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Law, king of all: Schmitt, Agamben, Pindar

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ABSTRACT

Both Carl Schmitt and Giorgio Agamben draw on the ancient Greek concept of *nomos* as an important element underpinning their legal theories. Aiming to restore that concept to its pre-sophistic meaning, they grant central weight to a piece of poetry in which Pindar famously proclaims that ‘law (*nomos*) is king of all’, guiding both mortals and immortals while ‘justifying the utmost violence with a powerful hand’. For Schmitt as for Agamben, this means that the Pindaric fragment exposes the violent origins of law that normativist jurisprudence typically shields from view. For one thing, I will explain in this article why Schmitt’s and Agamben’s use of the fragment is at odds with any acceptable interpretation of it in its wider literary and historical context. More importantly, perhaps, my aim is ultimately to reconstruct a Pindaric jurisprudence as it should actually be preferred to that of both Schmitt and Agamben.

KEYWORDS *Nomos*; rule of law; violence; fragment 169; legal philosophy

1. Introduction

Freshly graduated from secondary school, Carl Schmitt intended to study classical philology – an idea that was vehemently opposed by one of his uncles, who predicted him that a career in that field would be ‘a very sorrowful affair’ and advised him to take up the subject of law instead.¹ Moving from small-town Plettenberg to Berlin to register as a new student at what is now the Humboldt University, the young man who would soon invent the theory of legal decisionism was still undecided on the important choice he had to make. As Schmitt later reported in an interview, he climbed the steps of the university, ‘pondered for a moment’ and then simply went into the section signposted as ‘Faculty of Law’ and stayed there.² Schmitt would never regret that decision. To his joy, the study of law turned out to be ‘wonderful

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¹Frank Hertweck and Dimitrios Koutsidis (eds), ‘Solange das Imperium da ist’: Carl Schmitt im Gespräch mit Klaus Figgie und Dieter Groh 1971 (Duncker & Humblot 2010) 54.

²ibid 54–55.

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because it straight away began with Roman law in the first term'.³ Meanwhile, he was very disappointed by a course in Greek and Latin literature offered by renowned scholar Ulrich von Wilamowitz-Moellendorf. What could a man 'as well-placed, as contained and accommodating' as Wilamowitz ever teach him about Cicero, 'whose entire existence is found [...] in a complete situation of civil war'?⁴ To Schmitt, the 'existential inconsistency' between Wilamowitz' detached learnedness and the political urgency of Cicero's writings made the former's teachings 'empty and masked' – a 'most distinguished mask' that saddened him more than he could bear.⁵

Schmitt's close attachment to the ancients, however, has remained undiminished throughout his long career as a lawyer and legal scholar. His deep engagement with ancient sources particularly emerges in *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, published shortly after the war and considered by Schmitt himself as his most significant contribution to legal scholarship.⁶ That work contains five introductory corollaries in which Schmitt lays out his concept of *nomos*, aiming to restore the 'original meaning' of that word in its unspoiled 'energy and majesty'.⁷ Since the sophists, Schmitt explains, the Greek noun *nomos* is usually taken to refer to a legal or customary norm, representing the domain of the ought (*Sollen*) as dissociated and opposed to the mere being (*Sein*) of nature (*physis*). In its pre-sophistic sense, however, *nomos* would not only refer to norms or customs, but also to the spatial structure of a concrete order as the basis from which all normative prescriptions derive. As Schmitt explicates, *nomos* is the nominalization – the *nomen actionis* – of the Greek verb *nemō*, denoting, amongst other things, the appropriation of land: the constitutive act of spatial ordering that conceptually precedes the moral and legal order that follows from it.⁸ As such, Schmitt's reconstruction of *nomos* in its pre-sophistic sense aims to unveil the violent underpinnings of law that normativist jurisprudence tends to shield from view.⁹

Schmitt's understanding of *nomos* features prominently in the legal and political philosophy of a wide variety of thinkers of whom Giorgio Agamben stands out as particularly influential. In *Homo Sacer: Sovereign Power and*

³ibid 55. With regard to his doubts between classical philology and law as his preferred topic of study, Schmitt contemplates in self-reflective fashion that 'one must have such a great distance from the joy of decision-making to be able to develop a theory of decisionism in the first place', connecting his decisionistic thinking to the 'remarkable passivity' of his character. For Schmitt's decision to study law instead of classical philology, see also Reinhard Mehring, *Carl Schmitt: A Biography* (Polity Press 2014) 7–9.

⁴Carl Schmitt, 'Berlin, 1907' in Piet Tommissen (ed), *Schmittiana I* (Duncker & Humblot 2001) 17–18.

⁵ibid 21.

⁶Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Gary Ulmen tr, Telos Press 2006), first published in German in 1950. For Schmitt's assessment of *The Nomos of the Earth* as his most important contribution to legal scholarship, see Hertweck and Koutsidis (n 1) 82.

⁷Schmitt, *Nomos of the Earth* (n 6) 67.

⁸ibid 69–72.

⁹Cf. Martin Loughlin, 'Nomos' in David Dyzenhaus and Thomas Pole (eds), *Law, Liberty and the State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press 2015) 69–71.

Bare Life, Agamben draws explicitly on the Schmittian understanding of *nomos* as a fundamental 'localization' that discerns between the outside and the inside of the law as a normative domain.¹⁰ Like Schmitt, Agamben refers to what he considers as the 'most ancient recorded formulation' of that principle:¹¹ Pindar's fragment 169, consisting of the scattered remains of a choral song of which only the first eight lines have been reconstructed with some degree of certainty. That fragment famously refers to '*nomos*, king of all', guiding both mortals and immortals as it 'justifies the utmost violence with a sovereign hand'. The poet finds evidence for the supremacy and the justifying potential of *nomos* in the works of Heracles, the hero God (*hērōs theos*) mediating between nature and culture as the brutal and violent conqueror who is also the protector of the civilization he has helped to construct. For Agamben, Pindar is 'the first great thinker' of law and sovereignty, drawing attention to 'the sovereign as the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence'. Thus, he echoes Schmitt's praise of Pindar as a poet who recognizes 'the pure immediacy' of power as a necessary basis for any social order in which that power is mediated by legal norms.¹²

Both Schmitt's and Agamben's use of ancient sources has been the object of a select number of studies that typically aim to correct the mistakes and circularities in their philological argumentations.¹³ The projects of both thinkers are, for a large part, directed towards the uncovering of linguistic and intellectual origins; therefore, it makes sense that the textual sources of which that uncovering arises are given proper attention. Obviously, however, the ultimate purpose of Schmitt and Agamben is not primarily philological; alternatively, their analyses of ancient literary sources serve to corroborate their theories of law and politics. As Schmitt himself has it, philological objections against his conception of *nomos* are besides the point. Instead, he is 'concerned with legal and theoretical constitutional matters', with his deliberations throwing new light on the original meaning of *nomos* rather than the other way around. Thus, he emphasizes not being bound by 'the vicissitudes of disputed philological issues' such as the contested etymology of *nomos* or the much-debated interpretation of that term in archaic Greek poetry.¹⁴

¹⁰Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press 1998) 18–19.

¹¹ibid 24.

¹²ibid 25.

¹³See esp. Michael Auer, 'Pindar's "Nomos" und Agambens "Basileus": Zur philologischen Textpolitik des "Homo sacer"' [2013] *Poetica* 271; Thomas Schestag, 'Namen nehmen: Zur Theorie des Namens bei Carl Schmitt' [2007] *MLN* 544; Katerina Stergiopoulou, 'Taking Nomos: Carl Schmitt's Philology Unbound' [2014] October 95.

¹⁴Carl Schmitt, 'Appropriation/Distribution/Production: An Attempt to Determine from Nomos the Basic Questions of Every Social and Economic Order' in Carl Schmitt, *Nomos of the Earth* (n 6) 324 (with Schmitt's methodological remark on the relation between philology and legal theory added in postscript to a previous version of the paper).

Similarly, Agamben has repeatedly defended himself against accusations of selective philological and historical reasoning by pointing out that he merely makes use of examples from literature and history as 'paradigms' whose role is primarily 'to constitute and make intelligible a broader historical-problematic context' that helps to reflect on problems of our own time.¹⁵

My aim in this article is to present a critical analysis of the way in which Schmitt and Agamben build their concept of *nomos* on the meaning of that term in archaic Greek poetry. For one thing, I will explain why Schmitt's and Agamben's use of pre-sophistic Greek *nomos* as a fundament of their legal theories does not do justice to the ancient sources they draw upon. Surely, Greek heroes like Heracles usually operate outside the boundaries of the legal-political order, violating the laws and other norms of ordinary social life that others take for granted. But that does not imply that their behaviour takes place in a normative vacuum in which unrestrained violence passes over into law and vice versa. Neither do their liminal acts that constitute cities or otherwise create cultured environments comprise an anormative 'appropriation of the land' or any other conduct that is merely regulated by the lawlessness of nature. My ultimate purpose in this paper, however, is to go beyond the correction of inaccuracies in Schmitt's and Agamben's philological analyses. Indeed, the Pindaric fragment they adduce in support of their theories merits careful philosophical attention – if only, or so I will argue in this article, to make clear that, in some ways, the jurisprudence as it can be reconstructed from the poetry of Pindar is actually to be preferred to that of both Schmitt and Agamben.

While laying out the Pindaric conception of *nomos* in fragment 169 and its representation in the theories of Schmitt and Agamben, I will proceed in the following way. First, I will provide an account of the manner in which Schmitt's concept of *nomos* builds on the Pindar's use of that term, tracing back Schmitt's engagement with fragment 169 to the works that mark his 'institutional turn' in the early thirties and subsequently examining his more elaborate use of that fragment in post-war writings such as *The Nomos of the Earth*. Second, I will offer an analysis of Agamben's reliance on Pindar as the 'first great thinker' of law and sovereignty, explaining how his Homo Sacer project draws upon a strategic interpretation of *nomos* in Pindar's fragment 169 as one of its central theoretical underpinnings. Third, I will connect both Schmitt's and Agamben's use of Pindaric *nomos* to the vast abundance of philological scholarship on that subject, placing fragment 169 within the wider framework of Pindar's poetry and archaic Greek lyric. Fourth and fifth, I will argue that, respectively, Agamben's and Schmitt's incorporation of

¹⁵Giorgio Agamben, *The Signature of All Things: On Method* (Luca D'Isanto and Kevin Attell trs, Zone Books 2009) 9. See also William Watkin, 'The Signature of All Things: Agamben's Philosophical Archaeology' [2014] MLN 138.

Pindaric *nomos* as a crucial concept underlying their theories seems at odds with a proper analysis of fragment 169 in its wider historical and literary context. Reconstructing a Pindaric *nomos* as it seems to be reflected in fragment 169 and Pindaric poetry more at large, my aim is ultimately to absolve it from its distorted and decontextualized representation in the works of Schmitt and Agamben and to lay it – to borrow one of Schmitt’s dramatic phrases – on the ‘altar of jurisprudence’ as an attractive basis from which to construct an alternative to their theories.¹⁶

2. Schmitt

Carl Schmitt’s engagement with archaic Greek *nomos* first emerges in his *On the Three Types of Juristic Thought*, written shortly after Schmitt’s decision to back National Socialism in 1933.¹⁷ That work marks Schmitt’s endorsement of institutionalism as a type of legal thinking that should be preferred to both normativism and decisionism. Whereas, as Schmitt explains, ‘the normativist thinks in terms of impersonal rules, and the decisionist implements the good law of the correctly recognized political situation by means of a personal decision, the institutional legal thinking unfolds in institutions that transcend the personal sphere’.¹⁸ As Schmitt has now come to realize, the decisionist approach endorsed by him in such works as *Political Theology* and *The Concept of the Political* suffers from a lack of positive content, with the sovereign decision springing from a ‘normative nothing’ that Schmitt no longer regards as convincing.¹⁹ That does not mean, of course, that Schmitt has come to support a normative jurisprudence as a style of thinking that adheres to the abstract idea of a ‘government of law, not men’. The law ‘cannot apply, administer or enforce itself’ – only concrete persons can do so, even if they pose as the objective spokesmen of justice.²⁰ In contrast to earlier work, however, Schmitt emphasizes that these persons should not be regarded as freestanding individuals, but rather as actors operating in a given social and normative context from which they cannot be isolated.²¹

¹⁶Cf. the first sentence of the author’s foreword in Schmitt, *The Nomos of the Earth* (n 6) 37: ‘This book, the defenceless product of hard experiences, I lay on the altar of jurisprudence, a discipline I have served for more than forty years.’

¹⁷Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph Bendersky tr, Praeger 2004).

¹⁸Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, The University of Chicago Press 1985) 1–4 (translating the preface to the second German edition that appeared in 1934, revising the first edition of 1922).

¹⁹On Schmitt’s institutional turn, see, e.g. Jens Meierhenrich, ‘Fearing the Disorder of Things: The Development of Carl Schmitt’s Institutional Theory, 1919–1942’ in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (Oxford University Press 2016) 171–216, Mariano Croce and Andrea Salvatore, *The Legal Theory of Carl Schmitt* (Routledge 2013) 13–29 and, by the same authors, ‘After Exception: Carl Schmitt’s Legal Institutionalism’ [2016] *Ratio Juris* 410, with further references.

²⁰Schmitt, *Three Types* (n 17) 51.

²¹Croce and Salvatore, ‘After Exception’ (n 19) 416–17. See also Marc de Wilde, ‘The Dark Side of Institutionalism: Carl Schmitt Reading Santi Romano’ [2018] *Ethics & Global Politics* 12, relating Schmitt’s institutionalism to the theory of Italian legal theorist Santi Romano.

While amending and adapting his own theoretical framework, Schmitt remains focused on normativist thinking as his primary polemical target. Attacking what he regards as the mistaken ‘superiority and eminence’ of abstract rules and principles elevated above individual cases and concrete situations, he also addresses the normativist corruption of ‘one of the most beautiful and oldest coinages of human legal thought’: the Pindaric saying that opens fragment 169, claiming that *nomos* is the king of all (*nomos ho pantōn basileus*).²² As Schmitt explains, that saying has been repeatedly misunderstood as denoting that only law and not men should be allowed to govern. Picked up by the Stoic tradition, it had particular effectiveness through the corrupted adaptation of Chrysippus, referring to *nomos* as the natural law that is ‘king over everything’, an ‘authority that determines between good and evil’ and a ‘leader of men’ as it ‘lays out standards of right and wrong’.²³ But *nomos*, as Schmitt has it, originally ‘does not mean statute, rule, or norm, but rather *Recht*, which is norm, as well as decision and, above all, order’.²⁴ As such, the kingship of *nomos* in its archaic sense – like Pindar uses it – would not refer to some abstract normativism, but, instead, would underpin an institutionalism for which ‘order is not primarily rule or summation of rules, but conversely, rule is only a component and a medium of order’.²⁵

The uncovering of what Schmitt regards as the original sense of *nomos* continues in more elaborate fashion in *The Nomos of the Earth*, with the term’s alleged semantics and etymology further explored in two essays that have been included in the appendix of Ulmen’s recent translation of that work.²⁶ Most controversially, Schmitt traces German *nehmen* (to take, to appropriate) and the Greek verb *nemō* – with *nomos* as its *nomen actionis* – back to the same linguistic root.²⁷ Thus, he aims to find support for his conception of the ‘taking of the land’ (*Landnahme*) as the ‘primeval act of founding law’, grounding law both internally and externally as the ‘primary legal title that underlies all subsequent law’.²⁸ Within the land-appropriating group itself, it represents ‘the first order of all ownership’, whether public or private.²⁹ Confronting other land-appropriating or land-owning groups and powers, land-appropriation also serves as a radical title in international law. As Schmitt himself is well aware, the relatedness of

²²Schmitt, *Three Types* (n 13) 48–51.

²³Hans von Arnim, *Stoicorum Veterum Fragmenta: Volumen III: Chrysippi Fragmenta Moralia* (Teubner 1964) 77 (fragment 314).

²⁴Schmitt, *Three Types* (n 17) 50.

²⁵*ibid* 48.

²⁶Schmitt, ‘Appropriation/Distribution/Production’ (n 14); Carl Schmitt, ‘Nomos-Nahme-Name’ in Schmitt, *Nomos of the Earth* (n 6) 336–50.

²⁷*ibid* 70–71; in more elaborate fashion in Schmitt, ‘Appropriation/Distribution/Production’ (n 14) 326–27.

²⁸*ibid* 45.

²⁹*ibid* 46–47.

Greek *nemō* and German *nehmen* is a contested matter amongst philologists, with defenders of that relatedness sometimes accused of semantic impressionism.³⁰ For Schmitt, however, it is enough to take the root parity of the verbs as ‘a hypothesis in legal history’.³¹ Although he is ‘prepared to learn from philologists’, his main goal is ‘to make the original meaning of *nomos* relevant to social problems’.³² In that respect, ‘its fruitfulness is evident’ as it helps to uncover the appropriation of land as law’s fundamental constituting act, even when men have forgotten it. In such cases, Schmitt argues, it is legitimate to conjecture that ‘language knows it still’.³³

Schmitt also connects *nomos* to two other meanings of *nemō* that are more commonly accepted. The first of those is ‘to divide, to distribute’ (*teilen, verteilen*). Whereas *nomos* as land-appropriation has been long forgotten in jurisprudence, ‘no prominent legal scholar’ would have overlooked its reference to processes of division and distribution. Hobbes, for example, refers to ‘that *nomos*, that is to say, distribution, which we call law’, evoking the classical understanding of justice as ‘every man his own’.³⁴ However, the particular meaning of pre-sophistic *nomos* as the distribution and apportionment of *space* – logically related to the meaning of *nomos* as the primeval act of land-appropriation – would be in need of intellectual excavation as it was lost almost completely out of sight since the sophists. It is they, says Schmitt, who turned the idea of *nomos* into a mere norm or act, an ‘imposed *ought* dissociated from and opposed to *is*’ and as such no longer to be distinguished from other Greek terms that express normative prescriptions.³⁵ In its pre-sophistic sense, however, *nomos* would be ‘the immediate form in which the political and social order of a people becomes spatially visible’, comprising the land-appropriation as well as the concrete order contained in it and following from it.³⁶ The original spatial character of *nomos* would also find expression in a second generally accepted meaning of *nemō*: ‘to pasture’ (*weiden*), that is, the productive work that is commonly associated with the ownership of land.³⁷ As such, it would articulate the

³⁰There’s no trace of any connection between Greek *nemō*, *nomos* and related words to German *nehmen* in the extensive study of the historical linguistics of those words in Emmanuel Laroche, *Histoire de la racine nem- en grec ancien* (Klincksieck 1949). Nevertheless, that connection is taken for granted without any argumentation in Felix Heinemann, *Nomos und Physis: Herkunft und Bedeutung einer Antithese im griechischen Denken des 5. Jahrhunderts* (Reinhart 1945) 59. For philological criticism of the alleged connection, see esp. Schestag (n 13) and Stergiopoulou (n 13).

³¹Schmitt, ‘Nomos-Nahme-Name’ (n 22) 346.

³²Schmitt, ‘Appropriation/Distribution/Production’ (n 14) 325.

³³Schmitt, ‘Nomos-Nahme-Name’ (n 26) 346, quoting German linguist and philosopher Johann Arnold Kanne.

³⁴*ibid* 327. Schmitt’s quote of Hobbes can be found at Thomas Hobbes, *Leviathan* (first published 1651, Cambridge University Press 1996) 171.

³⁵Schmitt, *Nomos of the Earth* (n 6) 69.

³⁶*ibid* 70.

³⁷Schmitt, ‘Appropriation/Distribution/Production’ (n 14) 327, disregarding the difference between paroxytonic *nōmos* (with the acute accent on the penultimate syllable) and oxytonic *nomós* (with the acute accent on the ultimate syllable), usually translated as ‘place of pasturage’ or ‘dwelling place’

final phase in a logical sequence of the appropriation, division and tenure of land that would link the original semantics of *nemō* and *nomos* together.³⁸

Returning to the opening of Pindar's fragment 169 as important proof of his linguistic claim, Schmitt now discusses that passage more in full, relying on Schroeder's edition of the text of which the translation runs as follows:³⁹

Nomos, king of all,
of mortals and immortals,
guides them as it justifies the utmost violence
with a powerful hand. I bring as witness
the labours of Heracles,
for he drove Geryon's cattle
to the Cyclopean portal of Eurystheus,
unmasked and without payment.

*Nomos ho pantōn basileus
thnatōn te kai athanatōn
agei dikaiōn to biaiotatōn
hupertatai cheiri. Tekmaïromai
ergoisin Hērakleos:
epeī Gērūona boas
Kuklōpiōn epi prothurōn Eurustheos
anaitētas te kai apriatas elasen.*

5

For Schmitt, the interpretation of these lines is clear. In service of Eurystheus, cruel king of Mycenaean Tiryns, Heracles attacks and kills Geryon, a fearsome giant inhabiting a mythical island in the far west of the Mediterranean, steals his cattle and brings it to Eurystheus. In his efforts to cultivate wild nature, the hero kills sacred beasts and even challenges the gods. Despite the transgressive nature of such acts, Heracles – the 'mythical founder of order' – creates law, turning chaos into order, making the Mediterranean world safe for human exploitation and navigation while also setting up the pillars of Heracles as the *ne plus ultra* of that cultivated domain.⁴⁰ As such, the Pindaric fragment unveils *nomos* as 'the full immediacy of a legal power not mediated by laws', tracing law back to its violent underpinnings. The explanations of those who see in Pindaric *nomos* some 'higher objective' or supreme norm at work are dismissed by Schmitt as 'idealistic-rhetorical

and also (especially in Herodotus) frequently used to denote a certain district or sphere of command. In a later essay, Schmitt defends his disregard for Greek accents while referring to Max Pohlenz, 'Nomos' [1948] *Philologus* 135 (arguing for a close semantic connection between *nómos* and *nomós*) and to Walter Porzig, who assured him in personal communication that '[t]he accent difference between *nómos* and *nomós* is insignificant'; see Schmitt, 'Nomos-Nahme-Name' (n 26) 344–45. Among philologists, the relation between *nómos* and *nomós* is a contested matter. Whereas some suppose a semantic interrelation, others (although generally recognizing a common linguistic root) regard oxytonic and paroxytonic *nomos* as distinct semantic categories. For a recent account of the matter, see Thanos Zartaloudis, *The Birth of Nomos* (Edinburgh University Press 2019) xxi–xxviii, with further references.

³⁸Cf. Loughlin, 'Nomos' (n 9) 71. See also Martin Loughlin, 'Politonomy' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (Oxford University Press 2016) 580–82 and Peter Burgess, 'Culture and the Rationality of Law from Weimar to Maastricht' in Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Oxford University Press 2013) 160–62.

³⁹Otto Schroeder, *Pindari Carmina cum Fragmentis Selectis* (3rd edn, Teubner 1930). Schroeder's text differs from the modern standard edition of Herwig Maehler, *Pindari Carmina cum Fragmentis, Pars II: Fragmenta, Indices* (Teubner 1989), where the fragment is listed as 169a, only in two instances (*Kuklōpeion epi prothuron* for *Kuklōpiōn epi prothurōn* (7) and *anatei* for *anaitētas* (8)) that need not further be dealt with in this article. The translation of the fragment is adopted from William Race, *Pindar* (Harvard University Press 1997), with slight adaptations.

⁴⁰Schmitt, *Nomos of the Earth* (n 6) 73; cf., e.g. Walter Burkert, *Greek Religion* (John Raffan tr, Harvard University Press 1985) 208–12.

paraphrases' that totally miss the concrete spatial sense of the term as it would be rooted in the appropriation and division of space.⁴¹

3. Agamben

The intellectual excavation of the pre-sophistic meaning of Greek *nomos* also plays a prominent role in Agamben's *Homo Sacer* project, comprising, amongst other things, a fundamental critique on the totalitarian features of western political culture in general and the theory of political sovereignty in particular.⁴² The project borrows its name from a judicial term from archaic Roman law, with the *homo sacer* ('sacred man') designating the rightless individual who – in response to a grave wrongdoing – has been cast out of the city.⁴³ As an outlaw from the profane and the religious spheres alike, the *homo sacer* is left with nothing more than 'bare life', that is, the unqualified biological life as such, exposed to power unmediated by human or even divine law, paradoxically included in the juridico-political order only by virtue of its exclusion from it.⁴⁴ In his liminal state of inclusive exclusion, the *homo sacer* finds a logical counterpart in the sovereign power that produces him, with the sovereign and *homo sacer* being both simultaneously outside and inside the juridical order. Subscribing to Schmitt's famous thesis that the sovereign is the one who decides on the state of exception, Agamben concludes with Schmitt that 'the sovereign stands outside the juridical order and, nevertheless, belongs to it, since it is up to him to decide if the constitution is to be suspended'.⁴⁵

For Agamben, the paradox of sovereignty – with the sovereign being located both within and outside the juridical order – is clearly exemplified by Pindar's fragment 169. That fragment's meaning would become clear only when one understands that at its centre lies a 'scandalous unification' of violence (*bia*) and justice (*dikē*) as two principles that were usually conceived in plain opposition to each other.⁴⁶ In Hesiod's *Works and Days*, for instance, *nomos* is the force that separates *bia* and *dike*, with that didactic poem summoning man to 'forget violence and attend to justice' as *nomos* would require it.⁴⁷ In the Pindaric fragment, however, *nomos* would not be invoked as a normative principle that separates violence and justice, but, instead, as the power that, 'with the strongest hand', achieves their paradoxical union. As such, Pindar's *nomos* would unveil the enigmatic conjunction of

⁴¹Schmitt, *Nomos of the Earth* (n 6) 73–74.

⁴²See Giorgio Agamben, *The Omnibus Homo Sacer* (Stanford University Press 2017), uniting all nine volumes of the *Homo Sacer* project in one book.

⁴³Agamben, *Homo Sacer* (n 10) 47–48.

⁴⁴*ibid* 9–12.

⁴⁵*ibid* 17, referring to Schmitt, *Political Theology* (n 18) 7.

⁴⁶*ibid* 24.

⁴⁷Hesiod, *Works and Days* 27–28.

opposites as the hidden paradigm that would prefigure modern conceptions of sovereignty, with the sovereign located at the position where law and violence are indistinct, the one passing over into the other and vice versa. In fact, the exposure of that paradigm is identified by Agamben as a great contribution to political philosophy, granting Pindar pride of place in the history of political thought as the first great thinker of law and sovereignty.⁴⁸

Further proof of the pre-sophistic notion of *nomos* at the point of indistinction between violence and justice is found by Agamben in Plato's *Gorgias*, where Callicles – Socrates' fierce opponent in that dialogue – famously refers to Pindar's fragment 169 while defending the 'might makes right' of nature. As Callicles understands it, conventional justice is merely a rhetorical device invented by the weak to curb the strong, restraining the natural right of better and stronger men to rule their inferiors. Eagerly awaiting the advent of some Nietzschean *Übermensch*,⁴⁹ Callicles looks forward to the day when 'some man arises with a nature of sufficient force' who will 'burst his bonds and break free', trampling underfoot all those artificial 'charms and laws which are all against nature'.⁵⁰ Only with the strong man as our master, the 'full light of natural justice' will be finally unveiled, stripped of all those codes and conventions that shield it from view. Callicles invokes Pindar in support of his cynical view on law and justice, quoting fragment 169 as the ode where he remembers him saying that *nomos* – the king of all, mortals and immortals – 'violates what is most just with a powerful hand', taking Heracles' exploits as proof of that statement.⁵¹ As Callicles vaguely recalls, the poem continues with a report on Heracles' theft of Geryon's cattle, 'taking it as a natural right that cows or any other possessions of the inferior and weaker should belong to the superior and stronger'.⁵² Doesn't that Pindaric fragment corroborate his judgment of all that normative talk – those conventional rules and principles – as worthless nonsense?⁵³

For Agamben, it is only a small step from Pindar and sophists like Callicles to modern state theoreticians such as Hobbes. Notwithstanding their differences, their theories would converge in their common interest in the intricate relation between the inside of the juridico-political order and its constitutive moment outside of it. In Hobbes' theory, the cultured and ordered environment of the commonwealth is clearly separated from wild nature, with the state – that great Leviathan – saving us from the war of all against all that

⁴⁸Agamben, *Homo Sacer* (n 10) 25.

⁴⁹On Callicles and Nietzsche's concept of the *Übermensch*, see esp Eric R. Dodds, *Plato: Gorgias* (Oxford University Press 1959) 387–491.

⁵⁰*Plato, Gorgias* 484a.

⁵¹*ibid* 484b.

⁵²*ibid* 484c.

⁵³*ibid* 492c

would threaten us at the moment of its dissolution.⁵⁴ Nonetheless, however, Hobbes – like Pindar and Callicles before him – addresses the unavoidable coalescence of culture and nature, order and power, law and violence, conserving the state of nature in the person of the sovereign as ‘the only one to preserve its natural *ius contra omnes*’.⁵⁵ In this way, as Agamben explains, sovereignty presents itself as an incorporation of the state of nature in society, occupying the place of indistinction between the out- and inside of the juridico-political sphere. Resisting a simple conception of *nomos* and *phusis* as two distinct domains, Hobbes follows Pindar and Callicles in conceiving a *nomos* from which *phusis* is not external, but, instead, is understood as a principle internal to it, essential in its constitution and preservation, but clearly revealed only on the verge of its dissolution. Paradoxically, ‘exteriority’ is thus ‘the innermost center of the political system’.⁵⁶

Relating his own analysis of Pindaric *nomos* to Schmitt’s understanding of it, Agamben completely disregards its centrality in Schmitt’s turn from decisionism to concrete-order thinking. Downplaying the institutionalist sense that lies at the heart of Schmitt’s conception of *nomos*, Agamben describes it in decisionistic terms and connects it to the state of exception as a ‘juridically empty space’, a legal vacuum in which ‘everything could happen’ as long as the sovereign deems it necessary. For Agamben, Pindaric and Calliclean as well as Schmittian *nomos* necessarily implies ‘a zone that is excluded from law’, taking the shape of a domain in which the sovereign is free to decide anything, unrestrained by any normative prescription.⁵⁷ Rather than the chaos that precedes the juridico-political order, Agamben envisages that zone as the situation that results from its suspension. Drawing heavily on Schmitt’s decisionism as it is laid down in his *Political Theology* and other works, Agamben subscribes to the idea that sovereign is he who decides if the regular juridico-political order is actually effective, with the suspension of the existing order granting him ‘principally unlimited authority’. In such a situation, ‘the state remains, whereas law recedes’, presenting ‘the undoubted proof’ of its superiority over legal norms. Within that legal void, the decision is free from all normative ties and ‘becomes in the true sense absolute’.⁵⁸ The exception, as Agamben explains, is a kind of exclusion, only related to normativity in the form of its suspension.⁵⁹

⁵⁴Hobbes n (34) 117–29.

⁵⁵Agamben, *Homo Sacer* (n10) 27.

⁵⁶*ibid* 26–27. On Hobbes’ theory of state sovereignty, see also Giorgio Agamben, *Stasis: Civil War as a Political Paradigm* (Nicholas Heron tr, Stanford University Press 2015) 25–70.

⁵⁷Agamben, *Homo Sacer* (n 10) 27–28.

⁵⁸Schmitt, *Political Theology* (n 18) 12.

⁵⁹On Agamben’s view on the state of exception, see, e.g. Jessica Whyte, *Catastrophe and Redemption: The Political Thought of Giorgio Agamben* (State University of New York Press 2013) 47–72; Leland de la Durantaye, *Giorgio Agamben: A Critical Introduction* (Stanford University Press 2009) 335–59.

4. Pindar

Despite its centrality in the theories of both Schmitt and Agamben, their reconstructions of Pindaric *nomos* have hardly been examined in the available literature. Among the few authors who have discussed Schmitt's philological reasoning is legal scholar Martin Loughlin, who concludes from a short survey of philological scholarship that 'Schmitt's explanation of the original meaning of *nomos* is corroborated by classical scholars', mistakenly assuming that 'it is commonly accepted that in Pindar's work [...] *nomos* acts as an amoral, violent agent'.⁶⁰ In more critical vein, Thomas Schestag and Katerina Stergiopoulou have written lengthy pieces in which they accuse Schmitt of a speculative 'Zukunftsphilologie', that is, a philological method not informed by scholarly rigour and a devotion to historical truth-finding, but, instead, by subjective speculations that attune to current extra-philological purposes.⁶¹ Agamben's treatment of Pindar's fragment 169 has been criticized by Michael Auer, who accuses Agamben of a 'textual politics' that only partially incorporates that fragment's significance into his own theory, thus reproducing – on a textual level – the 'inclusive exclusion' of which Pindar's poem would serve as a paradigm.⁶² Similarly, Andrew Benjamin and Thanos Zartaloudis have argued that Agamben's reading of fragment 169 as 'the most ancient recorded formulation' of the 'paradox of sovereignty' – with *nomos* as the anormative force that leaves law and violence indistinct – is at least one-sided, remaining blind to indications that point towards Pindaric *nomos* as some principle of normative regulation.⁶³

The shortage of scholarly work on Schmitt's and Agamben's philological reasoning stands in marked contrast to the vast abundance of literature on possible interpretations of Pindar's fragment 169 itself.⁶⁴ Controversy on the fragment dates back as far as to antiquity, with Callicles' invocation of the poem in support of a natural 'might makes right' opposing another quotation of it in Herodotus' *Histories*. While describing the multi-ethnic nature of the ancient Persian empire, Herodotus reports how king Darius the Great once asked some of his Greek servants what price would persuade them to eat their fathers' dead bodies. Of course, they answered that there was no price for which they would do it. Then Darius summoned some members of an Indian tribe, who eat their parents, and asked them what would make them willing to follow the Greeks in burning their fathers at death. Thereupon,

⁶⁰Loughlin, 'Nomos' (n 9) 71, relying esp. on Poulheria Kyriakou, 'The Violence of Nomos in Pindar fr. 169a' [2002] *Materiali e discussione per l'analisi dei testi classici* 195.

⁶¹Schestag (n 13); Stergiopoulou (n 13).

⁶²Auer (n 13).

⁶³Andrew Benjamin, 'Spacing as the Shared: Heraclitus, Pindar, Agamben' in Anrew Norris (ed), *Politics, Metaphysics, and Death: Essays on Giorgio's Agamben's Homo Sacer* (Duke University Press 2005); Zartaloudis (n 37) 239–46.

⁶⁴See Otto Schroeder, 'NOMOS Ο ΠΑΝΤΩΝ ΒΑΣΙΛΕΥΣ' [1917] *Philologus* 195, then already referring to the poem's long reception history as a 'Krankheitsgeschichte der Interpretation'.

the Indians cried aloud that he should not speak of such a horrid act, affirming, as Herodotus concludes, that Pindar was right in saying that 'nomos is king of all'.⁶⁵ Thus, whereas Callicles refers to *nomos* in the Pindaric fragment as an abstract principle underpinning the rule of the strong over the weak, Herodotus invokes the same concept as proof of the binding force of customs and conventions, describing *nomos* as a shared set of normative beliefs and cultural practices within a given community. As such, Herodotus incorporates the Pindaric fragment in his work in order to buttress the claim of the relativity of law and custom that pervades his writings.⁶⁶

In a way, the divergence between Callicles' use of the fragment and Herodotus' reference to it prefigures modern scholarly debates as they have been waged incessantly at least since August Boeckh's monumental edition of Pindar's poetry in the early nineteenth century.⁶⁷ Since the 1960s, philological interest in Pindar's fragment 169 was stirred even more by the discovery of a papyrus that – in piecemeal fashion – added some forty lines to the poem's opening eight lines as they had previously been transmitted only indirectly through quotation by other authors and their scholiasts.⁶⁸ Roughly, interpretations of the fragment can be clustered in three groups. First, there are scholars like Poulheria Kyriakou who more or less follows in the footsteps of Callicles, understanding *nomos* in the Pindaric fragment as 'an amoral, violent agent' whose 'pure, violent action cannot be thwarted or resisted'.⁶⁹ Second, there are scholars who follow Herodotus in understanding *nomos* as a shared set of laws and customs within a given community. Wilamowitz-Moellendorf, for example, describes it as that which is right in the common belief of the people ('wie es die Menschen gelten lassen'),⁷⁰ whereas Pavese defines it as 'the custom accepted by the community and determining individual behavior'.⁷¹ And third, there are those who understand *nomos* in Pindar's fragment 169 as some higher principle of justification – be it not the cynical 'might makes right' of Callicles, but, instead, the 'will of Zeus'.⁷²

⁶⁵Herodotus, *Histories* 3.38.

⁶⁶See, e.g. Sally Humphreys, 'Custom and Culture in Herodotus' [1987] *Arethusa* 212.

⁶⁷August Boeckh, *Pindari opera quae supersunt* (Weigel 1811–1821). A particularly exhaustive bibliography and analysis of interpretations up until the nineteen fifties is provided by Marcello Gigante, *NOMOS ΒΑΣΙΛΕΥΣ* (first edition 1956, Arno Press 1979) 72–102.

⁶⁸Edgar Lobel, *The Oxyrhynchus Papyri* (Egypt Exploration Society 1961) 141, with significant restorations in Denys Page, 'Pindar: P. Oxy. 2450, fr. 1' [1962] *Proceedings of the Cambridge Philological Society* 49. For a handsome overview of available scholarly interpretations since the early nineteen sixties, see Konstantinos Stefou, 'ΝΟΜΟΣ Ο ΠΑΝΤΩΝ ΒΑΣΙΛΕΥΣ: Pindar, Callicles and Plato's Treatment of νόμος in the Gorgias' [2015] *Akroterion* 1; Zartaloudis (n 37) 216–38.

⁶⁹Kyriakou (n 60) 199.

⁷⁰Ulrich von Wilamowitz-Moellendorf, *Platon: Beilagen und Textkritik* (Weidmann 1920) 96.

⁷¹Carlo Pavese, 'The New Heracles Poem of Pindar' [1968] *Harvard Studies in Classical Philology* 47, 55. See also Martin Ostwald, 'Pindar, Nomos, and Heracles' [1965] *Harvard Studies in Classical Philology* 109, 130–31.

⁷²See esp Hugh Lloyd-Jones, 'Pindar Fr. 169' [1972] *Harvard Studies in Classical Philology* 45.

or some 'absolute divine principle' that governs the world and protects a just and universal order.⁷³

For Kyriakou, interpreting the Pindaric fragment in Calliclean fashion, the behaviour of Heracles as it is hinted at in the fragment exemplifies the amoral force of *nomos* as a sovereign power that claims 'extreme violence as its prerogative', reserving the use of such violence as 'its right in order to fulfil its ends'.⁷⁴ On her view, the hero's actions are nothing but 'violence and ruthless treachery' – not only towards Geryon, illegitimately robbing him of his cattle, but also towards Diomedes, fierce king of Thrace and proud possessor of man-eating mares. As the text of the newly found papyrus seems to report, Heracles violently attacks him and ultimately feeds him to his own ferocious herd.⁷⁵ As Kyriakou acknowledges, Calliclean interpretations of the fragment have not found much support in modern Pindaric scholarship.⁷⁶ Among its few – but distinguished – adherents, however, is August Boeckh, comparing the Pindaric fragment to a passage in Euripidean tragedy in which Hecuba – taken captive and enslaved by the Greeks after the fall of Troy – bemoans the cruelty of 'the gods, who have force, as does the law (*nomos*) that has power over them'.⁷⁷ For Pindar as for Callicles, *nomos* would denote the natural rule of the stronger as the 'highest law' (*suprema lex*) in the universe, dominating both man and the gods.⁷⁸ A more recent supporter of the Calliclean view is Braswell, who regards *nomos* in fragment 169 as 'the expression of a simple realism rather than a moral justification of might'.⁷⁹

Calliclean interpretations such as that of Kyriakou are unconvincing. As far as we can assess, all of Pindar's choral lyrics are *Gelegenheitsdichtung*, devised to bolster the authority of the rich and powerful patrons that commissioned them.⁸⁰ For the largest part, the Pindaric corpus as it has come down to us consists of odes that celebrate the athletic victories of an aristocratic elite.

⁷³See, e.g. Gigante (n 67) 92 ('Nella nostra interpretazione, Νόμος è il principio assoluto della divinità'). For the 'double transmission' of the natural law tradition, invoked both in support of (Cicero, Grotius) and in opposition to (Callicles, Nietzsche) the idea of higher normative standards, see Laurens Winkel, 'Remarks on the Uniformity of Natural Law Concepts in the History of Legal Philosophy' [2018] *Fundamina* 161, 170–71.

⁷⁴Kyriakou (n 60) 200.

⁷⁵For a careful discussion of the significance of the Diomedes episode to the interpretation of the fragment's opening gnome, see, e.g. Ostwald (n 71) 118–22, concluding that 'if the Diomedes episode in the new papyrus teaches us anything', it is that we are to regard Heracles' behaviour towards Geryon as 'a more serious flaw than has hitherto been done'.

⁷⁶Kyriakou (n 60) 198 (footnote 5).

⁷⁷Euripides, *Hecuba* 798–800.

⁷⁸August Boeckh, *Pindari opera quae supersunt*, vol. 2, part 2 (Weigel 1821) 640–42.

⁷⁹Bruce Karl Braswell, *A Commentary on Pindar Nemean Nine* (De Gruyter 1998), while commenting on *Nemean* 9.15 (*Kressōn de kappauēi dikan tan prosthen anēr* – But the stronger man puts an end to a former dispute). See also Kyriakou (n 60) 198.

⁸⁰On the importance of a proper understanding of the occasional nature of Pindar's poetry, see esp. Ilya Leonard Pfeijffer, *Three Aeginetan Odes of Pindar: A Commentary on Nemean V, Nemean III and Pythian VIII* (Brill 1999) 1–21.

Of the forty-five surviving victory odes, twenty feature a mythical story on Heracles' great exploits, with the hero explicitly or implicitly mirroring the victor whose heroic status the ode is designed to celebrate.⁸¹ Pindar's mythical narratives are typically ambiguous stories crafted to strengthen the political position of the poet's patron not only by praising him but also by scolding and criticizing him so as to protect him against hubris and the envy of his fellow citizens.⁸² The Heracles theme lends itself perfectly for that purpose. While Heracles' actions leave ample room for critical reflection, the hero ultimately tends to surface as a great benefactor of humankind, collaborating with his father Zeus in supplanting a wild *chaos* with a *kosmos* that is governed by justice and harmony – an order that itself, perhaps, is bound up with violence, but should certainly not be mistaken for the 'might makes right' that is defended by Callicles.⁸³ To be sure, the occasion of the fragment 169's original performance is impossible to determine; perhaps Lobel is right in claiming that it was probably not a victory ode, but a choral song in honour of Dionysus.⁸⁴ There is no ground to assume, however, that the political poetics of the Heracles theme in fragment 169 would differ from its use in Pindar's extant works as they are available to us.

Those, then, who argue for a Herodotean reading of *nomos* in fragment 169 usually rely on the most common meaning of the term in the Pindaric corpus. Pavese provides a useful list of cases in Pindar's extant works in which *nomos* clearly denotes a traditional custom, a shared practice or a common rule of behaviour, arguing that any acceptable interpretation of *nomos* in fragment 169 should be in accordance with that range of meanings.⁸⁵ But why would that fragment refer to Heracles' brutal confrontation with Geryon and the theft of his cattle as the obvious proof of the superiority of *nomos* as a law or custom that – as line 3 of the fragment has it – 'justifies the utmost violence' (*dikaiōn to biaiotaton*)? Surely, it does not seem to make any sense to understand Heracles' extraordinary actions as customary or as lawful in any habitual sense. Pavese's correction of the most common interpretation of *dikaiōn to biaiotaton* – 'justifying the utmost violence' – comes to the rescue here. According to Pavese, the verb *dikaioō* as it is used in line 3 should not be

⁸¹Odes featuring a mythical story on Heracles include *Olympian Odes* 1 (with short reference to Heracles as founder of the Olympic games in 10–11), 2, 3, 6, 7, 9 and 10, *Pythian Odes* 9, 10 and 11, *Nemean Odes* 1, 3, 4, 10 and 11 and *Isthmian Odes* 1, 4, 5, 6 and 7. On Pindar's preference for Heracles as a mythical exemplum, see esp. M.P. Nieto Hernandez, 'Heracles and Pindar' [1993] *Metis* 75, observing that 'of all of his heroes, Heracles is, beyond all doubt, his favourite figure'.

⁸²Kevin Crotty, *Song and Action: The Victory Odes of Pindar* (Johns Hopkins University Press 1982) 108–38; Leslie Kurke, *The Traffic in Praise: Pindar and the Poetics of Social Economy* (Cornell University Press 1991) 257–62.

⁸³Hernandez (n 81) 87; Gigante (n 67) 56–71.

⁸⁴Lobel (n 68) 141; but see Pavese (n 71) 153, observing that 'there is no good ground' for Lobel's tentative classification of the fragment as a dithyramb.

⁸⁵Pavese (n 71) 54, referring to *Olympian* 8.78, *Olympian* 2.38, *Pythian* 1.62 and *Pythian* 2.86. For a similar analysis of the most general meaning of *nomos* and related words in Pindar, see also Zartaloudis (n 37) 212–216, with further references.

understood as ‘to justify’, but as ‘to punish, to bring to justice’, with the ‘utmost violence’ referring not to Heracles’ own behaviour but to the monstrosity of Geryon as a wild creature living outside the normative world of God and man. Greek denominal verbs with ending on *-oō* are usually factitive, suggesting that *dikaioō* (very rare in ancient Greek literature) should be understood as ‘to make *dikaios*’, here, as Pavese has it, to be understood as ‘to make observant of rule or custom’ rather than ‘to make just’.⁸⁶ Thus, Pavese himself renders the fragment’s opening as ‘Law, king of all/ mortals and immortals/ leads, bringing violence to justice/ with highest hand’.⁸⁷

Those advancing a reading of *nomos* as a higher principle of justification, however, rightly point out that interpretations like those of Pavese do little justice to the theme of Heracleian violence that runs through ancient Greek literature in general and Pindaric poetry in particular, making it rather awkward to understand *biaiotaton* – ‘the utmost violence’ – in line 3 to refer to the behaviour of anyone else but Heracles. As Lloyd-Jones rightly notes, Pindar generally depicts Heracles as a violent, but great benefactor of mankind, slaying monsters and suppressing other wild creatures while enforcing a divine order. Though his brutal conduct in fragment 169 clearly transgresses commonly accepted standards of behaviour, it is ultimately justified – or so Lloyd-Jones argues – by *nomos* as ‘the justice of Zeus’, the supreme and just ‘law of the universe’ to which both gods and men should obey.⁸⁸ Similarly, Marcello Gigante describes *nomos* in the Pindaric fragment as the manifestation of divine justice – ‘il principio assoluto della divinità’ – justifying Heracles’ transgressions towards Geryon as a higher standard that overrides all other norms of behaviour.⁸⁹ Among the enormous abundance of parallel sources Gigante adduces in support of that interpretation, he particularly emphasizes Heraclitus’ fragment 114, in which ‘that great philosopher from Ephese’ opposes a plurality of ‘human laws’ (*anthrōpeioi nomoi*) to a ‘divine law’ (*theios nomos*) that reigns supreme, ‘sufficing for all and prevailing in everything’ while ‘having as much power as it wishes’.⁹⁰

After all that has been written on Pindar’s fragment 169, it is hard to provide arguments that could be taken as decisive for the interpretive stance of either of the last two opposing groups of scholars. An attractive way out of the stalemate, however, can be found in a reading of the fragment

⁸⁶Pavese (n 71) 57–59. On the factitive value of verbs on *-oō*, see Evert van Emde Boas, Albert Rijksbaron, Luuk Huitink and Mathieu de Bakker, *The Cambridge Grammar of Classical Greek* (Cambridge University Press 2019) 274.

⁸⁷*ibid.* 85.

⁸⁸Lloyd-Jones, ‘Pindar Fr. 169’ (n 72) 56; see also Hugh Lloyd-Jones, *The Justice of Zeus* (University of California Press 1972) 48–51.

⁸⁹Gigante (n 67) 92.

⁹⁰*ibid.* 50–55. The numbering of the fragment follows Hermann Diels and Walther Kranz, *Die Fragmente der Vorsokratiker* (6th edn, Weidmann 1972–1973). See for an extensive analysis esp. Alexander Mourelatos, ‘Heraclitus, fr. 114’ [1965] *American Journal of Philology* 258; the translation is adopted from Geoffrey Kirk, *Heraclitus: The Cosmic Fragments* (Cambridge University Press 1954) 48.

in which Herodotean readings of *nomos* as human law or custom and abstract interpretations of *nomos* as some higher natural or divine justifying principle do not necessarily exclude each other.⁹¹ Pre-sophistic Greek thought as it is reflected in Pindaric poetry does not know of any clear distinction between culture and nature, human and divine law, or law and justice; instead, it tends to adhere to a cosmology in which such categories are essentially interconnected.⁹² In fact, Heraclitus' fragment 114 – cited by Gigante as clear proof of the supremacy of divine law as opposed to human law – offers a clear example of this. 'All the laws of men', as Heraclitus has it, 'are nourished (*trephontai*) by one law, the divine law', with the Greek verb *trephō* ('to nourish') having strong connotations of protection and guardianship.⁹³ Thus, we learn from fragment 114 that human *nomoi* find their source and are guarded by divine law as an abstract principle that finds further concretization in the manifold laws of man. The fragment thus brings the divine and the human into unity rather than supposing a mere opposition. Surely, as Zartaloudis also argues, 'the human *nomoi* are limited, in comparison to the divine, yet they are not separated or merely differentiated from the cosmic *nomos*, but instead remain part of it'.⁹⁴

The intricacies of pre-sophistic *nomos* clearly also figure in Pindar's first *Nemean Ode*, celebrating the victory of a certain Chromios – an aristocrat from Syracuse – in the chariot race of the Panhellenic games of Nemea. The example of *Nemean 1* is especially relevant here because of the central role played by Heracles in the ode's central mythical narrative.⁹⁵ Associating on the theme of great achievements, the poet implicitly compares Chromios' victory with the great deeds of Heracles. As a first heroic action, the myth tells us, Heracles – as a newly born infant – grasped two monstrous snakes and strangled them to death. That spectacle struck bystanders with fear and joyous wonder both at the same time, stunned as they were by the excessive 'spirit and power' of the child, with the Greek referring to those features as 'outside of *nomos*' (*eknomios*).⁹⁶ Summoned for advice, the prophet Tiresias declares that the infant is surely not predestined to spend his life while cautiously remaining within the normative bounds of the *polis*. Instead, he will

⁹¹See also Crotty (n 82) 105–08; Marian Demos, 'Callicles' Quotation of Pindar in the *Gorgias*' [1994] *Harvard Studies in Classical Philology* 85, 92–100; Jacqueline de Romilly, *La loi dans la pensée grecque* (Budé 1971) 62–69.

⁹²Cf. Wouter Oudemans and André Lardinois, *Tragic Ambiguity: Anthropology, Philosophy and Sophocles' Antigone* (Brill 1987) 82–114, with further references, with the book as a whole arguing for a proper understanding of the 'interconnected ancient Greek cosmology' as it emerges from Aeschylean and Sophoclean tragedy for a proper understanding of Sophocles' *Antigone*. In its lack of any separation between the legal sphere and other spheres of life, the interconnected view on law, justice and order as analysed by Oudemans and Lardinois clearly qualifies as a 'chthonic legal tradition' as described in Hugh Patrick Glenn, *Legal Traditions of the World* (5th edn, Oxford University Press 2014) 60–97.

⁹³See also Zartaloudis (n 37), referring to Mourelatos (n 90) 262–64.

⁹⁴Zartaloudis (n 37) 207.

⁹⁵See also Ostwald (n 71) 109, 126; Zartaloudis (n 37) 226.

⁹⁶Pindar, *Nemean Ode* 1.56–57.

exceed those bounds while violently confronting 'lawless beasts' (*thēras aidro-dikas*) on land and sea, making the world safe for human cultivation in general and ordered political life in particular.⁹⁷ Ultimately, he will even challenge the Giants in support of the 'divine law' (*semnon nomon*) protected by Zeus.⁹⁸ Thus, Heracles is depicted as a hero being both inside and outside of *nomos*, paradoxically exceeding the normative framework of the *polis* in order to install and uphold it. However, his excessive behaviour does certainly not fall beyond *any* standard of behaviour, as even Heracles is bound by a divine *nomos* as the ultimate source of all law and order.⁹⁹

5. The rule of law: inside and outside

What, then, is there to say about the ways in which Schmitt and Agamben incorporate Pindaric *nomos* as a crucial concept that underpins their theories? Let's start with Agamben, whose reliance on Pindar's fragment 169 as a revelation of boundless violence seems at odds with a proper analysis of that fragment in its wider historical and literary context. Surely, the fragment exposes serious transgressions of Heracles as he steps outside the normative framework of the *polis*, entering a wild domain in which clear and specific standards of behaviour are absent. That does not mean, however, that the hero's conduct outside the ordinary juridico-political order remains free of any regulation. By no means does Heracles operate within some normative vacuum, with his transgressions being justified by nothing more than the 'might makes right' of nature. With his cynical reading of the fragment, Agamben follows Callicles' manipulative use of it in Plato's *Gorgias* rather than a plausible interpretation of the fragment within the context of Pindaric poetry more at large. Notwithstanding the legitimate diversity of scholarly analyses of the fragment, it seems safe to say that the *nomos* to which it refers entails higher norms of law that bind the hero's behaviour. Thus, Heracles' position outside the cultured space of the *polis* does not mean that he is now at a place where law and violence are indistinct. Instead, he has merely entered a domain in which he is still within the grip of a higher normativity as it is protected by the Olympian gods.¹⁰⁰

Obviously, such objections of mere philological nature affect Agamben's philosophical project only to a limited extent. While tracing back the concept of sovereign power as the coalescence of law and violence to Pindar's fragment 169, Agamben evidently has present purposes in mind,

⁹⁷Pindar, *Nemean Ode* 1.64.

⁹⁸Pindar, *Nemean Ode* 1.72.

⁹⁹Cf. Gigante (n 67) 56–71.

¹⁰⁰See Benjamin (n 63) 159–68; Auer (n 13) 278–85 and Zartaloudis (n 37) 239–46 for similar criticism of Agamben's reading of Pindar's fragment 169.

exposing the structure of the exception as the hidden paradigm of modern western law. Philosophically excavating limitless violence as the true foundation of the juridico-political order, Agamben's *Homo Sacer* project draws our attention to the concentration camp as the secret *nomos* of the modern world, unveiling the dark space in which the 'bare life' of human beings is controlled by nothing but the unmediated power of the sovereign.¹⁰¹ Notwithstanding the importance of Agamben's critical deconstruction of law, an attractive alternative for his analysis could, I think, be found in a less cynical jurisprudence which adopts the critical potential of Agamben's theory without embracing his radical critique of the entire juridico-political system that serves as its theoretical fundament.¹⁰² Such an alternative is actually presented to us by Pindar's fragment 169 as one of the main targets of Agamben's philosophical archaeology. In that way, a critical assessment of Agamben's use of that fragment as one of the cornerstones of his theory does not necessarily have to remain limited to schoolish corrections of Agamben's philological reasoning. Instead, a close analysis of the way in which Agamben draws on Pindaric *nomos* also provides a good starting point for criticism of his philosophical enterprise itself.¹⁰³

Whereas Agamben adduces the Pindaric fragment in his exposition of unlimited and unpunished violence as the hidden basis of the legal order, that fragment, upon closer inspection, merely exposes the layeredness of that order, with the ordinary juridico-political order – consisting of rather clear-cut rules of positive law – being encapsulated within a wider normative framework of an overriding normativity of which the prescriptive content is usually much harder to grasp. By no means, Pindar's fragment 169 presents us with some Hobbesian abyss in which the sovereign – from a position both inside and outside the juridical order – may operate in some kind of legal vacuum, with his decisions merely constituting law while remaining completely unregulated themselves. To be sure, the obligations that bind heroes like Heracles as they step outside the normative framework of the *polis* are often far from clear. Being a hero, however, requires accepting the responsibility that comes with one's freedom.¹⁰⁴ Outside of the ordinary juridico-political order, there is no comfortable set of rules that may serve to mitigate the burden of that responsibility. For Pindar, the heroic life is the only life well-spent, but it also entails the inevitable risk of *hubris* as the hero has no choice but to transgress ordinary standards of human

¹⁰¹Agamben, *Homo Sacer* (n 10) 95–101.

¹⁰²Cf., e.g. Leila Brännström, 'How I Learned to Stop Worrying and Use the Legal Argument: A Critique of Giorgio Agamben's Notion of Law' [2008] *No Foundations* 22.

¹⁰³Cf. Benjamin (n 63) 167–68.

¹⁰⁴Cf. Bob Dylan, *Biograph* (Columbia Records 1985): 'I think of a hero as someone who understands the degree of responsibility that comes with his freedom'; see also Arthur Adkins, *Merit and Responsibility* (Clarendon Press 1960).

behaviour. Outside the normative world of the *polis*, he has to plot his way within a precarious domain only regulated by a divine justice that usually reveals itself only afterwards, exalting some while devising the downfall of others.¹⁰⁵

Far from being the first expression of sovereignty as the hidden paradigm of the western legal tradition, Pindar's fragment 169 and his poetry more in general thus reflect a layered understanding of law that enables us to conceptualize a space outside of positive law without succumbing to the cynical idea of that space as a legal and normative void in which nothing but sovereign violence reigns supreme. The detention camp at Guantánamo Bay, for example, has been described by Agamben and others as a place where law and lawlessness are indistinguishable, a 'zone of indifference' embodying law's suspension, with the detainees being subject to nothing but 'raw power'.¹⁰⁶ According to Pindar's layered understanding of law, however, it is not necessary to think of Guantánamo as a 'black hole' entirely removed from the law.¹⁰⁷ To be sure, it is a place outside of the ordinary juridico-political order, distanced from routine legality, with the U.S. executive consciously seeking to create a 'legal no man's land'.¹⁰⁸ That effort has been justly criticized as an unwarranted appeal to exceptionalism, evoking a 'discourse of crisis' that shields normalcy from view and strategically disavows the entitlement of the detainees to their rights under U.S. constitutional law and the international laws of war.¹⁰⁹ A layered conception of law as it is articulated by Pindar, however, dismisses the concept of an extra-legal space outside of legal normalcy altogether. The Pindaric notion of law keeps the notion of 'the rule of law' intact even in the direst circumstances, acknowledging the need for extraordinary acts in extraordinary circumstances without conceptualizing an 'outside of law' in which all legal principles and responsibilities lose their binding force.¹¹⁰

¹⁰⁵The inevitable risk of incurring divine punishment for hubristic behaviour that goes with ancient Greek heroism is especially evident from Pindar's *Olympian Ode* 1, narrating the heroic but transgressive behaviour of both Tantalus and Pelops. See, on this point, esp. Charles Segal, 'God and Man in Pindar's First and Third Olympian Odes' [1964] *Harvard Studies in Classical Philology* 211, 212–28.

¹⁰⁶Ulrich Raulff, 'An Interview with Giorgio Agamben' [2004] *German Law Journal* 609, 610–12.

¹⁰⁷*R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] *EWCA Civ* 1598, [2003] *UKHRR* 76, [32].

¹⁰⁸Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception' [2005] *EJIL* 613, 620.

¹⁰⁹For criticism of strategic political and legal use of 'crisis discourse', see, e.g. Laura Henderson, 'Crisis in the Courtroom: The Discursive Conditions of Possibility for Ruptures in Legal Discourse' [2018] *Netherlands Journal of Legal Philosophy* 49.

¹¹⁰As such, a careful analysis of the Pindaric concept of *nomos* as it is articulated in fragment 169 may be relevant to the debate on the intra- or extra-legal conceptualization of the state of exception, clearly tending towards the intra-legal stance taken up by, e.g. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006) 35ff. See William Scheuerman, 'Survey Article: Emergency Powers and the Rule of Law After 9/11' [2006] *The Journal of Political Philosophy* 61 for a handsome overview of the discussion.

6. Justice, law and order

Schmitt's incorporation of *nomos* in his institutional theory of law is more complicated. Whereas Agamben draws on Pindar's fragment 169 to illustrate the workings of unlimited violence as law's hidden constitutive principle, Schmitt refers to Pindaric *nomos* as an evolving order, an *ordo ordinans* ('order of ordering') that comes with 'an inner measure', a 'terrestrial fundament' in which all law would be rooted'.¹¹¹ Rejecting the Calliclean understanding of *nomos* as nothing but the arbitrary right of the stronger,¹¹² Schmitt advances a conception of *nomos* as a 'spatially concrete, constitutive act of order and orientation' that itself is constrained by 'earth as the mother of law', imposing order as a set of natural restraints on human behaviour.¹¹³ Law, as Schmitt has it, is 'bound to the earth and related to the earth'. As 'every farmer knows', the earth 'justly rewards' human toil and trouble with growth and harvest.¹¹⁴ It is also the required medium by which demarcations of ordered community life – all those lines engraved and embedded in the earth – can become apparent, separating mine from thine and friend from enemy.¹¹⁵ Schmitt's institutionalism – or 'concrete-order thinking', as he himself preferred to call it – can thus be traced back to a fundamental boundness to the earth from which all law is ultimately derivative. On the most abstract level, that natural order precedes the juridico-political order or any other normative domain, restraining even the act of land appropriation (*nomos* as *Landnahme*) that constitutes it.¹¹⁶

Invoking Pindar's fragment 169 in support of an institutional theory of law in which law and justice are components of order rather than the other way around, Schmitt touches upon the difficult topic of ancient views on the relation between justice and law on the one hand and order on the other. In early Greek poetry as in Schmitt's legal theory, law, justice and order are closely related. As Lloyd-Jones explains in his *The Justice of Zeus*, the Greek word for justice (*dikē*, often personified as a goddess) as it is used in the Homeric epic and early Greek lyric fundamentally entails 'the preservation of the established order', with the notions of law and morality closely connected to it.¹¹⁷ The cosmic order as the early Greeks envisioned it required that each god and man should receive his proper share, his *timē* to which each is entitled on the basis of his actions and his status. Whereas the order in human communities is safeguarded by aristocratic monarchs, the gods

¹¹¹Schmitt, *Nomos of the Earth* (n 6) 42, 47.

¹¹²ibid 73.

¹¹³ibid 42, 78.

¹¹⁴ibid 42.

¹¹⁵ibid 44–45.

¹¹⁶See also Oliver Simons, 'Carl Schmitt's Spatial Rhetoric' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (Oxford University Press 2016) 784–86.

¹¹⁷Lloyd-Jones, *Justice of Zeus* (n 88) 4.

have Zeus as their king, protecting the divine order that he and his fellow Olympians have installed by overturning the rule of previous generations of gods.¹¹⁸ In Pindaric poetry, Zeus is typically portrayed as a relentless guardian of that Olympian order, brutally punishing heroes such as Tantalus for their hubristic behaviour¹¹⁹ and violently controlling divine opponents such as Typhos¹²⁰ who have challenged his supremacy among the gods. The order installed and protected by Zeus – from which, ultimately, also human laws derive their power and legitimacy – is not ideally just in an abstract moral sense; it merely creates the ordered societal life as a basic condition for communities and their individual members so as to flourish.¹²¹

Interestingly, the conception of the interrelation of law and justice on the one hand and order on the other surfaces in a surviving piece of Pindaric poetry that is of immediate relevance for the interpretation of the mythical narrative on Heracles and Geryon that seems to have followed fragment 169's famous opening lines on the supremacy of *nomos*. In fragment 81 (transmitted by Aelius Aristides while explaining Callicles' use of the fragment in Plato's *Gorgias*), Pindar bestows emphatic praise on Geryon and subsequently asserts that he, as a poet, will have to discontinue that praise in order not to provoke the anger of Zeus.¹²² As Pindar explains, 'it is not proper, when your possessions are being stolen, to sit by your hearth and play the coward', thus explicitly acknowledging the legitimacy of Geryon's resistance against Heracles' violent theft of his cattle. For fear of divine *nemesis*, however, Pindar is careful not to extend his praise too far. 'I praise you, Geryon, but about that which is less pleasing to Zeus, I will remain completely silent', the poet professes in dramatic fashion.¹²³ In this way, there seems to be a dichotomy between Pindar's own assessment of just praise for Geryon's behaviour on the one hand and justice as it is installed and protected by Zeus on the other. The order championed by Zeus 'makes mightiest cities' and installs a God-given 'tranquillity' (*hēsuchia*), preventing humans from the many harms associated with civil strife (*stasis*).¹²⁴ However, it is surely not ideally just, leaving a certain space for the poet to acknowledge its shortcomings from the perspective of abstract normativism.¹²⁵

The example of Heracles and Geryon thus illustrates Pindar's acknowledgment of the realities of ordered justice as it is necessarily imperfect, relying on power relations for which no final rationale or ultimate legitimacy can be provided. That does not mean, however, that Pindar concurs with Schmitt in

¹¹⁸Lloyd-Jones, *Justice of Zeus* (n 88) 27.

¹¹⁹Pindar, *Olympian Ode* 1.54–65.

¹²⁰Pindar, *Pythian Ode* 1.15–29.

¹²¹Lloyd-Jones, *Justice of Zeus* (n 88) 49–51.

¹²²See also Crotty (n 82) 105.

¹²³Pindar, *Fragment 81* (Snell-Maehler).

¹²⁴Pindar, *Pythian Ode* 8.1–4.

¹²⁵Cf. Demos (n 91) 97.

proposing a conceptual primacy of order over law and justice, with justice and law being mere derivatives of order. In contrast to Schmitt, Pindar seems only concerned with the unbreakable interrelation between law, justice and order. As a superior force immanent in nature, Zeus surely imposes his will on gods and men in a compelling way, maintaining a cosmic order that may not be perfect in an abstract normative sense. But that does not mean that Pindar's conception of that order lacks an intrinsic moral element. The justice of Zeus, as Pindar refers to it, is sharply contrasted to 'deceitful gain' (*kerdos dolion*), calling on humans to 'rule their tempers' in order not to confuse their personal interests with justice.¹²⁶ It is closely connected to the rights of guests and strangers and attaches great value to faithfulness and selfless loyalty.¹²⁷ The justice of Zeus, or so it seems, may not be ideal, but Pindar's view of it is certainly not cynical so as to regard normative prescriptions as nothing more than the derivatives of an anormative order. Instead, it differs from Schmitt's disparaging realism by accepting the order of Zeus as a regime that is in and by itself bound up with law and justice, without distinguishing a conceptual primacy of any of those elements over the other.¹²⁸

Pindar's account of *nomos* as ordered justice also differs from Schmitt's in its disregard for any 'terrestrial fundament', with all law – as Schmitt has it – rooted in a constitutive act of land-appropriation. Although there are some instances in which *nomos* and *nemō* seem related to the cultivation and tenure of land, nowhere in Pindar does it seem that those notions are conceptually connected to a violent *Landnahme*, a 'taking of the land' as Greek *nemō* would share its linguistic roots with German *nehmen* ('to take, to appropriate').¹²⁹ Whereas Schmitt's appeal to the etymological relatedness of Greek *nomos* to German *nehmen* could arguably be described as an example of a speculative *Zukunftphilologie* as it was once quite fashionable in German academic circles, his reliance on the connection between *nomos* and *nemō* in the sense of 'to divide, to distribute' – quite uncontroversial among philologists – merits more serious consideration.¹³⁰ Ordered justice in Pindar seems primarily a matter of 'maintaining the existing situation or of returning to a previous status quo', mirroring the conservative preoccupations of an aristocratic elite in a world of class friction and imminent revolution.¹³¹ As Marian Demos has noted, *nomos* as it is used in fragment 169 seems to refer to a legal regime of ordered justice as a certain 'allotment' or 'apportionment', an 'existing state of affairs' backed up by Zeus and his

¹²⁶Pindar, *Pythian Ode* 4.139–41

¹²⁷Pindar, *Olympian Ode* 2.6; *Isthmian Ode* 9.5.

¹²⁸Lloyd-Jones, *Justice of Zeus* (n 88) 49; see also Romilly (n 91) 62–69.

¹²⁹See esp. the extensive semantic analysis of *nomos*, *nemō* and related words in Zartaloudis (n 55) 212–16.

¹³⁰Cf. Stergiopoulou (n 13) 98–112.

¹³¹Pfeiffer (n 80) 468.

fellow Olympians; as such, it 'is not a derivative concept' in the sense that 'one cannot provide a rationale for it'.¹³² Though we can be sure, or so Pindar has it, that its outcome is somehow just, the cosmic order – as it is both factual and normative, without any conceptual primacy of the one over the other – that is installed and protected by Zeus is ultimately beyond our intellectual grasp.

7. Conclusion

Schmitt and Agamben both incorporate the Pindaric understanding of *nomos* as they see it reflected in fragment 169 as a crucial concept underpinning their theories. Schmitt builds on the fragment while laying out an institutionalist theory of law in which law and justice follow order instead of the other way around. For Agamben, the Pindaric fragment serves as a central paradigm that unveils the paradox of sovereignty, with the sovereign being located both in- and outside the juridico-political order. As Agamben has it, Pindaric *nomos* marks the place where law and violence are indistinct, the one passing over into the other and vice versa. As such, it would open our eyes for a 'legal vacuum' that is essential for the constitution and preservation of the modern juridico-political order. However, Agamben's reliance on Pindar's fragment 169 as a revelation of boundless violence as human society's hidden fundament seems at odds with a proper analysis of that fragment within its wider historical and literary context. To be sure, Pindaric *nomos* goes beyond the boundaries of the normal juridico-political order, but it also entails a higher normativity that is still operative in case of that order's suspension. Neither does Schmitt's interpretation of the fragment as proof of a conceptual primacy of order over law and justice seem to fit any acceptable philological analysis. Instead, it seems safe to conclude that, for Pindar, law and justice on the one hand and order on the other should be thought of as intrinsically interconnected, without any conceptual primacy of the one over the other.

Obviously, philological objections to the strategic interpretations of Pindaric *nomos* by Schmitt and Agamben affect their philosophical projects only to a limited extent. Tracing back their ideas to a pre-sophistic understanding of *nomos*, both thinkers evidently have present purposes in mind, interpreting Pindar's fragment 169 so as to corroborate their theories of law and politics as proper responses to contemporaneous challenges. However, a close examination of their strategic interpretations of Pindaric *nomos* yields much more than corrective criticism of their philological methods and arguments only. In fact, a careful analysis of Pindaric *nomos* as it can be distilled from Pindar's fragment 169 and his poetry more at

¹³²Demos (n 91) 99–100.

large may serve as a basis for an attractive alternative to the theories of both Schmitt and Agamben. The Pindaric notion of *nomos* explicitly acknowledges the limits of the normal juridico-political order as it necessarily depends on acts of constitution and preservation that lie outside of it, recognizing its reliance on the use of brutal violence at its real or imagined borders. Nonetheless, it does not conceptualize the domain outside of that order as a zone of utter lawlessness, offering a layered understanding of law where such acts are still regulated by a higher normative framework. While acknowledging the tragic brokenness and unavoidable imperfections of ordered justice in human society, Pindar's jurisprudence graciously evades the temptations of an easy nihilism, taking up an attractive position somewhere in between cynical realism and naïve normativism. I lay it on the altar of jurisprudence for further consideration.

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