

LAW-MAKING AT ATHENS IN THE FOURTH CENTURY B.C.

It is now twenty years since A. R. W. Harrison remarked in this *Journal* 'For students of Athenian private and public law it is a painful, but undeniable fact that there is still grave uncertainty as to the precise methods by which statutes, one of the most important sources of law, were made at the most formative period of the history of the system from the middle of the fifth century B.C. onwards.'¹ His own article is entitled 'Law-making at Athens at the end of the fifth century B.C.' and is concerned primarily with establishing that an important change was made in or soon after the year 403/2. That was the date at which a new procedure for making laws (nomoi) was introduced, which Harrison calls 'the fourth-century procedure of nomothesia', involving officials called νομοθέται. Before then there was no procedural difference between making a nomos and making a psephisma. References to nomothetai in texts before 403 are irrelevant.² In 403 the decree of Teisamenos laid down a procedure for review and amendment of laws, involving two distinct bodies of nomothetai;³ but that was a procedure for one particular occasion. The regular procedure was instituted shortly afterwards, and was to some extent modelled on the procedure of the Teisamenos decree.

These conclusions about the end of the fifth century are now generally accepted. But it remains a fact, no less painful than in 1955, that there is uncertainty about the methods by which nomoi were made and amended in the subsequent period, from the beginning of the fourth century to the time of Demosthenes and Aiskhines: what exactly was 'the fourth-century procedure of nomothesia'? Two recent books have included some brief but helpful comments on it, and a third includes a more general survey of it,⁴ but no one has attempted to explain it in detail since Harrison wrote his article. In the present article I attempt to continue from the point where he left off.

I am here concerned only with the making of laws (nomoi), not with the making of decrees (psephismata). Apart from a few references to nomothetai in inscriptions, the evidence consists of a number of passages in Demosthenes and Aiskhines, including the first three of the legal documents preserved in the text of Demosthenes's speech *Against Timokrates*.⁵ The documents in that speech are now generally accepted as genuine, and I so accept them here. The correct approach to such texts is never to reject them out of hand, but to try to explain them. Only if they cannot be reconciled with other evidence should they be dismissed as forgeries; and in fact the *Timokrates* documents fit into our picture of nomothesia satisfactorily. Nevertheless, the picture is in my view more complex than has generally been assumed. It is not the case that our texts all refer to one and the same procedure which we may call 'the fourth-century procedure of nomothesia'. They reveal several distinct procedures which were used for different purposes or at different periods, and previous discussions of the subject have gone astray when they have tried to force all the evidence into one account of a single law-making procedure in use throughout the century.

My discussion is therefore based on the texts themselves rather than on other scholars' interpretations, to which I refer only occasionally. For readers wishing to investigate other

¹ *JHS* lxxv (1955) 26.

² Th. viii 97.2 refers to an occasion when the democratic constitution was not in force. In *IG* i² 63 (Meiggs and Lewis no. 69) line 16 the restoration is dubious.

³ And. i.83-4; for a view of this decree cf. MacDowell, *Andokides: On the Mysteries* (1962) 194-9.

⁴ F. Quass, *Nomos und Psephisma* (1971) 68-72;

P. J. Rhodes, *The Athenian Boule* (1972) 50-2; R. A. de Laix, *Probouleusis at Athens* (1973) 52-68.

⁵ For the sake of brevity I assume here that Demosthenes is the author of *Against Timokrates*. How much of the composition was actually due to Demosthenes and how much to Diodoros is a question which does not affect the problems discussed in this article.

views, I list in a footnote some of the most important works (to which I refer later by author's name without title).⁶

A. EPIGRAPHICAL EVIDENCE

The fourth-century inscriptions mentioning nomothetai and their proceedings are of two kinds only.

A1. There are four instances of the formula *δεδοχθαι τοῖς νομοθέταις* introducing a law: *IG* ii² 140.7–8 and 244.6, *SEG* xii 87.6–7 and xviii 13.7. In a fifth case, *IG* ii² 333.13, though the part of the inscription where *δεδοχθαι τοῖς νομοθέταις* may have stood is not preserved, part of the prescript of the law is restored as *νομο[θετῶν ἔδρα]*.

Does this mean that the nomothetai's decision about a law was final, or was it subject to ratification by the *ekklesia*? In the analogous case of decrees, a decision by the *boule* subsequently ratified by the *ekklesia* (a probouleumatic decree) is regularly inscribed with the formula *ἔδοξεν τῇ βουλῇ καὶ τῶι δήμῳ*, or with a probouleumatic formula indicating that the *boule*'s resolution is to be submitted to the *δῆμος*, or with both; the formula *ἔδοξεν τῇ βουλῇ* or *δεδοχθαι τῇ βουλῇ* with no reference to the *δῆμος* is used only for decrees of the *boule* not ratified by the *ekklesia*.⁷ It is reasonable to infer that the same is true of the formula *δεδοχθαι τοῖς νομοθέταις*, and that a law made by nomothetai was not subsequently ratified by the *ekklesia*.

Each of these five laws is dated within the period 353–334. The time of year varies: *IG* ii² 333.13 has the date Skirophorion 6; *SEG* xii 87 belongs to the ninth prytany; in *IG* ii² 140 the prytany must be either the fifth or the seventh or the tenth. This evidence shows that sessions of nomothetai were not confined to any one time of year.

A2. There are three decrees in which the *ekklesia* gives orders for a proposal for additional legislation to be put before nomothetai: *IG* ii² 222.41–6, 330.18–23, vii 4254.39–40.

In one of these texts the officials who are to put the proposal to the nomothetai are denoted a few lines later by the words *οἱ [πρ]όεδροι καὶ [ὁ ἐπιστά]της τῶν νομοθετῶν* (*IG* ii² 222.49–50), from which it seems right to infer that the nomothetai were presided over by their own proedroi and epistates, not by the proedroi and epistates of the *boule* and *ekklesia*.⁸

The last of the three, *IG* vii 4254.39–40 (dated to the third prytany of 329/8), uses the expression *ἐν τοῖς πρώτοις νομοθέταις*, 'at the next nomothetai'. These words indicate that a minor addition to a law does not justify convening nomothetai specially to consider it; it can wait until the next occasion when there is a meeting of nomothetai anyway. This means that nomothetai meet reasonably often, but it does not necessarily mean that their dates of meeting are fixed and the same every year.

B. THE OLD LEGISLATION LAW (DEMOSTHENES 20.89–99)

In the speech *Against Leptines* in 355/4 Demosthenes refers to an old (*παλαιός*) law, which he attributes to Solon, laying down a procedure for *νομοθετεῖν*. He calls for the law to be

⁶ R. Schöll, 'Über attische Gesetzgebung' (*Sitzungsberichte der Akademie der Wissenschaften zu München* [1886] 83–139); H. Francotte, *Mélanges de droit public grec* (1910) 5–7; U. Kahrstedt, 'Untersuchungen zu athenischen Behörden, II: Die Nomotheten und die Legislative in Athen' (*Klio* xxxi [1938] 1–32); K. M. T. Atkinson, 'Athenian legislative procedure and revision of laws' (*Bulletin of*

the John Rylands Library xxiii [1939] 107–50); F. Wotke *Nomothetai* (Pauly-Wissowa, *Real-Encyclopädie* Supp. vii [1940] 578–81). Quass, Rhodes, and de Laix are listed in n. 4 above.

⁷ Cf. Rhodes, *The Athenian Boule* Tables C and G.

⁸ So Rhodes 28. The opposite view is taken by Kahrstedt 3 n.2 and Atkinson 125 n.2.

read out, but its text is not preserved and we can only partially reconstruct it from his comments. In 93-4, immediately after the reading of the law, he draws attention to three features of it which he regards as particularly significant.

B1. The decision about a new law is made at a session of 'you who have taken the oath': *παρ' ὑμῖν, ἐν τοῖς ὁμωμοκόσιν, παρ' οἷσπερ καὶ τὰλλα κυροῦται.*

Demosthenes is addressing a jury; the oath meant is the one taken at the beginning of each year by all those on the list of jurors for the year. Just before, in 92, Demosthenes refers to *οἱ πρότερον νομοθέται*, the nomothetai under the old law. We can put the two phrases together and say that under the Old Legislation Law the nomothetai are jurors. The use of *κυροῦται* indicates that in their capacity of nomothetai, as in their capacity of jurors in trials, their decision is final and is not subject to appeal or confirmation.

B2. The procedure involves repealing any existing law which is contrary to a new one being made (*λύοντα τοὺς ἐναντίους*).

This feature is also mentioned a little earlier, in 89: *γράφεσθαι μὲν, ἂν τίς τινα τῶν ὑπαρχόντων νόμων μὴ καλῶς ἔχειν ἠγγῆται, παρεισφέρειν δ' αὐτὸν ἄλλον, ὃν ἂν τιθῆ λύων ἐκεῖνον*: anyone who thinks an existing law unsatisfactory is to *γράφεσθαι* and introduce another to replace it. But what is meant by *γράφεσθαι* (and by *γραψάμενος* in a similar context in 96)? It has sometimes been taken to mean that the proposer of a new law has to prosecute the existing law, the one which his proposal is to replace, by the process of *γραφῆ*.⁹ Two facts can be adduced in support of that interpretation. One is that in another law (D3 below) the ekklesia appoints men to speak in defence of laws whose repeal is proposed. The second is that a *γραφῆ νόμον μὴ ἐπιτήδειον θείναι*, when the time-limit of one year for prosecuting the proposer of a new law had expired, could still be used for attacking the law itself, and in fact this is just what Demosthenes does in his speech *Against Leptines*.¹⁰ These facts show that one cannot rule out as absurd the notion that a law might be prosecuted by *γραφῆ*. Nevertheless I do not think that the use of the word *γράφεσθαι* in Dem. 20.89 and 96 need mean that the formal procedure for proposing the repeal of a law was identical with the procedure for prosecution of a man for an offence. The verb in the middle voice can be used of getting an item put down on the written agenda for a meeting (*cf.* Dem. 24.48 *πρόσδοον γράψασθαι πρὸς τὴν βουλὴν*, 'to get his admission to a hearing before the boule put on its agenda'). So *νόμον γράψεσθαι* may mean no more than getting a law put down for formal consideration of its repeal, and the verb cannot be relied on to give us any further information about the procedure by which repeal was carried out.

B3. The proposer has to exhibit his proposal in advance in front of the statues of the eponymous heroes of the tribes, and also to give a copy to the secretary to read out at meetings of the ekklesia: *καὶ πρὸ τούτων γ' ἐπέταξεν ἐκθεῖναι πρόσθε τῶν ἐπωνύμων καὶ τῶ γραμματεῖ παραδοῦναι, τοῦτον δ' ἐν ταῖς ἐκκλησίαις ἀναγιγνώσκειν, ἕκαστος ὑμῶν ἀκούσας πολλάκις . . .*

It is interesting that the proposal has to be read out at more than one meeting of the ekklesia. The correctness of the reading *ἐκκλησίαις* is confirmed by *πολλάκις*. The law must surely have specified a particular number of meetings, and Dobree's suggestion that *ταῖς* should be emended to *τρισὶν* may well be right.

B4. A little later in the speech (99) Demosthenes refers again to 'the old law' and says that, according to the procedure which it prescribes, the vote against an existing law (such as the law of Leptines in the present case) makes valid the new law proposed as a substitute for it: *τῇ ὑμετέρᾳ ψήφῳ τοῦ τούτου <= Λεπτινίου> νόμου λυθέντος τὸν παρεισενεχθέντα κύριον εἶναι σαφῶς ὁ παλαιὸς κελεύει νόμος*. This means that, when the proposal comes before the nomothetai, they do not vote twice (first for or against the existing law, secondly

⁹ This is an important, but in my view mistaken, part of Mrs Atkinson's reconstruction of the system; *cf.* pp. 115-19 of her article, and Gomme's criticism

of it in *CR* liv (1940) 38.

¹⁰ Dem. 20.144. The period of one year is given only in the second hypothesis to the speech, §3.

for or against the new proposal) but only once, choosing between the existing law and the proposed substitute.

The next words of Demosthenes are puzzling: . . . ὁ παλαιὸς κελεύει νόμος, καθ' ὃν οἱ θεσμοθέται τοῦτον ὑμῖν παρέγραψαν. The thesmothetai are the officials presiding over the trial of the γραφή νόμον μὴ ἐπιτήδειον θεῖναι, for which the speech *Against Leptines* is composed, and I suspect that Demosthenes is trying to make his hearers think that the Old Legislation Law applied to such γραφαί when in fact it did not. He himself shows little confidence in his own argument at this point (. . . εἰδὼ, ἵνα μὴ περὶ τούτου τις ἀντιλέγη μοι). So I prefer not to infer anything from these words about the Old Legislation Law.

Even though we cannot reconstruct the Old Legislation Law completely, a fairly clear outline emerges of the procedure which it laid down. Anyone wishing to propose a new law has to submit his proposal in writing; he must also propose the repeal of any existing law with which his new one conflicts. He must exhibit his proposal in public, and it is also read out at meetings of the ekklesia. Finally a decision about it is taken at a meeting of nomothetai; the nomothetai are men from the list of jurors for the current year.

During what period was the Old Legislation Law in force? Demosthenes attributes it to Solon; in a fourth-century speech that is most likely to mean that it was among the laws inscribed on stone at the Stoa Basileios at the end of the fifth century. Accepting Harrison's view that a regular procedure involving nomothetai was first introduced in or very soon after 403/2, I think that the Old Legislation Law is the law by which that innovation was made. By the date of *Against Leptines* (355/4) it had been obsolete for a considerable time, for Demosthenes does not himself remember the occasion when a change was made (91 ὡς ἐγὼ πυνθάνομαι). I should suppose that it was annulled before 370.

C. THE NEW LEGISLATION LAW (DEMOSTHENES 20.91)

What then replaced the Old Legislation Law? Demosthenes tendentiously describes the change as follows: ἐπειδὴ δὲ τῶν πολιτευομένων τινὲς δυνήθεντες, ὡς ἐγὼ πυνθάνομαι, κατεσκεύασαν αὐτοῖς ἐξεῖναι νομοθετεῖν, ὅταν τις βούληται καὶ ὃν ἂν τύχη τρόπον, τοσοῦτοι μὲν οἱ ἐναντίοι σφίσιν αὐτοῖς εἰσι νόμοι, ὥστε χειροτονεῖθ' ὑμεῖς τοὺς διαλέξοντας τοὺς ἐναντίους ἐπὶ πάμπολυν ἤδη χρόνον, καὶ τὸ πράγμα οὐδὲν μᾶλλον δύναται πέρασ ἔχειν. Certain powerful politicians procured for themselves permission to legislate at any time anyone wished, and in any way; as a result, so many contradictory laws have been made that the Athenians have now for a long time been appointing men to sort out the contradictions, an interminable task.

When due allowance is made for exaggeration, it still seems to me that the following inferences are reasonably secure.

C1. When the Old Legislation Law was repealed, it was replaced by a new law about law-making.

C2. Under the New Legislation Law there are still nomothetai (for otherwise Demosthenes would not use the expression οἱ πρότερον νομοθέται in 92 for the nomothetai under the Old Legislation Law, but merely οἱ νομοθέται). But, since Demosthenes makes a point of remarking that under the Old Legislation Law the nomothetai were jurors (B1), we may infer that under the New Legislation Law they no longer have to be jurors.

C3. Under the New Legislation Law the procedure for making new laws is simpler (though there must of course be *some* procedural requirements: ὃν ἂν τύχη τρόπον cannot be taken literally). In particular, it involves fewer checks on whether a proposed new law conflicts with an existing one. This presumably means that two features of the Old Legislation Law to which Demosthenes draws special attention no longer exist in the New Legislation Law: the specific requirement to repeal an old law which is contrary to a new one

being made (B₂), and the requirement to exhibit the proposal in public and have it read out at meetings of the ekklesia (B₃).

C₄. There is also a relaxation of previous requirements about the times at which new laws may be made. Although Demosthenes's words *ὅταν τις βούληται* could be an exaggeration, probably it is now permitted to make new laws at any time of year. From the implied contrast it appears that the Old Legislation Law imposed some limitations on the times when new laws could be made.

C₅. Starting at some date later than the institution of the New Legislation Law, but several years before 355/4, the ekklesia has been electing commissioners to inspect the existing laws for contradictions.

One can see from this that the Athenians had difficulty in finding an acceptable compromise between facility and control of legislation. At the end of the fifth century strict controls were imposed (the Old Legislation Law); some years later the controls were found irksome and they were largely relaxed (the New Legislation Law); some years later again, the lack of control was found to have given rise to inconsistencies and steps had to be taken to remove them (C₅).

D. THE REVIEW LAW (DEMOSTHENES 24.20-3)

The first of the documents inserted in *Against Timokrates*, a speech composed probably in 354/3,¹¹ is entitled *ἐπιχειροτομία νόμων* and lays down a procedure for review of the laws.¹² The document contains a considerable number of clauses and Demosthenes therefore calls it *νόμοι*, in the plural, though in English it is more convenient to call it 'a law'. The clauses do not give the stages of procedure in strict chronological order; they are rearranged in chronological order in the following list.

D₁. When the ekklesia meets on the eleventh day of the first prytany, the first business, after the opening prayer, is to be voting on the laws (*ἐπιχειροτομίαν ποιῆν τῶν νόμων*).

It has generally been assumed from this that it was the rule for the ekklesia to hold its first meeting of the year on the eleventh day of the first prytany. That seems likely enough, though I do not know of any other clear evidence for it.¹³

D₂. The questions are put in the following order:

- (a) Are the *νόμοι βουλευτικοί* satisfactory, or not?
- (b) Are the *νόμοι κοινοί* satisfactory, or not?
- (c) Are the laws for the nine arkhons satisfactory, or not?
- (d) Are the laws of the other officials satisfactory, or not?

Since there is no evidence or probability that any laws were immune from this annual review, the four groups listed must be exhaustive; every law falls into one or other of them. The reason for dividing the laws into four groups is just convenience. To vote on each law individually every year would take up too much of the ekklesia's time; to vote simply on the one question 'Are the laws satisfactory?' would be too sweeping; taking them in four gulps is a compromise. The four groups no doubt correspond to the order in which the official texts of the laws are arranged (as inscribed on stone at the Stoa Basileios, or as written on papyrus in the state archives in the Metroon, or both), and the arrangement is according to the officials responsible for seeing that the various laws are obeyed.¹⁴ The code of laws is

¹¹ The date 353/2 is given by Dion. Hal. *Amm.* 1.4, and this is regarded as acceptable by R. Sealey (*REG* lxxviii [1955] 110), but D. M. Lewis gives reasons for preferring 354/3 (*BSA* xlix [1954] 32).

¹² Schöll 84 compares the *ἐπιχειροτομία* of magistrates at the *κυρία ἐκκλησία* of each prytany (*Dem.* 58.27, *Arist. Ath. Pol.* 43.4, 61.2).

¹³ Schöll 85 refers to a dissertation of 1880 by A. Reusch entitled *De diebus contionum ordinarium apud Athenienses*, which I have not seen.

¹⁴ This is in the reinscription carried out in the years 410-403. It is not evidence for the arrangement of the laws before that; so I need not discuss here how Solon arranged his laws.

the magistrates' rule-book. Thus group (c) includes all laws about offences for which any of the nine arkhons is responsible for holding trials, as well as laws about their other duties. Likewise group (d) includes, for example, laws about desertion from military service, because the strategoi hold trials for that offence. Group (b) includes laws common to all *ἀρχαί*: an example would be the law *ἀγράφῳ δὲ νόμῳ τὰς ἀρχὰς μὴ χρῆσθαι μηδὲ περὶ ἐνός* (And. 1.85). Group (a) includes the matters for which the prytaneis (and in the fourth century the proedroi) are responsible, the proceedings in the boule and ekklesia; the Review Law itself is an example. Perhaps laws about the Areopagos are also in group (a); more likely they are in group (c) because the basileus presides over it.

D3. If the ekklesia votes that all four groups of laws are satisfactory, that is the end of the matter. But if it votes that any of the four groups is not satisfactory, it elects five men to speak in defence of those laws: *αἰρεῖσθαι δὲ καὶ τοὺς συναπολογησομένους τὸν δῆμον τοῖς νόμοις, οἳ ἂν ἐν τοῖς νομοθέταις λύωνται, πέντε ἄνδρας ἐξ Ἀθηναίων ἀπάντων, τῇ ἑνδεκάτῃ τοῦ Ἑκατομβαιῶνος μηνός.*

This is the last sentence of our document, strangely separated from the rest of the provisions about procedure at the meeting on the eleventh day of the first prytany. But the date at the end shows that it does refer to the same meeting; at this period the arkhon-year and the boule-year coincided, so that the eleventh day of the first prytany was always the eleventh of Hekatombaion. The reason why the sentence is at the end of the document could be that it is a later addition.¹⁵

Demosthenes refers to these five advocates a little later as *τοὺς συνηγόρους, οὓς χειροτονεῖτε* (Dem. 24.36), which shows that they are elected by show of hands.¹⁶

D4. Any Athenian who wishes to propose a new law has to write it on a whitened board and exhibit it in front of the statues of the eponymous heroes of the ten tribes every day until the day on which the ekklesia meets: *πρὸ δὲ τῆς ἐκκλησίας ὁ βουλούμενος Ἀθηναίων ἐκτιθέτω πρόσθεν τῶν ἐπωνύμων γράψας τοὺς νόμους οὓς ἂν τιθῆ . . . ὁ δὲ τιθεὶς τὸν καινὸν νόμον ἀναγράφας εἰς λεύκωμα ἐκτιθέτω πρόσθεν τῶν ἐπωνύμων ὁσημέραι, ἕως ἂν <ῆ> ἐκκλησία γένηται.* The meeting of the ekklesia mentioned here is not the one on the eleventh day of the first prytany, but the later one (D5) with which the immediately preceding sentences of the document are concerned.

This provision seems carelessly drafted. The second sentence to some extent repeats the content of the first, but with some apparently pointless variations of wording, e.g. from the plural *τοὺς νόμους* to the singular *τὸν καινὸν νόμον*. And the proposer of a new law is told to exhibit it every day until the ekklesia meets, but he is not told how soon the exhibition must begin. It looks to me possible that the second sentence is a late addition to the law, made after some occasion when the proposer of a new law, after putting it in front of the *ἐπωνύμοι*, took it away again before everyone had had time to see it; thus the significant words in this sentence are the last ones (*ὁσημέραι, ἕως . . .*).

D5. The matter then comes up for consideration again at the last of the three meetings of the ekklesia (*τῇ τελευταίαν τῶν τριῶν ἐκκλησιῶν*), and severe penalties are prescribed for the prytaneis and the proedroi if they fail to bring it forward. The first business of the meeting, after the opening religious ceremony, is consideration of the arrangements for the session of the nomothetai, and of where their pay is to come from (*περὶ τῶν νομοθετῶν, καθ'*

¹⁵ Schöll 108 prefers to delete *τῇ ἑνδεκάτῃ τοῦ Ἑκατομβαιῶνος μηνός* from the text; then the election of the five advocates takes place at the later meeting. That seems a more sensible procedure, and it may be right; but, if so, it is not clear how the five spurious words got into the text at this point.

¹⁶ Schöll 109, Wotke 579, and others take the

σύνδικοι in Dem. 20.146 to be an instance of this type of *συνήγοροι*, but Atkinson 110 n.2 rightly rejects this view. Those *σύνδικοι* are taking part in a *γραφῆ νόμον μὴ ἐπιτήδειον θεῖναι*, tried by a jury, not in proceedings before nomothetai following *ἐπιχειροτονία νόμων*.

ὅ τι καθεδοῦνται, καὶ περὶ τοῦ ἀργυρίου, ὁπόθεν τοῖς νομοθέταις ἔσται). The nomothetai are to be some of the current year's jurors (ἐκ τῶν ὁμωμοκότων τὸν ἡλιαστικὸν ὄρκον).

'The last of the three' perhaps means the third meeting after the one mentioned earlier.¹⁷ More difficult to understand are the details about the nomothetai. The nomothetai are to be jurors (as in B1), but it is remarkable that the text does not say how many nomothetai there are to be, nor how they are to be selected from the complete list of jurors for the year. Presumably it is taken for granted that the method of selection will be the same as is used for selecting a jury for a trial, namely lot. But the number of nomothetai required can hardly be taken for granted. (Juries were not all the same size.) Either a number has been lost from our text (before or after εἶναι: cf. Dem. 24.27), or else the number is one of the matters which the ekklesia has to decide under the vague heading καθ' ὅ τι καθεδοῦνται. Possibly it has to decide also the date and place at which the nomothetai are to meet, and a sentence later in the law indicates that it sets a time-limit for them to complete their task (ὅπως ἂν πρὸς τὸ πλῆθος τῶν ἐκτεθέντων νόμων ψηφίσῃται ὁ δῆμος περὶ τοῦ χρόνου τοῖς νομοθέταις). The vagueness about these matters makes it all the more remarkable that the ekklesia's responsibility for decision about the source of money for paying them is mentioned so specifically. One might have expected them to receive the normal jurors' pay, from its normal source, without the need to make any *ad hoc* arrangement. Why this is not so can only be conjectured. One possible conjecture, I suggest, is that this procedure was introduced at a date when it could not be taken for granted that enough money was in fact available for normal jurors' pay; the years 403–1 seem to have been such a period, when the hearing of private cases had to be suspended for a time.¹⁸

It is also noticeable that the document says nothing about what the nomothetai are to do when they meet, or about the validity of any decisions which they reach about the proposed legal changes. It is essentially a law about procedure in the ekklesia; for the activities of the nomothetai one is expected to look elsewhere.

What relationship does this Review Law bear to the Old Legislation Law and the New Legislation Law? Several parts of it are the same as provisions of the Old Legislation Law which were not included in the New Legislation Law: the requirement that the nomothetai should be jurors (B1); the requirement to exhibit a proposed new law in front of the ἐπώνυμοι (B3); the stipulation of a particular time of year at which the procedure is to be followed (cf. C4). But that does not mean that the Review Law is the Old Legislation Law. The two cannot be identical, for two reasons. First, the Old Legislation Law was annulled by about 370, whereas the Review Law was still in force in 354/3. Secondly, they have different functions: the Old Legislation Law is essentially a law about making new laws, even though this does sometimes involve repealing an old one; the Review Law is essentially a law about reviewing existing laws, even though this sometimes leads to making a new one.

I suggest that the Old Legislation Law and the Review Law are contemporary and complementary.¹⁹ After the review and inscription of laws ordered by the decree of Teisamenos in 403/2, the Athenians set up a regular procedure for scrutinising proposals for new laws (the Old Legislation Law) and for scrutinising the existing laws to see if they required amendments (the Review Law). Some details of the procedure were the same in both laws. Some, particularly those about the functioning of the nomothetai, were probably stated fully in the Old Legislation Law (which would naturally be the first of the two) and so

¹⁷ Kahrstedt 1, Atkinson 110, and de Laix 60 take it as the third meeting of the year, and thus the second (or the third counting inclusively) after the one mentioned earlier.

¹⁸ Lys. 17.3, Isok. 21.7; cf. MacDowell in *Revue Internationale des Droits de l'Antiquité* xviii (1971) 267.

¹⁹ If this dating of the Review Law in 403/2 or

very soon after is correct, it has a bearing on the date of the institution of the proedroi of the boule and ekklesia, who are mentioned in it. Other evidence fails to reveal at what date between 403/2 and 378/7 they were instituted; cf. Lewis in *BSA* xlix (1954) 31–4 and Rhodes 26, including n.10.

could be taken for granted without repetition in the Review Law. At some date before 370, to make the introduction of new laws easier, the Old Legislation Law was repealed and replaced by the New Legislation Law; but the Review Law remained, probably not for any reason of deliberate policy but merely because no one took the trouble to propose any amendment or replacement. This meant that legal changes proposed under the Review Law were henceforth subject to a more complex procedure and stricter scrutiny than other proposed new laws.

This was a somewhat anomalous state of affairs; and anomalies give opportunities to a clever speech-writer like Demosthenes. After presenting the Review Law to the jury, Demosthenes next confronts them with the decree proposed by Epikrates, arranging for the session of nomothetai at which Timokrates put forward the new law which Demosthenes is attacking in this speech. The decree of Epikrates (Dem. 24.27) has a prescript dating it to the eleventh day of the first prytany, and it orders the prytaneis to convene nomothetai tomorrow (the twelfth) to make arrangements needed for the Panathenaia: the nomothetai are to be 1001 of the jurors for the year, plus the 500 members of the boule.

Now, to judge from the evidence we have, this decree is in complete conformity with the requirements of the New Legislation Law now in force. The New Legislation Law no longer requires proposals for new laws to be made at any particular time of year (C₄); it does not require a period of time to be allowed for a proposal to be exhibited in public before the nomothetai meet to consider it (C₃); and it does not require the nomothetai all to be jurors (C₂). But (or, rather, so) Demosthenes never, in *this* speech, mentions the New Legislation Law. Instead he has the Review Law read out at length, and points out that the decree of Epikrates does not conform to *that*, especially in the matter of timing. The procedural requirements of the Review Law are more stringent than those of the New Legislation Law (not for any good logical reason, but for the historical reason that it was made at an earlier period, when stricter control was favoured, and has not been modified since), and it is true that Epikrates's decree does not come up to them; but why should it? It is not concerned with amendments to the existing laws, arising out of the annual review, but with a proposal for a new law about arrangements for the Panathenaia.

Admittedly, when the nomothetai met on the twelfth, the proposed new law which Timokrates actually put forward was not about the Panathenaia at all but about a quite different matter, which Demosthenes may be justified in claiming should not have been introduced at that meeting.²⁰ But that was not a fault in the decree of Epikrates. It is only by the subterfuge of substituting the Review Law for the New Legislation Law that Demosthenes can point to illegalities in that decree. The subterfuge may have taken in some Athenian jurors; it has certainly taken in some modern scholars.

E. THE REPEAL LAW (DEMOSTHENES 24.33)

The third document in the speech *Against Timokrates* is a law about the procedure for repealing an existing law.

²⁰ The twelfth was the day of a religious festival, the Kronia (Dem. 24.26). Demosthenes says there was a law forbidding secular business on that day: νόμον κειμένον μήτ' ἰδία μήτε κοινῇ μηδέν ἀλλήλους ἀδικεῖν ἐν τούτῳ τῷ χρόνῳ, μηδὲ χρηματίζεω ὅ τι ἄλλο μὴ περὶ τῆς ἑορτῆς ἧ' (Dem. 24.29). If this is true (Demosthenes does not ask for the law to be read out to support his statement), Timokrates's proposal should not have been permitted on the day of the festival. Probably a proposal about the Panathenaia,

such as Epikrates's decree envisaged, would have been permissible, because it concerned another religious occasion. However, if τῆς ἑορτῆς is an exact quotation from the law and is interpreted strictly, it may mean that only business concerning the Kronia is permitted. In that case Epikrates's decree does infringe this law. But that does not affect the point which I make in my text above, that the decree does not infringe the New Legislation Law and does not need to conform to the Review Law.

E1. It is not permitted to repeal any of the existing laws except at a meeting of *nomothetai* (ἐν νομοθέταις). Then any Athenian who wishes is permitted to do so, if he puts forward another law to replace the one he wishes to repeal.

It is interesting that the law insists that any repealed law must be replaced by a new one. It is not envisaged that it might ever be desirable that a matter regulated by law in the past might be left unregulated in the future. But this does not mean that the converse is true, that a new law may not be made unless it replaces an old one on the same subject.²¹ The reason why the making of a new law which does not replace an old one is not mentioned here is simply that that is not what the Repeal Law is about; that is the concern of the Old and New Legislation Laws.

E2. The *proedroi* hold voting (διαχειροτονίαν) about the laws in the following order:

(a) Does the existing law seem suitable for the Athenian people, or not?

(b) Does the proposed new law seem suitable for the Athenian people, or not?

The word *διαχειροτονίαν* means, I think, that the *nomothetai* vote by show of hands like the *ekklesia*, not by *ψηφοι* like a jury, and serves to warn us not to regard a board of *nomothetai* as a jury, as some scholars have done. For, although the verb *ψηφίζεσθαι* is often used of voting which is not carried out by *ψηφοι*, I know of no instance of *χειροτονεῖν* used of voting not carried out by *χεῖρες*: this verb and its derivatives are not applied to the proceedings of juries.

As for the order of voting, we may assume that if the majority of the *nomothetai* vote in favour of the existing law under question (a), question (b) is not put at all. If the vote goes against the existing law under (a), then under (b) surely alternative proposals and amendments can be discussed and voted on in turn, until one of them receives the *nomothetai*'s approval; otherwise a negative vote to both (a) and (b) would leave the Athenians with no law at all on the matter concerned.

E3. Whichever proposal the *nomothetai* vote for is to be valid law: ὁπότερον δ' ἀν χειροτονήσωσιν οἱ νομοθέται, τοῦτον κύριον εἶναι.

The meaning of this sentence is clear: the *nomothetai*'s decision is final, and is not referred to the *ekklesia* for confirmation or rejection. This accords with the epigraphic evidence of the time of Demosthenes (A1). The Athenian people have delegated to the *nomothetai* their right of decision about the repeal and replacement of laws.²²

E4. The remaining sentences of the Repeal Law say that a new law must not be contrary to an existing law; anyone who repeals a law and replaces it by a law which is contrary to an existing law or is 'not suitable for the Athenian people' is liable to prosecution by a *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι*. I need not discuss that procedure here.²³

As a whole the Repeal Law is a clear document, parallel to the Old and New Legislation Laws in the sense that they deal with making new laws, the Repeal Law with annulling existing laws. The only problem is its date: is it contemporary with the Old Legislation Law or with the New? Its voting procedure (E2) differs from that of the Old Legislation Law (B4). And the Repeal Law does not specify that the *nomothetai* must be jurors, nor that the repeal procedure is to be carried out at any particular time of year, nor that time must be allowed for public exhibition of proposals. These omissions distinguish it from the Old Legislation Law and from the Review Law, and make it more like the New Legislation Law. So I should conjecture that the Repeal Law was made at the same date as the New Legislation Law. There is no way of telling whether there had previously been an

²¹ Quass 70 n.110 rightly rejects the views of Schöll and Francotte.

²² Mrs Atkinson's attempt to deny this is rightly rejected by Harrison in *JHS* lxxv (1955) 35 and by Rhodes 52.

²³ The best discussion now of the *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι* is that of H. J. Wolff, "Normenkontrolle" und Gesetzesbegriff in der attischen Demokratie (*Sitzungsberichte der Heidelberger Akad., Phil.-hist. Klasse*, 1970/2) 28-44.

Old Repeal Law, which was annulled at that date, or whether there was previously no procedure for repeal except such as was specified in the Old Legislation Law and the Review Law.

F. THE INSPECTION LAW (AISKHINES 3.38–9)

In 330, more than twenty years after *Against Timokrates*, we find Aiskhines in his speech *Against Ktesiphon* saying that there cannot be two valid but inconsistent laws in existence about the proclamation of crowns, because a procedure exists for eliminating such inconsistencies. He calls for the law about this procedure to be read out; the document itself is not preserved, but his summary mentions the following steps.

F1. Each year the thesmothetai are required to carry out a correction of the laws at a meeting of the ekklesia (*διορθοῦν ἐν τῷ δήμῳ τοὺς νόμους*).

Presumably the law specifies a time of year at which this has to be done, but Aiskhines does not say when it is.

F2. First the thesmothetai have to examine the inscribed laws to see whether any are inconsistent, invalid, or redundant: *ἀκριβῶς ἐξετάσαντας καὶ σκεψαμένους εἴ τις ἀναγράφεται νόμος ἐναντίος ἐτέρῳ νόμῳ, ἢ ἄκυρος ἐν τοῖς κυρίοις, ἢ εἴ που εἰσὶ νόμοι πλείους ἐνὸς ἀναγεγραμμένοι περὶ ἐκάστης πράξεως*. If they find any such, they have to write them out and exhibit them in front of the statues of the eponymous heroes of the ten tribes.

F3. *τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγράφαντας νομοθέτας*. It is not quite obvious how we should interpret these rather vague words of Aiskhines (or of the law, if he is quoting it verbatim). But the last two words should mean that the thesmothetai put nomothetai in writing on to (*ἐπι-*) some document, and the document meant must surely be the ekklesia's agenda. I take the emphasis of the sentence to be on these two words rather than the infinitive, since convening the ekklesia is a regular duty of the prytaneis which does not need to be specially ordered by the Inspection Law. So I should translate 'The prytaneis are to put "nomothetai" on the agenda when they convene a meeting of the ekklesia'.

F4. There is to be a vote of the ekklesia to decide the question, and they are to abolish some laws and retain others, to ensure that there is one and only one law on each subject: *τὸν δ' ἐπιστάτην τῶν προέδρων διαχειροτονίαν διδόναι τῷ δήμῳ, καὶ τοὺς μὲν ἀναιρεῖν τῶν νόμων, τοὺς δὲ καταλείπειν, ὅπως ἂν εἷς ἢ νόμος καὶ μὴ πλείους ἐκάστης πράξεως*.

Aiskhines's loose wording leaves two obscurities: what question is the ekklesia to decide, and who is to abolish some laws and retain others? If these two clauses are taken together, they could mean that the ekklesia is to decide which laws to abolish and which to retain. But the objection to that interpretation is that it leaves no task for nomothetai. So I think that *διαχειροτονίαν* must refer back to *νομοθέτας*, the item on the agenda mentioned in the previous clause: the ekklesia is to decide whether to appoint nomothetai or not. This decision will depend on whether the discrepancies in the laws to which the thesmothetai have drawn attention are considered by the ekklesia to be serious or not. Then the accusative to be understood as the subject of *ἀναιρεῖν* and *καταλείπειν* is not *τὸν δῆμον* but *τοὺς νομοθέτας*.

As a whole, then, the Inspection Law lays down a procedure, not for making new laws, but for detecting and eliminating faults in the existing laws: the thesmothetai inspect the laws for faults, the ekklesia decides whether the faults uncovered are serious enough to justify consideration by nomothetai, and nomothetai decide which of the faulty provisions should be annulled. The Inspection Law is not the same as the Review Law. One difference is that the Review Law does not give to the thesmothetai the duty of inspecting the laws. Another difference is that the Review Law is concerned with making new laws to replace existing laws which are unsatisfactory or inadequate, but Aiskhines is talking about

a procedure which seems to be for the purpose of deletion only. Even though Aiskhines might misinterpret a law to suit his case, and his case here requires a law about the elimination of contradictions in the laws, still his threefold classification of faults (F2) does look as if it were based on a corresponding classification in the law to which he is referring; but no such classification appears in our text of the Review Law. It is more to the point to compare the Inspection Law with the arrangement to elect commissioners to inspect the laws for contradictions arising after the institution of the New Legislation Law (C5). This arrangement does appear to have exactly the same purpose as the Inspection Law. Yet it is not the same arrangement, since those commissioners are elected by voting in the *ekklesia* (*χειροτονεῖθ' ὑμεῖς* in Dem. 20.91), whereas the *thesmothetai* are appointed by lot. Nor can it be argued that Aiskhines has made a mistake in mentioning the *thesmothetai* in this connection; Theophrastos in Book iii of his *Laws* also attributed to the *thesmothetai* the annual correction of the laws (Harp. *θεσμοθέται*).

The best explanation seems to be that the Inspection Law described by Aiskhines succeeded and replaced the earlier arrangement (C5). At first the Athenians thought that a special commission elected on one or two occasions would be sufficient to eliminate discrepancies in the laws, but when they found that the task was interminable (*τὸ πρᾶγμα οὐδὲν μᾶλλον δύναται πέρασ ἔχειν*, as Dem. 20.92 says) they substituted a permanent annual inspection by the *thesmothetai*. The change must have been made after 355/4 (the date of *Against Leptines*), but not long after; for when Aiskhines is speaking in 330 the origin of the Inspection Law is no longer remembered, and he can attribute it vaguely to 'the law-maker who founded the democracy' (*τῷ νομοθέτῃ τῷ τὴν δημοκρατίαν καταστήσαντι*).

G. OTHER LITERARY EVIDENCE

G1. The law of Timokrates quoted in Dem. 24.63 gives us another instance of the phrase *δεδοχθαι τοῖς νομοθέταις*, as in the inscriptions (A1).

G2. In another passage of *Against Leptines* Demosthenes refers to the possibility of making a new law when *nomothetai* are next appointed: *ὅταν πρῶτον γένωνται νομοθέται* (Dem. 20.137). This is much the same as *ἐν τοῖς πρώτοις νομοθέταις* in an inscription already mentioned (A2); it indicates that a meeting of *nomothetai* is not necessarily convened specially for each proposed legal change.

G3. In his *Third Olynthiac* in 349 Demosthenes introduces his suggestion that the theoric funds should be diverted to military purposes in well-known words: *νομοθέτας καθίσατε. ἐν δὲ τούτοις τοῖς νομοθέταις μὴ θῆσθε νόμον μηδένα (εἰσὶ γὰρ ὑμῖν ἱκανοί), ἀλλὰ τοὺς εἰς τὸ παρὸν βλάπτοντας ὑμᾶς λύσατε* (Dem. 3.10). This confirms that it is possible to propose to the *ekklesia* that a meeting of *nomothetai* should be convened, either to make a new law or to repeal an old one, at any time (*cf.* C4); the abrupt imperative 'Convene *nomothetai*!' would not be appropriate if there were fixed times of year at which *nomothetai* regularly met. The absence of the article with *νομοθέτας* should also be noted: not 'Convene the *nomothetai*', but 'Convene some *nomothetai*'. (It is the same in the decree of Epikrates in Dem. 24.27: *καθίσαι νομοθέτας*.) This implies that for a fresh occasion fresh *nomothetai* are appointed; it is not the case that in each year there is only one board of *nomothetai* serving for the whole year.

G4. 'Our politicians make laws nearly every month' (Dem. 24.142) is no doubt a rhetorical exaggeration, but it would not be effective rhetoric if it were not legally possible to make laws in every month of the year. This too accords with the other evidence about the New Legislation Law (C4).

G5. A final passage, which I mention only to dismiss it, is the definition of *nomothetai* given in Polydeukes viii 101: *νομοθέται δ' ἦσαν χίλιοι, οἷς ἐξῆν λύσαι νόμον παλαιόν, ἀλλ' οὐ*

θεῖναι νέον· τοὺς γὰρ νέους ἐδοκίμαζεν ἡ βουλὴ καὶ ὁ δῆμος καὶ τὰ δικαστηρία. The other evidence (A₁, B₁, E₃) makes it unlikely that new laws passed by nomothetai had then to be ratified by other bodies; and the fact that the decree of Epikrates specifies that the number of nomothetai on that occasion is to be 1001 of the jurors plus the 500 members of the boule makes it unlikely that the number of nomothetai was permanently fixed at 1000. So I think that Polydeukes has confused his information in some way, or has wrongly tried to generalize from a single instance.

CONCLUSION: THE APPOINTMENT AND PROCEEDINGS OF NOMOTHETAI

The sequence for which I have been arguing is this:

(a) In 403/2 the decree of Teisamenos ordered a review of the laws, with amendment and reinscription where necessary, to produce what was intended to be the permanent legal code henceforth.

(b) When that was completed, in 403/2 or soon after, the Old Legislation Law set up a regular procedure for careful sifting of any new laws proposed, and the Review Law provided for annual consideration whether the existing laws were adequate. Under both these laws the final decision was taken by nomothetai, who were some of the year's jurors.

(c) Some years later (not later than about 370) the procedure of the Old Legislation Law came to be considered irksome, making the proposal of new laws too difficult. So it was replaced by the New Legislation Law, which specified a simpler procedure for making new laws. Perhaps at the same time, the Repeal Law specified a similar procedure for annulling existing laws. Final decisions were still taken by nomothetai, but it was no longer a rule that they must be jurors.

(d) The simplification of the procedure and the reduction of checks on proposed laws led to the passing of some new laws which contradicted or overlapped with old ones. To remedy this, the Athenians at first (several years before 355/4) elected commissioners on a temporary basis to sort out the discrepancies, and later (after 355/4, but not long after) passed the Inspection Law making it a duty of the thesmothetai each year to inspect the laws for inconsistencies and other faults, which the ekklesia would, if it thought them serious, refer to nomothetai.

If this sequence, or something like it, is accepted, it becomes clear that it is unsatisfactory to speak of 'the fourth-century procedure of nomothesia'. Different laws specified different procedures for different purposes at different periods. But perhaps the one which is of interest to most readers is the procedure for making new laws in the time of Demosthenes. This was the subject of what I have called the New Legislation Law; and a serious mistake, as I see it, made by a number of scholars, has been the assumption that information about this procedure is to be found in the text of the Review Law. From this it has been supposed that all new legislation was dealt with by one board of nomothetai who must be jurors, appointed in the first prytany for the whole year. But in fact, if my interpretation of the evidence is correct, under the New Legislation Law the ekklesia could appoint a board of nomothetai whenever it liked, deciding at the time how many there were to be and whether they were to be jurors or other persons; the decree of Epikrates is an example.

How did nomothetai proceed when they met? There is some evidence in the Repeal Law and in the inscriptions belonging to the time of the New Legislation Law. There a meeting of nomothetai is conducted by their proedroi and epistates (A₂, E₂). We can take for granted that the citizen proposing to make a new law or repeal an old one speaks in favour of his proposal, and that anyone opposed to it can speak against it. Then the nomothetai vote by show of hands (E₂, E₃), and their decision is final (A₁, E₃). But there may have been a different procedure earlier in the century. Under the Review Law five men are appointed

by the ekklesia to speak in defence of laws whose repeal is proposed (D3). This provision is absent from the Repeal Law. Thus it seems possible that under the earlier laws (the Old Legislation Law and the Review Law) the procedure at meetings of nomothetai had refinements which were omitted from the later laws. This would be in accord with our general impression that after the turmoil of 403 the Athenians at first wanted to make it difficult for themselves to introduce changes in the laws, but later found that the restrictions and complexities were excessive. Law-making must not be too easy, but it must not be too difficult either.

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Postscript. An instance of ἔδοξε τοῖς νομοθέταις has now come to light, introducing a law on silver coinage (published by R. S. Stroud in *Hesperia* xliii [1974] 157–88). Its date is 375/4, which makes it earlier than the instances of δεδόχθαι τοῖς νομοθέταις (A1); but it has the same meaning, and it does not affect my argument and conclusion.