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## INDETERMINACY IN GREEK LAW: STATUTORY GAPS AND CONFLICTS

Historians have traditionally counted the emergence of written law among the most significant developments of the archaic and classical periods of Greek history. They agree less about the reasons why the Greeks first wrote down laws and what impact written law actually had in practice. It used to be believed that the earliest written laws were the work of individual lawgivers who created extensive legal codes that helped to establish order and good government. Fixing certain rules in writing standardized legal procedures, made them known and widely accessible, and curtailed the arbitrary exercise of judicial power by aristocratic judges.<sup>1</sup> Eventually there developed an equation between written law on the one hand and equality and democracy on the other. The mythical Theseus thus claims in Euripides' *Suppliants*, composed in the 420s, that written laws provided equal justice for both rich and poor and allowed the weaker man to prevail over the stronger, if he had justice on his side (Eur. *Suppl.* 429ff.). A century later Aischines also touted respect for law, by which he certainly meant written laws, as one of the defining qualities of democracy and a feature that set it apart from oligarchic and despotic forms of government (Aisch. 3.6-7).<sup>2</sup>

More recent scholarship, however, has adopted a more critical approach toward surviving traditions about the earliest Greek laws and lawgivers. Scholars are now less inclined to believe in the existence of large-scale law codes in the archaic period, or that written law brought justice and equality to all citizens. Instead, laws appear to have been enacted piecemeal and in response to specific situations or crises, not in large, coherent collections or at the hands of individual lawgivers.<sup>3</sup> Moreover, neither good government nor democracy necessarily followed when states did set laws down in writing. The *poleis* of Crete, for example, which possessed the most ancient tradition of written law in the Greek world, retained aristocratic governments well into the classical period, and Aristotle criticized Cretan magistrates for preferring to administer their duties by their own discretion as

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<sup>1</sup> So, e.g., Busolt 1920: 527-41; Bonner and Smith 1930: 67-81, esp. 67-8; cf. also Finley 1970: 103-4; Jeffrey 1976: 42-4; Murray 1993: 181-4.

<sup>2</sup> For the later equation of writing and democracy see Thomas 2005: 41-3.

<sup>3</sup> See especially Hölkeskamp 1992a, 1992b, 1999; cf. also Thomas 1996; 2005; Gschnitzer 1997; Gehrke 2000. Gagarin 1986 accepts some traditions about early Greek lawgivers but sees the earliest written laws as responses to specific crises.

opposed to written measures (*Pol.* 1272a35-39; cf. 1272b1-11). In addition, some features of written laws limited their efficacy. Laws could be vaguely worded or imprecise, raising questions about their applicability in particular situations. Excessive legislation might also create conflicting statutes on the same topics, leaving uncertain what law applied to a particular case. Aristotle recognized these and other qualities of written laws, and in the *Rhetoric* (1375a22-1375bb22) he offered litigants advice as to how they could exploit these failings to their advantage. This advice may have been effective rhetorically, but it surely upsets any notion that the simple existence of written laws ensured the equitable administration of justice.<sup>4</sup>

The presence of gaps, ambiguities, and other indeterminate qualities in written laws has also played a role in debates about the nature of the Athenian legal system and whether the Athenians actually achieved the “rule of law.” Some scholars have argued that reforms of the late fifth century made the laws, and not the people, sovereign at Athens, and that Athenian jurors strove to uphold and enforce the laws when they made their decisions in legal cases.<sup>5</sup> Others, however, emphasize the use of litigation by citizens as a method to pursue personal feuds and enhance individual honor and status. Features of Athens’ laws contributed to this use of the courts. Laws failed to define precisely the offenses that they covered, thus giving jurors broad discretion in interpreting the meaning and applicability of individual laws to particular cases.<sup>6</sup> Likewise, conflicting statutes allowed litigants to produce opposing laws on the same subject, thereby creating uncertainty and leaving it to jurors to decide which law, if any, applied in a given situation.<sup>7</sup>

This picture of both Athenian and Greek law, one that depicts them as made up of statutes characterized by gaps, ambiguities, and conflicts, is rather dim, and it suggests that the Greeks tolerated a fair degree of legal inconsistency and indeterminacy. To some extent that may have been the case, but the goal of this paper is to suggest that the situation was not quite so bleak. The Athenians and their fellow Greeks were well aware of the indeterminate qualities of written laws, and they sometimes took active, legislative steps to mitigate inconsistency, ambiguity, and conflict. Much of the evidence for such corrective steps comes from Athens, where our sources are more abundant and complete. But other material, especially inscriptions, from outside of Athens and from several periods of Greek history shows that a concern for remedying defects in the formulation and shape of written laws was not a phenomenon peculiar to Athens of the classical period. The solutions

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<sup>4</sup> Aristotle’s advice, however, did not necessarily translate into actual practice: Carey 1996.

<sup>5</sup> See especially Ostwald 1986 and Sealey 1987 for the view that the Athenians achieved the rule of law in the late fifth century. For the view that jurors routinely attempted to apply the laws see Harris 2000; 2005; 2007a.

<sup>6</sup> Cohen 1995, especially 188-95; Todd 1993: 54-62; cf. also Christ 1998: 23-4, 195-6; Lanni 2006. But see now Harris 2007b.

<sup>7</sup> Todd 1993: 58-60.

adopted by individual states certainly did not eliminate statutory ambiguity, gaps, or conflicts entirely or remove the impact of these attributes on the administration of justice in Greek courts. They do show that both the Athenians and the Greeks valued consistency in their written laws.

Let us begin with contradictions. In the years 410-399, the Athenians subjected their existing laws to an extensive review. Our knowledge of this undertaking derives primarily from Lysias's speech *Against Nikomachos*, Andokides' speech *On the Mysteries*, and fragments of laws and a sacrificial calendar that were published on stone at the end of the fifth century.<sup>8</sup> Even with this fairly abundant amount of information, many details of this review remain obscure. But its goals seem to have included the removal of contradictory and obsolete measures that had accumulated during the fifth century and the creation of a coherent "code" of laws.<sup>9</sup> As part of this review of existing laws, or shortly after its completion, the Athenians also instituted new procedures to control lawmaking (*nomothesia*) in the future, and several different laws that governed legislation during the fourth century are attested.<sup>10</sup> Although their relationship to one another is unclear, an overriding concern of nearly all of them was the prevention and removal of contradictory statutes. According to one law, proposals for new laws had to be accompanied by the repeal of existing laws with which they conflicted (Dem. 20.93). Another law allowed the repeal of older laws only if they were replaced by newer ones and on the condition that the new law did not contradict any existing statute (Dem. 24.33). Still another law assigned the *thesmothetai*, who normally presided over certain types of lawsuits, the task of conducting periodic searches of the city's laws in order to identify and remove conflicting statutes (Aisch. 3.38-9).

How effective these measures were is difficult to say. Some scholars believe that the increasing volume of new legislation in the fourth century thwarted the attempt to create a coherent body of law at the end of the fifth century, and that the Athenians soon abandoned the idea of maintaining a consistent code.<sup>11</sup> And yet good evidence for incoherence and contradictory statutes in the fourth century is difficult to come by. One possible instance of conflicting statutes may have been exposed in the dispute between Aischines and Demosthenes over the crown proposed by Ktesiphon for Demosthenes' public services (Dem. 18; Aisch. 3). Each orator cited laws to support his view of the legality or illegality of Ktesiphon's motion, suggesting that the Athenians may not have had entirely consistent laws on the awarding of crowns. Curiously, however, neither speaker claimed that the laws he had adduced was contradicted by others, and Aischines (3.40) went so far as to claim that contradictions in the laws were impossible. Because the texts of the relevant laws cited by each speaker do not survive it is impossible for us to gauge if or how far they actually conflicted with one another. But apparent contradictions may be more the product of selective citation and interpretation by the two speakers than outright inconsistency in the laws themselves.<sup>12</sup>

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<sup>8</sup> On the late fifth-century revision see especially Rhodes 1991 and Robertson 1990; cf. also Todd 1996; Sickinger 1999: 94-105; Volonaki 2001. For the inscribed sacrificial calendar see now Lambert 2002.

<sup>9</sup> I use the term "code" for the sake of convenience, and not in the modern sense.

<sup>10</sup> For procedures of Athenian lawmaking in the fourth century see Hansen 1991: 161-77; Rhodes 1985; MacDowell 1975.

<sup>11</sup> Todd 1996: 130. Hansen 1991: 164, refers specifically to the abandonment of a central, inscribed code of laws.

<sup>12</sup> For detailed analysis of the legal issues and arguments see Harris 2000: 59-67.

Allusions to conflicting statutes are otherwise rare and of limited value. Demosthenes maintains in the speech *Against Leptines* that powerful politicians had managed to relax the statutory restrictions on lawmaking, so that the number of conflicting statutes was so great that commissioners were required to weed them out.<sup>13</sup> The context of this claim, however, is significant. Demosthenes alleges that Leptines had similarly ignored legal requirements governing the proposal of new laws, and his aim was to highlight and even exaggerate the dangers posed when proper legislative procedures were ignored; his characterization of the legislative situation cannot be regarded as disinterested or wholly accurate. The same holds true for a similar charge leveled in the Lysianic speech *Against Nikomachos*. The speaker asserts that Nikomachos, while serving as one of the *anagrapheis* or “recorders” responsible for reviewing Athens’ laws at the end of the fifth century, had dispensed conflicting statutes to litigants involved in the same suits (Lys. 30.3). But he does not cite the supposedly conflicting laws or call witnesses to support his allegations, and his goal was undoubtedly to blacken the character of Nikomachos, not to offer an unbiased picture of the coherence or consistency of the city’s laws. The fact that a speaker makes such an allegation – that litigants had received conflicting statutes – implies that events of this nature were regarded as both irregular and undesirable.

The inscribed copies of fourth-century Athenian laws may also shed light on the frequency of legislation and the possibility of conflicting statutes. Only nine laws on stone are presently known from the fourth century.<sup>14</sup> Since the Athenians probably never sought to publish all their laws in stone copies, this small number may not accurately reflect the quantity of new laws enacted over the course of the fourth century.<sup>15</sup> But even so, the number is surprisingly small, and it hardly supports an image of frequent legislation that gave rise to multiple, potentially contradictory statutes. What is more, features of some fourth-century laws that do survive indicate that the Athenians were aware of the possibility of conflicting legislation or that they framed new laws with existing ones in mind. Thus, Nikophon’s law on silver coinage from 375/4 concludes with instructions to the secretary of the *boulē* to dismantle any *stelai* recording decrees whose contents conflict with its terms.<sup>16</sup> That removal was tantamount to repeal of those decrees, and its purpose was undoubtedly to prevent problems or difficulties that might arise from the existence of decrees whose terms were made obsolete by the terms of the new law. Another law, dating from 353/2 and dealing with offerings of first-fruits to the Eleusinian goddesses, does not mention repeal or destruction of any existing statutes. But it opens by

<sup>13</sup> Dem. 20.91: ἐπειδὴ δὲ τῶν πολιτευομένων τινὲς δυνήθεντες, ὡς ἐγὼ πυνθάνομαι, κατεσκεύασαν αὐτοῖς ἐξείναι νομοθετεῖν, ὅταν τις βούληται καὶ ὄν ἂν τύχη τρόπον, τοσοῦτοι μὲν οἱ ἐναντίοι σφίσιν αὐτοῖς εἰσὶ νόμοι, ὥστε χειροτονεῖθ’ ὑμεῖς τοὺς διαλέξοντας τοὺς ἐναντίους ἐπὶ πάμπολυν ἤδη χρόνον, καὶ τὸ πρᾶγμ’ οὐδὲν μᾶλλον δύναται πέρας ἔχειν. See also Dem. 24.142 and Isok. 8.50 for complaints about excessive legislation at Athens.

<sup>14</sup> For a list see Stroud 1998: 15-16.

<sup>15</sup> On the selectivity of Athenian publication practices see Sickinger 1999: 64-72, esp. 72-3.

<sup>16</sup> Rhodes and Osborne 2003, no. 25, lines 55-56. For other instances of tearing down inscriptions when their contents became obsolete by later legislation, see *IG* 2<sup>2</sup>.43; *IG* 2<sup>2</sup>.116; Philochoros *FGrH* 328 F55a, b.

reaffirming the validity of an older law of Khairemonides on the same subject.<sup>17</sup> By introducing itself in this way the newer law removes any questions about its relationship with the older law and makes clear that its terms are not meant to rewrite or change it, but simply to add to and supplement its provisions with newer regulations. In other words, the new law was not enacted in ignorance of earlier legislation but with a clear knowledge of the contents of an earlier law on the same subject.

The safeguards instituted by the Athenians to guard against the intrusion of contradictory statutes were not unique. Measures against unconstitutional proposals, including *dikai paranomōn*, are attested in several Greek *poleis* and testify to a general concern for the maintenance of a consistent bodies of laws.<sup>18</sup> Many states also established specific procedures for enacting new legislation, such as specifying times when certain issues could be addressed or when lawmaking itself might take place.<sup>19</sup> We do not know if these measures were as stringent as at Athens or if they always included requirements for the repeal of contradictory statutes, but restrictions on legislative activity will have reduced the opportunities for introducing new and potentially conflicting measures. In addition, new legislation from some *poleis* incorporates provisions that effectively nullify already existing but inconsistent statutes. A few honorary second-century decrees from Magnesia on the Maeander conclude by rescinding any existing decrees that contradict their texts “with respect to that which is in conflict.”<sup>20</sup> Laws and decrees from other states also call for the annulment or physical removal of older legislation rendered obsolete by their terms. This practice may have been especially common for voided treaties,<sup>21</sup> but it also extended to other types of measures, including one from Thasos concerning citizenship rights.<sup>22</sup>

Another technique for guarding against the ratification of contradictory statutes was the insertion of entrenchment clauses that restricted or prohibited amendment or repeal of a law or decree.<sup>23</sup> The earliest epigraphically preserved examples date from the early fifth century.

<sup>17</sup> *IG* 2<sup>2</sup>.140, lines 8-10: τὰ [μὲν ἄλλα κατὰ τὸ]ν Χαιρημονίδο νό[μον τὸν περὶ τῆ]ς ἀπαρχῆς.

<sup>18</sup> *SEG* 23.405, line 12 (Demetrias); *IPriene* 44, line 18 (Alexandria Troas); *ILabraunda* 56, line 3 (Mylasa). See also Quaß 1971: 42 with n. 60.

<sup>19</sup> *IG* 9.1<sup>2</sup>.2.583, line 76: ἐπεὶ κα νομοθεσία καθικη (Akarnania); *IKyme* 19, lines 21-24. For discussion of “lawful procedure” in the ratification of new legislation see Rhodes with Lewis 1997: 520-2; on legislative practice in general see Quaß 1971: 44-68.

<sup>20</sup> *IMagnesia* 92b, lines 16-19: λελύσθαι δὲ καὶ εἴ τι ψήφισμά ἐστιν ἐναντίον τῶιδε τῶι ψηφίσματι κα[τ’ αὐ]τὸ τοῦτο κα[θ’ ὃ] ἐστιν ἐναντίον; cf. *IMagnesia* 92a, lines 13-4; 102, lines 21-2; see Rhodes with Lewis 1997: 523.

<sup>21</sup> *IG* 2<sup>2</sup>.43, lines 31-35; *IG* 2<sup>2</sup>.116, line 39 But see now Bolmarcich 2007.

<sup>22</sup> *IG* 12 Suppl., no. 364, lines 11-13: [προσγράψαι δὲ πρ]ὸς τὸν νόμον τὸν τῆς ἀτιμίας τῶδε τὸ ψηφίσμα ἐν τῇ ἀγορῇ καὶ ἐν λιμένι] καὶ καθελῆν τὸς προστάτας καὶ τὸν γραμματέα τὸ περὶ Ἀπημάντο ψηφίσμα] καὶ τὸν ἰσοποῖον ἐπὶ τὸ Ἡρακλέος τὸ ἰϋρὸν ἀναγράψαι ταῦτα].

<sup>23</sup> For the practice see Harris 2006: 22-24; Rhodes with Lewis 1997: 524-5.

One well-known instance is the fifth-century agreement from Halikarnassos about the resolution of property disputes; it imposes confiscation of property and either exile or enslavement on anyone intending or trying to annul the agreement's provisions.<sup>24</sup> In the fourth century a series of decrees from Mylasa not only ordered the confiscation of the property of individuals who had plotted against Mausolous but also prescribed curses against anyone proposing measures contrary to their terms.<sup>25</sup> Other texts envision that they might be annulled or amended and so prescribe sanctions against anyone attempting to change them, sometimes by declaring in advance all such proposals invalid. Thus, a number of citizenship decrees from Thasos prohibit proposing or voting upon any measures that would nullify their grants, but they also preemptively make void any contradictory measures that are enacted.<sup>26</sup> A decree from Miletos of the late third century provides for payments to individuals who donated money to the city, and it prohibits anyone from proposing, amending, putting to a vote, reading out, or recording a motion that would deprive the donors of their due payments or make any substitutions. If any such measure were proposed, it was to be invalid (*akura*) and the proposer fined 1000 staters and made *atimos* until the fine was paid.<sup>27</sup> A second-century law from Teos governing the education of the city's children also specifies penalties not only if certain legally required funds are not paid, but also if any citizen or magistrate proposes, amends, puts to a vote, or otherwise introduces a law contrary to the law itself, or in any way tries to annul its contents by suggesting diversion of or other uses for the specified funds; those acts were to be invalid and the wrongdoer guilty of sacrilege.<sup>28</sup>

Insertion of sanctions against future changes to laws or decrees hardly guaranteed that conflicting measures would not be ratified at a later date, nor did it ensure that the laws of

<sup>24</sup> Ruzé and Van Effenterre 1994, no. 19, lines 32-42: τὸν νόμον τοῦτον ἴην τις θέλη συγγέαι ἢ προθήτα[ι] ψήφον ὥστε μὴ εἶναι τὸν νόμοιν τοῦτον, τὰ ἔοντα αὐτὸ πεπρήσθω ἰκαὶ τῶπὸλλωνος εἶναι ἱερὰ καὶ αὐτὸν φεύγεν αἰεὶ· ἦν δὲ μὴ ἢ αὐτῶι ἄξια δέκα στατήρων, αὐτὸν [π]επρήσθαι ἐπ' ἐξαγωγῆ καὶ μη[δ]λλαμὰ κάθοδον εἶναι ἐς Ἀλικαρνησόν.

<sup>25</sup> Rhodes and Osborne 2003, no. 54, lines 12-16: καὶ πρόσθετα ποιήσαντες Μουσώλλωι, ἐπαρὰς ἰεποιήσαντο περὶ τούτων, μήτε προτιθέναι ἔτι ἰαρά τὰυτα μηδένα μήτε ἐπιψηφίζειν· εἰ δὲ τις ἰαυτὰ παραβαῖνοι, ἐξώλη γίνεσθαι καὶ αὐτὸν ἰκαὶ τούς ἐκείνου πάντας; cf. also lines 28-31, 48-50.

<sup>26</sup> *IG* 12.8.267, lines 12-16: μὴ [ἐξεί]ῆναι δὲ ὑπὲρ τούτων μηδενὶ μήτε εἰπεῖν μήτ' ἐπελθεῖν ὑπὲρ λύσιος μήτ' ἐπιψηφίσαι ἀκρατέα εἶνα[ι ταύ]ῆτα τὰ ἐψηφισμένα. ὃς δ' ἂν παρὰ τὰυτα εἴπη ἢ ἐπέλθῃ ἢ ἐπιψηφίση, τὰ τε δόξαντα ἄκυρα ἔστω καὶ χιλίους στατήρας ὀφειλέτω ἱεροῦς τῶι Ἀπόλλωνι τῶι Πυθίωι, χιλίους δὲ τῆι πόλει. Compare also *IG* 12 Suppl., nos. 355, 358, 362, 364.

<sup>27</sup> *SIG*<sup>3</sup> 577, lines 24-9 (= *IMilet* 1.3.147): μὴ εἶναι δὲ τούτων μήτε ἀνατάκτηι ἀλφαίρεισιν ποιήσασθαι μήτε ἄλλωι μηθενὶ ἀντεισφοράν, ὡς δεῖ μὴ ἑξαιρεῖσθαι ἢ ἔλασσον λαμβάνειν τοὺς δεδωκότας τοῦ ὠμολογημένου καὶ κατακεχωρισμένου ἐν τῶιδε τῶι ψηφίσματι. ἐὰν δὲ τις εἴπη ἢ προθῆ ἢ ἐπιψηφίση ἢ ὑπογραμματεὺς ἀναγνῶι ἢ γραμματεὺς ἀναγράψῃ, τὰ τε γραφθέντα ἄκυρα εἶναι καὶ ὀφείλειν ἔκαστον τῶν αἰτίων ἰστατήρας χιλίους καὶ εἶναι ἄτιμον, ἕως ἂν ἐκτείση.

<sup>28</sup> *SIG*<sup>3</sup> 578, lines 40-6: ἦν δὲ οἱ ἐνεστηκότες ταμίαι ἢ οἱ ἐκάστοτε γινόμενοι μὴ παραδῶσιν τὸ ἀργύριον τοῦτο κατὰ τὰ γεγραμμένα, ἢ ἄλλος τις ἄρχος ἢ ιδιώτης εἴπη ἢ πρήξῃται ἢ προθῆ ἢ ἐπιψηφίση ἢ νόμον προθῆ ἐναντίον τούτῳι ἢ τοῦτον τὸν νόμον ἄρηι τρόπῳ τινὶ ἢ παρευρέσει ἡιοῦν ὡς δεῖ τὸ ἀργύριον κινήθῃαι ἢ μὴ ἀναλίσκεσθαι ἀπ' αὐτοῦ εἰς ἃ ὁ νόμος συντάσσει, ἢ ἄλλ[η] π[ου] καταχωρισθῆναι καὶ μὴ εἰς ἃ ἐν τῶιδε τῶι νόμῳ διατέτακται, τὰ τε προαχθέντα ἄκυρα ἔστω.

Greek *poleis* were coherent, internally consistent, and entirely free from contradictions. The citizen assemblies that typically ratified new legislation did not always observe their own constraints on legislative procedure, and a carefully-worded motion might avoid the appearance of conflict, even if its terms addressed the same subject as an existing law. Conflicts certainly will have arisen. Even so, we should not dismiss attempts to prevent the intrusion of contradictory statutes as hollow or wholly ineffectual. The Greeks regarded as best those laws that were stable and unchanging, and even the Athenian democracy was suspicious of frequent changes to its laws.<sup>29</sup> Those attitudes are reflected in the precautions and measures adopted by Greek states to guard against conflicting statutes.

Even so, the Greeks were also well aware that, in spite of their convictions that laws should remain fixed and unaltered, written laws were sometimes incomplete, ambiguously worded, or failed to address new circumstances and situations. Change was sometimes necessary, and so they sometimes took steps to address vagueness or omissions in their laws.<sup>30</sup> One method was simply to tolerate gaps and ambiguity, and to let judges and jurors decide by using their best judgment, what the Greeks called ἡ δικαιοσύνη γνώμη, when cases arose that were not specifically addressed in written laws. At Athens this sentiment was expressed in the oath taken each year by jurors, in which they swore to apply the city's laws and decrees and to vote according to their best judgment in situations that were not covered by a written statute. Some scholars have also argued that jurors disregarded the laws and resorted to their best judgment more often, especially in cases in which the law seemed to conflict with their sense of justice or when confronted with vague or ambiguous laws.<sup>31</sup> But we have few direct insights into the minds of jurors, and it is striking that the speeches of the Attic orators do not urge them to adopt this course of action; instead, these speeches routinely stress jurors' obligation to vote according to the laws.<sup>32</sup>

But whatever weight individual jurors put on the law or their own private views, the Greeks did not always leave it to court proceedings to settle how statutory gaps should be filled or ambiguous laws interpreted. They also took active, legislative steps to fill gaps, make corrections, or otherwise remedy ambiguities in the contents of their laws. As we have already seen, between the years 410 and 399 the Athenians undertook a large-scale review and republication of their existing laws.<sup>33</sup> The task was entrusted to a board of *anagrapheis* whose initial duties seem to have been to collect and republish the original laws of Drakon and Solon and later modifications to them, perhaps for the purpose of creating a single, fixed code of laws. Enacting new legislation was not part of their assignment. The work of the *anagrapheis* was

<sup>29</sup> For Athenian resistance towards legislative change see Boegehold 1996; on legislative change more generally see Camassa 1994, esp. 101-108.

<sup>30</sup> See Gehrke 2000: 148-50; Quaß 1971: 19-21.

<sup>31</sup> For a reconstruction of the oath and discussion of this expression see Harris 2007a; on its application see also Johnstone 1999: 33-42; Todd 1994: 59-60; Biscardi 1970; Meyer-Laurin 1965.

<sup>32</sup> See especially Harris 2000; 2007a.

<sup>33</sup> For further discussion see the works cited in note 8 above.

interrupted by the takeover of the Thirty Tyrants in 404, but they were reappointed after the restoration of the democracy in 403 and completed their duties in 399. The restoration of the democracy, however, appears to have highlighted some problems in the laws that the *anagrapheis* had collected. So when democratic government returned, the Athenians voted to continue using the laws of Drakon and Solon, which probably meant the laws compiled by the *anagrapheis* in their first term, but they also appointed *nomothetai* who, according to the terms of the decree of Teisamenos, were to produce proposals for new laws “on whatever matters there is a further need.”<sup>34</sup> That is, the *nomothetai* were to make additions and fill gaps in the existing laws, and Andokides mentions some of supplementary laws that were eventually ratified: magistrates were not to use any unwritten law; *nomoi* were to have greater force than decrees; no law could be directed against a single individual but had to apply to all Athenians; and so on (And. 1.87). These supplementary laws spelled out more clearly than had been the case before how laws (*nomoi*) were to be applied and what was their proper relationship to other types of legislation (i.e. *psēphismata*, decrees). But the enactment of these supplementary measures also shows that the Athenians were quite willing to take legislative action to resolve ambiguities or fill gaps in the existing laws; they did not always allow uncertainties to persist or to be settled on a case by case basis by the courts.

Athenian procedures for lawmaking in the fourth century provided further opportunities for revising, updating, and supplementing older legislation. One of the laws governing the introduction of new laws, cited by Demosthenes in the speech *Against Timokrates*, required the assembly to conduct an annual vote on the existing laws according to four different categories, and to decide whether any group seemed unsatisfactory or insufficient.<sup>35</sup> If a group of laws was found wanting, citizens were given the opportunity to propose new measures in that area. Neither Demosthenes nor the text of the law included in the speech explains the grounds on which existing laws could be rejected as unsatisfactory, and probably no specific grounds were spelled out in the statute itself. But several reasons can be imagined. Some laws might have become obsolete in light of new conditions. Changing economic, social, or political circumstances will have necessitated revisions to older laws, and existing legislation sometimes will have failed to address topics or situations over which unforeseen disputes or uncertainty had arisen. Indeed, P.J. Rhodes has suggested that one of the fourth-century laws on *nomothesia*, the so-called “Repeal Law” that allowed older to be annulled only if they were replaced by a new one, was itself intended to fill gaps in the requirements of the “Review Law” that had previously governed legislative procedure.<sup>36</sup>

Some of the inscribed copies of fourth-century laws also reflect attempts to fill gaps, remove ambiguity, or otherwise supplement existing legislation. The law on Eleusinian first fruits (*IG II<sup>2</sup> 140*), discussed above, is itself cast in the form of an amendment or supplement to an existing law of Khairemonides on the same subject.

<sup>34</sup> Andok. 1.83: ὁπόσων δ’ ἂν προσδέη. For a recent discussion of the decree see Carawan 2002.

<sup>35</sup> Dem. 24.20: ἡ δὲ χειροτονία ἔστω ἢ προτέρα, ὅτω δοκοῦσιν ἀρκεῖν οἱ νόμοι οἱ βουλευτικοί, ἢ δ’ ὑστέρα, ὅτω μὴ δοκοῦσιν· εἶτα τῶν κοινῶν κατὰ ταῦτά.

<sup>36</sup> Rhodes 1985: 57.



The new law gives the assembly overall responsibility for deciding how first-fruits were to be collected, but it makes the *boulē* responsible for their actual collection and for ensuring that the proper sacrifices are made. Because the older law of Khairemonides does not survive, we cannot say with certainty how the new provisions alter, revise, or supplement its provisions. But some features of the older law must have been ambiguous, incomplete, or somehow incompatible with conditions at the time the new law was passed. The Athenians did not allow these deficiencies to stand or leave them to be sorted out in legal proceedings; they sought to rectify them through the legislative process.<sup>37</sup>

Nikophon's law on silver coinage, enacted in 375/4, may also reflect a new statute intended to fill a legislative gap or to address a situation not addressed in an older law.<sup>38</sup> The first part of the law (lines 3-36) outlines the responsibilities of an existing official, the *dokimastēs* or public tester of coinage, and makes provisions requiring Athenians to accept Athenian coinage. The second part of the law (lines 36-44) establishes a second tester who was to operate in the Peiraieus. Because earlier legislation outlining the duties of the original *dokimastēs* does not survive, the degree to which all parts of Nikophon's law alter older laws, revise their procedures, or fill gaps in their contents is unknown. The law's wording makes it clear that addition of a second tester is an innovation, but how far the law's other provision retain, modify, or replace older regulations is difficult to say. One possibility is that an influx of counterfeit coinage into Athenian markets led some Athenians to reject of authentic issues of foreign coinage and thereby necessitated the creation of a second tester, as well as new measures regulating the treatment and handling of vetted coins.<sup>39</sup> But whatever the background to its enactment, ratification of the new law illustrates the Athenians' willingness to modify and supplement existing statutes in response to changing needs and conditions.

The Athenians were not alone in their attempts to find legislative remedies to correct, supplement, or fill gaps in existing statutes. Greek *poleis* tended to be conservative in enacting new laws, and, as we have seen, many statutes included sanctions against nullifying, changing, or even supplementing the contents of existing legislation. Nonetheless, the Greeks were realistic enough to recognize that changes and additions to laws were sometimes necessary, and this realization is documented by provisions of laws and decrees that allow and even call for legislative changes and supplementation. One of the earliest examples is a late sixth-

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<sup>37</sup> The Athenians legislated on the collection and offering of first-fruits to the Eleusinian goddesses on several occasions: *IG* 1<sup>3</sup> 78 (425-415 B.C.); the law of Khairemonides, mentioned in *IG* 2<sup>2</sup> 140 (undated; between 403/2 and 353/2, line 9); *IG* 2<sup>2</sup> 140 itself (353/2 B.C.); and *Agora* 19, no. 57, which mentions the *aparchē* of grain (undated; probably mid-fourth century).

<sup>38</sup> Rhodes and Osborne 2003, no. 25

<sup>39</sup> See Rhodes and Osborne 2003: 116-9, for discussion of the general background and references to earlier studies.

century law from Olympia concerned with procedures for making changes to existing written laws, by garnering the approval of a council of 500 and the full assembly.<sup>40</sup> Its framer recognized that situations might arise that he had not foreseen or that rendered the law inadequate or in need of amendment. Instead of simply leaving it to the discretion of a magistrate or court to decide how to deal with new situations, he made it possible to change the law with the consent of both *boulē* and assembly. Another early example appears in a Locrian law concerning a colony at Naupaktos. One of its clauses forbids anyone from violating its terms unless both the assembly of the Opuntians and the Naupaktians allow it.<sup>41</sup> This qualification seems to envision that circumstances might arise in which the terms of this law do not apply, but it does not leave it to a court or magistrate to make that decision. Instead, the law allows itself to be amended with the consent of the legislative bodies of each community.

Emergency or revolutionary situations were especially prone to highlight deficiencies or omissions in existing laws, and provisions for filling potential gaps or resolving uncertainties in existing legislation appear in the laws and decrees of several cities enacted in the wake of changes of government or constitutional instability. I have already mentioned the decree of Teisamenos, which called for additions to Athens' laws in the tumultuous final years of the fifth century, after the fall of the Thirty Tyrants and the restoration of the democracy. The campaigns of Alexander the Great caused similar changes in government in many *poleis* and also created constitutional instability, and these conditions led some states to supplement and revise their laws. Thus, a decree from Mytilene from the late 330s provides detailed regulations allowing the return of exiles and the restoration of property. It explicitly acknowledges that its terms might be incomplete, and it invests the city's council with the authority to settle matters.<sup>42</sup> On Chios, a letter from Alexander the Great himself called for the appointment of lawgivers (*nomographoi*) who were to write and correct the city's laws because of the restoration of democratic government and the return of exiles.<sup>43</sup> Both developments will have created problems. Some citizens will have found themselves susceptible to prosecution

<sup>40</sup> Ruzé and Van Effenterre 1994, no. 109, lines 3-6: τὸν δὲ καὶ γραφέων, ὃ τι δοκεῖ καλιτέρος ἔχεν πο(τ) τὸν θεόν, ἐξαργέον καὶ ἐνποδὸν σὺν βολαῖ πεντακατίον ἀφλανέος καὶ δάμοι πλεθύνοντι δινάκοι· (δινά)κοι δ' ἐν τρίτῳ, αἶ τι ἐνποιοὶ αἴτ' ἐξαργέοι; cf. also Ruzé and Van Effenterre 1994, no. 108, and Quaß 1971: 51-2.

<sup>41</sup> Ruzé and Van Effenterre 1994, no. 43, lines 38-41: ἡσσοσις : κα τὰ φεφαδεφῶτα : διαφθεῖρει : τέχνη καὶ μαχανάι : καὶ μᾶι, : ἵοτι κα μὲ ἀνφοτάροις : δοκεῖ ἡποποντίον : τε χιλίον : πλέθαι καὶ Ναυπακτίον : τὸν ἐπιφοῖρον : πλέθαι, : ἄτιμον εἶμεν : καὶ χρέματα παματοφαγεῖσται.

<sup>42</sup> Rhodes and Osborne 2003, no. 85B, lines 37-38: αἱ δὲ κέ τι ἐνδεύῃ τῷ ψαφίσματος, ἢ περὶ τούτῳ ἂ κρίσις ἔστω ἐπὶ τῆ βόλλαι.

<sup>43</sup> Rhodes and Osborne, no. 84A, lines 4-6: αἰρεθῆναι δὲ νομογράφους, οἵτινες γράψουσι καὶ διορθώσουσι τοὺς νόμους, ὅπως μηδὲν ἐναντίον ἦι τῆ δημοκρατία μηδὲ τῆ τῶν φυγάδων καθόδωι.

under the laws of a previous regime, and returning exiles will have made claims on property that others believed they had acquired legally. Neither Alexander probably nor the Chians were content with leaving such disputes to the discretion of judges or juries, so *nomographoi* were appointed to draft new legislation and correct older laws, presumably by revising some statutes and addressing issues not dealt with in them.

War and revolution, however, were not necessary to convince the Greeks that laws needed revision, clarification, or supplementation. A law from Megalopolis of the second century grants the current year's council the right to make additions to the published laws if they seemed to be wanting or deficient in any way.<sup>44</sup> Another measure from Megalopolis does not mention gaps or failings so explicitly, but it seems to give the council and assembly the right to make additional corrections or supplements to a *diagramma*.<sup>45</sup> Other documents from the Hellenistic period contain frequent references to corrections to existing legislation or officials called "correctors", and often their work will have involved making additions to and filling gaps in older laws. Thus, a set of judicial agreements between the Stymphalos and Sikyon from the late fourth century concedes that the terms of the agreement might not be beneficial to both cities,<sup>46</sup> and it allows for the appointment of correctors (*diorthōtēres*) charged with drawing up new proposals to be presented to and approved by both cities. A decree of the Akarnanian *koinon*, which transfers control of the Aktian games from the city of Anaktoria to the *koinon* itself, specifies strong penalties against changes to it, but then concludes with a provision allowing for corrections to the sacred laws, probably ones affected by its terms, provided that nothing contradicts with its own provisions as they were inscribed on the *stēlē*.<sup>47</sup> Elsewhere we find mention of the possibility of correcting or revising a Teian law in a letter from Eumenes II to the artisans Dionysos,<sup>48</sup> while a third-century decree

<sup>44</sup> *IPArk* 30, lines 6-9: [εἰ δὲ τι δόξει] ἐνλείπειν ἐν τοῖς νόμοις τοῖς προηγγραμμένοις, κύριον ἔστω τὸ ἐφ' ἔτο[ς] συνέδριον ὅσα καὶ δόξει τῷ συνεδρῳ ἀδιοίξει[τα προσθεῖναι].

<sup>45</sup> *IG* 5.2.434, line 8: [εἰ δὲ δόξη τῷ δάμωι ἢ τοῖς συνέδροις ἐπιδιορθῶσαι τὸ διάγραμμα.

<sup>46</sup> *IPArk* 17, lines 184-201: εἰ δ[ὲ τ]ι τῶν ἐν ταῖ συμβολαῖ γραφέντων καὶ δοξάντων ἐν ταῖ χρήσει μὴ συν[φ]ερόντως ἔχειν δοκέει τοῖν πολίοιιν, [ἔτε]ραι πόττειαι πρρσβέας ἀποστειλάν[τιων τ]ούτων, ὀππότεραι δόξαι τοῖν π[ολί]οιιν τῶν γεγραμμένων τι μὴ σ[υν]φ[ερ]όντως ἔχειν· τῶ δὲ πόλιε διορθ[ω]τήρας ἐλέσθαι τὰς συμβολὰς· τοῖς δὲ ἀ[ί]ρεθέντας διορθωτήρας, ἅ κα[α]βουλεύ[σωντι, δεῖξαι ταῖ τε βουλά[ι]καὶ ταῖ ἐκκλησίαι ἐν ἐκατέραι τοῖν πολίοιιν· ὅ[ι]σα δὲ κα δόξει τῶν διορθ[ω]μένων κἀλῶς ἔχειν, γράφ[ε]σθαι πὸτ τὰν συμβολάν, ἄλλο δὲ μηδὲν ἐκ[α]τέραν τοῖν πολίοιιν κινεῖ[ν τῶν ἐ]ν ταῖ συμβολαῖ γεγραμμένων].

<sup>47</sup> *IG* 9.1<sup>2</sup>.583, lines 75-7: τοὺς δὲ ἰε[ρο]ῦς ἰνόμους ἐξέστω διορθοῖν, ἐπει κα νομοθεσία καθίγη, μηθὲν ὑήεναντίοντοῖς ἐν ταῖ στάλαι καταγράφοντας τ[ι]—

<sup>48</sup> *IPergamon* 163, ΠΑ, lines 6-8: εἰ δὲ προσδεῖται διορθώσεως ὁ ὑπὲρ τούτου νόμος, καὶ πρότερον ἐτοίμως ἔχειν συνδιορθοῦσθαι, καὶ ἰνὺν τὸ αὐτὸ ποιοῦντα[ς παρ'] ἡμῶν εὐρεθῆσθαι.

from Samos begins by describing its provisions as corrections or supplements to an older *diagraphē* concerning shopkeepers operating in the sanctuary of Hera.<sup>49</sup>

These provisions for changing and amending laws demonstrate that the Greeks were quite open to altering and supplementing older legislation, and that to some degree they were unwilling to accept deficiencies, shortcomings, and weaknesses in their existing laws. New legislation was indeed passed to correct, supplement, and clarify older statutes. When coupled with the steps that the Greeks took to guard against the intrusion of conflicting statutes, these measures point to a more general desire to maintain at least minimally coherent, consistent, and up-to-date collections of laws. The very nature of written laws meant, of course, that some ambiguity always remained, and no system of law could ever be entirely free of gaps, overlap, or contradictions within its corpus of statutes. Likewise, some topics may have attracted more frequent legislative attention, and hence legislative change, while others were allowed to retain a greater degree of ambiguity or uncertainty or imprecision. Thus, many of the *nomoi* enacted and published on stone by the Athenians during the fourth century were concerned with religious or financial matters or a combination of both, while inscriptions from other states show that these areas were similarly the subject of close scrutiny. New legislation governing personal relations, on matters inheritance, *hybris*, and adultery, appears less well attested,<sup>50</sup> perhaps because the Greeks were more willing to accept some ambiguity and to give courts broader discretion in applying statutes on those matters. But it remains important to remember, when considering the nature of Athenian and Greek law, that the Greeks were aware of and concerned with the indeterminate qualities of at least some of their laws, and that they took steps to address these features not only in the courts but also by means of legislation.<sup>51</sup>

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<sup>49</sup> *SEG* 27.545, lines 3-5: τάδε εἰσήνεγκαν οἱ νεω[ποῖα] περὶ τῶν ἰκατηλείων, διορθωσά[μενοι] τὴν διαγραφὴν τῶν κατή[λων] τῶν ἐν Ἰ[τῶ]ι ἱερῶι τῆς Ἥρας κατ[ὰ] τὸ ψήφισμα, καὶ ὁ δῆμος ἐκύρωσ[εν]; see Thür and Taeuber 1978.

<sup>50</sup> Carey 1998 notes that Athenian laws in some areas had stronger substantive than procedural orientation than laws on other topics, and so were less susceptible to varying interpretations.

<sup>51</sup> I have avoided comment on the complicated issues raised by the Gortynian law code. But see Kristensen 2004, and the earlier studies cited there, who observes that the features of this collection show that many of its laws had been the subject of supplementary legislation and revision.

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