



Closing address at the Queensland Launch of the Hellenic Australian Lawyers Association Friday 30 January 2015

**The Hon Justice A Philpides
Court of Appeal**

Chief Justice French, Chief Justices Carmody and Kourakis, your Honours, distinguished guests, ladies and gentleman. I was delighted to learn last year of plans to establish the Hellenic Australian Lawyers Association, and I am very honoured to have been invited to be its Queensland Patron.

I want to close, by emphasising the enduring connections between the western legal tradition, of which Australia is a part, and the Hellenic world of antiquity.

One such connection is the concept of the rule of law. It is commonplace for historical discussions of the rule of law to commence with the statement, attributed to Aristotle, “we do not permit a man to rule, but the law”. In fact, that abbreviated statement refers to a famous passage in the *Nicomachean Ethics* and the proper translation reads, “we do not allow a man to rule, but rational principle”, because, as Aristotle explains, a man tends to rule “in his own interests and becomes a tyrant”.¹ The magistrate, on the other hand, he states “is the guardian of justice, and, if of justice, then of equality also”.² That provides the reasoning for Aristotle’s earlier statement in the same passage, that justice can “only exist between those whose mutual relations are regulated by law”.³ In other words, as he states in *Politics*, “law should rule”.⁴

¹ *Nicomachean Ethics* (Bk V: 6) trans. by W. D. Ross, in *The Basic Works of Aristotle* Richard McKeon ed., p 1013.

² *Nicomachean Ethics* (Bk V: 6) trans. by W. D. Ross, in *The Basic Works of Aristotle* Richard McKeon ed., p 1013.

³ *Nicomachean Ethics* (Bk V: 6) trans. by W. D. Ross, in *The Basic Works of Aristotle* Richard McKeon ed., p 1013.

⁴ *Politics* 3.16, 1287a, trans by T. A. Sinclair, Penguin Classics, 1992, p 226.

The expression “rule of law”, as we presently understand it, was not one used in antiquity. Frederick Hayek begins his essay, *Origins of the Rule of Law* by quoting John Locke’s celebrated statement: “The end of the law, is not to abolish or restrain, but to preserve and enlarge freedom... For liberty is to be free from restraint and violence from others; which cannot be, where there is no law”.⁵

And while Hayek states that, the concept of individual liberty in modern times cannot really be traced back beyond England of the 17th century, he emphasises that the influence of the classical tradition on “the modern ideal of liberty is indisputable”.⁶ Hayek notes that it is often said that the ancient Greeks did not know liberty, in the sense of individual freedom, but disputes that that can be said of the Athenians of the 5th century, that is, of Pericles’ time, which is seen as the golden age of classical Greece.⁷ He cites Pericles’ statement to his fellow Athenians:⁸ “the freedom which we enjoy in our government extends also to our ordinary life [where], far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbour for doing what he likes”.

Hayek⁹ identifies that, the main characteristic of that notion of freedom, is suggested by the ancient Greek word, “*isonomia*” to which Chief Justice French has referred, a word derived from the Greek words “isos” (equal) and “nomos” (law). It was Pericles who famously described the Athenian State of his time as one where “as regards the law, all men are on equal footing as far as concerns their private disputes”.¹⁰

But there is a rider; the concept of equality that applied, even in the Athens of Pericles, was by no means a perfect one. For example, the law did not bestow on slaves the privileges accorded to Athenian citizens, and the status of women was a vexed one, to say the least.

⁵ Frederick Hayek, *The Constitution of Liberty*, p 162.

⁶ Frederick Hayek, *The Constitution of Liberty*, p 162. See also Morgans H Hansen , p 10;

⁷ Frederick Hayek, *The Constitution of Liberty*, p 164.

⁸ Frederick Hayek, *The Constitution of Liberty*, p 164, citing Pericles, Funeral Speech for the Athenian War Dead.

⁹ Frederick Hayek, *The Constitution of Liberty*, p 162.

¹⁰ Pericles, Funeral Speech for the Athenian War Dead.

However, as one would expect in a society that valued freedom of speech, these imperfections did not go unremarked. Often, it was the playwrights who held up a mirror to the inequities of Athenian life. Thus, it was Euripides, who first condemned slavery, describing it as, “That thing of evil, by its nature evil, forcing submission from a man to what no man should yield to”.¹¹

The ancient Greeks were also concerned with the nature of law and its intersection with morality. And it was another playwright, Sophocles, who explored the question of whether civil disobedience may be justified in the face of an unjust law. In *Antigone*, the female protagonist, on pain of death, defies the King’s decree forbidding the burial of her brother, who has fought in a civil war against him. The brother’s body is to be left where he fell, to be devoured by beasts, thus preventing his soul (according to the prevailing religious beliefs) from finding repose. In her defence, Antigone relies on a higher moral law, “the immutable unwritten laws of heaven”.¹² The issues raised in *Antigone* are echoed in a key jurisprudential question of the modern era as debated by Fuller and Hart, and others; whether principles of morality form part of the concept of legality.

Perhaps the essential point to be made is that the great issues as to how human affairs ought most beneficially to be arranged, and concepts like the rule of law, and the nature of law, were ones that occupied the ancient Greeks – and they remain central to our own concerns. And what the Greek thinkers of antiquity wrote, so long ago, still has relevance to our debates on these matters.

I look forward to the Association hosting future events, to promote its commendable objectives, in particular, in fostering dialogue on the matters of importance to Hellenic Australian lawyers, promoting inclusiveness, and especially, in providing encouragement and support for a new generation of Hellenic Australian lawyers.

¹¹ Edith Hamilton, *The Greek Way to Western Civilization*.

¹² See Kelly, *A Short History of Western Thought*, p 20.