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Second-order Impartiality and Public Sphere

Abstract In the first part of the text the distinction between first- and second-order impartiality, along with Brian Barry's thorough elaboration of their characteristics and the differences between them, is examined. While the former impartiality is related to non-favoring fellow-persons in everyday occasions, the latter is manifested in the institutional structure of society and its political and public morality. In the second part of the article, the concept of public impartiality is introduced through analysis of two examples. In the first example, a Caledonian Club with its exclusive membership is considered as a form of association which is partial, but nevertheless morally acceptable. In the second example, the so-called Heinz dilemma has been reconsidered and the author points to some flaws in Barry's interpretation, arguing that Heinz's right of giving advantage to his wife's life over property rights can be recognized through mitigating circumstances, and this partiality can be appreciated in the public sphere. Thus, public impartiality imposes limits to the restrictiveness and rigidity of political impartiality implied in second-order morality.

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1. Introduction

The initial stance of modern ethical theories is that local morality, or ethical relations between mutually close persons does not cover the entire span of moral assessments and duties at all.¹ Moreover, overcoming the ethics of interpersonal relations, that is, traditional ethical particularism which determines obligations through the social roles of persons becomes a challenge: morality should include relations which do not belong to the face-to-face category, and thus include both relations towards distant persons in a public sphere as well as relations to strangers and those with whom we have nothing in common but humanity. It cannot be reflected in how people should act only from the context of mutual relations in a family, neighborhood or among friends. These interpersonal relationships include both the justified and unjustified partiality which people display towards each other and persons have the acknowledgment of the rights of giving priority to members of their family, friends, neighbours or colleagues in

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certain situations. On the other hand, it is argued that the public sphere should contain objectivity, equal treatment and non-favoring any person or group and thus any form of partiality or discrimination on a certain basis is morally dubious to say the least.² Moral dubiousness, but not proscription is mentioned because forcing impartiality (as well as narrowing its scope to the level of political relationships) is often problematic: does a society, state or public have legitimate authority to impose an institutional moderation for relations between members of a club, to determine ethical boundaries of freedom of association and regulate inclusion or exclusion of membership or to, for example, leave relations between an employer and employee in the sphere of personal preferences, mutual consent and direct agreement?

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In political philosophy, when examining public and political impartiality, the almost inevitable point of reference is distinction between first-order and second-order impartiality, elaborated by Brian Barry, primarily in his book *Justice as Impartiality*. This distinction will serve as the basis for consideration of questions of impartiality in the public sphere. Therefore, the first part of this article contains an exposition of certain of Barry's important standpoints, that is, the theory of justice as the second-order impartiality, while the second part of the article problematizes and further examines relations of such impartiality and the public sphere.

Polemics between advocates of impartiality and its critics had been amongst the most vibrant in ethics over the past few decades, where, roughly speaking, on one hand there are defenders of various consequentialist and deontological ethical conceptions, while on the other hand there are philosophers such as Bernard Williams, Cottingham and Scheffler,³ who claim that morality must take into account the specific role of subjects and their relationships – according to this conception, in certain circumstances, such as when people depend on us, impartiality towards personal projects or fellow persons is morally unjustifiable. Some utilitarian-consequentialist and Kantian-deontological ethics argue that the good of each individual is equally valuable and that moral obligations with their bindings are not determined by a subject's personal interconnections and his/her relationships with others, thus it is not morally valid to favor any person no matter how strong our affiliation to the person is. Justice is one and it is uniform: if a stranger suffers a greater injustice than I do or a member of my family, I

2 On this occasion, we will set aside political impartiality which should be restrictive regarding any partiality at least when it comes to the relation of institutions towards the citizens, and thus it is considered that institutions, although they prioritize citizens' rights and interests, have "negative" duties towards non-citizens, such as fulfilling basic moral considerations and not causing harm.

3 Cf. Williams 1981; Cottingham 1984; Scheffler 2010.

have to, due to justice, endeavor to correct the injustice to this person regardless of my own needs or the demands of my fellows. Unlike 'conventional' morality, universal morality determines rights and duties which are in force no matter which context we are speaking about, and in this case general duties cannot be affected by heteronomous and particularist motives, instead they should have priority in relation to particular obligations stemming from previous connections and affections.

On the other hand, those who advocate moral impartiality claim that there are ethical reasons why it is justifiable that an individual leans towards certain people with whom he/she has a special relationship. Parenthood, friendship, coworkers' relations, neighborhood, etc. carry a legitimate right as well as the obligation of a biased behavior. Moreover, these are paradigm cases of actions when there is an obligation of partiality: we have a duty to take care of our parents or children, and not of those of others, we have a strong duty to help a friend, but not a distant stranger. Characteristics and intensity depend on the type of relationship with another person, and since the specific nature of relationship brings a specific partiality, it can be claimed that there cannot be a general pattern of partiality – just like connections, affiliations and commitments are specific, partialities have their *sui generis* characteristics too. Relations such as friendship, parenthood, coworkers' relations, club membership, as well as relationships between persons sharing the same nationality, religion or ethnicity can however be compared with one another and in this way there can be acquired a conception of properties and limits of legitimacy of partiality, but each of these relationships requires a special justification. For example, paternalism is an inseparable part of raising a child, but not of relations between coworkers, thus it would be inappropriate for a boss to have the right of examining social lives of employees. We do not have the same obligations towards distant people of our nationality (presuming that we have it), as we do towards our friends.

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2. Two Levels of Impartiality

Still, in its extreme either-or form, neither morality of partiality nor morality of impartiality are common, that is, both philosophical analysis and everyday moral judgment most often justify partiality or impartiality depending on the domain and context, supposing that partiality in some way must be incorporated in general moral demands, that is, that morality has shortcomings if it eliminates agent-oriented demands. Barry rejects substantial moral universalism as well as its criticism by such as communitarianism, ethical particularism and ethics of care and the following paragraphs will tell more about his solution which leads onto the distinction between the first-order and second-order impartiality.

The source of a persistent conflict between morality based on impartiality and ethical demands resulting from special connections is found, according to Barry, in the confusion of various moral domains, levels or spheres, where there are different types of partiality and impartiality. More precisely, the first-order impartiality is expressed in the sphere of everyday interaction, that is, in interpersonal relationships. Barry states that morality in this sphere implies actions which incorporate the impartial norms in the form of moral recommendations – utilitarianism and deontological theories are such conceptions of the first-order, since they directly set and validate norms and proscribe the scope and limits of the behavior of the individual. Therefore, being impartial in this sense means not being motivated by personal reasons nor personal motives, hence a person would refer to demands of other people in the same way as to his/her very own demands or those of his/her close friends or family. It is legitimate for an individual to take care of their own children and not the children of others, but in case where a person is selected to be a judge in a competition in which his/her child is participating, then the person is expected to be impartial. Also, it would be rather morally appalling if a parent should favor one of his/her children over the another, even if the parent has a better relationship with the first child or if they have more in common. In certain contexts, motives resulting from affection can be a justification when it comes to one's own children and not children of others', but not when it comes to unequal treatment of one's own children.

Second-order impartiality operates on a different level – it could be said that it covers rules, principles and institutions which refer to first-order impartiality. While the first-order morality gives directions regarding how a person should act, second-order morality answers the question of what the meaning of morality itself is. Or: within first-order morality we ask what kind of friends we should choose, whereas within second-order morality we ask the question of how the practice of free non-imposed choice of friends should be justified, that is, it refers to a set of rules or norms necessary for individuals or groups to have the possibility of choice. We have to seek for a justification of our practices in terms accessible to all, which leads us towards second-order morality.⁴ While in personal relations partiality, as well as impartiality are legitimate depending on the context, second-order impartiality is crucial for the political sphere because it is assumed that unbiased treatment, which does not favor anyone regardless of social status, gender, race, ethnicity or cultural and confessional belonging, is in fact the first characteristic of justice. When led by impartiality, the principles of justice cover rules which enable societies to avoid violent conflicts, since well-formed principles of justice imply that no one has a reasonable

4 Barry 1998: 255.

objection regarding him/her being treated with bias, that they are discriminated against or that they suffer unequal treatment.

Problems occur if, within substantial ethical theories (which Rawls calls comprehensive) such as certain abovementioned consequentialist and deontological theories, there is a tendency to constitute the universal first-order impartiality which would be judgmental towards partial behavior in relation to fellow persons in every context.⁵ Such universal impartiality is an easy target for critics of moral impartiality, but there is still the question of whether they hit that target, because most consequentialist and deontological conceptions endeavor to justify partiality from their own positions, that is, to formulate basic principles which would allow it. For example, a more complex utilitarianism assumes that it is extremely valuable, or that it create a significant good, if an individual has a right to prioritize his/her projects, their personal relationships or freedom to form ethical conceptions, as well as that the state in which this right is respected is more valuable than the one where such rights do not exist.⁶

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Barry still doubts that utilitarian or Kantian perspectives may properly formulate the principles of second-order impartiality, agreeing with Rawls' stance that adequate formulation requires a conception of justice which is not based on a substantial or comprehensive conception of good. Contractualist theories, such as Rawls' and Scanlon's, which Barry quotes, should be considered as second-order constructs which describe actions of justification and rational constituting of principles which are at the level of

5 Scheffler and Nagel make this mistake as well, because they emphasize the importance of ethical partiality and reject impartiality assuming that the entire impartiality is the first-order impartiality (Barry 1995: 247). In Barry's conception of two level moral theory one level is not opposing the other as a critical instance revising ordinary or substantive moral reasons, as it is claimed in Hare's two-level moral theory. (Hare 1981) When it comes to similarity with Frankfurt's distinction between first and second order desire, Frankfurt argue that I and others have the "capacity for reflective self-evaluation", which is the predisposition of having second-order desire (Frankfurt 1971: 7), as well as the existence of second-order impartiality. However, Frankfurt's analysis refers to the level of individual ethical action, while Barry has in mind the forming of principles which regulate life with others. Barry's concepts of first- and second-order impartiality owe a lot to Rawls' distinction between justification of individual acts and justification of the very moral practice (whereas these justifications are not interchangeable) which he mentions in "Two Concepts of Rules". For example, if in a utilitarian moral theory we do not differentiate morality of first and second order, it could lead to a the conclusion that persons have the liberty to judge every particular act according to a general utilitarian position. In that case, people have the rights to break a promise when breaking it leads to a greater good. (Rawls 1955: 18)

6 Cf. Arneson (1998: 81): „So if individual discretion is highly productive of good consequences, a society ruled by concern to maximize good consequences will make ample room for individual discretion.“

the first-order complex and conflicting. Even though Barry's position is unspecific regarding whether the principles of justice are mediators or a balance when it comes to conflicting conceptions of good and whether as such they should be neutral regarding their content, that is, whether they are concerned with neutrality between conceptions of good or with the impartial right for their advocacy,⁷ it is important that the principles of second-order impartiality are formed in a manner which avoids irrevocable conflicts which, among others, occur if there is one conception of good that is promulgated as binding for a society as a whole.⁸

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Unlike the conception of justice as impartiality based on the independence of principles of justice from visions of the good life, substantial or comprehensive ethical conceptions presuppose the existence of the integrated set of principles of first and second order. Utilitarianism can thus continue to apply utilitarian moral principles on the justification of institutional order. According to contractualist theories, utilitarianism, as well as some similar conceptions, such as the explanation of justice as the mutual advantage that individuals acquire when they accept and hold on to certain principles, are insufficient at explaining principles of second order. Rawls argues mutual advantage principles are considered to be *modus vivendi* principles which, when applied to the basic structure of society, lead towards the state in which every interested group tends to change the principles of justice for their own interests in a situation that is different from the original where they were formed and accepted. Let us imagine that a certain institutional arrangement establishes the creation of citizens of the first and second order in accordance with criterion of ethnicity. This arrangement openly disagrees with justice as impartiality and – in line with the Scanlonian thesis on the unacceptability of principles of justice if certain individuals or groups have got a justifiable reason for their rejection – we can assume that members of some groups will not accept to be discriminated against and tend either to (eventually) separate themselves from the institutional frame, or to change the given principles setting up the definition of equality of persons. In the case of imposing a special status, the principles of impartiality are better means of establishing civil equality than principles which are justified on the basis of mutual advantage: the latter leads to an unstable coalition between ethnic groups, which is undermined when one group estimates that by abolishing of coalition and resorting to violent means can achieve a more favorable situation.⁹ Impartiality integrates the

7 Barry 1995: 12, 29-30, 76. Cf. Sládeček 2016.

8 Barry asks: Is there a conception of good which would deserve collective pursuit, which no reasonable subject could reasonably reject? He concludes that no positive or first-level conception of the good could pass this test, thus no one can expect special advantage for their own conception of good. (Barry 1998: 234; 1995: 160)

9 Barry 1995: 114.

moral aspect with the political one, unlike the other key theoretic concepts such as overall utility, balance and stability, which provides feasible social cooperation and coordination on closely equal terms for all, but they do not ensure the satisfying moral justification.¹⁰

Second-order impartiality assumes that there is agreement around the principle of discretionary right (that is, that there is no reasonable rejection of these principles) within which partiality is justified. Just as they demand their rights, persons accept the right of others to follow their own projects, independently raise their own children, decide who their friends are going to be and, most important for public impartiality, to form associations based on principles and criteria which they autonomously choose, and to individually or collectively follow their own conceptions of the good. Second-order impartiality does not provide instructions on how people should live, instead it tells us how to live along with other people: it provides a framework of this co-living, a certain set of norms, rights and duties which prohibit certain things, allow others, and leave some to the discretionary rights of each person. According to Scanlon's test which Barry often quotes, people would reasonably reject any principles of justice which includes significant violations of right to discretion in person's own affairs and interests.¹¹

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It should be noticed that this conception draws a lot from Rawls' theory of justice as fairness.¹² In this theory, the impartiality does not refer to certain specific moral cases, but to the 'basic structure of a society'. This is a political and, in a wider sense than that, public impartiality: it does not refer to the ethical principles of the actions of individuals in a private domain, instead it is applied to the norms of actions of institutions, or moral norms of justice necessary for a social cooperation of individuals and groups. Apart from assessing moral justification of a legal and economic order, it also regulates the coexistence of individuals and groups which mutually differ based on race,

10 One of those concepts is agreement, which stems from utility and mutual advantage through following rational self-interest. Agreement enables stability, but the stability can be supported with bad moral reasons. (cf. Nielsen 1994: 515-516.) In some situations where unequal bargain power is sustained, for individuals cooperation with the stronger, with those who degrade them and exploit their weakness, is rational if non-cooperation leads to their comparatively worse position. For the sake of stability, or to maintain civil peace and order, individuals can hand a significant portion of their facilities or a portion of their time to other people, and in that way be on the brink of slavery.

11 Cf. Scanlon 1998: 153; Barry 1995: 192, 200.

12 Barry agrees, too: „And finally, I point out that Rawls's theory of justice is (like mine) a two-level theory that requires impartiality only at the point at which principles are to be chosen.” (Barry 1998: 246) Just like in Rawls's case of fairness, impartiality is a condition for political morality which should be publicly approved: „Impartiality is here /among supporters of impartiality/ seen as a test to be applied to the moral and legal rules of a society; one which asks about their acceptability among free and equal people.” (Barry 1995: 194.)

religion, ethnicity, culture, etc. while at the same time it assesses whether individuals or groups display justifiable or unjustifiable partiality. What appears beyond its reach is the individual way of living and life projects, as well as ethical character of friendship, family relations, relations within religious communities and similar (of course, except where the internal relationships, such as oppression and exploitation, are morally unacceptable in a general sense). Due to the fact they ensures equal discretionary right for all individuals to follow freely selected reasonable conceptions of the good, principles of public impartiality are incompatible with endeavor to impose certain ethical or religious conceptions as dominant and mandatory for all members of the society.¹³

3. Public Sphere and Partiality: Two Examples

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Inadequately determined limits of principles of second-order impartiality in the public sphere would cause a situation where they would regulate either too much or too little – in the first case it would jeopardize freedom of association and the right to follow conception of the good, whereas in the second case when scope of impartiality is too limited, such as in libertarian political morality, it would tolerate relations of dominance in family relations or relations between employers and employees, insisting on the public or institutions not having any right to influence relations between family members or business associates.

As has been said, justification of partiality and impartiality varies depending on the circumstances and characteristics of associative relationships. Some cases, such as choice of friends, parental care and criteria of club membership are examples in which individual, couple or group have thier discretionary right to favoritism. Moreover, the imposition of universal impartiality on the first two cases would be immoral, as it would jeopardize not only autonomy and freedom of choice, but also the human need to trust and rely on somebody, and also would lead to neglecting the significant needs of children. In the third case freedom to assemble, or person's

13 Rawls claims that citizens who are supposed to choose the principles of justice have a burden of judgments emerging from the fact of pluralism, that is, from the existence of non-identical but still reasonable conceptions of the good, the variety of which results in part from the distinct perspectives of citizens. (Rawls 1993: 58) Barry also emphasizes equal representation of interests which should be examined in order to determine whether the actual societies approximate to the “circumstances of impartiality”. Societies which articulate the interests of all relevant groups are closer to circumstances of impartiality than those where these interests are suppressed. This does not refer only to groups determined by identity such as ethnicity, gender or race: the society where business is well organized, whereas unions are weak is farther from circumstances of impartiality than those where the interests of employers and employees are on an equal footing. (cf. Barry 1989: 347-348.)

right to form associations on condition chosen by herself and voluntarily join a partnership or union which she considers valuable will be infringed.

However, the state and all its institutions, such as the judiciary and bureaucracy, are obliged to act neutrally and not give advantage to any individual or group. Non-discrimination should be mandatory in restaurants, shops, theatres, schools (although it is debatable if public schools funded by confessional organizations are neutral, in as much as they implement religious agendas). Formally speaking, the non-discriminatory character of association can be regarded as a prerequisite for licencing and recognition as a public association.¹⁴ However, some association, such as clubs, which are legally allowed in certain western liberal-democratic states, set special requirements as conditions for the membership, such as ethnocultural background, and therefore it is disputable whether and in which way second-order morality can tolerate the exclusivity of the membership of this kind.

One of the clubs in which the question of public impartiality and its limits can be raised is the Caledonian Club in London, which is defined by its ethnocultural mark. As such, this club can be classified as impermissibly discriminative, however ethnicity or Scottish origin is not an exclusive requirement, as numerous other ties with Scotland and Scottish heritage suffice to gain club membership.¹⁵ In that way, discrimination become much less strict, and conditional membership is intertwined with voluntary membership, as considerable significance is given to enthusiasm to join, notwithstanding no meeting outlined requirements.

This type of association is legitimized through preserving culture and cultural ties, which does not imply discrediting or threatening other cultures, so in this regard exclusivity is not morally unacceptable. Therefore, the important consideration is a moral threshold and the question whether or not it has been overstepped. Having in mind relative openness and legitimacy

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14 The exception is strictly private clubs which are not open to the public, and they are subjected to restrictions from which registered club are exempted – for example, private clubs in the USA cannot claim tax exemptions. In the same country, anti-discriminatory rules are applicable to social clubs which are engaged in commercial activities. Some cities, according to a U. S. Supreme court rule, may force large private clubs to admit minorities and women. In the UK, Equality Act 2010 ruled that all associations with more than 25 members are subject to anti-discrimination act. However, from the standpoint of second-order impartiality it may be considered as intriguing why clubs are allowed to discriminate on the basis of social standing, as numerous clubs do.

15 Some of the additional conditions are: being closely associated with a multinational employer's Scottish interests, having been educated in Scotland and having been resident in Scotland for at least five years. Even those loose requirements are not definitive, because it is also stated that „if you are suitably qualified (by being a Scot or having a close association or empathy with Scotland) you can apply.” (Caledonian Club, internet)

of association, explicit exclusion of collectives – in particular some historically oppressed and disadvantaged groups – is repugnant. But why, in this particular case, is racial exclusivity not permissible, while ethnocultural exclusivity is tolerated? The reason can be found in history of racial inequality which even nowadays lives on in the memory of oppressed group, and marks current generations. It could be imagined that the Holocaust and racial discrimination had not existed, strictly Christian clubs or maybe even racially exclusive clubs will be more tolerable from the standpoint of public impartiality. On the other hand, in hypothetical situation in which an English minority in Scotland was oppressed and treated with contempt, the exclusiveness of Caledonian Club would be inappropriate.

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From the standpoint of public impartiality, there is no moral reason to ban the Caledonian Club. Taking into account permissibility of forming such an association, it can be stated that impartiality is, as an indispensable part of justice, the main trait of political morality, but not public morality as such. The freedom to associate, however, is not absolute and right to partiality or favoritism, if aspire to be in the public sphere, should be subject to restrictions. The claim that this right is limited by moral reasons does not imply that association needs moral approval to be acceptable, but that no individual or collective could object reasonably that exclusivity was inherently unjust.

As an example of an implausible attack on second-order impartiality Barry examines Kohlberg's widely discussed hypothetical Heinz's dilemma.¹⁶ As Barry argues, the key subject of political justice (above all Rawls', to whom Kohlberg occasionally refers) is not related to the agent's moral dilemma and his consideration on the correctness or wrongness of his action on particular occasion, but it refers to the institutional arrangement, along with its political morality, in which certain rights and duties can be considered as just. Again, in this famous example impersonal demands of second-order morality have been conflated with duties in interpersonal relationships in first-order morality, without discerning their different domains of validity.

As it is stated in Kohlberg's example, Heinz's wife is seriously ill and the only way to her to be saved is to take the medicine, which local pharmacist is selling, but who has priced the medicine at ten times its real market value. Heinz has saved only half a sum which the pharmacist is asking for, but druggist will not agree to sell the drug for the amount of money Heinz offers. Consequently, Heinz decides to break into the pharmacy and steal the drug to save his wife. Kohlberg's conclusion is that Heinz's act is morally justified from the utilitarian standpoint, because the good of saving his wife outweighs the good which the pharmacist would gain by selling the product. More importantly, from the standpoint of Kantian universal

16 Kohlberg 1979; Barry 1995, ch. 10 (40)

morality as the sixth, post-conventional level of moral development, Heinz's act is legitimate because in general the right to life is more important than profit or owning property.

On the level of an isolated act, the rightness of the act is quite straightforward. But the Kantian standpoint imply universalisation, which leads to difficulty in vindicating the act, as the only slightly higher price than that which Heinz is able to pay will be sufficient to encourage stealing, that is, any loss of money which the chemist suffers would be legitimate inasmuch as the result of stealing is considerably more worthwhile. Therefore, in a respectable number of cases the theft will be permitted. Also, if the neighbor should have the medicine, the universalisation should justify stealing from him as well, as saving a life is not only more valuable than the chemist's profit, but also more valuable than neighbor's property. Consequentialist reasons for sentencing Heinz could also be stated, as it may be assumed that, if a court adjudicates that this type of theft is excusable, the chemist will presumably, as act of protest, withdraw the drug from distribution. Also, he and every other chemist would lose any economic incentive for producing the medication, and would stop all further research and development which might have considerably improve treatment of disease.¹⁷ Thus, Heinz's case fail these tests of moral sustainability, and it does not demonstrate adjustability of partiality to second-order moral principles or to institutional impartiality (and *vice versa*). The maxim of permissibility of theft in extremely important cases does not concern constitution of social order, civic equality, non-violent resolution of conflicts or established principles of social cooperation approved by all reasonable citizens. On the other hand, let us assume that second-order impartiality permits or excuses theft by no means. Does this imply that this kind of impartiality condemns Heinz's act regardless of his good intentions? Barry's answer is that we should not jump to this conclusion, because second-order impartiality is related to institutional structure, albeit not to a person's concrete action.¹⁸ The institutional order in Kohlberg's example is defective. The fact that Heinz is compelled to steal the drug indicates that the social order is established wrongly, and in such an order a seriously ill person cannot avoid suffering or death if she, the members of her family or any other person cannot afford to obtain medical treatment. According to justice as impartiality, this order, in which universal social security and health care is not provided, and in which medical aid is available only to affluent members of society, is deeply unjust.

Claiming that conclusion about Heinz's guilt is far-fetched, Barry, as it seems, accepts strict dichotomy of two levels of impartiality by contrasting the

17 Barry 1995: 242-243.

18 Cf. Barry 1995: 244.

eventual vindication of the particular act to subjecting the same act to sentencing in accordance with the norms of second-order morality. Such a position is paying the price of a curse of dualism of two-world theories, which refer to each other, but are at the same time are to be kept at a distance from each other, not managing to communicate between themselves, which stems from their separate aims and leads to the justification of contrary outcomes. Although Kohlberg's example cannot lead to the conclusion that Heinz's acting is unequivocally justifiable from the moral point of view, the example, however, suggests that the distance between two levels of impartiality is lower than Barry is willing to concede. One of the aims of the adequate moral theory is to give an elaborated and sound explanations of the relation between first-order morality or everyday ethical principles, and the demands of institutional order with its publicly endorsed moral norms. It is possible that the court is punishing Heinz, but at the same time „recognize“ his duty to steal by taking into consideration motivational force and relevance of substantive morality, that is, the relevance of the kind of partiality to which Kohlberg refers to. The taking into consideration of mitigating circumstances (and the existence of the institution of probation) indicates that in legislative, as well as in everyday morality, it is accepted that identical or similar acts, depending on the circumstances, do not have the same significance and therefore have to be treated differently. In this way, the public morality of a society and its institutional articulation can justify, or can demand to be taken into account in adjudication, first-order moral reasons. This can be understood as the confirmation of Hegel's thesis on the offender's right to be punished: the judiciary should recognize Heinz's position and award him a lenient sentence, while Heinz himself should accept the fact that he will be sentenced whenever he should be caught. It can be hypothetically assumed that he broke the law being aware that he would be prosecuted and punished, and he would accept the sentence (except if draconic and the highest stipulated penalty), as well as it can be assumed that dismissal of taking into consideration the relevant particular occasions will be interpreted by the public as a manifestation of incompetence by the judges stemming from their lack of common moral sense and reasonableness in adjudication.

As Rawls' theory in exploring the principles of justice implies their pertinence to the basic structure of a society, Barry points out that Kohlberg's referring to the theory of justice is misleading. Rawls' conception is not concerned with justification of the violation of unjust laws, except in the case of civil disobedience. Yet this disobedience is public, and it is the subject of public reason, whereas Heinz's act, according to Barry, is a case of concealment of an offense. Rawls would advise Heinz to launch a campaign for national health care, but he cannot be supportive of his act of theft.¹⁹

19 Barry 1995: 245.

However, this stance still needs to respond to the example of the right to be punished, because if Heinz turn himself in immediately after giving medicine to his wife, confesses offence and is ready to suffer legal consequences, his act should not be treated as concealment. If we assume this, his act can be interpreted – regardless of his actual intentions in which the wider picture is not explicated – as a protest against a defective national health system, against rules of licencing, the rights to medical distribution, or as a protest against an excessively powerful pharmaceutical industry which is abusing its monopolistic position. In any case, Heinz's act might have as an effect, if not instigation of the reform of public health service, then at least provoking public debate about the purpose and extent of care which citizens have in particular public health system, and their vulnerability in conditions of the prevailing commodification of health services.

Barry's standpoint on Heinz's case is inclining to duality of justice, according to which theft is justifiable from the standpoint of the agent when Heinz is obliged to act on behalf of his wife, yet, from the standpoint of institutionalized justice and political morality he has no right to commit theft. The existence of mitigating circumstances and a person's willing acceptance of the risk of being convicted are premises on basis of which duality in Heinz's case can be resolved. In the same way, the priority of saving the life of fellow person does not equalize all theft of this sort as morally permissible: public impartiality would dictate more severe punishment if money had been stolen from a neighbour, because the neighbour is a third party, not involved in the dispute between Heinz and the chemist (or pharmaceutical industry) who has overpriced his product. Nor the objection that in this way the stealing of medicine (or anything else) which will contribute to recovery of an unknown person (or any person) is plausible: there is no reason why Heinz in particular is obliged to help an unknown person by an illegal act, whereas, on the other hand, he has a responsibility towards his own wife.

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However, it can still be objected that justification for an isolated act of giving advantage to the wife is generically different than justification of public moral norms. In line with the second kind of justification parochialism of *vis-à-vis* relations should be transcended and different ethical and moral requirements should be stated. But example of Heinz does not have to be interpreted as a limiting case in which moral duty stemming from a relationship supersedes impartiality of justice, but as a situation in which second-order norms have to take into account an individual's moral motivations. Therefore, it is problematic if impartiality which imposes an identical sentence on both Heinz and the person whose reason to steal the medicine is profit from reselling, would be just.

It can be stated that second-order morality stands in need of reasonableness, rather than in need of subsuming moral dilemmas to general principles. The

moral threshold between partial and impartial actions should be set in such a way that it leaves enough scope for other moral considerations.²⁰ Whereas justice as impartiality is not arbitrarily imposed from Mount Olympus, flexibility and adaptability of norms endorsed by institutions is guided by shared understandings of limits both of impartiality and favouritism, which correspond to needs and values existing in a given society. Ill-structured second-order impartiality may involve excessive restrictiveness, rigidity of rules and ultra-regulation of social relationships and would lead to violation of freedom of assembly and association, to a considerable narrowed scope of permissible partiality, as well as to imposing excessive demands on the individual.

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20 Brink 2001: 171.

Michal Sládeček

Nepriistrasnost drugog reda i javna sfera

Rezime

Prvi deo teksta razmatra distinkciju između nepriistrasnosti prvog i drugog reda, zajedno sa Berijevom (Brian Barry) temeljnom elaboracijom karakteristika i razlika ovih nepriistrasnosti. Dok se nepriistrasnost prvog reda odnosi na nefavorizovanje bliskih osoba u svakodnevnim odnosima, nepriistrasnost drugog reda se ispoljava u institucionalnoj strukturi društva i njenom javnom i političkom moralitetu. U drugom delu članka uvodi se pojam javne nepriistrasnosti kroz analizu dva primera. Prvi primer jeste Kaledonijski klub sa svojim ekskluzivitetom članstva i razmatra se kao oblik udruženja koje je pristrasno, ali je ipak moralno prihvatljivo. Drugi primer predstavlja takozvana Hajncova dilema, pri čemu autor daje svoju reinterpetaciju slučaja i ukazuje na pojedine slabe tačke Berijevog tumačenja, smatrajući da se kroz postojanje olakšavajućih okolnosti može prihvatiti Hajncovo pravo da daje prednost svojoj supruzi u odnosu na prava vlasništva i da ova pristrasnost može biti prihvaćena u javnoj sferi. Na taj način javna nepriistrasnost određuje granice restriktivnosti i rigidnosti političke nepriistrasnosti koja je implicirana u nepriistrasnosti prvog reda.

Ključne reči: Brajan Beri, nepriistrasnost prvog i drugog reda, moralno opravdanje, pravda, javna sfera

