Did the Athenian *Ecclesia* Legislate after 403/2 B.C.?

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I

N AN EARLIER ARTICLE¹ I argued that *nomois* were passed by the *nomothetai*, that *nomois* superseded *psephismata* and that the γραφὴ νόμον μὴ ἐπιτήδειον θέναι was introduced as a special type of public action against unconstitutional *nomois*, whereas the γραφὴ παρανόμων henceforth could be brought only against *psephismata*. But these distinctions are purely formal. I shall now turn to the crucial question: was there any difference in substance between *nomois* and *psephismata*? and if so, was the distinction respected by the Athenians?²

As is well known the essential difference between *nomois* and *psephismata* is reflected in Greek legal thought and expressed by the philosophers.


Arist. *Pol.* 1292a4–7: έτερον δὲ εἶδος δημοκρατίας τάλλα μὲν εἶναι ταύτα, κύριον δ' εἶναι τὸ πλῆθος καὶ μὴ τὸν νόμον. τοῦτο δὲ γίνεται ὅταν τὰ ψηφίσματα κύρια ἢ ἄλλα μὴ νόμος. 32–37: ὅπου γὰρ μὴ νόμοι ἄρχονται, οὐκ ἔστi πολιτεία. δει γὰρ τὸν μὲν νόμον ἄρχειν πάντων τῶν καθόλου, τῶν δὲ καθ' ἐκκατὰ τὰς ἀρχὰς, καὶ ταύτην πολιτείαν χρέων. ὡστε εἶπετ ἔστι δημοκρατία μία τῶν πολιτειῶν, φανερῶν ὡς ἡ τοιαύτη κατάστασις ἐν ἧς ψηφίσματα πάντα διοικεῖται,


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"οδή δημοκρατία κυρίως; οδήν γὰρ ἐνδέχεται ψήφισμα εἶναι καθόλου. (ed. Ross OCT).

[Pl.] Def. 415b: NOMOS δόγμα πλήθους πολιτικῶν οὐκ ἐκ τινα χρόνον ἀφωρισμένον. ΨΗΦΙΣΜΑ δόγμα πολιτικῶν εἰς τινα χρόνον ἀφωρισμένον.

From this evidence it is apparent that a nomos is a general and permanent rule whereas a psephisma is an individual rule or a rule with a limited period of validity. But the definitions found in Aristotle and the Corpus Platonicum are made without reference to Athens. Was the same distinction between nomos and psephisma applied by the Athenians after the restoration of the democracy in 403/2? This question can, I suggest, be answered in the affirmative. (1) The revised law code of 403–399 included a nomos defining or at least delimiting nomos as a general rule. (2) The preserved nomoi and psephismata of the period 403/2–322/1 show that the concept of nomos introduced in 403/2 was, with a few exceptions, consistently applied by the Athenians.

I

The law delimiting the concept of law is quoted by Andocides in his speech On the Mysteries 87: NOMOI: ἀγράφῳ δὲ νόμῳ τὰς ἁρχὰς μὴ χρῆσθαι μηδὲ περὶ ἐνός. ψήφισμα δὲ μηδὲν μὴτε βουλής μὴτε δήμου νόμου κυριώτερον εἶναι. μηδὲ ἔπ᾽ ἀνδρὶ νόμον ἔξειναι θεινα, ἕκαν μὴ τὸν αὐτὸν ἐπὶ πάσιν Ἀθηναίοις, ἕκαν μὴ ἐξαισχυλῶς δόξῃ κρύβθην ψηφίζομένοις.

That this law was fundamental for the restored democracy is proved by the frequency with which it is quoted or paraphrased by the orators. By defining a nomos as a rule binding on all Athenians, a distinction is introduced between general rules (passed as nomoi) and individual rules (passed as psephismata). Admittedly, the law quoted by Andocides is vague and obscure like most Athenian nomoi, but its provisions can be interpreted in the light of actual nomoi and psephismata passed by the Athenians in the fourth century. An individual rule is primarily a rule relating to a person or a group of persons mentioned by name. A rule relating to a group of unnamed persons or even to a single unnamed person is often a general rule falling within the scope of nomos. The Athenian law code included, for example, a

3 Prohibition against ad hominem legislation: Dem. 23.86, 218; 24.18, 59, 116, 159, 188; 35.45, 46.12. Laws supersede decrees: Dem. 23.87, 218; 24.30; Hyperid. 5.22.

4 In the speech Against Midias (Dem. 21.31–32) Demosthenes emphasizes the importance of distinguishing between an office and the individual who holds the office. The passage is concluded with the phrase: ὁ γὰρ θεσμοθέτης οὐδὲν ἀνθρώπων ἢς' ὄνομα ἄλλα τῆς πόλεως.
nomos allowing ἐμποροί and ναύκληροι to bring a δίκη ἐμπορική and a nomos instructing the archon to take care of orphans and heiresses (Dem. 43.75). Conversely, a rule binding on all Athenians is not a general rule if it regulates a particular case. In 352/1, for example, the Athenians passed a psephisma prescribing that forty triremes be launched, that all classes up to the age of forty-five be called up to man the ships and that an eisphora of 60 talents be imposed (Dem. 3.4). Such a psephisma is binding on all Athenians, but it is not a permanent rule since it will become a dead letter when it has been carried out and those who do not turn up have been duly punished.

Now the law defining nomos refers, as quoted by Andocides, only to individual persons and not to individual cases, but Andocides quotes only a few lines of the law, and the revision of the code in 403–399 is in itself an indication that the new concept of nomos was given the wider interpretation suggested above. The purpose of the revision of the code was to make order in the welter of thesmai, nomoi and psephismata transmitted since Draco and Solon and to make those rules which were valid available to the Athenians by inscribing the revised code on a stele set up in the Stoa Basileios. Since no clear


6 It is, of course, impossible to fix any period of limitation after which a psephisma was a dead letter. The levying of eisphora, for example, was always warranted by a psephisma τοῦ δήμου. In Dem. 22.42–68=Dem. 24.160–75 we hear that the Athenians in 356/5 appointed an extraordinary commission to collect arrears of eisphora, some of them dating back to the archonship of Nausinicus (378/7). So a psephisma might be enforced more than twenty years after it had been passed. We must, however, bear in mind that the arrears of eisphora were currently recorded by the practores and that the collection of money was based on the official list of state-debtors and only indirectly warranted by the original psephisma.


8 Andoc. 1.84–85. Cf. H. A. Thompson and R. E. Wycherley, The Agora of Athens (Princeton 1972) 88–90. It may seem surprising that apart from Andocides’ reference we have no other mention of the law code inscribed in the Stoa Basileios. Scores of nomoi are quoted in the forensic speeches, but when an orator occasionally states where he has read the law, the reference is either to a stele (Lys. 1.30; Dem. 47.71, 59.75–76) or to the Record Office in the Metroon (Dem. 25.99; Lycurg. 1.66; Harp. s.v. Metroon). A reasonable explanation of the silence of our sources about the code in the Stoa Basileios is that the new code was upheld in its unrevised form for only a short period and the revisions soon proved to be so extensive that the idea of a comprehensive publication inscribed on the
distinction between types of rule existed before 403, it must have been an important and difficult task to decide which of all the enactments still valid in 403/2 were to be included among the *nomoi*. The code inscribed on stone presupposed a distinction both between general and individual rules and between permanent and temporary rules; I suggest that the conceptual difference between *nomos* and *psephisma* was developed and refined precisely in connection with the revision of this code.⁹ Although we know very little about the revision, we can safely assume that rules relating to individual persons such as honorary decrees and citizenship decrees were excluded. But similarly, decrees prescribing despatches of troops, declarations of war, levying of *eisphora* etc. must have been excluded, although they were binding on all Athenians. In this case the criterion for the exclusion must have been that the enactment related to an individual case and was of temporary validity.

On the basis of the law in Andoc. 1.87 as interpreted above the distinction between *nomoi* and *psephismata* can be schematized and illustrated with Athenian enactments of the fourth century:

<table>
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<tr>
<th>Temporary</th>
<th>Permanent</th>
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<tr>
<td><strong>GENERAL</strong></td>
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<td><em>Psephisma</em> that forty triremes be launched, that all classes up to the age of forty-five be called up to man the ships and that an <em>eisphora</em> of 60 talents be imposed (Dem. 3.4).</td>
<td><em>Nomos eisangeltikos</em> against anyone who attempts to overthrow the democracy or to betray the Athenian armed forces or to speak to the people after taking bribes (Hyperid. 3.7–8).</td>
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<tr>
<td><strong>INDIVIDUAL</strong></td>
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<td><em>Psephisma</em> that Demosthenes be crowned with a golden crown to be awarded in the theatre at the Greater Dionysia (Aeschin. 3.49).</td>
<td><em>Psephisma</em> bestowing citizen rights on Dionysius I of Syracuse and all his descendants and granting permanent right of <em>prosodos</em> to the people and to the council (<em>IG II</em>² 103).</td>
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wall had to be abandoned. Around 380, for example, the presidency of the *ecclesia* and of the *boule* was transferred from the *prytaneis* to the *proedroi* (cf. W. K. Pritchett in *CSCA* 5 [1972] 164–69 no.2). This reform alone must have entailed innumerable revisions in the code, and it was probably impossible to erase the passages in question and insert the corrections in the text on the wall (cf. the law quoted in Dem. 24.20–23, which has been subject to at least three corrections ca 380). Perhaps as early as in the 390's the idea of a law code cut in stone was abolished as impracticable, and henceforth *nomoi* were probably published on some more perishable material and a *nomos* was inscribed on stone only when the *nomothetai* so decided.

⁹ *Cf.* MacDowell, *op.cit.* (supra n.7) 127, and Harrison, *op.cit.* (supra n.2) 27.
In this model, *nomos* is defined as a general and permanent rule, *psephisma* as an individual rule and/or a rule with a limited period of validity. The model is in agreement with the definitions of *nomos* and *psephisma* offered by the philosophers; it was, I suggest, applied by the Athenians in the revision of the law-code in 403/2–399, but the important problem is: was it respected by the Athenians during the eighty years of democratic government from 403/2–322? The problem is complex and can be split into two questions: (a) are there any examples of general and permanent rules passed as *psephismata*? and (b) are there any examples of individual or temporary rules taking the form of a *nomos*?

II

I shall begin with the *psephismata* and ask whether the preserved decrees of the people include examples of general and permanent rules which ought by their contents to have been given as *nomoi*.

(a) Alliances, conclusions of peace and similar enactments invariably take the form of a *psephisma*, although a treaty is regularly a general permanent rule. In 375, for example, the Athenians and the Corcyreans concluded a *συμμαχία εἰς τὸν ἀεὶ χρόνον* (IG II 97 = Bengtson 263). The provisions are, of course, binding on all Athenians, and it is difficult to imagine a more permanent rule than an alliance for all time to come. Nevertheless there is no example of a treaty taking the form of a *nomos*. Now a contemporary jurist will undoubtedly object that treaties come within the law of nations and cannot be classified as legislation in the proper sense. A law is a rule binding on the citizens within a state whereas a treaty is an agreement between two or more states. But did the Athenians acknowledge the same difference between treaties and laws? The evidence is scarce but in my opinion sufficient. In a central passage of the *Politics* (1298a3–7) Aristotle distinguishes between four different

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10 *Cf. e.g. IG II 98 (=Bengtson 267) Alliance between Athens and Kephallenia, lines 6–7 [τῶν ψήφων] θηρίσματι τῷ ἀεί, and lines 23–25 [τὸ δὲ ψήφω]μα τῇ γραμμα[τείᾳ] ἀναγραφάτω... Xen. *Hell.* 3.5.16 (=Bengtson 223) Alliance between Athens and Boiotia, πάντες δὲ ἐφησίσαντο βοηθεῖν αὐτοῖς. Ὁρασύβουλος δὲ ἀποκρινόμενος τὸ ψήφωμα καὶ τούτο ἐνδείκνυτο, δή...  

types of decision belonging to τὸ βουλευόμενον and made by the sovereign body of government. The first type is enactments περὶ πολέμου καὶ εἰρήνης καὶ συμμαχίας καὶ διαλύσεως. The second type is enactments περὶ νόμων. A similar distinction between laws and treaties is made in the Rhet. ad Alex. 1423a21ff. Admittedly, neither Aristotle nor the author of the Rhet. ad Alex. writes about Athens, but since all Athenian treaties in the fourth century are passed as psephismata and not a single one as a nomos, it must be admissible to conclude that the Athenians did in fact distinguish between legislation in the proper sense (nomoi) and agreements between states passed as psephismata.

(b) Apart from treaties there are indeed very few examples of general and permanent psephismata. The epigraphical evidence comprises 482 decrees of the people. Among these I have found no more than ten examples of enactments which may have been general permanent rules passed by the ecclesia in the form of a psephisma.

1. _Hesperia_ 40 (1971) 280–301 no.7. Theozotides' psephisma (nomos?) about state aid to orphans (403/2 or shortly afterwards). Since the decree ends with a list of the names of the orphans it is primarily an individual rule. On the other hand, I have previously argued that the decree, in order to provide the necessary money for the rearing of the orphans, may have included the proposal discussed in the speech Against Theozotides, viz. that the daily allowance to men serving in the cavalry be reduced from one drachma to four obols, while the daily allowance to ἵππος ὀξύτατος be increased from two obols to eight. If so, there can be no doubt that the enactment was in part a general permanent rule.

2. _IG II²_ 45. Lex fiscalis (378/7). Enactment concerning debtors to the

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12 Cf. Hansen 317 n.6. A rough classification of the decrees according to their contents gives the following result: 100 decrees of unknown contents; 282 citizenship decrees and honorary decrees (28 citizenship decrees, 32 honorary decrees for Athenians, 191 honorary decrees for metics and xenoi, 31 honorary decrees for either Athenians or metics/xenoi); 67 decrees relating to foreign policy (40 alliances, 6 symbolai and symbola, 7 decrees relating to envoys, 8 decrees relating to the relations between Athens and another named city, 2 decrees about syntaxis, 2 decrees about cleruchies, 2 decrees relating to naval expeditions); 21 decrees relating to cult; 5 decrees relating to the administration of justice; 7 decrees of various contents.


14 In 431 Athens had 1000 ἵππες and 200 ἵππος ὀξύτατος. We do not know the numbers for the years around 400, but if we accept the same proportion (5:1) the state must, by accepting Theozotides' proposal, have saved four obols in the case of each group of five ἵππες and one ἵππος ὀξύτατος.
state. Neither the preamble nor the publication-formula is preserved and it is impossible to decide whether the fragment is part of a *nomos* or a *psephisma*. Accepting the restorations in lines 5–6 we must infer that the enactment included a catalogue of names of state-debtors. Lines 7–15 contain instructions to the *practores* (who were responsible for the collection of debts and the recording of the names of the debtors). Nothing prevents us from classifying the enactment as a *psephisma*, in which case it should be recorded as a *decretum fiscale* and not as a *lex fiscalis*.

3. *Hesperia* 32 (1963) 2 no.2 = SEG XXI 255. *De mysteriis* (*s*.IV p. prior). Enactment concerning the mysteries. Too little is preserved to decide whether the provisions are general permanent rules or individual regulations for a specific occasion. So the enactment may be either a *nomos* or a *psephisma*.

4. *Hesperia* 26 (1957) 52–53 no.9 = SEG XVI 50. *Decretum de mysteriis* (*ca med.* *s*. IV); cf. SEG XVII 21, XXI 257. A fragment inscribed with regulations for sending out heralds for the truce for the mysteries. A large unpublished fragment of the same stele contains instructions to the *basileus*, the *thesmothetai*, the Eumolpidai and the Kerykes. The regulations are permanent general rules, and the type of enactment ought to be a *nomos*. Neither the introduction nor the conclusion is preserved, and so the enactment may be a *nomos* passed by the *nomothetai*. The title should be changed to *lex de mysteriis*.

5. *Hesperia* 7 (1938) 294–96 no.20 = SEG XVI 55. *De ludis* (*Eleusine?*) *instituendis decretum* 330/29(?). Enactment regulating a festival. In this case too there can be no doubt that the provisions preserved are general permanent rules which ought to have been passed by the *nomothetai* as a *nomos*. But again there is no indication of whether the fragment is a decision made by the *nomothetai* or by the *ecclesia*. In BSA 51 (1956) 3–5 A. M. Woodward proposed the following restoration of line 3: δεδόθη τῶι δήμωι, ἀναγράψας· ταῦτα παρὰ τῷ γράφην... I would prefer e.g. ἐδοξε· τοῖς νομοθέταις ἀναγράψας· ταῦτα παρὰ τῷ γράφην... and the title *De ludis instituendis lex*.

6. *Hesperia* 37 (1968) 267–68 no.3 = SEG XXV 82. *Lex sacra de Dipoliis et Bouphoniis* (*s*. IV). General provisions regulating the Dipolieia and the Bouphonia. In *Hesperia* the decision is described as "a decree," but since neither the preamble nor the publication-formula is preserved, the enactment can be either a *nomos* made by the *nomothetai* or a *psephisma* passed by the *ecclesia*.

7. *IG II²* 125 = Tod 154 (357/6). Decree ordering a trial of those who joined in the campaign against Eretria; and a provision that any Athenian or ally who in future joins in a campaign against Eretria or another allied city shall be punished with death and the confiscation of property. Furthermore, it is decreed that any allied city which infringes these provisions be
liable to a fine to be paid to the koinon. The decree is concluded with some honours bestowed upon those who came to the aid of the Athenians. This enactment is a psephisma introduced with \[\varepsilon\delta\omega\varepsilon\tau\iota\nu\ \delta\acute{\iota}\mu\omicron\omega\iota\]. It contains first an individual temporary rule, but then follows a general provision binding on all Athenians. The third provision is an order issued to the allies, and the fourth is an honorary decree. Although the decree deals with foreign policy, it may be argued that the second provision ought to have been passed as a nomos and not merely included in a psephisma. We must, however, bear in mind that the prohibition is binding both on the Athenians and the allies, and so a nomos (binding on the Athenians only) would not be a proper form of enactment.

8. IG II² 204 (cf. JHS 49 [1929] 185, 72 [1952] 31; SEG XXV 64). De cippis terminalibus (352/1). Lines 1-5(?). Lines 5-16: election of ten private Athenians and five councilors empowered to pass judgment about the boundary line of the ἵππαι ὀργάκες. Lines 16-23: provision that the ἵππαι ὀργάκες and all other sanctuaries in future be supervised by the council of the Areopagus and various other officials in addition to those mentioned by the law in each individual case. Lines 23-54: the Delphic oracle is to be consulted as to whether the ἵππαι ὀργάκες shall be leased or left untilled; the procedure for the consultation is described in detail. Lines 54-65: regulations concerning the publication of the decree in question and of a previous decree; grant of a per diem to the envoys to Delphi and to the board of judges empowered to delimit the boundary line of the ἵππαι ὀργάκες. Lines 65-73: the πωληταὶ are instructed to provide the ὅριον marking the boundary of the ἵππαι ὀργάκες. Lines 74-84: list of the envoys and the judges appointed by the assembly. Lines 85-86: delegation of power to the council to make amendments and additions to the decree. This enactment is explicitly described as a psephisma (line 85) and most of its provisions are indeed individual decisions of temporary validity. But the psephisma includes among its provisions in lines 16-23 a general permanent rule which undoubtedly ought to have been passed by the nomothetai as a nomos: \[\varepsilonπι\]μελείσθαι [\(\delta\)] ἐ τῆς ἵππας ὀργάδος καὶ τῶν ἄλλων [\(\nu\) ἵππων ἀπάντων] τῶν Ἀθηναίων ἀπὸ τῆς ἡμέρας εἰς τὸν [ἀεὶ χρόνον] μὲ τὸ νόμον κελεύει περὶ ἐκάστου αὐτῶν καὶ τ[\(\varepsilon\)] ἰπποῦ πάγου καὶ τὸν στρατηγὸν τῶν ἐπιτῆς [\(\nu\) φιλ])ακι] ν τῆς χ[\(\alpha\)]ώρας κεκεφωτοθημέναν καὶ τοὺς περιπολά[\(\chi\)]ουσ καὶ τοὺς [\(\varepsilon\)]μάρχους καὶ τὴν βουλὴν τὴν ἀεὶ βουλεύου[\(\zeta\)] καὶ τῶν ἄλλων Ἀθηναίων τὸ μού βουλόμενον τρόπω ὅταν ἂν α[\(\varepsilon\)][τ]των [\(\nu\)] ταῖς.

9 IG II² 334 (cf. Syll.² 271; SEG XVIII 13, XXI 269, XXV 65). Decree relating to the Lesser Panathenaea (336-34). The motion-formula \[\varepsilonιψηφίζεται τῶν δῆμων\] (line 7) shows that the enactment is a decree of the people. It contains instructions to a board of ἱεροποιοὶ about the sacrifices at the Lesser Panathenaea. There can be no doubt about the permanent
nature of the regulations, but the decree is inscribed on the lower part of a stele. The top of the stele was found in 1938 and contains an enactment of the nomothetai relating to the financing of the Lesser Panathenaea (SEG XVIII 13; see p.39).

10. IG II² 412. Legis formula (post a. 336/5). Enactment relating to the administration of justice, probably a law regulating the phasis procedure (cf. lines 7–8). Neither the introduction nor the conclusion is preserved, and the enactment may be a nomos passed by the nomothetai.

Of these ten enactments Theozotides’ decree (1) was presumably passed before the introduction of nomothesia by nomothetai. (2) and (3) may have been individual decisions, and nothing is known about the form of enactment. (4), (5), (6) and (10) are general permanent rules to be passed by the nomothetai. They are usually classified as psephismata but without sufficient evidence. In all four cases a new fragment may turn up inscribed with the formula δεδόχθαι τοῖς νομοθέταις. (7) is a debatable example since it deals with foreign policy and since the general rule laid down is binding not only on the Athenians but also on the allies, and so we are left with (8) and (9) as the only unquestionable examples of general permanent rules passed as psephismata. In (8) the permanent rule is only one provision among several which correctly take the form of a psephisma, and in (9) there is a gap of several lines (?) between the preserved part of the nomos (SEG XVIII 13) and the psephisma passed by the people (IG II² 334). It may be suggested that the psephisma was inscribed below the nomos because the enactment of the demos was referred to the nomothetai and ratified by them.

(c) The literary sources provide us with some 220 examples of psephismata passed by the ecclesia in the period 403/2–322/1. The vast majority are individual and/or temporary decisions, but I have

15 We do not know when the regular nomothesia was introduced. The terminus post quem is Tisamenus’ decree (Andoc. 1.83–84) passed late in 403. The terminus ante quem is the law quoted in Andoc. 1.87, in which nomoi are opposed to psephismata of the people and of the council. The distinction between nomoi and enactments of the demos indicates that nomoi were no longer passed by the demos but by the nomothetai (cf. Hansen 322). The law quoted in Andoc. 1.87 cannot be dated more precisely than prior to the trial of Andocides, which took place in the autumn of 400 (cf. MacDowell, op.cit. [supra n.7] 204–05). The revision of the code was not completed until 399 (cf. Dow, op.cit. [supra n.7] 272 and 291), and so the law about nomothesia was probably included in the code inscribed on stone.

16 Cf. Hansen 319 n.15. A rough classification of the decrees according to their contents gives the following result: 3 decrees of unknown contents; 60 citizenship decrees and honorary decrees (24 citizenship decrees, 25 honorary decrees for Athenians, 11 honorary decrees for
collected eleven instances of general permanent rules enacted by the *ecclesia* in the form of a *psephisma* and not by the *nomothetai* as a *nomos*.

1. Decree prescribing that all δικαίοι and δίαιτα adjudged during the democracy be valid and that the laws be enforced from the archonship of Euclides on (Andoc. 1.87, 93). The decree must be connected with the amnesty and dated 403/2.

2. Decree renewing a Solonian law by which all *xenoi* are debarred from keeping a shop in the Agora (Dem. 57.31) unless they pay a special tax, the *ξενικόν* (Dem. 57.34). The decree is proposed and carried by Aristophon of Azenia and may be dated 403/2 (cf. Hansen 320 n.17).

3. Decree prescribing exemption from punishment if anybody kills a person who attempts to establish a tyranny, or to betray the city, or to overthrow the democracy (Lycurg. 1.124–25). The decree must be dated 403/2 or shortly afterwards.17

4. Amendment of the δοκιμασία τῶν ἄρχων (Lys. 26.9, 20; cf. Hansen 319). The exact content of the decree is unknown, but it is apparent from Lysias’ speech that former oligarchs through the amendment could be

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17 “After the Thirty” (Lycurg. 1.124). The decree referred to by Lycurgus may be a republication of Demophantus’ decree passed in 410/9 and quoted by Andocides (1.96–98). Demophantus’ name is mentioned by Lycurgus in 127.
debarred from holding office. The decree must be dated 403/2 or shortly afterwards.  

5. Decree providing that any poor or disabled citizen be entitled to a daily pension of one obol.  

6. Decree providing for state aid for the rearing of children of Athenian citizens who died under the oligarchy while fighting for democracy. The subsidy amounts to one obol a day to each orphan. Furthermore it is presumably decreed, in order to provide the necessary money, that the daily allowance to men serving in the cavalry be reduced from one drachma to four obols, while the daily allowance to ἵπποι οξόται be increased from two obols to eight (cf. Hansen 320 and supra p.32). The decree is proposed and carried by Theozotides of Kikynna. It is indicted as unconstitutional but is upheld by the court (cf. Hansen 327). The decree must be dated 403/2 or shortly afterwards (cf. Hansen 320).

7. Decree prohibiting on pain of death exportation of weapons and shipbuilding supplies to Philip of Macedon during the war (Dem. 19.286–87). The decree is proposed and carried by Timarchus of Sphettus as a member of the Council and must be dated 347/6.  

8. Decree concerning the Athenian participation in the meetings of the Amphictyonic synedrion. It is decreed for all time that the ἕρωμυθήματα and the πυλογόροι shall attend only the regular meetings of the synedrion in accordance with the ancestral customs (viz. the spring and autumn 

18 It is most unlikely that in 403 any kind of atimia was imposed on any Athenian except the Thirty, the Ten in the Piraeus, and the Eleven (Lys. 26.2–3; cf. M. H. Hansen, Atimistrofien i Athen i Klassik Tid [Odense 1973] 8–9 and 130–31). So the law/decreed referred to by Lysias must have contained a provision by which it was possible to reject a candidate without maintaining that he was formally debarred from holding office. Now in the Ath.Pol. 55.4 Aristotle describes a reform of the dokimasia which must have had precisely this effect: . . . ἐὰν δὲ μηδεὶς βούληται κατηγορεῖν, εὐθὺς διδωκε τὴν ψήφον. καὶ πρότερον μὲν εἰς ἐνεβάλλε τῆν ψήφον, νῦν δ’ ἀνάγκη πάντας ἐκτὶ διαφημίζει εἰς τινά ἀτυχών, ἵνα, ἁν τις ποιησά τῶν ἀπαλλάξῃ τοὺς κατηγορούς, ἐπί τοῖς δικασταῖς γένηται τοῦτον ἀπόθεσιμα. The amendment referred to by Lysias may be identical with the reform described by Aristotle. The decree was passed after the restoration of the democracy (Lys. 26.9) and probably shortly afterwards.

19 The main source is Lysias’ speech For the Invalid, delivered before the council and probably in connection with the δοκιμασία τῶν ἄθικτων (Arist. Ath.Pol. 49.4). From some casual remarks in Lysias’ speech we can infer that the disabled citizens were granted the pension individually by a psephisma of the boule (13) and that the dokimasia was repeated and the psephisma renewed each and every year (26, cf. 7). The pension scheme, however, was warranted by an act which in the beginning of the fourth century took the form of a psephisma of the demos (Lys. 24.22 cf. Hansen 319–20).

20 Timarchus was a member of the council in 361/0 (Aeschin. 1.109) and again in 347/6 (Aeschin. 1.80). Since the decree explicitly refers to Philip of Macedon, 347/6 is the only possible date.
38  DID THE ATHENIAN ECCLESIA LEGISLATE?

meetings). Furthermore it is decreed that the ἵερομνήμων and the πυλαγόροι in office shall take no part in the extraordinary meeting stipulated at the spring meeting of 340/39 (Aeschin. 3.126–27). The decree is in substance proposed and carried by Demosthenes of Paeania and must be dated 340/39.21

9. Decree prescribing that all revenue be transferred to the Stratiotic Fund (Philoch. FGrHist 328 f. 56a). The decree is proposed and carried by Demosthenes of Paeania in 339/38. 22

10. Decree empowering the council of the Areopagus to punish any offender in accordance with the ancestral laws. The Areopagus is authorized to inflict even the extreme penalty of the law, and the decision is final. A man sentenced to death by the Areopagus can be executed immediately. 23 The decree is proposed and carried by Demosthenes of Paeania and must be dated 338/37. It is probably passed immediately after the defeat at Chaeronea.24

11. Decree prescribing that those leaving the country in times of danger be liable to a charge of treason (Lycurg. 1.53). The decree must be dated 338/37 and is probably passed immediately after the defeat at Chaeronea. 25

Eleven examples constitute a small but not inconsiderable part of 219 psephismata. But in our analysis the date of the decrees must be taken into account. 1–6 are passed in 403/2 or shortly afterwards. Consequently, all six decrees are probably earlier than the nomothesia by nomothetai and the distinction between nomoi and psephismata. 26 8–11 are passed by the ecclesia during the final war against Philip of

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21 The terminus post quem is the spring meeting of the synedrion held in March(?) 339, the terminus ante quem is the extraordinary summer meeting held in May/June(?) 339.
22 In the archonship of Lysimachides but, according to Philochorus, before Philip’s capture of Elatea in Nov.(?) 339.
23 The Areopagus was not authorized to inflict any punishment except minor fines. So the terminus post quem is ca 340, and the terminus ante quem is the period after the battle of Chaeronea when the assembly passed the decree that those leaving the country in times of danger be liable to a charge of treason (infra no.11). The Areopagus passed several sentences of death in accordance with this decree (Lycurg. 1.52, Aeschin. 3.252), and the two decrees are probably contemporaneous. The public action warranted by Demosthenes’ decree must not be confused with the ἀπόφασις introduced ca 350 B.C. Cf. M. H. Hansen, Eisangelia (Odense 1975) 39–40.
24 Cf. supra n.24.
25 Consequently I have omitted Tisamenus’ decree regulating the revision of the law code (Andoc. 1.83–84) and Phormisius’ decree that citizen rights be reserved for those who owned landed property (Lys. 34). Phormisius’ decree was probably proposed and rejected before the archonship of Euclides (cf. Arist. Ath.Pol. 41.1).
Macedon, and at least two of them (10–11) are decisions made immediately after the defeat at Chaeronea when the Athenians were panic-stricken and probably took no notice of constitutional formalities that may have caused delay. The conclusion is that, apart from a short period of crisis in 339–38, there is in the literary sources only one example of the ecclesia having legislated by psephisma in the fourth century, viz. Timarchus' ban on export of weapons to Philip of Macedon.

III

In the preceding section I hope to have demonstrated that the Athenians in the fourth century did not legislate through psephismata. I shall now turn to an examination of the opposite problem: do the nomoi preserved on stone or paraphrased in the speeches include individual rules of temporary validity which ought to have been enacted by the ecclesia as psephismata? Among the more than one hundred nomoi quoted or discussed by the orators, I have not found one single instance of this. All nomoi are what they should be: general standing rules binding on all Athenians for an unlimited period. The epigraphical evidence, on the other hand, is more controversial and must be discussed in some detail.

Of the six nomoi preserved on stone five are general permanent rules, viz. the law on silver coinage (Hesperia 43 [1974] 157–88), the law on Eleusinian first-fruits (IG II² 140), the tyranny law (SEG XII 87), the law on the Panathenaea (SEG XVIII 13) and the complex religious law on some offerings (IG II² 333). The sixth nomos, however, deals with a particular case, viz. the rebuilding of the walls around the Piraeus; and moreover three honorary decrees include a provision that the psephisma be referred to the nomothetai for ratification (IG II² 222.41–52; IG II² 330.18–23; Syll.³ 298.35–41).

The law on the rebuilding of the walls and the three references in honorary decrees to the nomothetai have one thing in common: the nomothetai are requested to pass a finance bill. At this point let us remember that in the fourth century the Athenian financial administration was based on an annual merismos. I shall quote a passage from Rhodes, op.cit. (supra n.2) 103: “In the fourth century, with its μερισμός, we reach a more advanced level of financial organization. Whereas previously, so far as we can tell, every payment from the
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Public treasury was earmarked for a particular purpose, various ἄρξαι were now given an annual allowance for their ordinary expenses, which presumably was theirs to spend without further interference, so long as they could satisfy the boards of logistae in the check made every prytany, and in the final examination after their year of office. A few of the allocations are known: in 357/6 Midias as treasurer of the Paralus had 12 talents to spend; in the 320s the ἱερὼν ἐπισκευασταί received ½ a talent a year and the epimeletae of the Great Dionysia 1½ talents..." The important question is, who was responsible for the merismos? Although it was undoubtedly subject to frequent revisions, it was by nature a general permanent rule. The merismos was in practice annual because the appropriations ran for one year at a time, but that does not imply that the merismos itself had to be renewed every year. Many boards of officials seem to have received the same amount year after year.27 The merismos was in principle permanent, and so it ought to be a nomos passed by the nomothetai.28 This inference is confirmed by several sources. Both the Stratistiotic and the Theoric Funds were regulated through nomoi,29 and I have previously argued that both funds were financed through annual appropriations.30 Demosthenes states in the Third Olynthiac that any transference of money from the Theoric Fund can be made only through a nomos passed by the nomothetai.31 And the assumption that all appropriations were based on a nomos finds some support from various decrees preserved on stone.32 Now both the rebuilding of the walls and the three honorary decrees referred to the nomothetai for ratification relate to revisions of or additions to the merismos.

27 E.g. the ἱερὼν ἐπισκευασταί receiving thirty minae a year (Arist. Ath.Pol. 50.1) and the epimeletai of the Greater Dionysia receiving 100 minae (Arist. Ath.Pol. 56.4). Cf. Rhodes, op.cit. (supra n.2) 103.

28 This is also the position of Rhodes, op.cit. (supra n.2) 101. According to A. H. M. Jones, Athenian Democracy (Oxford 1957) 102, the sums were allocated either by law or by decree of the people.

29 The Stratistiotic Fund: Dem. 59.4; the Theoric Fund: Dem. 3.11. Similarly a nomos had to be passed by the nomothetai in order to provide money for the Lesser Panathenae first in 353/2 (Dem. 24.26-29) and again in 336-34 (SEG XVIII 13). Cf. D. M. Lewis, "Law on the Lesser Panathenaia," Hesperia 28 (1959) 245-47.


31 Dem. 3.10. Cf. Hansen, op.cit. (supra n.30) 236-37 with n.10.

32 IG II² 29.18-22, IG II² 354.30-31.
1. *IG II² 244* is a *nomos* passed by the *nomothetai*. It is presumably not a decision to rebuild the walls; it deals primarily with the financing of the rebuilding and the administration of the money set off for the purpose. On the analogy of the *Stratiotika* and the *Theorika* the Athenians have introduced a special appropriation τὰ τειχοποιικά (lines 18, 21, 31, 37, 40, 44). The rebuilding is expected to last several years, and the *nomos* includes a reference to a previous *nomos* (line 13) probably dealing with the same subject. The *nomos* does not refer to any named person. On the other hand it relates to a particular case, and it cannot be described as a general, permanent rule.

The three *psephismata* ratified by the *nomothetai* are undoubtedly individual decisions since they all relate to named persons.

2. *IG II² 222* is a citizenship decree for Pisithides of Delos. Among the honours bestowed is a pension to be paid out to Pisithides until he returns to Delos. The *ταμίας τοῦ δήμου* is instructed to pay out a daily allowance of one drachma, and the *πρόεδροι* of the next session of the *nomothetai* are instructed to propose a supplementary appropriation to the effect that the ἀποδέκται shall transfer the amount to the ταμίας each and every year:

εὖ δὲ τοῖς νομοθέταις τοῖς προέδρους οἷς ἀν προεδρεύοντες καὶ τῶν ἀποδέκτων ταμίαι τοῦ δήμου εἰς τὸν έν εἰσαυντὸν ἐκαστὸν (41–46). The ratification by the *nomothetai* is a general measure in so far as it results in a revision of the annual *merismos* for an unlimited period of time. On the other hand, it relates to a particular case since the money is to be paid out to a named person.

3. *IG II² 330* is an honorary decree for Phyleus the ἱεροποιός who is awarded a golden crown worth 1000 drs. The *ταμίας τοῦ δήμου* is instructed to lay out the money, but in order that he can have the 1000 drs. refunded the *πρόεδροι* of the next session of the *nomothetai* are instructed to propose supplementary estimates: διὸ ἐὰν τῷ μιᾷς ἀπολαβῇ τῷ ἀργύρῳ τῷ εἰρημένῳ τοὺς προέδρους, οἱ ἀν λάχωσιν πρῶτον προεδρεύον εἰς τὸν νομοθέτας προσνομοθετήσῃ καὶ περὶ τοῦ ἀναλόγου δόμου δὲν καὶ οἱ ἄλλοι οἱ καθιστάμενοι ἱεροποιοὺς πρὸς τὴν βουλήν καὶ τῶν δήμων ἄρχων κατὰ τοὺς νόμους καὶ εἶναι χρήσιμοι τοῖς δήμῳ τῶν Ἀθηναίων (18–23). The purpose of this act is to exhort future ἱεροποιοί to merit the gratitude of the people, but the act itself seems to have been no more than an individual decision to grant the ταμίας τοῦ δήμου a supplementary appropriation of 1000 drs. to be paid out only once.

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34 Both in 395–91 and in 307/6 the decision to rebuild the walls took the form of a *psephisma*. Cf. Philoch. *FGrHist* 328 F 40 and Maier, *op. cit.* (supra n.33) 21–36 (the rebuilding in 395–91); *IG II²* 463 and Maier 48–67 (the rebuilding in 307/6).
4. Syll. 3 298 (=IG VII 4254) is an honorary decree for a board of epimeletai (whose names are recorded). Among the honours bestowed is a grant of 100 drs. for a sacrifice and a votive offering. The ταιμίας τοῦ δήμου is instructed to lay out the money to the sacrifice, but at the next session of the nomothetai (the πρόεδροι) are instructed to propose a ratification of the expense: δοῦναι δὲ αὕτως καὶ εἰς θυσίαν καὶ ἀνάθημα Ἡ δραχμάς· τὸ δὲ ἄργυρον τ[δ] εἰς τὴν θυσίαν προδανεῖσαι τὸν ταμίαν τοῦ δήμου· ἐν δὲ τοῖς πρώτοις νομοθέταις προονομοθετήσαι τῶι ταμ[θ]α(35–41). The sum may seem ridiculously small, but nevertheless the aorist δοῦναι in opposition to the present ἀργυροῦ in line 44 indicates that the nomothetai are asked to vote for an once-for-all appropriation of max. 100 drs.

How can the ratification by the nomothetai of a psephisma be reconciled with the principle that a nomos ought to be a general permanent rule? Admittedly, since a nomos could be changed only through a new nomos and not through a psephisma, any revision of the merismos must be referred to the nomothetai. Nevertheless it remains a disquieting fact that the nomothetai, when ratifying honours bestowed on named persons, resorted to ad hominem legislation, which is in conflict with the principle that a nomos must be a general rule binding on all Athenians. The clash of principles is insurmountable, but the Athenians seem to have foreseen the problem and taken their precautions. In the law delimiting the concept of nomos there is an additional provision which has troubled many scholars and has not yet been satisfactorily explained: μηδὲ ἐπ’ ἀνδρὶ νόμον ἕξειναι θεῖναι, ἕαν μὴ τὸν αὐτὸν ἐπὶ πάσιν Αθηναίοις, ἕαν μὴ ἐξακισχύλοις δόξη κρύβην ψηφιξομένῳς (Andoc. 1.87). The clause ἕαν μὴ ἐξακισχύλοις δόξη κρύβην ψηφιξομένῳς is usually rejected as nonsense since it contradicts the principle that a nomos must apply to all Athenians, and the phrase νόμος ἐπ’ ἀνδρὶ is sometimes even changed into the term ψήφιζε μαν ἐπ’ ἀνδρὶ. I shall argue, however, that the text of the law is sound and can be understood without difficulty.

The provision for a νόμος ἐπ’ ἀνδρὶ is added to the law as an exemption clause, and it is in perfect harmony with another exemption clause quoted in Dem. 24.45: No ἀπίμος is allowed to apply for a

35 Against Dittenberger's interpretation Rhodes has pointed out (op.cit. [supra n.2] 276) that the clause to be referred to the nomothetai is contained in lines 35–41 and not in lines 39–45.


37 E.g. G. Busolt and H. Swoboda, Griechische Staatskunde II (München 1926) 885, 995, 1000. Quass, op.cit. (supra n.2) 20 with n.108.
reduction of his sentence except when he has obtained an ἀδεια passed by a quorum of 6000 voting by ballot. It is important to notice that the 6000 Athenians do not make any decision on the reduction of the sentence; they merely permit that the application be made. 38 Similarly we must suppose that the 6000 who have to vote on a νόμος ἐπ᾽ ἀνδρὶ do not pass the law. They merely permit that a νόμος ἐπ᾽ ἀνδρὶ be proposed. Now the nomothesia itself was invariably conducted by the nomothetai, but it was always initiated in the assembly. 39 So we may assume that a νόμος ἐπ᾽ ἀνδρὶ might be passed if a quorum of 6000 voting by ballot in the assembly decreed that nomothetai be appointed with the purpose of making a decision on the proposal.

This seems to be exactly what happened in those three cases where the ecclesia decreed that the grant of a sum of money to a person honoured be submitted to the nomothetai for ratification. The money is paid out to a named person, but a decision made by the nomothetai is a nomos. Consequently the ratification must be a νόμος ἐπ᾽ ἀνδρὶ.

My combination of the law in Andoc. 1.87 with the three honorary decrees rests upon the assumption that the decision to submit the honorary decrees to the nomothetai was passed by a quorum of 6000 voting by ballot. This assumption can be proved in one case, viz. the decree for Pisithides. Among the honours bestowed on Pisithides is Athenian citizenship (lines 16–18), and we know from Dem. 59.89 that a citizenship decree had to be ratified by a quorum of 6000 voting by ballot. Thus the required quorum must have been present in the assembly and must have voted not only for the citizenship grant but also for the provision that the decree be submitted to the nomothetai for ratification. It can now be assumed, although not proved, that the other two honorary decrees as well were passed by the required quorum voting by ballot.

Summing up: all the known exceptions to the principle that a nomos ought to be a general permanent rule can be explained as revisions of a nomos (the merismos) which ought to take the form of a nomos, and moreover as exemptions foreseen by the Athenians in the clause describing the conditions for passing a νόμος ἐπ᾽ ἀνδρὶ.

38 Andoc. 1.77, ἐπεζήθη ἐφηβισαυτῷ Ἀθηναίοι τὴν ἀδειαν περὶ τῶν ἄτιμων καὶ τῶν ὀφειλόντων ὧντε ὕψιν ἔχαιναι καὶ ἐπιφοβίζεσιν, ψηφισάθαι τὸν δήμον... 39 Dem. 3.10-13, 24.20-23; Aeschin. 3.38-39.
These conclusions are in conflict with the accepted view according to which there was little or no difference in substance between nomoi and psephismata, since general permanent rules were frequently passed as psephismata whereas individual decisions sometimes were made by the nomothenai. The foundation of the traditional view is the general description of radical democracy in the Politics of Aristotle combined with one passage in the Ath.Pol. and one in Demosthenes’ speech Against Leptines (cf. the references supra n.2).

1. Aristotle states in the Politics that the sovereignty of the demos in a radical democracy supersedes the sovereignty of the nomos so that all decisions are made as psephismata by the ecclesia.⁴⁰

2. Since the fourth-century Athenian constitution is classified by Aristotle as a radical democracy,⁴¹ it is a priori probable that Aristotle’s general description of psephismata in a radical democracy applies to Athens.

3. This inference is confirmed by Aristotle’s description of Athens’ eleventh constitution, in which πάντα διοικεῖται ψηφίσματα καὶ δικαστήριοι (Arist. Ath.Pol. 41.2), and by Demosthenes’ scornful remark in the Leptines speech that ψηφισμάτων . . . οὐδ’ ὅτιον διαφέρουσιν οἱ νόμοι (Dem. 20.92).

Apparently this is a reasonable line of argument, but it is based on Arist. Ath.Pol. 41.2 and Dem. 20.91, and neither source is straightforward and uncontroversial. In Ath.Pol. 41.2 it is worth noticing that nomoi (and nomothenai) are passed over in silence and the distinction made is between a type of enactment (psephismata) and a body of government (dicasteria). Since both the nomothenai (making the laws) and the dicastai (manning the courts) were appointed from among the 6000 jurors, we cannot preclude the possibility that Aristotle draws a distinction between the ecclesia (passing psephismata) and the dicasteria (pronouncing judgements and making nomoi). Moreover, Aristotle is highly critical of democracy, and I find it hazardous to trust, without further evidence, what is said about radical democracy by a man who detests that form of constitution.

Dem. 20.92 is an even more controversial passage. First, Demosthenes’ discussion of nomothesia in the Leptines speech is deliberately blurred, and most scholars agree that he attempts to deceive the

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⁴⁰ Arist. Pol. 1292a5–7, 24, 35; 1293a9–10; 1298b13–15; 1305a32; 1310a3–4; 1317b28–30.

⁴¹ Arist. Pol. 1274a7–11; 1319b21; Ath.Pol. 41.2.
court by a fallacious interpretation of the legislative procedure. Second, even if we take Demosthenes’ statements at their face value, they do not constitute any evidence that the Athenian ecclesia legislated through psephismata. Demosthenes criticizes some politicians for having introduced (unconstitutionally?) a new and debased form of nomothesia by which it is easier to propose and carry a nomos. The result has been a greater number of nomoi, sometimes even conflicting nomoi and, worst of all, nomoi are frequently passed after the psephismata although the psephismata ought to be warranted by the nomoi.

On the other hand, the politicians are accused neither of having abolished nomothesia by the nomothetai nor again of having allowed the ecclesia to arrogate to itself legislative powers by passing general permanent rules as psephismata.

In short, neither Arist. Ath.Pol. 41.2 nor Dem. 20.92 can be adduced in support of the statement that the ecclesia legislated through psephismata, and furthermore, in opposition to the two passages discussed, we have a greater number of sources showing that the Athenians themselves respected the nomoi as the foundation of the democracy and regarded the nomoi and not the ecclesia as the sovereign proper: διὰ τὶ οἶδες, ὦ ἄνδρες, τοὺς μὲν νόμους καλῶς κείθαι, τὰ δὲ ψηφίσματα εἶναι τῆς πόλεως καταδείκτηρα, καὶ τὰς κρίσεις ἐν τοῖς δικαστήριοις ἐχεῖν ἐπιπλήξεως; ἡγοῦ ἡς τούτων αἰτίας ἐπιδείξω. ὅτι τοὺς μὲν νόμους τίθεσθε ἐπὶ πᾶσι δικαίοις... ἐν δὲ ταῖς ἐκκλησίαις καὶ τοῖς δικαστήριοις πολλάκις ἀφέμενοι τῶν εἰς αὐτὸ τὸ πρῶγμα λόγων, ὑπὸ τῆς ἀπάτης καὶ τῶν ἀλαζονευμάτων ὑπάγεσθε,... (Aeschin. 1.177–78).

These reservations considerably reduce the evidential value of the two passages usually adduced in support of the assumption that Aristotle has Athens in mind when he writes about nomos and


43 Dem. 24.5, 25.20–21, 26.10; Aeschin 1.4–5, 3.6, 169, 196; Lycurg. fr.70. Democracy is the constitution characterized by the sovereignty of the laws in contrast to oligarchy and tyranny: Dem. 24.75–76; Aeschin. 1.5, 3.6.

Psephisma in a radical democracy. Instead of relying on generalizations in two debatable sources, scholars ought in my opinion to concentrate on the decisions actually made by the Athenians in the period 403–322. From the inscriptions and the literary sources we know about the contents of some six hundred psephismata and more than one hundred nomoi. For students of ancient history this is an enormous amount of evidence. If scholars are right in assuming that the distinction between nomoi and psephismata was disregarded by the Athenians, we should have no difficulty in finding scores of examples of general permanent rules passed as psephismata and individual temporary rules taking the form of nomoi. Nevertheless the examples adduced by those who discuss the question are astonishingly few and most of them must be questioned. On the other hand, it is a curious fact that historians hardly ever refer to any of the few unquestionable examples of legislation through psephismata discussed above on pp.36–38 and dated within the periods 403–402 and 339–338. Harrison, Ehrenberg, Ostwald and de Romilly give no examples at all. Rhodes and Quass refer in their notes to a few sources, and Kahrstedt has a short discussion in the text. An examination of the evidence adduced by Kahrstedt, Quass and Rhodes (opp.citt. supra n.2) gives the following result.

1. Kahrstedt bases his discussion on the Heliastic Oath: “Neben der behandelten Art der Nomothesie setzt aber das 4. Jahrh. auch eine Gesetzesgebung durch das Volk voraus… Der Richtereid des 4. Jahrh. verpflichtet die Heliasten auf die Nomoi und die Psephismen von Rat und Volk, d.h. auf die normal mit Probouleuma zustande gekommenen Volksbeschlüsse. Die populäre Begriffsbestimmung von [Plat.] ὄροι 415β, nach der Nomoi dauernde, Psephismen einmalige Anordnungen sind, versagt hier völlig, die letzteren müssten dann für den betr. Prozess erlassen sein und das Urteil präjudizieren, das ist die einzige Art von Psephismen, die in Athen absolut unmöglich ist” (12–13). Kahrstedt’s interpretation of the Heliastic Oath is one of his major fallacies and is disproved by, e.g., Dem. 47, where a trierarch addresses the jurors and invokes both the nomoi (regulating the naval administration in general) and several psephismata (dealing with the fitting out of the squadron in question).45

45 Either two or three decrees concerning the recovering of naval equipment from former trierarchs. (A) The recently appointed trierarchs are entrusted with the collection of the equipment, and the ἐπιμέληται τῶν νευρίων are instructed to perform a sortition by
Similarly, most of the other sources adduced by Kahrstedt are in perfect agreement with the definitions given in [Pl.] Def. 415b, according to which nomoi are permanent and psephismata temporary enactments. The only passages cited which may support Kahrstedt's assertion are Dem. 57.30, υν μόνον παρὰ τὰ ψηφίσματα τὰ περὶ τὴν ἀγοράν διεβάλλειν ἡμᾶς Ἐυβουλίδης, ἀλλὰ καὶ παρὰ τοὺς νόμους... and Dem. 44.38, τὸν δὲ παρὰ τὸ ψηφίσμα τὸ ύμετέρον ἀξιωῦντα τὸ θεωρικὸν λαμβάνειν, πρὶν ἐγγραφῆναι εἰς τοὺς Ὀτρυνέας, ὡς ἐξ ἐτέρου δήμου, τούτων οὐκ οἴσεθε τοῦ κλήρου παρὰ τοὺς νόμους ἀμφιβητεῖν; In Dem. 57.30 τὰ ψηφίσματα τὰ περὶ τὴν ἀγοράν may have been general standing rules regulating the trade in the Agora, but they may as well have been individual and temporary enactments. We do not know. The same objection applies to the psephisma in Dem. 44.38. There is some evidence that the amount paid out as theorica varied from festival to festival.47 If so, the rate and method of payment must have been fixed in every individual case through a psephisma τοῦ δήμου, and any illegal attempt to obtain theorica would be an infringement of the psephisma in question. So there is no reason to assume that the psephisma regulating the theoric payment at the Panathenaea in one of the years around 330 is one of the general standing rules for the Theoric Fund referred to by Demosthenes in 3.10-11 as οἱ περὶ τῶν θεωρικῶν νόμων.

2. According to Quass (op.cit. 71) "konnte...die Volksversamm-

which the former trierarchs owing equipment are distributed among the trierarchs in office and the epimeletai of the symmories. (B) Decree regulating the distribution of former trierarchs owing naval equipment among the trierarchs in office. (C) Decree prescribing confiscation of property if anybody in possession of naval equipment belonging to the state refuses to give it up or if anybody owning naval equipment refuses to sell it. All decrees must be dated 357/6 (Dem. 47.44). (A) is described in §21 and read out to the jurors after §20. (B) is described as ἔτερον ψηφίσμα δήμου in §21 and is read out after §24. (C) is paraphrased by §44 and is read out after §44. (C) may be a part of either (A) or (B). (A) and (B) are referred to in the plural in §§22, 25, 29, 30, 37 and 80 and are read out to the jurors after §40.

46 τὰ ψηφίσματα codd.: τὰ ψηφίσμα Blass coll. §7. If we adopt the correction proposed by Blass (as most editors do), the reference is to Demophilus' psephisma about the revision of the citizen rolls and not to some psephismata concerning the Agora (the passage is mistranslated by Gernet in the Budé edition). The decree is erroneously described as a nomos by Dion.Hal. Isaeus 16 p.617 and in hyp. Dem. 57.

47 Hyperid. 1.26 and Din. 1.56. I follow J. Van Ooteghem (EtCl 1 [1932] 406) and J. J. Buchanan (Theorika [New York 1962] 85) in assuming that the five drachmae are a one-lump-handout and not a sum "Conon may well have drawn over several years" (Jones, op.cit. [supra n.28] 33).
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lung Beschlüsse mit dem sachlichen Gehalt von Gesetzen fassen.” But he adduces only two examples, *viz.* the charter of the Second Athenian Confederacy (*IG II² 43.35ff*)\(^{48}\) and the regulations of the lesser Panathenaea (*SEG XVIII 13+ IG II² 334*). In n.114, however, Quass admits himself that neither example is valid, and this cautious remark is much nearer the truth. *IG II² 43.35ff* is a provision that no Athenian citizen may acquire landed property in the territory of the allies. It is a general standing rule, but it deals with foreign policy and is not an Athenian *nomos* in the proper sense (*cf. supra* p.31). Consequently it is laid down that any infringement of the provision be referred to the *synedrion* of the allies (and not to an Athenian *dicasterion*). On *IG II² 334* and *SEG XVIII 13* *cf. supra* p.34.

3. Rhodes states that “νομοθεσία was presumably regarded as more solemn and binding than the enactment of ψηφίσματα, but the measures which have survived suggest that the Athenians failed to live up to this ideal (49–50). Whenever it was possible, the Athenians continued to express their will in ψηφίσματα... (52).” In illustration of how the Athenians disregarded the distinction between *nomoi* and *psephismata* Rhodes cites three *psephismata* concerning the Theoric Fund: the *psephisma* referred to in Dem. 44.38, Apollodorus’ *psephisma* of 348 concerning the surplus of the administration (Dem. 59.4) and Demosthenes’ *psephisma* of 339 that all money be transferred from the Theoric to the Strat扥tic Fund (Philoch. *FGrHist* 328 Ρ 56a). The *psephisma* in Dem. 44.38 is adduced also by Kahrstedt and is discussed above on p.47. Apollodorus’ decree is commonly believed to be a permanent *psephisma* transferring money from the Theoric to the Strat扥tic Fund. In a previous article,\(^ {49}\) however, I have argued that it is no more than a provision that the *ecclesia*, on one particular occasion, shall take the vote on whether the surplus (τὰ περιόντα) be used as *Theorica* or as *Strat扥tica*. If I am right in my interpretation, the distinction between general *nomoi* and individual *psephismata* is respected by Apollodorus. His decree is probably *paranomon*, but it is not a permanent provision passed as a *psephisma*. Demosthenes’ decree, on the other hand, is indeed a permanent rule which ought to have been enacted by the *nomothetai*. It has been discussed above on p.38 as one of the four *psephismata* unconstitutionally passed by the

\(^{48}\) Adduced also by Busolt, *op.cit.* (*supra* n.2) 458 n.5.

\(^{49}\) *Op.cit.* (*supra* n.30) 244–45.
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ecclesia during the final war against Philip of Macedon. Summing up: the assumption that the Athenians in the fourth century legislated through psephismata passed by the ecclesia is unfounded and contradicted by the sources.

V

My conclusion will, undoubtedly, be countered by the question: is it believable that all legislation rested with the nomothetai when references to nomothesia in our sources are so scarce and scattered? I shall round off my investigation with an answer to this question, or rather with three answers, since we have three different types of source material: (a) enactments of the Athenians preserved on stone, (b) enactments quoted or referred to in the forensic speeches and (c) a systematic description of the Athenian fourth-century constitution in Arist. Ath. Pol. 42–69.

(a) The epigraphical evidence comprises some 480 psephismata as against only 6 nomoi passed by the nomothetai. But in any society individual temporary decisions are made much more frequently than general permanent rules, and so it is only natural that the number of preserved nomoi is much smaller than the number of psephismata. The ecclesia met forty times every year and passed, say, ten psephismata during a single session. In the speech Against Timocrates 142, Demosthenes criticizes the Athenians for making new nomoi almost every month. Demosthenes is probably exaggerating, but even if we take his statement at face value, we arrive at a total of say, twenty-five nomoi per annum as against some four hundred psephismata.

On the other hand we know of more than one hundred nomoi quoted or referred to in the forensic speeches. Of these only the homicide law is preserved on stone. The survey of psephismata (supra n.12) shows that the epigraphical evidence is stereotyped and gives a distorted picture of the decisions made by the Athenians. Conversely, the few unquestionable examples of general permanent rules cut in stone are either demonstrably enactments of the nomothetai or fragmentary enactments which may prove to be decisions made by
the nomothetai if a new fragment turns up inscribed with the enactment-formula or the publication-formula.\textsuperscript{53}

So the epigraphical evidence, for what it is worth, supports and does not contradict the assumption that the ecclesia did not legislate in fourth-century Athens. The proper question is not, why are so few enactments of the nomothetai preserved on stone, but rather, why are so few general permanent rules preserved on stone? I suggest two possible answers to this question. (1) Both nomoi and psephismata were frequently cut in stone, but the nomoi were published in such a way or set up in such a place that most of them are lost, whereas accidentally a higher proportion of psephismata has been preserved. (2) The idea of a law code cut in stone had to be abandoned a few years after the democratic restoration, and henceforth nomoi were published on some more perishable material and kept in the Metroon (cf. supra n.7).

A psephisma would eventually become a dead letter but did not need any revision while in force. A nomos was a permanent rule but subject to revision that could only with difficulty be executed on a stone. Publication of nomoi on stone may have been the exception rather than the rule. Lycurgus, for example, assumes in his speech Against Leocrates that, regularly, the only text of a law was the original which was kept in the Metroon (Lycurg. 1.66).

(b) In the forensic speeches there are hundreds of references to the demos = the ecclesia as against only a few scattered accounts of nomothesia by nomothetai. The orators, however, frequently quote or paraphrase a nomos, but it is always the content of the nomos that is discussed, and the orators show little or no interest in the questions how and by whom the nomos was made.\textsuperscript{54} But the psephismata dis-

\textsuperscript{53} Cf. supra pp.33–35 nos. 4–6 and 10.

\textsuperscript{54} For references in the speeches to the nomothetai cf. Hansen 321 n.22. For references to the jurors cf. ibidem n.23. Apart from the nomothetai or the jurors (= the audience), when an orator mentions the legislator, the reference is either to Draco (Andoc. 1.81ff; Dem. 20.158; 23.25, 27, 29, 51, 62; 24.211; 47.71; Aeschin. 1.6ff) or to Solon (Andoc. 1.81ff, 95, 111; Lys. 10.15; 30.2, 26, 28; Dem. 18.6; 20.90, 93, 102–04; 22.25, 30; 24.103, 106, 113, 142, 148, 211; 26.23; 36.27; 42.1; 43.62, 66–67, 78; 44.67–68; 48.56–57; 57.31–32; Aeschin 1.6ff, 13ff, 183; 3.2, 175–76, 257; Hyperid. 5.22) or to some named or unnamed politician. The politicians named as legislators are Tisamenus and Nicomachus (Lys. 30.28), Aristophon (Dem. 57.32), Demosthenes (Dem. 18.102ff, 320; Aeschin. 3.222; Hyperid. fr.160), Leptines (Dem. 20.3 et passim), Midias (Dem. 21.173), Timocrates (Dem. 24.1 et passim), Eudemus (Dem. 24.138), Philippus (Dem. 24.138), Periandr (Dem. 47.21). Frequently the reference is to some unnamed politician (δ νομοθέτης, δ τῶν νόμων θείς or ἥθεις etc.). In some of these passages the orator probably has Solon in mind:
discussed usually relate to foreign policy, and there is hardly any evidence of general permanent rules which ought to have been passed as nomoi. So the question, why are references to the nomothetai so scarce? must be countered by the questions, why are references to those who made the nomoi so scarce and why is it impossible in several thousand pages to find no more than five unquestionable examples of general permanent rules enacted by the ecclesia in the form of a psephisma?

A plausible explanation may be that the passing of a nomos (binding on the Athenians and relating to domestic policy) was usually a much less controversial issue than the passing of a psephisma (frequently relating to foreign policy). It is worth noticing that we have preserved thirty-nine examples of γραφὴ παρανόμων (against psephismata) whereas there are only six known instances of the γραφὴ νόμον μὴ ἐπιτίθειν θείναι (against nomoi). Psephismata passed by the ecclesia seem to have been questioned far more frequently than the few nomoi passed by the nomothetai; and a psephisma, especially a psephisma relating to foreign policy, was often the result of a violent struggle between opposing politicians, so that the orators tend to discuss the enactment as well as the content of a psephisma. Aeschines may be right in his assertion that the passing of nomoi caused much less trouble than the enactment of psephismata in the ecclesia and the administration of justice in the dicasteria. Complaints of the legislative procedure are concentrated in speeches delivered in a γραφὴ νόμον μὴ ἐπιτίθειν θείναι (Dem. 20 and 24) where it is almost impossible to decide to what extent the criticism of the legislation is rhetorical exaggeration.

(c) In Aristotle's Constitution of Athens the nomothetai are passed over in silence. Does that mean that nomothesia had been abolished after 329/8 or stopped being of any importance? Certainly not. Argumenta e silentio of this kind based on the Constitution of Athens are of no value whatsoever. Two simple observations can be adduced in

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Lys. 1.33, 26.9; Is. 2.13; 11.3, 12; Dem. 19.7, 239; 20.91, 22.11, 23.86; 24.51, 114, 116, 119, 142; 36.25; 44.49, 58; 47.3, 58.11; Aeschin. 1.160, 165; 3.11, 14, 16–18, 20–21, 26, 31, 33–34, 47; Hyperid. 5.16; Din. fr.60.2. (The references given in this note are fairly exhaustive but not complete.)

55 Cf. supra pp.37–38 nos. 7–11.
56 Cf. Hansen, op.cit. (supra n.13) 46–47.
57 Aeschin. 1.177–78 quoted above on p.45.
58 The last references to the nomothetai are Aeschin. 3.38–40 (from 330/29, cf. Dion.Hal. Ad Amm. 12, Plut. Dem. 24) and Syll.9 298.35–41 (from 329/28).
support of this assertion. First, the ecclesia receives no independent treatment in Aristotle's systematic description of the Athenian constitution but is merely described in three notes in the section dealing with the boule.\textsuperscript{59} If the relative importance of the bodies of government in fourth-century Athens had to be assessed on the basis of the \textit{Ath.Pol.}, the conclusion would be that the ecclesia was much inferior to the boule, the archai and the dicasteria. Second, apart from three scattered remarks,\textsuperscript{60} the council of the Areopagus is not dealt with in the systematic part of the \textit{Ath.Pol.}, and this in spite of the fact that the powers of the Areopagus were considerably extended during the fourth century, especially in the period after 338.\textsuperscript{61} So it is impossible to deduce anything from Aristotle's silence about the nomothetai.

\section*{VI}

In conclusion: shortly after the restoration of the democracy in 403/2, and probably in connection with the revision of the law code, the Athenians introduced a distinction both in form and in substance between nomoi and psephismata. In future any general permanent rule had to be passed by the nomothetai as a nomos, whereas the powers of the ecclesia were restricted to foreign policy and, in domestic policy, to the passing of individual rules and/or rules with a limited period of validity. The extensive source material of the period 403/2–322/1 shows that the distinction was, by and large, respected by the Athenians. We have no examples of the ecclesia having passed a nomos, or of the nomothetai having enacted a psephisma. In the literary sources we have a few examples of general permanent rules taking the form of a psephisma passed by the ecclesia. But these examples must be dated within the period when the Athenians were engaged in the final war with Philip of Macedon. Conversely, there are, among the nomoi preserved on stone, a few examples of individual rules passed as nomoi, but all are in conformity with an exemption clause according to which a νόμος ἐν ἀνδρῷ may be passed (by the nomothetai) if the ecclesia gives its permission to \textit{ad hominem} legislation by a vote requiring a quorum of 6000 voting by ballot. So the distinction between nomos

\textsuperscript{59} Arist. \textit{Ath.Pol.} 43.4–6, 44.2–4, 45.4.

\textsuperscript{60} Arist. \textit{Ath.Pol.} 57.3–4, 59.6, 60.2.

\textsuperscript{61} Cf. Busolt, \textit{op.cit.} (supra n.2) 926.
and *psephisma* was not disregarded by the Athenians, and the inference is that the *ecclesia*, in the fourth century, had no legislative powers in the proper sense. Its influence was restricted to initiating legislation by voting that *nomothetai* be appointed for the purpose of passing or rejecting a bill proposed by a private citizen on his own initiative. 62

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62 After this article was accepted for publication I have seen D. M. MacDowell, *The Law in Classical Athens* (London 1978). I am much in sympathy with his brief remarks on p.49 about legislation by *nomothetai*. I should like to thank Dr Rhodes for reading and commenting on a draft of this paper. His notes have been most helpful, and he has saved me from two errors. Furthermore, I should like to express my gratitude to Statens Humanistiske Forskningsråd for defraying the costs of a visit to Cambridge.