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Nomos Empsychos: towards a Historiography of the Greek Living Law Idea

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Abstract

In the Middle Ages, the idea of legislative sovereignty was expressed with reference to a host of commonplace arguments, such as *pater legis*, *Sol Iustitiae*, or *lex animata*. And many believe that it was the Roman legal concept of animate law which eventually laid the foundation for the elaboration of the idea of absolute power in the late Middle Ages. If this hypothesis is correct, the philosophic background of some late medieval and early modern absolutistic doctrines of political government could be sought after as early as the classical Greek descriptions of a king who is *nomos empsychos*, that is, a living law. In this article, I intend to consider this intellectual tradition, and raise some doubts about the merits of the above claim, arguing instead for a separate consideration of the individual sources of the *nomos empsychos* concept. As such, I am tracing the genealogy of the expression to the fifth-century Pythagorean, Archytas of Tarentum, and I am demonstrating that originally the *nomos empsychos* was inseparably associated with an intrinsically Archytean tradition.

Keywords

nomos empsychos – *lex animata* – living law – Pythagoreanism – Archytas of Tarentum

It is a matter of grave controversy whether there existed any fundamental discontinuity between late medieval and early modern ideas of politics, and whether the medieval kingdoms of Europe could properly be called states at all.¹ Arguably, at least one vital component of the modern state, the idea of legislative sovereignty, which Jean Bodin described as ‘*summa in cives ac subditos legibusque soluta potestas, quam Graeci ἀρχὴν ἐξουσίαν [...] appellant*’,² was still missing from the medieval formulations of political government, though, true it is, both the jurists and canon lawyers were familiar with concepts like *suprema potestas*, or *plenitudo potestatis*. This idea of a prince, unbound by the confines of positive law, was expressed with reference to a host of commonplace arguments, such as *vicarious Christi, pater legis, Sol Iustitiae*, etc., but many modern commentators believe³ that it was the familiar, Roman law *lex animata* topic which ‘laid the foundation for the elaboration of the concept of absolute power in the late Middle Ages.’⁴ However, given the fact that the expression, *lex animata*, occurs but once in the extant body of Roman law (*Nov.* 105.2.4), a considerable number of eminent scholars of ancient and medieval political thought⁵ argue to various extent that ‘the concept of the Prince

- 1 Cf. J.N. Figgis, *Studies of Political Thought from Gerson to Grotius 1414–1625* (Cambridge: Cambridge University Press, 1923); W. Ullmann, ‘The Development of the Medieval Idea of Sovereignty’, *The English Historical Review* 64 (1949), pp. 1–33; B. Tierney, ‘“The Prince is Not Bound by the Laws.” Accursius and the Origins of the Modern State’, *Comparative Studies in Society and History* 5 (1963), pp. 378–400; M.J. Wilks, *The Problem of Sovereignty in the Later Middle Ages* (Cambridge: Cambridge University Press, 1963); E.H. Kantorowicz, *The King’s Two Bodies. A Study in Mediaeval Political Theology*. With a new preface by W.C. Jordan (Princeton, NJ: Princeton University Press, 1997); Q. Skinner, ‘A Genealogy of the Modern State’, *Proceedings of the British Academy* 162 (2009), pp. 325–370; M. Troper, ‘Sovereignty and Natural Law in the Legal Discourse of the Ancien Régime’, *Theoretical Inquiries in Law* 16 (2015), pp. 315–335.
- 2 I. Bodinus, *De republica libri sex, latina ab autore redditi multo quam antea locupletiores* (Paris: du Puys, 1586), I.8, p. 78.
- 3 O. von Gierke, *Political Theories of the Middle Age*. Translated with an introduction by F.W. Maitland (Cambridge: Cambridge University Press, 1913), pp. 77–78; A. Steinwenter, ‘ΝΟΜΟΣ ΕΜΨΥΧΟΣ. Zur Geschichte einer politischen Theorie’, *Anzeiger Akademie der Wissenschaften in Wien Philosophisch-historische Klasse* 83 (1946), pp. 250–268; Wilks, *The Problem of Sovereignty*, pp. 151–163; Kantorowicz, *The King’s Two Bodies*, pp. 127–137; F. Oakley, *Kingship. The Politics of Enchantment* (Malden, MA, Oxford, and Carlton: Blackwell Publishing, 2006), p. 48.
- 4 J.P. Canning, *A History of Medieval Political Thought. 300–1450* (London and New York: Routledge, 1996), p. 8.
- 5 E.R. Goodenough, ‘The Political Philosophy of Hellenistic Kingship’, in A.M. Harmon (ed.), *Yale Classical Studies Vol. 1* (New Haven: Yale University Press, 1928), pp. 55–102, at pp. 100–101; Steinwenter, ΝΟΜΟΣ ΕΜΨΥΧΟΣ, pp. 250–268; Wilks, *The Problem of Sovereignty*, pp. 151–163; G.J.D. Aalders, ‘ΝΟΜΟΣ ΕΜΨΥΧΟΣ’, in P. Steinmetz (ed.), *Politeia und Res Publica. Beiträge*

as the “animate Law” was a denizen with regard to Roman legal thought. The notion itself, νόμος ἔμψυχος, derived from Greek philosophy; it was blended with the idea of the Roman Emperor being the embodiment of all Virtues and all else worth the living; and perhaps it was not free from Christian influence either.⁶

If the above hypothesis is correct, the philosophic background of some late medieval and early modern absolutistic theories of political government could be sought after as early as the classical Greek descriptions of a king who is νόμος ἔμψυχος, that is, a living law.⁷ And, indeed, despite of the serious methodological concerns that could be raised against such a unitary approach and continuity thesis,⁸ there seems to be a definite scholarly consensus favouring the existence of such an ancient Greek tradition of the νόμος ἔμψυχος which, arching over the epochs of ancient history, set the agenda for political discourse from the time of the Socratics to Emperor Justinian.⁹

It is the merit of this claim about which I intend to raise some considerable doubts in this paper, arguing that such a ‘mythology of doctrines’, where the νόμος ἔμψυχος idea is being ‘hypostasised into an entity’, cannot but obscure any sound historical analysis because such narratives ‘almost instantly lose contact with statement-making agents.’¹⁰ Instead, I propose to investigate the individual occurrences of the νόμος ἔμψυχος, separate of any metanarrative that may hinder our understanding of the sources. In the course of this

zum Verständnis von Politik, Recht und Staat in der Antike (Wiesbaden: Franz Steiner Verlag, 1969), pp. 315–329, at pp. 326–329; D.M. Nicol, ‘Byzantine political thought’, in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450* (Cambridge: Cambridge University Press, 1988), pp. 49–80, at pp. 64–625; J. Procopé, ‘Greek and Roman political theory’, in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought c.350–c.1450* (Cambridge: Cambridge University Press, 1988), pp. 21–36, at pp. 26–8; Canning, *A History of Medieval Political Thought*, p. 8; Oakley, *Kingship*, p. 48.

6 Kantorowicz, *The King’s Two Bodies*, p. 127.

7 E.g.: Giles of Rome, *De regimine principum libri III*. Recogniti et una cum vita auctoris in lucem editi per F. Hieronymum Samaritanum (Rome, 1607), IaIIae.11, where Giles elaborates on Aristotle, or Engelbert of Admont, *De regimine principum* (Regensburg: Peezil, 1725), Proem., where the Abbot incorrectly ascribes the idea to Aristotle (*Pol.* 3).

8 Cf. Q. Skinner, *Visions of Politics. Vol. 1: Regarding Method* (Cambridge: Cambridge University Press, 2002), pp. 57–89.

9 Cf. Goodenough, *The Political Philosophy of Hellenistic Kingship*, pp. 55–102; L. Delatte, *Les Traités de la Royauté d’Euphante, Diotogène et Sthénidas* (Liège: Faculté de Philosophie et Lettres, 1942), pp. 245–248; Steinwenter, ΝΟΜΟΣ ΕΜΨΥΧΟΣ, pp. 250–268; Aalders, ΝΟΜΟΣ ΕΜΨΥΧΟΣ, pp. 315–329; O. Murray, Περὶ βασιλείας. *Studies in the Justification of Monarchic Power in the Hellenistic World* (PhD Thesis, University of Oxford, 1971), pp. 251–262, 273–281.

10 Skinner, *Visions of Politics*, p. 62, 85.

endeavour, I shall trace the genealogy of the expression to the fifth-century Pythagorean, Archytas of Tarentum (cc. 435/410–355 BCE), and I shall demonstrate that originally the νόμος ἔμψυχος idea was inseparably linked to an intrinsically Archytean tradition.

1 Identifying the Sources

At the outset of this inquiry, it is fitting to determine the proper scope of the study. Under the spell of the above mythology, the prior scholarship on the history of the νόμος ἔμψυχος tended to trace the idea's earlier anticipations, prefigurations, and forerunners to the Socratics, claiming that Isocrates' kingly character (Isoc. 1.36), Xenophon's βλέπων νόμος (Cyr. 8.1.22), Plato's ideal ruler who has no need of laws or ordinances (Leg. 875c–d), or Aristotle's δίκαιον ἔμψυχον (Eth. Nic. 1132a22) convey essentially the same meaning.¹¹ I, on the other hand, do not think that *prima facie* the intellectual history of the νόμος ἔμψυχος idea could be separated from its peculiar verbal expression since assuming that distinct Greek concepts mean the same thing would be to presuppose what would have to be shown first. It is for this reason that I limit the scope of my inquiry to those ancient Greek places where the expression, νόμος ἔμψυχος, occurs. My sole purpose is, then, to uncover the meaning of νόμος ἔμψυχος at its distinct occurrences and to investigate whether these different employments are dependent on one another.

Till the time of Emperor Justinian (482–565), the expression comes to be invoked 31 times in the works of 17 distinct authors.¹² However, of these various instances, 6 authors (Eusebius of Caesarea, Gregory of Nazianzus, John Chrysostom, Basil of Seleucia, Theodoret of Cyrus, and the anonymous

11 Goodenough, *The Political Philosophy of Hellenistic Kingship*, pp. 62–67; Delatte, *Les Traités de la Royauté*, pp. 245–247; Steinwenter, ΝΟΜΟΣ ΕΜΨΥΧΟΣ, pp. 262–263; Aalders, ΝΟΜΟΣ ΕΜΨΥΧΟΣ, pp. 317–321; Murray, Περὶ βασιλείας, pp. 278–280; J.W. Martens, *One God, One Law: Philo of Alexandria on the Mosaic and Greco-Roman Law* (Boston and Leiden: Brill, 2003), pp. 32–35.

12 Archyt. *De leg.* [Stob. 4.1.135, pp. 82.20–83.5 Hense, p. 33.8–12 Thesleff], Diotog. *De regn.* [Stob. 4.7.61, p. 263.15–20 Hense, p. 71.18–23 Thesleff; p. 265.8–12 Hense, p. 72.21–23 Thesleff], Philo *Abr.* 5.1–8; *Mos.* 1.162; 2.4.1–5.1, Muson. *Rhet.* [Stob. 4.7.67, p. 283.22–27 Hense], Clem. Al. *Strom.* 1.26.167.3.1–168.1.1; 2.4.18.4.3–19.3.1, Euseb. *Dem. evang.* 4.2.2, Them. *Or.* 5.64b3–c4; 8.118d3–7; 16.212d3–8; 19.227d3–228a8; 34.10.7–15, Greg. Naz. *Or.* 43.80.7.1–9, Jo. Chrysos. *De paenitentia* 2.1.3; *in Matth.* 1.3–4; *in epist. ad Philipp.* 13.3; *in epist. i ad Tim.* 13.1; *vidi dom.* 4.5.75–79; 4.6.5–12, Isid. Pel. *Ep.* 3.106, Bas. Seleuc. *Serm.* 4.3, Theod. Cyr. *in epist. i ad Tim.* 4.12, Anon. *Catena in epist. i ad Tim.* 4.12, Procl. *In R.* 2.307.6–13, Procop. *Gaz. Panegy.* 23, Just. *Nov.* 105.2.4, Olymp. *in Alc.* 8.

Catenist) could be completely disregarded from the present inquiry because their usage is entirely theological and hermeneutical, leaving 11 authors and 20 places to consider. After a closer analysis, though, this number could be further reduced to 5 as Gaius Musonius Rufus, Clement of Alexandria, Proclus, and Olympiodorus only testify to the usage of the expression, while Isidore of Pelusium and Procopius of Gaza employ it merely in an idiomatic sense, without any original contribution to the idea's semantic evolution. The proper scope of the study is, then, the analysis of the political application of the νόμος ἔμψυχος expression in those works which are attributed to Archytas of Tarentum, Diotogenes the Pythagorean, Philo of Alexandria, Themistius, and Justinian.

This attribution is rather unproblematic in the case of the latter three authors but the authorship of the two Pythagorean pieces forms part of a hotly debated subject of ancient Greek doxographic studies. With some noteworthy exceptions,¹³ these fragments are generally deemed to be pseudo-Pythagorean forgeries of uncertain origin.¹⁴ And, given the fragments come to us only through Stobaeus' fifth-century *Anthology*, a collection of dubious reliability, this majority view is often taken for granted.

There are, however, several flaws to this opinion, starting with the highly biased idea of treating the political fragments (Stob. 4.1.135–8, 4.5.61, 4.7.61–6)

- 13 A. Delatte, *Essai sur la politique pythagoricienne* (Liège & Paris: Vaillant-Carmanne–Édouard Champion, 1922), pp. 121–124; H. Thesleff, *An Introduction to the Pythagorean Writings of the Hellenistic Period* (Åbo: Åbo Akademi, 1961), p. 114; B. Blumenfeld, *The Political Paul. Justice, Democracy and Kingship in a Hellenistic Framework* (London: T&T Clark International, 2003), pp. 124; P.S. Horky and M.R. Johnson, 'On Law and Justice Attributed to Archytas of Tarentum', in D.C. Wolfsdorf (ed.), *Early Greek Ethics* (Oxford: Oxford University Press, 2020), pp. 455–490, at pp. 458–460; F. Scrofani, (2021) 'Le traité Sur la loi et la justice et le fragment 3 attribués à Archytas. Une théorie de la loi en rapport avec celle du Minos attribué à Platon', in C. Macris, T. Dorandi and L. Brisson (eds.), *Pythagoras redivivus. Studies on the Texts Attributed to Pythagoras and the Pythagoreans* (Baden Baden: Academia Verlag, 2021), pp. 177–204.
- 14 E. Zeller, *Die Philosophie der Griechen in ihrer Geschichtlichen Entwicklung*. 111/2 (Leipzig: Fues' Verlag, 1868), pp. 92–93; Goodenough, *The Political Philosophy of Hellenistic Kingship*, pp. 61–63; Murray, *Περὶ βασιλείας*, pp. 258–259; G.J.D. Aalders, *Political Thought in Hellenistic Times* (Amsterdam: Hakkert, 1975), pp. 27–39; B. Centrone 'Platonism and Pythagoreanism in the early empire', in C. Rowe and M. Schofield (eds.), *The Cambridge History of Greek and Roman Political Thought* (Cambridge: Cambridge University Press, 2005), pp. 559–584, at pp. 570–575; C.A. Huffman, *Archytas of Tarentum. Pythagorean, Philosopher and Mathematician King* (Cambridge: Cambridge University Press, 2005), pp. 599–606; M. Schofield 'Archytas', in C.A. Huffman (ed.), *A History of Pythagoreanism* (Cambridge: Cambridge University Press, 2014), pp. 69–87, at pp. 82–85.

as a whole, which tendency I, for my part, cannot but disapprove. While Diotogenes is most likely a pseudonym, masking some pseudo-Pythagorean author, Archytas was a historical figure of whom considerable amount of genuine material is preserved too. The fragment containing the νόμος ἔμψυχος expression (Stob. 4.1.135) is the initial part of a work running by the title *On Law and Justice* (Περὶ νόμου καὶ δικαιοσύνης) and, according to the order of Stobaeus' *Anthology*, it is inserted right before a genuine Archytean fragment (Stob. 4.1.139) which elaborates on the political implications of using calculation (λογισμός). The fragments are all in direct speech, and Stob. 4.1.135 even contains a first-person pronoun, conveying the impression that 'these were Archytas of Tarentum's actual views'.¹⁵ Though, there are some undeniable parallels with Aristotle and the Peripatetics,¹⁶ the fragments seem to establish a strong connection with genuine Archytean material,¹⁷ suggesting the passages' ultimate drawing on some trustworthy early accounts, such as Aristoxenus' lost biography, the *Life of Archytas* (Ἀρχύτα βίος). For this reason, I intend to side, for present purposes, with Horky and Johnson, and accept that 'the fragments of *On Law and Justice* were derived from a speech (or dialogue) contained in Aristoxenus' biography of Archytas'.¹⁸

The other piece, Diotogenes' *On Kingship* (Περὶ βασιλείας) is, on the other hand, a pseudo-Pythagorean forgery which was most likely produced sometime between the late first century BCE and the early first century CE.¹⁹ This dating is, however, quite problematic, and not without heavy conjectures since neither the treatise's highly eclectic nature, nor its alleged author could provide any clear points of reference. The name of Diotogenes the Pythagorean is utterly unknown to us, apart from the fact that Stobaeus' *Anthology* credits him with the authorship of two treatises, *On Kingship* and *On Piety* (Περὶ δσιότητος),

15 Horky and Johnson, *On Law and Justice*, p. 456.

16 Such as the use of ζωόφορος at Stob. 4.1.138, p. 87.18 Hense, p. 35.25 Thesleff. Cf. [Arist.] *Mund.* 392a11.

17 E.g.: Stob. 4.1.137's (pp. 84.16–85.4 Hense, p. 34.4–11 Thesleff) elaboration on the Archytean division of musical means (Porph. in *Harm.* 1.5), the intimate connection between the λογισμός of genuine fragment 3 (Stob. 4.1.139) and the νόμος of *On Law and Justice*, both being mental activities making human association possible, or the several points of contact between Athenaeus' (*Deipn.* 545b–546c, A9 Huffman) and Cicero's (*Sen.* 12.39–41, A9a Huffman) testimony and the passages of *On Law and Justice*.

18 Horky and Johnson, *On Law and Justice*, p. 459.

19 Cf. Delatte, *Les Traités de la Royauté*, pp. 284–285; Murray, Περὶ βασιλείας, pp. 280–282; I. Andorlini and R. Luiselli, 'Una ripresa di Diotogene Pitagorico, Sulla regalità, in PBingen 3 (Encomio per Augusto?)', *Zeitschrift für Papyrologie und Epigraphik* 136 (2001), pp. 155–166; Blumenfeld, *The Political Paul*, p. 234.

and the treatise itself is 'scarcely a genuine attempt to rethink the problem of monarchy'.²⁰ Rather, it is a syncretic display of significant Middle Platonic dependence with considerable Stoic and occasional Homeric and Pythagorean borrowings.²¹ The only hint which points to an early Imperial date of composition is a probable papyrus reference²² and the forger's unique authenticating strategy which capitalises on Archytean paraphrases, suggesting a revived interest in Archytea, such as the period between the banishment of Anaxilaus of Larissa in 28 BCE²³ and the composition of Gaius Musonius Rufus' testimony (Stob. 4.7.67, p. 283.22–27 Hense) in the second half of the first century CE. A date which is also supported by Diotogenes' characteristic use of the kingly attributes δεινότης and σεμνότης.²⁴

2 The Archytean Genesis

The expression, νόμος ἔμψυχος, makes its first appearance to the extant body of ancient Greek literature in the first passage of *On Law and Justice*, a fragmentary work attributed to Archytas the Pythagorean, but, in fact, most likely appearing in a Hellenistic epitome of Aristoxenus' *Life of Archytas*. This crucial passage reads as follows.

20 Murray, *Περὶ βασιλείας*, p. 266.

21 Cf. Murray, *Περὶ βασιλείας*, pp. 260–266; B. Centrone, 'The pseudo-Pythagorean writings', in C.A. Huffman (ed.), *A History of Pythagoreanism* (Cambridge: Cambridge University Press, 2014), pp. 315–340, at pp. 333–340; G. Roskam, 'Some Fresh Air into the Neopythagorean Tradition: The Fragments *On Kingship* by Diotogenes', *The Cambridge Classical Journal* 66 (2020), pp. 203–220. The treatise's Middle Platonic dependence manifests itself, above all, in its firm insistence on the idea of σύσταμα (Stob. 4.7.61, p. 264.11–12 Hense, p. 72.8 Thesleff) and natural hierarchy, together with the ruler's godlike character (Stob. 4.7.61, p. 265.6–12 Hense, p. 72.19–23 Thesleff). The Stoic influence is most obvious in the fragment's portrayal of the prudent, sage-like ruler who is so perfectly virtuous that he is almost completely detached from his subjects (Stob. 4.7.62, p. 268.2–5 Hense, p. 74.9–12 Thesleff), while the Homeric elements are confined to the threefold division of royal duties at Stob. 4.7.61, pp. 263.20–264.1 Hense, p. 71.23–24 Thesleff.

22 Andorlini and Luiselli, *Una ripresa di Diotogene Pitagorico*, pp. 155–166.

23 W. Burkert, 'Zur geistesgeschichtlichen Einordnung einiger Pseudopythagorica', in K. von Fritz (ed.), *Pseudepigrapha 1. Pseudopythagorica – Lettres de Platon Littérature pseudépigraphique juive* (Genève: Fondation Hardt, 1972), pp. 25–55, at p. 45.

24 C.R. Bouchet, A. Gangloff and M. Widmer, 'Diotogène, Sur la royauté Commentaire historique et politique pour un essai de datation', *Ktêma: Civilisations de l'Orient, de la Grèce et de Rome antiques* 45 (2020), pp. 27–44 at pp. 38–41.

Νόμος ποτ' ἀνθρώπῳ ψυχάν τε καὶ
 βίον ὅπερ ἀρμονία ποτ' ἀκοάν τε καὶ
 φωνάν· ὅ τε γὰρ νόμος παιδεύει μὲν
 τὰν ψυχάν, συνίστησι δὲ τὸν βίον, ἃ
 τε ἀρμονία ἐπιστάμονα μὲν ποιεῖ τὰν
 ἀκοάν, ὁμολογον δὲ τὰν φωνάν. φαιμί
 δὴ ἐγὼ πᾶσαν κοινωνίαν ἐξ ἄρχοντος
 καὶ ἀρχομένῳ συνεστάμεν καὶ τρίτον
 νόμων. νόμων δὲ ὁ μὲν ἔμψυχος βασι-
 λεύς, ὁ δὲ ἄψυχος γράμμα. πρῶτος
 ὦν ὁ νόμος· τούτῳ γὰρ <ἐμμονᾶ> ὁ
 μὲν βασιλεὺς νόμιμος, ὁ δ' ἄρχων
 ἀκόλουθος, ὁ δ' ἀρχόμενος ἐλεύθε-
 ρος, ἃ δ' ὅλα κοινωνία εὐδαίμων· καὶ
 τούτῳ παραβάσει <ὁ> μὲν βασιλεὺς
 τύραννος, ὁ δ' ἄρχων ἀνακόλουθος,
 ὁ δ' ἀρχόμενος δοῦλος, ὁ δ' ὅλα
 κοινωνία κακοδαίμων. (Stob. 4.1.135,
 pp. 82.15–83.5 Hense, p. 33.3–12
 Thesleff, D25a, pp. 258–260 Laks
 and Most)

The law's relation to the soul and
 life of a human being is the same as
 attunement's relation to hearing and
 vocal expression. For, whereas the law
 educates his soul, and so it organizes
 his life; likewise, whereas attunement
 makes his hearing comprehensible, and
 so it makes his vocal expression agree-
 able. I, for my part, declare that every
 community is constituted of ruler,
 ruled, and thirdly, laws. Of laws, one,
 the animate, is a king, but the other,
 the inanimate, is written. Thus law is
 primary; for by means of it, the king is
 lawful, the ruler is compliant, the man
 who is ruled is free, and the whole com-
 munity is happy. And in contravention
 of this <sc. law> the king is tyranni-
 cal, and the ruler noncompliant; and
 the man who is ruled slavish, and the
 whole community unhappy.²⁵

Of this single passage, there exists a variety of conflicting interpretations²⁶ and translations²⁷ which variance is probably stemming from most commentators' unwillingness to accept the fragment as an uninterrupted and interdependent linguistic and logical unit. Obviously, the sense of the passage hinges on the translation of the analogy's μέν and δέ clause which is rendered as a correlative conjunction of two balanced clauses in most translations. Since the latter clause, introduced by δέ, describes such an outcome which is logically dependent on those respective instrumental activities which are set out in the

25 Horky and Johnson, *On Law and Justice*, p. 461 slightly modified.

26 Delatte, *Essai sur la politique pythagoricienne*, pp. 83–86; Goodenough, *The Political Philosophy of Hellenistic Kingship*, pp. 59–63; Murray, *Περὶ βασιλείας*, p. 256; Blumenfeld, *The Political Paul*, pp. 126–128; Centrone, *The pseudo-Pythagorean writings*, p. 335; Schofield, *Archytas*, p. 84; Horky and Johnson, *On Law and Justice*, pp. 462–464.

27 Goodenough, *The Political Philosophy of Hellenistic Kingship*, pp. 59–60; A. Laks and G.W. Most, *Early Greek Philosophy. Vol. 4: Western Greek Thinkers. Part 1*. Loeb 527 (Cambridge, Mass.: Harvard University Press, 2016), pp. 258–261; Horky and Johnson, *On Law and Justice*, p. 461.

relating μέν clauses, I believe these translations fail to grasp the essence of what Archytas has to offer. According to my understanding, attunement makes the hearing comprehensible, and so, it makes vocal expression agreeable, while law educates the soul, and so, it makes human association possible. It is no coincidence therefore that law is said to be primary. Nevertheless, the Archytas of *On Law and Justice* is thinking only of those laws which are complete (τέλῃος), namely, laws which are 'compliant with nature, effective in affairs, and beneficial to the political community. For if it lacks either one or more or all of these things, it will surely not be a law, or not a perfect law.'²⁸ And so, the νόμος of *On Law and Justice* is quite similar to the λογισμός of Stob. 4.1.139, insofar both being devices of Archytean moral psychology. While 'calculation increases concord by means of seeking reconciliation in our mutual dealings with others' and 'serves as a standard and hindrance to the unjust',²⁹ laws purporting to be effective (δυνατός) also prompt equitable actions and enhance the citizens' moral consciousness which eventually results in the predominance of lawful actions. That is why 'the law should be engrained in the characters and the pursuits of the citizens. For it will put the citizens in a self-sufficient condition and distribute the portion that falls to each in accordance with his worth.'³⁰

It makes no difference therefore whether the laws are being written or unwritten; hence, the conventional interpretation of the Archytean distinction of νόμος ἔμψυχος and ἄψυχος rather loses its edge. However, though the existing passages of *On Law and Justice* do not elaborate on this distinction, one cannot but assume that there must have been some sort of rational for distinguishing kings and the written letter of law in the first place. And this rational consists, I assume, in the passage's connection with the late fifth- and early fourth-century debates over νόμος and φύσις and over the principles of an ideal constitution.

We know that these debates concerned a wide range of Classical philosophers, including Plato and Aristotle, and it is no wonder therefore that one may find strikingly similar passages in both. In the *Statesman* (292a5–8), the Eleatic Stranger demonstrates the inadequacy of the conventional criteria for distinguishing constitutions according to the number of governors, their wealth, the manner of their government, or whether there exists a written constitution, or there is an absence of laws (καὶ μετὰ γραμμμάτων καὶ ἄνευ νόμων συμβαίνουσιν

28 Stob. 4.1.136, p. 83.15–18 Hense, p. 33.20–23 Thesleff, trans. Horky and Johnson, *On Law and Justice*, p. 464.

29 Stob. 4.1.139, pp. 88.15–89.4 Hense, trans. Huffman, *Archytas of Tarentum*, p. 185.

30 Stob. 4.1.138, p. 87.14–17 Hense, p. 35.21–24 Thesleff, trans. Horky and Johnson, *On Law and Justice*, p. 481.

γίγνεσθαι). And, though the Young Socrates hesitates to accept the idea of a government without laws (τὸ δὲ καὶ ἄνευ νόμων δεῖν ἄρχειν χαλεπώτερον ἀκούειν ἐρρήθη, *Plt.* 293e7), eventually he concedes to the Stranger's initial proposition (*Plt.* 293c5–d2) that the only real constitution is the one in which the rulers are found to be truly possessed of kingly science, irrespective of whether they rule by law or without it.³¹ In a similar fashion, Aristotle also raises the dilemma (*Pol.* 1286a7–9) whether it is more advantageous to be ruled by the best man, or by the laws, and after dully considering the matter, he dismisses it simply by observing that ‘among people who are alike and equal, it is neither expedient nor just for one to rule over all, neither when there are no laws, but he himself, as it were, in the place of law, nor when there are laws’ (*Pol.* 1288a1–3, Rackham's trans. slightly modified), which, from our point of view, demonstrates the virtual existence of both constitutional systems.

I believe, the Archytean distinction of νόμος ἐμψυχος and ἄψυχος attests this duality, but, unlike Plato and Aristotle, Archytas did not feel compelled to enunciate the above dilemma because to him this distinction was not a meaningful one at all. To Archytas, the idea of a constitution without laws was, due to the logical and practical priority of νόμος, utterly unthinkable, and so, I cannot find any essential difference between his idea of kingly government and the rule of a magistrate either. It is for this reason that the Archytas of *On Law and Justice* was able to proclaim without any difficulty that a true ruler (τὸν ἀλαθινὸν ἄρχοντα) must be νόμιμος (δεῖ δ' αὐτὸν καὶ νόμιμον ἡμεν, *Stob.* 4.5.61, p. 218.16 Hense, p. 36.5–6 Thesleff), and that ‘the one nearest to the law would be the best ruler’ (ἄριστος δὲ κ' εἴη ἄρχων ὁ ἀγχοτάτω τῷ νόμῳ).³²

3 Ps.-Diotogenes' Pseudo-Pythagorean Synthesis

Next to the Archytean *On Law and Justice*, the second documented occurrence of the νόμος ἐμψυχος expression is to be found in *On Kingship*, another fragment in Stobaeus (4.7.61), ascribed to Diotogenes the Pythagorean.

³¹ See a detailed analysis in G. Casertano, ‘True and Correct in the Politicus’, in B. Bossi and T.M. Robinson (eds.), *Plato's Statesman Revisited* (Berlin, Boston: De Gruyter, 2019), pp. 73–84 and M.C.D. Peixoto, ‘On the Limits of Law and the Sovereignty of the Wise. Conjectures about the Primacy of Law in Plato's Statesman’, in B. Bossi and T.M. Robinson (eds.), *Plato's Statesman Revisited* (Berlin, Boston: De Gruyter, 2019), pp. 249–262.

³² *Stob.* 4.5.61, p. 218.21 Hense, p. 36.9–10 Thesleff, trans. Horky and Johnson, *On Law and Justice*, p. 484.

Βασιλεύς κ' εἴη ὁ δικαιοτάτος, δικαιοτάτος δὲ ὁ νομιμώτατος. ἄνευ μὲν γὰρ δικαιοσύνας οὐδεὶς ἂν εἴη βασιλεύς, ἄνευ δὲ νόμῳ δικαιοσύνα. τὸ μὲν γὰρ δίκαιον ἐν τῷ νόμῳ ἐντί, ὁ δὲ γε νόμος αἴτιος τῷ δικαίῳ, ὁ δὲ βασιλεὺς ἦτοι νόμος ἔμψυχός ἐντι ἢ νόμιμος ἄρχων· διὰ ταῦτ' ὦν <ὁ> δικαιοτάτος καὶ νομιμώτατος. (Stob. 4.7.61, p. 263.15–20 Hense, p. 71.18–23 Thesleff, R58 Laks and Most)

The most just would be king, and the one who complies most with the law would be the most just. For without justice no one could be king, and without law there could not be any justice. For that which is just is in the law, and the law is the cause of that which is just, and the king is surely a living law, or a lawful ruler. This is, then, why he is the most just and complies most with the law.³³

ἀ μὲν γὰρ πόλις ἐκ πολλῶν καὶ διαφερόντων συναρμοσθεῖσα κόσμῳ σύνταξιν καὶ ἁρμονίαν μεμίκαται, ὁ δὲ βασιλεὺς ἀρχὰν ἔχων ἀνυπεύθυνον, καὶ αὐτὸς ὦν νόμος ἔμψυχος, θεὸς ἐν ἀνθρώποις παρεσχαμάτισται. (Stob. 4.7.61, p. 265.8–12 Hense, p. 72.21–23 Thesleff)

For the city, which is being fitted together of different parts, imitates the world's arrangement and harmony, the king possesses such a power which is not liable to men, himself being a living law who has been transformed into a god amongst men. (Trans. mine)

The first passage, which constitutes the initial six lines of the fragment, is apparently a paraphrase of the Archytean *On Law and Justice* but with considerable alterations to the original text. While the Archytean passage (Stob. 4.1.135, pp. 82.20–83.5 Hense, p. 33.8–12 Thesleff) elaborates on the primacy of law, and it mentions the king only in passing, arguing that it is the law which makes the king lawful and the magistrate law-abiding, ps-Diotogenes' argument is centred around the idea of the king being the most just and the most lawful. Although, the Archytean νόμων δὲ ὁ μὲν ἔμψυχος βασιλεὺς and *On Kingship's* ὁ δὲ βασιλεὺς ἦτοι νόμος ἔμψυχός ἐντι may look synonymous, there is, in fact, a whole range of differences to these passages' meaning, and the two treatises have particularly dissimilar, I even daresay conflicting, understandings of νόμος. Unlike Archytas, who fancied that laws are founded on natural justice (Stob. 4.1.136, pp. 83.18–84.1 Hense, p. 33.23–24 Thesleff), ps-Diotogenes subscribes to that Sophistic position according to which law and justice are no more than mere social conventions, far removed from nature. This is being the very opinion Polyarchus so vehemently argued for in his alleged debate with Archytas (Ath. *Deipn.* 545b–546c, A9 Huffman). Moreover, ps-Diotogenes'

33 Laks and Most, *Early Greek Philosophy*, p. 433 modified.

use of the terms, βασιλεύς, ἄρχων, and νόμος ἐμψυχός, is not without ambiguity either, which is perhaps due to that fact that there is nothing more to the passage than ‘a subtle legitimization of the king’.³⁴ But I think, it is more likely that these lines are part of a cunningly devised authenticating strategy.

Bruno Centrone forcibly argues that by the first century BCE, ‘the former belief, along with a widespread scepticism towards the alleged writings of Pythagoras, which fuelled a more generally critical attitude towards the authenticity of Pythagorean material, probably discouraged the production of apocryphal texts in Pythagoras’ name and favoured the composition of writings bearing the names of other Pythagoreans’.³⁵ And both him and Phillip S. Horky claim that in building these apocryphal treatises’ pedigree, the name of Archytas had central significance.³⁶ Unlike Pythagoras, the obscure magus, Archytas was the perfect candidate for authenticating strictly philosophical doctrines, especially because he was considered a mediator between the ancient Pythagorean and the Platonist traditions. Hence, ps.-Diotogenes’ appeal to Archytas was a perfectly normal course of action on his part which he applied in his other surviving treatise, *On Piety*, as well.³⁷

However, ps.-Diotogenes’ adoption of the Archytean terminology comes at a price: ps.-Diotogenes’ argument is conclusive only insofar νόμος is being granted a middle term, and so ἡ νόμιμος ἄρχων is not only inconclusive with a view to the premises (P1: that which is just is in the law and that the law is the cause of that which is just, and P2: that the king is a living law or lawful magistrate) but it constitutes a *petitio principii* too since the lawful magistrate is said to be νομιμώτατος and δικαιοτάτος by virtue of being νόμιμος which does not make any sense at all. What is more, despite of the seeming significance of the distinction of νόμος ἐμψυχός and νόμιμος ἄρχων, the extant passages fail to elaborate on the subject, and since ‘Diotogenes’ affirmations of law have no logical status in the unity of his thought, and thus are mere relics of an older, now alien, discourse’,³⁸ a series of self-contradictory insinuations are imminent as well (cf. Stob. 4.7.62, p. 266.19–23 Hense, p. 73.15–19 Thesleff).

34 Roskam, *Some Fresh Air into the Neopythagorean Tradition*, p. 216.

35 B. Centrone, ‘Authority and Doctrine in the Pseudo-Pythagorean Writings’, in M. Erler, J.E. Heßler and F.M. Petrucci (eds.), *Authority and Authoritative Texts in the Platonist Tradition* (Cambridge: Cambridge University Press, 2021), pp. 115–129, at p. 118.

36 Centrone, *Authority and Doctrine in the Pseudo-Pythagorean Writings*, pp. 119–120; P.S. Horky, ‘Archytas: Author and Authenticator of Pythagoreanism’, in C. Macris, T. Dorandi and L. Brisson (eds.), *Pythagoras redivivus. Studies on the Texts Attributed to Pythagoras and the Pythagoreans* (Baden-Baden: Academia Verlag, 2021), pp. 137–170, at p. 160.

37 Stob. 4.1.96, p. 36.15–16 Hense, p. 76.2–3 Thesleff are almost verbatim repetitions of Stob. 4.1.138, p. 86.6–7 Hense, p. 34.30–31 Thesleff.

38 Blumenfeld, *The Political Paul*, p. 236.

I believe, ps.-Diotogenes was only interested in invoking the genuinely Archytean νόμος ἔμψυχος expression, but he was not sufficiently motivated in elaborating on the topic of justice and rulership which, together with some other conspicuous characteristics, signals the treatise's initial lines and this particular distinction's logical independence of the main body of *On Kingship*. His indulgence into commonplace arguments, such as the king's need for being just, or the identification of law and justice,³⁹ are too parts of his cunningly devised authenticating strategy, just like his employment of the conspicuous double adjectives, δικαιοτάτος καὶ νομιμώτατος, which echoes a commonplace from Xenophon's *Cyr.* (1.6.28).

That being said, a historian of political thought may very well lose interest in ps.-Diotogenes, but even despite this fraudulent intent, ps.-Diotogenes managed to contribute to the semantic evolution of the idea. Unlike Archytas, who fancied kings are being bound by natural justice, ps.-Diotogenes set the tone for a novel meaning, according to which kings wield unaccountable power (ὁ δὲ βασιλεὺς ἀρχὴν ἔχων ἀνυπεύθυνον) by virtue of their godlike status and by virtue of being living laws themselves.

4 The Philonic Metamorphosis

Finally, there is yet another textual occurrence of the νόμος ἔμψυχος expression from the idea's formative period, existing in the works of the Jewish exegete, Philo of Alexandria (cc. 13/10 BCE–47 CE). Philo, who came from a wealthy and illustrious Jewish family of Alexandria, could enjoy the privilege of his high standing, and pursue a life of contemplation and scriptural learning.⁴⁰ He left an impressive literary production, some 36 titles, the majority of which address various themes of the Jewish law, the Torah. It is in the course of his exposition of the law,⁴¹ a summarised presentation of the Pentateuch to mostly gentile readers,⁴² that Philo invokes the νόμος ἔμψυχος expression on three occasions.

39 Cf. X. *Mem.* 4.4.12. Goodenough, *The Political Philosophy of Hellenistic Kingship*, p. 65.

40 J. Daniélou, *Philo of Alexandria*. Translated by J.G. Colbert (Cambridge: James Clarke & Co., 2014), p. 147.

41 Although, strictly speaking *On the Life of Moses* does not form any integral part of Philo's *Exposition*, we have reason to believe that 'it may have been intended as a kind of introduction to it'. J.R. Royse, 'The Works of Philo', in A. Kamesar (ed.), *The Cambridge Companion to Philo* (Cambridge: Cambridge University Press, 2009), pp. 32–64, at p. 47; cf. Royse, 2009: 47; cf. E.R. Goodenough, 'Philo's Exposition of the Law and His De Vita Mosis', *Harvard Theological Review* 26 (1933), pp. 109–125.

42 Goodenough, *Philo's Exposition of the Law*, pp. 109–125; E. Birnbaum and J.M. Dillon, *Philo of Alexandria: On the Life of Abraham* (Leiden: Brill, 2021), pp. 26–29.

τάχα δ', ἐπεὶ καὶ νομοθέτης ἔμελλεν
ἔσσεσθαι, πολὺ πρότερον αὐτὸς ἐγίνετο
νόμος ἔμψυχός τε καὶ λογικὸς θεῖα
προνοία, ἥτις ἀγνοοῦντα αὐτὸν εἰς
νομοθέτην ἐχειροτόνησεν αὐθις.
(Philo *Mos.* 1.162)

βασιλεῖ προσήκει προστάττειν ἃ χρὴ
καὶ ἀπαγορεύειν ἃ μὴ χρὴ· πρόσταξις
δὲ τῶν πρακτέων καὶ ἀπαγόρευσις
τῶν οὐ πρακτέων ἴδιον νόμου, ὥς
εὐθύς εἶναι τὸν μὲν βασιλέα νόμον
ἔμψυχον, τὸν δὲ νόμον βασιλέα
δίκαιον. (Philo *Mos.* 2.4.1–5.1)

οἱ γὰρ ἔμψυχοι καὶ λογικοὶ νόμοι
ἄνδρες ἐκείνοι γεγόνασιν, οὓς δυοῖν
χάριν ἐσέμνυνεν· ἐνὸς μὲν βουλό-
μενος ἐπιδειῖναι, ὅτι τὰ τεθειμένα
διατάγματα τῆς φύσεως οὐκ ἀπάδει,
δευτέρου δὲ ὅτι οὐ πολὺς πόνος τοῖς
ἐθέλουσι κατὰ τοὺς κειμένους νόμους
ζῆν, ὁπότε καὶ ἀγράφῳ τῇ νομοθεσίᾳ,
πρίν τι τὴν ἀρχὴν ἀναγραφῆναι τῶν ἐν
μέρει, ῥαδίως καὶ εὐπετῶς ἐχρήσαντο
οἱ πρῶτοι· (Philo *Abr.* 5.1–8)

Perhaps, too, since he [i.e., Moses]
was destined to be a lawgiver, the
providence of God, which hereafter
appointed him to that work without
his knowledge, made him a living and
speaking law long before.⁴³

It is a king's duty to command what is
right and to forbid what is wrong. But
to command what should be done and
to forbid what should not be done is
law's peculiarity, so it follows straight
away that the king is a living law, and
the law is a just king.⁴⁴

For those men [i.e., the patriarchs]
have become living and speaking laws
whom Moses magnified for two rea-
sons. First, he wanted to show that the
enacted ordinances were not at vari-
ance with nature, and second that it is
not very demanding to live according
to the established laws for those who
are willing since the first generations
lived easily and without difficulty by
the unwritten law before any of the
particular laws were put into writing.
(Trans. mine)

Most modern commentators on Philo's politics believe that he must have borrowed the expression from the current Hellenistic portrayal of the ideal king,⁴⁵

43 Philo, *On Abraham. On Joseph. On Moses*. Translated by F.H. Colson. Loeb 289 (Cambridge, MA: Harvard University Press, 1935), p. 359 modified.

44 Philo, *On Abraham. On Joseph. On Moses*, p. 453 slightly modified.

45 Cf. É. Bréhier, *Les idées philosophiques et religieuses de Philon d'Alexandrie* (Paris: Alphonse Picard & Fils, 1908), p. 19; E.R. Goodenough, *The Politics of Philo Judaeus. Practice and Theory* (New Haven: Yale University Press, 1938), pp. 90–99; W. Richardson, 'The Philonic Patriarchs as Νόμος Ἐμψυχός', in K. Aland and F.L. Cross (eds.), *Studia Patristica. Vol. 1: Papers presented to the Second International Conference on Patristic Studies held at Christ Church, Oxford, 1955*. Part 1 (Berlin: Akademie Verlag, 1957), pp. 515–525, at pp. 520–521; E.R. Goodenough, *By Light, Light. The Mystic Gospel of Hellenistic Judaism* (Amsterdam:

and they assume that by employing this characteristic epithet, Philo wanted to capitalise on the idea's explicit royal imagery, and to show that the patriarchs and especially Moses did not fall short of the Hellenistic standards for kingship. However, there are at least two considerable factors these commentators seem to have utterly disregarded. First, unlike the two previous sources, Philo associates the νόμος ἔμψυχος epithet with figures who were not *stricto sensu* kings, even if both Abraham and Moses were said to be bestowed with God's kingship (Philo *Abr.* 261.2–3; *Mos.* 1.148). And second, at two out of these three places Philo supplements the expression with the λογικός adjective which syntax is otherwise completely unprecedented in ancient Greek literature.⁴⁶

At the first such place, *Mos.* 1.162, νόμος ἔμψυχός τε καὶ λογικός carries the implication that Moses was a friend of God who enjoyed a perfect partnership (κοινωνία) with Him (Philo *Mos.* 1.155–156); hence, even before the actual act of lawgiving, his deeds and life constituted a law of some kind. And it is precisely this sense which eventually gets amplified at *Abr.* 5, where the patriarchs are identified as ἄγραφοι νόμοι, 'men who lived blameless and good lives' (ἀνδρῶν οἱ ἀνεπιλήπτως καὶ καλῶς βιώσαντες, Philo *Abr.* 4.1–2), whose 'deeds and words' (ἔργα καὶ λόγους, Philo *Abr.* 6.1) were to be regarded the archetypical original (ἀρχετύπους προτέρους, Philo *Abr.* 4.1) of the Mosaic laws. As the patriarchs were laws themselves (Philo *Abr.* 276), who had no written law to consult their actions with, Philo's invocation of the Archytean terminology is certainly appropriate. And probably there is even a grain of truth in Goodenough's claim, according to which the λογικός addition may imply the patriarchs' articulation of the νόμος within them.⁴⁷ However, I cannot simply ignore the peculiarity of Philo's syntax, and the third passage's conspicuous parallel with Cicero's *Leg.* (3.1–2).

At the beginning of the third book of his *Laws*, Cicero appeals to an aphoristic argument which reads as follows:

Philo Press, 1969), pp. 127–128; Martens, *One God, One Law*, pp. 90–95; Birnbaum and Dillon, *Philo of Alexandria*, p. 151.

46 There are only two occurrences of λογικός νόμος, one in Clement of Alexandria's *Paedagogus* (3.12.94.1.1–4), which is most likely depending on Philo, and another in the sixth-century Byzantine scholar, Asclepius of Tralles' *Commentary on Aristotle's Metaphysics* (253.35–254.1), where it simply designates the rules of dialectical reasoning.

47 Goodenough, *By Light, Light*, p. 189.

Videtis igitur magistratus hanc esse uim, ut praesit praescribatque recta et utilia et coniuncta cum legibus. Vt enim magistratibus leges, sic populo praesunt magistratus uereque dici potest, magistratum legem esse loquentem, legem autem mutum magistratum. (Cic. *Leg.* 3.2.1–6)

You understand, then, that the function of a magistrate is to govern, and to give commands which are just and beneficial and in conformity with the law. For as the laws govern the magistrate, so the magistrate governs the people, and it can truly be said that the magistrate is a speaking law, and the law a silent magistrate.⁴⁸

This is a simple juxtaposition of two assertions where the logical relation is established by mere transposition (cf. *Rhet. Her.* 4.39.1–9). Based on Cicero's wording and the sentence's syntax, it looks as if Cicero was invoking some kind of aphorism on law and government. First, he begins with a commonplace: it is a magistrate's duty to govern. Then, he introduces the crucial clause with *uereque*, as if he was sincerely expecting his audience's familiarity with and sympathy for the aphorism he was about to spell out. But, just like the phrase, λογικὸς νόμος in Greek, Cicero's *lex loquens* is an unparalleled expression in classical Latin literature. The only surviving, yet almost verbatim repetition of Cicero's argument is to be found in Philo's *Mos.* 2.4–5, where Philo enumerates and considers the faculties (δυνάμεις) which Moses fulfilled. When he reviews the king's duties, Philo virtually repeats the Ciceronian passage, the only difference being his substitution of *magistratus* for βασιλεύς and his insistence on the essential justness of laws instead of emphasising their silence.

Though, Philo probably knew Cicero's *Laws*,⁴⁹ it is quite unlikely that his acquaintance with the Archytean νόμος ἔμψυχός is due to some Ciceronian dependence, as Cicero neither employs the term explicitly, nor conveys an Archytean sense to his *legem loquentem*.⁵⁰ Instead, based on the allusions Cicero makes to Charondas' laws (Cic. *Leg.* 3.5.11–14), his characteristically

48 Cicero, *On the Republic. On the Laws*. Translated by C.W. Keyes. Loeb 213 (Cambridge, MA: Harvard University Press, 1928), pp. 459–461.

49 D. Lincicum, 'A Preliminary Index to Philo's Non-Biblical Citations and Allusions', in D.T. Runia and G.E. Sterling (eds.), *The Studia Philonica Annual. Studies in Hellenistic Judaism*. Vol. 25 (Atlanta: Society of Biblical Literature, 2013), pp. 139–167, at p. 153.

50 Goodenough (*By Light, Light*, pp. 186–187) offers a Ciceronian parallel, though with reference to *Mos.* 1.162, while in Richard Horsley's opinion, the passage is adapting traditional Stoic ideas, and David Lincicum lists Gaius Musonius Rufus (Stob. 4.7.67) as a likely source of borrowing. R.A. Horsley, 'The Law of Nature in Philo and Cicero', *The Harvard*

Pythagorean analogical argument, and his esteem for everything Pythagorean,⁵¹ a common Pythagorean source seems to be a more convenient explanation. One, which is rather well supported by the Gaius Musonius Rufus testimony (Stob. 4.7.67, p. 283.22–27 Hense), according to which the ancients believed that the ideal king, someone who endeavours to live up to the expectations set for a living law, ought to be perfect both in words and deeds.

As such, I believe, Cicero and Philo are both following a common, Pythagorean source, which either employs both the νόμος ἔμψυχος and λογικὸς νόμος expressions, or stresses in some other way the significance of the king's speech. And, since νόμος ἔμψυχος appears to be a genuinely Archytean expression, which could serve ps.-Diotogenes' authenticating purposes in a roughly contemporary scenario, I think this lost passage is either derived from *On Law and Justice* or closely depending on it.

In conclusion, I think, the Philonic applications of the νόμος ἔμψυχος are drawing on the Archytean *On Law and Justice*, though, true it is, the passages do not purport to establish any further connection with Archytas. Still, I suppose the principal reason why Philo found it necessary to adopt the Archytean terminology to Moses and the patriarchs of the Old Testament consists in the essential need for relating these royal figures to his uninitiated gentile readers to whom Philo wanted to explain the fragile balance of natural law, Pre-Sinaitic law, and the Mosaic law. It is for this reason that Philo decided to invoke the νόμος ἔμψυχος phrase which, since its first Archytean application, carried the meaning of such a state where the principal actor, unbound by the constraints of written law, freely acts in a way which abides by the principles of natural justice, or right reason within the Philonic context. By such an association, Philo could imply, on the one hand, that the patriarchs were holy men who followed the dictates of right reason, and so their lives constituted laws themselves, and, on the other hand, that these laws were νόμοι only due to their perfect agreement with the divine λόγοι. It follows, then, that Moses and the patriarchs were sage-like rulers and laws themselves who were able to live by the law of nature, even before any of the particular laws were laid down.

Theological Review 71 (1978), pp. 35–59, at pp. 37–39; Lincicum, *A Preliminary Index to Philo*, p. 156.

51 J.-J. Flinterman, 'Pythagoreans in Rome and Asia Minor around the Turn of the Common Era', in C.A. Huffman (ed.), *A History of Pythagoreanism* (Cambridge: Cambridge University Press, 2014), pp. 341–359.

5 *Nachleben: Themistius and Justinian*

The preceding inquiry demonstrates that up until the first century CE, the expression, νόμος ἔμψυχος, was inseparably linked to the Tarantine Pythagorean, Archytas. Later, a rapid proliferation of the Philonic sense, completely independent of Archytas, appears to have taken place in the early Christian tradition, resulting in the concept's adaptation to Christ,⁵² the apostles,⁵³ and holy men in general.⁵⁴ Of course, beside this hermeneutical application, the political sense of the νόμος ἔμψυχος was still gaining some momentum in late antiquity with the two notable surviving examples of Themistius and Justinian.

Themistius was born around 317, probably in Paphlagonia, but he spent most of his childhood in Constantinople. His father, Eugenius, was a teacher of philosophy at Constantinople and the principal influence on young Themistius. After completing his philosophic training, Themistius soon established himself a reputation for a philosopher and one of the leading orators of his day.⁵⁵ As such, he won favour with five reigning emperors, and produced 19 political orations, addressing either the emperor himself, or a member of his household. It is in these speeches that the νόμος ἔμψυχος expression makes its appearance on four occasions which, given Themistius' peculiar position,⁵⁶ could be understood as an expression of current imperial court ideology.⁵⁷

The first such instance is in the introduction to his fifth oration (64b–c), delivered on 1st January 364 at Ancyra as 'part of the celebrations being held to mark the consulship of the Emperor Jovian'.⁵⁸ There, Themistius praises the emperor for adopting philosophy, mostly because philosophy 'declares that the king is living law, a divine law which, in the course of time, has come down from above as outpouring of the eternal Good, a providence of that nature closer to the earth, who looks in every way towards Him, and strives in every way for imitation'.⁵⁹

52 Clem. Al. *Strom.* 2.4.18.4.3–19.3.1; Euseb. *Dem. evang.* 4.2.2.

53 Jo. Chrysos. in *Matth.* 1.3–4; Jo. Chrysos. in *epist. ad Philipp.* 13.3.

54 Greg. Naz. *Or.* 43.80.7.1–9; Jo. Chrysos. in *epist. i ad Tim.* 13.1; Theod. Cyr. in *epist. i ad Tim.* 4.12.

55 P. Heather and D. Moncur, *Politics, Philosophy, and Empire in the Fourth Century. Selected Orations of Themistius* (Liverpool: Liverpool University Press, 2001), pp. 1–3.

56 Cf. Heather and Moncur, *Politics, Philosophy, and Empire*, pp. 33–34.

57 There is an additional occurrence in Themistius' private orations (*Or.* 34.10.7–15), where Themistius reviews and gives an account of his public career.

58 Heather and Moncur, *Politics, Philosophy, and Empire in the Fourth Century*, p. 149.

59 Them. *Or.* 5.64b4–8, trans. Heather and Moncur, *Politics, Philosophy, and Empire*, pp. 160–161 slightly modified.

Next, he invokes the expression in his eighth oration (118d), aired in public on 28th March 368, celebrating the fifth anniversary of Emperor Valens' reign. This speech is predominantly concerned with the Gothic wars, and it 'sheds much light on the tax reductions of Valens and Valentinian'.⁶⁰ After elucidating the hardships which may attend on the particularities of tax assessment, Themistius observes that there are some things which cannot be determined by law. And he recommends that 'what is needed is a living law which adapts itself to each particular case, being a mundane justice, which is always sympathetic to the people's present circumstances'.⁶¹

Finally, in the sixteenth (212d) and nineteenth orations (227d–228a), delivered between 383 and 385, the νόμος ἔμψυχος comes to be employed with reference to Theodosius' charitable decision, ordering the partial return of properties, confiscated of persons condemned for capital offences to their children and other relatives, saving them from utter ruin and poverty. In these cases, Themistius is eager to emphasize that in his action, Theodosius is far from breaking the law as, being a living law himself which is superior to its written letter, the emperor is completely free to mitigate the law's injustice and universal harshness according to his own pleasure (Them. Or. 16.212d3–8, 19.227d3–228a8).

All these instances illustrate, quite well, I think, that central to Themistius' understanding of the νόμος ἔμψυχος is the consideration that the emperor is the ultimate source of law who is supreme to and stands above its written letter (Them. Or. 1.15b3–7). As such, Themistius' νόμος ἔμψυχος is effectively a byword for the emperor's legal supremacy, having very little in common with either the Archytean or Philonic senses of the concept. Thus, the semantic evolution of the νόμος ἔμψυχος seem to have taken a whole new direction with Themistius, albeit the originality of his contribution is most likely very limited. The way he employs the νόμος ἔμψυχος as a rhetorical trope suggests that he closely followed some already existing absolutistic reading, probably elaborating on the king's elevated nature and on the need for divine mediation, which he found readily available in some, perhaps pseudo-Pythagorean source.⁶²

60 Heather and Moncur, *Politics, Philosophy, and Empire*, p. 13.

61 Them. Or. 8.118d4–7, trans. P. Heather and J. Matthews, *The Goths in the Fourth Century* (Liverpool: Liverpool University Press, 1991), p. 34 modified.

62 There are several parallels between Themistius' speech (Or. 5.64b–c) and the pseudo-Pythagorean treatises *On Kingship*. Both Sthenidas and Themistius claim that the king is a follower of the higher god (Or. 5.64b4–5, Stob. 4.7.63, p. 270.14 Hense, p. 187.11 Thesleff, R59 Laks and Most), that his course is time-constrained (Or. 5.64b5, Stob. 4.7.63, p. 270.18–19 Hense, p. 188.2 Thesleff), and stress the need for divine imitation (Or. 5.64b6–8, Stob. 4.7.63, p. 270.15–21 Hense, pp. 187.12–188.4 Thesleff, R59 Laks and Most, Stob. 4.7.63, p. 271.11–12

Although, a somewhat similarly absolutistic reading may already be at hand in ps.-Diotogenes' *On Kingship*, due to the lack of any compelling evidence for this treatise's circulation, I am hesitant to argue for Themistius' intellectual dependence. To me, it appears to be more palpable to assume the existence of a fairly accessible doxographic source. More precisely, I think Themistius was under the influence of that very source of which's existence I have argued for in Philo's case. It would justify, then, both Themistius' choice of rhetorical *exemplum* and explain the lack of characteristically Archytean elements, as the source attested by Cicero, Philo, and Gaius Musonius Rufus was most likely nothing more than a brief idiomatic statement, similar to the one found in Cicero's (*Leg.* 3.2.1–6) and Philo's (*Mos.* 2.4.1–5.1) accounts. However, given Themistius' friendship with Gregory of Nazianzus,⁶³ and his probable acquaintance with another Archbishop of Constantinople, John Chrysostom,⁶⁴ who both employed the νόμος ἔμψυχος expression,⁶⁵ a Christian influence cannot be completely ruled out either.

For the above reason, I limit my conclusion to the observation that with Themistius the absolutistic reading of the νόμος ἔμψυχος stopped being a mere court flattery and became a legal principle, eventually making its way to Roman law itself under the reign of Justinian.

On the death of his uncle, Justinian became the Byzantine emperor in 527, ushering in a new era for the East. On his ascension, he initiated his grandiose and greatly ambitious enterprise of revising and compiling the diffuse body of Roman law. This project was 'entrusted to a specially appointed committee of ten, headed by the praetorian prefect John of Cappadocia'.⁶⁶ After one year of tremendous work, they compiled the *Codex Justinian*, promulgated in April 529, which was soon appended with the so-called *Quinquaginta*

Hense, p. 188.12–13 Thesleff). The latter theme is also central to Diotogenes (Stob. 4.7.61, p. 265.6–12 Hense, p. 72.18–23 Thesleff, Stob. 4.7.62, p. 270.10–11 Hense, p. 75.15–16 Thesleff) and, as ὁμοίωσις θεῷ, to Ecphantus (Stob. 4.7.64, p. 272.9–14 Hense, pp. 79.20–80.4 Thesleff, R57b Laks and Most). While the king's elevated nature is a subject treated by Diotogenes and Ecphantus (*Or.* 5.64b5–8, Stob. 4.7.61, p. 265.4–6 Hense, p. 72.18–19 Thesleff, Stob. 4.7.64, p. 272.9–14 Hense, pp. 79.20–80.4 Thesleff, R57b Laks and Most).

63 B.E. Daly, *Gregory of Nazianzus* (London: Routledge, 2006), p. 3.

64 John Chrysostom finished his rhetorical training probably under the tutelage of Themistius' friend, Libanius. W. Mayer and P. Allen, *John Chrysostom* (London: Routledge, 2000), p. 5.

65 Greg. Naz. *Or.* 43.80.7.1–9; Jo. Chrysos. *De paenitentia* 2.1.3; in *Matth.* 1.3–4; in *epist. ad Philipp.* 13.3; in *epist. i ad Tim.* 13.1; *vidi dom.* 4.5.75–79; 4.6.5–12.

66 C. Humfress, 'Law and Legal Practice in the Age of Justinian', in M. Maas (ed.), *The Cambridge Companion to the Age of Justinian* (Cambridge: Cambridge University Press, 2005), pp. 161–284, at p. 163.

decisiones to remove some outstanding controversies within the ancient juristic texts.⁶⁷ Impressed by their success, Justinian went further and commissioned his quaestor, Tribonian, to codify the juristic literature which finally took shape in the form of the *Digest's* publication in 533. Finally, still in 533, Tribonian produced a handbook for law students as well which came to be known as the *Institutiones*. Despite of this illustrious achievement, Justinian's legislative machinery was not brought to a halt, however. Between 535 and 565, the emperor issued 165 new laws which are now referred to as the *Novellae Constitutiones*, and it is the 105th novel in which the νόμος ἔμψυχος becomes part of Roman legal history.

We are told that this novel was issued at Constantinople on 27th June 536, and it was addressed to the ex-consul, Strageius Apion, regulating a variety of issues concerning the consular office. At its very end, the novel makes an exception of the previously outlined rules in favour of the emperor, stating that the consulate belongs in perpetuity with the emperor, yet he is far removed from the previous provisions because it was God Himself who elevated him above the laws, making him a living law amongst men (ἦ γε καὶ αὐτοὺς ὁ θεὸς τοὺς νόμους ὑπέθηκε νόμον αὐτὴν ἔμψυχον καταπέμψας ἀνθρώποις, *Nov.* 105.2.4).

The passage's similarity with Themistius is quite obvious, and it is not surprising that a direct dependence has long since been assumed.⁶⁸ Still, I am not prepared to argue for the novel's borrowing of Themistius, especially if Themistius did, indeed, propagate current and already existing court ideology in his public orations. Though, it is certain that Tribonian, the man in charge for overseeing the *Novels'* drafting was closely familiar with Themistius' intellectual heritage,⁶⁹ no immediate connection can on sheer textual grounds be established between Themistius and the novel. And this shortcoming is, in my opinion, mostly due to the previously hypothesized doxographic reception of the νόμος ἔμψυχος which resulted in the creation or canonisation of one, or several doxographic senses, largely independent of the original sources. As such, I conclude that the Byzantine sources must constitute a separate tradition, having perhaps no direct or indirect connection with the idea's Archytean foundations.

67 Humfress, *Law and Legal Practice in the Age of Justinian*, p. 165.

68 Steinwenter, ΝΟΜΟΣ ΕΜΨΥΧΟΣ, pp. 260–261.

69 Steinwenter, ΝΟΜΟΣ ΕΜΨΥΧΟΣ, p. 260.

6 Conclusion

In this study, I have proposed to investigate the individual occurrences of the νόμος ἔμψυχος, principally with a view to discrediting that widespread misbelief which identified the concept as the *par excellence* expression of monarchical supremacy and, as such, a forerunner of the medieval ideas of governmental absolutism and legislative sovereignty. I demonstrated that the νόμος ἔμψυχος expression made its first appearance to the history of political thought in a work ultimately drawing on the Tarantine Pythagorean, Archytas. And I argued that Archytas most likely did not have any specific rationale for introducing his νόμος ἔμψυχος and ἄψυχος distinction, which was rather the outcome of his peculiar description of fourth-century political *status quo*. At the same time, the expression was characteristic enough to be invoked by some first-century BCE pseudo-Pythagorean forger to lend an authentic sense to his treatise, regardless of ps.-Diotogenes' lack of interest in elaborating on any of the Archytean themes, or motivation for adhering to its genuine context. It is this break with the Archytean context which produced ps.-Diotogenes' involuntary contribution to the semantic evolution of the νόμος ἔμψυχος. That which I have described as a pseudo-Pythagorean synthesis, a blend of mostly Middle Platonic and Stoic ideas of kingship under the guise of ancient Pythagoreanism.

After dully considering the sources, I believe an epitome of the Archytean *On Law and Justice*, containing the νόμος ἔμψυχος expression, must have made its way to some doxographic collections by the first century BCE,⁷⁰ and probably it is this circulation which is then attested by Cicero, Philo of Alexandria, and Gaius Musonius Rufus. Later, through the mediation of Philo, the concept came to be absorbed by the early Church Fathers of Alexandria, Caesarea Maritima, and Constantinople, but the political sense still managed to hold sway at least until the sixth century. And it was a form of this political sense which was eventually transmitted through the *Authenticum* to medieval juristic thought.⁷¹ However, the way in which Themistius and Justinian's novel

70 The hypothetical existence of a *Corpus Pythagoricum* is recurrently insisted on by some scholars, such as, Thesleff, *An Introduction to the Pythagorean Writings of the Hellenistic Period*, p. 119; Centrone, *The pseudo-Pythagorean writings*, p. 339; Horky, *Archytas: Author and Authenticator of Pythagoreanism*, pp. 137–170, and there are, in fact, sound linguistic and stylistic arguments in favour of the theory. In my opinion, those fragments which are introduced by some variety of the Πυθαγορείου ἐκ τοῦ lemma in Stobaeus are likely to have a common source of origin.

71 It is hard to assess the gravity of influence *lex animata* had on the development of medieval political thought, yet it was certainly a phrase of relative importance. It was first employed

employ the concept has, beside the phrase itself, nothing in common with the previous senses; hence, I assume that these late antique sources are largely independent of the idea's Archytean tradition.

by the Four Doctors of Bologna who, according to Godfrey of Viterbo (c.1120–1191), supposedly called the emperor Frederick Barbarossa a living law at the imperial Diet of Roncaglia in 1158. Godfrey of Viterbo, 'Gesta Frederici', in G.H. Pertz (ed.), *Monumenta Germaniae Historica*, Tom. 22 (Hannover: Avlicus Hahnianus, 1872) pp. 307–334 at p. 316. Then, in the 1230's the phrase appears in some legal sources (*Regesta Imperii* 5.1.1 1793; URH 2 315; 5.1.1 1959) and in Accursius' *Glossa ordinaria* too (*D.* 1.3.22; *D.* 2.1.5; *C.* 10.1.5.2; *Nov.* 105.2.4). Finally, it is employed by a wide range of jurists and canonists, such as Andreas of Isernia's (c.1230–1316) gloss on the *Liber Augustalis* (3.26), Giovanni da Viterbo's (fl. c.1240) *De regimine civitatum*, Giles of Rome's (c.1243–1316) highly influential *De regimine principum* (1.2.12), Engelbert of Admont's (c.1250–1331) *De regimine principum* and *De ortu et fine Romani imperii*, Cynus of Pistoia's (1270–1336/7) polemics on the interpretation of *D.* 2.1.5, Johannes Andreae's (c.1270–1348) *Glossa on the Liber Sextus* (6.1.14), Albericus de Rosate's (cc. 1290–1354) gloss on *D.* 1.3.31, or Baldus de Ubaldis' (1327–1400) commentary on *D.* 1.3.2.