

Nomos and Psephisma in Fourth-Century Athens

Mogens Herman Hansen

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 Heliastic oath *ψηφιοῦμαι κατὰ τοὺς νόμους καὶ τὰ ψηφίσματα τοῦ δήμου τοῦ Ἀθηναίων καὶ τῆς βουλῆς τῶν πεντακοσίων*,¹ and similarly an orator always uses the phrase *οἱ νόμοι καὶ τὰ 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, ὧ ἄνδρες δικασταί, νόμοις καὶ ψηφίσμασιν διοικεῖται*, and a few other quotations from the orators may serve as illustrations of this common practice: *πόθ' οὗτος ἢ διὰ ψηφίσματος ἢ νόμου ἐπηνώρθωσε τὸ ἵππικόν;* (Din. 1.96); *τί γὰρ ἂν καὶ ἀντέλεγον αὐτῷ ψηφίσματα καὶ νόμους παρεχομένῳ, ὡς προσῆκεν ἐμὲ εἰσπράξει τὰ κκεύη;* (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 Heliastic 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 τὰ 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.³ 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.⁴

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*.⁵ 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 οἱ ἀσεβήσαντες καὶ ὁμολογήσαντες 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 νόμος ἐν τῷ ψηφίσματι (Dem. 59.106). Furthermore, in Aristophanes' *Birds* 1035ff the ψηφισματοπώλης 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 καίτοι τί διαφέρουσιν ἡμῶν ἐκείνοι, πλὴν γ' ὅτι

³ G. Busolt, *Griechische Staatskunde* I (München 1920) 458. U. Kahrstedt, "Untersuchungen zu athenischen Behörden II, Die Nomotheten und die Legislative in Athen," *Klio* 31 (1938) 12–18. A. R. W. Harrison, "Law-making at Athens at the End of the Fifth Century B.C.," *JHS* 75 (1955) 27. V. Ehrenberg, *The Greek State* (Oxford 1960) 57. M. Ostwald, *Nomos and the Beginnings of the Athenian Democracy* (Oxford 1969) 2. F. Quass, *Nomos und Psephisma* (München 1971) 71. J. de Romilly, *La loi dans la pensée grecque* (Paris 1971) 209. P. J. Rhodes, *The Athenian Boule* (Oxford 1972) 50–52.

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 νόμοι 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.

⁵ Cf. K. J. Dover, "Anapsephisis in Fifth-century Athens," *JHS* 75 (1955) 18, and Quass, *op.cit.* (*supra* n.3) 23–24.

ψηφίσματα οὐ γράφουσιν; (1428–29). 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 *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι*. 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 νόμον μὴ ἐπιτήδειον θεῖναι*, whereas a public action against an unconstitutional *psephisma* must be brought as a *γραφὴ παρανόμων*. (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.

I

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*⁶ in addition to six *nomoi* passed by the

⁶ I have counted 482 different *ψηφίσματα τοῦ δήμου* preserved on stone. My investigation is based on IG II² *Decreta Senatus et Populi* 1–370 and 403–48 with the following omissions, additions and corrections: I have excluded decrees of the council (IG II² 6, 12, 13, 32, 49, 50, 58, 63, 77, 95, 157, 361; on IG II² 16 and 18 cf. Rhodes, *op.cit.* [*supra* n.3] 83–84), *nomoi* passed by the *nomothetai* (IG II² 140, 244, 333), decrees of the people which, because of later research or the discovery of a new fragment, have been redated and assigned either to the fifth century (IG II² 3, 27, 38, 48, 50, 55, 71, 73, 142, 174) or to the Hellenistic period (IG II² 169, 350, 358), fragments of decrees joining another fragment but published separately (IG II² 178, 259, 261, 318–19, 441, 442, 445), decrees which are only a second copy of another preserved decree (IG II² 35, 155, 217) and a dedication(?) which has wrongly been classified as a decree (IG II² 165). Conversely, some decrees considered Hellenistic by Kirchner have afterwards been assigned to the period 403–322 and are accordingly included in my investigation (IG II² 336b, 452, 454, 511, 541, 547, 548, 660, 727, 800), and two decrees published among the

nomothetai.⁷ The discrepancy between the number of preserved *nomoi* and *psephismata* is a problem which I have discussed in a previous study.⁸ 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 ἔδοξε τῷ δήμῳ or ἔδοξε τῇ βουλῇ καὶ τῷ δήμῳ⁹ is invariably referred to as a *psephisma*, e.g. in the publication-formula ἀναγράψαι τόδε τὸ ψήφισμα τὸν γραμματέα¹⁰ or in the motion-formula ἐψηφίσθαι τῷ δήμῳ.¹¹ Similarly an enactment of the *nomothetai* is invariably a *nomos*.¹² 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.¹³ There is no direct evidence of the term applied to such a decision. I have argued¹⁴ that the *psephisma* by the ratification of the *nomothetai* became a νόμος ἐπ' ἀνδρί, and I shall return to the problem in my future study of the Athenian legislation.

Tabulae Magistratum ought to have been recorded among the *decreta populi* as well (IG II² 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 II² *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) 267–68 (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; XXI 241, 272; Syll.³ 129, 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).

⁷ *Hesperia* 43 (1974) 157–88, Law on silver coinage (375/4). IG II² 140, Law on Eleusinian first-fruits (353/2). IG II² 244, Law on the rebuilding of the walls (337/6). SEG XII 87, Law against tyranny (337/6). SEG XVIII 13 (+ IG II² 334), Law on the Panathenaea (336–334). IG II² 333, Law about some offerings (335/4).

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 II² iv.1 index, “*Sermo publicus*” s.v. ἀναγράψαι ψήφισμα καὶ κτῆσαι, 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 II² 222, Honorary decree for Pisithides of Delos (344/3); IG II² 330, Honorary decree for Phyleus of Oinoe (335/4); Syll.³ 298, Honorary decree for the *epimeletai* of the *Amphiaraiion* (329/8).

¹⁴ “Athenian *Nomothesia* in the Fourth Century B.C. and Demosthenes’ Speech Against *Leptines*,” paper delivered in Chantilly, June 1977, to be published in the *Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte*.

(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,¹⁵ 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 ἐψηφίσασθε ἀπ' Εὐκλείδου ἄρχοντος χρῆσθαι) 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 ἀδύνατοι 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*. . . ἡ πόλις ἡμῶν ἐψηφίσαστο τοῦτο τὸ ἀργύριον. The *psephisma* must be dated 403/2 or shortly afterwards.¹⁶ 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*.

¹⁵ 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 Baier 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 *ψηφισμα*, 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: ὁ δῆμος ἐψηφίσαστο, ὑμεῖς ἐψηφίσασθε (in addresses either to the *ecclesia* or to the *dicasterion*), οἱ Ἀθηναῖοι ἐψηφίσαστο, 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 δεῖνα γράψαι κτλ. (when it is sufficiently clear from the context that the proposal was made in the assembly), τοῦ δήμου προετάξαντος, τοῦ δήμου δόντος etc.

¹⁶ Every kind of *μισθοφορία* 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 ξενικόν] (Dem. 57.31–34).¹⁷

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.* I 14 = Lys. fr.6 Gernet).¹⁸ 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 τού[τωι τῶ]ι νόμ[ωι in the papyrus line 2.¹⁹ Again, the date of the enactment must be 403/2 or shortly afterwards.²⁰

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 ὀρφανοί, 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 μισθός to ἱππεῖς be reduced from one drachma to four obols, whereas the daily allowance to ἵπποτοξόται 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 μισθός to ἱππεῖς is a separate *psephisma* adduced only to illustrate Theozotides' earlier ill-placed policy of retrenchment. In my opinion both proposals are *sub iudice* 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 μισθός to ἱππεῖς. 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 μισθός to ἱππεῖς, are combined with (b) and (c), and finally, in fr. (h) ο]ρφαν (130) between ι]ππευς (129) and μισθ[οφοριαν (134, cf. 137) is a strong indication that the two proposals were combined (mentioned by Stroud, but considered accidental). (2) ἐνίκησε[ν ἐν τῶι δ]ήμωι in fr. (c) line 81 proves that Theozotides' proposal about μισθός to ἱππεῖς 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 *nomoi* already passed by the *nomothetai* (cf. e.g. βλάψει 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 μισθός to ἱππεῖς 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 μισθός to ἱππεῖς was inscribed beneath the proposal about the orphans. Another possibility is that the *psephisma* attacked as παράνομον 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 ἔδοξεν τῇ βολῆ[ι καὶ τῶι δ]ήμωι and in the papyrus Theozotides' decree is referred to with the phrase τ[αύ]την τῆγ γνώμηγ ἐ[ί]σφ[ε]ρων]. . . ἐνίκησε[ν ἐν τῶι δ]ήμωι (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 *psephismata*, 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, *Probouleusis 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 *γραφὴ 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 ψηφίσμασιν ἀλλὰ τοῖς ἤθεσι καλῶς οἰκεῖσθαι τὰς πόλεις, καὶ τοὺς μὲν κακῶς τετραμμένους καὶ τοὺς ἀκριβῶς τῶν νόμων ἀναγεγραμμένους τολμήσειν παραβαίνειν, τοὺς δὲ καλῶς πεπαιδευμένους καὶ τοῖς ἄπλῶς κειμένοις ἐθελήσειν ἐμμένειν. 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' ἴστε, ὦ ἄνδρες δικασταί, ὑμεῖς γὰρ ἔθεσθε τὸν νόμον. 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 Dicasterion 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: τοὺς μὲν νόμους τίθεσθε 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 *dicasterion*.

the *demos* as the legislative body. It is often stated that the *demos* decreed (ὁ δῆμος ἐψηφίσατο), and a decree is frequently described as τὸ τοῦ δήμου ψήφισμα.²⁵ Similarly, when *nomoi* and *psephismata* are juxtaposed, τοῦ δήμου may be added to the *psephismata*²⁶ but never to the *nomoi*. We hear about οἱ τῆς πόλεως νόμοι²⁷ 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.²⁸ 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.²⁹

2. In *Hyp.* 4.3 the law forbidding any abusive language about Harmodios and Aristogeiton is called an enactment of the people: ἐν νόμῳ γράψας [ὁ] δῆμος ἀπέειπεν . . . 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 ἀκτή who is a virgin until her wedding: τὸν μὲν βασιλέα . . . ὁ δῆμος ἤρεϊτο . . . τὴν δὲ γυναικα αὐτοῦ νόμον ἔθεντο ἀκτὴν εἶναι . . . 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 laws by the *thesmothetai*: τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγράψαντας νομοθέτας, τὸν δ' ἐπιστάτην τῶν προέδρων διαχειροτονίαν διδόναι τῷ δήμῳ, καὶ τοὺς μὲν ἀναιρεῖν τῶν νόμων, τοὺς δὲ καταλείπειν. A first reading of this passage suggests that the subject to be understood with the infinitives ἀναιρεῖν and καταλείπειν is τὸν δήμον. But most scholars have—rightly in my opinion—

²⁵ Cf. Hansen, *op.cit.* (*supra* n.24) 131 with nn.15 and 16.

²⁶ *Din.* 1.84 τῶν ὁμωμοκότων πείσεσθαι τοῖς νόμοις καὶ τοῖς τοῦ δήμου ψηφίσμασι. 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; *Din.* 3.4. τὸν νόμον τοῦτον ἢ πόλις γέγραφε, *Dem.* 18.120. Cf. *Dem.* 24.94, 137.

²⁸ *op.cit.* (*supra* n.3) 207. Cf. H. Swoboda, "Über den Process des Perikles," *Hermes* 28 (1893) 595–96.

²⁹ *op.cit.* (*supra* n.3) 184. The Lysimachus affair is assigned to the period before 403 by H. Francotte, "Loi et décret," *Mélanges de droit public grec* (Paris 1910) 19.

objected either that τῷ δήμῳ is a gloss³⁰ or that we must assume a change of subject so that “the accusative to be understood as the subject of ἀναιρεῖν and καταλείπειν is not τὸν δῆμον but τοὺς νομοθέτας.”³¹ Both interpretations rest upon the correct assumption that Aeschines indicates an opposition between the *demos* (who appoint the *nomothetai*) and the *nomothetai* (who legislate).

5. So we are left with one passage which is in conflict with the general pattern that the *demos* never legislates. In the speech *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 Ἀθηναίων κυριώτατος ἂν τῶν ἐν τῇ πόλει ἀπάντων, καὶ ἐξὸν αὐτῷ ποιεῖν ὅ τι ἂν βούληται, οὕτω καλὸν καὶ σεμνὸν ἡγήσατ' εἶναι δῶρον τὸ Ἀθηναῖον γενέσθαι, ὥστε νόμους ἔθετο αὐτῷ καθ' οὓς ποιεῖσθαι δεῖ, εἴαν τινα βούλωνται, πολίτην. This unique passage allows of three possible interpretations: (a) *demos* denotes the *ecclesia*, in which case we have one example of the *ecclesia* having passed a *nomos* in the fourth century; (b) *demos* denotes the *nomothetai*, in which case we have one example of the *nomothetai* being loosely referred to as the *demos*; (c) ὁ δῆμος ὁ Ἀθηναίων denotes the Athenian (democratic) state,³² and Apollodorus refers neither to the *ecclesia* nor to the *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 *nomoi* = *psephismata* in the fifth century were passed by the *demos* in the *ecclesia*. After the restoration of the democracy in 403/2 *nomoi* were separated from *psephismata*, the legislative powers were transferred to the *nomothetai*, and henceforth the *ecclesia* passed only *psephismata*. Moreover, when *psephismata* are introduced with the formula ἔδοξε τῷ δήμῳ and *nomoi* with the formula δεδόχθαι τοῖς νομοθέταις, the reasonable inference is that the *demos* did no longer pass any *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 *demos* as legislator being carried on in the fourth century. Scholars who wish to maintain

³⁰ R. Schöll, “Über attische Gesetzgebung,” *SBLepz.* (1886) 117, followed by Blass in the Teubner edition.

³¹ MacDowell, *op.cit.* (*supra* n.24) 71.

³² Cf. Hansen, *op.cit.* (*supra* n.24) 130 with n.12.

that *nomoi* were still made by the *demos* in fourth-century Athens³³ 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*: ψήφισμα δὲ μηδὲν μήτε βουλῆς μήτε 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 δεῖν κατὰ τοὺς νόμους ὁμολογεῖται γράφειν.³⁴ In Dem. 22.5 the provision is interpreted as a prohibition against any *psephisma* which is not expressly warranted by a *nomos*,³⁵ 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 νόμον μὴ ἐπιτήδειον θεῖναι*, 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', ὦ ἄνδρες Ἀθηναῖοι, ὅσα ψηφίσματ' ἄκυρα ποιεῖ ὁ νόμος, καὶ ὅσους ἀνθρώπους

³³ e.g. Harrison, *op.cit.* (*supra* n.3) 27.

³⁴ Dem. 23.86, 20.92; cf. Dem. 22.43 etc.

³⁵ ἐγὼ δ' αὐτὸ τούναντίον οἶομαι, νομίζω δὲ καὶ ὑμῖν συνδόξειν, περὶ τούτων <δεῖν> τὰ προβουλευμάτων' ἐκφέρειν μόνων περὶ ὧν κελεύουσιν οἱ νόμοι, ἐπεὶ περὶ ὧν γε μὴ κείνται νόμοι οὐδὲ γράφειν τὴν ἀρχὴν προσήκει οὐδὲ ἐν δήπῳ.

ἀδικεῖ. 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: εἰ δέ τι ψήφισμα γέγραπται πο ἐστήληι πα[ρὰ τ]όνδε τὸν νόμον, καθελέτω ὁ γραμματεὺς τῆς βολ[ῆς].³⁶ So the *γραμματεὺς 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 *γραφὴ 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 *γραφὴ παρανόμων* by a *ὑπωμοσία*, no matter whether it was unconstitutional or not. For a detailed account of the *γραφὴ 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 *γραφὴ παρανόμων* and the *γραφὴ νόμον μὴ ἐπιτήδειον θείναι*. Whereas the *γραφὴ παρανόμων* is attested from 415,³⁷ there is no unquestionable reference to the *γραφὴ νόμον μὴ ἐπιτήδειον θείναι* earlier than the trial of Eudemus of Cydathenaeum 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: ΝΟΜΟΣ· εἰ δέ τις λύσας τινὰ τῶν νόμων τῶν κειμένων ἕτερον ἀντιθῆ μὴ ἐπιτήδειον τῷ δήμῳ τῷ Ἀθηναίων ἢ ἐναντίον τῶν κειμένων τῶν, τὰς γραφὰς εἶναι κατ' αὐτοῦ κατὰ τὸν νόμον ὃς κείται εἰάν τις μὴ ἐπιτήδειον θῆ νόμον. So the *terminus ante quem* is 383, and I accept the

³⁶ Ed. R. S. Stroud, "An Athenian Law on Silver Coinage," *Hesperia* 43 (1974) 157–88; cf. 159 lines 55–56 and the commentary 184–85.

³⁷ Leogoras' *γραφὴ παρανόμων* against Speusippus (Andoc. 1.17 and 22). Cf. Hansen, *op.cit.* (*supra* n.8) 28, Catalogue no. 1.

traditional view proposed by Kahrstedt³⁸ and supported by Wolff³⁹ that the *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι* 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 θεῖναι*. Kahrstedt, however, did not collect and discuss the sources, and his argument was weakened by his belief that the *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι* was "eine in Klageform eingebrachte Nomothese ausserhalb des Termins."⁴⁰ 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*,⁴¹ 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*.⁴² Similarly, we have evidence of four *γραφαὶ νόμον μὴ ἐπιτήδειον θεῖναι* against *nomoi*⁴³ 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 θεῖναι* 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.

³⁹ H. J. Wolff, 'Normenkontrolle' und Gesetzesbegriff in der attischen Demokratie, SBHeidelb. 1970, 41.

⁴⁰ *op.cit.* (*supra* n.3) 25. Criticized by Wolff, *op.cit.* (*supra* n.39) 36–40.

⁴¹ Hansen, *op.cit.* (*supra* n.8) Catalogue nos. 4 (Arist. *Ath.Pol.* 40.2); 7 (Dem. 20.84); 8 (Din. 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 (Aeschin. 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. 25 hyp. 1); 30 (Aeschin. 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 Aeschin. 3.191–92, 194; Lycurg. 1.7; Din. 1.101.

⁴³ Dem. 24.138 (two examples); Dem. 20 *passim*; Aeschin. 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—hesitatingly—classified by Wolff as a *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι*,⁴⁴ 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 *nomos*, and in the speech preserved on papyrus it is probably referred to as a *nomos*.⁴⁵ The conclusion seems to be that it was proposed and carried before the introduction of the distinction between *nomoi* and *psephismata*. But the *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι* was probably instituted in consequence of the new distinction between *nomoi* 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 *nomos*.⁴⁶ 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 θεῖναι*.⁴⁷ 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 θεῖναι* 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 *nomos*, 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 *π]αράνομα* 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 γραφεῖς τὸν ἀγῶνα τοῦτον εἰς ὑμᾶς εἰσῆλθον καὶ ἀπέφυγον*. Which type of public action was brought against Demosthenes' proposal? The answer is to be found in the phrase *τὸν ἀγῶνα τοῦτον*, where the pronoun *τοῦτον* cannot refer back to the previous section since the trial has not been mentioned earlier. So *τὸν ἀγῶνα 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' ὃ εἰσῆλθον τὴν γραφήν*. So the *γραφὴ παρανόμων* is connected with a *psephisma*, but a *psephisma* about what?

τὸ ψήφισμα καθ' ὃ εἰσῆλθον τὴν γραφήν 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 ἐπιτήδειον θεῖναι*. 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-

⁴⁸ *νόμος* Dem. 18.102–07 (seven occurrences), 312; Din. 1.42; Hyp. fr.160. *νομοθετεῖν* Aeschin. 3.222.

⁴⁹ Din. 1.42. Cf. Hansen, *op.cit.* (*supra* n.14) and "ΟΙ ΠΡΟΕΔΡΟΙ ΤΩΝ ΝΟΜΟΘΕΤΩΝ. A Note on IG II² 222, 41–52," *ZPE* 30 (1978) 156.

⁵⁰ Cf. Hansen, *op.cit.* (*supra* n.8) 45, and H. Weil, *Les plaidoyers politiques de Démosthène I* (Paris 1883) 470. *παρανόμων* after *τοῦτον* (*add. vulg.: om. S L F*) is correctly omitted by most editors as a gloss, but in my opinion it reflects a correct interpretation of the passage. So the type of public action must be a *γραφὴ παρανόμων*, *pace* Wolff, *op.cit.* (*supra* n.39) 39 n.102, who classifies the trial as a *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι*.

⁵¹ The position of Atkinson and de Laix, *cf. supra* n.21.

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*.⁵² 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 θεῖναι* 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.⁵³ Epicrates' *psephisma*, however, was itself *παράνομον*⁵⁴ and so the prosecutor must have had a choice between bringing a *γραφὴ παρανόμων* against Epicrates' *psephisma* and a *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι* 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 θεῖναι* 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*).⁵⁵

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*

⁵² Dem. 3.10–13, 24.20–23; Aeschin. 3.38–39.

⁵³ Dem. 24.27. Cf. Hansen, *op.cit.* (*supra* n.49) 154–57.

⁵⁴ Dem. 24.30 *γράψαι καὶ θεῖναι νόμον ὑμῖν κατὰ ψήφισμα, ὃ καὶ αὐτὸ παρὰ τοὺς νόμους εἰρημένον ἦδει.*

⁵⁵ Cf. Hansen, *op.cit.* (*supra* n.24) 145 n.40.

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 νόμον μὴ ἐπιτήδειον θεῖναι*.⁵⁶

UNIVERSITY OF COPENHAGEN

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