## Framework

#### The meta-ethic is practical reason -

#### 1] All moral decisions depend on interpersonal moral justifications through our ability to formulate and reject normative judgments that rely on practical reason.

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For Scanlon, the value of human beings stems from their rationality, that is, the faculty all rational creatures have to understand, formulate, assess, and reject normative judgements about reasons, that is, “considerations that count in favor of adopting” any belief, attitude, or behavior. What respecting human life recommends is that, in my practical deliberation, I take other people into account as beings who have reasons to want to lead a good life, who are able to select between various ways in which a life is worth living, and who thus lead their life in an active and autonomous manner. When I ask how to act, this recognition involves taking the reasons of others into account, together with the way in which they may, from their own viewpoint, appraise the reasons for acting I am envisaging following. If I step on your foot out of gross negligence, I am disregarding your value as a rational creature, for I do not take into account your reasons for being opposed to my acting in this manner: in addition to the physical discomfort it causes you, and the harm it does to your right to control how others interact with your body, my action also generates what Philippa Foot calls a “second-order evil13”, linked to your ability to appreciate how little importance I attach to your reasons in my practical reasoning, and thus the lack of significance I attach to you and your value as a human being. 8 In short, the principles of interpersonal morality bear on the various ways in which I may represent others’ reasons in my practical reasoning. Since taking account of the reasons that others may put forward to dispute the permissibility of my behavior comes down to wondering if my behavior may be justified to them, it follows that the criterion for the moral validity of my action is its interpersonal justifiability. For a demand made of others to be acceptable from the perspective of moral theory, it must be such that all those concerned – the person acting, the person acted upon, and any third parties who may be affected by a principle authorizing individuals to make such demands of one other – can accept it, or, in Scanlon’s formulation, which we shall examine shortly, that none of them can reasonably reject it. The behavior I envisage adopting is thus morally right only if the principle authorizing me to interact in this way with others is justifiable to them. Equally, the way in which I treat others’ interests is morally wrong only if the latter are in a position to make a decisive objection against the permissibility of my action. That means that we cannot think of wrongness, at least in how it relates to the precepts of interpersonal morality, independently of justifiability14. 9 What we owe each other, in virtue of the value attached to the singular capacity we have to understand and assess normative judgements, is thus to act solely in a manner which may be justified to each of those affected by our action. The fact that an action may be justifiable to others does not mean, however, that the moral validity of the principle authorizing me to treat them as I do is grounded simply in their psychological disposition to accept such or such a justification for this action. To be valid, a moral principle must be not reasonably rejectable. If the principle authorizing my action is contested by others out of pure selfish interest or lack of regard for the reasons which drove me to act as I do, then this is not such to establish that this principle is unjustifiable. Equally, if by abusing the low self-esteem of the person I am mistreating, and by misleading them, I manage to get them to accept the treatment I am inflicting on them, it does not thereby become morally acceptable. In fact, it is doubtless made even less so by the “ideological recognition”15 whereby I would tend to value that person’s tendency to submission and so lead them to act in accordance with my illegitimate claims on them. What matters is thus not the possibility of reaching a concrete agreement with others about the permissibility of my action, but the fact that the latter be ideally justifiable to them 16. In the following sections we shall see what ideal justifiability consists in. But it is important to insist first on the appeal of relationships of mutual justifiability.

#### Absent interpersonal justification for the justifiability of our actions our actions become unjustifiable. We only justify actions to ourselves through the practical reason of interpersonal justifications if our action can be agreed upon by others. All other ethical formulations fail to capture how reason is not isolated in the self, but is rather found in the agreement between others of our action. Otherwise we would have no basis or confidence in our own reason for justification, meaning other ethical frameworks can never formulate the reason behind reason of our actions.

#### 2] Principles must not be able to be reasonably rejected in order to be justifiable. Objections to principles generate the ability to choose between principles and value personal objections against each other and weigh ethical action. Actions which cannot be reasonably objected despite personal objections generate justification for ethical actions.

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For an action to be justifiable, the principle authorizing it should be such that nobody could reasonably reject it. Hence the arguments we need to examine take the form of objections to the moral validity of a rival principle to the one we are seeking to defend. In answer to the question why we need to think of moral justification in terms of a double negative, Scanlon answers that, while it is perhaps not unreasonable for me, given my inclinations, to accept a principle demanding that I sacrifice certain of my legitimate interests for the benefit of others, it may nevertheless be perfectly wrong of the latter to take advantage of this predisposition of mine30. That means that the validity of our moral judgements does not depend wholly on our predisposition to be reasonable in the demands we make of others. While it is certainly not always unreasonable to be “too kind”, it is not morally right to take advantage of any such penchant shown by others. 19 The theory set out in What We Owe to Each Other stipulates that, in our practical deliberation, we should only take into account objections (to the validity of moral principles) that comply with the three following restrictions: to be acceptable, an objection must be personal, individual, and generic. This means it must be such that it could be made by an individual on their own behalf, and, further, that it should refer to how the interests of any person who found themselves in their position would be affected by the action under appraisal. Since contractualism is a theory of interpersonal morality, it excludes from practical deliberation all impersonal demands referring to something other than the human interests at stake in the situation under examination. Because it is the moral value of other individuals that is to be recognized, it debars all collective demands, for what matters are the interests individuals may defend on their own behalf, not those of a group of people. And it disallows all non-generic demands – that is to say, demands specific to a particular individual involved in the situation in question, as opposed to the interests at stake of any person who might one day find themselves in the same situation, for we are seeking principles that could be true in a generality of cases. Being reasonable thus means taking into account all the personal individual generic objections that others may make to the permissibility of my action. 20 Once we have identified the objections that each may make on their own behalf against the principle favored by the other party, the principle which will pass the test of reasonable non-rejectability is that which best resists the strongest of these various objections. If, for example, Peter and James have both had an accident, but Peter is more seriously injured than James, each of them have personal individual generic reason to demand they be treated as quickly as possible. But Peter’s state of health is more alarming than that of James, so the principle authorizing the rescuers to look after James first, to the detriment of Peter, may be reasonably rejected by the latter. Whereas James cannot reasonably reject a principle granting priority to the person in the most urgent situation. The considerations that are morally relevant pertain to how the various principles would affect the interests of the individuals concerned. Thus it is objections relating to personal interests that need to be taken into account, not moral beliefs in the validity of any given behavior, otherwise the contractualist test of reasonable non-rejectability would be circular, for it would allow into the deliberation the very type of judgement we are seeking to test.

#### 3] All persons have a right to justification. Asking why we value rights cedes a right to justification for those rights and recognition of the others right to have rights – all rights entail a logically prior right to justification for those rights in the first place.

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One final and important point: Contractualists agree that persons have a right to justification, as Forst puts it. That is, we have a right to demand and be given good reasons when deliberating over matters that affect us in important ways. But Forst and Benhabib in particular call special attention to the structure of such a right. In Forst’s formulation, the right to justification is logically prior to and entails a right to participate in those discourses in which substantive rights are ‘constructed’ by determining—as persons in the case of moral rights, or as a specific community in the case of political rights—what entitlements and protections ‘could not be denied to others without violating reciprocity and generality’ (Forst 2011a, p. 969). Inversely, when individuals or groups are treated as though they are ‘invisible’ for the purposes of justification, so that they are subjected to rules or relations ‘without adequate justification’, they are ‘dominated’ and their human dignity is violated (Forst 2011a, p. 967). In a still more extreme case, Forst describes as ‘violence’ not the simple rejection of claims to justification, but the circumvention of the process of justification as a whole which is unilaterally replaced by other means for the coordination of action. Such violence is often concealed by ideological restrictions of the space of reason-giving, which present certain institutions or relations as natural or unalterable (Forst 2011a, p. 970). What for Forst is a right to justification is for Benhabib—modifying a phrase from Hannah Arendt—a right to have rights. This is, in Benhabib’s account, a right of every human being to be recognized by others as a person entitled to moral respect and legal inclusion. But she specifies these entitlements as protections for the communicative freedom of individuals (Benhabib 2007, p. 9). Rights-claims, she argues, therefore take the following form: ‘I can justify to you with good reasons that you and I should respect each other’s reciprocal claim to act in certain ways and not to act in others, and to enjoy certain resources and services’ (Benhabib 2007, p. 13). Given this constructivist form, I cannot enjoy rights except insofar as I can justify my rights-claims to you; but that means I must acknowledge your communicative freedom, your right to have rights, which is to say, your right ‘to accept as legitimate only those rules of action of whose validity [you have] been convinced with reasons’ (Benhabib 2007, p. 13). And this holds reciprocally: you cannot enjoy any rights except insofar as you recognize my right to have rights. Thus, all specific first-order rights-claims presuppose a recognized second-order right to have rights. The hypothesis that all first-order or substantive rights claims entail a second-order or logically prior right to justification or right to have rights will be especially important in the argument that follows.

#### Thus prefer the standard of an adherence to the justifiability or non-rejectifiability of actions–

#### Prefer Additionally -

#### 1] Contractualism makes up for the failures of consequentialism in various instances

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Consequentialists hold that, to know how to act, it suffices to look at the consequences our actions may have. Since they establish strict equivalence between our moral duty and the injunction to maximize good (or minimize bad), they identify a value – well-being, equality, etc. – that our actions should promote, by bringing about states of affairs that maximize this value. Hence, for example, utilitarian appraisal of our actions focuses on the sole measure of aggregate well-being. It requires that we concern ourselves with considerations – such as the value attached to maximizing the happiness of the greatest number – that are, for Scanlon, far removed from what really motivates our moral sensibility, namely, as we shall see, our concern for others’ interests and for the quality of interpersonal relationships regulated by the ideal of mutual justifiability. When I am moved by promoting aggregate well-being, I am more concerned with the quality of a state of affairs – one that by definition is impersonal, since no single individual enjoys the sum of benefits produced – than with how my action affects others. This does not seem able to adequately account for our concern with morality, since it is not self-evident that we should concern ourselves with the impersonal quality of states of affairs6, rather, for example, than with demands others may make of me on their own behalf. 4 So, due to their insistence, as just seen, on impersonal considerations, consequentialist theories are unable to explain our concern for the demands of morality. Utilitarianism – the consequentialist theory that values producing the state of affairs that brings about the greatest good of the greatest number of individuals – is in turn unable to justify valid moral principles. Contractualist theory was devised in response to this. Here, speaking of failure rather than inherent inability is significant. For contractualism takes the same starting point as the utilitarian project, namely the idea that what matters, from the perspective of morality, is to satisfy others’ needs, and how my action affects their interests by furthering or harming their interests. (Seen from this angle, contractualism has far more in common with utilitarianism than with ethical egoism or libertarianism.) The utilitarian, however, departs from this path as soon as he becomes a consequentialist: it is then no longer satisfying an individual’s needs that matters, but bringing about the state of affairs with the greatest aggregate utility7. The purpose of my action is to produce the best possible state of affairs, as measured by the extent to which it promotes the value attached to aggregate utility. The standards of reasoning utilitarians recommend we respect for ranking different states of affairs and selecting the best among them leads us to defend counterintuitive conclusions and justify questionable moral principles. Let us consider two examples. Suppose you are the fortunate owner of a small yacht and are out sailing. Not far off are two little islands about to be submerged by the rising tide, with one person on one, and two on the other. Because of the time needed to reach the two islands in turn before they are covered by the waves, you cannot reasonably hope to come to the assistance of all three individuals. You can only rescue one of the two groups. What must you do? For a utilitarian the answer is simple: you have to save the greatest possible number of people, in this case, two, so as to produce the best consequences. Initially at least, that seems to match most people’s moral intuition. Now suppose that Jones has had an accident in the transmitter room being used for the live broadcast of a World Cup football match that has just started and is being watched by millions of people. Jones is experiencing very painful electric shocks that he can only be spared by interrupting the broadcast for fifteen or so minutes[8](https://www.politika.io/en/notice/rightness-as-justifiability-thomas-scanlons-moral-contractualism#note-texte-3937). Should we stop the broadcast to help him, or on the contrary should we leave him to suffer until the match is over? A utilitarian will reason that the sum of the individual utilities of the viewers is such that the level of aggregate well-being would be less overall if we rescue Jones rather than allowing the broadcast to continue. [They] will therefore recommend that we satisfy the preferences of the greatest number even though, taken individually, they are trivial in comparison to the intensity of Jones’s suffering. If the consequentialist reasoning adopted by utilitarians leads to this eminently counterintuitive conclusion, does this not signal that we should resist the change of focus mentioned earlier on, between, on the one hand, taking into account the well-being of the individual and, on the other, promoting aggregate well-being? Further, is it really possible to defend the judgement according to which you should steer your yacht towards the island with the greatest number of people without thereby having to fall back on consequentialist reasoning? That is the challenge contractualism sets itself.

#### Contractualism solves this problem

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Let us first look at the case of Jones, who, the reader will remember, has been electrocuted in the transmitter room of a live sporting event. Objections to the moral principle requiring that we come to his assistance even if it means interrupting the broadcast must not be collective in nature, that is to say put forward in the name of the interests of the group formed by the spectators, arguing for example that the sum of their preferences outweighs Jones’s demand. Therefore the demands of each spectator must be considered in isolation. What each of them demands is that the broadcast of the match continue without interruption, not even for fifteen minutes, in order to satisfy their interest in watching it. In comparison to the hour-long suffering that Jones would be spared, the interest the TV spectators have at stake is derisory. None may thus reasonably demand on their own behalf that Jones be made to suffer a further hour of electrocution. In a case such as this, the counterintuitive conclusions of aggregate reasoning adopted by consequentialists are very easily avoided thanks to the restrictions described earlier.

#### 2] Performativity – We agreed to a set amount of time for prep, not because it was consistent with the will of the sovereign or the categorical imperative or that it maximized expected wellbeing, we did it because we both cannot reasonably reject the time. If it was too long or short then any one of us might not be able to adequately participate in the debate, giving a reasonable reason to object. Following the rules of this debate round concedes that we should follow rules nobody could reasonably reject.

## Offense

#### I affirm: A just government ought to recognize an unconditional right of workers to strike.

\*\*\*Pre-round and CX checks for any definitions, I disclosed, its your fault for not looking at the doc, and you likely never asked me to specify definitions in the 1AC anyway so this is terminal defense.

#### 1] The right to self-determination is a second-order moral right and is therefore logically prior to other rights – granting the right to strike to be presumptively legitimate

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The forms of contractualism I have in mind are also and importantly forms of metaethical constructivism: that is, they view norms as arising from agreement among those affected, and so deny the existence of antecedent normative facts. Thus, if there is a right to strike, it would be because affected parties grant it to one another (caveats to follow), and so ‘construct it’ through some rational procedure. The attempt to combine contractualism with constructivism in this way has been criticised for emptiness or circularity. It is not my aim here to pursue these metaethical questions (see Borman 2015b). But there is an analogous worry about applying contractualist-constructivism (which I will hereafter simply call ‘contractualism’) to the sorts of non-ideal conditions of which labour relations in class societies are an example: namely that, in point of fact, the affected parties do not reciprocally recognize a right to strike. One is tempted to say, ‘Well, they should!’ and so to beat a hasty retreat into ideal theory. But the critics may seem to have a point here: under existing conditions, it appears to be difficult to answer why affected parties should so agree without violating the contractualist-constructivist premise that all norms are the product of agreement. That is, it looks as though we will need to draw on some antecedent norms which do not originate from or within agreement. This worry plays out somewhat differently, as I will show, depending on whether the relevant agreements are taken to be actual or hypothetical. But in either case, it is one of the central aims of this paper to argue that this worry is a false one: contractualism, in the constructivist sense I am defending, can provide a defence of the right to strike precisely in the non-ideal conditions of a class society, and without appeal to anything other than the procedures for rational agreement. This defence will rest on two inter-related points: first, that for contractualists of whatever stripe, the question raised by the strike is not so much one of the case for or against a particular right, as it at first seems, but of the scope of morality or of reason-giving itself; second, that the strike represents the assertion of a second-order moral right to self-determination, which is to say a right to justification regarding the conditions of one’s labour. If I am correct in this, then the historical and contemporary controversy surrounding the strike is best seen as concerning not the plausibility or merit of this assertion taken on its own terms, but the salience in the first place of moral assertion in this particular area of human life. Taking together the two points mentioned above, I will argue that within a properly understood contractualist framework, the right to strike enjoys pro tanto or presumptive legitimacy

#### 2] The right to strike is simply an extension of the right to self-determination

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There are two things to say about this as it relates to a putative right to strike. First and most importantly, under a system in which employers refuse to subject labour conflict to judgments of substantive merit, which is to say that they reject that workers have a right to conditions of employment that they accept as justified, the strike represents the assertion by workers to the contrary. That is, under actually existing conditions, striking—whatever the substantive demands—simply is the assertion of the right to self-determination in labour, and so the question of whether there is a right to strike hangs on whether the right to self-determination is justified in this context. Accordingly, my argument is focused chiefly on the latter. Second, and somewhat more remotely, if it is granted that the right to self-determination is justified, and if we imagine that some alternative system of arbitration is settled upon as the principal mechanism through which this right is to be realized, we should still ask whether in this scenario the moral right to strike would indeed be quite dissolved. I think that it would not be, but that it would become a right of last resort, like the moral right to civil disobedience, which is legitimately invoked to protest procedurally correct decisions which nevertheless misfire in some morally important way. I will not pursue this second line of defence here since, given its counterfactual premises, first things ought to come first. Still, the theoretical possibility of alternative mechanisms is sufficient to show that the connection between the right to self-determination and the right to strike is not conceptual: the implication is a product of the non-ideal conditions of our social world, specifically, the problem of class domination reflected in asymmetrical property relations and the legal institutionalization of the capitalist firm.

#### 3] Striking is a form of economic self-determination, and similar to the right to freedom of expression, is justified even if the specific expression or strike isn’t

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By striking, workers declare their right to self-determination within economic life, the right to cooperatively determine the rules and conditions of labour which affect them in essential ways, materially and psychologically. This assertion of a right to justification is activated when normative conflict of some kind arises (as reflected in the list of common demands given earlier). As Don Locke argues in his noncontractualist defence of the right to strike, strikers—irrespective of the particular, first-order claims involved (better pay, better hours, etc.)—are thus making, in effect, a certain sort of moral, or quasi-moral, claim: a strike is not simply a refusal to continue working on the terms currently on offer; it is also, in effect, a claim that those terms are unacceptable [i.e., unjustified or unjustifiable], and it is because they are unacceptable that the strikers refuse to accept them. (Locke 1984, p. 192)6 This is a normative claim: if it were simply descriptive (‘these terms are unacceptable’), strikers could not legitimately prevent others from coming into take these jobs on those terms (which would constitute an empirical refutation of the descriptive claim) and, if that were the case, there would be no right to strike at all but only a right to quit. The claim, then, is that no one should perform these jobs under those conditions, even if there are many who for reasons of comparative desperation might consent to do so. The actual act of striking is, therefore, not a punitive boycott aimed strategically at forcing the hand of employers (and therefore a strategy for reaching a compromise between conflicting interests); it is, according to Locke, an ‘exculpatory boycott,’ in which we refuse to perform an act because it would be wrong (for anyone) to do so (Locke 1984, p. 193). The strike is therefore one salvo in a process aimed at reaching an agreement regarding justified conditions (and this, whether or not it is pursued in tandem with organized collective bargaining). Of course, workers can be unjustified in their particular or first-order assertions and demands; this is no way alters the fact that, whatever the content of those demands, the making-of-them implies a second-order claim to a right to selfdetermination which, like the right to freedom of expression, protects even its wrong-headed use. This second-order claim can be taken both as a targeted complaint against a particular employer and, as it has been historically, as a protest against the structural domination of the capitalist labour market.

#### 4] The right to strike is justified by its ability to justify itself through the reasonability to demand such a right. It relies on a meta-ethical justification through the right to rights since the principle of self-determination behind the strikes is not reasonably objectionable. Even if the individual strike isn’t justified and can be disallowed, the right to strike is justified universally.

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Thus, rather than being a question of applied ethics, the issues raised by the strike tend toward the meta-ethical: can the demand to justify itself be justified in a way that is compelling from the perspective of those who refuse to argue? If we could answer this in the affirmative, the right to strike would immediately come under the general defence of justification; the remaining questions to be settled within discourse would concern only the legitimacy of particular strikes and particular demands (none of which would challenge the right to strike itself). There is little hope, I think, of arriving at such a result via informal logic: morality is a practical, historical device and the limits of practices of reason-giving are determined by social struggle. Probably all of the contractualists I have mentioned here would accept this judgment in some form; but it certainly has a greater affinity with, and so perhaps offers some reason to prefer, the approach of the actual-agreementContractualism and the Right to Strike 95 123 contractualists insofar as the latter see the scope of morality as the product of ‘political struggles, social movements, and learning processes’ (Benhabib 2007, p. 16). For hypothetical-agreement contractualists like Scanlon, morally motivated social struggle must have two distinct stages: first, contractualist reasoners have independent insight into what cannot be reasonably rejected; second, they engage in social struggle, armed with this prior, independent, and already completed justification for their conduct. For the actual-agreement contractualist, at least full justification only emerges at the end of the struggle, with the successful effort to convince others and so reach agreement (see Borman 2015a). When it is a question of opening up some domain of human life to moral questioning, the actual agreement account seems a better fit for the messy outcomes of historical struggle, of which the labour movement is an especially good example. Historically, workers saw labour, its terms and conditions, as a moral question. The presently ambiguous status of the right to strike reflects the unresolved legacy or, to put it more harshly, the historical failure or defeat of the labour rights movement in this regard. Indeed, the ‘special interest’ character of many trade unions today, which confine themselves to advancing the narrowly defined employment interests of their members (for which they are ridiculed by their anti-union critics) is the result of the systematic repression of a much broader labour movement which actively sought connections with broader concerns of social justice. It is noteworthy, in this respect, that by the 1950s in the U.S., secondary boycotts and sympathy strikes were illegal (Lambert 2005, pp. 62–63). Where does this leave the right to strike? If morality is regarded as a practical project of coordinating action and action-effects via legitimized norms, then it is enough to show how workers who demand such a right are reasonable to do so while employers who refuse to engage with the claim are not. Operating on the premises of actual-agreement-contractualism, it is in fact easy to accomplish this: I would propose that, because the scope of morality is defined by the pursuit of rationally legitimated norms, every sincerely raised and undefeated demand for justification— every assertion of the right to justification—is presumptively or pro tanto legitimate. This does not mean that every particular strike is actually legitimate any more than any proposed substantive right is automatically justified. The right to have rights is justified presumptively as an implication of the mere raising of any given rights-claim, and so similarly, the right to self-determination in labour is justified presumptively by the mere raising of any labour-rights-claim. Any attempt to take-up, even in order to reject the right to have rights would presuppose its recognition, and the same may be said for the right to self-determination. Let me repeat this deceptively simple, though somewhat unsatisfying, outcome: the particular strike implicitly asserts a right to self-determination, as a presupposition of whatever particular claims are made. That right cannot be reasonably rejected since any attempt to reject it on the basis of reasons is self-defeating, guilty—as Habermas might say—of a petitio tollendum fallacy. If indeed the right to strike is derivable from the right to self-determination, then there is a presumptively justified right to strike. And this is established without appeal to antecedent normative reasons for believing that those affected should agree to such a right. 96 D. A. Borman 123 This does not do away with the practical obstacles that endure in the absence of full justification or recognition of the right to have rights in labour. We can add for good measure that if the rejection of justification within labour is bolstered only by appeals to the interests of employers taken personally, then the rejection is not based on good, generalizable reasons. If the rejection is, as is more commonly the case in legislative restrictions of the right to strike, ‘justified’ by first-order appeals to economic efficiency, then the reply is guilty of a fallacy of irrelevance. Of course, employers and governments could attempt a second-order justification of the firstorder insistence upon compromise-orientation in place of consensus-orientation (that is, a principled, communicatively oriented defence of the claim that economies ought to be regarded as ‘norm-free’ subsystems evaluated according to their efficiency alone); but doing so would require genuine communicative engagement with the justificatory demands of workers who reject the thesis on the basis of putatively good reasons and would be tantamount to an acceptance of the right to self-determination (here, as agreeing to be governed by principles of compromiseformation). Simply pushing through a compromise-orientation at the second-order level, too, entails that the entire sequence of interactions is reduced to a question of mere power.