

JERZY ZAJADŁO¹

The Concept of *Nomos* – Some Remarks²

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Abstract

It is a widespread opinion that modern jurisprudence was shaped first of all by the tradition of Roman law. In this article author tries to explain why ancient Greek legal thought should be equally important. As an example he considers the evolution and the different meanings of the concept of *nomos*. Four issues are presented in this paper. First, *nomos* in the political philosophy of Carl Schmitt and Giorgio Agamben. Secondly, *nomos* in one of Pindar's poems. Thirdly, the distinction between *physis* and *nomos* made by the sophists. Fourthly, *thesmos*, *nomos* and *psephisma* in the legislative practice of Athenian *ekklesia*.

Keywords: ancient Greece, *nomos*, jurisprudence, politics, Carl Schmitt, Giorgio Agamben.

¹ Prof. Jerzy Zajadło – Faculty of Law and Administration, University of Gdańsk, Poland; e-mail: jerzy.zajadlo@prawo.ug.edu.pl; ORCID: 0000-0002-3113-9828.

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JERZY ZAJADŁO

Koncepcja *nomosu* – kilka uwag

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Streszczenie

Celem artykułu jest analiza pojęcia *nomos* w jego historycznym rozwoju w greckim antyku – od archaicznego okresu czasów Homera aż po szczyt ateńskiej demokracji czasów Demostenesa. Autor stawia tezę, że ta ewolucja od *nomos* jako synonimu ogólnego pojęcia porządku do *nomos* jako synonimu prawa pozytywnego odzwierciedla proces stopniowej jurydyzacji polityki. Na tym tle przedstawiono w artykule recepcję omawianego pojęcia we współczesnej filozofii polityki, zwłaszcza w pracach Carla Schmitta i Giorgio Agambena. Autor stawia tutaj drugą główną tezę opracowania – wykorzystanie pojęcia *nomos* w teologii politycznej Carla Schmitta jest przykładem procesu odwrotnego, dejurydyzacji polityki.

Słowa kluczowe: starożytna Grecja, *nomos*, prawo, polityka, Carl Schmitt, Giorgio Agamben.

Preliminary Remarks

Lawyers have always been profoundly influenced by the legal culture shaped by the traditions and terminology of Roman law – when they speak of law, they mean either the idea of law in general, in the sense of *ius*, or a specific act of positive law, in the sense of *lex*. These are clearly two distinct concepts, and the philosophy of law has long sought to establish the relations between them. However, much less attention has been devoted to the legacy of the legislation and literature of ancient Greece. This is somewhat surprising since it is not disputed that the conceptual apparatus of contemporary political philosophy was not primarily shaped by Rome, but rather by the Athenian philosophers, to whom we are indebted for the following concepts: political virtues, democracy, constitutionalism, cosmopolitanism, citizenship, republic, justice, sovereignty – to name but a few.³ Given the close relationship between the philosophy of law and political philosophy, it would be wise, perhaps, to expand the field of research on the sources of our contemporary legal world view beyond Roman jurisprudence, and to enrich it with studies on the ideological and terminological context of Ancient Greece. It would appear that this is also the trend currently being pursued in the international literature on the subject: there is an increasing number of works devoted not only to Ancient Greek law, but also to the conceptions of law which appear in the works of Greek poets, writers and philosophers. Of central importance here is the notion of *nomos*; the number of works of historians, historians of philosophy and ancient literature, classical philologists, political scientists, literary theorists and linguists devoted to this term is vast, and has a very long tradition, but rather little has been written on this issue from a strictly legal perspective. *Nomos* has the character of a *sui generis* phenomenon, and a unique consequence associated with this is that everywhere the concept is referred to directly as *nomos* because it is difficult to find a direct equivalent in different languages, e.g. Polish, German or English. On the one hand, *nomos* has numerous meanings, yet on the other its content and functions have changed over time and appeared in very different contexts. Although both the etymology and semantics of the term are not entirely clear, it is difficult to find any aspect of the concept that would not receive much attention in the scholarly literature. Despite very rich and diverse research on it, *nomos* still fascinates contemporary

³ M. Lane, *The Birth of Politics. Eight Greek and Roman Ideas and Why They Matter*, Princeton 2014.

scholars.⁴ If one looks at this problem from the point of view of the main theme of this volume, namely the political nature of jurisprudence, then the historical development of the concept of *nomos* and some of its contemporary interpretations may indicate an interesting phenomenon. Hannah Arendt devoted a lot of attention to this in her writings⁵ – the process of the transition from *nomos* to *lex* is, in fact, a gradual juridisation of politics; the reverse process, that is, the return from *lex* to the original concept of *nomos*, is like its progressive de-juridisation. Therefore, lawyers should also devote much more attention to this issue than they have hitherto done because *nomos* has, on the one hand, a very close relationship with law from the outside and, on the other hand, paradoxically, it is itself law from the inside; it is both text and context. If today, in the era of the interdisciplinary science, we have a much greater methodological awareness that law is an extremely complex phenomenon (e.g. a language, a normative system, a social fact, a mental experience, a carrier of values, etc.), perhaps *nomos* better reflects the essence of this phenomenon than the traditional Latin formula *ius et lex*. Interestingly, such an opinion prevails among many historians of the ancient world, for instance, Włodzimierz Lengauer wrote over twenty years ago that “*nomos* is an ambiguous term, meaning both ‘law’ and ‘custom’, it corresponds to as many as three Latin terms: *ius*, *lex*, *mores*.”⁶ However, this also corresponds to what Cicero, a few centuries after the innovations of Ancient Greece, judged to be the essence of law. Cicero was not a typical Roman jurist, but rather a court lawyer, speaker, philosopher and politician with an excellent knowledge of the law. In his political-legal and moral thought, the concepts of *ius*, *lex* and *mores* also merge, on the philosophical level, into one idea. However, this is hardly surprising – although Cicero’s system is, on the one hand, specifically Roman, on the other hand, it is simultaneously deeply eclectic and based on Greek sources (e.g., stoicism, the scepticism of Plato’s Academy, the Peripatetic School, and even elements of Epicureanism).⁷ While formulating its famous definition, which states that ‘Law is the highest reason, implanted in Nature, which commands what ought

⁴ From the most recent literature see, for instance, T. Zartaloudis, *The Birth of Nomos*, Edinburgh 2019 – the author presents various aspects of the concept of *nomos*, encompassing virtually the entirety of Greek culture (from literature, through philosophy, to music), and adopts the division into Homeric and post-Homeric *nomos* as the basic criterion.

⁵ For more detailed discussion of this issue, see M. Gondoni, C. Corkindale (eds.), *Hannah Arendt and the Law*, Oxford–Portland, OR 2012, especially Part I, *Between Nomos and Lex. The Concept of Law in Hannah Arendt’s Political Thought*, pp. 13–97.

⁶ W. Lengauer, *Religijność starożytnych Greków*, Warszawa 1994, p. 36.

⁷ For more detailed discussion of this issue, see J. Zajadło, *Cycon dla prawników*, Gdańsk 2019.

to be done and forbids the opposite,⁸ Cicero has the Greek *logos* in mind, rather than *nomos*, but while in some philosophical contexts, these terms may have been fundamentally different, and in others, they may have meant one and the same thing. Today, *nomos* has acquired a paradigmatic dimension, and for some authors, the term is a symbol whose reference extends beyond the historical context of Greek antiquity. Such usage can take very different forms and operate on various scales and dimensions – from a synthesis constructed at a high level of abstraction to very detailed analytical considerations. *Nomos*, with its ambiguous, diverse and deep content, can stimulate the legal imagination in various ways.

If, for instance, one associates jurisprudence with social theory, then, according to Donald R. Kelley, the entire history of law and its theory and philosophy, from antiquity to the present day, can be presented through the prism of the idea of *nomos*.⁹ In turn, in the most recent research, Johan van der Walt attempts to construct the concept of liberal democratic law on the basis of *nomos* and the historical and theoretical disputes surrounding it (from Protagoras to Hart and Dworkin), and all this in the context of the crisis in the European Union.¹⁰ The same is true when we look for links between law and politics – in this sphere, it is also difficult to disregard or even do without the concept of *nomos* because it not only forms the axis of our deliberations, but it is even the key to understanding the phenomenon called *political jurisprudence*.¹¹ *Nomos* may also constitute a starting point in the search for a new critical dimension of the theory and philosophy of law, and for treating the law not only in terms of a normative system, but also through the prism of the real world surrounding it and a certain concrete context in which this normative system is embedded – which is why, for instance, *nomos* appears in the title of Robert M. Cover's article *Nomos and Narrative*,¹² which is already legendary today, having been commented on repeatedly and in various ways. Finally, *nomos* is sometimes a starting point for, and then crops up in various specific aspects of, the contempo-

⁸ Cicero, *De legibus*, I, 18 (and in a similar vein, also II, 8) – I cite from Cyceron, *Pisma filozoficzne II. O państwie. O prawach. O powinnościach. O cnotach*, transl. W. Kornatowski, Warszawa 1960, pp. 207 and 241.

⁹ D.R. Kelley, *The Human Measure. Social Thought in the Western Legal Tradition*, Cambridge, MA–London 1990.

¹⁰ J. van der Walt, *The Concept of Liberal Democratic Law*, Routledge 2020.

¹¹ M. Loughlin, *Political Jurisprudence*, Oxford 2017; see also idem, *Nomos*, [in:] D. Dyzenhaus, T. Poole (eds.), *Law, Liberty and State. Oakeshott, Hayek and Schmitt on the Rule of Law*, Cambridge 2015, pp. 65–95.

¹² R.M. Cover, *The Supreme Court 1982. Foreword: Nomos and Narrative*, "Harvard Law Review" 1983, 97(4), pp. 3–68.

rary legal discourse – from the relationship between democracy and the rule of law,¹³ through the idea of constitutionalism,¹⁴ to the protection of human rights.¹⁵ All of this suggests that Polish lawyers should also pay a little more attention to the notion of *nomos*, as it may allow for a better understanding of the overall complexity of the phenomenon of law in its historical and contemporary dimension. The short sketch provided here is therefore not, obviously, an exhaustive study of the issue and is only intended to encourage further studies which would fill a gap in Polish legal research. For the purpose of this analysis, only a few problems will be addressed, which are related to the genesis and evolution of the concept of *nomos*.

Perhaps a good starting point for the discussion on this subject will be Carl Schmitt's famous work on the international order, namely *Nomos of the Earth*; the concept of *nomos* appears in the title, but in a very specific interpretation characteristic of political theology.¹⁶ According to Martin Ostwald, an insightful researcher of the term in question, the reconstruction of *nomos* may follow one of two methods: etymological or semantic.¹⁷ Below I will attempt to present both – although Schmitt employed the former method, the latter seems more important to lawyers.

Nomos der Erde

The notion of *nomos* plays a fundamental role in Carl Schmitt's political philosophy – this applies not only to the aforementioned *Nomos of the Earth*, which has recently been published in Polish, but actually to all of his so-called political theology. There is also a certain personal and biographical element, which shows that *nomos* continually crops up, sometimes quietly, sometimes clearly, throughout his life and work,

¹³ Today, the question of the relationship between democracy and the rule of law is being intensely discussed in the context of the processes taking place within the European Union, but it actually has its roots in ancient Athens (see, for instance: R. Sealey, *The Athenian Republic. Democracy or the Rule of Law?*, University Park–London 1987 and E.M. Harris, *Democracy and the Rule of Law in Classical Athens. Essays on Law, Society, and Politics*, New York 2006. In both of these works, for instance, it is to some extent *nomos* that is key to understanding and solving the apparent dilemma of 'democracy or the rule of law?').

¹⁴ See, for instance: J.D. Lewis, *Constitution and Fundamental Law. The Lesson of Classical Athens*, [in:] E. Frankel Paul, F.D. Miller, Jr., J. Paul, *What Should Constitutions Do?*, New York 2011, pp. 25–49; and in Polish research, A. Bryk, *Konstytucjonalizm. Od starożytnego Izraela do liberalnego konstytucjonalizmu amerykańskiego*, Kraków 2013, pp. 77–143.

¹⁵ See, for instance, E.Y. Krivenko, *Rethinking Human Rights and Global Constitutionalism. From Inclusion to Belonging*, Cambridge 2017, pp. 112–121 and 144–147.

¹⁶ C. Schmitt, *Nomos ziemi w prawie międzynarodowym ius publicum Europaeum*, transl. K. Wudarska, Warszawa 2019.

¹⁷ M. Ostwald, *Nomos and the Beginnings of the Athenian Democracy*, Oxford 1969, pp. 9–11.

suggesting a degree of obsession with this term. A Greek inscription was engraved on Schmitt's tombstone in the Catholic cemetery in Plettenberg: *Kai nómon egno* (He came to know *nomos*). This sentence is Schmitt's own translation and interpretation of the relevant fragment of the first sentence of Homer's *Odyssey*¹⁸ and is said to be somehow related to the memory of Anima, his only daughter (she died in 1983, two years before her father). In his opinion, however, 'to come to know *nomos*' is much more than 'to come to know Gesetz' [law, statute – J.Z.] or 'to come to know Ort [place – J.Z.]', as this passage was sometimes translated.¹⁹ So finally, for the purposes of his interpretation, Schmitt actually corrects Homer – the word *nous* is replaced with the word *nomos* because, in his opinion, it reflects the sense of the first sentence of *Odyssey* better.²⁰ The question thus arises out of a certain logical order: whether *nomos* was the starting point of the considerations from which Schmitt constructed his entire political theory, or, conversely, whether *nomos* is just an additional reinforcement, added legitimacy for the proposed conception of sovereignty and the theory of the state of exception. The latter possibility is more likely the case: the notion of *nomos* was not present in Schmitt's writings from the outset, and when it does appear at a certain point, it is given a concrete, specific meaning – by no means the most widespread one, and one which had been reconstructed by means of an etymological method. Although Schmitt applied this concept at the end of the 1930s, and after the Second World War primarily to his conception of international relations and his territorial-spatial understanding of the organisation of the world order,²¹ in the end, it also became compatible with his political theology, the concept of sovereignty and the theory of the state of exception. However, a characteristic feature of Schmitt's work, related to his biography, is that as a young man, he intended to study history and literary theory, and it was only under pressure from his family that he finally graduated from law studies. In fact, until the end of his life, Schmitt remained keenly interested in language analysis, and in the creation and interpretation of concepts (*Begriffsbildung*). As far as *nomos* is concerned, this

¹⁸ R. Mehring, *Carl Schmitt. Aufstieg und Fall. Eine Biographie*, München 2009, p. 578.

¹⁹ In W. Dawidowicz's Polish translation, this is rendered as 'poznał zwyczaj i myśli [he learned the customs and minds]', which really reflects the essence of Homer's concept of *nous* (cf. footnote 3) – Homer, *Odysseja*, transl. W. Dawidowicz, Warszawa 2010, p. 21: 'Muzo, wspomnij o mężu sławnym z przeróżnych fortel, który swoim podstępem zburzył prześwietny gród Troi, potem długo wędrował, poznał zwyczaj i myśli wielu ludów'. R. Merrill's translation is somewhat similar: 'Tell me, Muse, of the man versatile and resourceful, who wandered many a sea-mile after he ransacked Troy's holy city. Many the men whose towns he observed, whose minds he discovered', Homer, *The Odyssey*, transl. R. Merrill, Anna Arbor, MI 2002, p. 85.

²⁰ C. Schmitt, *Nomos ziemi...*, pp. 44–46.

²¹ From more recent literature on this topic, see for instance: L. Odysseos, F. Petitto (eds.), *International Political Thought of Carl Schmitt. Terror, Liberal War and the Crisis of Global Order*, Routledge 2007.

resulted, for instance, in the article *Nomos, Nahme, Name*,²² which was published in 1959. Nevertheless, this does not change the fact that Schmitt felt at home in the legal profession and always considered himself primarily a jurist. In an interview that he gave to Fulco Lanchester on 9 November 1982, and thus just a few years before his death, he insisted: 'I have been and I am a jurist. I will remain a jurist. I will die a jurist. And all the misfortune of being a jurist is involved therein.'²³ However, it is Schmitt the jurist's entry into the sphere of language theory and the correctness of his numerous terminological and etymological considerations that arouses not only interest, but also doubts of some contemporary philologists.²⁴ In *Nomos of the Earth*, Schmitt clearly emphasises that the concept of *nomos* had many meanings, and he enumerates several of them: "Nomos and law (Gesetz)", "Nomos as ruler", "Nomos with Homer" and "Nomos as a fundamental process of apportioning space."²⁵ For the sake of his theory, he chooses the latter meaning, considering it the most primordial, and justifies this with the etymological method mentioned above, though, as has been seen, he requested that the Homeric sense of *nomos* be carved on his tombstone – but in his corrected version of Homer! However, there is no contradiction in this if one considers the differences between Schmitt's political philosophy and his philosophy of law.²⁶ In terms of a specific legal order, Schmitt would be close to the idea that *nomos* is at simultaneously *lex*, *ius* and *mores*, and even something else – 'the habits and minds of many peoples' (and thus *nous* in Waław Dawidowicz's translation). Schmitt had a habit of opening his books with a powerful sentence. This is somewhat reminiscent of Alfred Hitchcock's famous thesis, well known in the theory of cinematography: 'A good film should start with an earthquake and be followed by rising tension.' In *Political Theology*, from 1922, Schmitt's most famous and evocative sentence appears at the beginning: 'Sovereign is he who decides on the exception.'²⁷ The work *Roman Catholicism and Political Form*, from 1923, begins with a controversial and oft-discussed opinion: 'There is an anti-

²² W.S. Behn (ed.), *Der beständige Aufbruch. Festschrift für Erich Przywara*, Nürnberg 1959, pp. 92–105 – for a more detailed discussion of this issue, see: H. Schmidt, *Nomosbegriff bei Carl Schmidt*, "Der Staat" 1963, 1, pp. 81–108.

²³ G. Agamben, *A Jurist Confronting Himself*, [in:] J. Meierhenrich, O. Simons (eds.), *The Oxford Handbook of Carl Schmitt*, Oxford 2016, p. 458.

²⁴ See, for instance: T. Schestag, *Namen nehmen. Zur Theorie des Namens bei Carl Schmitt*, "Modern Language Notes" 2007, 122(3), German issue, pp. 544–562 (for the concept of *Nomos*, see: p. 559 ff.).

²⁵ C. Schmitt, *Nomos of the Earth*, transl. G.L. Ulmen, New York 2003, pp. 67–79.

²⁶ For a more detailed discussion of this issue, see: J. Zajadło, *Schmitt*, Sopot 2016, and the literature cited therein on the subject of Carl Schmitt's philosophy of law.

²⁷ C. Schmitt, *Political Theology*, transl. G. Schwab, Chicago 2005, p. 5.

-Roman temper that has nourished the struggle against popery.²⁸ *The Concept of the Political* (from 1932, but originally published in 1927, in the form of an article) begins in a way that still inflames the emotions and imagination of political scientists: 'The concept of the state presupposes the concept of the political.'²⁹ In *Nomos of the Earth*, the work that I am chiefly interested in here, a similar effect is achieved by the following three fragments: 'The Greek word for the first measure of all subsequent measures, for the first land-appropriation understood as the first partition and classification of space, for the primeval division and distribution, is *nomos*.'³⁰ And a little further on: 'Thus, the original meaning of *nomos* – its origin in land-appropriation – still is recognizable. The original meaning was destroyed by a series of distinctions and antitheses. Most important among them was the opposing of *nomos* and *physis*, whereby *nomos* became an imposed *ought* (*Sollen*) dissociated from and opposed to *is* (*Sein*) (...). In contradistinction, when I use the word *nomos* (again in its original sense), the point is not to breathe artificial new life into dead myths or to conjure up empty shadows. The word *nomos* is useful for us, because it shields perceptions of the current world situation from the confusion of legal positivism (...).'³¹ And finally: '*Nomos* comes from *nemein* – a [Greek] word that means both "to divide" and "to pasture." Thus, *nomos* is the immediate form in which the political and social order of a people becomes spatially visible – the initial measure and division of pastureland, i.e., the *land-appropriation as well as the concrete order contained in it and following from it* (...). *Nomos* is the measure by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process.'³²

Nomos basileus

Readers can become acquainted with the conception of *nomos* in Carl Schmitt's thought not only through *Nomos of the Earth*, but also thanks to Giorgio Agamben's *Homo Sacer*.³³ Agamben analyses Schmitt's thought with regard to a certain issue

²⁸ Idem, *Roman Catholicism and Political Form*, transl. G.L. Ulmen, Westport 1996, p. 3.

²⁹ Idem, *The Concept of the Political*, transl. G. Schwab, Chicago 2007, p. 19.

³⁰ Idem, *Nomos of the Earth...*, p. 67.

³¹ Ibidem, p. 69.

³² Ibidem, p. 70.

³³ G. Agamben, *Homo sacer. Suwerenna władza i nagie życie*, transl. M. Salwa, Warszawa 2008.; see also idem, *Stan wyjątkowy. Homo sacer II, 1*, transl. M. Surma-Gawłowska, Kraków 2008.

which he himself describes as the paradox of sovereignty, i.e. what actually constitutes the very core of political theology:

‘The paradox of sovereignty consists in the fact the sovereign is, at the same time, outside and inside the juridical order. (...) This means that the paradox can also be formulated this way: “the law is outside itself,” or: “I, the sovereign, who am outside the law, declare that there is nothing outside the law”.’³⁴

So here one arrives at what probably is currently the most widely discussed context in which *nomos* appears in Greek ancient literature. The source is the following fragment of Pindar’s poetry:

*Law, the king of all,
of mortals and immortals,
guides them as it justifies the utmost violence
with a sovereign hand. I bring as witness
the deeds of Heracles,
for he drove Geryon’s cattle
to the Cyclopean portal of Eurystheus
without punishment or payment.*³⁵

These words of Pindar still arouse great emotions among contemporary scholars – analysis is devoted to the later interpretations of Schmitt and Agamben, as well as to the original intentions of Pindar himself.³⁶ An attempt is being made to somehow collect and summarise the huge amount of scholarly literature devoted to just this one initial phrase: ‘Law, king of all’ (*Nomos basileus*), and not only studies directly relating to Pindar’s fragment, but also to subsequent indirect transmissions.³⁷ In the latter case, of particular importance is Plato’s *Gorgias*, where Callicles, in conversation with Socrates, presents a sophist version of the concept of natural justice as the law of the stronger, by recalling the words of Pindar from memory, but not very precisely, and giving his own interpretation (*Gorgias* 484b1–c3). Pindar’s text is, obviously, about the tenth labour of Heracles – the hero was tasked with taking the cattle of Geryon, a monster with three heads, three torsos, six arms and six legs. Heracles succeeded in overcoming many obstacles by using force, and this for

³⁴ Idem, *Homo Sacer. Sovereign Power and Bare Life*, transl. D. Heller-Roazen, Stanford 1998, p. 27.

³⁵ Pindar, *Nemean Odes, Isthmian Odes, Fragments*, transl. William H. Race, Cambridge, MA–London 1997, pp. 400–403 (Pindar, Fragment 169a).

³⁶ See, for instance: L. v. d. Berge, *Law, King of All. Schmitt, Agamben, Pindar, “Law and Humanities”* 2019, 19(2), pp. 198–222.

³⁷ K.C. Stefou, *Νόμος ό πάντων βασιλεύς: Pindar, Callicles and Plato’s treatment of νομος in the Gorgias, “Akroterion”* 2015, 60, pp. 1–11, and the recent literature cited therein.

Callicles is proof of the existence of the law of the stronger – Heracles, acting ‘without punishment or payment’ established his own *nomos* as ‘king of all’, and ‘justifies the utmost violence with a sovereign hand.’ But what does the phrase ‘Law, the king of all’ (*Nomos basileus*) mean in this context? For some contemporary commentators, it is ‘the law of fate’, for some, it is ‘the will of Zeus’, for others, it is ‘the order sanctified by tradition’, and for yet others, it is ‘the customs and habits accepted in the community.’³⁸ In fact, this clearly demonstrates the ambiguity of this version of *nomos* because it is difficult to reduce these different interpretations to a single common denominator – especially since, as will be seen below, in the subsequent development of Greek philosophy, *nomos* simply became synonymous with law or sometimes even positive law. After all, in the Platonic dialogue *Laws*, the original title is nothing more than *nomos* in the plural – *Nomoi*. The term *nomos* is also used in various places in connection with (broadly understood) law, especially in Aristotle’s *Rhetoric*. For the purposes of his theory, Schmitt therefore goes against the popular opinion that *nomos* was closely connected with law (*Gesetz*), and he particularly contests Hölderlin’s German translation of Pindar’s fragment, and proposes *Ordnung und Ortung* instead of *Gesetz*: ‘Not to lose the decisive connection between order and orientation, one should not translate *nomos* as law (*Gesetz* in German), regulation, norm, or any similar expression. (...) But Hölderlin also confuses his interpretation of the Pindar passage by translating the word *nomos* as “law,” and by taking the false path of this unfortunate word, although he knew that, in the strictest sense, law is mediation. In its original sense, however, *nomos* is precisely the full immediacy of a legal power not mediated by laws; it is a constitutive historical event – an act of legitimacy, whereby the legality of a mere law first is made meaningful.’³⁹ Callicles’ interpretation in the spirit of the ‘law of the stronger’ is therefore, obviously, the simplest possible reading, but with Schmitt and Agamben, the issue becomes far more complicated and sophisticated. Each of these authors, however, places a different emphasis on the meaning and political-legal consequences of Pindar’s words.

Let us start with Schmitt and his understanding of the concept of *nomos* as ‘a fundamental process of apportioning space.’ He writes as follows: ‘As long as the Greek word *nomos* in the often cited passages of Heraclitus and Pindar is transformed from a spatially concrete, constitutive act of order and orientation – from an *ordo ordinans* [order of ordering] into the mere enactment of acts in line with the *ought* and, consistent with the manner of thinking of the positivistic legal system, translated with the word *law* – all disputes about interpretation are hopeless and all philological acumen is fruitless (...). In reality, the words of Heraclitus and Pindar mean

³⁸ Ibidem, p. 2 ff.

³⁹ C. Schmitt, *Nomos of the Earth...*, p. 70 and 73.

only that all subsequent regulations of a written or unwritten kind derive their power from the inner measure of an original, constitutive act of spatial ordering. This original act is *nomos*.⁴⁰ If one goes beyond *Nomos of the Earth* and turns to *Political Theology*, the situation becomes clearer, even if in the latter the word *nomos* does not necessarily appear directly. It turns out that *nomos* as a 'fundamental process of apportioning space' is no longer just some sort of completed, primary process of appropriation, division and organisation of 'pasture'. On the contrary, the process is ongoing and at any time the 'pastureland' can be appropriated, divided and reorganised anew, especially in a 'state of exception'. As seen above: a '[s]overeign is he who decides on the exception.' Thus, the sovereign can abolish the old *nomos* at any time and establish a completely new one – the issue is not the positivist legality of this act, only its legitimacy.⁴¹ As *Nomos basileus* in Pindar's poem – the sovereign can justify 'the utmost violence with a sovereign hand'; just as Heracles 'drove Geryon's cattle (...) without punishment or payment.' *Nomos* will always be the original act that constitutes legality and creates legitimacy, but without any feedback between legality and legitimacy. Thus, current legality does not create any ultimate barriers or restrictions on a new act of legitimacy, ergo a new *nomos*. Translating this into the language of modern constitutional disputes, the formal procedure for amending the Basic Law is of no importance if one stands face to face with *nomos* because the old legality has to give way and capitulate before the new legitimacy. Only *nomos* has an original and directly constitutive character, so it cannot be translated as *Gesetz* because *Gesetz* is only an indirect and subsequent instrument in the 'sovereign hand' of *nomos*. It seems that Agamben noticed Schmitt's peculiar and hidden interpretative manipulation of Pindar's text, thus writing: 'From this perspective, it will not seem surprising that Schmitt grounds his theory of the originary character of the "nomos of the earth" precisely on Pindar's fragment and, nevertheless, makes no allusion to his own definition of sovereignty as the decision on the state of exception. What Schmitt wishes to establish above all is the superiority of the sovereign *nomos* as the constitutive event of law with respect to every positivistic conception of law as simple position and convention (*Gesetz*).'⁴² According to Agamben, the essence of Pindar's words is completely different from what Schmitt suggests. The point is not the constant renewability of the *nomos* by a sovereign capable of declaring a state of exception, but rather the internal paradox of the double, mysterious nature of law – justice on the one hand and violence on

⁴⁰ Ibidem, p. 78 ff.

⁴¹ For a more detailed discussion of these concepts, see idem, *Legalność i prawomocność*, transl. B. Baran, Warszawa 2015.

⁴² G. Agamben, *Homo sacer...*, pp. 19–20.

the other hand: 'The principle according to which sovereignty belongs to law, which today seems inseparable from our conception of democracy and the legal State, does not at all eliminate the paradox of sovereignty; indeed it even brings it to the most extreme point of its development. Since the most ancient recorded formulation of this principle, Pindar's fragment 169, the sovereignty of law has been situated in a dimension so dark and ambiguous that it has prompted scholars to speak quite rightly of an "enigma" (...). The enigma consists in more than the fact that there are many possible interpretations of the fragment. What is decisive is that the poet – as the reference to Hercules' theft clarifies beyond the shadow of a doubt – defines the sovereignty of the *nomos* by means of a justification of violence. The fragment's meaning becomes clear only when one understands that at its center lies a scandalous unification of the two essentially antithetical principles that the Greeks called *Bia* and *Dikē*, violence and justice. *Nomos* is the power that, "with the strongest hand," achieves the paradoxical union of these opposites.'⁴³

Nomos/physis

In the history of the concept of *nomos*, the breakthrough moment was certainly the philosophy of the sophists because they made a fundamental distinction between law (*nomos*) and nature (*physis*). Carl Schmitt noted this, but assigned to the distinction a definitely pejorative meaning since that has already been seen in his opinion: 'The original meaning [of *nomos*] was destroyed by a series of distinctions and antitheses. Most important among them was the opposing of *nomos* and *physis*.' However, in the history of jurisprudence, and consequently also from the point of view of the mentality of the contemporary lawyers mentioned at the beginning, the distinction certainly had a much greater resonance and much more far-reaching theoretical and practical consequences than the above-discussed conception of *nomos* proposed by Carl Schmitt. Following the sophists, the law ceases to be inseparable from nature; it becomes a conventional creation and, as a result, an artefact. Human beings may, obviously, and perhaps should, draw on nature in the process of law-making, but ultimately, the law is a human creation and is not part of nature, and it is much less identical to it.

⁴³ Ibidem, p. 17 ff.; moreover, this fragment of Pindar appears in various sources, not only in Plato's *Gorgias*, but also, for instance, in the *Histories* of Herodotus, and the violent dimension of *nomos* is emphasised there – K.S. Kingsley, *Justifying Violence in Herodotus's Histories* 3.38. *Nomos, King of All, and Pindaric Poetics*, [in:] E. Bowie (ed.), *Herodotus. Narrator, Scientist, Historian*, Berlin–Boston 2018, pp. 37–58.

In the contemporary theory and philosophy of law, one tends to associate the thesis on the conventional nature of law with Herbert L.A. Hart's sophisticated positivism, but it turns out that it has much deeper ancient roots. The validity of the thesis of the conventional nature of law is in no way contradicted by the attempts to re-establish the relationship between *nomos* and *physis* which have been going on for centuries, for which nowadays the best evidence seems to be provided by legal hermeneutics.⁴⁴ Paradoxically, this is not contradicted by Pindar's enigma, mentioned above, which highlights the tension between justice and violence inherent in *nomos*; on the contrary, violence is to some extent an expression of convention, and justice sometimes goes beyond that convention. It is beyond the scope of this brief outline to provide a detailed description of the birth and development of the sophist thesis on the distinction between *nomos* and *physis* at the turn of the 5th and 4th centuries BC. The issue is very extensive and rather complex, but at the same time, it is well known, with a wealth of research devoted to it; one can find basic information on this subject in any guide to the history of ancient philosophy. This issue will not be explored further in this paper, for two reasons. Firstly, because the views of the sophists were not homogeneous in terms of their attitude to the *nomos/physis* antithesis – both with regard to the content of the two concepts and their thoughts on assessing the consequences of this division in the moral and political spheres.⁴⁵ Secondly, because in this study, I am primarily interested in the historical development of the concept of *nomos* and the significance of this evolution in the sphere of jurisprudence. Methodologically speaking, the sophist antithesis of *nomos/physis* was radical, if not revolutionary, because from that moment on, *nomos* took on a less ambiguous meaning than it had had before; it became a collective synonym for law, both written (*nomos eggraphos*) and unwritten (*nomos agraphos*), but at the same time, even later development (Plato, Aristotle) meant that *nomos* could refer to both positive and natural law.

Nomos/thesmos/psephisma

Finally, important information about ancient Greek legislation also contributes to knowledge of the history of the meaning and development of the concept of *nomos* – it is no coincidence that in ancient Greece legislation was referred to as *Nomothesia*

⁴⁴ For a more detailed discussion of this issue, see J. Zajadło, *Kaufmann*, Sopot 2018.

⁴⁵ For instance, W.K.C. Guthrie distinguishes three groups of sophists in this respect: 'the upholders of *nomos*', 'the realists' and 'the upholders of *physis*' – *The Sophists*, Cambridge–London–New York–Melbourne 1971, pp. 60–131.

and the legislator as *Nomotheta*.⁴⁶ Almost parallel with the emergence of the *nomos/ physis* antinomy, or even earlier, and thus at the end of the 6th century BC, the meaning of *nomos* was gradually changing in the Greek political-legal order – on the one hand, this general, ambiguous *nomos* was employed in the writings of philosophers and poets, and, on the other hand, in the sphere of political and legal order, each *polis* had its own *nomos*, and sometimes they differed significantly from one another: for instance, Athens had its *nomos*, as did Sparta. However, in the legislation that I am interested in here, and the accompanying terminology, the change in the meaning of the term *nomos* was closely linked to the development of ancient democracy, and thus to Athens rather than Sparta.⁴⁷ Martin Ostwald describes the process of how Athenian democracy developed in the 5th century BC – perhaps too straightforwardly and with a little exaggeration – as the transition from the sovereignty of the people (popular sovereignty) to the sovereignty of law, with this law being called *nomos*.⁴⁸

Three concepts are key in this context: *nomos*, *thesmos* and *psephisma*.⁴⁹ Each term was closely related to law and the legislative process, but at the same time, each had a unique meaning. However, at a certain stage in the historical development of Athenian democracy, *nomos* and *thesmos* became rival terms, and *nomos* prevailed over time, replacing *thesmos* completely, while the term *psephisma*⁵⁰ retained its distinct character. However, given that the aim of this paper is to investigate the ancient sources of our current legal world view, then a fascinating aspect of this phenomenon is primarily that it has some traces and references in the theory of contemporary legislation, and even in the general theory of law. This, however, only confirms that the thesis adopted at the beginning of this study is correct, i.e. that one should look for the origins of our contemporary legal world view not only in Roman

⁴⁶ For more detailed discussion of this issue M.H. Hansen, *Athenian Nomothesia*, “Greek, Roman and Byzantine Studies” 1985, 26, pp. 345–371; see also, in more recent research, M. Canevaro, *Nomothesia in Classical Athens. What Sources Should We Believe?*, “The Classical Quarterly” 2013, 63(1), pp. 139–160 and idem, *Making and Changing Law in Ancient Athens*, [in:] E. Harris, M. Canevaro (eds.), *The Oxford Handbook of Ancient Greek Law*, Oxford 2015 (online version, without page numbers – <https://oxfordindex.oup.com/view/10.1093/oxfordhb/9780199599257.013.4>, access: 1.10.2020).

⁴⁷ M. Ostwald, *Nomos and the Beginnings of the Athenian Democracy...*, passim; see also P. Cartledge, P. Millett, S. Todd (eds.), *Nomos. Essays in Athenian Law, Politics and Society*, Cambridge 1990.

⁴⁸ M. Ostwald, *From Popular Sovereignty to the Sovereignty of Law. Society, and Politics in Fifth-Century Athens*, Berkeley–Los Angeles–London 1986.

⁴⁹ M.H. Hansen, *The Athenian Democracy in the Age of Demosthenes. Structure, Principles and the Ideology*, trans. J.A. Crook, Norman 1999, especially Chapter 7, *The Laws and the Nomothetai*, pp. 161–177 (the Polish edition – *Demokracja Ateńska w czasach Demostenesa. Struktura, zasady i ideologia*, transl. R. Kulesza, Warszawa 1999; hereinafter, references are to the page numbers in the English edition).

⁵⁰ For broader discussion of this concept in the context of *nomos*, see F. Quass, *Nomos und Psephisma. Untersuchungen zum griechischen Staatsrecht*, Munich 1971.

thought, but also in Greek thought, for while *thesmos/nomos* contained general-abstract norms in today's understanding of the term, and had no temporal limits of validity, *psephisma* was a concrete and individual act, in today's sense, and of limited validity, as can clearly be seen later on in the writings by Plato and Aristotle.⁵¹ It resembled the relationship that exists today, *mutatis mutandis*, between laws and some resolutions of the Sejm. It is also worth noting in this context that a certain research programme was initiated in Göttingen in the early 1980s as part of the Academy of Sciences, under the name 'The Function of the Law in History and Contemporary Times' (*Die Funktion des Gesetzes in Geschichte und Gegenwart*). So far, several volumes have been published, which provide a detailed analysis of very different historical and contemporary aspects of the term *Gesetz*. Interestingly, one of them directly addresses the subject of this article: the relationship between *nomos* and *Gesetz* in ancient legal culture.⁵²

During the days of Draco and Solon, the legal acts adopted by the People's Assembly and corresponding more or less to today's statutory law were referred to as *thesmos*, but during the days of Cleisthenes in 507 BC, the term *nomos* appeared in reference to statutory acts.⁵³ Previously, although the concept of *nomos* had functioned as a general term to denote certain customs, morals, conditions or even a style of social life (somewhat like the Roman *ius* and *mores*), it was not synonymous with a specific legal act (in the sense of the Roman *lex*); it was rather a certain external environment in which *thesmos* was created and in which it functioned.

However, when one looks through various types of encyclopedias, lexicons or dictionaries of ancient culture, the term *nomos* is most often defined directly as 'law', sometimes also as 'customs' and 'morals'. Such definitions are somewhat misleading because they do not reflect the phenomenon of *nomos* in all its complexity and historical development, just as, for obvious reasons, it does not reflect the complexity of the phenomenon of 'law' itself.

Final Remarks

I do not know if I have managed to convince Polish lawyers to broaden their professional erudition which is based mainly on the Roman tradition, with the sources of Greek antiquity. However, I think it is worthwhile because the concept of *nomos*

⁵¹ M.H. Hansen, *The Athenian Democracy...*, p. 161.

⁵² O. Behrends, W. Sellert (eds.), *Nomos und Gesetz. Ursprünge und Wirkungen des griechischen Gesetzedenken*, Göttingen 1995.

⁵³ M.H. Hansen, *The Athenian Democracy...*, p. 161.

has become a permanent feature of our language and is an important element of the contemporary political-legal discourse. If we are aware of its history and very different meanings, it may be easier for us to understand the world around us and the processes taking place in it. Especially in such turbulent times for lawyers as the ones which we are now living in.

In contrast to the great dangers associated with the constant renewability of *nomos* in the name of a new legitimacy at the expense of the existing legitimacy, as shown in Carl Schmitt's conception, in general, the idea of *nomos* was, in fact, associated with certain harmony and a stable and just political-legal order, though, at the same time, revealing the paradox of a union of justice (*Dike*) with violence (*Bia*) contained in Pindar's poem. It is no wonder that the word *nomos* was the core of such concepts as *eunomia* or, last but not least, *isonomia*.⁵⁴ Let us recall that in antiquity, the former was a symbol of social order and the rule of law, and its opposite was *hybris*, i.e. arbitrary pride, and especially the pride of those in power. The latter, in turn, was a synonym of equality, especially equality before the law. Bearing all this in mind, it is indeed hard to imagine a better starting point for any legal discourse than *nomos* in this sense. For lawyers, this law should ultimately be king of all and everything (*nomos basileus*).

Coming back to the title of this study, it can be said once again, on the basis of the analysis carried out here, that the concept of *nomos* is actually the focus of the entire issue of the political nature of jurisprudence. As has been seen, *nomos* has gradually evolved towards the juridisation of politics; the return to its original meaning in Carl Schmitt's interpretation is the opposite process – i.e. far-reaching de-juridisation.

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⁵⁴ Michel Foucault argued, however, that the term *eunomia* appeared prior to *nomos* and that *nomos* emerged from *eunomia*, and not vice versa, which, in my opinion, does not change the fact that there is a close relationship between them; perhaps it was the case that *nomos* was a necessary means of realising *eunomia*, which, however, can also be referred to *isonomia* – see: M. Foucault, *Lectures on the Will to Know. Lecture at the Collège de France 1970–1971 with Oedipal Knowledge*, transl. G. Burchell, New York 2011, p. 155 ff.; for more in Polish literature, see: R. Turasiewicz, *W kręgu znaczeniowym pojęcia Nomos*, "Meander" 1974, 29, pp. 7–22 and idem, *Złożenia z nomos w funkcji terminów politycznych*, "Meander" 1978, 33, pp. 45–61.

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