

NOMOTHESIA IN FOURTH-CENTURY ATHENS

There have been two recent attempts to disentangle the evidence for the procedures in fourth-century Athens for the enactment and revision of *nomoi*, by D. M. MacDowell and by M. H. Hansen.¹ I have learned from both, but think that further progress can be made.

MacDowell distinguishes five separate measures:

- (b)² The Old Legislation Law, requiring action at a specified time, advance publicity for the new proposal, concurrent repeal of any existing law with which the new proposal conflicts, and a decision by nomothetae who are *omomokotes*, men who have sworn the dicastic oath (for the current year and are on the register of potential jurors): this is described as a *παλαιὸς νόμος*, and as the law *καθ' ὃν ἦσαν οἱ πρότεροι νομοθέται*.
- (c) Replacing that *c.* 370, the New Legislation Law, no longer requiring action at a specified time, advance publicity, concurrent repeal, or that the nomothetae should be *omomokotes*: as a result of the change conflicting laws have been enacted, and for some time continuing to the mid 350s commissioners have had to be elected to sort out the conflicts.³
- (d) Still valid in the 350s, the Review Law, requiring an annual *epicheirotonia* of the laws in four subject divisions in the assembly on 11 Hecatombaeon (i), advance publicity for new proposals, and at the third assembly after 11 Hecatombaeon the appointment of nomothetae who are *omomokotes* to decide between the existing laws and the new proposals.⁴
- (e) Enacted *c.* 370, the Repeal Law, stating that an existing law may be repealed only through the nomothetae, by the proposal of a new law to replace the existing law, that no law may be enacted which conflicts with an existing law, that if any one proposes to replace an existing law with one which is inexpedient or which conflicts with another law he shall be liable to prosecution in a *γραφὴ νόμον μὴ ἐπιτήδειον εἶναι*, and not containing the requirements that were

¹ MacDowell, *JHS* 95 (1975), 62–74; Hansen, *C&M* 32 (1971–80), 87–104: I shall cite these articles by author's name only. I should like to thank Professor MacDowell for reading a draft of this article and helping me to improve it, though I have not converted him to my views, and the University of Durham for a grant from its Research Fund.

² To avoid confusion, I omit letter *a* and use MacDowell's lettering.

³ Dem. 20. *Lept.* 89–99.

⁴ Quoted Dem. 24. *Tim.* 20–3. MacDowell 66 repeats the suggestion of R. Schöll, *Sb. München* (1886), 85, that the first statutory assembly of the year regularly met on 11 Hecatombaeon: according to J. D. Mikalson, *The Sacred and Civil Calendar of the Athenian Year* (Princeton U. P., 1975), 25–8, 182–93, there is no evidence for 5, 9 or 10 Hecatombaeon, but 1–4 and 6–8 are ruled out as being festival days, while there is good evidence for assemblies on 11 Hecatombaeon and the 11th is a common assembly day in other months too. I think it is very likely that the first statutory assembly of the year did regularly meet on 11 Hecatombaeon; the third assembly after that, falling in the same prytany (§21), will have been the last statutory assembly of the first prytany (cf. *Ath. Pol.* 43. 3). Since completing my typescript I have seen M. H. Hansen, *GRBS* 23 (1982), 331–50 = *The Athenian Ecclesia* (Opuscula Graecolatina, 26. Copenhagen: Museum Tusculanum Press, 1983), 83–102. He agrees that the assembly on 11 Hecatombaeon was the first of the year and that the later assembly mentioned was the last of the first prytany, but he counts inclusively and supposes that in the 350s there were not four but three regular assemblies each prytany (argued in detail by M. H. Hansen and F. W. Mitchel, *SO* 59 [1984], 13–19: I am not persuaded).

included in the Old Legislation Law but are inferred to be absent from the New Legislation Law.⁵

- (f) Valid in 330, the Inspection Law, requiring the thesmothetae to inspect and correct the laws annually in the assembly, in order to eliminate conflicts between laws, by giving advance publicity to any conflicts which they discover and then having these referred by the assembly to the nomothetae, who are to decide which laws shall be valid.⁶

MacDowell believes that in *Lept.* Demosthenes is trying to suggest to the jury that the Old Legislation Law, rather than the less stringent New Legislation Law, ought to be followed.

Hansen rejects both the Old Legislation Law and the New Legislation Law, and believes that in *Lept.* Demosthenes is trying to impose on the jury a fantasy arrived at by misinterpreting the Repeal Law in such a way as to confuse the procedure for *nomothesia* with that in the *γραφὴ νόμον μὴ ἐπιτήδειον θείναι*.

Now I do not think highly of the Athenians' bureaucratic skills, but it would need very good evidence to convince me that, having at the beginning of the fourth century adopted a code of *nomoi* which included the requirement that changes in the code should be enacted by nomothetae who were *omomokotes*, they should c. 370 replace one *nomos* in the code with a new one which abandoned that requirement but (although they then proceeded to enact *nomoi* more frequently than before) retain unamended another *nomos* which insisted on that requirement. That is, I am reluctant to believe with MacDowell that the New Legislation Law and the unamended Review Law were in force simultaneously. However, I agree with him that in *Lept.* Demosthenes is not simply conjuring up a fantasy but is trying to impose on the jurors a genuine legislation law.

Lept. and *Tim.* are only two years apart,⁷ and the irregularities which Demosthenes alleges in them are very similar. Leptines has failed to comply with a *παλαιὸς νόμος* which requires action at a specified time, advance publicity for the new proposal, concurrent repeal of any law with which the new proposal conflicts, and a decision by nomothetae who are *omomokotes*. Epicrates has failed to comply with the Review Law, which requires *epicheirotomia* on 11 Hecatombaeon and the appointment of nomothetae at the third assembly after that (his decree was proposed on 11 Hecatombaeon, probably after an *epicheirotomia*, but he did not wait until a later assembly to appoint nomothetae), advance publicity for the new proposal, and a decision by nomothetae who are *omomokotes* (he has combined the members of the boule, who have taken an oath but not the jurors' oath, with a panel of *omomokotes*); and Timocrates has failed to comply with the Repeal Law, which requires the concurrent repeal of any existing law with which the new proposal conflicts (and also has failed to keep to the subject area indicated in Epicrates' decree). Although they have eventually been attacked, they did originally succeed in following the procedures to which Demosthenes objects: these procedures were not so obviously wrong that they were immediately ruled out of order. The similarity suggests that Demosthenes was invoking the same laws each time. Hansen 92–3 repeats the view of Schöhl that the law which Demosthenes cited in *Lept.* was the Repeal Law;⁸ but the Repeal Law

⁵ Quoted Dem. 24. *Tim.* 33. I think it is possible that originally the application of the *γραφὴ νόμον μὴ ἐπιτήδειον θείναι* was more narrowly defined, and that one consequence of the Repeal Law was to extend it to *nomoi* which were illegal because they conflicted with existing *nomoi*.

⁶ Aesch. 3. *Ctes.* 38–40.

⁷ I accept from Dion. Hal. 724–5. *Amm.* 4 the dates of 355/4 and 353/2.

⁸ Op. cit. (n. 4), 111.

does not cover all Demosthenes' objections to the procedure followed by Leptines, so it is better to think that (as in *Tim.*) Demosthenes cited the Review Law and the Repeal Law.

MacDowell 68 says that the Old Legislation Law and the Review Law cannot be the same because they have different functions; but the difference may be only of emphasis. A man who wanted to enact a new law would inevitably think that the existing laws in one of the four subject divisions were unsatisfactory, and if (as I agree with MacDowell) in the early fourth century the enactment of *nomoi* was deliberately made difficult it is not incredible that enactment should have been allowed only as a sequel to the annual *epicheirotonia* as laid down by the Review Law. (There may of course have been more to the original law on the enactment of *nomoi* than is quoted in *Tim.* 20–3, for instance a fundamental statement that *nomoi* were to be enacted by boards of nomothetae; but for simplicity's sake I shall refer to this original law as the Review Law.) The Repeal Law is subsequent to the Review Law, since it takes for granted the existence of a procedure for appointing nomothetae (about which it therefore says nothing) and of the *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι*. Its purpose was to clarify what the Review Law left unclear: that an existing law could be repealed only by the use of *nomothesia* to enact a new law in its place (the possibility that a matter on which there was currently a law might need no law was not considered), and that a new law might not be enacted which conflicted with an existing law that was not concurrently repealed.

What was the status of the Review Law and the Repeal Law in the 350s? Demosthenes in *Lept.* refers to the two laws together (if I am right) as the *παλαιὸς νόμος, καθ' ὃν ἦσαν οἱ πρότεροι νομοθέται*; elsewhere in that speech he uses *παλαιὸς νόμος* of a law on *ateleia* which will still be valid unless Leptines' law is upheld (§§ 18, 129), and of a law about *syndikoi* which probably is still valid but is misapplied by Demosthenes to the defenders of Leptines' law in this *γραφὴ* (§ 153). We can assume from Demosthenes' complaints that now *nomothesia* was no longer limited to a procedure begun on 11 Hecatombaeon and continued at the third assembly after that,⁹ that the requirements about advance publicity and concurrent repeal were no longer observed, and that the nomothetae were no longer invariably *omomokotes*. However, I do not believe that Demosthenes was citing as valid or even as desirable a law which indisputably was no longer valid: such a manoeuvre would too easily be exposed. I suggest that the Repeal Law was enacted as a rider to the Review Law, with the intention not of relaxing its requirements but of filling gaps in them; but some time after that, though some time before the mid 350s, men who wanted *nomothesia* to be easier began to take the Repeal Law for a self-sufficient law, arguing (as MacDowell 70 does) that because it says nothing about times, publicity and *omomokotes* these were no longer required, and perhaps on the first occasion when this was done arguing that urgent legislation was needed and that it would be wrong, or even that 'the lawgiver did not intend them', to wait until the next Hecatombaeon. Because the Athenians did not want to be prevented from enacting *nomoi* when they chose to do so, this interpretation went unchallenged until the mid 350s. No one, of course, will have claimed that the ban on enacting a new law which conflicted with an existing law had been removed; but any one who proposed a new law would if questioned automatically assert that there was no existing law with which it conflicted, and his

⁹ This is confirmed by the dates given in the prescripts of inscribed *nomoi*: MacDowell 63 (the law cited in his Postscript, p. 74, is not dated within the year 375/4; the beginning of the law published by K. Clinton, *Hesp.* 49 [1980], 258–88, is not preserved).

assertion would have to be believed unless his opponent discovered a law with which the proposal did conflict.

What Demosthenes says about *nomothesia* in *Lept.* and *Tim.* is therefore legally correct: the Review Law is still valid, but the custom has arisen of treating the Repeal Law not as a rider but as a replacement, and of assuming that restrictions in the Review Law which are not repeated in the Repeal Law do not apply to proposals made under the Repeal Law. In addition to this, as Hansen argues,¹⁰ in *Lept.* Demosthenes is deliberately confusing *nomothesia* with the *γραφὴ νόμον μὴ ἐπιτήδειον θείναι*: the speech was written for a *γραφή*, but the prosecutors have drawn up an alternative proposal to that of Leptines which is under attack (§§88, 97–8); Demosthenes insinuates (§§99, 164), but falsely (§§98–101, 137), that if the jury trying the *γραφή* condemns Leptines' proposal the alternative will automatically become law in its place.

On *γράφεσθαι* in *Lept.* 89, 96, probably Hansen 91 is technically right and MacDowell 64 is technically wrong. *γράφεσθαι* is the proper verb for initiating a *γραφή*, of *νόμον μὴ ἐπιτήδειον θείναι* or on any other charge; it is not, I imagine, proper for objecting to one of the existing laws when proposing a replacement for it by *nomothesia*, but the usage is an easy extension, particularly as the active *γράφειν* is the proper verb for proposing a new law or decree. (MacDowell cites *Tim.* 48, in which *γράφεσθαι* is used of requesting access to the boule: that is another usage in the same area, but it is not the usage of *Lept.* 89 and 96.) In *Lept.* the extension of the technical usage helps Demosthenes' deliberate confusion between *nomothesia* and the *γραφή*, but this is not to say that it must be an innovation made by Demosthenes on this occasion for this purpose.

MacDowell 70 claims that during the fourth century there was a change in the method of voting used by the nomothetae: *Lept.* 99 uses *ψηφός* of the vote which will invalidate Leptines' law and make the alternative proposal law in its place,¹¹ but the Repeal Law uses *διαχειροτονίαν* and *χειροτονήσωσιν* of the nomothetae's decision between an existing law and a new proposal. MacDowell believes that, whereas *ψηφός* and its derivatives may refer to decisions taken not by ballot but by show of hands (as most *ψηφίσματα* of the assembly were), *χείρ* and its derivatives always refer to decisions taken by show of hands and not by ballot.¹² However, there are two passages in *Ath. Pol.* which use *χειροτονία* without that implication (34. 1, 41. 3).¹³ There was a tendency in classical Athens to use words from one root or the other for different kinds of decision, not necessarily in accordance with the method of voting. In the assembly *ψηφός* was used for decrees and *χείρ* for elections; but within the realm of decrees *χείρ* was regularly used with reference to a choice between two specified alternatives, *διαχειροτονία*.¹⁴ I suspect that *διαχειροτονίαν* and *χειροτονήσωσιν* are used in the Repeal Law not because of the method of voting but because the author of the law was influenced by the analogy of *διαχειροτονίαι* in the assembly. In *Lept.* 99 Demosthenes is referring not to the vote of the nomothetae but to the vote of the jury which is trying the *γραφή*. That leaves us with no direct evidence of how the nomothetae voted.¹⁵ However, I should guess that, as a body (originally) of

¹⁰ Cf. MacDowell 65.

¹¹ Cf. *καταψηφίσθησε*, § 164.

¹² Cf. Hansen, *GRBS* 18 (1977), 124 = *The Athenian Ecclesia*, 104.

¹³ See P. J. Rhodes, *Commentary on the Aristotelian Athenaiion Politeia* (O.U.P., 1981), *ad locc.*

¹⁴ E.g. M&L 65 = *IG* i³ 61, 5 with 29.

¹⁵ Hansen 93–4 understands *Lept.* 99 as I do, and concludes that 'we have no evidence of how [the nomothetae] voted', but he then infers from the Repeal Law that the nomothetae voted

omomokotes, as a body which was similar in size to a jury and which like a jury listened not to a debate among its own members but to *synegoroi* on each side and decided between the two, the nomothetae always voted by ballot. In that case, if two rival alternatives to an existing law were proposed, I should expect a single three-option vote as in a *diadikasia* in a law-court¹⁶ (whereas a *διαχειροτονία* in the assembly was always between two options¹⁷).

Hansen 98–9 quotes the law that a νόμος ἐπ’ ἀνδρί may not be enacted ἐὰν μὴ ἑξακισχιλίοις δόξη κρύβδην ψηφίζομένοις,¹⁸ which refers not to a vote of the nomothetae but to a vote in the assembly.¹⁹ He suggests that we have examples of what was intended in three decrees which award honours involving the assembly in extra expenditure and call on the *nomothetae* to revise the *merismos* and make the necessary addition to the assembly’s expense allowance:²⁰ changes in the *merismos* required a *nomos*, changes for the benefit of a named individual required a νόμος ἐπ’ ἀνδρί and must be authorised by a secret ballot in a quorate assembly, and Leptines’ real irregularity lay in his using for a *nomos* of general application the procedure appropriate to a νόμος ἐπ’ ἀνδρί. However, what the nomothetae are asked in the three decrees to do is not ratify the decrees but simply revise the *merismos*, and I see no reason to believe that these revisions would count as νόμοι ἐπ’ ἀνδρί. The rule about νόμοι ἐπ’ ἀνδρί seems to have been one of those adopted when the production of a revised code was resumed in 403, and when procedures for further *nomothesia* after the completion of the code had not yet been devised; but it remained in force afterwards. I suspect the original intention was that, whereas other enactments of the nomothetae should be valid without more ado, a νόμος ἐπ’ ἀνδρί would require subsequent confirmation by a quorate assembly (as it was decided in the course of the fourth century that, whereas other decrees of the assembly should be valid without more ado, a decree conferring citizenship would require confirmation by a quorate assembly). As the distinction between *nomoi* and *psephismata* was worked out, it became clear that any measure ἐπ’ ἀνδρί should be a *psephisma*, and I suspect that there never were any νόμοι ἐπ’ ἀνδρί.²¹ At any rate, I am certain that the problem of νόμοι ἐπ’ ἀνδρί is irrelevant to *Lept.*

by show of hands. I agree with him against MacDowell that on each issue two votes only were called for, those in favour of the existing law and those in favour of the new proposal (if there was only one new proposal).

¹⁶ Rhodes, *op. cit.* (n. 13), 732.

¹⁷ Hansen 93–4 with n. 5; cf. *GRBS* 18 (1977), 124 = *The Athenian Ecclesia*, 104.

¹⁸ Quoted And. 1. *Myst.* 87; cf. Dem. 24. *Tim.* 59 and (without this clause) 23. *Arist.* 86, [Dem.] 46. *Steph.* 2. 12.

¹⁹ Cf. Dem. 24. *Tim.* 45, [Dem.] 59. *Neaer.* 89–90, and Hansen, *GRBS* 17 (1976), 125–6 = *The Athenian Ecclesia*, 11–12.

²⁰ *IG* ii² 222, 41–6; 330, 15–23; vii 4254 = *SIG*³ 298, 35–41. Cf. Hansen, *GRBS* 20 (1979), 39–43 = *The Athenian Ecclesia*, 191–5, and on the principle that the *merismos* was fixed by *nomos* and could be changed only by *nomos* Rhodes, *The Athenian Boule* (O.U.P., 1972), 50 n. 1, 101.

²¹ On the principle, that *nomoi* should be permanent and should apply equally to all citizens, and that decisions which fail to satisfy one or both of these requirements should be expressed as *psephismata*, and on the fact, that (with the major exception of decisions in foreign affairs, which even in the case of a treaty intended to last for ever were always expressed as *psephismata*) almost all Athenian decisions between 399 and 321 conform to the principle, see Hansen, *GRBS* 20 (1979), 27–53 = *The Athenian Ecclesia*, 179–205 with addenda 206. Hansen believes that the theoretical principle was itself embodied in the revised code of *nomoi*, but I think it more likely that the theoretical principle was taken for granted than explicitly stated, and that it was assumed that any new decision which would cancel, add to or modify one of the *nomoi* in the code must itself be a *nomos*, but that other decisions might take the form of *psephismata*. This will explain the exceptional nature of decisions in foreign affairs: there were none in the code, and so none needed to take the form of *nomoi*.

To sum up. As part of the revised code of *nomoi* or immediately after its completion the Review Law was enacted, to provide an annual opportunity for making changes in the code; later the Repeal Law was enacted, in the spirit of the Review Law and with the purpose of filling gaps which had been discovered in that law; later still men took the Repeal Law to be an independent measure and ceased to observe the restrictions in the Review Law which had not been repeated in the Repeal Law. As a result of this laxer procedure new laws were enacted which conflicted with existing laws, and special commissions had to be appointed to look into the problem; in the 350s Demosthenes tried to reassert the restrictions of the Review Law against Leptines and against Epicrates and Timocrates, but he lost both his cases;²² between the mid 350s and 330 the appointment of *ad hoc* commissions to deal with conflicting laws was superseded by the Inspection Law.²³

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²² Cf. G. L. Cawkwell, *Mnem.*⁴ 15 (1962), 377–8; the epigraphic evidence (n. 9, above) shows that it remained possible to enact *nomoi* at any time in the year.

²³ On this point I agree with MacDowell.