Agreement as the convergence of will: A consensualistic approach to negotiation

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Abstract

Negotiation is often treated as an attempt to reconcile conflicting interests. Instead, I define negotiation as an attempt to produce a convergence of will. Based on a distinction initially made by Rawls (1955), I draw attention away from summary rules that are introduced during negotiation, including win-win interest prescriptions, and put the emphasis on the practice rules that are validated by the final agreement. The term convergence of will refers to the co-adoption of practice rules that define the interaction that is the subject of negotiation. It essentially refers to the negotiating parties establishing the normative or "ought" standards of the interaction they are negotiating about. Moving from the subjective view of Kant to the intersubjective view of Habermas, I offer an approach that examines how agreement validates the "ought" requirements of that interaction, going beyond underlying interests.

Keywords: negotiation; intersubjectivity; will; Kant; Habermas; moral psychology

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1. The teleology of negotiation

Handshakes or signatures often mark the successful end of negotiation. Such gestures denote the significance of agreement as, arguably, the teleological purpose of negotiation. People can aim for disagreement or can work toward agreement but it can hardly be doubted that negotiation is a field where people explore the path toward agreement, even if their true objective is to avoid it. My purpose is to offer a consensualistic approach that focuses on the resolution of disagreement. This type of perspective is distinguishable from current perspectives that focus on interests and decision making, such as the field of negotiation analysis (Sebenius, 1992), and is aligned with an intersubjective analysis of negotiation (Arvanitis & Karampatzos, 2011, 2013) which focuses on the communication among participants and its driving role in the negotiation process. Instead of treating negotiation as an attempt to resolve a conflict of interests, I treat negotiation as an effort to accommodate a divergence of will and produce an agreement regarding the terms of the interaction that is the subject of negotiation—what parties are negotiating about. This abstract framework can be applied to all kinds of negotiation arising in the context of interpersonal or intergroup interactions.

2. The divergence of will as the basis of negotiation

Not all disagreements lead to negotiation. It is the subject of disagreement that establishes whether negotiation is a possible option. Common disagreements involve facts of the objective world, such as the identity of the highest mountain in the world, and address what is correct or incorrect, true or false. Such issues may be resolved through debate and not through negotiation, since claims of this sort can be validated by reference to facts. An element of this type of disagreement is often involved in

negotiation too, but only peripherally. The main and central point of disagreement in negotiation is how to regulate an interaction between individuals or groups (Arvanitis & Karampatzos, 2013). The subject pertains the very interaction of the negotiating parties and more importantly it is within their power to form the basis of agreement. Simply put, the disagreement can be settled because the parties jointly will it that way.

Examples of negotiations are encountered in everyday life. The movie theater you visit with your spouse, the bonus you earn in case you reach a workplace goal, the terms of ceasefire between countries, are all subject to disagreement. People can disagree on the type of movie, on the level of bonus, on the terms of ceasefire. A successful negotiation would end with agreement on a specific movie, on a specific bonus, on specific terms of ceasefire, all of which can be considered terms of the parties' interaction. The parties will then proceed with their interaction under the specific terms they have agreed upon. These terms can also be seen as the *regulatory framework* of their interaction. By terms of interaction, regulatory framework, or ought requirements and standards, I mean implicit or explicit rules that regulate interactions such as going to the movies, working or signing a peace treaty (I do *not* refer to rules of negotiation as such, even though they themselves can be the object of disagreement and negotiation).

Although some aspects of the disagreement in the above examples, such the identity of the actors in a movie, might be open to simple debate, the conflict cannot be resolved solely by finding objective facts to corroborate a specific view. The settlement is not strictly derived by some reference to outside factors but by the parties' power to choose the terms of their interaction. Agreement is, therefore, a matter of convergence of will for the negotiating parties, and not strictly a matter of convergence of belief or "attitude alignment" (Davis & Rusbult, 2001). Consequently,

negotiation can be defined as *an effort to resolve the divergence of will* among the negotiating parties.

The above definition requires further elaboration, in particular as regards the notion of "will." Very simply put, "the will in truth, signifies nothing but a power, or ability, to prefer or choose" (Locke, 1847, p.155). If, in our notion of "will" we restrict our focus to preference rather than choice in general, any divergence of will can be thought of as a divergence in preferences, or in other words, as *a conflict of interests*. Negotiation would then amount to an effort to reconcile those competing interests. This is exactly the dominant approach in the psychological study of negotiation (Thompson, Wang, & Gunia, 2010), which is partly inspired by the field of economics and stresses that people should focus on the underlying conflict of interests and try to achieve win-win outcomes (Fisher, Ury, & Patton, 1991). Locke (1847) argued that the will should not necessarily be viewed only as desire or preference since it is possible to want one thing but to will something else. He nonetheless proceeded to note that the will is naturally determined by a state of uneasiness induced by a gap between current and ideal *desired* state of affairs; consequently, he did not offer a plausible explanation of how the will can readily be distinguished from interests.

It might be argued that when people are completely free to choose and act—for instance, in a non-social environment—their will is indeed determined by their needs and desires alone. In a social environment, though, the satisfaction of one person's desires often contradicts the satisfaction of another's. This is exactly what the term conflict of interests refers to.

Interaction between individuals that is not regulated—that is, no normative standards or rules exist for it—will result in a *battle of interests* and eventually lead to

the survival of the fittest so long as individuals do not make an attempt to negotiate: an effort to resolve the divergence of will. The negotiation process, on the other hand, might offer a plausible way out of this situation.

During negotiation, people voluntarily and jointly outline the limits within which they can pursue their interests by agreeing on the *ought* requirements of their interaction; that is, impersonal normative standards that are independent of an individual's wishes (Heider, 1958). As long as people are able to reason, they can produce *ought* requirements and laws to regulate their behavior: "The freedom, then, of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will" (Locke, 2002, p. 28).

In other words, people can voluntarily bind themselves to particular terms, regulate their interaction and establish the limits of their individual liberty, which, in turn, set boundaries for the field within which they can pursue their individual wants. Although people may simply try to impose their will on others and to satisfy their interests irrespective of any rules or established terms, they often employ negotiation to set, evaluate, realign or reestablish the normative terms of their interaction. Negotiation is essentially a process of determining *ought* requirements, that is, the regulatory framework of a certain interaction—the terms of that interaction—which lay out how people are supposed to act in a specific context and how they may pursue the satisfaction of their individual interests, if that is their intention.

Divergence of will might refer to a divergence of interests and to a divergence of norms or of *ought* requirements. Either can give rise to a process of negotiation. The whole process, though, is less about coordinating interests than about coordinating norms.

During negotiation, interests are not really subject to change since they represent basic orientations of the individual toward the environment. Interests involve certain inclinations toward resources such as love, status, money, information, goods, services (Foa & Foa, 1974). These interests cannot be changed in the near term to accommodate the interests of others although they may change over time as individuals develop psychologically. By contrast, norms can be set jointly by negotiating parties, are often open to reassessment, and could be viewed as the primary element of the negotiation process. For example, a disagreement on the movie you will watch with your spouse cannot be resolved by altering your movie preferences. These may change over time, but your marriage might be over by then, if you choose to wait this long to resolve the disagreement. It can be resolved, though, by coming to an arrangement which specifies that you will watch a particular movie (which your spouse prefers) this time, in exchange for watching the movie of your choice some other time. This agreement seals a particular regulatory framework for "movie watching" interactions with your spouse. Norms concerning certain interactions are therefore set through negotiation, which also takes into account interests that are fairly constant and not subject to rapid change.

Consequently, convergence of will cannot usually be reached by a change in interests—since they are considered rather stable and fixed—but only through the establishment or alteration of intersubjective *ought* standards. Negotiation deals directly with the accommodation of divergent wills concerning the normative requirements of the interaction and only indirectly with the resolution of the conflict of interests. From now on, I focus on how normative or *ought* requirements are connected to the will, as well as how they are established within the context of negotiation while at the same time discussing their relation to the concept of interests.

3. Summary and practice rules in negotiation

Imagine negotiating with a dealer the purchase of a car. Ideally you would want to get the car for free. The car dealer might ideally want to sell it for a million dollars or even, why not, for a billion dollars. Wants are limitless. However, any wants or desires are restricted by the regulatory framework of the interaction. Each party can satisfy wants within certain normative limits. These limits can be implicit, like an indication that you are poor by what you are wearing, or explicit, like the dealer's original selling price.

In fact, any type of meaningful behavior can be seen as governed by implicit or explicit rules. Monks have explicit rules that govern their behavior and their interaction with other people, whereas anarchists prefer to abstain from the use of explicit rules. But in the end, it can hardly be doubted that anarchists' behavior is also determined by reasons and rules that define the life of an anarchist, even if they do so implicitly (Winch, 1958). The application of such rules does not have to be conscious or reflective (Bloor, 1997). According to an interactivist account (Bickhard, 2008), implicitness is an essential feature of social life, especially of its most basic level, being-in-the-world (Christopher & Campbell, 2008). In the car sale example, one rule is to buy the car at the selling price, just as you would buy other products. This type of rule does not have to be processed consciously but can still guide behavior.

Such rules are set by considering the same people in different situations or different people in similar situations so that an abstraction from these cases may seem pertinent to the current interaction. This can be possible through processes of identification and distanciation (Gillespie, 2012). The rules abstracted represent a summary of other contexts that can be applied in the present context. They are

logically antecedent to other specific interactions but can be generalized and used as "rules of thumb" for a current situation: These are *summary rules* (Rawls, 1955).

The negotiation problem arises because summary rules are not set, are too broadly defined, or parties have different perceptions regarding them. The parties then start negotiating in order to set the details of the regulatory framework for the interaction to take place successfully. Negotiation is the process through which the practice of the interaction is laid out and agreed upon, the process that establishes *practice rules;* in other words, rules that specify a "new form of activity" (Rawls, 1955, p. 24). In our example, this would be the process that establishes that if the sale of a car is to take place, it will take place at a certain price, for example $30,000.

For Rawls, practice rules refer to established rules that any individual is aware of when entering a specific practice, like the rules of chess or baseball. I propose to extend the notion to refer even to a unique interaction, as long as individuals that enter it know its rules beforehand. The only way the parties can know of such unique rules or norms before they enter the interaction is by specifying them themselves before it takes place. During successful negotiation, the regulatory framework of an interaction is specified down to the details necessary for the parties to proceed. By engaging in the interaction, parties realize they are implementing the terms of an agreement.

Not all practice rules are, of course, the product of negotiation; they can be set unilaterally by one person or they can be the product of immediate agreement between two persons or more. By contrast, if negotiations take place, a successful resolution will only result in the establishment of practice rules, as these are rules that precede the final interaction. Before or during negotiation, parties will propose terms that derive from all kinds of summary rules. After reaching agreement in negotiation, though, the only norm in force derives from their agreement on specific terms, which

become the practice rules for the future interaction. Without negotiation, for example, you may pay $35,000 for a car because that was the asking price: This involves the application of a summary rule. However, after engaging in a successful negotiation, you pay $30,000 because you agreed to a specific practice rule. It does not matter what type of arguments you used to support your claims in negotiation, or the reasons you wanted to pay $30,000. Such arguments make claims drawing from sale situations regarding other people, or you and the dealer in different situations; these are summary rules. The reason, though, why you end up paying $30,000 after the negotiation is that both parties have agreed to these terms. The agreement itself sets the rules that are logically prior to the practice. “Those engaged in a practice recognize the rules as defining it” (Rawls, 1955, p.24). It may make sense to question a particular practice rule on the basis of summary rules and, if one does, one engages in further negotiation. Once there is final agreement, though, the resultant rules gain their authority from their ability to define the interaction, which in turn defines them as practice rules.

It would be interesting to analyze how parties move from summary rules to practice rules during negotiation. I will briefly refer to this issue but mostly focus on what agreement means and how it establishes practice rules. The end result of a (successful) negotiation is the terms under which the purchase will take place: The specific amount of dollars X for the specific car Y. What is determined by negotiation is how much you ought to pay to get the car and which car the seller ought to give to get your money. Both parties are in essence negotiating what they ought to do in a prospective transaction. In this process, they can appeal to summary rules of all kinds but in the end, it is by the power of their will that they set the practice rules. The question that arises is how the will can set any type of rule.

4. The will as a legislator

Without taking interaction directly into account, we can think of individual *will* as a producer of normative standards. Kant (1785/2011) visualized the will as a *legislator* that produces imperatives, objective principles that are obligatory for it. According to Kant, the will is grounded only in the world of understanding and can be identified with practical reason itself. In his account of will and its relation to imperatives, Kant was mainly concerned with identifying the grounds of morality but did provide a map of how an individual generally relates to rules: objective rules such as imperatives as well as maxims, which are the subjective principles of action. I will draw upon this account of maxims and imperatives as a starting point for analyzing the ways in which individuals adopt rules that regulate their interaction. I should stress here that not all rules that are examined in negotiation are moral but that any type of willful acceptance of certain rules should have a property of being normative, of imposing a sense of *ought*; this is what I will try to capture by drawing on the work of Kant, and mostly on the work of Habermas (1985, 1991).

According to Kant, there are two types of imperatives, categorical and hypothetical. Categorical imperatives, which in essence are moral rules, command the satisfaction of objective principles that transcend a particular situation or relationship. They never draw upon desires or interests but are formulated by reason alone. Kant related actions that are consistent with categorical imperatives to the notion of freedom since these actions are not bound by any aspects of the empirical world but draw their obligatory character from pure reason, which rests outside the empirical world. This thesis has drawn considerable criticism by philosophers and is problematic for psychology, because the existence of categorical rules is attributed to a noumenal will that is inaccessible to empirical science (Campbell & Christopher,

1996). I will not attempt to defend the existence of a noumenal will but do find useful a notion of *general will* (Habermas, 1991)—this is analyzed further in section 10—that reasons beyond individual interests: Distinguishing between rules that are formulated on the basis of interests or inclinations and rules that are formulated beyond the interests of individuals is especially meaningful when we consider current theories' economics-inspired focus on interests (Thompson et al., 2010). Very different from categorical imperatives are hypothetical imperatives; that is, imperatives that command the necessity of an action as means to something else that is willed. Any imperative that is justified in terms of an interest or an inclination, in terms of the empirical world rather than the world of understanding, is a hypothetical imperative; in a nutshell, it serves the fulfillment of a certain purpose.

If we view the will as a legislator, a producer of rules, Kant argues that these rules should not be dictated by interests or inclinations, but by the power of the will itself. These rules are validated universally by all rational beings; in fact, they are in some ways self-validating. "You should not lie" is an example of such a categorical imperative. A hypothetical imperative would take the form of a statement that hinges upon particular interests, such as the statement "You should not lie unless a person feels bad after hearing the truth" and can be easily replaced in a specific situation by another hypothetical imperative of the sort: "You should not lie, even if the person feels bad, unless there is something else that person can gain." Categorical imperatives are not open to challenge or reassessment because they are constructed on the basis of their application as universal laws. On the other hand, hypothetical imperatives are constantly assessed and reassessed on the basis of interests and inclinations and are validated in the empirical world, rather than the sphere of individual reason. Categorical imperatives appear to be authored by the will whereas

hypothetical imperatives appear to be followed by the will, but the body of rules that permeate interactions includes both types of imperatives. In essence, they are empirically contingent or universally held rules that are willed by individuals while interacting with each other.

Kant's approach is very insightful especially for understanding how a person would approach any principle of action on an individual basis. So far, the analysis has been concerned with how individuals construct or follow normative rules—*ought* requirements—on their own rather than with how they converge or agree on the terms of their interaction. We will now turn our attention to the ways in which rules can be constructed intersubjectively during negotiation.

5. From a subjective to an intersubjective conception of will

The divergence of will concerning the regulatory framework—the normative requirements—of an interaction can only be resolved by shifts in the will of a party in order to accommodate the will of another party. The negotiation process may entail a complete surrender of one party's will to the will of another but usually involves a meeting of wills on new ground. *Ought* requirements are decided on the basis of a communicative process among wills rather than a unilateral examination of interests or universally applied rules. Willful acceptance and agreement involves the negotiating parties' mutual respect for new *ought* requirements for the interaction. This communicative process seems substantially different from an isolated individual process of setting categorical imperatives or conforming to hypothetical imperatives.

Kant focused on the individual and treated individual reason as the supreme lawgiver. In the case of negotiation, though, the terms of interaction are intersubjectively established and validated through a constant re-examination of maxims. A commonplace example of maxims being asserted in a simple bargaining

situation is for one party to offer "I'll give you A if you give me B" (which subjectively translates as follows into a maxim for the other party: "I ought to turn over B so I can have A") and for the other party to counteroffer "I'll give you B if you give me A plus C". If these were validated and treated as objective rules, Kant would treat these maxims as hypothetical imperatives that are derived from interests. It would be possible, however, for reason to transcend the particular interaction and produce rules that fit the famous portrayal of the categorical imperative: "Act only in accordance with that maxim through which you can at the same time will that it become a universal law" (Kant, 1785/2011, p. 31). In this case, it is evident that reason transcends the particular interaction and relates to other wills in the act of producing universal laws. These laws potentially bind all wills, including those of the individuals that participate in the particular negotiation. However, the application of categorical imperatives is still restricted to individual reason: It only takes place within the sphere of individual will and fails to capture the communicative interaction of wills and their potential convergence in the context of interaction. Therefore, here we need to conceive *communicative reason* as the supreme lawgiver of the negotiation process.

Habermas (1991), in an effort to revise Kant's view of ethical rules, replaced individual reason with communicative reason and set intersubjective agreement as the criterion for the validity of a norm. More specifically, he provided a procedural reformulation of the categorical imperative: Instead of the maxim being individually tested and validated by the will's understanding of a universal law, the maxim is tested in a discursive process that assesses its universal validity (McCarthy, 1994). Negotiation can be treated as a process that tests validity claims of negotiating parties and potentially leads to the truth, the truth being intersubjective objectivity or

rightness (Arvanitis & Karampatzos, 2011). In this light, negotiation can be treated as the de facto discursive process for establishing the validity of the maxims that individuals examine as potential normative requirements of their interaction. If validated, the maxims can become imperatives and be elevated to a status that makes them obligatory for the will. It is intersubjective agreement, then, that makes a maxim into an impersonal—objective—*ought* standard that rules an interaction, not subjective individual reason per se.

6. Specific context and general rules

It seems counterintuitive to suggest that normative requirements that are agreed upon are impersonal when everything about a negotiation seems to be so personal. It is the *personal* salary of a person that is under dispute, the *personal* property of a person that is for sale, the *personal* favor a person is asking of a friend. Should any norms therefore not be limited to the people and the task at hand? From this standpoint, norms can easily be created by a negotiating party's ability to use power and make *personal* requirements for the other party. This view fails to treat negotiation as a communicative action procedure where any claim-rights require the agreement of the other party in order to be validated (Arvanitis & Karampatzos, 2013). If we were referring to interactions where normative requirements could be imposed—for example, in the event of extortion—the requirements would indeed be personal and limited to a certain negotiating party. During negotiation, though, all maxims need to be validated by the agreement of the other parties and are, therefore, subject to the communicative mechanisms that apply more broadly than one particular situation. Agreement validates any maxims that seem personal and context-dependent by accepting that these maxims have properties that make them suitable for regulating the particular interaction, or any type of similar interaction. This suitability can only

be established by communicative processes that may be applied in broader contexts and deal with the prospective validity of maxims in general.

The fact that norms or *ought* requirements are impersonal does not mean that they necessarily take the form of categorical imperatives. Indeed, the universal validity of categorical imperatives and Habermas's reformulation is usually intended for moral rules. Moral rules are often part of negotiation, but not all of the rules that are examined in a negotiation are moral because every negotiation is specifically situated and context-dependent—as is every type of interaction among people. Therefore, we expect specific interests and inclinations to give rise to maxims that, during negotiation, assert their status as hypothetical imperatives meant to apply only in the particular situation and are subject to the context-restricted agreement of the negotiating parties, rather than some test of universal validity. Still, the communication process is the only testing field for the validity of the maxims that are asserted by the negotiating parties and its inner workings inevitably go beyond the particular context.

What is more, the communication process among negotiating parties is structured in abstract argument forms that transcend the specific context, the forms Aristotle (1926/2000) calls *common topoi.* Common topoi, such as contradiction and analogy, are argument forms that serve as a bridge between the negotiation and the accepted, valid reality and therefore unavoidably extend beyond the level of a particular negotiation (Arvanitis & Karampatzos, 2011). Indeed, they can be seen as ways to introduce summary rules in a negotiation. Their ability to produce agreement does not lie in the particular context in which the negotiation takes place but in general properties of argumentation and their ability to bring about consensus. This consensus is more easily achieved if the arguments appear reasonable when delivered

before a universal audience, as Perelman and Olbrechts-Tyteca (1958) have suggested in a way that is quite similar to Habermas's theory of communicative action (Haarscher, 1986). Therefore, maxims need to transcend the specific context and achieve a degree of impersonal status in order to be validated, even as hypothetical imperatives.

So far, I have suggested that all rules that surface in negotiation and assert their status as categorical or hypothetical imperatives are validated—through agreement—as impersonal *ought* requirements by going beyond specific contexts. These norms are the exact subject of negotiation and lay out the field in which interests or inclinations can be fulfilled. While Kant suggests that the will produces laws that are obligatory for the *will*, the present analysis (building on Habermas's extension of Kant's moral philosophy) focuses on the convergence of will and the co-production of laws that are obligatory for the *converging wills*. The validity of the maxims inheres in practical reason for Kant, but for Habermas it rests in the agreement between communicatively rational agents. Habermas's extension of Kant's practical reason seems most appropriate for the analysis of negotiation, since negotiating is undoubtedly a discursive process that establishes the terms of interaction through agreement. The question remains how agreement makes maxims obligatory for the wills of negotiating parties (i.e., how maxims become impersonal *ought* standards) and promotes them from the level of subjectivity to intersubjectivity.

7. Agreement, duties and rights

Kant and Habermas share the idea that duty is a central concept in understanding laws, although they propose different bases for their validation. For Kant, duty is "the necessity of an action from respect of the law" (1785/2011, p. 13). Such duty is derived from reason alone, and cannot be attached to any sort of inclinations because,

were that the case, the action would result from the need to act from a certain interest and not from respect for the law. In the case of acting only out of respect for the law, the law prescribes actions that are never means to an end: The actions are ends in themselves. This is conceivable in a *kingdom of ends* where people invariably treat each other as ends and not as means. The practical necessity of duty rests solely on the relationships of rational beings to one another and serves to limit all subjective ends in favor of objective rules. What this practically means is that such laws introduce minimal requirements to act only in ways that can possibly elicit the consent of other people (O'Neill, 1985). However, these laws are not made by interacting individuals but by the will of the individual alone. Therefore, Kant's views on duty cannot capture the way in which the terms of interaction are formed during the process of negotiation. My purpose instead is to examine how the sense of duty arises through a process of interaction rather than a state of individual reflection.

Habermas improves Kant's analysis by adding the social obligations that come into play when rational consensus has been achieved (Bordum, 2005). In contrast to Kant's theory, the laws of interaction do not have to exclude any considerations of interests: all interests and consequences can be taken into account in the person's free acceptance of the laws. Especially in negotiation, it is important to acknowledge the role of interests, as Habermas (1991, p.120) does in his treatment of moral norms: "For a norm to be valid, the consequences and side effects that its general observance can be expected to have for the satisfaction of the particular interests of each person affected must be such that all affected can accept them freely." One can see the correspondence to the theory of negotiation which also emphasizes that negotiating parties take their interests into account (Lax & Sebenius, 1986) in order to produce rules they would voluntarily accept. Moreover, "only those norms can claim to be

valid that meet (or could meet) with the approval of all affected in their capacity as *participants in a practical discourse*" (Habermas, 1991, p.66). The two statements from Habermas epitomize two basic principles of his moral philosophy, the principle of *Universalization* and the principle of *Discourse Ethics*, which can be treated as principles for the adoption of impersonal *ought* requirements. Habermas refers to idealized conditions that determine ethical norms but the basic properties of discourse apply in every communication, and, by extension, in every negotiation. Through discourse that "generalizes, abstracts, and stretches the presuppositions of context-bound communicative actions" (Habermas, 1991, p. 202), people go beyond a limited personal context and validate any rules that they would accept freely as commands of communicative reason. These rules become the norms which negotiation participants jointly commit themselves to.

As long as participants, having understood the consequences, agree on the terms of their interaction during negotiation, the terms become "laws": The proposed maxims are validated by all parties involved and corresponding duties must be followed. The maxims, in other words, become *ought* requirements for negotiating partners. Accordingly, almost by definition, claim-rights are formed since "X has a *claim right* that Y should do, or refrain from doing, an act if and only if Y has a *duty* to X to do, or refrain from doing, that act" (Stevens, 2007, p. 4). In fact, the whole discursive process can be viewed as a process of asserting and validating claim-rights (Arvanitis & Karampatzos, 2013) since rules, duties, and rights are inextricably intertwined. Agreement itself produces a duty to uphold the content of the agreement (Gilbert, 1993) and a simultaneous right of other participants to require the fulfillment of the duty. It is often difficult to dissociate rules from duties or rights since they appear as different sides of the same coin during the discursive process. For example,

in a two-party negotiation, a person may ask for something specific in return for what that person is offering. An agreement from the other side validates the proposed term of the interaction, elevates it to an *ought* requirement, establishes the duty of both parties to uphold the content of the agreement and gives the right to each party to ask for the fulfillment of what was agreed. It is often more practical to approach negotiation as a process of asserting and validating claim-rights, as a process of give-and-take, but it should be noted that negotiation fundamentally concerns the convergence of will and, consequently, the co-authoring of rules.

8. Negotiation as co-regulation

The approach to negotiation that is outlined in this paper is intrinsically connected to issues of self-regulation, co-regulation and intersubjectivity. Self-regulation refers to adopting standards to regulate one's actions (Bandura, 1991) or to changing one's behavior so as to follow rules (Baumeister & Vohs, 2007). It is therefore possible to treat each individual change of will that occurs in a negotiation as a self-regulatory process. This would be equivalent to adopting a subjective approach that is based on individual reasoning, as Kant's approach is. More appropriately, though, negotiation can be approached as a co-regulatory process, specifically as a coordination process which entails the execution of complementary actions (Semin & Cacioppo, 2008) in order to co-adopt specific rules of interaction. Such complementary actions are exemplified in conversational turn-taking (Sacks, Schegloff, & Jefferson 1974), which is a fundamental aspect of negotiation. Through the analysis of the negotiation process, we can approach how people achieve common ground on a moment-to-moment basis (though *grounding* – see Clark & Brennan, 1991), how they assert claim-rights (Arvanitis & Karampatzos, 2013), how they construct a network of shared agreement (Jochemczyk & Nowak, 2010) but also how they deal with their

disagreements. Disagreement is just as important as agreement on the level of participatory contribution (Matusov, 1996); that is, on the level where individual contributions are coordinated. This is also a fundamental thesis for the current paper: Agreement and disagreement are approached intersubjectively, that is, in terms of how they are constituted by negotiation participants' communication, rather than subjectively, in terms of the wants or the interests or the thought processes of individuals. Although negotiation can be viewed as a process leading to agreement, both disagreement and agreement are core properties of negotiating and arise only through the negotiators' participation. If we adopt Habermas's general philosophical view, we can proceed to analyze negotiation on the basis of the rules people will rationally agree on but in the same manner understand what disagreement entails.

It is useful to note that negotiation is not mere coordination. Any summary rule, explicit or implicit, might serve as the basis for coordination, without any need to negotiate. However, once summary rules are challenged, parties will try to establish practice rules, that is, specific norms regulating their interaction. Such *ought* requirements transcend incidental situational factors and are accepted intersubjectively (Heider, 1958). For negotiators to agree on the terms of their interaction, they should be able to achieve psychological distance from immediate circumstances and subjective states and engage in imaginatively coordinating and generalizing perspectives as well as in rational and moral considerations (Martin & Gillespie, 2010). In this way they can invent or re-invent practice rules for their interaction. Through communication, they will be able to transcend their subjective states and coordinate their perspectives, thus creating an intersubjective regulatory framework for interaction—validated by rational agreement. Subjective states will tend to inform the creation of an intersubjective regulatory framework: Interests,

intentions, beliefs will be taken into account as they are communicated to negotiating partners. Further, the intersubjective *ought* standards will be evaluated on an individual, subjective basis and in relation to the sphere of free space that any possible agreement would allow for the realization of individual desires. Again it should be stressed that negotiation per se is an intersubjective process of coordinating perspectives and, more importantly, establishing the rules of interaction: Although, under a subjective view, it can equally be viewed as a "vehicle" for the satisfaction of individual interests, the communicative aspect of negotiation unfolds as a co-regulatory process of mutual acknowledgment of *ought* requirements and their corresponding duties and claim-rights.

9. Divergence of will and the concept of conflict

Negotiation is understood as a conflict resolution process. This is traditionally taken to be a conflict of interests, a view which reflects a subjective rather than an intersubjective approach. More appropriately, negotiation can be viewed as stemming from a "conflict of wills", a divergence of will concerning the terms of the interaction that can be seen as a disagreement between authors of rules. Maxims, as well as corresponding duties and claim-rights, which are asserted by one party are contrasted with equivalent maxims, duties and claim-rights asserted by other parties. The core of the conflict is the disagreement on the terms of the interaction and only agreement can seal the—new—practice rules of the interaction and end the negotiation successfully. Otherwise, the interaction does not take place, or it proceeds with the parties' commitment to their own subjective wills and the persistence of the underlying conflict.

A conflict referring to *ought* standards (or a conflict of claim-rights— see Arvanitis and Karampatzos, 2013) might be greeted with skepticism by current

negotiation theorists, who prescribe solutions that avoid positional confrontations and instead push for a *focus on interests*, as the best selling negotiation manual *Getting to Yes* proclaims (Fisher et al., 1991). However, these same negotiation experts also say "Insist on the use of objective criteria" (Fisher et al., 1991, p.81), which, in the end, only promotes maxims proposed in communication—even if they are based on interests—being validated as impersonal norms that are accepted by rational agents. *Ought* standards are not imposed on an interaction by one person but are intersubjectively accepted by all negotiating partners as impersonal requirements. Any conflict can be resolved by reference to interests, values, rights, norms or whatever can help negotiating partners coordinate, while at the same time negotiating partners can choose whatever strategy they find subjectively attractive. In the end, though, the resolution requires the parties' intersubjective communicative convergence of will regarding the terms of their interaction.

10. Ethics and negotiation

I have focused on the philosophical theories of Kant and Habermas to account for how agreement establishes the practice rules of negotiation. I have not argued in favor of their theories to determine which summary rules should be adopted as practice rules. Summary rules of all kind are put forward on the negotiating table, some of which are moral rules as Kant and Habermas define them. Negotiation is the testing ground for these summary rules: It might even be treated as the "arbiter of ethical issues" (McGill, 1968, p.19).

One general ethical rule that is prevalent in negotiation theory and should often be expected to come up during negotiation is the "win-win" prescription. This prescription, derived from utilitarianism, asks parties to seek to satisfy their interests as well as those of others: "…laws and social arrangements should place the

happiness or (as practically it may be called) the interest, of every individual as nearly as possible in harmony with the interest of the whole" (Mill, 2000, p.26). "The whole" refers to the whole of society or the world, but in the case of negotiation, "the whole" could be taken to refer to the sum of the negotiating parties. Therefore, according to a utilitarian view, the moral end of negotiation should be sought in the maximization of utility for all involved parties; in other words, in the "win-win" prescription.

Such utility considerations may appear as simple reciprocal rules or may be presented as reflective utilitarian conceptions of more general rules. According to the influential approach of Kohlberg (1973), these types of ethical rules can correspondingly be classified in Stages 2 and 5 within a six-stage process of moral development, in which the highest level refers to Kantian views of ethics. In this sense, it might be argued that an agreement in negotiation should ideally reside at this highest level, which emphasizes the role of duty and goes beyond utilitarian considerations. However, this structural view of ethical reasoning can be criticized as quite restrictive in emphasizing rights and neglecting other views such as altruism or eudaimonism, which go beyond post-Kantian conceptions of morality (Campbell & Christopher, 1996). The emergence of any summary rule during negotiation could be linked to emotions such as empathy, shame and guilt (Eisenberg, 2000) or could relate to virtues, which, in the Aristotelian tradition (Aristotle, 1999), can be seen as character traits (Peterson & Seligman, 2004). Moreover, ethical propositions can be thoughtfully processed or can be intuitive (Haidt, 2001) and they can relate to individual or to group processes (Ellemers & Bos, 2012). A breadth of factors can decide which summary rule will surface in a negotiation and assert moral ground. In the end, the same factors can also influence the final agreement on specific practice rules.

Especially in a two-party negotiation, any of the above-mentioned factors may play a role in the final agreement, without conscious considerations of its moral grounds. However, as we move away from a two-party negotiation toward a collective negotiation, the more we move from an implicit, intuitive level. On the high level of countries, diplomatic negotiations are rule-making processes that incorporate the input of experts and take into consideration a wealth of domestic and international conditions in the arenas of economics, law, and politics (Lang, 1996). Negotiations focus on very complicated matters and seek a minimum of consensus among all countries and respective non-state stakeholders. Through the power of agreements, countries consciously and deliberately forfeit part of their sovereignty to embrace and uphold transboundary rules that have moral standing.

To take this a step further, on an ideal global level, we can think of individuals conferring within a kingdom of ends, similar to the one Kant (1785), Habermas (1991) or Rawls (1971) envisioned. They all sought to identify the properties of rules people would agree on under certain ideal conditions, that is, correspondingly, free of interests, under conditions of ideal communication or in *the original position*. Without explicitly mentioning a negotiation process, they envisioned a universal negotiation among individuals, leading individual wills to converge toward a universal *general will*. We can think of this general will as the producer of ethical standards: Under ideal conditions, negotiating parties' wills produce ideal rules. Whatever (ethical) summary rules are brought into the process, it is agreement that decides their moral standing and establishes practice rules in a given interaction.

We should keep in mind that negotiation is a specifically situated process, bound by space and time and subject to all the constraints of human perception, emotion and behavior. It would be difficult to accept that such a process can produce

ideal rules. However, the emergence of morality can be approached by the integration of context-dependent knowledge, represented as event knowledge in the prefrontal cortex, with more abstract, context-independent semantic knowledge and central emotional and motivational states (Moll, Zahn, de Oliveira-Souza, Krueger, & Grafman, 2005). During negotiation over a specific context, more general, ethical rules may emerge, especially if the process is close to the collective, thorough, ideal communicative process of the sort Habermas envisioned. Within the Kantian tradition, such a negotiation process would test universalized maxims in a logically consistent manner that would apply to all humans if they would agree to it. In this case, agreement goes beyond simple acknowledgement of normative requirements: It can ratify a code of ethics for the negotiating parties. In this admittedly idealized manner, we can think of negotiation as a producer of ethical rules. In real life negotiation there should be some element of this ethical dimension present to some degree.

11. Practical implications of a consensualistic approach

Shifting the focus from a subjective view of negotiation on the basis of interests to a consensualistic view that emphasizes agreement and consensus serves a fundamental aspect of the negotiation process: People may not need agreement for what they want but they need agreement for what they can get out of a negotiation. Disagreement is essentially a sign that people have not regulated their interaction. For example, a couple needs to agree on the destination of their journey so that they can go on a trip together; an employer needs to agree with an employee on salary and other aspects of their working relationship so that they can work together; a country needs to agree with the neighboring country so that a ceasefire can be achieved. Negotiation is about establishing the terms of an interaction that are under dispute: The destination of a

trip, the level of pay, the terms of the ceasefire. Parties may have their own interests in mind but negotiation creates the regulatory framework in which they can pursue their interests. The interests themselves are not subject to negotiation since people do not negotiate what they want; what they do negotiate is how they can regulate their interaction, how they can agree on the terms that are under dispute. In this sense, the driving force behind the process of negotiation is whatever can lead to agreement, whether it is labeled as interests, norms, sincerity, trust—the same force establishes what will not lead to agreement. Through agreement, negotiating parties regulate their interaction, meaning that they create a framework of normative or *ought* requirements, and further establish their duties and the corresponding claim-rights. A consensualistic approach would therefore examine how people achieve convergence of will, that is, how they co-author the rules of their interaction by means of communication.

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