

JUSTICE IN EDUCATION: TWO EXAMPLES

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*Until recently, justice in education has not attracted much attention. However, social justice has been an exception for many years, above all in the Anglo-American philosophy of education. The main reason was the first publication of John Rawls' book *A Theory of Justice* (1971), which has significantly influenced not only political philosophy, but also the philosophy of education. According to Rawls, justice should be seen as the first virtue of social institutions, and should no longer be perceived only as a value to be weighed alongside the others (such as freedom, rights or the common good). It should, therefore, be seen as »the standard by which we assign weight to other values«.¹ If we accept Rawls' thesis, then justice should be the first virtue of educational institutions as well. However, the problem is knowing what the central issues of justice are. Different conceptions of justice provide different answers.*

In this paper, the author discusses two topics related to justice in education: educational assessment and punishment.

Key words: punishment, education, justice, evaluation

Just educational assessment

The application of the well-known classical Aristotelian principle of justice (i.e., equals must be treated equally, and unequals must be treated unequally) to educational assessment requires that all students being examined who are members of the same or equivalent school class and who demonstrate equal knowledge, learning achievement or whatever is defined as the object of assessment and grading get equal grades. If teachers violate this principle and give different grades to such students, then they assess them unjustly. Whether one student gets a higher or a lower grade than the others is not important here. In any case, one is given a different

¹ Kymlicka, W. »Introduction«, in: Kymlicka, W. (ed.), *Justice in Political Philosophy*, p. xii.

and thus unjust grade. It is unjust and morally unjustifiable also because the student who gets the grade does not deserve it.²

This formal rule of justice, therefore, requires that teachers must treat all students within the same school class equally. However, what does this mean? Firstly, this means that teachers must be impartial. Their impartiality requires that they ignore all differences between their students other than those of knowledge and achievement. Secondly, it means that they must use the same assessment criteria.³

If teachers apply the same criteria, the assessment criteria they use seem not to be important. However, such a conclusion leads to a paradoxical situation – assessment injustice can arise even though teachers use the same criteria when assessing students who belong to the same school class and they, therefore, assess them equally; and if equally, then – according to the rule of formal justice – also justly. Let us say that two teachers teaching the same school subject in two parallel classes in the same school use different assessment criteria. Students in both classes are assessed equally and, therefore, justly. However, on the school level, such assessment practice is – considering the same rule of formal justice – unjust, since students in similar classes are assessed unequally. Assessment practices in schools prove the existence of such assessment injustice not only on the level of schools but also on the national level, simply because teachers use different assessment criteria in different schools. Therefore, assessment justice within each individual class, which is understood as the assessment of all students in a particular class in accordance with the same criteria,⁴ does not prevent assessment injustice as such.⁵ If all teachers were to use exactly the same assessment criteria, such injustice would be eliminated. However, this is, at best, an ideal, which teachers should try to achieve, and not a reality.

² Students feel and describe assessment injustice as arbitrary grading. For them, both over-graded and under-graded knowledge or competence are comparable to revenge and unjustified punishment (Dubet, F. »Sentiments et jugements de justice dans l'expérience scolaire«, in: Meuret, D. (ed.), *La justice du système éducatif*, p. 181). Dearden also states that »Wrongly to assess a person is not simply to make a mistake but, particularly if he is under-rated, also to do him an injustice.« (Dearden, R. F. »The Assessment of Learning«, p. 115)

³ With respect to complex achievement there may be some disagreement over the criteria in terms of what counts, or – more likely – disagreement over the relative importance of the criteria. (ibid., p. 117)

⁴ This is not a sufficient, but only a necessary condition of assessment justice.

⁵ Therefore, in the case of assessment in education, justice as the virtue of teachers is not sufficient for ensuring just assessment. According to Rawls, just assessment also requires justice as the virtue of social institutions (schools, national systems of assessment in education).

Moreover, even if it were possible to make teachers use the same assessment criteria, some teachers would perhaps disagree with assessing students according to the same criteria, because they might believe that it would be unjust. For grade inequalities to be fully deserved, both knowledge and learning achievement inequalities must not be ascribed to students' family, economic and/or cultural backgrounds.

Let us suppose that the teachers of the schools attended by more or less disadvantaged students are persuaded, on the one hand, that their students know, on the average, less than the students of other, comparable schools, and that, on the other hand, the students' inferior knowledge and lower learning achievements are not the consequence of differences in individual abilities, talents and efforts exerted, but rather of the economic and cultural disadvantages under which the students live. In such circumstances – i.e., when students in different schools are not provided equal opportunities for education – such teachers might believe that it would be unjust to assess them using the same criteria, such as externally administrated standardised tests. Even if all standardised tests were unbiased and as fair as possible for the test takers of different races, genders, ethnic backgrounds or disabilities, the assessment system would not ensure that all students receive fair treatment, thus avoiding limiting the students' future educational opportunities. It is highly possible that students who do not have equal opportunities for education get lower grades in standardised tests. It is for this reason that their opportunity to enrol in prestigious secondary schools are restricted – not because of their possible lower intellectual abilities or lesser effort exerted, but as the result of other factors (bad social conditions and non-stimulating environment in which they live; the schools they attend are not as well equipped as other schools, and that is why they cannot offer the same opportunities for learning; the State does not provide disadvantaged students with compensatory education programmes and other forms of assistance, which could – at least in some part – reduce the unequal educational opportunities, etc.). Since such students are – through no choice of their own – disadvantaged compared to the students of other schools, their teachers may understand helping them as their duty, and could also believe that they have a moral obligation to mend this injustice and redress the balance between the advantaged and disadvantaged groups of students so far as they possibly can. It is obvious that they cannot eliminate externally administrated standardised or national tests, particularly if they are an integral part of the assessment system. However, in those assessment systems, such as the one in Slovenia, where the final grades

given at the end of obligatory schooling are composed of two equal proportions – one pertains to the results of the final external assessment, whereas the other proportion to the final grades given by the teachers themselves – they can try to improve the future educational opportunities and their students' chances in life by intentionally either over-grading their knowledge or using lower criteria in internal assessment. In this way, their students would get better grades in terms of internal assessment and, consequently, better final grades as well. This is decisive for the future educational opportunities of their students, since the doors of good secondary schools thus open for them.

Despite the arbitrary raise of grades – or the lowering of the assessment criteria – assessment on the level of schools is still just if teachers, when raising grades, do not make distinctions between students, and if all students get equally higher grades. However, this is unfair in relation to the students of other schools, in which teachers do not raise grades. What might, in fact, happen to the students of such schools is that they – in spite of their better knowledge – may not enrol in the school of their choice, since their final grade is lower than the final grade of the students whose internal grade was raised. The teachers' good intention to amend the injustice by either over-grading their students or by simply lowering the criteria of internal assessment might result in injustice on the national level. This poses a number of questions: Are the teachers' actions justifiable? Are they morally acceptable? There is no simple answer. According to utilitarian ethics – for which the only criteria of morality are (either the good or bad) consequences of action – the teachers' over-grading or lowering the assessment criteria is not only morally acceptable but also obligatory in the moral sense, provided that the consequences of such actions are better than the consequences of some other possible actions. However, the problem is that teachers cannot know in advance whether the consequences of their lowering the assessment criteria or over-grading are going to be better than the consequences of them not doing so. It becomes possible to prove whether their actions were morally justified or not only once all the positive and negative consequences are calculated. Yet, positive consequences can be achieved only on condition that not all teachers over-grade their students or lower the assessment criteria. If all teachers were to over-grade their students or lower the assessment criteria the effects of their actions would be worthless. Therefore, their subjective principle of assessment cannot be universalised without, at the same time, nullifying exactly the results to be attained in this particular way. Since it is impossible to consistently *will* that the teachers' subjective prin-

ciple of action be raised to universality – since this will would then contradict itself – lowering the assessment criteria or over-grading some students is, within the context of Kant’s ethics, morally unacceptable. Kant’s formulation of the Categorical Imperative as a universal law clearly states: »Act only on that maxim through which you can at the same time will that it should become a universal law.«⁶ Having defined maxims as »subjective principles of action«,⁷ Kant, therefore, »thinks that the maxims that we should act on are ones that could be universally acted on.«⁸ For this reason, it seems that the maxims that cannot consistently be willed as universal laws are, according to Onora O’Neill, »those that if acted on by some cannot then be acted on by others. If, for example, successful action on a maxim will *in principle* preclude others from successfully making that maxim the basis of their action, then the maxim is not universalisable.«⁹ Therefore, if »certain principles of action that can coherently be adopted by some cannot coherently be adopted by all«, then »justice, taken in the traditional, minimal, formal sense of like requirements for like cases, will then require that those principles be rejected.«¹⁰

In any case, either over-grading or lowering the assessment criteria in some schools in order to rectify social injustice – the victims of which are disadvantaged students – induces assessment injustice on either regional or national levels. Past wrongs done to disadvantaged students cannot be either rectified or settled by actuating a new form of injustice, regardless of the fact that schools must fight for social justice and tend both the vocational and personal needs of all students equally well and just those who enrol with comparative advantages.

Just punishment in education

According to the retributive theory, any punishment is just if and only if it is deserved. This means that punishment must be inflicted only

⁶ Kant. *Groundwork of the Metaphysics of Morals*, IV, 421. »We must be able to will that a maxim of our action should become a universal law – this is the general canon for all moral judgment of action. Some actions are so constituted that their maxim cannot even be *conceived* as a universal law of nature without contradiction, let alone be *willed* as what *ought* to become one. In the case of others we do not find this inner impossibility, but it is still impossible to *will* that their maxim should be raised to the universality of a law of nature, because such a will would contradict itself.« (ibid., 424)

⁷ Ibid., 421n.

⁸ O’Neill, O. *Constructions of Reason. Explorations of Kant’s Practical Philosophy*, p. 151.

⁹ Ibid., p. 156.

¹⁰ Ibid., p. 215.

in consequence of an offence committed. In other words, in consequence of a real and not merely a supposed offence committed deliberately by a real (and not merely a supposed) offender who is thereby responsible for what (s)he has done. On the other hand, however, to say that punishment is just only when it is deserved is not to say that deserved punishment is always just. It is always unjust when it is excessive, when a severe or even cruel punishment is inflicted for a minor offence. The opposite is also valid – punishment is always unjust when it is too mild in respect of the offence committed, i.e., when there is no proportionality between the offence committed and the punishment imposed. Therefore, any punishment is just only when it is deserved and, at the same time, not excessive and disproportionate to the offence committed.¹¹ This means that undeserved punishment is always unjust. And when is it undeserved? It »is undeserved if imposed on the innocent, or if the offence is not a real offence, or if the punishment is excessive«(McCloskey, 1962, p. 325). Since punishment of the innocent is not deserved (because an innocent person is, by definition, someone who has not committed a real offence) it is also unjust (because punishment is just only on condition that it is deserved). Punishment of the innocent is, therefore, always unjust.

However, as has already been mentioned, from the fact that undeserved punishment – within the framework of retributivism – is always unjust it does not follow that all deserved punishment is just. For deserved punishment to be just, it must, in respect of severity, be proportionate to the offence committed. Therefore, just punishment demands that the most severe punishments be inflicted for the most serious offences and that less severe punishments be inflicted for less serious offences. For this reason it is impossible to punish justly if punishment stands in accordance with the well-known principle of justice, which requires that equals be treated equally. For, if a just treatment is defined as the equal treatment

¹¹ The conditions of just punishment are examined in more detail by Primoratz in his book *Justifying Legal Punishment* (1997) and by McClosky in his article »The Complexity of the Concepts of Punishment« (1962). These conditions are similar yet not identical with the conditions which must be satisfied for any punishment to be a punishment. Flew's set of five conditions of punishment are perhaps the most well-known conditions: »(1) Punishment must involve an evil, unpleasantness to the victim. (2) It must be for an offence (actual or supposed). (3) It must be of an offender (actual or supposed). (4) It must be the work of personal agencies, not merely natural consequences of an action. (5) It must be imposed by authority (real or supposed) conferred by the system of rules against which the offence has been committed« (Flew, A. »The justification of Punishment«, pp. 291–307). These conditions are also accepted by Benn and Peters in their book *Social Principles and the Democratic State* (1959), who, however, added a sixth condition: »The unpleasantness must be an essential part of what is intended, and not merely incidental.« (McClosky, H. J. »The Complexity of the Concepts of Punishment«, p. 321)

of all those who are equal, then the behaviour of teachers or headmasters punishing all their students who committed the same minor offence with the same extreme severity is, in fact, just, although cruel (cf. Perelman, 1990, p. 182). Since proportionate punishment also means that offences of equal seriousness must be matched with punishments of equal severity, it seems unjust to inflict punishments of differing severity on students who committed offences of equal seriousness. »If two students both violate the same rule but one is given a more severe penalty, we would *presume* (knowing no more facts) that comparative injustice had been committed by the teacher. Unless some relevant difference between the two offenders or their offences could be brought to light by the teacher, we would treat the presumption as decisive« (Feinberg, 1991, p. 346). Such unequal punishment for the equal offence can, therefore, be just provided that there are one or more relevant differences between the students who committed the offence. Let us suppose that two students have both left school without permission; however, one has committed this offence for the first time, whereas the other has repeated it several times. In this case, inflicting a lighter penalty on the former offender and a heavier penalty on the latter is usually taken as just punishment on condition, of course, that other mitigating and aggravating circumstances are irrelevant for both students. Just punishment, thus, requires that mitigating or aggravating circumstances be considered. There is a widespread agreement that the infliction of equal punishment would be unjust in, for example, the following cases: two individual students use very abusive language and gestures in school, but one does it for fun, whereas the other because he is provoked by the victim of his/her foul language, or two individual students damage school property, but one does it involuntarily and out of negligence, whereas the other acts deliberately, etc. However, in the absence of any diverse mitigating or aggravating circumstances, justice demands equal punishment. This, of course, does not imply »that for every offence there is a punishment absolutely equal to it in severity, and that we ought to prescribe such punishment for each and every offence, once and for all.« If this was required, »we would soon reach the conclusion that it is impracticable and that, consequently, every or almost every punishment inflicted is unjust and unacceptable.« (Primoratz, 1997, p. 81; cf. Ewing, 1929, p. 39–40)

Within this context, the previously stated assertion that justice demands equal punishment of all students from the same class or school who committed the same offence or offences of comparable gravity (except when there exist different mitigating or aggravating circumstances) means that students who committed offences of »comparable gravity

should receive punishments of comparable severity.« (cf. Hirsh, 1990, pp. 259–290)

With respect to the retributive philosophical theory of just punishment, it is, therefore, clear that only the guilty students deserve punishment, and that this should be proportionate to the gravity of their offences. However, does this only mean that the innocent should not be punished and that excessive and disproportionate punishments of the guilty are forbidden, or does it also mean that guilty students ought to be punished as they deserve? Some authors, whose theoretical position lies between utilitarianism (consequentialism) and retributivism,¹² understand guilt as a necessary, but not a sufficient condition of just and justified punishment. For this reason, punishment of the innocent and excessive (i.e., disproportionately severe) punishment of the guilty is for them – as it is to strict retributivists – unjust, morally wrong and unacceptable. On the other hand, however, they also think that the offences committed do not impose the duty to punish those who committed them. Offences give only the right to punish the guilty and nothing more. Only when punishment is deserved and its consequences are beneficial, the sufficient conditions of punishment are fulfilled. Like traditional utilitarians, they maintain that punishment is not justified when its consequences are not good. If good consequences (or at least effective deterrent effects) can be achieved by inflicting lighter punishments than the retributive criterion of proportionality requires, disproportionately lenient punishments are justified. On the other hand, retributivists hold that disproportionately lenient punishment is unjust (because offenders do not get what they deserve

¹² They have attempted to bridge the gap between the utilitarian and retributive theory of punishment »which seem to be mutually opposed and even irreconcilable« (Primoratz, *Justifying Legal Punishment*, p. 112). Among those who »hold that the way leading to a satisfactory theory is the middle way, that the theory of punishment must be a synthetic one which would avoid the one-sidedness, exaggerations, and outright mistakes of both utilitarianism and retributivism, while incorporating the important insights contained in both«, Primoratz analyses the theories defended by A. M. Quinton, A. C. Ewing, rule-utilitarianists, R. M. Hare and H. L. A. Hart (ibid., pp. 111–143), whose definition of punishment has a number of times been also taken as a starting point of the discussion on the problem of punishment in education. Although these theories of punishment »have in common a willingness to find room for considerations of justice and desert, ... justice is [except in Hart's theory] never seen as a truly independent moral principle. It is either a mere logical appendix to utilitarian ethical theory (Quinton), or a means to a utilitarian end (Ewing), or a rule of an institution justified by its utility, and accordingly a rule predicated on its own utility (rule-utilitarianism, Hare's two-level theory)« (ibid., pp. 140–141). Justice understood in this way cannot rule out the possibility of unjust punishment, if the latter is expedient. Hart's theory, on the contrary, includes justice as an independent principle and »rule[s] out injustice in punishment such as disproportionately harsh penalties, punishment of the irresponsible, or 'punishment' of the innocent, ... but it would justify disproportionately lenient penalties.« (ibid., pp. 141–142)

in respect of the seriousness of the offences committed), and that the non-punishment of the guilty is unjustified (because they deserve to be punished). It follows that offenders should not only be punished justly, but also that they must be punished regardless of the deterrent, reforming or educative consequences. According to Kant, one of the most radical proponents of the retributive philosophy of punishment, »no infringement of school law must be allowed to remain unpunished« (Kant, 1987, p. 125). In fact, all »disobedience entails punishment« (ibid., p. 128). Since »all transgression of a command by a child is a lack of obedience, ... this entails punishment. Even if the transgression is due simply to negligence, punishment is not unnecessary« (ibid., p. 126–127). Moreover, Kant also stresses that, »the punishment must always fit the offence« (ibid., p. 125). According to Kant, no breach of school law and no lack of obedience must, therefore, stay unpunished; however, any punishment should always be in accordance with the seriousness of the offence committed. In this regard, punishment in education seems to be a simple application of Kant's theory of juridical punishment as explained in his *Metaphysics of Morals*. However, his *Reflections on Education* also contains the following significant statement: »As a general rule, punishment must be inflicted on children with great caution and in such a manner that they may understand that its only aim is their improvement« (ibid., p. 128). Since the only aim of punishment in education is the improvement of children, it is obvious that the reason for inflicting punishment in education differs radically from the reason for administering juridical punishment, which »can never be administered merely as a means of promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*« (Kant, 1966, p. 158).¹³ Thus, there is no doubt that Kant's principles of child punishment are, in this regard, in conflict with his juridical theory of punishment, which »pretends to exclude every utilitarian and also educative conception of punishment«, for, otherwise, children ought to be punished only because they have committed offences (Philonenko, 1987, p. 126). If juridical punishment were aimed at improving offenders – from the retributive point of view – they would have to be treated as immature, unfree and irresponsible beings who may legitimately be improved by »others in accordance with their no-

¹³ The importance of this distinction within Kant's theory of punishment is pointed out by Philonenko in his text »Kant et le probleme de l'éducation«, which serves as the »Introduction« to Kant's book *Réflexions sur l'éducation* (Philonenko, 1987, pp. 29, 126–127n. 124).

tions of what is good, desirable and socially acceptable« (Primoratz, 1997, p. 35). Such a conception of juridical punishment is unacceptable for retributivists, who see punishment »as a reaction that is fully determined ... by the free action of the offender, an action for which he is responsible and by which he has accordingly deserved to be punished« (ibid., p. 34).

However, if just and deserved punishment presupposes – as a necessary condition – that the offender is a human being who »decides and acts freely, and therefore bears responsibility for his decisions and actions« (ibid., p. 34), then the following crucial question arises: is this theory of punishment relevant to the problem of just punishment in education, or – more precisely – in school? At first sight, it seems that it is not because children, by virtue of their immaturity, cannot be held responsible for their actions. In this regard and with respect to Kant's previously mentioned distinction between juridical punishment and the punishment of children, the assertion that »more important than the justice of the punishment in education is its point or purpose« (McCloskey, 1962, p. 313) sounds reasonable. However, if justice is here understood as less important because in education it is insufficient for the moral justification of the punishment of children, does this also mean that punishment justice in education is only one value amongst many others, and not »the first virtue of social institutions«, which, »no matter how efficient and well-arranged must be reformed or abolished if they are unjust« (Rawls, 1999, p. 3)? An affirmative answer to this question seems to be disputable, for »if there is to be any general justification of the institution of punishment at all, then punishments must, as far as possible, be just and fair. If all punishments were unjust we would no longer be able to support the institution of punishment« (Marshall, 1975, p. 153).

On the other hand, however, the presupposition that the retributive theory of punishment is irrelevant to the question of the punishment of students in school – because children, by virtue of their immaturity, cannot be held responsible for their actions – is problematic, since this is not true of students who attend the final year, for example, of secondary school. The retributive theory of punishment, which treats offenders as rational, free and responsible persons, seems to be also applicable in various school situations.¹⁴ Final year secondary school students should, in

¹⁴ It is difficult to answer the question of when it is exactly that »children reach the stage when we can treat them fully as persons« because »there is no magical age at which a sudden transformation takes place« (Peters, R. S. 1980, p. 289). But if »it will only occur if children are treated progressively as if they are persons« (ibid., p. 289), then it seems that if students younger than those in their final year of secondary education are punished in school, they should also be progressively treated as if they are persons.

fact, be treated in the same way as any other adult – as a person. What does this mean within the context of punishment in school situations? This means that a student who is punished because (s)he has committed an offence, which had been the result of his/her free action and for which (s)he is held responsible, is punished because (s)he deserves it. And to treat him »according to his deserts is to relate to him as a responsible and free being. Freedom is a manifestation of rationality, thus, to recognise another's freedom is to recognise him as a rational being. Freedom and rationality pertain to persons. Accordingly, when an offender is punished because he has committed an offence, he is being recognised as a person, and respect is shown to that which is distinctively human in him, that which gives him the dignity that sets him apart from all other beings – his freedom and rationality« (Primoratz, 1997, p. 79). Therefore, according to the retributive theory of punishment, when students are punished, they are also being treated as persons. They are treated as free beings responsible for their actions. Punishment that »recognises and, indeed, affirms the personhood of the person punished« and that »treats the person as a subject to whom justice is due« can be, as Kleinig emphasises, »viewed as compatible with the ends of education« (Kleinig, 1982, p. 239). The contrary, however, i.e. unjust punishment – such as the punishment of innocent students and collective punishment of the whole class when a certain number of students are innocent – should not be recognised as compatible with the ends of education, even if the achieved deterrent or other effects are outstanding. To punish innocent students in order to secure discipline or for some other valuable educational purpose would mean to treat such students merely as a means to such ends and not as ends in themselves. Since any such punishment is the very opposite of the categorical imperative, it is thereby also morally unacceptable within the context of Kant's deontological ethics.

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PRAVDA U ODGOJU: DVA PRIMJERA

Zdenko Kodelja

*Do nedavno, pravda u odgoju nije privlačila mnogo pozornosti. Ipak kroz dulje vrijeme izuzetak je bila, naročito u Anglo-Američkoj filozofiji odgoja, društvena pravda. Glavni je razlog bio objavljivanje knjige Johna Rawlsa *A Theory of Justice* (1971.), koja je imala snažan utjecaj ne samo na političku filozofiju nego i na filozofiju odgoja. Prema Rawlsu, na pravdu treba gledati kao na prvu vrlinu društvenih ustanova a ne samo kao vrijednost pored drugih (takvih kao sloboda, prava, ili opće dobro). Dosljedno tome treba vidjeti »standard kojim mi određujemo težinu drugim vrijednostima«. Ako mi prihvatimo Rawlsovu postavku, tada pravda kao takva treba biti prva vrlina odgojnih ustanova. Ali problem je: kako znati koja su centralna pitanja pravde. Različite koncepcije pravde daju nam različite odgovore. U ovom članku ja ću raspravljati, ukratko, dvije stvari vezane za pravdu u odgoju: odgojno vrednovanje i kažnjavanje.*

Ključne riječi: kažnjavanje, odgoj, pravda, vrednovanje