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## HOW TO UNDERSTAND EQUITY IN HIGHER EDUCATION?

(Draft)

The question – How to understand equity in higher education? – presupposes that it is not clear enough what exactly equity means. If this assumption is justified, then before we ask how to understand equity in higher education, we should ask what we mean by “equity”. To answer this question is not of course to answer the question how to understand equity in higher education, but it is a necessary preliminary condition for doing so. Suppose now, that the previously mentioned assumption is justified because “equity” means so many different things, competing interpretations and conceptions. The fact that the term “equity” is sometimes used as a synonym for both “equality” and “justice” is an obvious proof for this semantic confusion. However, the confusion is not only terminological, but also conceptual. Therefore, some conceptual clarification is needed first. For this reason I will try - in the first part of my presentation – to show that equity, equality and justice are closely connected, but not identical.

The English term “equity” derives from the Latin word “aequitas”, which has two main meanings: equality and fairness.<sup>1</sup> But the concept of equity is even older. We can find the philosophical explanation of the idea of equity in ancient Greece. The crucial text is Aristotle’s *Nicomachean Ethics*. It is significant that Aristotle introduces his analysis of equity (*epieikeia*) - in order to explain its relation to justice (*dikaiosyne*) - by means of an obvious paradox: equity is for him neither the same as justice nor different from it.<sup>2</sup> This paradox follows from two premises.<sup>3</sup> The first is: the equitable is the same as good. The second is: the equitable is different from the just. If the first premise is true, and therefore the equitable is something good, then it follows that the just is not good. But this is absurd, it is

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<sup>1</sup> However, the Latin term “aequitas” was – among Roman legal and political philosophers – also used “to refer more broadly to the idea of fairness between individuals” (Q. Skinner, *Visions of Politics*, Vol. II., Cambridge University Press, Cambridge 2004, p. 49). But when in this context they want to describe something as “aequus”, they used the synonym “planus”, and in this way they describe it “as flat or level or smooth. So when Cicero” – in his book *De Officiis* – “speaks of the need for arrangements between citizens to be ‘aequus’”, he says that “private individuals must live on level terms, on fair and equal footing, with the fellow citizens” (Ibid., 49. Cicero, *De Officiis*, I., XXXIV, 124).

<sup>2</sup> “While we sometime praise what is equitable (...) at other times, when we reason it out, it seems strange if the equitable, being something different from the just, is yet praiseworthy; for either the just or the equitable is not good, if they are different; or, if both are good, they are the same” (Aristotle, *The Nicomachean Ethics*, 1137b).

<sup>3</sup> M. Zanatta, »Commento«, in: Aristotele, *Etica Nicomachea*, Biblioteca Universale Rizzoli, Milano 1986, pp. 576-577.

illogical, since the just is something good. On the other hand, if the just is good, then the equitable cannot be something good. But in this case, the conclusion is in contradiction with the first premise which says that the equitable is the same as good. If, on the contrary, both, equitable and the just, are good, then they are identical. However, this is in contradiction with the second premise which stated that they are different. Therefore, we are faced with the following dilemma: either we should not regard both the just and the equitable as good; or, if they are both good, we must regard them as identical.<sup>4</sup> Aristotle's solution for this dilemma is to define equity as a kind of justice. This means that equity is not generically different from justice. They are, therefore, connected but not identical. Equity, Aristotle says, is a 'rectification of legal justice'.<sup>5</sup> That is to say, that the need for equity arises "when the strict letter of the law produces an unfair result and so the court relaxes the strict letter in order to reach a fair judgement".<sup>6</sup> Such understanding of equity has had a significant impact on Roman law and English common law.<sup>7</sup> In this context, the distinction between justice and equity can be compared with the distinction between positive laws and natural laws or in other words, between legality and morality. For this reason Kant claims that equity is not a matter of the tribunal, but rather a matter of the "tribunal of conscience."<sup>8</sup>

However, although *equity*, understood as a rectification of legal justice',<sup>9</sup> is a *kind of justice*, it is also very closely connected with *equality*. This connection is clearly visible on the terminological and conceptual level. As we have already seen, the term "aequitas" means both equality and fairness. The Greek word for "fair", which Aristotle uses, is "ison", and its literal meaning is "equal". But the problem is that he uses the same word "ison" also as a synonym for "fair", when he differentiates two ideas of justice: universal justice as "lawful", and particular justice as "fair". As a result, "he describes the fair or the just as the "proportionately equal".<sup>10</sup> Since distributive justice – which is concerned with the distribution of goods, honours or other things – is a sort of particular justice, a distribution of them "is just if it conforms to 'proportionate equality'".<sup>11</sup> In this case, Aristotle "extended the

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<sup>4</sup> Ibid., pp. 576-577.

<sup>5</sup> Aristotle, *The Nicomachean Ethics*, 1137b-12-13.

<sup>6</sup> D.D. Raphael, *Concepts of Justice*, Clarendon Press, Oxford 2003, p. 54.

<sup>7</sup> In Roman law this influence is seen in the distinction between *ius* (law) and *aequitas* (equity), and in English common law in the attempt to incorporate the notion of the equitable mediation between legal rules and justice (J. Tasioulas, "Justice, equity and law", *Routledge Encyclopedia of Philosophy*, Routledge, London).

<sup>8</sup> I. Kant, *Metaphysics of Morals*, Introduction to the Science of Right, F. 1.

<sup>9</sup> In this context the "dictum of equity may be put thus: "The strictest right is the greatest wrong" (*summum jus summa injuria*) (ibid.).

<sup>10</sup> D.D. Raphael, *Concepts of Justice*, p. 46.

<sup>11</sup> Ibid., p. 47.

idea of equality to cover an *unequal* distribution in accordance with differences of worth, calling it ‘proportionate equality’ because the differences of benefit were ‘in proportion’ to the differences of worth”.<sup>12</sup> This means that not all inequalities are unjust. Such a conclusion follows also from the principle of formal justice which is traditionally attributed to Aristotle: Equals must be treated equally, and unequals must be treated unequally (in proportion to their relevant similarities and differences). Application of this principle to situations, when several individuals compete to achieve the same goal that cannot be achieved by all – such as university admission, for instance – is in fact nothing but the application of the principle of justice as equality of opportunities.<sup>13</sup> According to John Rawls, we should distinguish between formal and fair equality of opportunity. While formal equality of opportunity requires only that public offices and social positions be open to talents in the formal sense, fair equality of opportunity requires also “that all should have a fair chance to attain them. To specify the idea of a fair chance” Rawls says: “supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin”. One of the necessary conditions for accomplishing this aim is that society establishes “equal opportunities of education for all regardless of family income”.<sup>14</sup>

Fair equality of opportunity has in relation to formal equality of opportunity the same role as equity has in relation to legal justice. Equity *corrects* legal justice, and fair equality of opportunity corrects – as Rawls explicitly says – “the defects of formal equality of opportunity”.<sup>15</sup>

One way to correct them, important also for higher education, seems to be the introduction of *affirmative action* policies. Although they might be incompatible with Rawls’s principle of »fair equality of opportunity«, some authors claim that affirmative action can be “best understood as an attempt to promote *equality of opportunity* in a social context marked by pervasive inequalities, one in which many institutional criteria and practices work to impede a fair assessment of the capabilities of those who” belong to disadvantaged minorities.<sup>16</sup>

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<sup>12</sup> Ibid., pp.234-235.

<sup>13</sup> N. Bobbio, *Eguaglianza e libertà*, Einaudi, Torino 1999, pp. 24-25.

<sup>14</sup> J. Rawls, *Justice as Fairness. A Restatement*, Harvard University Press, Cambridge. Mass. 2001, p. 43-44.

<sup>15</sup> Ibid., p. 43.

<sup>16</sup> L.C. Harris and U. Narayan, “Affirmative action as Equilizing Opportunity”, in: H. LaFollette (ed.), *Ethics in Practice*, Blackwell, Oxford 2003, p. 451.

If so, why then do so many other authors claim that affirmative action is unfair? In this second part of my presentation I will try to take into consideration just the question of whether the policies of affirmative action in higher education are fair.

### **Is affirmative action in higher education fair?**

In many elite American universities, affirmative action programs are in force, which give preferential treatment to socially disadvantaged minorities in the competition for student places. Since these programs involve selection on the basis of race, affirmative action policies generate intense controversy. Opponents and defenders of affirmative action have used different arguments for and against preferential treatment of black and other ethnic minorities in university admissions.<sup>17</sup>

Now, I am going to present very briefly only some of those arguments that are directly related to the question as to whether or not affirmative action in higher education is fair. Opponents of affirmative action are strongly convinced that it is unfair. The reason: using race as a factor in university admission violates the rights of those white applicants who have not been accepted although they have achieved better scores in aptitude or admissions tests than some blacks who have been accepted because of their race. The essence of this argument is the claim that by accepting “blacks with lower test scores than those achieved by some whites who are excluded, affirmative action violates the right of applicants to be judged on the bases of merit”.<sup>18</sup>

Ronald Dworkin rejects this argument because of two reasons. Firstly, he argues “that what counts as merit cannot be determined in the abstract but depends on those qualities” of a particular person, which are supposed to be “relevant to the social purpose” that the university serves.<sup>19</sup> Therefore, according to Dworkin, no applicant has such a right that it would imply the corresponding obligation of a university to define either its mission or admission criteria in a way that awards “above all any particular set of qualities – whether academic skills or something else”.<sup>20</sup> Just the contrary, a university is, in his opinion, free to

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<sup>17</sup> Proponents of such university affirmative action policies give three main arguments for it: “correcting for bias in standardised tests, compensating for past wrongs, and promoting diversity” (M. J. Sandel, *Justice*, Allen Lane, London 2009, p. 169).

<sup>18</sup> M. J. Sandel, *Liberalism and the Limits of Justice*, Cambridge University Press, Cambridge 1998, p. 136.

<sup>19</sup> *Ibid.*, pp. 136-137.

<sup>20</sup> R. Dworkin, »Why Bakke has no case«, *New York Review of Books*, November 10, 1977. According to Dworkin, admission is not an honour bestowed to reward superior merit or virtue. Neither the student with high test scores nor the student who comes from a disadvantage minority groups morally deserves to be admitted.

“define its mission and set its admission standards”.<sup>21</sup> This freedom can be understood as an unavoidable part of university autonomy. Consequentially, admitted will be those applicants who meet the admission standards better than other applicants. Among these standards can be either only academic qualifications or also some other features such as race, nationality, athletic abilities and so on. It depends on the mission of a particular university. If promoting racial diversity in socially strategic professions (doctors, lawyers, etc.) is, for instance, a mission of one university, then race is an important admission standard. But if so, does this mean, asks Michael Sandel, that every university is totally free to define its mission and admission criteria? If it is, then what is wrong with the admission criteria which denied blacks admission to racially segregated universities in the USA not so long ago? <sup>22</sup> Another problem with this argument of Dworkin’s against the thesis that affirmative action violates the right of applicants to be judged on the bases of merit is a moral one. For, it allows using people as a means for achieving worthy social ends, and thus it seems to be in opposition to Kant’s second formulation of the categorical imperative which says that we must always treat persons as ends in themselves, and never only as a means to the ends of others.

The second reason why Dworkin rejects the previously mentioned argument against affirmative action which claims that it violates the right of applicants to be judged on the basis of merit, is his belief that affirmative action does not violate it. What rights, he asks, have been denied to white applicants who have not been admitted? There are at least two possible answers to his question. The first such right can be the right “not to be judged according to factors, such as race, that are beyond their control”. Dworkin points out that “this does not distinguish race as a criterion but applies equally to most standards typically used in university admissions, including intelligence. While it is true that persons do not choose their race”, he says, “it is also true that those who score low in aptitude or admission tests do not choose their levels of intelligence”. Dworkin admits that it is true that a white applicant with marginal test scores would be accepted if he were black. But in the next step Dworkin shows the weakness of this argument, by arguing that it is also true, and in exactly the same sense,

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Her admission is justified insofar as it contributes to the social purposes the university serves, not because it rewards the student for her merit or virtue, independently defined. Dworkin’s point is that justice in admission is not a matter of rewarding merit or virtue; we can know what counts as a fair way of allocating seats (...) only once the university defines its mission. The mission defines the relevant merits, not the other way around. His account of justice in university admission runs parallel to Rawls’s account of justice to income distribution: It is not a matter of moral desert” (M. J. Sandel, *Justice*, p. 174).

<sup>21</sup> R. Dworkin, »Why Bakke has no case«.

<sup>22</sup> M. J. Sandel, *Justice*, p. 175.

that he would be accepted, if he were more intelligent. Therefore, according to Dworkin, race is not, in his case, a different matter from these factors equally beyond his control.<sup>23</sup>

The second right that affirmative action can violate is “the right to be considered according to academic criteria alone”. As we have seen, Dworkin has already rejected the possibility that this right would be “the right to be considered according to academic criteria alone”, by pointing out that there is not such a right.<sup>24</sup>

At first glance these arguments seem to be persuasive, but the problem is, that despite this, they are not sufficient for rejecting the thesis that applicants have the right to be judged on the basis of merit; to be considered according to academic criteria alone; and not to be judged according to race. These rights are in fact recognized as basic human rights. The *Universal Declaration of Human Rights* and some other international documents clearly state that higher education must be equally accessible to all on the basis of merit and individual capacity.<sup>25</sup> In addition, interpretations of a “meritocratic” approach to educational fairness; understandings of educational injustice as *reproduction*, in Bourdieu’s sense; and some interpretations of justice as fair equality of opportunities, require that only people’s natural talents should affect their opportunities. For this reason they require that the impact of such factors as race, gender, nationality or social background, be neutralised as well. It seems that the prevalent understandings of equity in higher education, on the one hand, and the majority of university admission policies, on the other hand, are based on such interpretations. But does this mean, therefore, that affirmative action in higher education is unfair?

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<sup>23</sup> M. J. Sandel, *Liberalism and the Limits of Justice*, pp. 135-136. R. Dworkin 1977, p. 15.

<sup>24</sup> M. J. Sandel, *Justice*, pp. 173-174.

<sup>25</sup> “Higher education shall be equally accessible to all on the basis of merit” (the *Universal Declaration of Human Rights*, Article 26.1), “higher education shall be made equally accessible to all, on the basis of capacity” (the *International Covenant on Economic, Social and Cultural Rights*, Article 13.2c), the States Parties to this Convention shall “make higher education accessible to all on the basis of capacity by every appropriate means” (the *Convention on the Rights of the Child*, Article 28.1c), the States Parties to this Convention undertake “to formulate, develop and apply a national policy which ... will tend to promote equality of opportunity and of treatment in the matter of education, and ... make higher education equally accessible to all on the basis of individual capacity” (the *Convention on Discrimination in Education*, Article 4a). From the above indicated it is made evident that race should present neither an obstacle nor an advantage in the accessibility of higher education. If this proves to be the case, we are dealing with discrimination, which, within the context of the above-mentioned Convention includes “any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: a) of depriving any person or group of persons of access to education of any type or at any level; b) of limiting any person or group of persons to education of an inferior standard” (the *Convention on Discrimination in Education*, Article 1).