PART I

THEORETICAL AND DOCTRINAL FOUNDATIONS OF JUDICIAL LAW-MAKING IN CENTRAL EUROPEAN COUNTRIES

EKKLESIA AND *DIKASTERION*—WHICH BODY IS CONSIDERED TO BE *KYRION PANTON*? (IS IT THE RIGHT QUESTION TO BE ASKED?) RECENT DIMENSIONS OF AN OLD PROBLEM

Alexander Bröstl*

Abstract

The article is focusing on the history of the relationship between the *ekklesia* (public legislative assembly of the Athenians) and the *dikasterion* or jury-court especially during the period of the classical Athenian democracy and also later on with an accent on the challenge of "unlawful" or "unconstitutional" laws / decrees prepared or already adopted by the people's assembly before the judicial authority (people's courts). Considerations are concerning first of all the investigation of the institution of *grafe paranomon* and *grafe nomon me epitedeion theinai* (what meant that a decision of the assembly would be reviewed by an Athenian court in a procedure closed to the one later known as constitutional / judicial review) as well as the work of *nomothetes* in cases when the law should be changed (amended). They are followed by the more recent appearance and introduction of the judicial review (U. S. Supreme Court) and the change of the paradigm in the relationship between the legislative power and the judiciary in the early 19th century, and by the debates on the topic who should be the guardian of the Constitution in the European 20th century continuation, beginning from the exchange of views between Carl Schmitt and Hans Kelsen. Finally, it is analyzing the very recent problem with the constitutional amendments in the light of the doctrine of their possible unconstitutionality, and the limits of amendment powers (pro et contra argumentation).

Keywords

ekklesia, *dikasterion*, *grafe paranomon*, *grafe nomon me epitedeion theinai,* judicial review, guardian of the constitution, unconstitutional constitutional amendments

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* This paper is dedicated to Professor Dr. Reinhold Zippelius to his 90th birthday earlier last year (2018), who was my supervisor during the time of my first academic stay in his *Institut für Allgemeine Rechtslehre und Rechtsphilosophie* in 1990/1991, at the *Friedrich-Alexander-University of Erlangen-Nürnberg*, Faculty of Law. At that time he recommended me to take part in the IVR World Congress in Göttingen in 1991. This was my first participation in that event: since that time I have attended all the IVR Congresses until Luzern 2019.

Χρωμεθα γαρ πολιτεια τους των πελας νομους παραδειγμα δε μαλλον αυτοι οντες τισιν η μιμουμενοι ετερους. Και ονομα μεν δια το με ες ολιγους αλλ᾽ ες πλειονας οικειν δημοκρατια κεκληται.[1]
Our constitution does not copy the laws of the neighboring cities, we are rather a pattern to others than imitators ourselves. Its administration favors the many instead of the few; this is why it is called a democracy…

Pericles' Funeral Oration. Thucydides,
The Peloponnesian War.
London, New York. Dent, J. M.-Dutton,
E. P. 1910, II, 37.

Ελευθεριας δε εν μεν το εν μερει αρχεσθαι και αρχειν.
But one factor of liberty is to govern and be governed in turn...

Aristotle, *Politics*, 1317b

1 Introduction / Εισαγωγη

The situation when Constitutional Courts are overruling Constitutional Amendments because of their unconstitutionality (non-compliance with the Constitution) had first of all in the respective Parliaments caused consternation, horror and furore, and a series of questions like How can the Court touch the "original and untouchable" constituent power (which should exclusively rest in the hands of the Parliament?), Which body is in the capacity of the most „powerful and significant authority" in a democratic polis governed by *nomoi* / a democratic state governed by the rule of law, if not the *ekklesia* / Assembly? The dilemma can be whether it should be in other words the Legislative (*ekklesia*, People's Assembly) or the Judiciary (*dikasterion*, Supreme Court / Constitutional Court)? Another way around: Which principle is decisive—the Supremacy / sovereignty of the Parliament or the Judicial Review in the name of the Protection of the Constitution?

2 On the Relationship Between εκκλησια and δικαστηριον in the Athenian Democracy

Democracy also with respect to the opinions of ancient Greek legal philosophers (Plato, Aristotle, etc.) must not necessarily be understood as a failed, unsuccessful

[1] A general remark on the use of the accent system in Greek: Aristophanes of Byzantium (257–185/180 B. C.) was a Hellenistic scholar, critic and grammarian. He is credited with the invention of the accent system used in Greek to designate the pronunciation. This system was simplified in 1982. When using written Greek, I am not following the accents in this text.

majority rule, as an unstable, arbitrary and occasionally brutal, supported by populist tyranny of majority,[2] corrupted and against nature.[3]

Every polis as we see is a sort of partnership (κοινονια), and every partnership is formed with a view to some good,[4] and is in fact a partnership of citizens in a government.[5] A politeia is a matter of citizens. Who is (in an absolute sense) entitled to the name of citizen, and what is the essential nature of a citizen? Here I would like to share Aristotle's response to this question: "A citizen pure and simple is defined by nothing else so much as by the right to participate in judicial functions and in office (assembly, etc.)."[6]

In a brief overview I would like to point out to the circumstance that Athenian democracy tried to develop itself towards perfection, following an ideal model of the relationship between "various branches of government" (thesmois, offices, institutions) in their constitution, and "more kinds of participation in the administration of an office". A special view I would like to offer to the role of the judiciary in a democracy, as an important source of inspiration for later, medieval, but also modern (contemporary) democracies at all. The question is—did the Athenians become aware of the fellowship between democracy and jury-courts? What was the reason that dikasteria in a way became a prototype of the democratic idea?[7]

By the way, deliberating over democracy probably needs to make two important remarks about this topic. The first one is focusing on Aristotle: before he is analyzing democracy he mentions that "it is thought that there are two forms of constitutions, democracy and oligarchy," and in his more precise view he announces "that there are several varieties … of democracy (about five kinds of democracy; note by A. B.) and of oligarchy." And the constitutional government (πολιτεια) is, to put it simply, a mixture of oligarchy and democracy."[8]

In the second special remark I would like to state that I am sharing the view of Friedrich August von Hayek when he underlines his opinion that "It is greatly to be

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2 OBER, Josiah: *Demopolis oder was ist Demokratie? (Democracy Before Liberalism in Theory and Practice)*. Darmstadt: Philipp von Zabern, 2017, p. 34. Not to deny the original description or definition on ancient Athens as "the quintessential direct male participatory democracy where the demos (the citizens) deliberated and decided on all issues of public interest." MUELLER, Dennis Cary: *Constitutional Democracy.* Oxford: Oxford University Press, 1996; MATSUSAKA, John G.: *Let People Rule. How Direct Democracy Can Meet Popular Challenges.* Princeton and Oxford: Princeton University Press, 2020.

3 ARISTOTLE: *Politics*, 1287b. In: RACKHAM, Harris (Transl.): *Aristotle in 23 Volumes*. Vol. 21. Cambridge (Mass.): Harvard University Press, London: William Heinemann, Ltd., 1944. In *Politics* democracy is defined also as a corrupted (parekbasis) and a form of government against nature (para physein).

4 Ibid., 1252a.

5 Ibid., 1276b.

6 Ibid., 1274b, 1275a. Aristotle is explaining the term "office" here: It need not to make any difference, since there is no common name for a juryman and a member of the assembly that is properly applied to both. Therefore, let us call the combination of the two functions 'office' without limitation."

7 BLEICKEN, Jochen: *Athénská demokracie [Athenian Democracy]*. Praha: OIKOYMENH, 2002, p. 244.

8 ARISTOTLE: *Politics*, 1291b, 1293b.

regretted that the word democracy should have become indissolubly connected with the conception of the unlimited power of the majority on particular matters. But if this is so we need a new word to denote the ideal of a rule of the popular opinion on what is just, but not of a popular will concerning whatever concrete measures seem desirable to the coalition of organized interests governing at the moment.[9] … If it is insisted upon that democracy must be unlimited government, I do indeed not believe in democracy, but I am and shall remain a profoundly convinced demarchist in the sense indicated."[10]

Aristotle himself questioned whether this form should even be called "democracy": "And another kind of democracy is for all the citizens that are not open to challenge to have a share in office, but for the law to rule… And it would seem a reasonable criticism to say that such a democracy is not a constitution at all; for where the laws do not govern there is no constitution, as the law ought to govern all things while the magistrates control particulars, and we ought to judge this to be constitutional government; if then democracy really is one of the forms of constitution, it is manifest that an organization of this kind, in which all things are administered by resolutions of the assembly, is not even a democracy in the proper sense, for it is impossible for a voted resolution to be a universal rule."[11]

Aristotle's rudimentary considerations on democracy include also his statement that the "fundamental principle of the democratic form is liberty—(…) only under this constitution do men participate in liberty (ωρ εν μονη τη πολιτεια ταυτη μετεχοντς ελευθεριας)." I would similarly refer to his use of the word "archein": "But one factor of liberty is to govern and be governed in turn (ελευθεριας δε εν μεν το εν μερει αρχεσθαι και αρχειν = merei archesthai kai archein).[12]

A long time it was believed among (legal) scholars that throughout the Classical period the "decisive" body of government in Athens was the People's Assembly

[9] HAYEK, Friedrich August von: *The Confusion of Language in Political Thought*. Tonbridge: Tonbridge Printers Ltd., 1968, p. 36. It is to avoid "the dangers which have plagued democracy from its very beginning and have again and again led to its destruction." It is the problem which arose in the memorable episode of which Xenophon tells us, when the Athenian Assembly wanted to vote the punishment of particular individuals and "the great numbers cried out that it was monstrous if the people were to be prevented from doing whatever they wished… Then the Prytanes, stricken with fear, agreed to put the question—all of them except Socrates, the son of Sophroniscus; and he said that in no case would he act except in accordance with law." (See also: BROWNSON, Carleton Lewis (ed.): *Xenophon*. Xenophon in Seven Volumes. Hellenica, I, vii, 15. Cambridge (Mass.): Harvard University Press: London: William Heinemann, Ltd., 1918, p. 73.; FOWLER, Harold North: *Plato*. Plato in Twelve Volumes. Vol. 1, Apology of Socrates. 32b. Cambridge (Mass.): Harvard University Press and London: William Heinemann, Ltd., 1966.; MARCHANT, Edgar Cardew (ed.): *Xenophon*. Xenophon in Seven Volumes.: Memorabilia, 1, 1, 18. Cambridge (Mass.): Harvard University Press and London: William Heinemann, Ltd., 1923.

[10] HAYEK, Friedrich August von: *The Confusion of Language in Political Thought*. Tonbridge: Tonbridge Printers Ltd., 1968, p. 35–36.

[11] ARISTOTLE: *Politics*, 1292a.

[12] ARISTOTLE: *Politics*, 1317b.

(demos, *ekklesia)*.[13] The opposite view, rethinking democracy, defended the opinion that *dikasterion* and not *ekklesia* should be considered *kyrion panton*, that the most significant and distinctively democratic institution in Athens in fact was the Courts.

It should be remembered that the powers of the assembly were "considerably restricted" or at least "remarkably outbalanced" by the people's court.[14] Athens' courts were themselves highly democratic bodies. Sometimes they have been seen as equal to the assembly: courts are the people.[15] The assertion that power needs legal control and power without equal law for all is unrighteousness injury is dealing with by Aischylos (525–456 B. C.) in his *Prometheus Bound*.[16] Eumenides gives also a picture of the work of the jury / jurymen (as a silent dramatis personae) and about casting votes and deciding the respective case (before the Temple of Athena).[17] Or in Aristotle's *Athenian Constitution*, when dealing with Solon as a legislator: "Adjusting might and right to fit together... And rules of law alike for base and noble, fitting straight justice unto each man's case, I drafted."[18] There is another comment of Aristotle concerning Solon's reforms as a legislator and codifier of laws, which indicates to the role of the judiciary: "… and third, what is said to have been the chief basis of the powers of the multitude, the right to appeal to the jury—court—for the people having the power of the vote, becomes sovereign in the government."[19]

Thus, the people (demos) is present in three institutions (trichotomy): if we consider that in the relevant time in Athens the institutionalization was not based on the idea of separation of powers and the Athenians "never developed any theory of the separation of powers,"[20] we can speak more adequate about the "triunity of the demos."

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13 HANSEN, Mogens Herman: The Concepts of *Demos*, *Ekklesia* and *Dikasterion* in Classical Athens. *Greek, Roman, and Byzantine Studies* 50 (2010), p. 499.

14 CAMMACK, Daniela Louise: *Rethinking Athenian Democracy*. Cambridge (Mass.): Harvard University, 2013, p. 7.

15 BLEICKEN, Jochen: *Athénská demokracie [Athenian Democracy]*. Praha: OIKOYMENH, 2002, p. 271.

16 AISCHYLOS: *Prometheus Bound*. If law and power go in one yoke, which pair-horse can be stronger than this one. p. 322.

17 AISCHYLOS: Ibid., 740–745. *Apollo*: "Friends, be sure to count the votes accurately. Be careful you don't make mistakes in judgement are followed by great disaster. One less vote destroys a house, another saves it." *Athena*: "The man is innocent of shedding blood. The votes are equal in number." In: SMYTH, Herbert Weir (Transl.): *Prometheus Bound*. Cambridge (Mass.): Harvard University Press, 1926.

18 ARISTOTLE: *Athenian Constitution*. 12 (4) In: RACKHAM, Harris (Transl.): *Aristotle in 23 Volumes*. Vol. 21. Cambridge (Mass.): Harvard University Press, London: William Heinemann, Ltd., 1952.

19 ARISTOTLE: *Athenian Constitution*. 9, 1; ARISTOTELES *Athenaion politeia*, 9, 1. "κύριος γὰρ ὢν ὁ δῆμος τῆς ψήφου, κύριος γίγνεται τῆς πολιτείας (one example to demonstrate the use of accents; see Fn 3)." In: KENYON, Frederic (ed.). Oxford 1920. In comments see: BARTA, Heinz: Solon – Schöpfer der politischen und rechtlichen Grundwerte Europas: Freiheit, Gleichheit, politische Teilhabe. E. K. E. I. E. Δ., 46, 2016, p. 14.

20 GAGARIN, Michael: *Democratic Law in Classical Athens.* Austin: University of Texas Press, 2020, p. 12. Although the description (of democracy) "foreshadows to some extent the modern division of government into three branches—legislative, executive, judicial." (p. 12)

Aristotle also mentions that in a radical democracy "For the people has made itself master of everything, and administers everything by decrees and by jury-courts in which the people is the ruling power… And they seem to act rightly in doing this, for a few more easily corrupted by gain and by influence than the many."[21]

Aristotle is noting on "laws" and "decrees" that in certain kinds of democracy the laws rule, but in other kind of democracies decrees can override laws (Pol., 1292a). According to Demosthenes Athens was the former kind of democracy where "No decree (ψηφισμα), either of the Council or of the Assembly shall have superior authority to a statute (a law)."[22] Mogens Herman Hansen in his distinguishing explains that *νομοι* were passed by the *νομοθεται*, that *νομοι* superseded *ψηφισματα*, and that the *γραφε νομον με επιτεδηιον θειναι (grafe nomon me epitedeion theinai)* was introduced as a special type of public action against unconstitutional *nomoi*,[23] whereas the *γραφε παρανομον (grafe paranomon)* henceforth could be brought only against psefismata.[24]

Considering the relationship between the Assembly and the Court it is essential to underline the crucial judicial instrument of *grafe paranomon*, suit against (bills) contrary to laws or called also "a public indictment against the proposer of a new psefisma (decree)" charging that his proposal is unconstitutional ("against the law"), which was introduced around the year 415 B. C. or even before, and its development.[25] In the Assembly *(ekklesia)* or in the Council *(boule)* everybody could raise an accusation (claim, petition) against a *decree* (psefisma), any law or draft-law,[26]

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21 ARISTOTLE: *Athenian Constitution* 41, 2.

22 DEMOSTHENES: *Against Aristocrates*. 23, 87. In: MURRAY, Augustus Taber (Transl.): Cambridge (Mass.): Harvard University Press, London: William Heinemann, Ltd., 1939. "I take it, gentleman of the jury, that a very short and easy argument will serve me to prove that *this statute has been violated in the drafting of the decree*. When there are so many statutes, and when a man makes a motion that contravenes every one of them, and incorporates a private transaction in a decree, how can anyone deny that he is claiming for his decree authority superior to that of a statute?"

23 More detailed and in disagreement with many of Hansen's claims see: CANEVARO, Mirko: Athenian Constitutionalism: Nomothesia and Graphe Nomon Me Epitedeion Theinai. In: THÜR, Gerhard, YIFTACH, Uri, ZELNICK-ABRAMOVITZ, Rachel (eds.): *Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Tel Aviv, 20.–23. August 2017). Vienna: Österreichische Akademie der Wissenschaften, 2019, pp. 65–98.

24 HANSEN, Mogens Herman: Nomos and Psephisma in Fourth-Century Athens. *Greek, Roman and Byzantine Studies* 19 (1978), pp. 315–330.; HANSEN, Mogens Herman: Did the Athenian Ecclesia Legislate after 403/402 B. C.? *Greek, Roman and Byzantine Studies*. 1979, 20, p. 27.

25 BLEICKEN, Jochen: *Athénská demokracie [Athenian Democracy]*. Praha: OIKOYMENH, 2002, p. 214 ff.; TODD, Stephen C.: *A Glossary of Athenian Legal Terms*. Edition Michael de Brauw, March 16, 2003, p. 44. Excerpts from: TODD, Stephen C.: *The Shape of Athenian Law*. Oxford: Clarendon Press, 1993.

26 YUNIS, Hayee: Law, Politics, and the *Graphe Paranomon* in Fourth-Century Athens, p. 361. "The word 'decree' is used to translate *psefisma*, and the word 'statute' to translate *nomos*, in the senses these words bear in the statutes passed in 403/402 B. C. following the decree of Tisamenus (Andocines. 1, 87).; Not to forget about Aristotle's view on democracies—let us now say that there are several varieties of …democracy…(1291b)—where decrees are authoritative () and not the law." ARISTOTLE: *Politics*, 1292a. Compare with: BLEICKEN, Jochen: *Athénská demokracie [Athenian Democracy]*. Praha: OIKOYMENH, 2002, pp. 216 and 219. Generally valid resolutions were called nomos, resolutions / decrees determined by a concrete situation psefisma (proposal passed by the

which was considered to be unlawful (antinomian) or not useful, because its content is contradictory to another, already valid, law. These accusations became since 415 B. C. very often, and they were directed against political leaders. Until 403 B. C. it is considered to be used against both—laws *(nomoi)* and decrees (psefismata); but in that year a formal distinction was for the first time drawn between the two types of statute: the old procedure was retained for use against decrees, but a new parallel procedure, the already above mentioned *graphe nomon me epitedeion theinai* was felt to be required for use against unconstitutional ("inexpedient") laws.[27] We know of 35 such cases between the years 403 and 322 B. C.: in this period any decision by the Assembly could be overturned by the Courts, but if the accuser failed to get at least 1/5 of the jury votes, he was punished instead.[28]

The respective *grafe* accusations have been dealt by jury-courts *(dikasterion)*. But usually already the plain fact that a citizen has announced in the *ekklesia* or in the *boule* that he is ready to raise such an accusation, has postponed the voting procedure on the respective issue—on the criticized matter—respectively, the validity of such a law, if the voting has already taken place.

The mentioned *grafe* could be directed against an unlawful content or against an eventually unlawful procedure linked with the proposal-making. The *grafe paranomon* was considered to be one of the fundamental pillars of democracy in Athens (with a possible end in the court).

The courts could nullify a decree based on the laws. When inscribed on stone for the permanent records, decrees begin with the formula, "It was decided by the People," or "It was decided by the Council and the People", a law began with the formula "It was decided by the Nomothetai".

In ancient Athens in a certain period also the legislative proceedings kept this form: in the case when an old statute *(nomos)* had to be substituted by a new one, the old statute had got a procedure by the *nomothetes*.

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majority of votes). (The difference has to do also with the way of voting (psefos = voting stones; cheirotonia = raising hands).

27 KREMMYDAS, Christos: *Commentary on Demosthenes Against Leptines*. Oxford: Oxford University Press, 2012, p. 2.: In 356/5 B. C. the Athenian politician Leptines of Koile introduced a law abolishing all honorary exemptions (ateleiai) from festival liturgies. Bothippos brought a public action against Leptines for carrying an inexpedient law. In 355/354 B.C. Apsefion brought a public action to repeal the Leptines-law. As Mirko Canevaro emphasizes the charge was against the law, not against Leptines, who was no longer subject to prosecution, because more than one year elapsed since his law was enacted. See more in: CANEVARO, Mirko: The Procedure of Demosthenes' Against Leptines: How to Repeal (and Replace) an Existing Law? *Journal of Hellenistic Studies*. 2016, Vol. 136, p. 1.

28 LYTTKENS, Carl Hampus, TRIDIMAS, George, LINDGREN, Anna: Making direct democracy work: a rational actor perspective on the *graphe paranomon* in ancient Athens. *Constitutional Political Economy*, Vol. 29 (201, p. 389 ff. There is a lot of evidence about the functioning of the juries; not only in Aristophanes—who has criticized the juries especially in his Wasps, but also in *Birds*, underlining the political importance of these bodies and their great influence within the Athenian democracy. In the words of Philocleon: "And if the Council and the People have trouble in deciding some important case, it is decreed to send the culprits before the dikastes."

In spring 404 B. C. in Athens an oligarchic conspiracy took shape towards the end of the Peloponnesian War. Dracontides of Afidna proposed a decree by which the power was entrusted to a board of thirty men who were to revise and codify the laws of Athens. The Thirty Tyrants (as they have been called later and now) once they were established (among others Dracontides, Erathosthenes, Critias, a student of Socrates and relative of Plato) they have secured their hold of power by appointing magistrates friendly to their regime. At the turn of new year they sworn in a Council of 500 stocked by their supporters. Under the Thirty Tyrants the Council of 500 functioned as a Court of Law (Lysias 13, 36) displacing the democratic system of jury-courts (dikasteria).

Later on in the case of changing (amending) a law the initiative of a citizen (by his own initiative in the assembly or beside the prescribed of the assembly) or of the magistrates *(thesmothetes)* was needed: if there was a decree adopted on establishing a commission of *nomothetes*, the people led by the *proedres* appointed these legislators from the list of jurors (501, 1001).[29] At the same time it elected several legal attorneys, who had to defend the valid laws *(syndikoi*, *synegoriai)*[30]. In a judicial proceeding acted both of them, the accuser *(nomothetes)* and the defender *(synegoras)*. First came the voting on the "old" law, followed by the voting on the "new" one. *Nomothesia* was, as Jochen Bleicken maintains, an instrument, which aim was to protect the democratic constitution.[31] It represents transferring of the legislative activity to the *nomothetes*.

The evidence of how *nomothetai* did their work is delivered by Demosthenes in his speech *Against Timocrates*. He reported that Timocrates passed in the Assembly a decree setting up a board of nomothetai, "and that such Legislative Committee (one of the translations for nomothetai, A. B.) do consist of one thousand and one citizens who have taken the oath, and that the Council co-operate therewith in legislative business."[32] The meeting of the nomothetai was conducted as a trial, with advocates speaking in favour of the existing laws *(syndikoi)*, and others speaking in favour of changing the laws. When both parties have spoken the nomothetai voted by show of hands.[33] Any

[29] Maybe an explanatory remark can be helpful here: "In any case the *thesmothetes* were annually elected magistrates, while the *nomothetes* were not even that, being selected by lot for a tenure of only one day at a time." (*Thesmia* have been taken to mean either customary law or decisions of the *thesmothetes* or others in individual cases (law reports?). In: BAUMAN, Richard Alexander: *Political Trials in Ancient Greece*. London and New York: Routledge, 1990, I, 2 Introduction: The Law Applicable in Political Trials.

[30] &in the mentioned procedure on an inexpedient law (Leptines' law) Demosthenes delivered his speech on his side as a *synegoras*. From the point of view of the procedure before the case came to trial Asefion, Demosthenes and Formion proposed a new law to replace Leptines' law. More in: CANEVARO, Mirko: The Procedure of Demosthenes' Against Leptines: How to Repeal (and Replace) an Existing Law? *Journal of Hellenistic Studies*. 2016, Vol. 136, pp. 1–3.

[31] See also RHODES, Peter John: Nomothesia in Fourth-Century Athens. *Classical Quarterly*. 1985, 35, pp. 55–60.

[32] DEMOSTHENES. *Against Timocrates.* Dem., 24, 27. In: MURRAY, Augustus Taber (Transl.). Cambridge (Mass.): Harvard University Press; London: William Heinemann, 1939.

[33] Ibid., Dem., 24, 33.

new laws proposed by the nomothetai, "[Solon ordered] … should be exposed near the statues of the Eponymous Heroes and handed in to the town-clerk to recite them at the meeting of the Assembly."[34]

Demosthenes in his speech *Against Meidios* is addressing the jurors as those, „who serve on juries such power and authority in all state-affairs."[35] Another surviving speech from a *grafe paranomon* is Demosthenes' *On the Crown* from 333 B. C. in response to Aeschines' *Against Ctesiphon*.[36]

In 324 B. C. the orator Dinarchus in his speech Against Demosthenes is speaking about the jurors as "κυριον παντον *(kyrion panton)*."[37]

According to Hans Julius Wolff the proper function of the *grafe paranomon* was to serve as a sort of legal review process *(Normenkontrolle)*, and that insofar as political issues were injected into the proceedings, it was abused.[38] He tried to show convincingly, "dass man den Begriff paranomon in einem weiteren Sinn verstand und augenscheinlich schon frühzeitig nicht mehr, vielleicht sogar zu keiner Zeit, nur auf offenkundige Widersprüche zum unmittelbaren Wortlaut bestehender Gesetze bezog", but *nomos* rather than *psefisma* was regarded as *paranomon*, "wenn sie mit den politischen Grundprinzipien der demokratischen Staatsordnung oder mit den tragenden Institutionen der Gesellschaftsordnung unvereinbar schienen."[39]

The fact that the *dikasterion* could—in case of *grafe paranomon*—overturn a decree of the people can support the impression that both institutions are equal. So the jurors are not the "third power", which is as a counterbalance set up to control the legislative power. The division of power is so far not known in Athens and the great number of jurors is that's why the same thing as the whole people or at least the committee of the people. The idea that the courts are identical with the people is further comprehended in the fact that there were 6000 jurors, which is the number the Athenians in the People's Assembly understood as the whole people. So the people is present in three institutions (if we count the *nomothetes*) of the polis.

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[34] DEMOSTHENES: *Against Leptines*. Dem., 20, 94. In: VINCE, Charles Anthony et al. (Transl.): Cambridge (Mass.): Harvard University Press; London: William Heinemann, Ltd., 1926. See further also: KREMMYDAS, Christos: *Commentary on Demosthenes Against Leptines*. With Introduction, Text, and Translation. Oxford: Oxford University Press, 2012.

[35] DEMOSTHENES: *Against Midias*. 21, 223. MURRAY, Augustus Taber (Transl.) Cambridge (Mass.): Harvard University Press; London: William Heinemann, Ltd. 1939. Demosthenes was choregus at the Great Dionysia of the year 351/350 B. C.: he lodged a plaint in the Assembly against Meidios as an offender in connection with the festival, not only for assault of his person at the Dionysia, but also for many other acts of violence during the whole period of his service.

[36] GAGARIN, Michael: Law, Politics, and the Question of Relevance in the Case On the Crown. *Classical Antiquity*. Vol. 31, No. 2, October 2012, pp. 293–311.

[37] DINARCHUS: *Against Demosthenes*. Din. 1, 106. ("ταυθ υμεις οι κυριοι παντων"). In Minor Attic Orators in Two Volumes. BURTT, J. O. (Transl.). Cambridge (Mass.): Harvard University Press; London: William Heinemann, Ltd. 1962.

[38] WOLFF, Hans Julius: *Normenkontrolle und Gesetzesbegriff in der attischen Demokratie. Untersuchungen zur graphe paranomon.* Sitzungsbericht der Heidelberger Akademie der Wissenschaften. Philosophisch-Historische Klasse. 2. Abhandlung. Heidelberg: C. Winter, 1970, pp. 46–65.

[39] Ibid., p.

The Athenians were well aware of the fact that laws are invalid unless they are enforced.; and the enforcement of the laws is a task incumbent on the *dikasteria*, especially after about 355 B. C., when the *ekklesia* was deprived of its right to act as a law court hearing political trials.[40]

The relationship between the courts and the laws brought serious problems. According to Jochen Bleicken,[41] if the jurors were considered the people and if they felt alike, the borderline between the adjudication and the law-making could easily disappear. If the jurors were identical with the people they could not transgress the law.

The sometimes overwhelming number of passages on the supremacy of the courts especially in the fourth century Athens is probably representative of what the Athenians believed, and not just a number of compliments invented by Demosthenes to flatter his audience in a forensic speech.[42] The fact, however, that the *dikasteria* often took precedence over the *ekklesia* and were called *kyria tes politeias* must not necessarily lead to the erroneous belief that the *dikasteria* mattered much more than the *ekklesia*. Admittedly, the *dikasteria* were considered the bulwark of the democracy but when the Athenians made decisions about war, peace, foreign policy, and important individual decisions concerning domestic policy, it was still the demos in the *ekklesia* that was *kyrios*.[43]

The courts were not obliged to follow any kind of legal precedent. The broad popular participation and lack of legal expertise characterizing the legal system in Athens implies that the court was an inextricable complement to the democratic constitution.

3 Strengthening the Judicial Power: The Birth of the Constitutional Review in the United States of America (Marbury v. Madison)

According to John Marshall, Chief Justice of the U. S. Supreme Court from 1801–1835, one of the arguments made in favour of the judicial review of legislation was that judicial review is of the very essence of judicial duty. It is a matter of fact that

[40] MACDOWELL, Douglas Maurice: Law-Making in Athens in the Fourth Century B. C. *Journal of Hellenic Studies*, 1975, 95, pp. 62–74.; HANSEN, Mogens Herman: Did the Athenian Ecclesia Legislate after 403/402 B. C.? *Greek, Roman and Byzantine Studies*. 1979, 20, pp. 27–53. Reprinted in: HANSEN, Mogens Herman: *The Athenian Ecclesia*. Copenhagen: Museum Tusculanum Press, 1983, pp. 161–206.

[41] BLEICKEN, Jochen: *Athénská demokracie [Athenian Democracy]*. Praha: OIKOYMENH, 2002, pp. 272–274.

[42] HANSEN, Mogens Herman: *The Athenian Assembly in the Age of Demosthenes*. Oxford: Basil Blackwell, 1987.

[43] HANSEN, Mogens Herman: The Political Powers of the People's Court. In: MURRAY, Oswyn, PRICE, Simon (ed.): *The Greek City. From Homer to Alexander*. Oxford: Clarendon Press, 1990, pp. 215–244, esp. pp. 242–243.

Marbury v. Madison 5 U. S. (1 Cranch), 137 (1803), the decision regarded as the root of judicial authority to strike down statutes as violating the Constitution, contains almost all the arguments that historically could be and have been raised in favour of constitutional review.[44]

Reconstructed in a brief summary: William Marbury had been appointed Justice of the Peace in the District of Columbia, but his commission was not delivered. That is why he petitioned the Supreme Court to compel the new Secretary of State, James Madison, to deliver the documents. Marbury, joined by three other similarly situated appointees, petitioned for a *writ of mandamus* compelling the delivery of the commissions. The Court found that Madison's refusal to deliver the commission was illegal, but did not order Madison to hand over Marbury's commission via *writ of mandamus*. Instead, the Court held that the provision of the Judiciary Act of 1789 enabling Marbury to bring his claim to the Supreme Court[45] was itself unconstitutional, since it purported to extend the Court's original jurisdiction beyond that which Article III, Section 2, established.

John Marshall expanded that a *writ of mandamus* was the proper way to seek a remedy, but concluded that the Court could not issue it. He reasoned that the Judiciary Act 1789 conflicted with the Constitution. Congress did not have power to modify the Constitution through regular legislation because Supremacy Clause places the Constitution before the Laws. In holding so Marshall established the principle of judicial review, i. e. the power to declare a law unconstitutional.

From this point of view it is emphatically the duty of the judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the. If two laws conflict with each other, the Court must decide upon the operation of each.

If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislation, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Edward Corwin in this connection wrote about a change of the paradigm: "In short there was no valid occasion in Marbury v. Madison for any inquiry by the court into its prerogative in relation to acts of Congress… To speak frankly, this decision bears many of the remarks of a deliberative partisan coup."[46]

Alexander Bickel is also objecting: "When the Supreme Court declares the unconstitutionality of a legislative act or of a decision of an elected representative of the executive power, it breaks the will of the real people here and now; it exercises control not in the name of the prevailing majority, but against it. This is without

[44] "Marbury v. Madison." Oyez, www.oyez.org/cases/1789-1850/5us137

[45] The Judiciary Act (Section 13): "The act to establish the judicial courts of the United States authorizes the Supreme Court to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

[46] CORWIN, Edward Samuel: *The Doctrine of Judicial Review: Its Legal and Historical Basis*. Princeton (N. J.): Princeton University Press, 1914, p. 542–543.