CHAPTER 15

Laws against Laws: the Athenian Ideology of Legislation

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Introduction

A seminal moment of the heated debate on the reconstruction of Athenian fourth-century nomothesia was the publication in 1975 of MacDowell’s ‘Law-Making at Athens in the Fourth Century B.C.’. MacDowell analysed systematically all the extant evidence and proposed an articulation of fourth-century nomothesia in separate procedures all in turn supplemented at various points throughout the fourth century. His conclusions have not ultimately withstood scrutiny, but his focus on reconstructing precisely the relevant procedures and institutions has been upheld in later studies by Hansen, Rhodes, Piérart and myself. Among MacDowell’s contentions, one that was immediately, and rightly, criticised by Hansen and Rhodes is that the statements at Dem. 20.91–92 describe a New Legislation Law that replaced an Old one: Demosthenes states that as long as the Athenians observed the original Solonian laws on nomothesia they did not enact new laws, but when powerful politicians made it possible for themselves to pass laws whenever and however they wanted, contradictions started arising among the laws, and laws no longer differed from decrees, and often were more recent than the decrees. Diodoros at Dem. 24.142 makes similar remarks and complains that rhētores legislate almost every month, repeal the laws of Solon and replace them with their own.

Both Hansen and Rhodes pointed out that these passages, rather than describing a specific law, blame malpractices and procedural infractions that are allegedly current when politicians without scruples enact new legislation. In Rhodes’ words, ‘Lept. and Tim. are only two years apart, and the irregular-

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1 MacDowell 1975. Before MacDowell, particularly influential works were Schöll 1886, Kahrstedt 1938, Atkinson 1939.


ities which Demosthenes alleges in them are very similar. Both Leptines and Timokrates ‘failed to comply with a palaios nomos which requires action at a specified time, advance publicity for the new proposal, and concurrent repeal of any law with which the new proposal conflicts’. Moreover, the claims made in these passages (Dem. 20.91–92; 24.142) are exaggerated and largely unjustified: Demosthenes claims that with the old law on legislation the Athenians did not enact new laws, yet we have epigraphical evidence of laws enacted before 355. He claims that clever politicians enact laws whenever and however they want, yet Leptines’ law had in fact been enacted by the nomothetai according to the palaios nomos, as Demosthenes admits at 20.94, and Leptines’ law was repealed at the trial, which is evidence that if the appropriate procedure was not followed, the infractions were later sanctioned in court.

As for the charges found in these passages (Dem. 20.91–92; 24.142) that nomoi are indistinguishable from psēphismata, and that the Athenians legislated too much, Hansen has convincingly shown that the distinction (procedural and substantive) between laws and decrees was upheld all the way down to 322, and the evidence shows that decrees were much more frequently enacted than laws.

If the statements at Dem. 20.91–92 and 24.142 are not descriptions of actual institutional arrangements, they must be read as rhetorical statements about current illegal practices, statements to which the orator expected the audience to respond sympathetically, because they reflected shared attitudes to the law, inscribed into an ideology of legislation that could be successfully exploited in court. This line of enquiry has been less popular among scholars than strictly institutional and legal reconstructions, but a few works have attempted to tackle it: Hansen’s, Thomas’ and Wohl’s discussions have isolated important features of fourth-century discourse on legislation, and highlighted the reliance on the figure of the lawgiver, Solon, in order to confer authority to the laws on the basis of their antiquity. They have also argued that, even in the fourth century, in order to be acceptable, innovations in the laws had to be

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5 Fourth-century laws in chronological order are SEG 26.72; Stroud 1998; Agora Excavations, inv. no. 17495 (unpublished); IG II² 142; IG II² 244; IG II² 1 320; IG II² 1 447; IG II³ 1 445. Cf. also Clinton 2005–2008: no 138; 2008: 116; SEG 52.104. The first five are earlier than these speeches. The document at Dem. 24.63 preserves a law earlier than these speeches, and should be reliable; see Canevaro 2013a: 151–157.
6 This law is referred to as παλαιός νόμος at Dem. 20.89.