

Aristotelian Equity and Discretion Thesis in Modern Legal Philosophy

Modern Hukuk Felsefesinde Aristotelesçi Hakkaniyet ve Takdir Yetkisi Tezi

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Abstract: This essay explores the Aristotelian concept of equity and the discretionary power of judges within the context of modern legal philosophy. Modern jurisprudence has changed profoundly as a result of the debates between Hart and Dworkin on judicial discretion and the principles of equity. The discretion thesis asserts that judges possess both the authority to fill gaps in law and to incorporate equitable principles when interpreting the law. By contrast, Aristotle's account of equity comprises two main dimensions: first, as a moral virtue; second, as a form of legal justice. Aristotle emphasises that applying equity requires careful consideration of case-specific irregularities. This essay argues that Hart and Dworkin's discretion thesis does not fully account for Aristotle's concept of equity due to insufficient emphasis on particularity in each case. Conversely, I propose that discretionary powers within contemporary codified law systems impose a continuing legal obligation upon judges, enabling them to more effectively balance discretion with equitable considerations.

Keywords: Equity, discretion, Aristotle, Hart and Dworkin, judicial discretion, codified law.



Introduction

In the second half of the twentieth century, modern legal philosophy was largely reshaped by the tension between Hart's rule-based interpretive model and Dworkin's principle-based interpretive approach regarding the scope of judicial discretion and the principles of equity. The discretion thesis is influenced by an Aristotelian account of equity, most notably in terms of the role and limits of judges in the decision-making process. This ongoing debate plays a central role in exploring the coexistence of the Aristotelian concept of equity as a form of legal justice and moral virtue with the discretionary power of judges in contemporary jurisprudence.

However, despite Hart and Dworkin's widely influential approaches, the intrinsic connection between discretion and equity remains unexplored in legal philosophy, particularly concerning codified law. The codified law is distinct from the Anglo-American legal background, in which the discretion thesis is conceptualised and cultivated. The purpose of this essay is thus to demonstrate that the contentious debate between Hart and Dworkin constitutes a misleading point of departure for revealing the profound Aristotelian connection between judicial discretion and equitable principles.

This essay focuses on re-examining the long-standing debate to reconsider the 'equitable discretion' within the codified law. Following this line, I emphasize that codified law possesses three distinctive features: (a) the boundaries of judicial discretion are prescribed and constrained by statutory provisions; (b) the exercise of discretion is explicitly authorized by legislation; (c) discretionary decision-making is inextricably linked to justice and equity within the context of case-specific argumentation.

To develop my point, I present a critique of the discretion thesis and advance a novel interpretation of Aristotelian equity. Firstly, the Aristotelian conception of equity necessitates an inner and essential link between judicial discretion and legal justice in adjudication. Unlike its association with moral virtues, equity here denotes a dimension of legal justice that must be considered in every individual case, including seemingly straightforward ones. Secondly, based on this premise, I argue that the discretion thesis inadequately captures Aristotle's notion of equity. This is because Hart and Dworkin's debate falls short of reconciling the particularities of



individual cases with equitable principles, primarily due to its emphasis on legal gaps and their intertwined understanding of ‘interpretation’ and ‘discretion.’

In the first section, I explain the two strands of *epieikeia* in Aristotle: a virtue of character and a form of legal justice. This dual aspect of Aristotelian equity can be formalised as follows: (1) “Its functional, legal-technical aspect, serves as a correction of the general law for the specific case, a task for the judge, the one who applies the law. (2) Its substantive, ethical aspect, as a human virtue, common to all men, an attribute of humanity” (Falcón y Tella, 2008, p. 22). Although both dimensions may exist in a person as a virtue, I put forward that it is important to point out that equity has an independent component that is exclusive to legal justice and legal decision-making. To differentiate personal moral virtues and legal justice related to equitable discretion, I provide an example from Charlotte Brontë’s novel *Jane Eyre*. Then, I critically address Amaya and Nussbaum’s arguments in favour of virtuous judges to justify my distinct stance that equity should be seen as a legal necessity within the discretionary power of judges, rather than as a reflection of their personal virtues.

From a legal perspective, equity functions as a form of justice by addressing the particularities of each case. In this sense, I propose that equity has a pivotal role as an analytical component of legal justice, independent of the virtuous character traits of judges. In other words, unlike the virtuous image of judges that Hart and Dworkin tacitly presumed, Aristotelian equity should primarily be considered as a ‘legal’ rather than ‘moral’ perception of judges.

In the second part, I reveal some implicit and explicit connections, more accurately, inspirations between Hart and Dworkin’s discretion thesis and Aristotelian equity. While Hart and Dworkin have developed counter-jurisprudential perspectives, their different understandings of discretion cannot be traced back to Aristotle. This is not only due to the different historical backgrounds and political understandings surrounding ancient Greek and modern Anglo-American jurisprudence, but also to the ‘discretion thesis,’ whereby equitable judgments are merely associated with gaps in the law and interpretation of the law. However, as Shiner thoroughly discussed, Aristotelian equity is not an appropriate basis for the



modern discretion thesis attributed to the debate between Hart and Dworkin (Shiner, 1994, p. 1251).

Following this connection, I set out a few critical arguments taken from Shiner's perspective, and also posit three original criticisms: (a) The distinction between the interpretative and discretionary roles of judges. (b) Legal gaps are not needed to exercise discretion. (c) The concept of "decree" in the Aristotelian lexicon is crucial in highlighting the particularity of each case.

In the third part, contrary to Hart and Dworkin's discretion thesis, I would argue that the contemporary issue of judicial discretion in codified law can be regarded as a reflection of Aristotelian equity. I suggest that Aristotelian equity, as a form of legal justice, would be better suited to the codified law because of the explicit written limits and inclusiveness of equitable principles in the codes. Thus, equitable discretion is neither connected to gaps in the law nor ignores the particularities of each legal case. By examining civil codes that explicitly promote equitable discretion under certain conditions and prescribe equitable principles, I demonstrate how equity interacts with legal justice and how judges exercise their discretion to reflect the particularities of cases in legal decisions. In civil codes, lawmakers grant judges discretionary powers, and the framework for that discretion is determined by specific statutory provisions along with equitable principles. I argue that this constitutes a fundamental feature of the discretionary power of judges in written legal codes, as demonstrated in the examples of Turkey and Switzerland. Moreover, in these statutory rules, Aristotelian equity has been enshrined in positive law, which is fundamentally different from the understanding of discretion put forward by Hart and Dworkin.

Equity as a Moral Virtue

In the *Nicomachean Ethics*, Aristotle presents equity as a personal virtue: "(...) who the equitable man is, the man who chooses and does such acts, and is no stickler for his rights in a bad sense but tends to take less than his share though he has the law on his side, is equitable, and this state of character is equity, which is a sort of justice and not a different state of character" (Aristotle, 2021, p. 65). Equity, as a personal virtue, requires a moral willingness to be satisfied with a lesser share than one's rightful share



under the law. In the *Rhetoric*, Aristotle adds new features and enriches that virtue with a number of principles: “Equity bids us be merciful to the weakness of human nature; to think less about the laws than about the man who framed them, and less about what he said than about what he meant; not to consider the actions of the accused so much as his intentions” (Aristotle, 2008, p. 73). Both definitions emphasize personal traits, focusing on the establishment of an equitable method by correlating equity with other virtues. It highlights that those who judge should not only be bound by legal rights and rules but should also internalise the fundamental principles that often remain outside the written laws. For example, since equitable justice should be applied to “forgivable acts,” the equitable person must be “merciful” and value good faith over mere actions.¹

Equity here is conceived as an almost inclusive virtue as one where whoever carries such a virtuous character accommodates all other related virtues and principles, such as mercy, forgiveness, and charity. To demonstrate the virtues of intertwined coexistence in one personality, it is useful to examine a fictional example from Charlotte Brontë’s novel *Jane Eyre*, which Gary Watt uses to differentiate between legal entitlements, charity, and equity (Watt, 2009, p. 38). According to the story, Jane Eyre inherits twenty thousand pounds from her uncle. She decides to share this unexpected windfall with her three cousins. She says, “It would be torment and oppress me to have twenty thousand; which, moreover, could never be mine in justice, though it might in law” (Brontë, 2009, p. 548). There is no doubt that Jane’s generous gesture, stemming from personal virtue, is an act of equitable justice that goes beyond legal rights-based reasoning. Nevertheless, it is perfectly legal in both respects; the uncle legally earned his fortune and “left it to whom he pleased,” so Jane has an unquestionable legal right not to distribute it to others.² Watt asserts that the possession of legal and customary rights does not have to align with equity itself, and

¹ Aristotle’s concept of equity as an moral virtue is related to directly equitable principles in which has been developed in jurisprudence and applied in law for centuries, such as ‘good faith’ (intention). (Brand, 2014, p. 43).

² As her cousin said, “I do see a certain justice; but it is contrary to all customs. Besides, the entire fortune is your right: my uncle gained it by his own efforts; he was free to leave it to whom he would: he left it to you. After all, justice permits you to keep it: you may, with a clear conscience, consider it absolutely your own.” (Brontë, 2009, p. 576).



Jane's intuition is exactly what Aristotle refers to as "the character of equity" (Watt, 2009, p. 39). In this context, it is crucial to distinguish between equitable justice and legal rules.

To illustrate how equity as a virtue can be operationalized within legal reasoning, it is necessary to construct a fictional scenario. Suppose Jane inherits a sum of money but refuses to share it with her cousins, retaining the entire inheritance for herself, despite having no legal obligation to divide it among them. In reaction to this, the cousins decide to steal the money from Jane and justify their actions by claiming urgent necessity, one cousin's child requires life-saving surgery, which they cannot otherwise afford. This hypothetical case highlights the tension between strict application of universal laws, which would classify theft unequivocally as a punishable crime. It is at this juncture that *epieikeia* becomes pertinent. How should a judge proceed?

Two approaches can be distinguished. The first entails imposing penalties strictly according to statutory provisions without regard for "extenuating circumstances." The second approach involves mitigating or even waiving punishment altogether by exercising discretion aligned with principles of equity. In the theoretical landscape, this latter approach, primarily presupposes that a virtuous judge should act or decide like Jane. This approach reflects Aristotle's conception of equity as a personal virtue, recognizing when compassion or forgiveness may be warranted. The crucial question, however, is this: Should judges emulate Jane's "character of justice" and act upon "conscientious justice", thereby fulfilling requirements for equitable adjudication? In other words, is a judicial decision on such a transgression deserving of leniency really based on both moral generosity and practical wisdom on the part of the judge?

Referring to the Aristotelian account of justice, virtue theorist Amaya suggests that virtuous judges, endowed with both moral and intellectual virtues, are best equipped to reach sound legal judgments. Equity as a virtue provides these judges with the practical wisdom necessary to fully appreciate the particularities of each case. Not only do such judges respond sensitively to individual circumstances, they also advance equitable judgments. Amaya concludes that from this virtuous perspective, a judge will "apprehend the reasons that would support law abidance as well as those that



would support challenging the law,” ultimately deciding what is right “in light of a conception of the good life and the role of law within it” (Amaya, 2022, p. 118). However, even if virtuous judges are able to follow legal and moral guidelines, it may be argued that ‘the good life’ remains too indeterminate for consistent equitable judgments.

Similarly, Nussbaum identifies equity with personal virtues. Drawing on Seneca’s philosophy, Nussbaum asserts a “merciful judge” should recognize not only individual culpability but also broader social obstacles faced by offenders as members of groups variously defined by culture, gender, nationhood, or simply humanity (Nussbaum, 1993, p. 103). Yet contrary to Nussbaum’s view, it can be maintained that compassion is not required for judicial recognition or consideration of contextual factors surrounding crime or criminality. A judge needs not possess merciful inclinations toward either offender or victim merely in order to accurately perceive relevant facts. Indeed, mercy cannot, invariably, serve as an effective means of tempering severity inherent in legal rules.

Both Amaya and Nussbaum’s perspectives, which conceptualize equity as a set of virtues exercised by judges, risk idealizing the character of judges to an unrealistic degree. At this point, I suggest shifting the focus from promoting virtuous judges to recognising equity as the primary analytical element of the law itself. Ultimately, if Jane’s virtuous traits, for example, could simply be transferred to every judge, the necessity for law itself would diminish. It is because, as Aristotle notes, “equity must be applied to forgivable actions” (Aristotle, 2008, p. 73). For a judge like Jane, if equity is regarded solely as personal virtue, the cousins’ crime might consistently warrant forgiveness. Therefore, when addressing equity within legal contexts, as distinct from its function as an individual moral virtue, it is essential first to recognize the established boundaries that require judges to justify their decisions in accordance with legal rules, precedents, and principles. This underscores why equitable judgments depend on achieving balance between general legal norms and the particularities inherent in each case. Consequently, even if all judges were as virtuous as Jane, the fundamental challenge remains: reconciling judicial discretion with equity independent of any single judge’s moral character.



Equity As a Form of Legal Justice and ‘Decree’

In the *Nicomachean Ethics*, Aristotle describes equity as “a correction of law where it is defective owing to its universality.” In fact, this is the reason why all things are not determined by law: about some things it is impossible to lay down a law, so that a decree is needed” (Aristotle, 2021, p. 65). Equity thus emerges as a form of legal justice intended specifically to amend legal shortcomings. Aristotle compares equity to the Lesbian rule, which does not rigidly adhere to universal legal statements but adapts according to circumstances. The Lesbian rule, as employed by builders on Lesbos, served as a flexible measuring device for irregular shapes in architecture; analogously, equity applies general legal provisions with sensitivity toward each case’s unique features. The metaphor of the Lesbian rule becomes particularly salient when general laws prove inadequate for addressing particularities in individual cases (Barr, 2021, p. 154).

Aristotle’s analogy also serves as guidance for legislators. Aristotle recommends issuing decrees (*psêphisma*) enabling judges or assemblies to respond appropriately when faced with new challenges or unforeseen circumstances. Within ancient Athens, a decree functioned as a legal or political decision adopted by the Assembly in response to such contingencies. As Kontos illustrated, the Assembly might decide that widows should receive a pension twice the prescribed legal amount after a particular war (Kontos, 2023, p. 54). Thus, this concept is crucial for both embedding equity within laws and linking it directly to discretion. As Shanske notes, Aristotle is implicit only in recommending that *epieikeia* be applied by judges or juries during disputes, but is explicit that legislative bodies should issue specific decrees correcting defects found within general laws (Shanske, 2008, p. 356). Indeed, in *Nicomachean Ethics*, Aristotle focuses less on using *epieikeia* at courts, instead indicates Assembly “to pass specific decrees to correct general laws” (Shanske, 2008, p. 363). Conversely, in his *Rhetoric*, Aristotle characterizes equity (“going beyond written law”) more closely with arbitration than formal adjudication (Aristotle, 2008, pp. 72–73).

By elucidating the term ‘decree’ in relation to judges’ equitable discretion, one can trace a conceptual path from Aristotle’s philosophy to contemporary legal codes. Since much of the debate surrounding judicial discretion in legal philosophy is influenced by Aristotelian equity, it is crucial



to clarify the fundamental dynamics between equity and discretion. The central point, echoing Aristotle, is that “about some things it is impossible” to enact a law; thus, alternative mechanisms must exist within legal frameworks for resolving disputes. Decrees should supplement universal laws by implementing through judicial action, to remedy injustices arising from rigid generality. Decrees as legal instruments, therefore, entail an obligation on judges. They must consider relevant circumstances in their judgments to ensure *epieikeia*.

As I have argued in the following pages, equitable discretion regulated in the statutory provision may be regarded as the contemporary equivalent of Aristotelian equity, functionally analogous to decrees.³ In broad terms, the Assembly’s historical role of issuing decrees to adapt statutes for unforeseen situations is reflected in contemporary discretionary powers of judges. In other words, today’s enacted laws explicitly assign equitable discretion to judges within codified systems. Accordingly, since equity involves ‘decrees,’ these decrees may also be interpreted as legislative frameworks specifically designed to guide judicial discretion. Thus, I contend that contemporary codes governing equitable discretion correspond directly with ancient notions of decree. Therefore, it becomes incumbent upon judges not merely to apply statutory provisions literally, but rather to invoke the requirements of equity when particularities arise, which are insufficiently addressed by existing law.

Discretion Thesis in Modern Legal Philosophy

I now turn to the discretion thesis, which seemingly reflects Aristotelian equity in the context of judicial discretion. In his famous book *The Concept of Law*, Hart directly engages with the concept of justice, asserting that “it is both a virtue specially appropriate to law and the most legal of the virtues” (Hart, 1994b, p. 7). With the exception of this pivotal reference, Hart and Dworkin make no explicit reference to Aristotle’s

³ It is evident that Aristotle’s suggestion that equity primarily functions within the relationship between judges and lawmakers, resonates not only with continental codified law but also with English and American common law doctrines (Blackhawk, 2020, p. 2042). Nevertheless, as I argue below, it would be more consistent with Aristotle’s understanding of equity where equitable discretion regulated concisely and transparently within general statutory frameworks.



concepts of justice and equity. Nonetheless, some indirect indications can be detected that point back to the concepts of Aristotle.

Following the debate between Hart and Dworkin, the discretion thesis can be summarised as follows: (1) Hart posits that some cases cannot be resolved through the straightforward application of legal rules and precedents. This is because, in such cases, the law is described as “fundamentally incomplete,” and there are gaps in the law that should be filled through the exercise of discretion (Hart, 1994a, p. 252). (2) Dworkin argues that in such hard cases, standards (political or moral principles) beyond rules guide and enlighten judges in decision-making. Judges exercise their discretion not to fill in the gaps (as there are no gaps in the law) but rather to interpret the law in a more appropriate manner (Dworkin, 1978, p. 68).

In his short article, Hart distinguished between “choice” and “discretion.” The former is defined “dictated by purely personal or momentary whims,” whereas the latter is characterised by “a certain kind of wisdom or deliberation that guides the choice” (Hart, 2013, p. 658). This distinction implies that judges do not make arbitrary choices; rather, they justify their decisions by reference to “prudential standards” (Hart, 2013, p. 657). If judges have an implicit or explicit power of discretion as enshrined in law, then the exercise of choice in a given case would entail conformity with the conscientious beliefs and values of legislators (Lacey, 2013, p. 644). As Hart stated, the authority of a judge is “interstitial”; they must “narrow their choice from which a legislature may be quite free” (Hart, 1994a, p. 273).

As Hart argued, exercising discretion gives the decision contingency value only insofar as it is necessary to resolve a borderline case. It is crucial to highlight that even in the case of Hart, certain legal rules or precedents are not entirely sufficient to ensure the satisfactory resolution of borderline cases. Therefore, judges must incorporate reasonable grounds in their judgments. As Zahnd notes, although the concept of “equity” is rarely used, “Hart essentially envisioned equity as a necessary component of adjudicating difficult cases because it fills gaps in laws previously enacted by the legislature or adopted by the courts” (Zahnd, 1996, p. 274). It can be said, therefore, that according to Hart, the purpose of exercising equitable discretion in borderline cases is merely to fill in gaps in the law.



However, Dworkin rejects the doctrine of strong discretion. Dworkin's critique of Hart is that judges do not exercise strong discretion in borderline cases. On the contrary, Dworkin maintains that there are no genuine gaps requiring such discretion. It is evident that a distinct set of principles and policies, separate from legal rules, duties, and rights, empowers judges. These principles and policies can potentially fill all gaps in the legal framework. Dworkin's hypothetical judge, Hercules, can apply certain standards defined as "political morality," in order to resolve hard cases. In essence, discretion is the power of judges to exercise the general requirements of legal reasoning. It is a decision-making process that aims to compose a particular chapter in a way that is consistent with the "integrity and coherence" of the legal system, as well as with the "social goals and the principle of justice" (Dworkin, 1982, pp. 195–196). Dworkin also emphasises that in these difficult cases, the judge should consider "what the legislature has, on this occasion, done" (Dworkin, 1978, p. 109). Ultimately, the exercise of discretion is constrained by the principles of "fit and integrity" and political-moral standards (Dworkin, 1986, pp. 348–354).

Additionally, some of the Aristotelian conclusions tacitly influence Hart and Dworkin's practical judgments. For instance, in the hypothetical example of the decision-making process of a young hostess, Hart repeatedly, but latently, ascribes significance to Aristotle's concepts: "On the whole, I think the wisest thing to do would be (...)", "we have a fairly definite idea of what are the optimum conditions for making a sound decision" (Hart, 2013, pp. 659–660). Similarly, in a hypothetical scenario regarding the entitlement of an aunt to compensation for emotional distress caused by a negligent driver, Dworkin concludes that a judge's determination regarding the appropriate interpretation of the law should rest upon "a sounder principle of justice," thereby invoking "the conception of integrity and coherence within law as an institution" (Dworkin, 1982, pp. 194–195).

Nevertheless, such considerations fail to adequately address the principle of particularity with respect to all individual cases in which judicial discretion is exercised—not merely those classified as difficult or borderline.



The Critique of Discretion Thesis

Although Hart and Dworkin adopt distinct approaches regarding judicial discretion and the validity of legal principles, both contend that there are gaps, described as “penumbral” by Hart or “doughnuts” by Dworkin, where judicial discretion may be exercised within the boundaries of law. However, Shiner’s robust critique demonstrates that the discretion thesis misinterprets Aristotle’s conception of equity. For Shiner, Aristotle’s understanding was neither concerned with modern judicial discretion nor with such legal gaps as identified by Hart or Dworkin.

Shiner analyses Aristotle’s theory of equity in a sophisticated way and with reference to two philosophical arguments linked to jurisprudential ones: (1) Equity as a virtue and justice, which is the “legitimate exception” inherently built into the universality of law for the purpose of rectifying it, thereby allowing for “particularized judgments.” (hence there is no need to apply equity as a standard beyond the limits of law). (2) *Phronesis* (practical wisdom) is related to *epieikeia*. Thus, when courts decide according to equity, practical wisdom is also applied on the basis of perceptual and intuitive practical judgment (Shiner, 1994, p. 1261). Therefore, equity cannot be regarded as a judicial virtue, as latently presumed by Hart and Dworkin, that can be used to correct errors of the legislature.

According to Shiner’s critical arguments, the discretion thesis fails to acknowledge the significance of a particularist approach to decision making. It also ignores the inherent connection between practical judgments and equitable discretion. Now, I depart from Shiner’s line and advance three distinct arguments against the discretion thesis.

(a) Differences Between Discretion and Interpretation: It is crucial to differentiate between ‘discretion’ and ‘interpretation’, at least within the contemporary codified law context. However, according to Hart, legal rules possess an open texture, whereas Dworkin compares them to doughnuts; both require processes involving interpretation and discretion. Although these terms are often discussed together in the debate about judicial performance (as a means for elucidating normative meaning), conflating them can be misleading. As I will demonstrate on the following pages, these concepts are regulated separately within codified systems: discretion refers (a) situations in which judges are authorized to decide in light of



equitable principles, or (b) cases where judicial discretion must be exercised according to unique factual circumstances. For Hart and Dworkin, on the other hand, interpretation is intertwined with judges' discretion. Two judicial functions in their argumentation become indispensable because of gaps and ambiguities in existing laws. In situations where there are no clear legal norms or established customs (i.e. for difficult or borderline cases), judges must display a similar creativity (relying on judicial discretion) as the legislature itself. In this way, judges interpret law holistically so as to establish new universal standards. By contrast, discretion operates most directly when dealing with atypical cases requiring the application of equitable principles. Here, judges' discretion focuses on addressing unique factual circumstances rather than legislative omissions per se. In short, contrary to the approaches of Hart and Dworkin, a clear distinction should be drawn between these two judicial functions, both conceptually and practically. I submit that equitable discretion actually results from a case-by-case interpretation.

(b) No Need for Legal Gaps for Discretion: It is important to note that the discretion thesis can only ensure equitable judgments to the extent that there are gaps in the law. Conversely, as Harris clearly states, "Aristotle does not say that *epieikeia* comes into play because of gaps in the law," rather, "it relates to the way laws are applied in particular situations, especially ones that merit special treatment as exceptions to the general rule" (Harris, 2013, p. 30). Hence, the concern about determining or creating the meaning of legal text, in cases where the law contains loopholes, is not within the scope of equitable discretion. More precisely, it is not possible to adequately respond to the distinctiveness of each case in accordance with Hart's rule-based interpretation or Dworkin's political moral principles.

(c) The Importance of 'Decree': It may be contended that the discretion thesis diverges significantly from the conception of *epieikeia*, largely because it overlooks Aristotle's emphasis on 'decree.' Within Anglo-American jurisprudence, there has long been an implicit (if not explicit) recognition that courts must adapt legal norms in response to different circumstances. Thus, interpretive flexibility remains central and even indispensable to any theory grounded in judicial discretion (Yntema, 1966, p. 86). In fact, both Hart and Dworkin strive toward legitimizing such



discretionary scope within established frameworks. The main point of disagreement between them is the best way to ground judicial discretion while still remaining faithful to legislative intent, both textually and philosophically.

However, the main challenge that the discretion thesis encounters regarding equitable discretion and ‘decree’ lies in addressing the uniqueness of each legal case. As Aristotle emphasized, it is a quality that cannot be anticipated by lawmakers. Aristotle does not advocate for a rigid adherence to statutory provisions; rather, he encourages judges to employ appropriate legal mechanisms to remedy deficiencies inherent in general rules. In this respect, *epieikeia* transcends the abstract generality of legislative norms. Harris illustrates this with reference to Attic orators in ancient Athens: judges there were bound by oath “to decide according to the laws and decrees of the Athenian people” (Harris, 2013, p. 47). The notion of ‘decree,’ alongside the laws themselves, thus provided a dual framework, enabling those adjudicating disputes to apply both legal rules and equitable principles within their decisions. As established practice in the Athenian courts dictated, the judicial oath afforded litigants and judges alike the discretion to strictly apply the relevant law or adopt “more flexible approaches that took extenuating circumstances into account” (Harris, 2013, p. 48).

Therefore, based on these three critiques, two issues arise that render the Hart and Dworkin theses susceptible to challenge. First, the legality of a judge’s equitable departure from applicable law is likely to remain questionable. Second, it is vital to explain how judges determine an equitable course of action in specific cases (Guest, 2017, p. 4). The solution proposed by the discretion thesis does not return to Aristotle’s conception of equity as legal justice, rather, Hart and Dworkin implicitly presume virtuous judges who ensure implementation of legal rules and principles. Accordingly, a balance between judicial discretion and legal rules seems to be possible only through morally virtuous judges, those capable of remedying gaps within existing legal provisions. However, in the absence of codified frameworks that effectively limit judicial discretion, there is always a possibility (at least from a jurisprudential standpoint) that judges may exceed the limits of equitable discretion. It is thus evident that further legal and moral



justification must be provided for discretionary decisions that are subjected to both equitable principles and established norms.

On the other hand, when viewed through the lens of case-oriented equitable discretion, the optimal resolution involves integrating analytical-legal perspectives with practical wisdom on a case-by-case basis. In such instances, the central question concerns not merely textual semantics or interpretive ambiguities inherent in law, but rather the careful consideration of each case's unique circumstances. This is precisely a pivotal factor underpinning what I called equitable discretion. At this juncture, contemporary codified law may be regarded as providing significant sources that incorporate Aristotelian equity into justice and virtue-based principles.

Equitable Discretion in Contemporary Codified Law

It is important to note that a significant breakthrough in the perception of equity within codified legal systems occurred in the nineteenth century. While the civil law tradition in Europe was gradually being codified and distinguishing itself from common law traditions,⁴ starting with developments in France,⁵ equity began to be conceptualized as “either discretion or justice in concrete cases” (Beneduzi, 2021, p. 125). Within this context, equity spread throughout continental Europe as an integral part of codified law. In contrast to Anglo-American jurisprudence, where questions regarding judicial discretion often remain open, in civil law jurisdictions, established legal norms determine when judges may exercise discretion or act analogously to legislators.

⁴ Both legal systems share roots in Roman Law. However, they have evolved along divergent paths, especially when comparing common law with continental traditions. The corpus of English law was shaped by two distinct branches: *ius civile* and *ius honorarium*. The former developed into common law through judicial decisions. The latter transformed over time; it became the basis for amendments introduced by Lord Chancellors as equitable corrections. The primary distinguishing feature between common law and continental traditions thus lies in their structural separation of jurisdictions. In England, the Court of Chancery emerged as a dedicated court of equity whose principal function was “to support, amend, and correct” deficiencies within the common law framework. (Koops & Zwolve, 2013, pp. 3–13).

⁵ Article 4 of Code Napoléon published in 1801, align with equitable discretion, regulates that “a judge who refuses to give judgments on the pretext that legislation is silent, obscure, or insufficient may be prosecuted for being guilty of denial of justice” (Beneduzi, 2021, p. 125).



These modern codes are clearly aligned with Aristotle's correlation between equity and judicial discretion. Thus, they define explicitly both the scope and limits of equitable discretion within statutory frameworks. For example, the Turkish Civil Code (TCC), derived from the Swiss Civil Code (ZGB), provides a clear illustration.⁶ Article 4 of the ZGB ("Judicial Discretion") establishes explicit grounds that demonstrate the intrinsic link between statutory regulation and equitable judgment:

"Where the law confers discretion on the court or makes reference to an assessment of the circumstances or to good cause, the court must reach its decision in accordance with the principles of justice and equity."

Article 4 of the TCC ("Discretion of the Judge") emphasizes the same relationship between discretion and equity:

"The judge decides on the basis of law and equity in matters where the law recognizes discretionary powers or orders consideration of the requirements of the situation or good cause."

The two Codes impose a legal obligation on judges to adjudicate cases in accordance with the principles of justice and equity.⁷ The Codes specify three conditions under which judges or courts may exercise their discretion: (1) The law itself may expressly or implicitly grant a margin of appreciation regulated within the framework of the meaning of legal norms or the body of rules; (2) it may create space for recognizing the uniqueness of particular legal facts; and (3) there may exist legitimate reasons justifying departure from general norms in relation to specific cases. These conditions refer back to relevant norms or principles that require consideration

⁶ The issue of lawmaking of judges raised by Hart and Dworkin is also regulated in Article 1 of the Codes: "In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator."

⁷ For instance, Penal Codes frequently include equitable provisions empowering judicial discretion: Turkish Penal Code Article 141 allows reduction/waiver penalties if theft was committed out of urgent necessity: "in case the theft crime is committed to meet a serious and urgent need, depending on the nature of the incident, the penalty to be imposed can be reduced or the penalty can be waived." Similarly, Italian Penal Code Article 626(2), provides mitigation where minor value objects were taken due to grave need: "se il fatto è commesso su cose di tenue valore, per provvedere a un grave ed urgente bisogno." And Italian Civil Code Article 1384 authorizes proportional penalty reduction for contracts at court's equitable assessment: "Riduzione della penale, la penale può essere diminuita equamente dal giudice (...)."



of both case-specific particularities and sound justification. Thus, whenever one or more prescribed conditions are present in a given case, judicial decisions must rest upon foundational principles of law and equity.

As previously noted, the discretionary power conferred by codes is already established statutorily; its purpose is not, (1) to exceed positive law's boundaries or (2) to creatively fill legislative gaps through invention of new general norms. Moreover, rules governing discretion and equity demonstrate the extent of judges' authority and obligation. It follows that, where a situation falls outside explicit coverage yet meets one of the above conditions, judges are empowered to act equitably. The Codes, thus, entitle judges to not merely apply abstract rules but also assess individual matters through equitable lenses already codified within the statutes.

Equitable Judgments in Codified Law

At first glance, equitable judgments may seem merely reflective of individual moral or subjective perspectives when assessing cases; however, this perception is also a misperception. Equity neither undermines positive law, nor grants arbitrary power for unrestrained subjectivity. Instead, it comprises value judgments firmly grounded in what justice demands under specific circumstances. Judges thereby illuminate factual nuances through departures from strict rule application without ever wholly disregarding legal rules. Thus, equity as a form of legal justice, not only guides decision-making according to general laws but also ensures responsiveness toward each case's distinct features.

Consequently, the question of whether laws are open-ended requiring interpretation (Hart), or only hard cases necessitate searching for equitable principles (Dworkin), is rendered irrelevant. Moreover, a statutory loophole need not exist before invoking equity since relevant standards have been embedded directly into codified frameworks. Equitable judgments here do not entail imposing personal virtues such as mercy or forgiveness (Nussbaum), nor presuppose inherent virtue among judges (Amaya). Rather, it aims at fostering practical wisdom throughout decision-making processes, as Shiner emphasised, based on equitable principles that are already set out in law.



In summary, through such provisions, the codes ensure that equitable judgments operate transparently under legislative authority. Judges are thereby empowered to balance general norms against case-specific particularities according to well-defined principles embedded within positive law.

Conclusion

The concept of equity is multi-layered and encompasses a range of legal principles and moral virtues. Aristotle's fundamental insight offers two distinct but inextricably linked aspects of *epieikeia*: equity as a moral character trait and as a form of legal justice. I suggested that in terms of the inherited correlation between judicial discretion and the particularity of each case, equity should primarily be conceived as legal justice and the 'analytical' component of legal reasoning, rather than personal moral virtues. Thus, the only appropriate way to apply Aristotelian equity to judicial discretion is to consider it principally as a legal duty incumbent upon judges so as to secure equitable outcomes tailored to individual cases.

Contrary to my understanding of equitable discretion, the discretion thesis is inclined toward Aristotelian equity in relation to how presumably virtuous judges should fill gaps in the law, while interpreting the law. Accordingly, Hart holds that judges appeal to equity to fill gaps in existing legal rules, while Dworkin argues that judges use principles as moral standards to guide them in complex and exceptional cases.

However, Hart and Dworkin fail to emphasize that the singularity of each case is central to judicial discretion. This omission leads to the conclusion that neither Hart nor Dworkin interpreted Aristotle's concept of *epieikeia* as a fixed principle inherently linked to judicial discretion. At this juncture, the discretion thesis becomes vulnerable to criticism. First, it is evident that neither Hart's nor Dworkin's thesis provides a foundation for claiming that equitable discretion is uniquely concerned with the particularities inherent in individual cases. Second, from this perspective, the discretion thesis does not offer a sufficiently robust account of equity upon which one might construct an effective theoretical framework capable of addressing deficiencies within statutory law.

Conversely, I concluded that equity should be considered alongside judicial discretion expressly governed by codes, an approach reminiscent of



Aristotle's notion of 'decree.' Within a codified legal framework, the content and context of statutory provisions governing discretion ensure that each case is adjudicated on its own merits, with equitable principles duly integrated into the legal reasoning process. This is because equitable discretion comprises multiple enforceable components specifically designed to enable judges to address unique nuances of each case effectively. Thus, equitable discretion in codified law involves thoroughly evaluating specific circumstances and achieving a just balance between abstract norms and concrete particularities.

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Öz: Bu makale, Aristoteles'in hakkaniyet kavramını ve yargıçların takdir yetkisini modern hukuk felsefesi bağlamında incelemektedir. Modern hukuk felsefesi, Hart ve Dworkin'in yargısal takdire ve hakkaniyet ilkelerine ilişkin tartışmaları sonucunda büyük ölçüde değişmiştir. Taktir yetkisi tezi, yargıçların hukuki boşlukları doldurma ve hukuku yorumlarken hakkaniyet ilkelerini kullanma yetkileri olduğunu iddia eder. Buna karşın Aristoteles'in hakkaniyet anlayışı iki temel boyuttan oluşmaktadır: Ahlaki erdem olarak hakkaniyet ve hukuki adalet olarak hakkaniyet. Aristoteles, hakkaniyet uygulamasının somut davaya özgü sıra dışılıkların dikkatle değerlendirilmesi gerektiğini vurgulamaktadır. Bu makale Hart ve Dworkin'in takdir yetkisi tezinin, her bir davanın tekilliğine yeterince vurgu yapılmaması nedeniyle, Aristoteles'in hakkaniyet kavramını tam anlamıyla açıklayamadığını iddia etmektedir. Buna karşın, çağdaş kodifiye hukuk sistemlerindeki takdir yetkileri yargıçlara daimî bir yasal yükümlülük getirmekte ve takdir yetkisini hakkaniyetle daha etkin bir şekilde dengelemelerini sağlamaktadır.

Anahtar Kelimeler: Hakkaniyet, takdir yetkisi, Aristoteles, Hart ve Dworkin, yargısal takdir, kodifiye hukuk.

