut plebisscita universum populum tenerent: itaque eo modo legibus exaequata sunt*); Pomp. *l. s. ench*. D. 1.2.2.8 (*mox cum revocata est plebs, quia multae discordiae nascebantur de his plebis scitis, pro legibus placuit et ea observari lege Hortensia: et ita factum est, ut inter plebis scita et legem species constituendi interesset, potestas autem eadem esset*); see, moreover, Liv. *perioch*. 11; Plin. *nat*. 16.37; *Inst*. 1.2.4.

7 See App. *bell. civ.* 1.266.

8 See Vassalli, *La plebe romana nella funzione legislativa* 1906, 131.

the general validity of what the *plebs "iussit atque constituit"* ('had approved and decided')[9].

---

9 Gai. 1.3. According to Mommsen's interpretation of this passage (who reads *quia*, instead of *quae*), the patricians refused to recognise any *plebisscitum*, because such enactments were not eligible for a grant of *auctoritas patrum* (i. e. the formal approval of the patrician senators): Mommsen, *Römische Forschungen* I 1964, 157; Id., *Römisches Staatsrecht* III.1 1887, 155, nt. 3; cf. Rotondi, *Leges publicae populi Romani* 1912, 43; Botsford, *The Roman Assemblies* 1968, 280; Magdelain, *De l'auctoritas patrum* 1990, 397; see, moreover, Biscardi, *'Auctoritas patrum'* 1987, 238. Differently, Staveley, *Tribal Legislation before the lex Hortensia* 1955, 21, believes that Gaius proves just what Mommsen thought him to deny, i. e. the grant of patrician sanction as a *condicio sine qua non* of the validity of a *plebisscitum*: "whether or not we read the alternative *quae* for *quia*, Gaius can be taken to mean something very different, namely that the patricians in the years immediately preceding the *lex Hortensia* had refused to recognize certain unsavoury *plebisscita* on the ground that they had not afforded them the required *auctoritas*". Also, Develin, *Comitia tributa plebis* 1975, 321, considers it more reasonable "to assume that before 287 there was a distinction between plebiscites with and without the *auctoritas*, since the phrase *plebisscitis … quae sine auctoritate eorum facta essent* must be given the meaning "such plebiscites as were made without *patrum auctoritas*": this author shares the idea that the reading *quae* – in Gai. 1.3 used to introduce a restrictive clause, rather than a non-restrictive or parenthetical clause – gives more natural Latin than *quia* (see Beseler, *Beiträge* 1920, 109; David, Nelson, *Gai Institutionum Commentarii* 1954, 13; Amirante, *Plebiscito e legge* 1984, 2035; Sandberg, *Magistrates and Assemblies* 2001, 134; cf. Mannino, *L'"auctoritas patrum'* 1979, 97 f., who reaches the same conclusions, even if he opts for the reading *quia*). According to Biscardi, *'Auctoritas patrum'* 1987, 85 and nt. 253, as well as to Guarino, *L'"exaequatio legibus' dei 'plebisscita'* 1951, 464 and nt. 37, Gaius used the term *auctoritas* improperly to mean something like 'participation (in the assembly)': in other words, the passage would suggest that once the patricians would say that they were bound by no *plebisscita*, since such enactments by the plebeians only, i. e. without their participation and acceptance (*iussus*), but once the *lex Hortensia* was passed, *plebisscita* were made equal to *leges* since it was stipulated that *plebisscita* should be bestowed with general validity for the whole *populus*. Once again, both authors conceive of the causal clause *quia sine auctoritate eorum facta essent* as non-restrictive, alluding to all *plebisscita*, as Mommsen did. Against this view, I remind the reader that, firstly, the particle *quia* regularly introduces a fact and rarely takes the subjunctive (i. e. the mode which expresses a reason given to the authority of someone different from the writer), and, secondly, that *facta essent* shows that Gaius is referring to a limited number of plebiscites which had been voted before 287 BC., whether *auctoritas* here hints at the 'approval by the patrician Senate', or more generally at any form of patrician 'approval'. To conclude: maintaining that the choice between *quia* and *quae* is irrelevant (see Siber, *Plebs* 1951, 67; Humbert, *La normativité des plebiscites* 1998, 211, nt. 1) is not persuasive, since the former would better fit the allusion to all *plebisscita* in general, while the latter would introduce a restrictive clause; the use of the pluperfect subjunctive and, thus, the implicit reference to a limited number of plebiscites, rules out the view that gives *auctoritas* the vague and general meaning of 'patrician participation' (since this aspect is already implied in the definition and since no plebiscite can be voted with the participation of patricians); the pronoun *quae* must be preferred to the particle *quia*.

The crucial point here, however, is that Livy, alongside Dionysius, attests to two statutes enacted prior to 287 BC: both appear to be identical in content and in form with the *lex Hortensia*, and to include measures which sought the same goal, that is, to make *plebisscita* binding for the entire community. The former was a *lex Valeria Horatia,* passed in 449 BC before the centuriate assembly *"ut quod plebs tributim iussisset populum teneret"*[10]; the latter was a *lex Publilia Philonis* proposed by the dictator *Publilius* in 339 BC before an unspecified assembly *"ut plebis scita omnes Quirites tenerent"* (Liv. 8.12.15–16).

Taking into consideration the period after the *lex Valeria Horatia* (449 BC) and prior to the *lex Hortensia* (287 BC), a question arises which is twofold: what was the legal status enjoyed by plebiscites? And what was the role played by the Senate regarding the general validity bestowed upon such plebeian resolutions?

II.1 'Rejecting the past': a view which only credits the *lex Hortensia*

The most radical approach rejects these two earlier laws as unauthentic, consequently supposing that no reliable change was effected in the legal standing of the plebeian resolutions prior to 287 BC[11].

---

10 Liv. 3.55.3: *Omnium primum, cum velut in controverso iure esset tenerenturne patres plebi scitis, legem centuriatis comitiis tulere 'ut, quod tributim plebes iussisset, populum teneret': qua lege tribuniciis rogationibus telum acerrimum datum est.*

11 Meyer, *Untersuchungen über Diodor's Römische Geschichte* 1882, 610 ff.; Id., *Der Ursprung des Tribunats* 1895, 1 ff.; Binder, *Die Plebs* 1909, 371, 476, 485; Baviera, *Il valore dell''exaequatio legibus' dei 'plebisscita'* 1910, 369; Beloch, *Römische Geschichte* 1926, 350, 477 f.; Siber, *Die plebejischen Magistraturen* 1936, 39 ff.; de Francisci, *Storia del diritto romano* I 1943, 303 ff. (but see also Id., *Storia del diritto romano* I 1943, 94); von Fritz, *The Reorganisation of the Roman Government* 1960, 18 ff.; Id., *Plebs* 1951, 61 ff.; Bleicken *Das Volkstribunat der klassischen Republik* 1955, 13 ff.; Id., *Lex Publica* 1975, 85 f., 95; Orestano, *I fatti di normazione* 1967, 266, nt. 3; Ridley, *Livy and the concilium plebis* 1980, 337 ff.; Maddox, *The binding plebiscite* 1984, 85 ff.; Hölkeskamp, *Die Entstehung der Nobilität* 1987, 163 ff.; Drummond, *Rome in the Fifth Century* 1989, 223; Magdelain, *De l''auctoritas patrum'* 1990, 385 ff.; Humbert, *La normativité des plébiscites* 1998, 211 ff.; Id., *I plebiscita* 2012, 307 ff.; Lanfranchi, *Les Tribuns de la Plèbe* 2015, 232 ff. The following authors consider the *lex Hortensia* the only historical measure that changed the status bestowed on plebiscites and gave them equal status to the *leges*, professing a sceptic *non liquet* with regard to the first two statutes (449, 339 BC): see Rotondi, *Leges publicae populi Romani* 1912, 65; Vassalli, *La plebe romana nella funzione legislativa* 1906, 111 ff.; Grosso, *Storia del diritto romano* 1965, 110 f.; Capogrossi Colognesi, *Diritto e potere* 2007, 148. See, also, Herzog, *Geschichte und System der römischen Staatsverfassung* I 1884, 190 ff., 193, nt. 1, 254, nt. 3, who accepts the tradition, but fails to distinguish between the measures of 339 and 287 BC.

According to Siber[12], whose work further advanced the theory presented by Meyer, the two earlier *leges* did not make the plebeian resolutions applicable to the general populace, and must be considered as mere inventions, i. e. unhistorical attempts to explain, in general terms, the extraordinary *erga omnes* validity bestowed on certain *plebisscita,* that were voted on prior to the *lex Hortensia*. Due to such general and ideologically rooted premises, the author at issue seeks to demonstrate that every *scitum* passed by the plebeian tribes before 287 BC was ratified by a vote of the *comitia centuriata*, so as to affect the whole people. In other words, to acquire general validity, the measures stated by a given *plebisscitum* were converted

---

12 Siber, *Die plebejischen Magistraturen* 1936, 39 ff., 44 ff.; Id., *Plebs* 1951, 61 ff.; Meyer, *Römischer Staat und Staatsgedanke* 1964, 69; cf. Hennes, *Das dritte valerisch-horatische Gesetz send seine Wiederholungen* 1880, 5 ff., who gives the *lex Valeria Horatia de plebisscitis* the same effect Siber supposes existed prior to the *lex Hortensia*: according to this scholar it was under the *lex* passed in 449 BC that plebiscites were bestowed general validity, only on the condition that they were converted into statutes. Likewise, see Guarino, *L'"exaequatio legibus' dei 'plebisscita'* 1951, 458 ff.; Id., *'Novissima de patrum auctoritate'*, 117 ff., who considers as unhistorical the *lex Valeria Horatia*. This author focuses on a difficult passage of Appian (*bell. civ.* 1.59.266: εἰσηγοῦντό τε μηδὲν ἔτι ἀπροβούλευτον ἐς τὸν δῆμον ἐσφέρεσθαι, νενομισμένον μὲν οὕτω καὶ πάλαι, παραλελυμένον δ' ἐκ πολλοῦ, καὶ τὰς χειροτονίας μὴ κατὰ φυλάς, ἀλλὰ κατὰ λόχους, ὡς Τύλλιος βασιλεὺς ἔταξε, γίνεσθαι, νομίσαντες διὰ δυοῖν τοῖνδε οὔτε νόμον οὐδένα πρὸ τῆς βουλῆς ἐς τὸ πλῆθος ἐσφερόμενον οὔτε τὰς χειροτονίας ἐν τοῖς πένησι καὶ θρασυτάτοις ἀντὶ τῶν ἐν περιουσίᾳ καὶ εὐβουλίᾳ γιγνομένας δώσειν ἔτι στάσεων ἀφορμάς), and reads it in the following sense. In 88 BC "i consoli Cornelio [Silla] e Pompeo [Rufo] proposero probabilmente ai comizi di ripristinare sotto la veste moderna di un *consultum* di tutto il *senatus* (organismo nobiliare di loro piena fiducia) l'*auctoritas patrum* preventiva per le *leges centuriatae*", so re-enacting the system supposedly laid down by the *leges Publiliae Philonis*; such provisions, passed in 339 BC and in force up to 287 BC, provided that "il popolo tutto era vincolato in definitiva, *patribus auctoribus*, solo dalle *leges centuriatae*" and that "i magistrati titolari del *ius agendi cum populo* furono tenuti, su richiesta dei *tribuni plebis,* a convertire i *pebiscita* in proprie *rogationes* ed a sottoporli, previo parere favorevole dei *patres* e con i propri auspici, ai *comitia centuriata*" (see, likewise, Lanfranchi, *Les Tribuns de la Plèbe* 2015, 35: "si la loi de 339 eut une certaine réalité, ce ne put être, au maximum, que celle que lui confère A. Guarino: une loi stipulant que les magistrats devaient soumettre aux comices les plébiscites dont les tribuns réclamaient l'application, comme s'il s'agissait de leurs propres *rogationes*. Rien de plus"). Yet, neither Livy, nor Appian seem to confirm Guarino's hypothesis: there is no case of such a conversion attested after 339 BC; no mention of such conversion is made in the short text of the *lex Publilia Philonis de plebisscitis* quoted by Livy; Sulla's law, as paraphrased by Appian seems to affect the resolutions of the *plebs* only, as one can infer from the word πλῆθος (mass) used to specify the meaning of δῆμος (people), and above all from the mention, made by the historian, of a rule providing the previous consent of the Senate that, first repealed or abrogated, was then re-established by Sulla and his colleague (which, clearly, only makes complete sense if one excludes any reference to the *leges centuriatae* since, as everybody knows, these provisions even prior to 88 BC never ceased to be *ex lege* previously authorised by the *patres*): see, on this topic, Biscardi, *'Auctoritas patrum'* 1987, 83 f., 150 ff., and ntt. 490–491, 237 ff.; De Martino, *Storia della costituzione romana* III 1973², 70.

into a *lex centuriata*: conversely, within the framework of the *civitas*, any plebeian enactment would merely represent a political wish, a non-binding programme, even for those who had passed it[13].

Despite approaching this problem from a radically different perspective, Mommsen *grosso modo* achieved similar results, at least as concerns the impact finally produced by the *lex Hortensia* on the previously existing *status quo*[14]. First, he believes that the so-called *comitia populi tributa* carried out legislation as early as the second half of the 5th century BC, and that such a fundamental reform could not be overlooked by the Roman annalists in their records[15]. Consequently, he maintains that the Valerio-Horatian law, and the Publilian law alike, were not

---

13 In other words, in the period prior to 287 BC the *plebisscita* were resolutions "die öfters zur Erwirkung von Komitialgesetzen und zu anderen Regierungsmaßnahmen … führten, die aber als solche für niemanden, auch nicht für die *Plebs* verbindlich waren" (Siber, *Plebs* 1951, 67; cf., in similar terms, Bleicken *Das Volkstribunat der klassischen Republik* 1955, 15 f.). See also Lanfranchi, *Les Tribuns de la Plèbe* 2015, 239: "à l'exception des plébiscites concernant la plèbe, s'il n'y avait pas intervention des consuls ou du Sénat, tout plébiscite – en particulier ceux qui souhaitaient modifier l'architecture institutionnelle de la cité – ne pouvait rester qu'un 'vœu'. Ils n'étaient porteurs d'aucune valeur normative hors de la plèbe et ne pouvaient, en théorie, modifier les structures fondamentales de Rome. C'était un appel, un moyen de pression".

14 Mommsen, *Römische Forschungen* I 1864, 163 ff.; Id., *Römisches Staatsrecht* III.1 1887, 157, nt. 1, 159 f.; cf., moreover, Cuq, *Institutions Juridiques des Romains* I 1891, 458; Krüger *Geschichte der Quellen* 1912, 17 ff.

15 The idea of two distinct tribal assemblies dates back to Mommsen, *Römische Forschungen* I 1864, 151 ff. (who also assumes that patricians were debarred from the assemblies summoned by plebeian tribunes in the later years of the Republic). It then gains a general support among scholars. See, for the view supporting the existence of two distinct assemblies based on a common tribal system that coexisted in the early Republic (as of 471 or 449 BC) and that, after the supposed *exaequatio*, tended to coalesce into one single body, Liebenam, *Comitia* 1900, 700 f.; Ogilvie, *Commentary on Livy's Books 1–5* 1965, 381; Taylor, *Roman Voting Assemblies* 1966, 6 ff., 60 ff.; Botsford, *The Roman Assemblies* 1968, 474. Others believe that the emergence of the patricio-plebeian tribal assembly dates after the enactment of the *lex Hortensia* (287 BC), when plebiscites were made directly binding on all *Quirites*, and accordingly the patricians started to participate in the voting process of the plebeians: see De Martino, *Storia della costituzione romana* I 1972², 330 e *Storia della costituzione romana* II 1973², 154 ff. (mainly at p. 182: where the scholar argues that after the "parificazione dei plebisciti alle leggi", it would be "assurdo pensare che i patrizi potessero continuare ad essere esclusi dalle assemblee, nelle quali ora si adottavano deliberazioni di interesse generale"). *Contra*, as supporters of the theory that inclines to deny that patricians had ever a vote in any form of tribal assembly, see Ihne, *Die Entwicklung der römischen Tributcomitien* 1873, 353 ff.; Kahrstedt, *Die Patrizier und die Tributkomitien* 1917–1918, 258 ff.; see also Develin, *Comitia tributa plebis* 1975, 302 ff.; Id., *Comitia tributa again* 1977, 425 ff.; Sandberg, *The concilium plebis* 1993, 74 ff.; from a different perspective, cf. Mitchell, *Patricians and Plebeians* 1990, 221 ff., who shares the view that there was only one tribal and tribunician assembly, even if he fails to regard it as an exclusively plebeian body.

concerned directly with the problem of plebiscites *per se*: the former concerning the legislative activity of any tribal assembly in general[16]; the latter introducing the power of the *praetor* to summon the Roman people as tribes[17]. Secondly, he claims that the grant of the *auctoritas patrum*, being a requirement of the *leges publicae populi* and affecting the comitial processes only (i. e. being "das Complement des Comitialbeschlusses"), was neither used to enact laws passed by a purely plebeian body (*concilium tributum*)[18], nor was it exactly overlapping with the *senatus consultum* that was required to precede any popular vote ("Vorgängige Zustimmung des Senat")[19]. At the same time, Mommsen acknowledges the existence of a legal principle, established at some point prior to the XII Tables (451–450 BC), which, remaining untouched by the 449 and 339 BC reforms, allowed plebiscites to take general force, provided that the "Vorbeschluss des Senats" had taken place[20], until the *lex Hortensia* was enacted. Such *lex*, Mommsen maintains, would finally have removed the ancient 'vestige' of the senatorial grant, so appearing to have operated along similar lines to the reform concerning the anticipation of *auctoritas patrum* with respect to the *centuriae*'s vote, which took place around 50 years earlier[21].

---

16 Mommsen, *Römische Forschungen* I 1864, 154 ff.; Staveley, *Tribal Legislation before the lex Hortensia* 1955, 12, tends to support this view. *Contra* see: Ihne, *Die Entwicklung der römischen Tributcomitien* 1873, 370 ff.; Lange *Römische Altertümer* II 1876, 573 f.; Soltau, *Die Gültigkeit der Plebiszite* 1885, 8, 113 ff.; Roos, *Comitia tributa – concilium plebis, leges – plebiscita* 1940, 22 ff.

17 *Contra*, see Staveley, *Tribal Legislation before the lex Hortensia* 1955, 12: "Mommsen's view … that the law concerned the right of the praetor to summon the *populus* by tribes is quite unsubstantiated".

18 See Mommsen, *Römische Forschungen* I 1864, 157, 233 ff.; Id., *Römisches Staatsrecht* III.1 1887, 155, nt. 3, 159; Id., *Römisches Staatsrecht* III.2 1888, 1037 ff.; see, moreover, Madvig, *Verfassung und Verhaltung des römischen Staates* I 1881, 233; de Francisci, *Storia del diritto romano* I 1943, 271; De Martino, *Storia della costituzione romana* I 1972², 270 ff.; cf. Rotondi, *Leges publicae populi Romani* 1912, 43; Botsford, *The Roman Assemblies* 1968, 280. *Contra*, see, among others, Soltau, *Die Gültigkeit der Plebiszite* 1885, 79; Staveley, *Tribal Legislation before the lex Hortensia* 1955, 20 f.

19 Mommsen, *Römische Forschungen* I 1864, 241 ff.; Id., *Römisches Staatsrecht* III.1 1887, 156 ff.; cf. De Martino, *Storia della costituzione romana* II 1973², 152.

20 Mommsen, *Römische Forschungen* I 1864, 215. See, on the *lex Cornelia* of 88 BC, which revived such pre-Hortensian rule, Id., *Römische Forschungen*, I, 206 f.; Id., *Römisches Staatsrecht*, III.1 1887, 158, 160.

21 Mommsen, *Römisches Staatsrecht* III.1 1887, 159 f. To be more precise, even if Mommsen believes that after the *lex Publilia Philonis de patrum auctoritate* "Praktische Bedeutung aber kommt der antizipierten Bestätigung gar nicht", he denies that the change introduced in 339 BC was itself the reason for such decadence: "nicht weil die Anticipirung diese Befugnis denaturierte, was keineswegs der Fall ist, sondern weil dieselbe, als beschränkt auf den patricischen Theil des Senats, wohl geeignet war die patricischen Reservatrechte zu schützen, aber ihre Bedeutung verlor, seit es solche effektiv nicht mehr gab und an die Stelle des Patriciats die patricisch-plebejische Nobilität getreten war" (Mommsen, *Römisches Staatsrecht* III.2 1888, 1043). In other words, it was under this law (but not due to this law), that the 'previous *auctoritas*' became purely a formality within the legislative process before