JUSTICE | FAIRNESS

GENERAL INTRODUCTION EU LAW AND BEYOND

Dr. Markus Frischhut, LL.M.

JUSTICE | FAIRNESS

1. Example
2. Terminology and further details
3. Similar questions in different fields

GUIDING QUESTIONS

- ❑ What is the relationship of law and justice?
- ❑ Is there a definition of fairness, respectively justice?
- ❑ What is fairness and is it different from justice?
- ❑ What is the difference between non-discrimination and equality?
- ❑ What is positive discrimination?

Equal justice under law

US Supreme Court, Washington D.C.
(Picture credit: Frischhut)

Example

Consider the following example: There are three children and suppose, you only have one (!) flute to give to one of them. Which child should receive the one and only flute?

- Anne, because she knows how to play the flute

- Bob, because he is the only child who has no toy on his own yet

- Carla, because she has produced the flute

Source: Hinsch, 2013, pp. 32-33

Example | answers

Consider the following example: There are three children and suppose, you only have one (!) flute to give to one of them. Which child should receive the one and only flute?

- Anne: according to **Aristotle** she should be given the flute, because the flute would presumably contribute most to the further development and exercise of human faculties

- **Utilitarian** philosophers would in this case agree, because Anne's beautiful play will increase overall happiness

- Bob: **egalitarian** approach (idea of equality for everybody)

- Carla: can claim the instrument either as a just desert or else in the name of a **libertarian** conception of **just acquisition** and possession
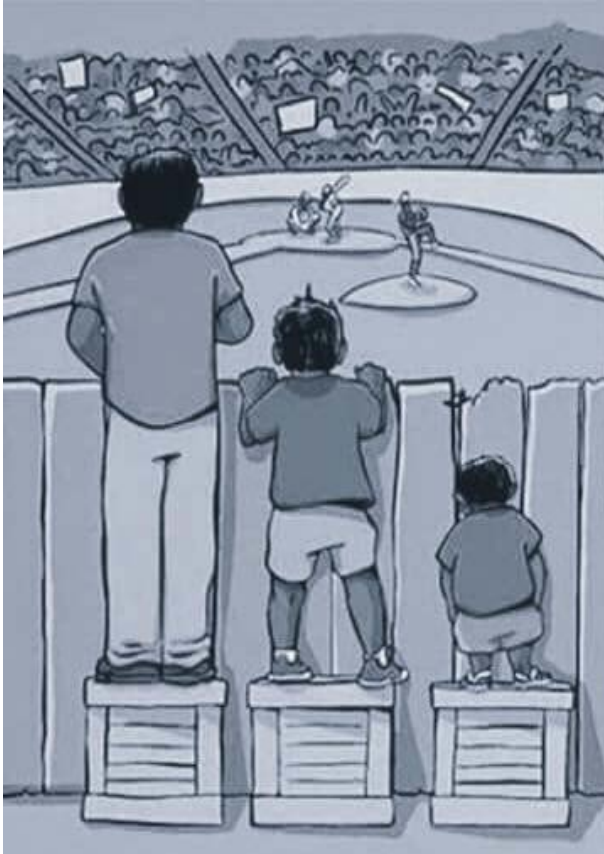
Source: Hinsch, 2013, pp. 32-33

Further details

- **Justice as virtue**: not due to external pressure (e.g. fear of punishment), but due to internal attitude / ethos (Luf, 2014, p. 83)

- **Justice as normative principle**, which regulates the living together of humans; non-discrimination as an important element (Luf, 2014, p. 84)

- **Iustitia distributiva:** in vertical situations (Luf, 2014, pp. 86f)
  - Distribution not in an arbitrary way, but according to objective principles
  - Important: uniform application of these principles
  - Either according to egalitarian (in case of fundamental needs) or proportional (in case of merits) aspects

- **Iustitia commutativa:** in horizontal situations (Luf, 2014, p. 87)
  - Fair balance of effort and consideration according to a principle of equivalence (e.g. when trading a good)

- **Procedural justice** (Luf, 2014, pp. 87f)
  - Rules on conflicts of interest, 'audiatur et altera pars', 'in dubio pro reo'
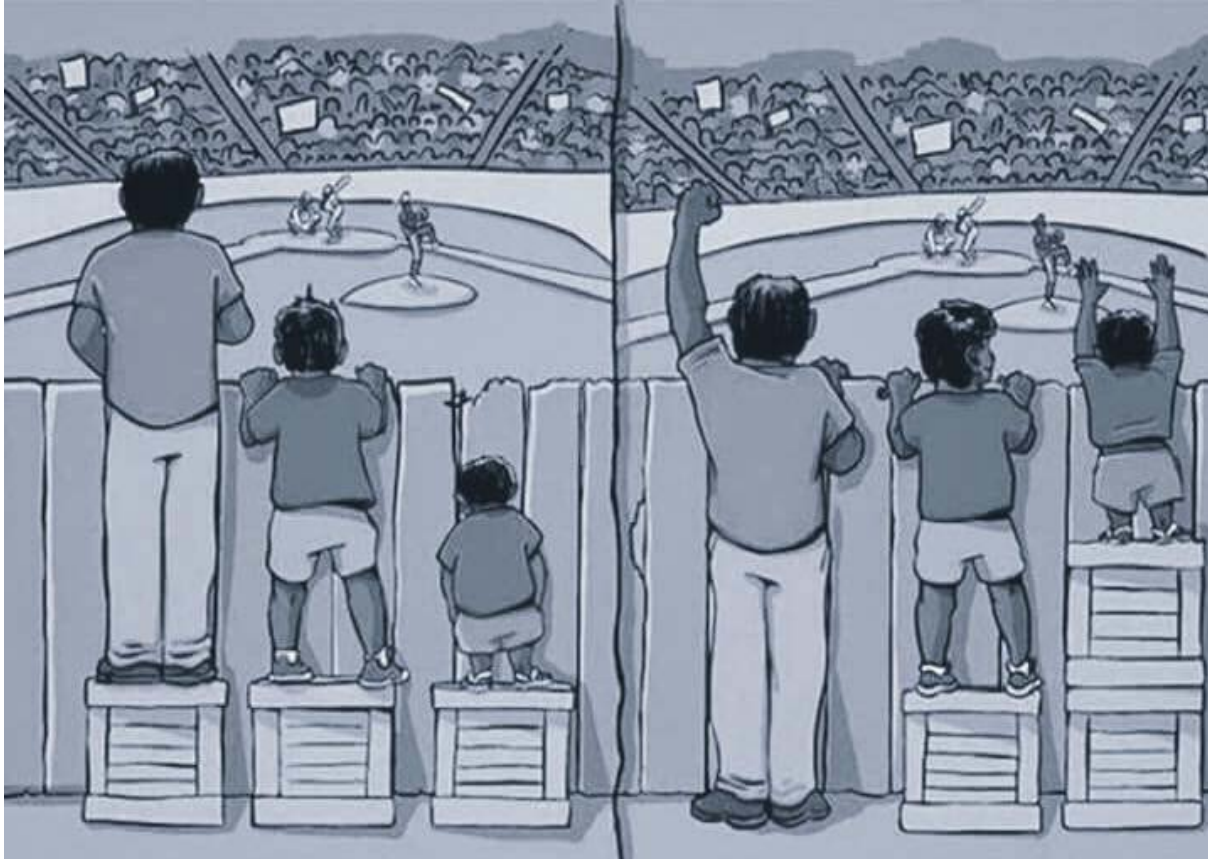 - Rawls example of the cake | discourse ethics (*Habermas*)

Discrimination?

- Not an issue of discrimination.
- Maybe they brought those boxes themselves.

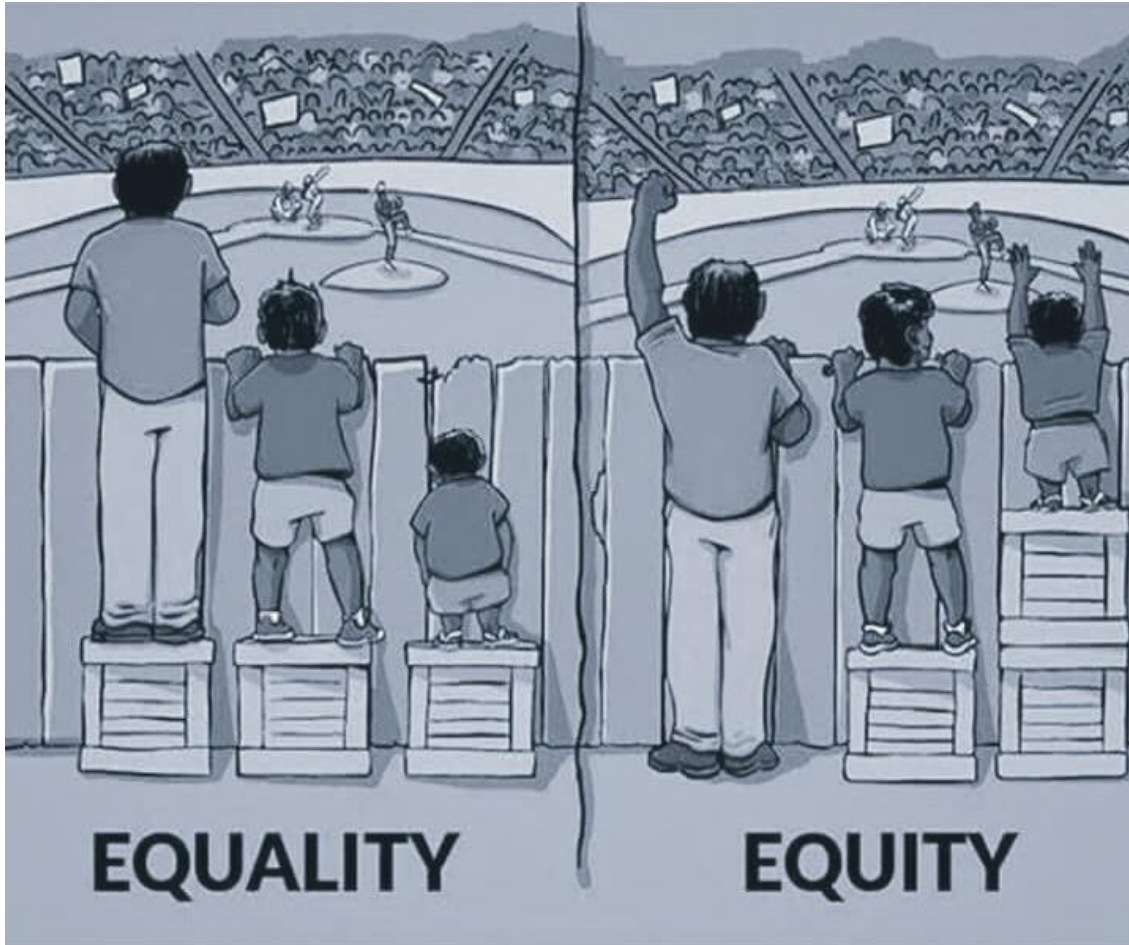# Positive discrimination

Positive discrimination

– Idea of 'affirmative action'.

Further details

- **Equality**

  - Related to fair (*see below*) treatment

  - To treat people in a **similar way**, not making differences based on prejudices or artificial limitations

  - Often **defined in a negative way** as 'non-discrimination' (as a legal term)

  - **Exception** to this principle (of non-discrimination): certain distinctions might be justifiable

- **Equity**

  - "Equity **fills the gap** between legal justice and absolute justice. The content of equity consists of those judgments required to reconcile the former with the latter." (Beever, 2004, p. 35)

  - "Equity […] is not justice itself but the **part of morality** that corrects the deficiencies of legal justice." (Beever, 2004, p. 35)

  - Today exists in terms of 'fair discretion' (*billiges Ermessen*), 'good faith' (*Treu und Glauben*), good morals (*gute Sitten*) (Luf, 2014, p. 89)

  - Equity can often be found in common law (e.g. England)

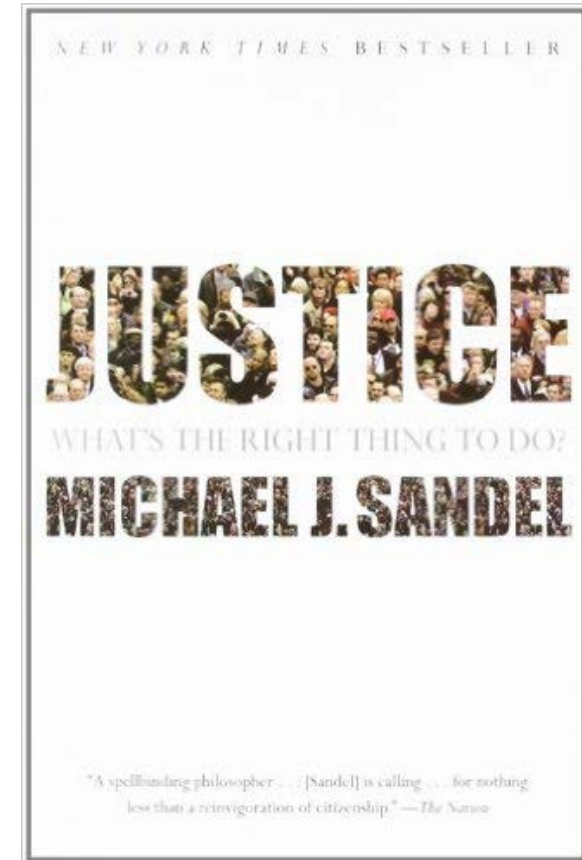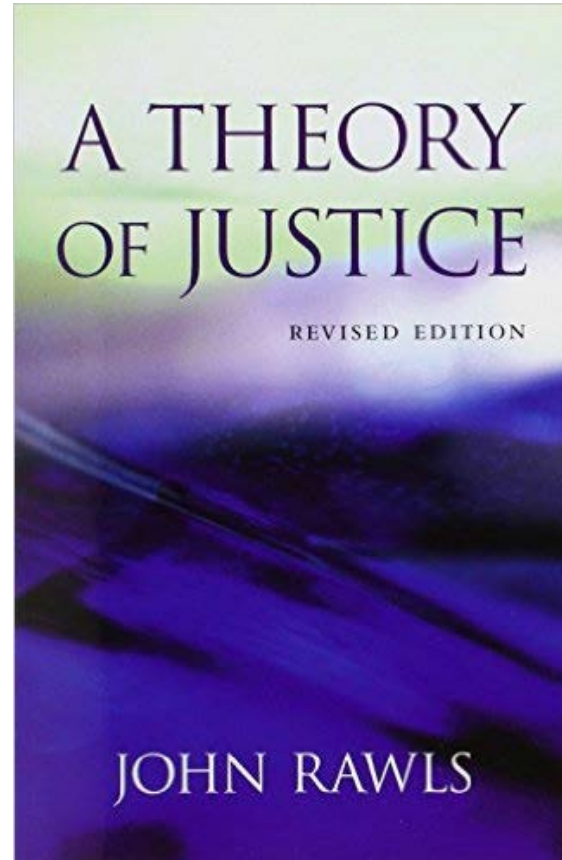# Further details

- ## Justice

  - To be found in **different disciplines**: philosophy (social justice), justice in religion / theology, justice in law

  - **Distributive** justice (how to distribute certain scarce resources or benefits) and **retributive** justice (punishment for wrongdoing)
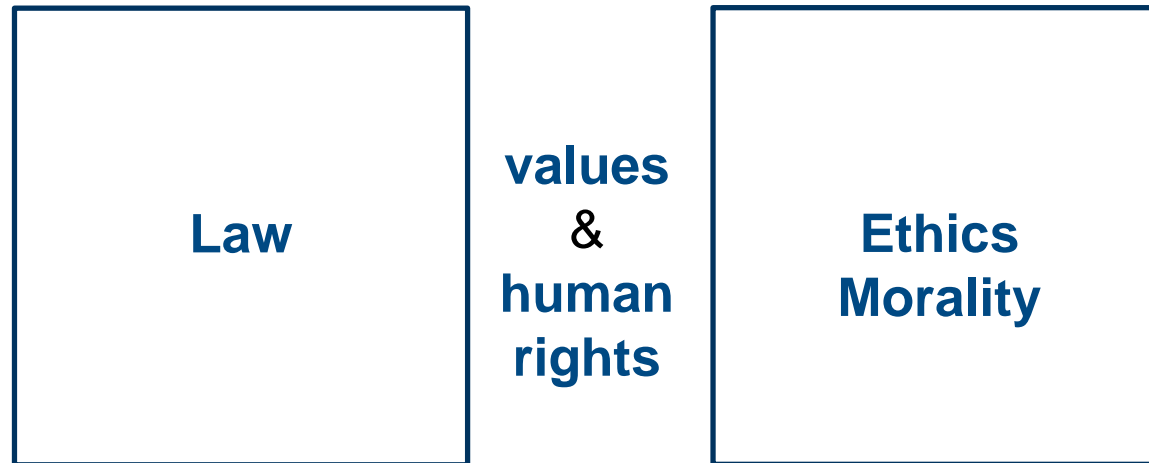
- ## Fairness

  - "A **moral principle** used to judge procedures for distributing benefits and burdens among parties." (Morelli, 2002, p. 301)

  - Often used as a **synonym of justice**; however, the term 'unjust' carries "a stronger tone of condemnation" than 'unfair' (Morelli, 2002, p. 301)

Further reading

Similar questions in different fields

Law	values & human rights	Ethics Morality

Article 2 TEU
The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, **justice**, solidarity and equality between women and men prevail.

Source: Frischhut, 2019

Literature mentioned on slides

- Beever, A. (2004). Aristotle on Equity, Law, and Justice. *Legal Theory*, *10*(1), 33–50.
- Frischhut, M. (2019). *The Ethical Spirit of EU Law*. Springer International Publishing.
- Hinsch, W. (2013). Legitimacy: Where Justice Meets the Law. In S. Vöneky, B. Beylage-Haarmann, A. Höfelmeier, & A.-K. Hübler (Eds.), *Ethik und Recht - Ethics and Law: Die Ethisierung des Rechts - The Ethicalization of Law* (pp. 17–40). Springer.
- Luf, G. (2014). *Grundfragen der Rechtsphilosophie und Rechtsethik: Einführung in die Rechtswissenschaften und ihre Methoden - Teil III*. Studienjahr 2014/15. Manz.
- Morelli, M. F. (2002). Fairness. In J. K. Roth (Ed.), *International encyclopedia of ethics* (pp. 301–302). Fitzroy Dearborn.
- Rawls, J. (1999). *A theory of justice* (Rev. ed.). Belknap Press of Harvard University Press.
- Sandel, M. J. (2010). *Justice: What's the right thing to do?* Farrar, Straus and Giroux.

❑ What is the relationship of law and justice?
  ✓ Law might be perceived to be 'just' or 'fair', but there can also be gaps.

❑ Is there a definition of fairness, respectively justice?
  ✓ As we have seen from the 'flute example', there are different approaches.
  ✓ See also the two books of Rawls (1999) and Sandel (2010).

❑ What is fairness and is it different from justice?
  ✓ Most of the time used in a synonymous way; however, sometimes justice has a stronger connotation.

❑ What is the difference between non-discrimination and equality?
  ✓ Often seen as two sides of the same coin.

❑ What is positive discrimination?
  ✓ Sometimes also called 'affirmative action'.
  ✓ Can be seen as a active support for an under-privileged group, to raise their situation to the same level as the privileged group.