SUPREME COURT
OF QUEENSLAND

Rules and Values in Law: The Influence of Greek Philosophy[1]
29 March 2017

The Hon Justice A Philippides
Court of Appeal

Chief Justices, your Honours, distinguished guests, ladies and gentlemen – I acknowledge the traditional owners of the land on which we gather and pay my respects to their elders past and present and the community today. In paying my respects to our First Nations people, and in the unifying spirit of reconciliation, I say:

> In the Turrabul language – *Kunnar mallera ngalingi* and
> In the Jagera language – *Ngali yagarr ganarri*
>
> "Let us be one."

I am delighted we have had the privilege to hear the Yugambeh Choir sing in language. Last year, the full choir sang to great acclaim in the foyer of the Banco Court of the Queen Elizabeth II Building that houses the Supreme and District Courts. Their performance here this evening marks the first time such a choir has sung in our country's national court. It is a significant and wonderful milestone.

Chief Justice Allsop, your paper has been much anticipated. You have given a wonderful and absorbing address which demonstrates the scholarship and originality of thought associated with you.

As this evening's topic suggests, what is striking about concepts to do with rules and values in the law, is that the starting point of discussion, in terms of the western legal tradition, commences not with lawmakers or jurists, but with philosophers (lovers

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1 This is a revised version of the closing address at the 2017 Hellenic Australian Lawyers Association Seminar, in response to a paper delivered by the Hon Chief Justice Allsop AO entitled "Rules and Values in Law: Greek Philosophy; The Limits of Text; Restitution; and Neuroscience – Anything in Common?"

"philo" of the virtue of wisdom "sofia"). Michel Villey was right to state: "The key to the history of law is the history of philosophy."[2] His astute observation that "philosophy precedes jurists on the road to change" is central to the debate as to the role of values in the law.[3]

The giants of ancient Greek philosophy, to whom the Chief justice has referred, and whose influences still resonate in modern conceptions of the law, were concerned about the "big questions" (the larger context): how a society is best governed, and by what concepts and for what purpose.

The eminent classicist, Edith Hall, has described four features of ancient Greek analytical thought that facilitated their rapid intellectual progress.[4] The first is that "their flexible tongue gave them a wider range than most modern languages of ways to express causality, consequence and sophisticated grades of overlap between them". The second was a love of analogy, "of looking for resemblances between difficult spheres of activity or experience". The third was the opposite love of polarity. The fourth, which was fundamental to the development of their philosophy, and particularly pertinent to this evening's address, was "the unity of opposites" which "explains the tendency towards duality in early Greek philosophy". As Edith Hall observes, it was Aristotle who saw that unethical conduct could consist of both an act and an omission. Culpability could "rest both on Doing and on Not Doing".[5] Their intellectual tolerance of, and indeed engagement with, opposition of thought revealed a unique intellectual independence.[6]

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2 M Villey, *Leçons d'histoire de la philosophie du droit. Annals de la faculte de droit et des sciences politiques de Strasbourg* (Paris: Dalloz, 1957) at 19, cited in JE Ecklund, *The Origins of Western Law : from Athens to the Code Napoleon* (Talbot Publishing, 2014) at Vol I, 7.

3 Villey at Vol I, 7.

4 E Hall, *The Ancient Greeks: Ten Ways They Shaped the Modern World* (Penguin Random House UK, 2015) at 17.

5 Hall at 17.

6 See GER Lloyd, *Polarity and Analogy: Two Types of Argumentation in Early Greek Thought* (Bristol Classic Press, 1966).

Aristotle was described by Bertrand Russell in his *History of Western Philosophy* as, "the last Greek philosopher who faces the world cheerfully; after him, all have, in one form or another, a philosophy of retreat".[7] Certainly, Aristotle reflected a self confidence that accompanied the heights of Greek accomplishment and power. He was the greatest of the great in a golden age of philosophy.

In his philosophy, Aristotle recognised both the universality of legal principles,[8] but also their limitations. Injustice could result from too rigid an adherence to general rules, if no moderation was possible for the individual case. General laws by their very character could not provide for every eventuality and were to be interpreted according to the intention rather than the letter.[9] As Justice Keane has expressed it: "Aristotle regarded an even-handed willingness to refrain from insisting upon the full measure of one's legal rights as a very great social virtue. He called this virtue 'epieikeia'. In Latin it was 'aequitas' and in the slower Anglo-Saxon tongue 'equity'".[10]

Aristotle's concept of "epieikeia" rested on the morally right conduct as the expression of a virtuous character. The honest and esteemed citizen that was the basis of Aristotle's principles, and connected to the notion that values provide a foundation for laws, is the antithesis of Oliver Wendell Holmes' "Bad Man", for whom the duty to keep a contract at common law was merely "a prediction that you must pay damages if you do not keep it, – and nothing else".[11] As has been remarked, "such an approach did

7 See B Russell, *A History of Western Philosophy* (Allen & Unwin, 1945).

8 Cicero named these principles "principles of natural law", a term that has endured in different incarnations.

9 JH Baker, *An Introduction to English Legal History* (4th ed, OUP, 2007). See also Aristotle, *Ethica Nichomachea* (WD Ross ed, 1925) vol 10. This approach was one that was known from mediaeval times and as Baker observed was applied during the year book period to the interpretation of statutes: JH Baker, *An Introduction to English Legal History* (4th ed, OUP, 2007) at 106, 208-212.

10 Justice Patrick Keane, "The Conscience of Equity" in M Cope (ed), *Interpreting the Principles of Equity: The WA Lee Lectures from 2000 – 2013* (Federation Press, 2014) at 255.

11 WMC Gummow, "Equity – Too Successful?" (2003) 77 ALJ 30 at 43.

not spring from the mind of an equity lawyer."[12] The Bad Man Theory of law is certainly entirely discordant with the virtue based philosophy of Aristotle.

Aristotle's concept of "epieikeia" can be seen in Chancery's moderating influence as a court of conscience. However, conscience, as it has been observed, had a subjective ring to it and, as such, the shift in terminology from "conscience" to "equity" was, as Sir John Baker has explained, more than a change in vocabulary.[13] Yet, over time, equity as a corrective to the rigours of laws, also suffered from rigidity and hardened into law.[14]

The subsequent emergence of modern unjustified enrichment law offered an alternative to an equity based approach. It had its genesis in the statement in Justinian's Digest: "it is a matter of natural equity that no one should be enriched to the detriment of another."[15] The comparativist, Professor Zimmerman has traced that principle also to Aristotle.[16] In England,[17] that jurisprudence was led by Robert Goff and Gareth Jones in their seminal work *The Law of Restitution* first published in 1966. In the 1984 academic year, I had the pleasure of being taught Restitution by the great

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12 Gummow at 43. The debate that has ensued over the Bad Man Theory of law reflects the dispute between those that see contract law as preserving a freedom to elect to breach a contract and pay the damages and the equity view that in general contracts are made to be performed. The virtues of promise-keeping, liberality, commutative justice, the final cause and essence of a contract, natural terms and equality of exchange that originated in Aristotelian concepts and principles were, however, overtaken in the nineteenth century by a focus on a will theory of contractual law. As to the difficulties in discarding moral concepts, see: J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (OUP, 1991) at 161 – 162.

13 Baker at 106.

14 Baker at 110.

15 *Justinian Digest*, 12.6.14, 50.147.206. See JW Nelson "On the Conceptual Origins of the Law of Unjustified Enrichment in the *Draft Common Frame of Reference*" (2013-14) 6(2) EJLS 119.

16 See R Zimmerman, "Unjustified Enrichment: The Modern Civilian Approach" (1995) 15(3) OJLS 403 at 403, cited in Nelson at fn 2.

17 Nelson provides an overview of the development of the law of unjustified enrichment and makes the observation that: "The influence that differing modes of thinking have had on unjustified enrichment is clear. The unjust factors approach is the result of the common law's inductive mode of thinking. There is no overarching principle that described every unjust factor, just as there is no overarching principle that explains common law contractual vitiation. This necessitates a process of analogising and differentiating. Equally, the civilian absence of legal basis approach is the product of the conceptual and deductive approach that characterises the civilian legal family" (at 132).

Garth Jones. It was a subject I had not previously encountered at law school and of which I knew nothing but one I found fascinating.

There can be no doubt that values remain important to the vitality of the law - as the Hon William Gummow has written "law without support in values is ineffective because it is static rather than dynamic".[18] The view that that dynamism is to be found in equity and that the "complex of values which ground equitable doctrines and remedies is an unfailing and inexhaustible source of guidance across new terrain,"[19] sits comfortably with the recent endorsement by the High Court in *Australian Financial Services Leasing Pty Ltd v Hills Industries Ltd*[20] of the proposition that "contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience".

Epilogue

Since the seminar was given, the Supreme Court of the United Kingdom has drawn on Aristotelian concepts to explain the purpose of the law of unjust enrichment as "designed to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions."[21] In that regard it reflects the "Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted," which "is why restitution is usually the appropriate remedy."[22]

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18 Gummow at 43.

19 Gummow at 42.

20 (2014) 253 CLR 560 at [74] (per Hayne, Crennan, Kiefel, Bell and Keane JJ), citing *Australian and New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662 at 673.

21 *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies* [2017] UKSC 29 at [42] (per Lord Reed, Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge agreeing).

22 *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies* [2017] UKSC 29 at [42] (per Lord Reed, Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge agreeing).