Nomos and Psephisma in Fourth-Century Athens

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In the fourth century B.C. the Athenians had two words for what we call a law, viz. nomos and psephisma. The best proof of this is the opening clause of the Helastic oath ψηφιοῦμαι κατὰ τοὺς νόμους καὶ τὰς ψηφίσματα τοῦ δήμου τοῦ Ἀθηναίων καὶ τῆς βουλῆς τῶν πεντακοσίων, and similarly an orator always uses the phrase οἱ νόμοι καὶ τὰς ψηφίσματα when he wishes to refer to the whole body of rules binding on the Athenians. Demosthenes, for example, states in the speech Against Timocrates 152: ἡ γὰρ πόλις ἡμῶν, ὁ ἄνδρες δικασταί, νόμοις καὶ ψηφίσμασι διοικεῖται, and a few other quotations from the orators may serve as illustrations of this common practice: πάθος οὖσα ἡ διὰ τὰς ψηφίσματας ἡ νόμου ἐπιφάνεια τῶν ἰσπικῶν; (Dem. 1.96); τί γὰρ ἂν καὶ ἀντέλεγον αὐτῷ ψηφίσματα καὶ νόμους παρεχομένω, ὅπως προσήκεν ἐμὲ εἰσπράξα τὰ σκεύη; (Dem. 47.29).²

The purpose of this paper is to examine the difference between nomos and psephisma in fourth-century Athens. The traditional view is that nomoi ought to be general rules passed by the nomothetai but that the Athenians disregarded the distinction between nomoi and psephismata and frequently allowed the ecclesia to pass a general rule as a

¹ Dem. 24.149-51. The document inserted in the speech is not above suspicion (cf. E. Drerup, "Über die bei den attischen Rednern eingelegten Urkunden," Njbb Suppl. 24 [1898] 256-64), but the authenticity of this clause is proved by the quotations in Dem. 19.179; Hyp. 1.1; Din. 1.84. Cf. M. Fränkel, "Der attische Heliasteneid," Hermes 13 (1878) 452-66. It is apparent from Andoc. 1.91 that the Helastic Oath was revised in 403/2 (cf. R. Bonner and G. Smith, The Administration of Justice from Homer to Aristotle II [Chicago 1938] 154), and since the phrase κατὰ τοὺς νόμους καὶ τὰς ψηφίσματα indicates a distinction between nomoi and psephismata of the people and the council, I suggest that the opening clause of the oath was rephrased in 403/2. The older version may have included only a reference to nomoi, cf. the quotation in Ant. 5.85, which does not, however, constitute any proof since reference to nomoi only can be found also in several fourth-century paraphrases of the oath, e.g. in Is. 11.6 (cf. Fränkel 453).

² Cf. Andoc. 1.86; Lys. 30.5; Dem. 12.9, 18.320, 20.131; 24.55, 72, 79, 92, 100, 112, 201; 26.8, 35.39; 47.18, 19, 22, 23, 24, 30, 37, 40, 41, 48, 80; 50.3, 57.30; 58.49, 50; 59.13; Aeschin. 1.79, 177; 2.160; 3.4, 31; Din. 1.41, 101; 3.21.
psephisma. My own conclusion is that the distinction between nomos and psephisma was in fact respected, and, with the exception of a short period of crisis in 340–38 B.C., there is hardly any example of the ecclesia having legislated in the proper sense of the word.

My investigation is confined to the fourth century, or rather to the period 403/2–322/1 B.C. In fifth-century Athens there is no demonstrable difference between nomoi and psephismata. Admittedly, the words nomos and psephisma are never strictly synonymous, although they have roughly the same meaning when referring to enactments of the Athenians. Nomos is used when the emphasis is on the contents of a rule whereas the enactment of the rule is stressed by the word psephisma. On the other hand, the words nomos and psephisma frequently have the same denotation, and a decision of the ecclesia may be referred to both as a nomos and as a psephisma. Demophantus’ tyranny law is a psephisma described by Andocides as a nomos (Andoc. 1.96). Cannonus’ law dealing with offences against the demos is called both a nomos and a psephisma by Xenophon in Hellenica 1.7.20 and 23. The provision proposed and carried by Isotimides that oĩ ácebhékavtẹc kai ómoloughékavtẹc be debarred from the sanctuaries is referred to as a psephisma by Andocides (1.71, 86, 103) but as a nomos by Lysias (6.9, 29, 52). The Megarian psephisma (Thuc. 1.139–40) is called a nomos by Aristophanes (Ach. 532), and in the speech Against Neaera Apollodorus describes the citizenship bestowed on the Plataeans in 427 as a nóµοc ēn τῶν ψηφίσμων (Dem. 59.106). Furthermore, in Aristophanes’ Birds 1035ff the ψηφίσματος·νωσ displays new nomoi, and in Clouds 1421ff Pheidippides’ new nomos that sons, when beaten by their fathers, may hit back is based on a prevailing custom among the cocks, so that Pheidippides can argue kaiuc tί διαφέρουν ἡμῶν ἑκεῖνοι, πλήν γ’ ὅτι

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4 The only scholars who assume that the distinction between nomos and psephisma was, by and large, respected by the Athenians are: F. B. Tarbell, “The Relation of ψηφίσματα to nóµοι at Athens in the Fifth and Fourth Centuries B.C.” AJP 10 (1889) 79–83, and A. H. M. Jones, Athenian Democracy (Oxford 1957) 122–23.

These examples indicate that in the fifth century any enactment of the ecclesia could be called both a nomos and a psephisma.

In the period 403/2–322/1, however, there is a clear difference between nomos and psephisma both in meaning and in denotation. When the democracy was restored the Athenians introduced a new concept of nomos, a new legislative body (the nomothetai) and a new type of public action available against unconstitutional nomoi, viz. the γραφή νόμον μη ἐπιτήδειον θείαι. These reforms entailed a distinction between nomoi and psephismata which can be described under the following four headings. (I) Nomoi are passed by the nomothetai, psephismata by the ecclesia. (II) Nomoi supersede psephismata, and psephismata must accord with nomoi. (III) The only public action available against an unconstitutional nomos is the γραφὴ νόμου μη ἐπιτήδειον θείαι, whereas a public action against an unconstitutional psephisma must be brought as a γραφὴ παρανόμου. (IV) A nomos is a general permanent rule, whereas a psephisma is an individual rule and/or a rule with a limited period of validity. In this paper I shall discuss the first three aspects. The fourth and most important will be reserved for a future study.

An inspection of all fourth-century sources shows that no enactment is referred to both as a nomos and as a psephisma and that nomoi invariably are passed by the nomothetai, psephismata by the demos in the ecclesia.

(a) The epigraphical evidence comprises some five hundred psephismata passed by the ecclesia in addition to six nomoi passed by the
nomothetai. The discrepancy between the number of preserved nomoi and psephisma is a problem which I have discussed in a previous study. What is important in this context is that the distribution of types of rule on the two legislative bodies is strictly respected. An enactment introduced with the formula ἐδοξε τῷ δήμῳ ὑπὲρ τῆς ὑφής καὶ τῷ δήμῳ is invariably referred to as a psephisma, e.g. in the publication-formula ἀναγράφει τὸ δήμῳ τὰν γραμματέα or in the motion-formula ἐπήφισθαι τῷ δήμῳ. Similarly an enactment of the nomothetai is invariably a nomos. There is no example of a nomos passed by the demos or of a psephisma passed by the nomothetai. We have, however, three examples of a psephisma passed by the ecclesia but referred to the nomothetai for ratification. There is no direct evidence of the term applied to such a decision. I have argued that the psephisma by the ratification of the nomothetai became a νόμος ἐν ἀνδρί, and I shall return to the problem in my future study of the Athenian legislation.

Tabulae Magistratuum ought to have been recorded among the decreta populi as well (IG II 1440.1–28 and 1629.165–271). Fragments of more than seventy-five new decrees of the period 403/2–322 have been discovered since Kirchner published IG II pars prima in 1913. I have examined the following: Hesperia 2 (1933) 395–98 (nos. 15–17); 3 (1934) 2–4 (nos. 2–5); 4 (1935) 34–35 (no. 4); 5 (1936) 414 (no. 11); 7 (1938) 275–97 (nos. 10, 14–15, 18–21); 8 (1939) 5–27 (nos. 3–4, 6); 9 (1940) 313–35 (nos. 30, 35–36, 39–41); 10 (1941) 41–52 (nos. 9, 12–13); 13 (1944) 229–33 (nos. 3, 5); 15 (1946) 159–60 (no. 16); 17 (1948) 54–60 (no. 65); 26 (1957) 52–53, 207–33 (nos. 9, 53–54, 56, 86–87); 29 (1960) 1–52 (nos. 2, 4–5, 39, 64–67); 30 (1961) 207–57 (nos. 2–3, 58–59); 32 (1963) 1–40 (nos. 1–2, 39–41); 37 (1968) 67–68 (no. 3); 40 (1971) 149–90, 280–301 (nos. 3, 22, 24, 26–27, 29, 32, 36, 7); 43 (1974) 322–24 (no. 3); SEG II 8; III 83; XIV 214, 272; Syll II 129, 158, 287, 298; IG VII 4252; AJA 40 (1936) 461–63 (nos. 3–4); ArchEph (1971) 137–45; CSCA 5 (1972) 165–69 (no. 2).


8 Cf. M. H. Hansen, The Sovereignty of the People’s Court in Athens in the Fourth Century B.C. and the Public Action against Unconstitutional Proposals (Odense 1974) 47.

9 On these enactment formulae cf. Rhodes, op.cit. (supra n.3) 64 and 246–66.

10 Cf. IG II iv.1 index, “Sermo publicus” s.v. ἀναγράφει ψήφισμα καὶ στήσει, pp. 39–41.

11 Cf. Rhodes, op.cit. (supra n.3) 65 and 246–66.

12 The only enactment of the nomothetai in which the word nomos does not occur is SEG XVIII 13, undoubtedly because of the fragmentary preservation of the law.

13 IG II 222, Honorary decree for Pisithides of Delos (344/3); IG II 330, Honorary decree for Phyleus of Oinoe (335/4); Syll II 298, Honorary decree for the epimeletai of the Amphiaraios (329/8).

(b) The terminology in the literary sources is in agreement with the inscriptions. Some two hundred psephismata passed by the demos are quoted or referred to by the orators and the historians, but only in five cases is an enactment of the people referred to both as a psephisma and as a nomos.

1. The provision that the laws of Athens be enforced from the archonship of Euclides onward is quoted as a nomos in Andoc. 1.87, but it is apparent from his reference to the law in 93 (τοῖς νόμοις ἐφηφίσατε ἀπ' Εἰκλείδου ἀρχοντος χρήσθαι) that it took the form of a psephisma. The enactment must be dated 403/2.

2. The amendment of the δοκιμασία τῶν ἀρχῶν is described as a nomos in Lys. 26.9 but as a psephisma in Lys. 26.20. The amendment was made immediately after the restoration of the democracy and probably in 403/2 (cf. Lys. 26.9).

3. The pension for ἀθικόν was warranted by an act which Aristotle and the scholiast on Aeschines describe as a nomos (Arist. Ath.Pol. 49.4 and schol. Aeschin. 1.103) whereas a phrase in Lys. 24.22 indicates that, in the beginning of the fourth century, it took the form of a psephisma. ... τοῦ τοῦ ἄρχοντος. The psephisma must be dated 403/2 or shortly afterwards. Since the pension, in the course of the fourth century, was raised from one (Lys. 24.26) to two (Arist. Ath.Pol. 49.4) obols, the revision of the original psephisma may have taken the form of a nomos.

I have counted 219 decrees of the people quoted or referred to in the literary sources. My survey is based on the following authors: Lys. 1–34 (except 20 and 25), Andoc. 1 and 3, Is. 1–12, Dem. 1–59 and Ep. 1–4, Aeschin. 1–3, Lycurg. 1, Hyp. 1–6, Din. 1–3, Isoc. 1–21, fragments of the orators after Baiter and Sauppe, Oratores Attici II (Zürich 1850), Xen. Hell. 3–7, Hell.Oxy., Diod.Sic. 14–18.18, Arr. Anab. 1, fragments of Ephorus, Theopompus, Androtion and Philochorus after FGrHist. I have, hesitatingly, included those examples from Diodorus where he seems to quote some detailed and reliable source (e.g. Diod.Sic. 18.10.1–4). On the other hand, I have deliberately excluded Plutarch and other late sources as unreliable for an investigation of this kind. The main difficulty in setting up a list of psephismata has been to find the necessary and sufficient conditions for classifying a reported decision of the Athenians as implying a psephisma passed by the ecclesia. In more than half of the 219 instances the classification is guaranteed by the occurrence of the word ψῆφιςμα, and in the vast majority of these cases there can be no doubt that the psephisma is an enactment of the ecclesia and not of the boule. The major part of the remaining enactments have been classified as psephismata on the basis of phrases such as: δὴμος ἐφηφίσατο, ὑμεῖς ἐφηφίσατε (in addresses either to the ecclesia or to the dicasterion), οἱ Ἀθηναῖοι ἐφηφίσατο, or the occurrence of the word ecclesia in the context describing a decision made by the Athenians. In a few cases I have relied on expressions such as τὸν δῆμον γράψας κτλ. (when it is sufficiently clear from the context that the proposal was made in the assembly), τοῦ δῆμου προστάξαντος, τοῦ δῆμου δύναντος etc.

Every kind of μεθορία was undoubtedly abolished by the Thirty. So the Pension Act must have been either introduced or renewed after the restoration of the democracy. The reference to the Thirty in Lys. 24.25, combined with the information that the defendant has obtained the pension for several years (Lys. 24.26), indicates that the Pension Act must have been passed in the archonship of Euclides or not much later.
4. In 403/2 or shortly afterwards Aristophon proposed and carried a *psephisma* renewing a Solonian *nomos* by which all *ξένοι* were debarred from keeping a shop in the agora [unless they pay a special tax, the *ξένικον*] (Dem. 57.31–34).  

5. After the return of the democrats Theozotides proposed and carried a decree providing state aid for the children orphaned by the civil war. The decree is preserved on stone and it is referred to in a fragment of a forensic speech by Lysias preserved on papyrus (P.Hib. 1 14 = Lys. fr.6 Gernet). It is apparent from both the inscription and the papyrus that it is a *psephisma*, but it is also called a *nomos* if we accept the restoration *τοὺς τῶν δήμων* νόμοις in the papyrus line 2. Again, the date of the enactment must be 403/2 or shortly afterwards.

17 The decree is probably contemporaneous with the renewal of Pericles' citizenship law which was proposed and carried by Aristophon in the archonship of Euclides (Ath. 577b).  

18 The inscription is published by R. S. Stroud, “Theozotides and the Athenian Orphans,” Hesperia 40 (1971) 280–301. The preserved part of the stele contains only the proposal about *όρφανοι*, whereas the fragment of the speech preserved on papyrus deals with two proposals: the state aid to orphans (frs. a and b) and a proposal that the *μέθος* to *ίσπειάς* be reduced from one drachma to four obols, whereas the daily allowance to *ισπουρόκτοι* be increased from two obols to eight (fr.c). Were these two proposals part of one *psephisma*, or did they belong to different *psephismata*? Stroud argues (297–98) that the proposal about *μέθος* to *ίσπειάς* is a separate *psephisma* adduced only to illustrate Theozotides' earlier ill-placed policy of retrenchment. In my opinion both proposals are *sub judice* in the *γραφή* *παρανόμων* (cf. n.44) and must accordingly have belonged to the same *psephisma*. (1) In the papyrus the fragments (a) and (b) contain the attack on the pension for orphans, whereas fragment (c) deals with *μέθος* to *ίσπειάς*. Now, Stroud is right in the observation that these fragments may belong to different parts of the speech, but the editors combine (b) and (c) on account of the writing on the verso of the papyrus. Similarly, frs. (h) and (p), which both deal with *μέθος* to *ίσπειάς*, are combined with (b) and (c), and finally, in fr. (h) *οφθαλμοι* (130) between *ίσπειές* (129) and *μεθοφροίνας* (134, cf. 137) is a strong indication that the two proposals were combined (mentioned by Stroud, but considered accidental). (2) *ένικησεν ἐν τῶν δήμων* in fr. (c) line 81 proves that Theozotides' proposal about *μέθος* to *ίσπειάς* had been carried before the trial. But, pace Stroud, the future tense in fr. (b) 29–30 does not prove that the proposal about orphans had not yet been passed by the assembly. A similar use of the future is frequently found in Demosthenes' speeches Against Leptines and Against Timocrates, which are both directed against *νόμοι* already passed by the *nomothetai* (cf. e.g. *βλάφει* in Dem. 20.28). Moreover, if the restoration proposed by Gernet/Bizos of fr. (c) 92–94 is on the right lines, the inference is that the proposal about *μέθος* to *ίσπειάς* is also under debate and accordingly belongs to the same *psephisma*. (3) As the lower part of the stele is very mutilated, it is not inconceivable that the proposal about *μέθος* to *ίσπειάς* was inscribed beneath the proposal about the orphans. Another possibility is that the *psephisma* attacked as *παράνομους* included both provisions but that the *ecclesia* decided to publish on stone only the provision relating to the orphans, which was in fact an honorary decree for their dead fathers with their names inscribed.

19 The decree is introduced with the enactment formula *έδοξεν τῇ βολή[ί καὶ τῶν δήμων]* and in the papyrus Theozotides' decree is referred to with the phrase *ταίριστην τὴν γνώμην ἐ[ἰςφέρων]... ἐνίκησεν ἐν τῶν δήμων* (cf. supra n.18 and Hansen, op.cit. [supra n.8] 45–46).

20 Stroud, op.cit. (supra n.18) 299–300.
Summing up: we have five instances of nomoi which are also psephis mata, but all five laws were probably passed immediately after the restoration of the democracy before the regular nomothesia was introduced, and so there is no exception to the rule that, in the fourth century, no decision made by the Athenians could be both a nomos and a psephisma. 21

More than one hundred nomoi are quoted or paraphrased by the orators. Usually only the contents of a nomos are discussed, but in the few passages where an orator does mention the legislative body the reference is to the nomothetai. 22 When addressing the jurors, an orator may use the second person plural about those who passed a nomos, 23 but this usage causes no surprise since the nomothetai were appointed from among the 6000 jurors, who acted both as nomothetai and as dikastai. 24 More important is the fact that the orators do not refer to

21 It has been argued (by K. M. T. Atkinson, “Athenian Legislative Procedure and Revision of Laws,” Bulletin of the John Rylands Library 23 [1939] 119, followed by R. A. de Laix, Pro bouleusis at Athens [Berkeley 1973] 57–58) that Demosthenes’ trierarchic Law of 340 was a nomos passed as a psephisma. I suggest, however, that Demosthenes’ psephisma, which was attacked through a γραφή παρανόμων, was different from the nomos itself. The problem will be discussed infra pp.327ff. The only passage in a fourth-century speech approximating an identification of nomos with psephisma is Isoc. 7.41, where the two words, however, are juxtaposed for rhetorical reasons to obtain a variatio: οὐ γὰρ τοῖς ψηφίζοις ἄλλα τοῖς ἔθεις καλῶς οἰκείσθαι τὰ πόλεις, καὶ τοῦτο μὲν κακῶς τεθραμμένοι καὶ τοῦτο ἀκριβῶς τῶν νόμων ἀναγεγραμμένοις τομήσειν παραβαίνει, τοῦτε δὲ καλῶς πεπαπειμένως καὶ τοῖς ἀπόλεις κευμένοις εἰθήσεις ἐδωρεῖ. Examples found in late sources carry no weight since we have no guarantee that the terminology is consistently applied: e.g., Lycurgus’ proposal that no woman may go in a carriage to attend the Mysteries in Eleusis is called a psephisma by Aelian in VH 13.24 but is classified among the nomoi in [Plut.] X Orat. 842a.

22 Dem. 3.10–13; 20.89–100, 137; 24.17–38; Aeschin. 3.36–40. Furthermore, two nomoi passed by the nomothetai are quoted in extenso in Dem. 24: Timocrates’ nomos about eisangelia (63) and his nomos about state debtors (39–40).

23 Dem. 42.18 ὑμεῖς δ’ ἵτε, ὃ ἀνδρες δικασται, ὑμεῖς γὰρ ἔθεθε τῶν νόμων. Cf. Lys. 6.52, 30.35, fr.268; Is. 4.17, 6.49, 9.34; Dem. 20.94; 21.11, 30, 34, 35; 24.123, 26.24, 42.15; Aeschin. 1.33, 118, 176, 177; 3.14, 158. Hyp. 3.5, 7–9.

24 Cf. D. M. MacDowell, “Law-making at Athens in the Fourth Century B.C.,” JHS 95 (1975) 62–74; M. H. Hansen, op. cit. (supra n.14). Admittedly, in courtroom speeches the second person plural is frequently used in references to decisions actually made by the demos in the ecclesia and not by the jurors (cf. M. H. Hansen, “Demos, Ecclesia and Di casterion in Classical Athens,” GRBS 19 [1978] 135–36), and so the passages cited in n.23 do not constitute a sufficient proof that nomoi were passed by the jurors and not by the people in assembly (cf. Dem. 4.33 and Prooem. 55.3). In one of the passages, however, a clear distinction is made between the legislators and the ecclesia, viz., in Aeschin. 1.178: τοῦτο μὲν νόμους τεθεῖσθαι ἐπὶ πᾶσι δικαίοις . . . ἐν δὲ ταῖς ἐκκλησίαις καὶ τοῖς δικαστηρίοις. The passage leaves no doubt that the sessions of the legislators were distinguished from those of the ecclesia and dica sterion.
the *demos* as the legislative body. It is often stated that the *demos*
decreed (ὁ δῆμος ἐφηφίσκατο), and a decree is frequently described as
τὸ τοῦ δήμου ψήφισμα. Similarly, when *nomoi* and *psephismata* are
juxtaposed, τοῦ δήμου may be added to the *psephismata* but never to
the *nomoi*. We hear about οἱ τῆς πόλεως νόμοι but never about οἱ τοῦ
δήμου νόμοι. There are only five passages in which the *demos* is referred
to as a legislator, and in three of these the reference is to a *nomos*
passed before 403/2 when *nomoi* were in fact made by the *demos*.

1. In *Ath.Pol.* 45.1 Aristotle relates how the *boule* was deprived of its
judicial powers in consequence of its miscarriage of justice in the Lysimachus
affair. The reform is described with the phrase ὁ δῆμος ... νόμον ἔθετο. Rhodes,
however, is highly suspicious of the story of Lysimachus and assumes that the
resulting *nomos* was invented by the fourth-century Athenians on the basis of
the bouleutic oath. I am less suspicious of the reform, but I agree with Rhodes
that there is no reason for dating the Lysimachus affair and the law in the fourth
century.

2. In *Hyp.* 4.3 the law forbidding any abusive language about Harmodios
and Aristogeiton is called an enactment of the people: ἐν νόμῳ γράφας [ὁ] δῆμος
ἀπείπεν ... If the law is genuine, it is undoubtedly much earlier than the
fourth century.

3. In *Dem.* 59.75 the *demos* is mentioned as the author of a law that the wife
of the *basileus* has to be an ἀστή who is a virgin until her wedding: τὸν μὲν
βασιλέα ... ὁ δῆμος ἤρειτο ... τὴν δὲ γυναῖκα αὐτοῦ νόμον ἔθεντο ἀστην ἔναι ...
In spite of the change to the plural it is reasonable to interpret the law as an
enactment of the *demos*, but in this case the *nomos* is ascribed to the period
shortly after Theseus' introduction of the democracy.

4. The fourth passage is Aeschines' famous account (3.39) of the revision of
the *thesmothetai*: τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγράφαντας
νομοθέτας, τὸν δ' ἐπιστάμεν ὅτι πρὸ ἐπεξώρυξιν διαχειρισθεῖν διδόναι τῷ δήμῳ, καὶ
τοὺς μὲν ἀναρεῖν τῶν νόμων, τοὺς δὲ καταλείπειν. A first reading of this passage
suggests that the subject to be understood with the infinitives ἀναρεῖν and
καταλείπειν is τὸν δῆμον. But most scholars have—rightly in my opinion—

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26 Din. 1.84 τῶν δημοκρίτων πείσκεθαι τοὺς νόμους καὶ τοῖς τοῦ δήμου ψηφίσματα. Cf. *Dem.*
19.179, 24.149; *Hyp.* 1.1 (the Heliastic Oath); *Dem.* 47.19, 41; 50.3; Din. 1.101, 3.21.
27 Lys. 1.26, 29, 50; 14.15, 15.6, 22.5; *Dem.* 46.27; Aeschin. 1.18; *Dem.* 3.4. τοῦ νόμου τοῦτον
(1893) 595–96.
29 op.cit. (supra n.3) 184. The Lysimachus affair is assigned to the period before 403 by
objected either that τῷ δῆμῳ is a gloss\textsuperscript{30} or that we must assume a change of subject so that “the accusative to be understood as the subject of ἀναπρεῖν and καταλείπειν is not τῶν δημον but τοὺς νομοθέτας.”\textsuperscript{31} Both interpretations rest upon the correct assumption that Aeschines indicates an opposition between the \textit{demos} (who appoint the \textit{nomothetai}) and the \textit{nomothetai} (who legislate).

5. So we are left with one passage which is in conflict with the general pattern that the \textit{demos} never legislates. In the speech \textit{Against Neaera} 88ff Apollodorus paraphrases and discusses the citizenship law as revised ca 370, and he opens his discussion with a high-flown reference to the Athenian people as the maker of the law: ὁ γὰρ δῆμος ὁ Ἀθηναῖων κυριώτατος ἃν τῶν ἐν τῇ πόλει ἀπάντων, καὶ ἐξὸν αὐτῷ ποιεῖν ὅ τι ἄν βούληται, οὕτω καλὸν καὶ εὐμνὸν ἡγήσατ' εἶναι δώρον τῷ Ἀθηναίῳ γενέθαι, ὡτε νόμους ἑθεον αὐτῷ καθ' οὗς ποιεῖθαι δεὶ, εάν τινα βούλωνται, πολίτην. This unique passage allows of three possible interpretations: (a) \textit{demos} denotes the \textit{ecclesia}, in which case we have one example of the \textit{ecclesia} having passed a \textit{nomos} in the fourth century; (b) \textit{demos} denotes the \textit{nomothetai}, in which case we have one example of the \textit{nomothetai} being loosely referred to as the \textit{demos}; (c) ὁ δῆμος ὁ Ἀθηναῖων denotes the Athenian (democratic) state,\textsuperscript{32} and Apollodorus refers neither to the \textit{ecclesia} nor to the \textit{nomothetai}. I prefer (c) because Apollodorus in this passage discusses the citizenship law and makes a distinction between the Athenians (who bestow the honour) and citizens of other states (who apply for Athenian citizenship). (a) is in my opinion most unlikely, but (b) is a possibility that cannot be ruled out.

The conclusion is that \textit{nomoi} = \textit{psephismata} in the fifth century were passed by the \textit{demos} in the \textit{ecclesia}. After the restoration of the democracy in 403/2 \textit{nomoi} were separated from \textit{psephismata}, the legislative powers were transferred to the \textit{nomothetai}, and henceforth the \textit{ecclesia} passed only \textit{psephismata}. Moreover, when \textit{psephismata} are introduced with the formula ἔδοξε τῷ δήμῳ and \textit{nomoi} with the formula δεδοξαί τοῖς νομοθέταις, the reasonable inference is that the \textit{demos} did no longer pass any \textit{nomos}. This is the unanimous testimony of the epigraphical evidence. The literary evidence conforms to the inscriptions, and I have found only one passage, Dem. 59.88, which may be interpreted as an example of the fifth-century notion of the \textit{demos} as legislator being carried on in the fourth century. Scholars who wish to maintain


\textsuperscript{31} MacDowell, \textit{op.cit.} (supra n.24) 71.

\textsuperscript{32} Cf. Hansen, \textit{op.cit.} (supra n.24) 130 with n.12.
that nomoi were still made by the demos in fourth-century Athens must cling to this passage from the Neaera speech. It is the only source that can be adduced in support of the assumption that the demos was still thought of as the legislative body. All other sources give evidence to the contrary.

II

At the restoration of the democracy in 403/2 the Athenians passed a nomos prescribing that a psephisma must never override a nomos: ψηφίσμα δὲ μηδὲν μὴτε βουλής μητε δήμου νόμου κυριώτερον εἶναι. The law is read out to the jurors in Andocides’ speech On the Mysteries 87, and it is frequently quoted in later speeches either in this form (Dem. 23.87, 218; 24.30; Hyp. 5.22) or in the slightly varying form that psephismata must accord with nomoi: τὰ ψηφίσματα δὲν κατὰ τοὺς νόμους ὁμολογεῖται γράφειν. In Dem. 22.5 the provision is interpreted as a prohibition against any psephisma which is not expressly warranted by a nomos, but this is undoubtedly an overstatement. That psephismata must accord with nomoi can only mean that a psephisma must never be in conflict with a nomos (παρὰ τοὺς νόμους, παράνομον).

The basic principle that nomoi superseded psephismata had a double legal effect. (a) If a new nomos was in conflict with previous psephismata, the psephismata were automatically null and void. (b) If a new psephisma was in conflict with any of the nomoi in force, the psephisma must be indicted as unconstitutional and rescinded by the court through a γραφὴ παρανόμων.

(a) It is indeed astonishing that a psephisma was automatically repealed if it was in conflict with a new nomos, but the conclusion seems inevitable. In 356/5 Leptines proposed and carried a new nomos abolishing any form of ateleia. The nomos was indicted as unconstitutional by a γραφὴ νόμου μὴ ἐπιτήδειον θεῖαν, and in his speech Against Leptines (20.44) Demosthenes argues that the law is detrimental to the Athenian people because all previous grants of ateleia—even to meritorious people—will automatically be repealed: καὶ θεωρεῖτ’, ὡς ἄνδρες Ἀθηναῖοι, ἀνα ψηφίσματ’ ἀκυρα ποιεῖ ὁ νόμος, καὶ ὅσους ἀνθρώπους

38 c.g. Harrison, op.cit. (supra n.3) 27.
39 Dem. 23.86, 20.92; cf. Dem. 22.43 etc.
40 ἐγὼ δ’ αὐτὸ τούναυτὸν οἴομαι, νομίζω δὲ καὶ ὑμῖν συνδόξει, περὶ τούτων ἀλ’ τὰ προβουλεύματ’ ἐκφέρειν μόνων περὶ ὁν κελέουσιν οἱ νόμοι, ἐπεὶ περὶ ὁν γε μὴ κεῖται νόμοι οὐδὲ γράφειν τὴν ἀρχήν προσκεῖται οὐδὲ ἐν τῇ δήσῃ.
Now Demosthenes is not always a reliable interpreter of the law, but his assertion in the Leptines speech is confirmed by a much more important source, viz. the recently discovered law on silver coinage. The last provision of this nomos passed by the nomothetai reads as follows: ει δε τι ψήφισμα γέγραπται πο ἐστήλη πα[ρὰ τ]όν νόμον, καθελέτω ὁ γραμματεύς τῆς βολ[ῆς]. So the γραμματεύς τῆς βουλῆς is empowered by an enactment of the nomothetai to go through all psephismata and on his own authority to delete those psephismata which are in conflict with the new nomos.

(b) A new psephisma conflicting with a nomos must be rescinded, but in this case no official was authorised to cancel the psephisma automatically. The decree must be overruled through a γραφή παρανόμων initiated by a private citizen and heard by a dicasterion. The procedure was introduced with a ὑπωμοσία, and the psephisma was suspended during the period between the ὑπωμοσία and the hearing of the case. A ὑπωμοσία might be lodged either before or after the passing of the psephisma, but if the psephisma had been passed by the ecclesia it was valid as long as no citizen had initiated a γραφή παρανόμων by a ὑπωμοσία, no matter whether it was unconstitutional or not. For a detailed account of the γραφή παρανόμων I refer to my previous study (supra n.8).

III

According to Arist. Ath.Pol. 59.2 the Athenians had two different types of indictment against unconstitutional enactments, viz. the γραφή παρανόμων and the γραφή νόμων μὴ ἐπιτήδειον θείαι. Whereas the γραφή παρανόμων is attested from 415, there is no unquestionable reference to the γραφή νόμων μὴ ἐπιτήδειον θείαι earlier than the trial of Eudemus of Cydatheneum in the archonship of Euandrus 382/1 (Dem. 24.138), and the most important piece of information about the institution is the law quoted in Demosthenes' speech Against Timocrates 33: NOMOS: εάν δὲ τις λύσει τὶν ὁ νόμων τῶν κειμένων ἔτερον ἀντιθητὴ μὴ ἐπιτήδειον τῷ δήμῳ τῶν Ἀθηναίων ἢ ἐναντίον τῶν κειμένων τῷ, τὰς γραφὰς ἐλθείς κατ᾽ αὐτὸν κατὰ τὸν νόμον δὲ κεῖται εάν τις μὴ ἐπιτήδειον θῆ νόμον. So the terminus ante quem is 383, and I accept the

traditional view proposed by Kahrstedt and supported by Wolff that the γραφὴ νόμον μὴ ἐπιτήδειον θεύναι was instituted in connection with the restoration of the democracy in 403/2. In the following I will discuss the relationship between the two different types of indictment and argue in favour of Kahrstedt's view that a γραφὴ παρανόμων, after 403/2, could be brought only against psephismata, whereas a public action against an unconstitutional nomos had to take the form of a γραφὴ νόμον μὴ ἐπιτήδειον θεύναι. Kahrstedt, however, did not collect and discuss the sources, and his argument was weakened by his belief that the γραφὴ νόμον μὴ ἐπιτήδειον θεύναι was "eine in Klageform eingeführte Nomothese ausserhalb des Termins." Because of these shortcomings his view has not been generally accepted and needs a full discussion of the evidence.

In the sources relating to the fourth century there are twenty-seven examples of a γραφὴ παρανόμων against a psephisma, and moreover when the γραφὴ παρανόμων is mentioned as a type of public action without reference to any particular case the orator always assumes that the enactment indicted is a psephisma. Similarly, we have evidence of four γραφαὶ νόμον μὴ ἐπιτήδειον θεύναι against nomoi in addition to the general reference in the law quoted in Dem. 24.33. On the other hand, we have not a single unquestionable instance of a γραφὴ νόμον μὴ ἐπιτήδειον θεύναι brought against a psephisma or of a γραφὴ παρανόμων brought against a nomos. Three public actions of the fourth century have been described by modern scholars as γραφαὶ παρανόμων against nomoi, but in all three cases the classification is based on a misinterpretation of the sources. The γραφαὶ in question are the indictment against Theozotides' law about state aid to orphans

38 op. cit. (supra n.3) 24.
41 Hansen, op. cit. (supra n.8) Catalogue nos. 4 (Arist. Ath.Pol. 40.2); 7 (Dem. 20.84); 8 (Dem. 1.16); 11 (Dem. 7.42); 12 (Dem. 22.8); 13 (Dem. 24.14); 14 (Dem. 23.2); 15 (Dem. 59.91); 16 (Dem. 59.91); 17 (Aesch. 2.14); 18 (Dem. 59.4); 21 (Dem. 58.37); 22 (Dem. 58.36–37); 23 (Dem. 58.30); 24 (Dem. 58.35); 26 (Dem. 18.222); 27 (Lycurg. 1.41); 28 (Hyp. fr.80); 29 (Dem. 23 hyp. 1); 30 (Aesch. 3.49); 31 (Polyeuctus fr. 1); 32 (Hyp. 4.4); 34 (Hyp. fr.xxii, 125–27); 35 (Hyp. 3.15); 36 (Lycurg. fr.91); 38 (Ael. VH 5.12; Din. 1.94); 39 (Hyp. fr.150). The reference to the catalogue is to a full description of the γραφὴ παρανόμων in question; the reference in brackets is to the source proving that the enactment indicted is a psephisma.
42 Aesch. 3.191–92; 194; Lycurg. 1.7; Din. 1.101.
43 Dem. 24.138 (two examples); Dem. 20 passim; Aesch. 1.34.
(Lys. fr.6 Gernet/Bizos), the indictment against Timocrates’ law about state debtors (Dem. 24) and the indictment against Demosthenes’ trierarchic law (Dem. 18.102–07).

(a) The public action against Theozotides’ decree providing state aid for orphans was—hesitantly—classified by Wolff as a γραφὴ νόμον μὴ ἐπιτήδειον θείναι, but his discussion of the problem was superseded by the rediscovery and republication of a stele inscribed with the decree. The date of the decree and the action against the decree can now be fixed to the period shortly after the democratic restoration, and furthermore there can be no doubt that Theozotides’ proposal was a psephisma. It relates, however, to permanent general rules which in the fourth century ought to be passed as a νομος, and in the speech preserved on papyrus it is probably referred to as a νομος. The conclusion seems to be that it was proposed and carried before the introduction of the distinction between νομοι and psephismata. But the γραφὴ νόμον μὴ ἐπιτήδειον θείναι was probably instituted in consequence of the new distinction between νομοι and psephismata, and so the public action brought against the decree must be a γραφὴ παρανόμων of the old type to be used against both permanent and temporary enactments of the ecclesia.

(b) It is often assumed that Demosthenes’ speech Against Timocrates was delivered in connection with a γραφὴ παρανόμων, although the indictment was brought against a νομος. But if we accept that the documents inserted in the speech are genuine and complete in their preserved form, we must follow Kahrstedt and Wolff in classifying the public action as a γραφὴ νόμον μὴ ἐπιτήδειον θείναι. Demosthenes opens his argumentation (17) with a reference to the law warranting the type of action resorted to. The relevant law is quoted in 33, and here only the γραφὴ νόμον μὴ ἐπιτήδειον θείναι is mentioned, not the γραφὴ παρανόμων.

(c) In 340/39 Demosthenes proposed and carried a new trierarchic law. In the sources it is consistently called a νομος, and its enactment

44 op.cit. (supra n.39) 31 n.78. Cf. Gernet/Bizos in the Budé edition. Stroud, op.cit. (supra n.18) 297 n.49, wavers between a γραφὴ παρανόμων and a προβολή. In addition to the line of argument in the fragments, the word πραράνομα in fr. (i) 150 indicates that the type of public action is a γραφὴ παρανόμων and not a προβολή.
45 Supra p.320 with nn.18 and 19.
46 Most recently by H. Wankel, Demosthenes, Rede für Ktesiphon über den Kranz I (Heidelberg 1976) 561.
47 Kahrstedt, op.cit. (supra n.3) 24; Wolff, op.cit. (supra n.39) 31ff.
is described with the verb νομοθετεῖν.⁴⁸ So it was probably a decision made by the nomothetai. Admittedly, Dinarchus states that the proposal was discussed at several meetings of the ecclesia,⁴⁹ but we know from Dem. 20.94 that a bill had to be read out to the assembly and discussed by the people before it was referred to the nomothetai. Demosthenes relates (18.103) that his proposal was indicted as unconstitutional but upheld by the court: καὶ γραφεῖ τὸν ἀγώνα τοῦτον εἰς ὅμοιος εἰς ἀνάφηλον καὶ ἀπέφυγον. Which type of public action was brought against Demosthenes’ proposal? The answer is to be found in the phrase τὸν ἀγώνα τοῦτον, where the pronoun τοῦτον cannot refer back to the previous section since the trial has not been mentioned earlier. So τὸν ἀγώνα τοῦτον must mean ‘this process’ = ‘such a process as the one in question’ = a γραφὴ παρανόμων, since Demosthenes makes the statement in his speech On the Crown, which was delivered in a γραφὴ παρανόμων.⁵⁰ The inference seems to be both that Demosthenes’ trierarchic law was a nomos passed by the nomothetai and that the indictment brought against Demosthenes was a γραφὴ παρανόμων; but this must not be taken to mean that a γραφὴ παρανόμων was brought against a nomos, for in 18.105 Demosthenes refers to τὸ ψήφισμα καθ’ ὅ εἰς ἀνάφηλον τὴν γραφὴν. So the γραφὴ παρανόμων is connected with a psephisma, but a psephisma about what?

τὸ ψήφισμα καθ’ ὅ εἰς ἀνάφηλον τὴν γραφὴν means “the decree according to which I was committed for trial,” but it cannot signify a psephisma warranting the action because—in contrast to the procedure in an eisangelia—no psephisma had to be passed in connection with a γραφὴ παρανόμων or a γραφὴ νόμον μὴ ἐπιτηδείου θείην. Nor are we allowed to assume that the psephisma is identical with Demosthenes’ trierarchic law.⁵¹ The law is consistently referred to as a nomos, and moreover there is no other example in any other source of a fourth-
century nomos being described as a psephisma. The clue to the problem is rather that any nomos passed by the nomothetai presupposed a psephisma passed by the ecclesia and ordering the appointment of nomothetai. The psephisma by which the trierarchic law was referred to the nomothetai was probably proposed and carried by Demosthenes himself, and so the public action brought against Demosthenes can be interpreted as a γραφὴ παρανόμων against the psephisma instructing the nomothetai to hear the nomos and take a vote on it. As a possible parallel to this I can refer to the trial of Timocrates. As I have argued above, the trial is a γραφὴ νόμον μὴ ἐπιτήδειον θείναι brought against a nomos passed by the nomothetai. But Timocrates’ nomos was proposed and carried in accordance with Epicrates’ psephisma that nomothetai be appointed on 12 Hecatombaion for the purpose of passing nomoi about the Panathenaea. Epicrates’ psephisma, however, was itself παράνομον and so the prosecutor must have had a choice between bringing a γραφὴ παρανόμων against Epicrates’ psephisma and a γραφὴ νόμον μὴ ἐπιτήδειον θείναι against Timocrates’ nomos, which he preferred to do.

Summing up: since the Athenians had two forms of indictment against unconstitutional proposals, there must have been a difference between them. The only demonstrable difference is that the γραφὴ νόμον μὴ ἐπιτήδειον θείναι was reserved for indictments against nomoi, whereas the γραφὴ παρανόμων could be employed only against psephismata. On the other hand, a γραφὴ παρανόμων could be brought against any psephisma and not only—as usually assumed—against a psephisma which was παράνομον either in form (by some infringement of the procedure) or in content (by being in conflict with some specific nomos).

IV

The examination of the formal differences between nomos and psephisma in fourth-century Athens has led to the following conclusions: in 403/2 or shortly afterwards a distinction between nomos

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52 Dem. 3.10–13, 24.20–23; Aeschin. 3.38–39.
54 Dem. 24.30 γράφατι καὶ θείναι νόμον ὧμιν κατὰ ψήφισμα, ὃ καὶ αὐτὸ παρὰ τοὺς νόμους εἰρημένον ἤδει.
and *psephisma* was instituted, and henceforth no enactment of the Athenians was both a *nomos* and a *psephisma*. *Psephismata* were passed by the *demos* in the *ecclesia*, *nomoi* by the *nomothetai*. There is no example of a *nomos* passed by the *demos* or of a *psephisma* passed by the *nomothetai*. *Nomoi* superseded *psephismata* and *psephismata* must accord with the *nomoi* in force. The distinction between *nomoi* and *psephismata* was reflected in the administration of justice. The γραφὴ παρανόμων was reformed and a new type of public action was introduced. After the reform the γραφὴ παρανόμων applied only to *psephismata*, whereas an unconstitutional *nomos* had to be indicted through a γραφὴ νόμων μὴ ἐπιτήδειον θείαι.\(^{56}\)

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