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## Fairness as an Essential Element of Law\*

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IVAN L. PADJEN

Faculty of Political Science, University of Zagreb

### Summary

Among institutions of advanced legal systems, few have been more perplexing than *the right to a fair trial*. An important reason is its content, especially the relation of the institution to fairness or equity.

The purpose of this paper is to provide, by correlating some well known episodes of legal philosophy that are usually kept apart, a new look at fairness of equity as an essential element of law understood as a way of reasoning. To that end the paper is divided in the following three sections: (1) Aristotle's conception of fairness as higher justice and an essential element of law; (2) the modern conception of equity, which relies on Kant's philosophy and assumes that equity is subjective and arbitrary unlike legal justice, which is objective and reasonable; (3) A recent turn in philosophy of law.

The brief analysis of selected key episodes of the history of the idea of equity or fairness allows some tentative conclusions. First, contemporary discussion in legal philosophy, most notably contributions of Lon Fuller, John Rawls and Ronald Dworkin, suggest, like Aristotle's practical philosophy, that there are good reasons to understand equity as a way of reasoning that is an essential element of law. Second, equity is a way of reasoning that involves moral insight into a unique constellation of both a characteristically unique detail of a practical situation and the peculiar structure of the whole to which the detail belongs. Third, the holistic nature of equity explains such phenomena as the diversity of rights lumped together under the label *the right to a fair trial*. What makes a trial fair is precisely a proper balance of a wide variety of rights and duties, which is in principle unique in every single case.

Among institutions of advanced legal systems, few have been more perplexing than *the right to a fair trial*. An important reason is its content, especially the relation of the institution to fairness or equity. On the one hand, the right often seems to be merely a label of a bundle of widely different procedural rights. Thus the subject *Fair Trial* in the index of a leading US casebook on criminal procedure is followed by the instruction *See Due Process; Jury Trial; Newspaper and Television; Trial by; Pretrial Publicity*.<sup>1</sup> Likewise, a leading comment of the fair trial clause (article 6, section 1) of the European Convention of Human Rights analyses the clause

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<sup>1</sup>Yale Kamishar, Wayne R. LaFave, Jerold H. Israel, *Modern Criminal Procedure: Cases, Comments and Questions*, 6th ed. (St.Paul, Minn.: West Publishing Co., 1986), at p.1543.

under headings that include *inter alia* the following: *right of access to a tribunal; right to a fair hearing (in particular, right to the equality of arms); right to a public trial and judgement; right to obtain a judgment 'within a reasonable time'; right to an independent and impartial tribunal established by law.*<sup>2</sup> On the other hand, partly due to the diversity of rights involved in the concept of a fair trial, the adjective fair as its distinctive property seems to be related only in name to fairness or equity, which have been commonly regarded as a way of reasoning relevant to law since Antiquity.

Another perplexing feature of the concept of fair trial is the relationship between fairness and discretion. Legal intuition should suggest that an official ought to exercise his discretion fairly. However, this is not how the intuition of continental European lawyers operates. European lawyers still tend to assume that discretion is something that is exercised by administrative or executive officials and as such outside the jurisdiction of judges.<sup>3</sup> Furthermore European lawyers still tend to understand discretion as the power that is related to expediency rather than fairness or justice and consists in choosing freely not only ends but also means of administrative action.<sup>4</sup> Even in the United States, where the idea that judges have vast discretionary powers is commonplace, there are few systematic writings on the subject.<sup>5</sup> A hiatus between discretion and fairness can best be seen in writings of Ronald Dworkin, which have probably made the most significant impact on legal philosophy in the last quarter of a century. The early writings were preoccupied with the positivist notion of discretion

<sup>2</sup>O. Jacot-Guillamord, "Rights Related to Good Administration of Justice (Article 6)", in R.St.J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Nijhoff, 1993), 381, at pp.391-98.

<sup>3</sup>On limited powers of the French and especially German judiciary, in comparison to the British judiciary, to review administrative discretion in the early 20th century see the Croatian classic Ivo Krbeć, *Diskreciona ocjena* (Zagreb: JAZU, 1937), at 77 ff. Meanwhile, differences between the three systems have largely disappeared. See briefly the comparative studies: Zaim N. Nedjati, *English and Continental Systems of Administrative Law* (Amsterdam: North-Holland, 1978), at pp.92-93; Mahendra P. Singh, *German Administrative Law: In Common Law Perspective* (Berlin: Springer, 1985), at pp.83-101; Spyridon Flogatis, *Administrative law et droit administratif* (Paris: Pichon et Durand-Auzias, 1986), at 193-95.

<sup>4</sup>See e.g. Karl Engisch, *Einführung in das juristische Denken*, 5.Aufl.(Stuttgart: Kohlhammer, 1971), at p.128 f.

<sup>5</sup>For a systematic account of the subject see Aharon Barak, *Judicial Discretion*, tr. from Hebrew (New Haven: Yale University Press, 1987).

without even mentioning fairness as an important concept.<sup>6</sup> In Dworkin's later work fairness is a central concept while discretion is left to oblivion.<sup>7</sup>

In Croatia the concept of fair trial is beset by additional difficulties. The standard Croatian edition of Aristotle's *Nicomachean Ethics* translates the key term at 1137a24 as impartial (*nepristrano*) rather than equitable (*pravično*).<sup>8</sup> The standard Croatian textbook of legal theory, which is broad enough to discuss at length judicial law-making, customary law, law of social integration in Georges Gurvitch's sense, the nature of things,<sup>9</sup> and even Article 1 of the Swiss civil code,<sup>10</sup> does not mention equity or fairness. The only two Croatian monographs on the subject, which are both devoted to equity in international law, ignore discussion of equity in contemporary philosophy and legal theory.<sup>11</sup> Perhaps the most puzzling aspect of the matter is the fact that *pravičnost*, which is the standard Croatian translation of equity or fairness (*επιεικεια*, *aequitas*), is sometimes used in Serbian to mean justice (*δικαιοσυνη*, *justitia*), while the term *pravednost*, which is the standard Croatian translation of justice, is in Serbian used to mean equity or fairness.<sup>12</sup> Hence it is not surprising that even some professional philosophers in Croatia believe that the term *pravičnost* is not only foreign to Croatian but also redundant to philosophy.

The purpose of this paper is to provide, by correlating some well known episodes of legal philosophy that are usually kept apart, a new look at fairness or equity as an essential element of law understood as a way of reasoning. To that end the paper is divided in three sections, which discuss briefly the following problems: (1) Aristotle's conception of fairness as higher justice and an essential element of law; (2) the modern conception of equity, which relies on Kant's philosophy and assumes that

<sup>6</sup>See Ronald Dworkin, *Taking Rights Seriously*, New Impression (London: Duckworth, 1977), index at pp.369-71.

<sup>7</sup>See Id., *Law's Empire* (Cambridge, Mass.: The Belknap Press, 1988), index at pp. 455-70.

<sup>8</sup>Aristotel, *Nikomahova etika*, tr. T. Ladan (Zagreb: Fakultet političkih nauka, 1982), at p.112.

<sup>9</sup>Berislav Perić, *Struktura prava*, part 1, 6th edition (Zagreb: SNL, 1978), at pp.169-213.

<sup>10</sup>*Ibid.*, at 208 notes that Article 1 (3) of the Swiss Civil Code recognises legal doctrine as a subsidiary source of law. However, the Croatian textbook fails to note that the same article incorporates verbatim a sentence on equity from Aristotle's *Nicomachean Ethics*. See more in note 15.

<sup>11</sup>Vladimir D. Degan, *L'equite et le droit international* (La Haye: Nijhoff, 1970); Josip Metelko, *Pravičnost u sukcesiji država* (Zagreb: Pravni fakultet, 1992).

<sup>12</sup>See esp. the leading Serbian authority on the ancient Greek literature Miloš N. Đurić, *Istorija helenske etike* (Beograd: Zavod za izdavanje udžbenika Narodne republike Srbije, 1961), at pp.434-35.

equity is subjective and arbitrary unlike legal justice, which is objective and reasonable; (3) A recent turn in philosophy of law, which indicates that discretion involves considerations of equity and constitutes an essential element of law. Concluding remarks point out the relevance of the discussion in this paper to a proper understanding of the right to a fair trial and also to some broader issues of legal and political philosophy.

### *1. Aristotle: equity as higher justice and an essential element of law*

Aristotle in chapter V of the *Nicomachean Ethics* first defines justice as a state of character that makes people disposed to act justly and will what is just and injustice as a state of character that makes people disposed to act unjustly and will what is unjust. A state of character, like a state of health, is always one of the two contraries. The various meanings of just and unjust are as follows: the just man is the lawful and fair man, while the unjust man is the lawless, in the sense of grasping, and unfair man.<sup>13</sup>

Aristotle distinguishes justice in the sense of lawfulness as complete virtue or the sum of all virtues in relation to others from justice as a particular virtue in relation to others. Unjust acts arising out of cowardice or malice are contrary to justice as complete virtue while acts arising out of graspingness violate particular justice. Aristotle then distinguishes two principal kinds of particular justice, namely, distributive justice, which regulates constitutional relations in a political community, and remedial justice, which regulates relations in markets.<sup>14</sup>

Finally, Aristotle in chapter V of the *Nicomachean Ethics* distinguishes justice (*δικαιοσύνη*, *δικαιον*; *justitia*, *justum*) and equity or fairness (*επιεικεία*, *επιεικής*; *aequitas*, *aequum*). The central part of Aristotle's argument runs as follows (this is the passage where the Croatian edition translates equity as impartiality):

*.. the equitable, though it is better than one kind of justice, yet is just, and it is not as being a different class of thing that it is better than the just. The same thing, then, is just and equitable and while both are good the equitable is superior. What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case.*

<sup>13</sup>Aristotle, *Nicomachean Ethics*, 1129a, in *The Works of Aristotle*, ed. by W.D. Ross, vol.9,

<sup>14</sup>*Ibid.*, 1129b25 ff.

*though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission - to say what the legislator himself would have said had he been present, and would have put into his law, if he had known.<sup>15</sup> Hence the equitable is just, and better than one kind of justice - not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, 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, viz., that about some things it is impossible to lay down a law, so that a decree is needed.<sup>16</sup>*

Aristotle draws a line between the functional side of equity, i.e. equity as a correction of law, and material equity, i.e. equity as the disposition of a man who “tends to take less than his share though he has the law on his side...”<sup>17</sup> Aristotle’s described summarily material equity by a set of imperatives that include *inter alia* the following: “it is equitable... not to treat errors and mishaps on a par; ..to excuse the common failings of mankind; to consider, not the law as it stands... but the legislator...; not the part, but the whole; not the momentary disposition of the agent, but his past character; ... to remember benefits one has received more than injuries...; to agree to arbitration rather than go to court - for the umpire in an arbitration looks to equity, whereas the juryman sees only the law.”<sup>18</sup>

For the further analysis it is essential to note the following two dimensions of equity according to Aristotle. First, equity is not something outside justice but its part that is higher than legal justice. Second, equity is not something outside law but a corrective function of law. It follows from these two properties that a law that is from the perspective of equity unjust must be adapted to demands of higher justice.<sup>19</sup> In that Aris-

<sup>15</sup>“It should be noted that this formulation has been adopted almost literally by one of the most modern and most carefully formulated law codes, the Swiss civil code of 1907”, Max Hamburger, *Morals and Law: the Growth of Aristotle’s Legal Theory* (New Haven: Yale University Press, 1951), at p.98, n.1.

<sup>16</sup>Aristotle, *note* 13, 1137b8-29.

<sup>17</sup>*Ibid.*, 1137a f. The terms material and functional are Hamburger’s, *note* 15, at p.101 ff.

<sup>18</sup>*The Rhetoric of Aristotle*, ed. by L. Cooper (New York: Appleton-Century-Crofts, 1932), 1374a.

<sup>19</sup>Hamburger, *note* 15, at p.96.

total differs from its predecessors (especially Plato)<sup>20</sup> and also from most modern thinkers.

## 2. Modern law: equity as subjectivity and arbitrariness

Almost the whole historical and strictly philosophical part of the article “Equity” in the *Historical Dictionary of Philosophy*<sup>21</sup> is devoted to Aristotle’s view of the problem. The reason for the privileged treatment of the Philosopher is indicated by the quotation from an 18th century translation of the *Nicomachean Ethics* which states that nothing can be added to Aristotle’s conception of the problem.<sup>22</sup> Even the part of the article that is devoted to the contemporary juristic analysis of equity reveals that the *Nicomachean Ethics* covers essential aspects of the problem.<sup>23</sup> Nonetheless, modern views of equity are closer to Kant’s than Aristotle’s conception.

Kant in *The Metaphysical Elements of Justice*, under the heading *aequitas* states roughly the following: when one appeals to equity he is basing his claim on his right rather than ethical duties of others; however, in the case of a right of equity conditions for determining how much and what kind of remedy should be allowed are absent. Kant exemplifies his point in the following way: in a commercial company formed under the condition that partners will share profits equally a partner contributes more than other members and then accidentally loses more than others; if he bases his demand to receive more than others on strict law his request will be refused since the judge has no particular data to serve as a guide how much the partner should receive according to the contract. The same applies to a servant whose wages have been paid in a currency that has depreciated<sup>24</sup> As Kant put it,

*He can only appeal to equity (a silent goddess who cannot be heard), because nothing was stipulated about this in the contract and a judge cannot pronounce in accordance with unstipulated conditions.*

*From this it follows that a court of equity ... is a self-contradiction. Only when the rights of the judge himself are involved and over matters of which*

<sup>20</sup>*Ibid.*, at p.92.

<sup>21</sup>“Billigkeit”, in *Historisches Wörterbuch der Philosophie*, Bd.1, hrsg. von J. Ritter (Basel: Schwabe & Co. Verlag, 1971), at 939-40.

<sup>22</sup>See *ibid.*, at p.940.

<sup>23</sup>See *ibid.*, at p.941.

<sup>24</sup>Immanuel Kant, *The Metaphysical Elements of Justice*, tr. and intr. by J. Ladd (Indianapolis: The Bobbs-Merrill, 1965), at 39-40.

*he can dispose for his own person may and should there be any hearing for equity.*<sup>25</sup>

Kant's view of equity may well look trivial today. A contemporary lawyer is likely to note that Kant's examples are routine cases of modern legal systems in the late 20th century. Thus the claim of the partner from Kant's first example can be settled on the basis of contract law and principles of *negotiorum gestio* and unjust enrichment, provided strict rules do not prohibit the application of those principles to the transaction of partners in Kant's example. Kant's servant could have recovered in principle even under communist laws. Thus courts of socialist Yugoslavia in the 1980s recognised real interest rates, which were much higher than the rate permitted by the Yugoslav Law of Obligations of 1978, on the ground that the lawgiver did not foresee high inflation.

However, objections to Kant's naiveté may easily overlook the following two phenomena: first, it is precisely the rapid development of the law of extra-contractual obligations (torts, unjust enrichment, *negotiorum gestio*) in the last two centuries that has led to frequent interventions of equity in Aristotle's sense into legal and contractual justice and as a result has changed substantially modern legal systems; second, despite that development modern lawyers, not unlike Kant, have assimilated the view that law is governed by mathematical reasoning, which is much narrower than legal, i.e. practical reasoning as understood by Aristotle.

Modern lawyers, who have assimilated the ideal of mathematical rationality, distinguish between decisions that can be grounded in law and decisions that cannot be grounded in such way. Of course, decisions based on equity belong to the latter group. The modern assumption is that equity is in the final analysis subjective and arbitrary.

H.L.A. Hart, probably the best known legal thinker after World War II, attempted to justify the distinction by reference to philosophy of language of the latter Wittgenstein.<sup>26</sup> According to Hart, a legal official decides on the basis of law if facts of the case he is deciding fall under the core meaning of the concepts that are involved in the rule he is applying. If the facts fall under the penumbral meaning of the concepts his decision is not based on law. In that case the official's decision is a result of discretion.<sup>27</sup> According to Hart's theory, administrative or judicial

<sup>25</sup>*Ibid.*, at 40.

<sup>26</sup>More exactly on F. Waisman's "Verifiability", in A. Flew (ed.), *Logic and Language*, 1st Series (Oxford: Blackwell, 1968), at 117, which is inspired by Wittgenstein's latter philosophy. See G.P. Baker, "Defeasibility and Meaning", in P.M.S. Hacker and J.Raz (eds.), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press, 1977), 26, at p.37.

<sup>27</sup>See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), at pp.138-44, 121 ff.

discretion can be reviewed from the standpoint of expediency or morality. But discretion cannot be reviewed from the standpoint of law since the exercise of discretionary powers is not based on law.

To paraphrase Hart's own example,<sup>28</sup> if in a park there is a sign "No vehicles" a policeman has a legal duty to see to it that automobiles and motorcycles, which obviously fall under the core meaning of the concept of a vehicle, do not enter the park and are fined if they do. By the same token, the policeman has a legal duty to allow free access to the park to roller skates and baby carriages. They obviously do not fall under the core meaning of the concept. But the policeman has a discretion to decide whether to allow teenagers' bicycles and ice-cream tricycles, since they fall under the penumbral meaning of the concept in question. Furthermore, only a higher administrative official can meaningfully decide all the appeals against the policeman's decisions on the admission of vehicles. But a judge can decide only appeals against decisions concerning gadgets that obviously are or obviously are not vehicles. If a judge were vested with the authority to decide appeals against decisions on the exclusion of teenagers' bicycles and ice-cream tricycles he would thereby stop being a judge and become an administrator or executive, i.e. an official of the political branch of the government.

Hart's conception of meaning, rationality, limits of law and discretion looks like a justification of early European systems of judicial review of administration rather than a sophisticated theory of legal reasoning derived from Wittgenstein anti-positivistic philosophy of ordinary language. The impression is not deceptive. The distinction between the core and penumbra of meaning, which Hart has allegedly derived from Wittgenstein's philosophy, can be found also in writings that have hardly had a chance to be informed by ordinary language philosophy. Thus Karl Engisch in his *Introduction to Juridical Thinking* distinguishes *Begriffskern* and *Begriffshof* in a way that is strikingly similar to Hart's distinction of the core and penumbra.<sup>29</sup> Belgrade Professor Radomir Lukić suggests in his *Introduction to Law*, again in a way strongly reminiscent of Hart's distinction, that the interpreter of law should take into account the distinction between the centre (*središte*) and the periphery (*oblast*) of a concept.<sup>30</sup> Hence Hart's conception of meaning, rationality, limits of law and discretion can best be understood as an expression of the *communis opinio doctorum* in modern legal systems but still not as a theory of legal reasoning in legal systems that establish the rule of law by expanding judicial review of administration.

<sup>28</sup>See *ibid.*, at 123.

<sup>29</sup>See Engisch, *note 4*, at p.108 f.

<sup>30</sup>Radomir D. Lukić, *Uvod u pravo* 2nd edition (Beograd: Naučna knjiga, 1976), at p.335.



### 3. Legal systems today: discretion / fairness as reasonableness

The article in the *Historical Dictionary of Philosophy* referred to above ends with the remark that equitable reasoning should be analysed in philosophical inquiries into foundations of law. That is the path Ronald Dworkin has followed. He started by questioning Hart's understanding of the dividing line between law and non-law. Perhaps the best introduction to Dworkin is the expanded version of an example he uses to show weaknesses of Hart's conception of discretion, and of legal positivist conception of law in general.<sup>31</sup>

A captain orders a sergeant to pick five of his men, cross a river and destroy enemy fortifications. The sergeant completes the mission but returns from it alone. His defence is that he has followed the orders and hence cannot be held responsible for casualties. A major has to decide whether the sergeant, or perhaps his captain, should be held legally responsible for the loss of five men. Dworkin's analysis suggests that the major's decision depends essentially on his answer to the following question: is the sergeant equally (ir)responsible in the case (a) he picked five out of thirty plain G.I.s under his command as in the case (b) he had under his command *inter alia* five pioneers, five rangers and five green berets but nonetheless picked out five plain G.I.s? Dworkin's analysis suggests that the two situations are legally very different. In the case (b) the sergeant's defence that he cannot be held legally responsible for his choice of men (i.e. for his *culpa in eligendo*), because he merely exercised his discretion, will be less than convincing. In other words, whether the sergeant will be held legally responsible depends essentially on whether he exercised his discretionary powers reasonably.

Dworkin's criticism concerns primarily discretion rather than fairness or equity. Thus he points out that "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction".<sup>32</sup> Needless to add, fairness, unlike discretion, is not comparable to a hole. He also distinguishes, to account for the fact that discretion is guided also by expediency, between two standards that guide exercise of discretion, namely, principles, which are requirements of justice or of fairness or of another dimension of morality, and policies, which are requirements setting out economic or similar goals to be attained.<sup>33</sup> But precisely Dworkin's characterisation of principles reveals that his criticism of legal positivism revolves around the notion of fairness and, more specifically around fairness as an essential element of law.

<sup>31</sup>See R. Dworkin, "The Model of Rules", in *note 6*, at p.32 ff.

<sup>32</sup>*Ibid.*, at 31.

<sup>33</sup>*Ibid.*, at 22.

Perhaps the main defect of Dworkin's theory is that initial formulations of the theory relied heavily on John Rawls's *A Theory of Justice*,<sup>34</sup> which tried to overcome tensions between social contract theories (esp. Kant's) and utilitarian moral theories (esp. Mill's) by using fairness as its central concept but without analysing it properly. Suffice it to note here that in Rawls' original usage fairness meant something like "free from bias, fraud or injustice",<sup>35</sup> i.e. something very similar to the unsophisticated translation of Aristotle's *επιεικεία* by the Croatian translator. Leaving aside later developments of Rawls's<sup>36</sup> and Dworkin's<sup>37</sup> theory, it seems that not only the problem which initiated this paper but also the problem of fairness or equity in general could be clarified by taking into analysing a dimension of Aristotle's characterisation of fairness, which is, surprisingly, overlooked in recent literature.

The dimension in question can be understood as the holistic nature of equity. It is holistic in the sense that equitable reasoning qua correction of legal justice, if one follows Aristotle, is not the intervention into an isolated relationship between two or more legal subjects but an intervention into a whole web of relations that dynamically develop between the subjects. In that equitable reasoning is different from reasoning of legal justice, which is concerned with isolated relationships between legal subjects. Equitable reasoning grapples with questions of the kind "How the web of relations between legal subjects A and B fit the legal (sub)system C", where both the web and the (sub)system are constantly changing due to activities and interests of numerous actors, including the subjects in question. An example is the question "How Slovenia and Croatia fit the Adriatic Sea?". Reasoning of legal justice or legalistic reasoning deals with questions of the kind "If A does X to B what is the equivalent of X that B owes to C?", where the relationship between A and B via X is in isolated in principle from all other events.

Perhaps the best explications of the relationship between considerations of equity and considerations of legal justice have been left by Lon Fuller. In *The Morality of Law* he left the distinction between two kinds of morality. He characterised them in the following way:

<sup>34</sup>John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1973).

<sup>35</sup>See e.g. J.K. Feibleman, "Rawls' A Theory of Justice", *American Journal of Jurisprudence*, vol.18 (1973), 198.

<sup>36</sup>See esp. J. Rawls, "Justice as Fairness: Political not Metaphysical", *Philosophy of Public Affairs*, vol.14 (1985), 223., translated in Croatian in John Rawls, *O liberalizmu i pravednosti*, ed. by M. Matulović (Rijeka: Hrvatski kulturni dom Rijeka, 1993), 27.

<sup>37</sup>Dworkin, *note* 7.

*The morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of Good Life, of excellence, of the fullest realisation of human powers ....*

*Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark. It is the morality of the Old Testament and the Ten Commandments. It speaks in terms of 'thou shalt not' and, less frequently, of 'thou shalt'..<sup>38</sup>*

The morality of aspiration and the morality of duty are obviously, although Fuller does not say so, ways of reasoning characteristic of equitable considerations and considerations of legal justice respectively. It is important to note that the two moralities are not Fuller's only contribution to the problem. In his earlier and widely circulated manuscript on the forms and limits of adjudication Fuller drew a distinction which was obviously related to problems that in *The Morality of Law* were assigned to the two types of morality. In "The Forms..." he drew a distinction between polycentric regulatory problems (essentially similar to holistic problems discussed above) and monocentric regulatory problems (essentially similar to isolated problems mentioned above). Fuller regarded the latter as susceptible to adjudication, i.e. to reasoning consisting of considerations of legal justice. But he maintained that essentially polycentric problems could not be solved in a satisfactory way on the basis of such considerations.<sup>39</sup> This view qualified Fuller, who has been known as a strong opponent of legal positivism, as a thinker who was at least in one period of his career much closer to positivism than it is commonly assumed. However, Fuller's latter conception of the two moralities make him a forerunner of the present turn of legal philosophy, which was started by Rawls and Dworkin.<sup>40</sup>

<sup>38</sup>Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), at 5-6.

<sup>39</sup>L. L. Fuller, "The Forms and Limits of Adjudication", *Harvard Law Review*, vol.92 (1978), 353; repr. in R.M. Cover and O.M. Fiss, *The Structure of Procedure* (Mineola, N.Y.: The Foundation Press, 1978), 508, at p.517 f.

<sup>40</sup>The fact that Fuller widely circulated "The Forms..." , note 39, but did not publish it during his life time, together with the fact that in *The Morality of Law* he introduced the morality of aspiration as a type of reasoning that deals precisely with the legal as well as moral problems he considered in "The Forms..." to be polycentric and, probably, outside the reach of law, indicates that Fuller in fact abandoned his position in "The Forms..." and developed his own solution to the problem of discretion, which differs significantly, and is probably in some important respects superior to, the solution articulated by Dworkin on the basis of Rawls.

#### 4. Conclusion

The brief analysis of selected key episodes of the history of the idea of equity or fairness allows some tentative conclusions. First, contemporary discussion in legal philosophy, most notably contributions of Lon Fuller, John Rawls and Ronald Dworkin, suggest, like Aristotle's practical philosophy, that there are good reasons to understand equity as a way of reasoning that is an essential element of law. Second, equity is a way of reasoning that involves moral insight into a unique constellation of both a characteristically unique detail of a practical situation and the peculiar structure of the hole to which the detail belongs. Third, the holistic nature of equity explains such phenomena as the diversity of rights lumped together under the label *the right to a fair trial*. What makes a trial fair is precisely a proper balance of a wide variety of rights and duties, which is in principle unique in every single case. However, in some situations the right to a fair trial includes also an explicit right to a balanced characteristic detail of the situation, as it does under the European Convention on Human Rights, where the right to a fair trial includes also a specific right to a fair hearing (see introduction). Fourth, legal and political philosophers should study the relationship between legal justice and equity, on the one hand, and legality and legitimacy, on the other. Fifth, moral and political philosophers might wish to consider the relationship between moral insight into a unique constellation of every practical situation (*φρονησις*, *prudentia*, *prudence*, *Klugheit*), equitable reasoning, reasoning in terms of legal justice, and mathematical reasoning<sup>41</sup> (the last two ways are *ex hypothesis* more closely, or at least more obviously, intertwined than, say equitable and mathematical reasoning<sup>42</sup>).

<sup>41</sup>On the role of mathematics in the development of Western legal systems see esp. Dieter v. Stephanitz, *Exakte Wissenschaft und Recht* (Berlin: De Gruyter, 1970) and Gray L. Dorsey, *Jurisculture: Greece and Rome* (New Brunswick: Transaction Publishers, 1989).

<sup>42</sup>It is interesting that the problem does not even occur in Trelis Engberg-Pedersen, *Aristotle's Theory of Moral Insight* (Oxford: Clarendon Press, 1983), and William F.R. Hardie, *Aristotle's Ethical Theory*, 2nd ed. (Oxford: Clarendon Press, 1980).