

**Negotiation as an Intersubjective Process: Creating and
Validating Claim-rights**

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Philosophical Psychology [copyright Taylor & Francis]; The article is
now available online at:**

<http://www.tandfonline.com/doi/abs/10.1080/09515089.2011.633692>

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Abstract

Negotiation is mainly treated as a process through which counterparts try to satisfy their conflicting interests. This traditional, subjective approach focuses on the interests-based relation between subjects and the resources which are on the bargaining table; negotiation is viewed as a series of joint decisions regarding the relation of each subject to the negotiated resources. In this paper, we will attempt to outline an intersubjective perspective that focuses on the communication-based relation among subjects, a relation that is founded upon communicative rationality mechanisms which are inherent in social activity. Much in contrast to the concept of interests which describe the relationship of each subject alone to the resources, we will use the concept of "claim-rights" which are properly formed and validated only vis-a-vis negotiating partners and on the basis of the communication that develops among them. We will offer a step-by-step account of the creation of claim-rights and argue that their validation does not necessarily lie in the parties' interests, but in the communication mechanisms that induce consensus and result in mutually acceptable outcomes.

Keywords: Agreement; Communicative Action; Conflict; Consensus;

Intersubjectivity; Negotiation; Rights

1. Introduction

Negotiation is usually treated as an interdependent decision-making process, especially after the publication of *The art and science of negotiation*, Howard Raiffa's (1982) landmark book. Originating in a conflict of interests, negotiation is perceived as a process through which parties attempt to accommodate their conflicting interests by reaching joint decisions. Strongly influenced by the field of negotiation analysis (e.g., Sebenius, 1992), negotiation theorists have approached negotiation from the scope of the decisions of each negotiating party, and have placed the words "win-win" in the vocabulary of anyone who is even vaguely acquainted with the field of negotiation. The ultimate goal of negotiation is a situation where parties manage to make beneficial decisions and achieve positive outcomes for themselves. In this way, negotiation is seen as a field where isolated individuals or groups jointly attempt to satisfy their interests, that is, their "needs, desires, concerns, fears—the things one cares about or wants" (Ury, Brett, & Goldberg, 1988, p. 5).

However, negotiation can otherwise be seen as a jointly held common ground, where individuals attempt to come to terms with their intersubjective reality, and can be treated as a communicative procedure requiring consensus that is often found beyond negotiating parties, their interests and their motivation. This type of reasoning focuses on intersubjective mechanisms that exceed the level of each party's interests and cross over to how consensus and agreement is built. Such mechanisms go beyond what a party wants to what a party can claim as true and intersubjectively valid (Arvanitis & Karampatzos, 2011). We will attempt to formalize negotiation in terms of how such claims are asserted and validated. We will argue that negotiation

originates in a conflict of claim-rights and is resolved through a process of mutual acknowledgment and validation of the conflicting claim-rights.

2. From Interdependent Decision Making to Intersubjective Validation of “Claim-Rights”

Current theory places emphasis on a subjective view of negotiation and treats it as a common problem that each subject approaches from their own, personal perspective. Negotiation is perceived as an effort to satisfy subjective interests that emanate from an interdependent structure of resources and essentially take the form of “a zone of agreement” (Raiffa, 1982) or a Pareto efficient frontier (von Neumann & Morgenstern, 1947). Such constructs describe the potential utility that each negotiating party can draw from a possible distribution of resources. By relying upon such constructs, theorists form prescriptions on the basis of the negotiating parties’ interdependence, i.e., on the basis of the parties’ interests and the objective structure deriving from the different possibilities regarding the allocation of resources. It is currently accepted even on a descriptive level, that behavior of negotiating parties fits the behavioral economic model (Thompson, Wang, & Gunia, 2010), meaning that negotiating parties do indeed strive to satisfy their interests, although they might often systematically fail to achieve that goal. Under this perspective, the prevailing approach seems to be that of “interests-based negotiation” (e.g., Fisher, Ury, & Patton, 1991; Ury, 1991; Ury et al., 1988), which maintains that the negotiation process assumes a general direction that, more or less, is defined and guided by the parties’ successful or unsuccessful efforts to satisfy their interests.

In light of the above, current theory rarely treats negotiation as a communicative process that goes beyond parties' "subjective interests" or "objective interdependence" and transcends into an intersubjective reality that is created and validated by the parties' communication and agreement. In doing so, though, it misses the point that human interaction is a process through which people reorganize and realign both psychological factors such as interests and attitudes, as well as sociological factors such as norms and values (Blumer, 1966). An intersubjective approach, on the other hand, is based on the premise that intersubjective reality does not necessarily exist before the parties start to communicate; it is created in and during the communicative process. Therefore, it cannot take the form of an objective structure of interests that preexists and waits to be cognitively processed for the purposes of an effective distribution of resources during a seemingly neutral process of social interaction. The communicative process is instead given great importance: as parties start to converge on what they will be able to claim from each other based not only on their interests, but also on many other factors, such as "norms" or "statements of truth," as they come forth in the communicative process, intersubjective reality is created. Agreement is the result of convergence and mutual acknowledgement that can only take place within a "we-relationship," from which the intersubjective world is constituted (Schutz, 1967). This line of thought is distant to a mere objective mapping of interests and is immersed into the intersubjective world of negotiation in which there is a readjustment, reorganization, and realignment of claims over the negotiated resources.

Negotiation is generally defined as the process of allocation of scarce resources, such as money and goods. Under a subjective, instrumental rationality perspective, the focus of the analysis should be directed at the relationship of the

subject to the resources, which is characterized mainly by the subject's interests in the resources. Negotiation originates in a conflict of interests between parties and ideally ends with the accommodation of those interests. On the other hand, under an intersubjective, communicative rationality perspective, such as that proposed by Habermas (1985), the focus would be on the ways in which allocation of resources is agreed upon. Negotiation would originate in disagreement on the allocation of resources and would successfully end with a valid agreement on the allocation of resources. Hence, our focus will be on the communicative processes that may lead to such an agreement.

To approach negotiation under an intersubjective point of view, we need to take the emphasis off of interests, since it is a term that describes the relationship of the subject alone to the resources, and not the relationship among the negotiating subjects in an interactive sense. Of course, once the allocation of resources is questioned, all parties' interests can be taken into account, thus creating a link between the individual relationships of each subject to the resources and arguably establishing an indirect relationship among subjects that contributes to intersubjective reality. However, intersubjective reality is constituted not only from interests, but from shared meanings that can only come forth through the parties' communication, whatever that entails, i.e., interests, rights, procedural rules, and so on. All such factors in a communicative process may potentially form the basis of an agreement. Furthermore, although interests might serve as an explanation of why parties may agree or disagree, they are not themselves open to negotiation, agreement or disagreement; in a nutshell, they are hardly changeable and cannot really describe the volatile and multi-factoral nature of the negotiation process. Indeed, we need a different concept that refers directly and simultaneously to the intersubjective

relationship of all subjects to the resources and at the same time describes more comprehensively the process of negotiation. We propose that this concept is the concept of “claim-rights,” which are raised and eventually validated during a negotiation process.

It can be argued that claim-rights, as will be defined later on, set up a direct link among all parties and resources together. They are formed on the basis of the relationship among subjects and are not conceived of unilaterally: in principle, claim-rights for one party exist when the other party has corresponding duties. A claim-right over a resource simultaneously demands specific actions, or simply respect of that right by other subjects. The whole process of the creation, and especially the validation, of these claim-rights is based on intersubjectively shared meanings, whether they take the form of personal interests, socially accepted rules, or other factors of the communicative process from which claim-rights are constituted.

The term ‘claim-right’ has not been dealt with in the context of negotiation theory and should not be treated as ‘rights’ are usually discussed in current negotiation literature, i.e., as strong non-negotiable entitlements that often stand in the way of successful negotiation outcomes (Ury et al., 1988). Indeed, the term does not necessarily refer to a rigid and pre-existing entitlement that is brought to the fore by a negotiator’s position, but also to a malleable entitlement whose true validation requires the acknowledgement, acceptance, and agreement of other negotiating parties. There is no doubt that once claim-rights of this sort are asserted in a forceful manner that rejects the significance of other parties’ validation, consequences on negotiation outcomes will be negative. Negotiation often grows into a contentious and sterile battle of claim-rights, but it can also evolve into a friendly and fruitful mutual acknowledgement of claim-rights. We will refer to claim-rights as the main

element in the mechanism of negotiation, an element that links resources to negotiators on an intersubjective level. These claim-rights should be applied loosely in the context of negotiation and not understood as strictly as in law theory—although the latter’s semantic approaches cannot be ignored.

3. Toward a New Conceptualization of “Rights” in Negotiation: Some Initial Definitions and Hohfeld’s Contribution

In traditional legal terms, the notion of “right” is perceived strictly. Even though there are many ways and terms in which one may describe or approach the meaning of the word ‘right’ (e.g., Alexy, 1994; Chelidonis, 2010; Corbin, 1964; Eleftheriadis, 2008; Larenz, 1977; Raz, 1984; Simmonds, 2008), special attention should be attached to the well founded view of Larenz (1977), according to whom the notion of “right” refers to something that one deserves by virtue of law. That “something” may have variable content: it may be, for instance, the protection of one’s bodily safety or a claim for delivery of certain goods. Accordingly, the term ‘right’ may also be seen as the power that is conferred on a person by law, in order to satisfy their legal interests (Larenz & Wolf, 2004). At any rate, both definitions relate rights to their being acknowledged by “law”; the latter term, however, may imply either “positive” or “natural” law, wherefrom emanates the fundamental distinction between “legal” rights and “moral” (or “natural”) rights, that is, between those rights that have a correlate in legal texts and those rights that are grounded on a moral theory (Bix, 2009; Dworkin, 1978; Eleftheriadis, 2008; Harris, 2004; Hart, 1955; 1982; MacDonald, 2009; Raz, 1984; Sumner, 2004). In more practical terms, though, when we say that a right is born we mean, in principle, that a person may freely use a

certain object and, at the same time, prevent others from using it or, further, when they may ask from another person to fulfill a certain duty (Larenz & Wolf, 2004; see also Wittman, 2006).

In negotiation theory the notion of “right” is often treated narrowly, and is perceived as a rigid notion upon which strict and narrow-sighted positions are built; the above mentioned legal approach seems to exert here a certain negative influence. In particular, Ury et al. (1988) maintain that rights are formalized either in law or contract (see also Larenz & Wolf, 2004) and further argue that a focus on rights leads to distributive outcomes, i.e., win-lose outcomes, and thus that such focus should be avoided. The same authors, however, accept that one way to resolve disputes is to rely upon some independent standard with perceived legitimacy or fairness to determine who is right; and a shorthand for such standards is indeed the term ‘rights’, especially in the context of the so-called “rights-based negotiation.” In essence, Ury et al. (1988) relate “rights” to “socially accepted standards of behavior,” such as reciprocity, precedent, equality, and seniority. These “standards of fairness,” though, are not deemed to be very useful in a negotiation process, above all because in a particular case there may be different—or even contradictory—standards that apply, a feature which can make reaching an agreement extremely difficult, especially since parties often tend to reciprocate rights-based arguments (Lytle, Brett, & Shapiro, 1999).

A seminal contribution to the general discussion over the meaning of the term ‘right’ was Hohfeld’s “Fundamental legal conceptions as applied in judicial reasoning” (1913/1964). The work may have divided legal scholars into separate camps (proponents and opponents), mostly due to its rather scholastic approach, but also surely revealed to us that the notion of “right” must in each case be treated very

carefully, in order to effectively accomplish its semantic role (Corbin, 1964).

Hohfeld's supreme goal was to eliminate ambiguity over the use of term 'right', in the interests of clarity.

More particularly, Hohfeld distinguished four types of right: claim-rights (Hohfeld himself called these simply "rights"), liberties (Hohfeld used the term 'privileges'), powers, and immunities, all of them depicting advantageous positions for their holder (Alexy, 1994; Bix, 2009; Cook, 1964; Eleftheriadis, 2008; Harris, 2004; Stevens, 2007; Simmonds, 2008; Sumner, 2004; Waldron, 2009). The most important distinction he drew was namely that between a claim-right and a liberty (see also Simmonds, 2008; Sumner, 2004). These two terms play a significant role in our conceptualization of negotiation as an intersubjective process, since they are not defined on an abstract and general level, but always in particular reference to other people, i.e., on a concrete interpersonal or intergroup level (Bix, 2009; Eleftheriadis, 2008). They can be treated as fundamental concepts that regulate a possible state of interaction between individuals or groups and, therefore, a brief description of their function is essential here.

On the one hand, X has a claim-right that Y should do, or refrain from doing, an act if and only if Y has a corresponding duty towards X to do, or refrain from doing, that act (Stevens, 2007, p. 4). So, X may have a claim-right against Y that Y will grant him free access to his land or that Y will not disclose X's company secrets to third parties. The claim-right is, therefore, defined on the basis of a reciprocal relation between persons or, further, between groups. The most familiar example of this sort of correlativity is the relation between the rights and the duties arising out of a two-party contract, whereby the first party's claim-right is directly connected with the second party's duty to the first (Sumner, 2004, p. 39; Waldron, 2009, p. 6), and

obviously vice versa if both contracting parties have claim-rights and duties as well. Contracts are essentially based on promises which are intended to have legal effect and are supported by some “consideration,” i.e., “something of value” one gets in exchange for their promise, e.g., some right, profit, or benefit accruing to them, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other party (Beatson, 2002; Stevens, 2007, p. 10; Treitel & Peel, 2007). And in this context, claim-rights and corresponding duties arise on both sides as well. In any case, the correlativity thesis is an essential component of the Hohfeldian analysis, reflecting the fundamental idea that “the imposition of constraint on one person and the empowerment of another is a necessary feature of the civil condition” (Eleftheriadis, 2008, p. 152).

On the other hand, X has a liberty, relative to Y, to do, or refrain from doing, an act if and only if Y has no claim-right that X should not so act, or refrain from acting (Stevens, 2007, p. 4). So, X may have a liberty to play his favorite music loudly in the evening hours, without considering whether Y is disturbed; however, if that happens during the night, then Y has a claim-right that her neighbor X does not create such a nuisance, and this very claim-right protects the liberty of Y to sleep and obviously at the same time it respectively restricts X’s liberty to play his favorite music loudly. Liberty (or privilege) signifies the absence of a duty owed to another individual (Cook, 1964, p. 7; Raz, 1984, p. 20; Simmonds, 2008, p. 297). In essence, the term ‘liberty’ encompasses all the basic individual freedoms, such as the freedom of movement, of contract, or of expression, e.g. we all have the liberty as against everyone to speak as we choose, so long as no one has the right to stop us (Stevens, 2007, p. 5; see also Eleftheriadis, 2008; Harel, 1997; Waldron, 2009). There is no doubt that the various freedoms of individuals conflict with each other; these conflicts

raise the demand of ascribing “equal freedom” to all, a demand that namely goes back to Kant (1785/1968) who in his *Metaphysics of morals* placed the idea of equal freedom, that is, of mutual restriction of conflicting freedoms, at the center of his account of justice (Simmonds, 2008, pp. 108–109; see also Alexy, 1994, pp. 410–411; Pawlowski, 2000, pp. 136-138). At any rate, however vexing this problem of mutual restriction of conflicting freedoms may in practice become, the Hohfeldian concept of claim-rights vis-a`-vis liberties offers a plausible way of reflecting upon or even resolving such conflicts and, consequently, may be seen as complementary to Kant’s fundamental idea.

Claim-rights and liberties are concepts that are arguably built on the simple idea that individuals need to regulate their interaction. They are often derived from law and thereby imposed on an interaction; on the other hand, they can be willfully created by a signed contract, the latter certainly presupposing a human interaction that actually leads to the formation of the contractual content (i.e., claim-rights and corresponding duties, and so on). Such an interaction can be found in the negotiation process as well: Indeed, negotiation can be treated as a voluntary process in which people try to regulate their interaction and establish each other’s claim-rights and corresponding duties. But how exactly does this need arise? To answer this question, we will resort to another useful distinction which may also be traced back to Hohfeld’s work, namely the distinction between “rights in rem” and “rights in personam” (Corbin, 1964; Eleftheriadis, 2008; Waldron, 2009).

Rights in rem refer to the relation that connects a person with a certain object. In principle, those rights must be respected by everyone, and thus they are being protected *erga omnes* (such as property rights, e.g., that everyone has the duty to refrain from damaging my car); in short, such rights are being deemed to have

absolute power. On the other hand, however, there are also rights in personam (or “personal rights”), i.e., those rights that a person acquires against another specific person who is in turn bound by a correlative duty, usually in the context of a contractual link. Those rights must be respected only by the counterpart who undertook the relevant contractual obligation; briefly, such rights are deemed to have relative/relational power. That is, they develop their power only between the contracting parties (Stathopoulos, 2008).

Before entering negotiations, a party may have a right in rem or a “liberty-right,” claiming that they, in reference to a certain object, possess the object as against everyone (right in rem) or that they have a certain freedom as against everyone (liberty-right), and that those rights must be fully respected by all other individuals. This is a totally subjective approach, in the context of which the individual stands alone in relation to a certain object or a certain freedom that could potentially become the resource of the negotiation, whereby, in a theoretical sense, they can claim whatever they wish to. This is equivalent to thinking in terms of interests: the individual is connected to the resource on the basis of a desire or a need that is, in principle, irrespective of the existence of another individual. In a hypothetical world that would comprise the individual alone, the resource would be subject solely to the individual’s desires and needs and the individual would ideally end up with the full size of a prospective “negotiation pie.” When, however, the very same person enters the field of negotiations, things change and the margin of possible claims is being automatically restricted, since then that person must see their rights’ position in relation to another person, who could probably raise the same right in rem (over the same object in dispute) or the same liberty-right (concerning the same freedom). On this intersubjective level, one could argue that from now on there are no rights in

rem but only rights in personam—i.e., rights against another specific person—that must be validated as claim-rights, since only such rights entail particular actions or lack thereof on behalf of other individuals. In other words, the beginning of the negotiation process marks a somehow structural change in the “rights-position” of the parties, who now possess only rights in personam—i.e., against one another—that strive to gain an intersubjective basis of validation.

From the above it may be easily inferred that at the heart of the negotiation process lies precisely the creation and validation of rights in personam, for it is rather obvious that the rights raised during the negotiation process have a relational character. That is, they are raised only in reference to the other negotiating party. And it may be no coincidence that Hohfeld himself regarded all the above mentioned basic rights (claim-rights, liberties, and so forth) as rights in personam, each of which, in the context of a simple interpersonal situation, must be thought of “as one side of a jural relationship obtaining between a pair of individuals [emphasis added]” (Simmonds, 2008, p. 300) or as describing a certain “legal relation” (Eleftheriadis, 2008).

4. Claim-Rights and Intersubjectivity in Discourse

As mentioned above, current psychological theory primarily treats communication as a platform for the expression of subjective states which are oriented toward the satisfaction of interests. Although interests do play a central role, subjective states are also approached through a wealth of other concepts such as emotions (e.g., Forgas & Cromer, 2004; van Kleef, De Dreu, & Manstead, 2004), cognitive biases (e.g.,

Bazerman & Neale, 1983), trust (e.g., Butler, 1999; Valley, Moag, & Bazerman, 1998), and goals (e.g., Huber & Neale, 1987; Thompson, 1995), which are examined mostly on the level of the individual and often in relation to the potential achievement of integrative outcomes and derivative satisfaction of interests. Psychology's understandable focus on the individual and the need for abstraction has led to the examination of cognitive responses to general contextual cues rather than to specifically situated interactions. On the other hand, an intersubjective approach would examine negotiators' behavior on the basis of the temporarily shared social world, which gives meaning to the process of negotiation, rather than in isolation from specific context. Intersubjectivity exhibits an architecture embedded in communication that is based on complementarity between the sender of a message and the receiver, as well as on reciprocal role-taking: encoding a message is listener-oriented while decoding it is speaker-oriented (Rommetveit, 1979).

There is a considerable amount of psychological research that adopts an intersubjective approach and focuses on communication as the primary level of analysis. This type of research is often positioned against cognitivism, defined as the field that proclaims the superiority of cognitive science in the study of human psychology and behavior. In fact, discursive psychology deals with cognitions only as they arise in the context of discourse (Edwards, 1997), meaning that it examines how concepts such as "thinking" and "remembering" are understood and communicated in the context of discourse rather than how we, as independent observers, define them or study them. It would, therefore, also examine how interests influence negotiation only when interests come up in conversation and influence its course (Wagner, 1995). Discourse analysis (Potter & Wetherell, 1987) emphasizes the constructive role of language utilized in people's accounts, and on the basis of which

reality is constructed. Conversation analysis further emphasizes the structure of conversation, the sequential pattern of utterances and turn-taking in which intersubjectivity is approached as a practical conversational accomplishment (Sacks, Schegloff, & Jefferson 1974; see also Edwards, 1995). Within dialogical analysis, on the other hand, intersubjectivity is viewed as transcending the strict context of conversation, in order to encompass situation transcending phenomena that include culture or even subjective processes (Gillespie & Cornish, 2010).

It is evident that various theoretical approaches as well as corresponding methodological tools emerge by shifting focus from aspects of the individual to aspects of social life and communication. It is difficult to deny that cognitions can affect communication just as acts of communication, even from early infancy, affect the development of cognitive processes (Trevarthen, 1979; for a review see Trevarthen & Aitken, 2001). Our own perspective does not necessarily reject subjective approaches, but prefers to focus on the proposed intersubjective pattern of communication which describes the procedure of negotiation as it unfolds among participants, arguably leading the negotiation to an outcome. In this sense, it is aligned with some of the basic premises of the above-mentioned psychological approaches to intersubjective communication. Negotiation is not, however, a simple communicative process, but one during which participants attempt to regulate their interaction. More particularly, communicating subjects attempt to resolve a disagreement regarding the terms of their interaction. Although any utterance in the context of a specifically situated communication can be seen as inherently argumentative (Verhagen, 2008), utterances in negotiation are undoubtedly argumentative: participants provide arguments and try to influence one another in an attempt to establish particular terms of interaction. Viewed intersubjectively, each

utterance serves as a context for the next, and each next utterance is a response to the previous: the whole process involves argumentation as a dialectical procedure that critically tests and clarifies positions. Of course, this is only one way to look at arguments; they can also be approached on the level of their persuasiveness and through the lens of rhetoric, or as products and in terms of their logical foundations (Wenzel, 1990). In this paper, we have chosen to focus on negotiation as a dialectic procedure that builds and unfolds through the participants' efforts to determine the terms of their interaction. More particularly, though, our focus is on agreement during the negotiation procedure. Our purpose is not to uncover what agreement subjectively means or what its subjective underpinnings are; our purpose is to approach what agreement constitutes intersubjectively. Under this prism, we will approach how negotiating parties set up the prospect of agreement and how agreement is effected in the end. It is, however, important to note that our approach does not require that subjects are necessarily oriented toward agreement, but accepts that negotiation is a procedure that examines the path toward agreement regarding the terms of interaction.

A final agreement on the terms of interaction goes hand-in-hand with the duties of participants to uphold the terms of the agreement, as well as the correlative rights to demand the observance of those terms (Beran, 1977; Gilbert, 1993). In fact, agreement, duties, and claim-rights are all intersubjectively established and interrelated. Each step toward agreement is each time a step toward the establishment of a duty and a corresponding claim-right, in the context of a piecemeal "negotiation-engineering." From this procedural perspective, the emphasis is on utterances which, accompanied by validity claims, attempt to elicit intersubjective recognition, establish agreement, and validate claim-rights. Agreement here does not necessarily refer to the

final agreement of the negotiation procedure, but also to any acknowledgements of the other parties' assertions. In the following section we will attempt to explore the pathway on which negotiation potentially leads to this type of agreement by focusing on claim-rights that are asserted by argumentation and validated by agreement during the bargaining process.

5. A Step-By-Step Account of the Creation of Claim-Rights During a Negotiation

Resources are transferred continually on an interpersonal or intergroup level. Not all transfers, though, are subject to negotiation. For example, a person can go into a shop and buy a jacket without any type of bargaining or negotiation. Negotiation is only possible and will take place whenever the regulation of the transfer of resources needs an intersubjective first-time settlement or reorganization, or, in short, whenever the claim-rights over the resources are challenged. Once a person goes to the counter and asks for a lower price, negotiation begins. Negotiation, therefore, begins when a prospective new distribution of resources is challenged or, simply, when one person makes a claim or demand on another who initially seems to reject it (Ury et al., 1988, p. 4). This process implies that rights are not rigid, but are indeed flexible and open to reassessment and reorganization. We will now turn our attention to how they can be willfully created before we show how they essentially drive the process of negotiation.

Hart (1955), in a classic article on natural rights, distinguished between "general" and "special." General rights are of the type "I have the right to speak freely," and involve the non-interference of others with the freedom of a person; they

are much alike Hohfeldian liberties, even though they are directly based on the naturalistic assumption that all people have the right to be free. Special rights are rights that arise out of previous voluntary actions and act as counterpart to general rights. In a negotiated exchange, parties express directly or indirectly their interest in a possible exchange of resources, enacting thus some general right to participate therein, and thereafter start to form their special rights, which essentially take the form of two types of claim-rights, since both types entail duties on the part of other negotiating parties. These two types of claim-rights arguably drive the whole negotiation process and should thus be analyzed in detail.

In the first place, the negotiation process is initiated by the mere fact of each negotiator's willingness to give up a resource—a willingness which falls under the notion of “general rights” for Hart or the notion of “liberties” for Hohfeld. Thereafter, within the voluntary process of negotiation, special rights are gradually formed, the most obvious case of which arises from promises (Hart, 1955). The promise to do something is essentially incurring obligations or acknowledging claim-rights to the promises. Although during negotiation no formal promises are actually made, all parties express their willingness to transfer their resources or part of them (even if this happens in the form of the modest possibility). This might not be necessarily classified as a promise, since it is rather closer to another source of special rights acknowledged by Hart, i.e., consent, which can be also thought of as an authorization to interfere (see also Raz, 1984). And precisely this feature may be detected in the negotiation process, during which individuals indirectly authorize others to interfere with their resources just by discussing a prospective exchange. In this way negotiating parties actually form the first type of right: this right is namely a claim-right that allows the person who is granted

access to the resources of the other negotiating parties to truly interfere with the resources.

Exchange, of course, is not unilateral by definition. The negotiation process makes the further step of making one party's transfer of resource contingent on another's. Hart argued that:

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required, have a right to a similar submission from those who have benefited from this submission. (1955, p. 185)

When individuals authorize others to interfere with their resources, they are basically restricting their liberties; in essence, the creation of a claim-right on one side results in the restriction or "attenuation" (Schäfer & Ott, 2005, pp. 99–100) of a liberty of the other side. More important, though, is that, according to Hart's above mentioned mutuality of restrictions, anyone that relinquishes a right respectively has the right to ask for a similar submission from the beneficiary. It is in this way that the second type of right is established: this right is also a claim-right, which this time empowers individuals who grant access to their own resources to claim a similar submission from those who benefit.

All in all, two types of claim-rights arise through the commitment to the exchange. One is equivalent to the claim-right arising from consent or authorization of others to interfere with a prospective transfer of resources and corresponds to the beneficiary of the consent/authorization. The other is equivalent to the claim-right arising from the expectation of a similar submission and corresponds to the party that offers the consent/authorization.

In negotiated exchange, agreement to the eventual transfer of resources is based on claim-rights. The negotiation process arguably starts because people want to gain control over some type of resource. To do so, they must have a right to claim over the resources that can be acknowledged by the party who controls them. Through negotiated exchange they will offer control of their own resources, or part of them, in order to acquire claim-rights over the resources of the other parties. Of course, no such transfer of control overtly takes place. However, offering control essentially means offering a claim-right to the other party. Simultaneously, this offer enables the assertion of a claim-right over the other party's resources, according to the above mentioned mutuality of restrictions.

The realization of the exchange requires in fact the transfer of the rights to control a resource from one party to another. Negotiation, accordingly, involves claim-rights over those resources. Claim-rights asserted by people on the basis of their submissions may not be equal to the claim-rights acknowledged by the other parties. There is, in essence, a conflict of claim-rights. Therefore, negotiation is more like the result of a conflict of claim-rights rather than a conflict of interests, as it has long been viewed. In fact, two types of conflict are usually identified in literature, namely conflicts of interests and conflicts of values (e.g., Chong, 1996; Harinck & De Dreu), which may often, though, be seen as inseparable (Aubert, 1963). The concept of a "conflict of claim-rights" incorporates both dimensions of conflict by recognizing both the element of competition over the resources as well as the element of dissensus over the proper evaluation and allocation of resources. The absence of conflict between asserted and acknowledged claim-rights paves the way for the finalization of the exchange.

A simple example may now illustrate our point. Mike goes into a shop to buy a jacket. The jacket costs \$100. Once the first contact has been made and willingness to buy the jacket has been expressed by Mike (the shopkeeper's intent is evident), claimrights are formed. The shopkeeper has a claim-right (based on her submission) on Mike's \$100. Mike also has a claim-right on the jacket (based on the shopkeeper's consent-authorization). On the other hand, Mike might offer to pay \$80. The shopkeeper will have a claim-right on Mike's \$80 and respectively Mike will have a claim-right on the jacket (based on his consent-authorization). Mike's claim-rights, acknowledged and asserted, coincide. The shopkeeper, however, might not be ready to concur to an exchange under these terms. The asserted and acknowledged claim-rights are depicted in table 1.

Table 1

Example of how claim-rights are asserted and acknowledged

	Mike's claim-rights	Shopkeeper's claim-rights
Consent-Authorization (by the other party) / ACKNOWLEDGEMENT	ACKNOWLEDGED CLAIM-RIGHT ON THE JACKET	ACKNOWLEDGED CLAIM-RIGHT ON THE \$80
Mutuality of Restrictions (based on one's own consent) / ASSERTION	ASSERTED CLAIM-RIGHT ON THE JACKET	ASSERTED CLAIM-RIGHT ON THE \$100
CONFLICT OF CLAIM-RIGHTS	-----	CLAIM-RIGHT ON \$20

If this exchange is to take place, it will probably take place between \$80 and \$100. This area of \$20 is claimed by both parties under the scenario of a realized exchange. Of course, both parties can retreat and release each other from any claims. That is, the latter do not have any binding character as long as there is an opt-out alternative. Should they commit to the exchange, they will allocate the \$20. We are not talking about \$20, not even of rights to use the \$20, but of rights to claim the \$20.

If Mike agrees to go up to \$85, he gives up the right to claim the \$5, but has not yet given up the right to control \$5—after all, as already said, the exchange might not take place anyway. The same applies for the shopkeeper as well. If she agrees to drop the price by \$5, she agrees to ask less for her submission of liberty (right to own the jacket). If there is a solution and agreement at \$90, both parties will have given up claim-rights on \$10 and awarded them to the other party. Now the final exchange can take place.

The above may have served to show that this paper attempts to attach value to the essence of negotiation. Negotiation is always connected to an exchange, and rational human beings are supposed to act in ways that serve their interests. According to our point of view, however, negotiation is a rational—in a communicative sense—process of allocation of claim-rights and will be resolved by meeting any condition that leads to agreement, and not necessarily through the direct satisfaction of interests. In other words, the interrelation among agreement (either to allow others to interfere with one's own resources or to acknowledge other participants' demands for similar submissions), duties and claim-rights can be seen as an essential property of the architecture of negotiation. The final outcome is reached through a sequence of promises, authorizations, assertions and acknowledgements that mainly relies upon argumentation. With this as a point of departure, an intersubjective analysis could therefore proceed to study how and why people finally agree, or disagree, during negotiation.

6. The Role of Claim-Rights in Integrative Bargaining

Our analysis so far has been primarily concerned with distributive bargaining, to

make our points shorter and our examples easier to understand. Distributive bargaining is about slicing and distributing the “pie.” The pie is the area that is under question by all interested parties. All parties feel they can claim a part of it, but the party that shows it has the strongest claim during negotiation, i.e., the more valid claim-right, will eventually end up with the largest piece of the pie. Negotiation, however, is rarely only distributive although people usually seem to think so (under the “fixed pie assumption”; Bazerman & Neale, 1983). In integrative bargaining, they try to reach agreement through increasing the value of the exchange. Since the use of rights has been incriminated for the failure to reach integrative agreements, we would like to point out how an intersubjective process that focuses on claim-rights does not stand in the way of such agreements, but on the contrary sheds light on how the interaction of negotiation actually works.

The underlying mechanism of the creation of claim-rights is the same. By offering more and increasing the size of the pie, one party can claim more of the larger pie on the basis of Hart’s (1955) mutuality of restrictions, while at the same time other parties have more of their claim-rights acknowledged. Let’s take for example John and Harry, who want to go on vacation together, but neither wants to use his car. In order to avoid a deadlock, John can offer to pay for the gasoline. The value of the prospective exchange increases, since the value of the gasoline is added to the value of using the car. By adding the value of the gasoline and offering it to Harry, John weakens Harry’s claim-right on the use of the car by acknowledging another claim-right that was not a part of the original prospective exchange. Now Harry has an acknowledged claim-right and may ask John to pay for the gasoline but, at the same time, this fact allows John to require a similar submission from Harry. If Harry feels it is a reasonable arrangement, he may be more willing to concede on the

matter of the car. Integrative bargaining is considered effective mainly because this type of persistence serves people's interests. Nonetheless, the underlying mechanism can be explained adequately and arguably more satisfactorily by the underlying communicative mechanisms that lead to consensus and resolve the initial conflict of claim-rights on an intersubjective level.

7. Validation Criteria for Claim-Rights

Claim-rights are raised during negotiation in an effort to provide a reasonable and rational regulatory framework for the transfer of resources that are under question. In fact, not all claim-rights that are raised are reasonable, but only those that can elicit the acceptance and agreement of other parties. Instrumental reason pervades current negotiation theory and provides a rather restrictive basis for the evaluation and validation of claim-rights. Any act on the negotiating table is evaluated on a means-end relation, wherein negotiation moves are treated as the means and the satisfaction of interests as the ultimate end. This type of reason applies with regard to the person performing the act, but also with regard to other negotiating parties. According to an interdependent decision-making approach, negotiating subjects are expected to behave rationally if they manage to make moves that promote the satisfaction of all parties' interests. Any outcome that serves the interests of all, as well as any claim-rights that lead in that direction, will be more easily validated. This is the main reason why win-win prescriptions have become so popular, and insist on advising people to "focus on their interests" (Fisher et al., 1991).

Although efficient moves that promote the satisfaction of interests are certainly a sign of rationality, they are not the only moves that can qualify as rational in the broader context of a communicative process. Any communicative action that is accompanied by a criticizable validity claim can qualify as rational, as long as it can be convincingly defended. In other words, the nature of the communication process itself sets the criteria for the validity of the asserted claim-rights. Indeed, on a general and abstract level, the conditions for validity can be much broader than the success of goal-directed actions: they can encompass appropriate evidence that may support a claim about the objective world, along the dimension of theoretical truth; criteria that establish the appropriateness of a norm, along the dimension of normative rightness; and, further, evidence that supports the genuine nature of a thought, a feeling, or an expression, along the dimension of subjective truthfulness (Habermas, 1985). In the context of negotiation, negotiators that can survive criticism about the sincerity of their intentions or their feelings, about the truth of their assertions with regard to the objective world, and about the appropriateness of a suggested norm with regard to a negotiation procedure or outcome, are negotiators whose asserted claim-rights can be validated more easily.

If we view negotiation as such a general communicative process, we may incorporate the dimensions of bargaining—i.e., concession exchange—and argumentation into a single human interaction process, at the same time as we blur the boundaries between conflicts of interests and conflicts of values by using the term ‘conflict of claim-rights’. Bargaining and argumentation are not necessarily distinct and may be put under the same umbrella of “rational discussion” (Provis, 2004). The above mentioned general criteria for validity, therefore, have to be further elaborated by the examination of the arguments through which claim-rights can be effectively

defended. The purpose of this paper, however, is not to provide the specific ways in which arguments can be successful and persuasive, but mostly to offer an intersubjective framework for the description and analysis of the negotiation process. Literature on discourse analysis and rhetoric within the field of negotiation (Arvanitis & Karampatzos, 2011; Firth, 1995; Putnam, 2004, 2010) can elucidate the general conditions for the validity of claim-rights by examining the degree of persuasiveness of specific argument forms, which is often measured in terms of the ability to persuade a hypothetical universal audience (Perelman & Olbrechts-Tyteca, 1958). The study of argument persuasiveness resides in the realms of rhetoric and aims at gaining general assent for an utterance.

For our purposes, it would suffice to say that argument forms aim at defending the claim-rights that are asserted during the negotiation process against potential criticism or refutation from other negotiating parties. The important point to note is that an asserted claim-right can be challenged in a variety of ways by other negotiating parties and on different grounds. To take the example of hypothetical negotiation situations, asserted claim-rights can be challenged on the grounds of subjective truthfulness, “I think this deal is more important to you than you suggest it is”; on the grounds of normative rightness, “I do not think a 50-50 split is right in this case”; or on the grounds of the theoretical truth, “I do not think that the average price of your raw materials is as high.” The validation of a claim-right that is connected to the above hypothetical challenges rests upon the ability to deliver successful (counter) arguments. Under this view, negotiation develops as a communicative process during which there is an exchange of arguments and counter-arguments both aiming at defending and, at the end, validating respective claim-rights. Nevertheless, a significant caveat must be entered here: the ability to

validate claim-rights on the above mentioned grounds does not merely mean that the party who raises the most convincing or strong claim-right shall be the “winner” of negotiations, but also that the negotiation’s outcome stands more chance to be accepted as valid by all negotiating parties.

8. Can Power Constitute a Validation Basis for a Claim-Right?

The above mentioned approach to the validation of claim-rights may appear too “soft” when there is a conflict of claim-rights, or any conflict for that matter. It is well known that contending, as a negotiation strategy, can also pay off under certain circumstances (Pruitt, Peirce, Zubek, McGillicuddy, & Welton, 1993). People often become more assertive when they feel powerful and are able to claim more resources by making a first offer or by simply initiating negotiations (Magee, Galinsky, & Gruenfeld, 2007). Assertive behavior does not seem to grow on the grounds of consensus and validation, but seems to depend upon power, which is traditionally viewed to stem from the control of resources and the capacity to reward others (Blau, 1986; Homans, 1974; Thibaut & Kelley, 1959). In Hohfeldian (1964) terms “power” denotes, in essence, everything that one can do, i.e., everything that is possible for someone (see also Sumner, 2004). The role of power in negotiations has been thoroughly examined by many authors, such as, for instance, Fisher et al., who have supported the argument that “the better your BATNA, the greater your power” (1991, p. 102; see also Ury et al., 1988, p. 8), i.e., the better the “Best Alternative To a Negotiated Agreement,” the more power people have to claim resources. It can be argued that in this context it is power and not validation of claim-rights, that is, it is a unilateral action and not an intersubjective communicative action that determines

the validity and acknowledgement of a claim-right.

Of course, this type of distinction lies deeper in the field of philosophy and can be traced to fundamental distinctions between consensus and conflict, or further, between the philosophical programs of Habermas and Foucault (Flyvbjerg, 1998). What is important to note here is that a successful negotiation requires the agreement of all parties involved. A unilateral exercise of power cannot result in an agreement unless other parties choose to accept and indirectly legitimize this use of power. Without agreement and consensus the negotiation will simply break down, however powerful one side is. Apart from reflecting an advantage in the field of resources, real negotiating power should also be able to elicit the other sides' agreement and thus can be viewed as an additional way to strengthen a claim-right, as long as negotiation is still a process that requires agreement of all parties involved. In any other case, the whole communicative process can hardly be classified as negotiation and is more likely to be described as blackmail. After all, just as negotiation tactics can be classified as cooperative or competitive, arguments can be cooperative and competitive too (Conklin, 1985). Especially within the realms of a competitive economy and business transactions, the use of power is often expected and is likely to produce claim-rights with a high likelihood of acknowledgment.

Overuse of power could, however, produce defensiveness and result in poor negotiation outcomes or lack of agreement (Hornstein, 1965; Kimmel, Pruitt, Magenau, Konar-Goldband, & Camevale, 1980; Pruitt, 1981). Moreover, it could very well be interpreted as overstepping the borders of one's liberty and asserting claim-rights which cannot be legitimized; in essence, overuse of power may be viewed as liberty abuse, unable to take the form of a claim-right and the corresponding duties on behalf of other parties. After all, it can be argued that

effective negotiation tactics or uses of power are, in principle, those that might ensure the acceptance of everyone involved in the negotiation.

9. The Analysis of Negotiation Through the Lens of Intersubjectivity

A very well-known distinction in negotiation theory is that between descriptive and prescriptive theory; in purely philosophical terms, one could distinguish here between factual and normative propositions. The intersubjective approach is more descriptive than prescriptive: it offers a rather accurate description of what actually happens during a negotiation, that is, of what constitutes a negotiation offer or a negotiation claim, a concession or an assertion, an “exchange of resources” or an “expansion of the pie.” The recourse to the concept of claim-rights allows us to follow the flow of the negotiation on the appropriate level of the intersubjective world, which unfolds during the communication process among negotiating parties. The process begins with a dispute over a distribution of resources, i.e., with a conflict of claim-rights over those resources, and is eventually resolved with the full and intersubjective acknowledgment of all parties’ claim-rights or, at least, of those claim-rights that are effectively defended in the above mentioned sense. Without such an acknowledgement no final agreement can take place. Both agreement and disagreement can be approached through the concept of claim-rights that portrays negotiation as a communicative process of assertion and validation of claim-rights. Thus, this concept might also offer a plausible explanation of how and why the negotiating parties are able or unable to reach an agreement, especially through the analysis of discourse. And it is rather evident that if there is any prescriptive element in this approach at all, it actually lies in pointing out the proper, communicative way

of validating an asserted claim-right.

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