

New Nomos of the Earth? Perspectives of the Order in the Age of Chaos

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New Nomos of the Earth? Perspectives of the Order in the Age of Chaos

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Summary. The article “The New Nomos of the Earth? Perspectives of the Order in the age of chaos” by Jan Okoński presents the concept of Nomos and its interpretations against the background of a changing global order. The author presented an analysis of the Nomos as a symbol of justice (similar to such ideas as: *ius*, maat, and tao) and Carl Schmitt’s analysis of this term, which is important from the point of view of the philosophy of law. Nomos is word derived from ancient Greek, a concept that somehow unites the plane of factuality and the plane of validity of law. In the word Nomos, there is contained, a strange, paradoxical union of violence and justice. The Italian philosopher and researcher of the thought of C. Schmitt, Giorgio Agamben, has pointed out that Hobbes’s sovereign is the only one that remains in a state of nature, retaining his “*ius contra omnes*”, we may say, perhaps along similar lines to the states in the UN Security Council. These considerations are set against the background of the former China-centred system of international relations in Asia and the current attempts to transform the global order. Nomos is proving to be an ever-present concept that, although not as popular as other ideas from ancient Greece, casts clear light on issues of the validity of law in general and helps to make the evolution of the global order easier to understand. Through the prism of the concept of Nomos, it can be seen that the old world order, crystallised by the Europeans, can be marginalised by the change of the global power relations. This is not a new process, for it has already occurred in history. It is clear from the content of the article that law has appeared, since ancient times, to be paradoxically linked to violence and the possibility of initiating it.

Keywords: philosophy of law, jurisprudence, Carl Schmitt, international relations, Giorgio Agamben, Grossraum.

Naujasis žemės Nomos? Tvarkos perspektyvos chaoso amžiuje

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Santrauka. Straipsnyje daugiausia dėmesio skiriama nomo sąvokos tyrimui ir jos reikšmei aiškinti vykstančius pokyčius besikeičiančio pasaulinės tvarkos kontekste. Analizuojama žodžio reikšmė ir etimologija, ypatingą dėmesį skiriant nomo reikšmei teisės filosofijoje ir kaip teisingumo simboliui, nurodant panašias reikšmes kitose kultūrose. Straipsnio turinys susijęs su Carlo Schmitto ir Giorgio Agambeno apmąstymų nomo tema rezultatais. Nomo klausimas buvo iškeltas šiuolaikinių įtampų tarptautinėje konsteliacijoje fone, kartu atkreipiant dėmesį į skirtumus tarp praėjusiais amžiais Azijoje egzistavusios tributarinės sistemos ir dabartinės europietiškos kilmės tarptautinių santykių tvarkos.

Pagrindiniai žodžiai: teisės filosofija, jurisprudencija, Carlas Schmittas, tarptautiniai santykiai, Giorgio Agambenas, Grossraum.

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Introduction

The spatial and legal changes in the world can be interpreted using a key of the philosophy of law. As we can observe, we live in times of great solstice or turning point of the world order. The results of many global tensions which will affect the future of this order, such as the progressive de-dollarization of world trade and Russia's aggression against Ukraine, are now *in statu nascendi*. To understand and interpret these changes, the ancient Greek concept of *nomos* may be helpful.

The world *nomos* comes from ancient Greek (νόμος). Noun *nomos* is a *nomen actionis* or action noun (a noun indicating the action of the verb) of a word *nemein* which means to distribute and to graze. *Nomos* in the philosophy of law was popularised by Carl Schmitt – a German lawyer and philosopher who lived in the 20th century. In 1950, his famous work entitled “Der Nomos der Erde: im Völkerrecht des Jus Publicum Europaeum” was published. It is worth noting that in context of etymology of the word *nomos*, Schmitt, despite the very high quality of the work, overlooked one point – that, actually at the beginning there were two words: *nómos* and *nomós* with different accent and meaning. Both words came from ancient Greek word *nemein*. The word *nómos* has pitch accent on the penultimate syllable, while *nomós* has pitch accent on the final syllable (Berge, 2022, p. 266).

The word *nómos* is most clearly related “with *nemein* as an act of distribution (to deal out, to distribute)” and mostly “referred to ‘place of pasturage’ ... sometimes also to a ‘province’ or a ‘sphere of command’ while *nomós* was noticeably “related to *nemein* in its pastoral sense (to graze, to pasture)” (Berge, 2022, p. 266–267). Finally, these words have combined together in terms of meaning. This term originally has many meanings, apart from law (*lex* means *nomos* in Cicero's translation), customs (*mores*) and morality (*ius*), it is etymologically related to the original division and occupation of land, marking out and taking possession of pastures and fields.

Given these circumstances, Carl Schmitt stated explicitly that “*nomos* it is the immediate form in which the political and social order of a people becomes spatially visible” (Schmitt, 2006, p. 70). So, it reflects the reality of law as a substantially heterogeneous phenomenon and goes beyond the purely normative context. It is worth noting right away that one of the scientists who described this problem, wisely stated that since law is an extremely complex phenomenon because it contains a normative system, language, social facts etc., perhaps *nomos* reflects the essence of this phenomenon better than the traditional Latin formula *ius et lex*, which focuses mainly on its normative, positive content (Zajadło, 2020, p. 4).

Regarding *nomos*, understood as justice and related to the Latin *ius* and the Greek *dike*, it should be noted that these are not accidental expressions from the Mediterranean area, but certain representations of a general, universal canon, in which other denotations of justice are also present, such as the Egyptian *maat*, the Chinese *tao*, the Indian *artha* and *rta*, the Jewish *tzedek* and the Greek *themis*. According to Voegelin, a German philosopher and admirer of the writings of Plato and Aristotle, words such as *nomos*, *ius*, *maat* and *tao* are designations of a certain substantive kind of order which ontologically constitutes the essence of law. In his view, statutory law has no status of its own, that is, an ontological essence, because there is nothing in the legal order itself that can be indicated as its immutable nature. The individual legal norms of a legal order can change or cease to apply. There are no laws in force that a philosopher, or a judge, can ignore as “unimportant”. Comparing multiple legal orders in order to capture their essence – a method already present in Plato's dialogue “Protagoras” – does not provide satisfactory results either. Voegelin summarised his ontological position as follows: “The exit from the *aporia* opens with the recognition that the legal order, while it has no ontological status of its own is a part of the process by which a society brings itself into existence and preserves itself in ordered

existence” (Voegelin, 1997, p. 38). In this view, laws are tools that are adequately used by society in the process of its ordering.

The aim of this article is to present the contemporary reconfiguration of the global order, particularly on the legal perspective in the international sphere using the ancient figure of nomos – as interpreted by Carl Schmitt and Giorgio Agamben. To this end, changes in the conceptualization of the division of space on Earth – as understood by Schmitt – were summarily followed. In particular, the question of China in the formation of the new nomos was highlighted. The difference in the evolution of the understanding of international relations between the Western world and China is also shown. Particular emphasis was placed on the spatial aspect of the topic under discussion.

1. Nomos and Spatial Borders – Dealing with Space and Law

It is a trivality to say that our existence is somehow space-based. This space, this spatiality is a feature of the reality we exist in. Many philosophers, such as Immanuel Kant and John Locke, highlighted the original, primordial relationship between law and land (Górnisiewicz, 2020). Attention was drawn to the fact that land appropriation is categorical in legal terms, an archetype of the constitutive process of law both internally (the ordering of land and property in the state) and externally (towards other peoples). It is hard not to notice that such an attitude connotes a rather non-positivist view of the law. It is worth recalling here, for example, the classical *triad* of features which, in Georg Jelnik’s optics, constitute the state – power, population, and territory. This role of the nomos as a constitutive force of the state and therefore territorial order was particularly emphasised by Schmitt and, in reference to him, also by contemporary Italian philosopher Giorgio Agamben who analyzes Schmitt’s thought against the background of a certain problem that he himself refers to as the paradox of sovereignty, which is, according to him, the very core of Schmitt’s political theology. In their reflections, both cited the same passage from Pindar’s work: “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/” (Race, 1997, p. 400-403). In this fragment law is the king of all (nomos lo pamon basileus). The ancient Greek author of lyric poetry invoked the figure of Nomos Basileus. Heracles, the divine Greek hero, in one of his 12 labours imposed on him as part of his punishment, was tasked with capturing the cattle of monster Geryon. Heracles accomplished this quest by stealing valuable cattle. In this way, in Pindar’s eyes, Heracles’ power blends opposing violence (*bia*) and justice (*dike*). The apodictic nature of this figure duly reflects the matter with which we are being confronted.

In the history of the world, we can enumerate at least three nomoi. First, there was the original nomos of the ancient times. Back then the earth was divided into the category of space. That was the period when mainland and open sea were separated for the first time. We were then dealing with the balance of land and sea. This opposition of land and sea as different spatial orders became more prominent with the opening of Europe to the oceans and the emergence of a proper image of our planet. Then, there was the second nomos in the age of the great discoveries. When the Western powers divided the world into their spheres of influence, this was the Eurocentric nomos of the sovereign national states.

New legal titles to new lands appeared in the form of discovery and occupation. It should be strongly noted that the discovery of the New World was an astonishing event from a European point of view. Schmitt compared it to the situation if, on the way to the moon, mankind had discovered a new, unknown planet. The German jurist considered the period after Peace of Westphalia in year 1648 the classic age of *Ius Publicum Europeanum* up to year 1914. There is a little problem with the third *nomos*,

because some people claim that it appeared during the time of the Cold War. In this interpretation, its distinctive feature was the division of the world into three parts: a so-called first world, western part, centred around the supposed Euro-Atlantic, then socialist second world, based mainly on the land masses of Eurasia, and finally with so called third world – usually poor rest of the states on our planet. It ended with the collapse of the Eastern Bloc. Others claim that it is the third not fourth *nomos* that is already in front of us. Nevertheless, this issue is not that important. What is important, regardless of chronological division issues, is that we are facing the emergence of the new *nomos*.

For Carl Schmitt the *nomos* in the original sense “is precisely the full immediacy of a legal power [Rechtskraft] 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” (Schmitt, 2006, p. 73). Schmitt thought that it is through *nomos* that it is the fount, kind of protoact, that enables the emergence of a legal order, that is the original definition of the territory that takes place during the creation of states, colonization and founding of the city. Giorgio Agamben pointed out that, for Schmitt, *nomos* is not so much a seizure of space as it is a primordial sovereign decision on the territorial state of exception, which constitutes a primordial juridico-political structure (Agamben, 2008). We can recall here the famous words of the English philosopher John Lock, who concluded that: “at the begging All World was America”. Again, it is easy to see that this emphasis on the spatial conditionality of law is rather incompatible with the positivist model, with the separation of being from ought, *sein* from *sollen*.

2. Asian International Relations Before *Ius Gentium*

In the modern era, it was European legal institutions such as the formal, written constitution, or the nation-state that dominated and spread around the world. The hegemony of the West was based on a devastating relation of force to force of the so-called savage peoples who knew no firearms and steamships. Today the power relationship is different. For example, African countries are no longer colonies as they were in the 19th century. As recently as the in the end of 20th century the US could wage war, make military interventions without a UN mandate. One could say that the States in the UN Security Council are probably still like the people in a state of nature in Hobbesian thought.

Free from the power of Leviathan, entities that can actually wage war. Law merges in a paradoxical way with violence and the possibility of initiating it.

But the international order, especially its legal components and international organisations are foreign for Chinese and Far-Eastern Asian tradition. In far Asia, a peculiar system appeared similar to *European Ius Gentium* (that grew up in Europe on the basis of Roman law) and prevailed for many centuries before Europeans sailed there. It was a model related to the system of the tributary states. The various rulers of Asia, from the snow-capped Himalayas to the Sea of Japan, from the Gobi Desert to the islands of Southeast Asia for centuries showed a dependence on the Chinese emperor, who was nominally at the top of a kind of hierarchy ladder. It was not uncommon for these relationships to include paying tribute to the Chinese ruler. The authors of the work “Sacred Mandates” believe that we can speak here of a model of law appropriate to ancient Far Asia, which regulated such issues as relations between political subjects and the treatment of emissaries. This order was a kind of model specific to Asia and was seen as sustainable and global. Its essential element was the formal hierarchy at the top of which stood the empire of China and him the emperor as the son of Heaven, to whom everything under Heaven was to be subjected (Boltjes, *et al.*, 2018).

In practice, it was a complicated and heterogeneous world, where dissent and armed conflict were not uncommon. Thus, it can be said that it was characterized by a nominal hierarchy in contrast to the

“anarchy” of clashing powers present in Europe at the time. The emergence of this regulation of relations was influenced by the Mongols, the Chinese (teachings of Confucius), and the Tibetan Buddhist sphere. This situation changed in the 19th century when Korea, China, Japan, and other Asian countries had to abandon their previous arrangement of international relations by overwhelming pressure from white peoples. Gunboat diplomacy was used to replace Chinese diplomatic rituals with Western protocols. One aspect of this change, for example, was that sovereignty began to be defined by the exclusive right to a subject’s precisely delimited territory. In the old days, local rulers of smaller entities enjoyed autonomy and could swear allegiance to more than one sovereign. The 19th century (more precisely the years 1839–1949) is referred to in China as the “Century of humiliation.” It was a period that included many interior rebellions and foreign campaigns, such as the two Opium Wars (1839–1842 and then 1856–1860), the Amur Annexation by Russia (1858–1860), the Sino-French War fought on Chinese territory (1884–1885), the First Sino-Japanese (War 1894–1895) and the Boxer Rebellion (1899–1901). It was not until the communists reunited the country on the mainland in 1949, which became a very important aspect of identity of contemporary Chinese.

3. Between Behemoth and Leviathan – Dawn of the New Nomos? Perspectives of Change

At this point, we need to describe the factual background to the changes that are the subject of our consideration. If the United States were the undisputed global hegemon like that state was 30 years ago, the scenario of a long, open, kinetic war in Europe would have seemed unthinkable, the same as China’s bold questioning of Taiwan’s non-reliance. I deliberately do not use the word independence, because Taiwan is recognized as a state by only 13 states in the world. Moreover, in March this year, Honduras withdrew its recognition of statehood of Taiwan.

When Napoleon entered Jena in the year 1806, Hegel wrote in a letter to a friend: “I saw the emperor – this world-soul – Weltseele – riding out of the city on reconnaissance.” Today, the consolidation of power in China is clearly concentrated in the hands of one man, Xi Jinping. Attempts to remodel the global nomos through the military efforts of the likes of Napoleon and Hitler have failed. Another form of hegemony, perhaps based on economic domination, is looming on the horizon. For instance: multibillion dollar Chinese investments in Africa and Asia (e.g., in power plants, roads, pipelines, and ports) are linked to support Chinese interests at the UN. Chinese soft power means, for instance, that the Uighur situation is not a widely debated media topic. The yuan is increasingly used in trade relations; according to calculations presented by the International Monetary Fund, the share of the dollar as the reserve currency of the world’s states may have fallen below 60%, whereas at the beginning of the 21st century it was around 70%¹. There is no doubt that the main drivers of the attempted reconstruction of the nomos are the revisionist states like Russia and China, participating in the development of BRICS project. It is worth mentioning that last summit of this group of countries in August this year did not bring the promised common currency, which does not solve the still existing problems of foreign exchange convertibility existing in trade. China has gone from being an object of the global balance of power in the 19th century when Western powers interfered to being a subject. Not so long ago, Henry Kissinger stated that peace in Ukraine could only be ensured by China’s mediation. Therefore, it can be said that while it was the European powers that shaped the spatial order of the world at the time of the

¹ Some researchers claim that this figure may be as high as an estimate of around 50%, but this is not a calculation provided by international institutions.

First Paris Conference after WWI, now Asia can influence the shaping of the spatial order of Europe. Moreover, it can be stated that in the Chinese-created geopolitical constellation, although its level of formalization is much less than that of its Western counterpart, its new centre is China. For example, because organizations of Eurasian countries such as BRICS, Asian Infrastructure Investment Bank, Shanghai Cooperation Organization, have established some part of their main structures in China.

The willingness of the BRIC countries to remodel the spatial fabric of Eurasia brings to mind the concept of *Großraum* of C. Schmitt. This German lawyer offered a diagnosis on the subject of a certain spatial order that, by apodictic force of fact, began to take shape in Europe between 1939 and 1942, but was not finalised. In this great geopolitical project, although it was initiated by a single state, in its formula lies the constitutive principle of a “Great Space” beyond the borders of individual states. Its inspiration was the so-called Monroe Doctrine, announced in 1823. Although it was introduced by the fifth president of the United States, James Monroe, its actual author was American lawyer and Secretary of State John Quincy Adams. The name by which this doctrine is now known was not given to the Doctrine until more than 20 years later after its presentation.

Its first point opposed European colonialism in the Western Hemisphere – a European nation would try to do so, the United States would view it as a hostile act against this nation, thus, neither North America nor South America can be the object of colonization by foreign countries. This doctrine ruled out European intervention in North and South American countries and it became part of the Treaty of Versailles in its 21st article, a treaty signed almost 100 years later after the defeat of the German Empire in World War I. Its modernity consisted of thinking in terms of global space (explicit invocation of the Western Hemisphere). According to Schmitt, the core of the American Monroe Doctrine was precisely to be the principle of the “Great Space”. One of the researchers studying the issue pointed out that for Schmitt the word “great” in this context has an aspect indicating, rather not so much a physically measurable size, but a certain creative context, because Schmitt, who was not the author of the very combination of these two words (it dates back at least to the 19th century) wanted to give it a special status in the new order of international law (Chrabaszcz, 2021, p. 429). In the second half of the 19th century, attention began to be drawn to the importance of a supra-national space in the context of common economic relations. No country aspiring to be an industrial power was capable of complete autarky without trade contacts and resources from abroad. Although *nomos* does not necessarily apply to large, geographical spaces, as Agamben has already pointed out in his work.

Engelking developed the concept further by pointing out that the function of *nomos* is actually performed by the former American prison at Abu Ghraib located in Iraq, not far from its capital. This facility was to be the place where the Schmittian state of exception gained its tangible spatial dimension. The sovereignty of the soldiers, representing “the political” existing in the extra-legal state of exemption, was limited only by the perimeter of the prison walls.

For Giorgio Agamben, exception is the original, primordial form of law. In short, for him the power does not need the law to set the legal order. It is within the legal order as well as outside of it. It can be said that it is transcending the law. Violence establishes the law and at the same time preserves that law.

Agamben pointed to ancient disputes over the antinomy of nature (*physis*) and law (*nomos*) – present in ancient Greece, especially in the disputes of the sophists and the specific position of the sovereign in Hobbes’s *Leviathan*. Hobbes’s sovereign is in some ways similar to the strong man of the sophists. In the view of the English philosopher, the pre-state state of nature means in practice a state of war of everyone against everyone (*bellum omnium contra omnes*). It can be said that the sovereign is the only one still in the state of nature and retains his “*ius contra omnes*” (Agamben, 2008, p. 55). According to Agamben, while nature in the sophists ultimately determines the justification of the violence of the

stronger, in Hobbes's thought the identity of the state of nature and violence constitutes the justification of sovereign power. Law merges in a paradoxical way with violence and the possibility of initiating it.

It is possible that the old legality will capitulate in front of the new legitimacy dictated by factors of economic and political dominance. Chinese works with the method of facts have been accomplished. China is gently probing the limits to which it can go. Tibet has been occupied and now is part of China. If Taiwan is to be occupied by China, according to Beijing nothing will change because *de jure* (according to Beijing) it always has been so. Why is China building aircraft carriers? Why are they building artificial islands? The aim is to change the rules of the game. China will create new land in sensitive places sending a signal – maritime boundaries? This is already ours. In light of Carl Schmitt's apocalyptic beliefs, William Blake's 19-th century work, Behemoth and Leviathan comes to mind. It depicts two biblical monsters. The first is a huge and terrifying land beast, the second is a great sea serpent. These two monsters from the Old Testament are representatives of war by land and by sea. It could be said, a clash between sea power and land power. Perhaps, like humans before World War I and II, we are merely living in the prelude of a global duel.

Conclusions

1. Given the previously outlined attempts by various powers to change the nomos of the world, analogies to today's situation come to mind on their own. Together with the relative decline of the Euro-Atlantic world, the model of international relations developed by it, considered "universal" and almost commonly accepted after the Second World War, may be subject to regression.
2. The concept of nomos may not have had as great a philosophical career as other notions originating in ancient Greece. And in principle, it is not difficult to be surprised by this. Complete changes in the global order are, from the perspective of the lifespan of a civilization, not a common occurrence and it might take even decades to establish that we are indeed dealing with them. The renaissance of this concept, which has been perceptible for some time, brings with it many interesting interpretations and comments. It is possible that the period of more than 70 years that has passed since the German publication of Schmitt's work on the nomos of the earth may in fact still have been too short for a reading of his work that could be juxtaposed with works of similar momentum, perhaps due to the lesser popularity of the issue compared to other philosophical concepts. For example, the first German edition of Schmitt's work and its interpretation by Agamben are separated by 45 years.
3. Given the considerations so far, the issue of nomos is important insofar as it, as it were, already precedes the purely legal analysis; one could say that it builds a bridge from facticity to normativity. It is perhaps from this aspect that its greatest significance is brought out. An example of this phenomenon is Engelking's use of the concept of nomos in his analysis of the establishment of the modern state of Israel. Nomos recalls itself wherever the temporal territorial order is challenged. Sometimes this may involve a certain section of the continent, and sometimes large areas of several of them together with the seas and oceans. Although still tentative for the time being, the scaffolding of the new nomos, or at least attempts to lay it down, are slowly beginning to rise. In modern interpretations of the thought of Schmitt, the nomos is being read primarily in the way that its essence is a process of territorial separation. It should be emphasized that we can talk here not only about the land mass, but also, for example, about the exact course of the borders of the territorial sea, and even, in a fantasy scenario, about outer space and other worlds. Thus, as you may have already begun to notice, the concept of nomos is a valid issue at all times, regardless of the type of surrounding space and technological advances.

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