

SESSIONS OF *NOMOTHETAI* IN FOURTH-CENTURY ATHENS¹

Thanks to the excavations in the Agora, our corpus of inscribed Athenian laws (*nomoi*) is gradually growing. The new finds have confirmed what could already be seen in *IG* ii² 140, that laws are published in exactly the same style as contemporary decrees (*psephismata*), with a prescript which contains some or all of: archon/pyrany and date within pyrany/[as yet we have no instance of month and date within month]/secretary/chairman/proposer—but where a non-probouleumatic decree² would have the formulae *ἔδοξεν τῶι δήμῳ* and/or *δεδοχθαι/ἐψηφίσθαι τῶι δήμῳ* ('resolved by the people' and/or 'be it resolved/decreed by the people'), a law has *ἔδοξε τοῖς νομοθέταις* and/or *δεδοχθαι* [as yet we have no instance of *ἐψηφίσθαι*, and it may have been deliberately avoided in an enactment which was not a *psephisma*] *τοῖς νομοθέταις* ('resolved by the *nomothetai* and/or 'be it resolved by the *nomothetai*')—after which the substance is formulated exactly as it would be in a decree. As the probouleumatic formula in some decrees of the assembly records the council's instructions to the *proedroi* to have an item dealt with at the next meeting of the assembly, those decrees of the assembly which call for the enactment of a law give instructions to the *proedroi* to have an item dealt with at a meeting of the *nomothetai*.³ The secretary who is instructed to publish laws is the same as the secretary who is instructed to publish decrees.⁴

For a long time, however, literary texts have led scholars (including myself⁵) to believe that a session of the *nomothetai* should be seen not as a kind of assembly, though one of a specially restricted body of men, but rather as a kind of lawcourt, in which the *nomothetai* functioned as a jury to decide between a proposal to change the laws and the existing body of laws, as between the cases advanced by a prosecutor and a defendant. The basis for this view is as follows.

1. The old legislation law⁶ praised by Dem. 20.93–4 required the *nomothetai* to be men who had sworn the dicastic oath and were currently registered as jurors—whereas it appears that abolition of or failure to insist on that requirement was one of the consequences of the new legislation law of which Demosthenes

¹ My thanks to Professor Piérart for the gift and stimulus of his article in E. Lévy (ed.), *La Codification des lois dans l'antiquité* . . . 27–29. xi.1997 (Paris, 2000), 229–56, and for his generous reaction to a draft of this article; also to Dr L. Rubinstein for her helpful comments.

² For the distinction between probouleumatic and non-probouleumatic decrees, see P. J. Rhodes, *The Athenian Boule* (Oxford, 1972), 66–78, cf. Rhodes with D. M. Lewis, *The Decrees of the Greek States* (Oxford, 1997), 20–1.

³ *IG* ii² 222.41–52, 330.18–20.

⁴ Secretary of the council: in laws, *SEG* xxvi 72.44–8, xii 87 = *Agora* xvi 73.22–7. On this secretary and his different titles, see Rhodes (n. 2), 134–8; A. S. Henry, *Hesp.* 71 (2002), 91–118.

⁵ Rhodes, in *Università degli Studi di Perugia & Consiglio Nazionale delle Ricerche, L'educazione giuridica V* (Edizioni Scientifiche Italiane, 1987), ii.5–26 at 19, acknowledging but unworried by the discrepancy between this view and the inscriptions.

⁶ For convenience I refer to the different laws about *nomothesia* by the labels which they are given by D. M. MacDowell, *JHS* 95 (1975), 62–74.

complains in §91.⁷ Cf. the review law, Dem. 24.20–3 at 21; decree of Epicrates, Dem. 24.27.⁸

2. At any rate on some occasions, boards of *nomothetai* were not large, assembly-like bodies (as a meeting of all 6,000 would have been) but small, jury-like bodies: the *ad hoc* body appointed in 403 under Tisamenus' decree numbered 500 (And. 1.83–4 at 84); under the decree of Epicrates they were to number 1,001 (Dem. 24.27, cf. 1,000 in Poll. 8.101). The number may have been fixed separately for separate occasions (a possible inference from Dem. 24.20–3 at 21).⁹
3. The review law stipulates that, when changes in the laws are proposed, the assembly is to elect five men to speak in defence of the existing laws (*synapologeisthai*: Dem. 24.20–3 at 23); the repeal law stipulates that anybody who proposes to repeal an existing law must also propose to enact a replacement, and that the *proedroi* are to hold a *diacheirotomia* by which the *nomothetai* decide between the two (Dem. 24.33); and similarly the inspection law stipulates that, if the *thesmothetai* in their annual inspection find any conflicts in the laws, the *proedroi* are to hold a *diacheirotomia* by which the *nomothetai* decide between the conflicting laws (Aesch. 3.38–9 at 39: not an inserted document but reported in the text of the speech); cf. also Demosthenes' report of the old legislation law, which does not use the technical language (Dem. 20.93–4 with 89).

Recently Piérart has argued that we should take the implications of the inscriptions more seriously, and that the standard interpretation of the literary texts is mistaken and they need not in fact undermine the view to which the inscriptions point, that a session of the *nomothetai* should be seen as a kind of assembly. His argument rests on the following points.

1. In the inspection law (Aesch. 3.38–9 at 39) scholars have regularly printed the text as emended by Dobree, τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγράψαντας νομοθέταις, 'the *prytaneis* shall hold an assembly labelling it for (sc. the appointment of) *nomothetai*'; but the manuscripts' text, which is perfectly acceptable Greek, is ἐπιγράψαντας νομοθέτας, which he takes to mean 'labelling it (sc. an assembly of) *nomothetai*'.
2. Whereas jurors voted by ballot, Piérart argues from *diacheirotomia* and the verb *cheirotonein* that the *nomothetai*, like an assembly, voted by show of hands.¹⁰
3. The creation of the *graphe nomon me epitedeion theinai*, for use against proposed laws, parallel to the *graphe paranomon*, for use against proposed decrees, would make better sense if the procedure for enacting a law were parallel to that for enacting a decree, and in each case the *graphe* was an invitation to a lawcourt to pronounce on the validity of a proposal put to an assembly.

⁷ On the relationship of the new law to the old, see the different views of MacDowell (n. 6) and Rhodes, *CQ* 35 (1985), 55–60: we agree that Demosthenes is complaining that *nomothetai* used to be jurors but now are not.

⁸ Piérart (n. 1) regards the 'decree of Epicrates' transmitted by the manuscripts as a forger's concoction: nothing that I say will depend on the unsupported evidence of that text.

⁹ Piérart (n. 1), 242–3, notes that 'on what terms they are to be convened' is followed by from what source they are to be paid, and suggests that numbers were limited for financial reasons.

¹⁰ Cf. MacDowell (n. 6), 70.

I offer the following response to these points.

1. In Aesch. 3.39 I think Piérart is right to claim that we should not emend but should retain the manuscripts' ἐπιγράψαντας νομοθέτας; but that will not necessarily mean what he wants it to mean. ἐπιγράφειν with accusative object is used of 'writing on' an additional piece of information in various senses: a proposed penalty in an individual case or generally, in a law;¹¹ adding an inscription to a dedication (Aesch. 1.116, 163–6, 190); adding the proposer's name to a proposal (Aesch. 2.68, 3.159, 167). The accusative here could well be (just as Dobree's dative has been thought to be) a way of saying 'putting *nomothetai* on the agenda', and there is no reason to think that it must mean 'labelling it (sc. an assembly of) *nomothetai*'.

2. I have argued before that it is safer to say that we do not know how the *nomothetai* voted.¹² The matter is complicated, on account both of the voting practices of different bodies and of the language used.

The assembly normally voted by show of hands (e.g. Ar. *Eccl.* 263–7, cf. *Ath. Pol.* 44.3); but, whereas *cheirotomia* and *cheirotonein* (from *cheires*, 'hands') are used for elections,¹³ and *diacheirotomia* and *diacheirotonein* for choice between specified alternatives,¹⁴ the words used of ordinary decrees are regularly *psephisma* and *psephizesthai* (from *psephos*, 'ballot').¹⁵ However, the assembly voted by ballot in the second vote on a grant of citizenship, when both secrecy and a quorum were required.¹⁶

In judicial and quasi-judicial matters the assembly still normally voted by show of hands: whereas *katapsephizesthai* is regularly used of condemnations by the courts,¹⁷ *katacheirotonein* is regularly used of the assembly's condemnations in connection with *eisangeliai*,¹⁸ *probolai* (e.g. Dem. 21.2, 175–80, 199) and *apophaseis* (e.g. Din. 2.20)—and the juxtaposition in the last passage cited of *katacheirotonein* for the assembly's vote and *katapsephizesthai* for the court's confirms that the choice of word is to be taken seriously. In the trial of the generals after the battle of Arginusae the assembly voted by ballot on the substantive motion but by show of hands to decide between procedures (Xen. *Hell.* 1.7.9–15, 34); but it is easy to believe that the use of the ballot was one way in which that episode was exceptional.

The juxtaposition of a *cheir*- word and a *pseph*- word should guarantee that for the *dokimasia* of the archons the council voted by show of hands but the court by ballot (*Ath. Pol.* 55.4), but for the *dokimasia* of invalids the council seems to have voted by ballot (Lys. 24.23, 26); on the expulsion of a member it voted by ballot after first voting with leaves (Aesch. 1.111–2); in an *eisangelia* it voted by ballot on the question of guilt but then by show of hands on the penalty.¹⁹ However, *katacheirotonein* is used

¹¹ Individual cases Ar. *Plut.* 480, Aesch. 1.16, *Ath. Pol.* 48.4 (last two middle); generally Aesch. 1.14.

¹² Rhodes (n. 7), 58–9.

¹³ For example, Ar. *Ach.* 598, Aesch. 3.24, *IG* ii² 123 = Tod 156.14.

¹⁴ For example, M&L 65 = *IG* i³ 61.5–9, 29–32.

¹⁵ For example, Thuc. 1.139.1–2, And. 1.12, 27–8; various instances in *IG* ii² 360; cf. *Ath. Pol.* 41.2.

¹⁶ [Dem.] 59.89–90; first epigraphic instance *IG* ii² 103 = Tod 133.33–6.

¹⁷ For example, Lys. 12.90–1; cf. the account of the voting in *Ath. Pol.* 68.2–69.1.

¹⁸ For example, Lys. 29.2 (M. H. Hansen, *Eisangelia* [Odense, 1975], 88, no. 73, uses *katacheirotonein* here as an indication that the trial was held in the assembly); Dem. 19.31.

¹⁹ [Dem.] 47.42–3. For a parallel for that combination from outside Athens, see Tod 191.56–68

of the council's condemnation in another *eisangelia*: this must be anomalous either linguistically or procedurally, but we cannot be sure which.²⁰

The conclusion to which this points for our enquiry is: (i) *cheir*- words and *pseph*- words are normally used appropriately, but there is one major exception in the use of *pseph*- words for decrees, and we cannot be certain that there were never any other exceptions; (ii) the use of (*dia*)*cheirotonein* is therefore a strong *prima facie* indication²¹ that the *nomothetai* voted by show of hands, but not a total guarantee, since the term could have been taken over from the assembly's choice between specified alternatives regardless of the *nomothetai*'s method of voting; (iii) in view of the flexibility in voting practice shown by the assembly and the council, if the *nomothetai* did vote by show of hands, that does not in itself show that they are to be regarded as an assembly-like body rather than a jury-like body.

3. Piérart regards his argument from the *graphai paranomon* and *nomon me epitedeion theinai* as an ancillary argument, and I think it does little to support either his view or the conventional view. A *graphe nomon me epitedeion theinai* could presumably be initiated at any time after the original proposal (made not at a meeting of any kind but by publication of the proposal by the statues of the tribal heroes): if it was done quickly, it could delay and if successful prevent the meeting of the *nomothetai* to decide on the proposal; if it was done after that meeting, it could delay and if successful prevent the coming into effect of the law approved by that meeting. The means by which proposals were made were certainly different for laws and for decrees; I do not think we can argue from the two *graphai* to the nature of the meeting which enacted laws.

Further points may be added:

4. There is a parallel, which Piérart might have cited, for an assembly specially limited in membership: that of 415 from which men not initiated into the Eleusinian Mysteries were excluded.²² However, sessions of the *nomothetai* would be very unusual assemblies, in that the *nomothetai* who decided to approve or reject a proposal would be a restricted body, in numbers and (at any rate under the old legislation law) in qualification for membership; but the proposer of a suggested new law might be 'any Athenian who wishes', who could not simply make his proposal in the meeting but had to publish it in advance, by the statues of the tribal heroes (Dem. 24.23, 33; cf. 20.89, 94; also the requirement for the *thesmothetai* similarly to publish any conflict which they found in the laws, Aesch. 3.38–9). Again, whereas in a normal assembly there was an invitation to whoever wished to speak (and indeed to make a proposal), at a session of the *nomothetai* the proposer (not necessarily himself one of the *nomothetai*) would presumably champion his proposal; the five men elected by the assembly (again, not necessarily themselves *nomothetai*) would champion the existing laws; and there is no indication that anybody else could speak, and a strong

(cf. 15–20) = A. J. Heisserer, *Alexander the Great and the Greeks* (Norman, OK, 1980), 27–78, ch. ii, §i.15–27 (cf. §ii.15–20), from Eresus.

²⁰ Dem. 51.8: cf. Hansen (n. 18), 44, 118, no. 42, discussing the word but not the method of voting.

²¹ Stronger than I acknowledged in Rhodes (n. 7).

²² And. 1.12. Cf. the assemblies of initiates in the cleruchy on Lemnos in the fourth century: Rhodes with Lewis (n. 2), 508.

presumption that further proposals could not be introduced. One more point to be borne in mind is that the *nomothetai* were presided over by *proedroi* with an *epistates*—but, it seems, these were not the *proedroi* and *epistates* appointed from nine of the ten tribal contingents in the council to preside over the council and assembly, but separate *proedroi* and *epistates* of the *nomothetai*.²³

5. One minor point of vocabulary may be noted. The verb *kathizein*, ‘make to sit down’, is used of convening meetings of the *nomothetai*:²⁴ that verb is used also of convening Athenian lawcourts;²⁵ but it is never used, to my knowledge, of convening Athenian assemblies.²⁶

6. Dem. 20 is a supporting speech for the prosecution in a *graphe nomon me epitedeion theinai*, a charge of wrongfully enacting a law; and, since a year has elapsed from the enactment of Leptines’ law, the prosecution is directed not against Leptines as proposer but against the law (§144). It is presumably for that reason²⁷ that the defence is entrusted to <Leptines and> four <other> elected *syndikoi* (§§146, 152)—just as when a new law is proposed to the *nomothetai* the existing laws are defended by five elected *synegoroi* (Dem. 24.23, 36).²⁸

This is the trial of a *graphe*, and is being held in a *dikasterion* (e.g. §1). Presumably if the prosecution had succeeded, the immediate result would have been that Leptines’ law would have been annulled and the laws as they were before its enactment would have been reaffirmed. Demosthenes and his associates have a new law of their own to propose (§§88, 94–7),²⁹ and Demosthenes suggests that if Leptines’ law is annulled this alternative will automatically become law in its place (§99, implying that this is a requirement of the old legislation law of §§93–4). But in making that suggestion Demosthenes is conflating the trial of the *graphe* and procedure before the *nomothetai*:³⁰ it is clear that if the alternative were to become law there would have to be a new process of *nomothesia* in which that alternative would be proposed and enacted (§98); Demosthenes says we promise and guarantee that it will, and if we do not then Leptines and the other *syndikoi* can bring in a new proposal themselves (§§99–100; 136–7, with *ὅταν πρῶτον γένωνται νομοθέται*).

It is possible that in this case the Athenians were making up the rules as they went along: this may well have been the first *graphe nomon me epitedeion theinai* which was tried after a year had elapsed, when the proposer could no longer be held liable for his

²³ NB ‘the *proedroi* and *epistates* of the *nomothetai*’, *IG* ii² 222.48–52; the fact that the *epistates* for the law quoted in Dem. 24.71 was a member of the tribe in prytany. The latter point is noted by M. H. Hansen, *C&M* 32 (1971–80), 103, n. 17.

²⁴ Dem. 24.21, 25, 26, 29, decree of Epicrates in 27; cf. Dem. 3.10.

²⁵ For example, Ar. *Wasps* 305; Dem. 21.223, 39.11; *IG* ii² 778.13–14.

²⁶ In *SIG*³ 976.3–8, from Hellenistic Samos, *agein* is used of convening the assembly and then *kathizein* is used intransitively of the members’ sitting where they ought.

²⁷ Thus J. E. Sandys, *The Speech of Demosthenes Against the Law of Leptines* (Cambridge, 1890), xxiii.

²⁸ *Synapologeisthai* Dem. 24.23, *synegoroi* 24.36. I agree with L. Rubinstein, *Litigation and Cooperation: Supporting Speakers in the Courts of Classical Athens*, *Historia Einzelschriften* 147 (2000), 44, that the difference between the words is unimportant.

²⁹ If in a process of *nomothesia* one proposed the annulment of a law one had to propose a new law to take its place (repeal law, Dem. 24.33); but I do not suppose that those who attacked Leptines’ law in this *graphe* were similarly obliged to propose a replacement.

³⁰ And has misled P. Orsini in the Budé edition of Demosthenes’ *Plaidoyers politiques* I (Paris, 1954), into thinking that this speech was delivered before the *nomothetai*.

law and so be expected to appear as defendant. But the fact that the assembly elected men to defend Leptines' law against prosecution in a *dikasterion*, as it would have elected men to defend the existing law against a new proposal before the *nomothetai*, is one further indication that the *nomothetai* could be perceived as being like a jury rather than like the assembly.

It appears, then, that the *nomothetai* were a thoroughly hybrid body. They resembled a jury in that the verb *kathizein* was used of convening them, as it was used of convening juries; in that under the old legislation law they were appointed from men registered as jurors, and they could be not the whole of that body but a smaller selection from them; in that they were not a body from among whom any member could speak and put forward a proposal, but they met to decide between an attack on and a defence of the laws as they currently stood, made by men who were not necessarily members of their own body; in that the defenders of the laws as they currently stood were elected by the assembly as the defenders of Leptines' law against prosecution were elected by the assembly. But they resembled an assembly in that they were presided over not by a single magistrate but by a board of *proedroi* with an *epistates* (though apparently their own *proedroi* and *epistates*, not those who presided over the council and the assembly); in that what they decided was like (but of a higher order than) a decree, and was published in a form closely resembling that of decrees, by the same secretary who published decrees, and could be attacked in a *graphe* similar to the *graphe* by which decrees could be attacked. The use of (*dia*)*cheirotonein* makes it very likely, though still not quite certain, that they voted by show of hands as the assembly did when passing decrees rather than by ballot as juries did when deciding lawsuits. I do not think that Aesch. 3.39 identifies the *nomothetai* with the *ekklesia*, whether we retain the manuscripts' ἐπιγράψαντας νομοθέτας (as I think we should) or emend with Dobree to ἐπιγράψαντας νομοθέταις.

In the past we have been too much impressed by the similarity of the *nomothetai* to jurors, despite the growing body of evidence for their similarity to assemblies. Piérart has for the first time done justice to their similarity to assemblies, but has disposed too easily of the evidence for their similarity to jurors. I now think it is better, though less tidy, to try to hold the balance between the two similarities.

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