

## **The Tragedy of Contract and the Naturalistic Fallacy at the Workplace<sup>\*</sup>**

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### **ABSTRACT**

This study concerns business ethics. In particular, this study is a critical review of consequentialist ethics, namely, the tragedy of contract, which underlies managerial practices at the workplace and which equates empirical flourishing with behavioural morality, an instance of the naturalistic fallacy. It shows that the application of consequentialist ethics in the corporate world is fundamentally flawed such that empirical consent, a key element of consequentialism, obtains at the expense of the weaker party to an exchange and that consent-based contracting both precludes the autonomy of the subject and paradoxically invites the influence of the third-part expert. The alternative practice is addressed with respect to the tradition of social contract, which places public ordering over private ordering.

**Keywords:** Business Ethics, Consequentialism, Social Contract

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## INTRODUCTION

This study critically examines the moral basis of the modern firm, which draws single-mindedly upon consequentialist ethics such as agency theory and utilitarian managers (Friedman 1962; Jensen and Meckling 1976), a type of normative ethics that finds the morality of action in the computation of the consequences brought in by the action itself. This study makes the case that the firm conceivable in consequentialist ethics (Bentham 1948; Mill 1978; Sidgwick 1922) serves only to preclude any managerial role at the workplace, culminating in the firm without the manager. Such a moral theory of the firm that denies the manager takes the following forms of managerial folklores (Friedman 1962; Jensen and Meckling 1976), which are mistakenly viewed as residing in the tradition of social contract and which repeat the naturalistic fallacy inherent in consequentialist ethics (Moore 1988): the firm is a nexus of contracts to maximize the welfare of trading parties in a way that reflects the consent of trading parties, not being regulated by the third party or the state (de-regulation); the best efforts obtain through the provision of outcome-based incentive such as pay-for-performance (measure supremacy); the limit of the firm is found in behavioral irrationality that derails the computation of each party's welfare (cultural irrationality); and the growth of the firm per se serves as a surrogate for the welfare of parties (managerial realism). This study concludes that the naturalistic fallacy in consequentialist ethics would be inevitable unless this view of the firm succumbs to the contractual and thus procedural basis of the firm.

## GOOD MANAGEMENT

The conventional views of good management rest with so-called consequentialist ethics such that the morality of an act depends on the consequences of the act and that the fulfilment of an end, mostly in the form of subjective well-being, outweighs the morality of a means to that end. Consequentialism is a taken-for-granted moral theory that underlies discourses about what is good management. Classical utilitarianism is the typical case of consequentialist ethics, whose inventory of moral theories are still on the increase (Bentham 1948; Mill 1978; Sidgwick 1922). The following are the

arguments that characterize the consequentialist ethics prevalent in the corporate world, which is readily combined with the elements of classical liberalism (Harsanyi 1977; Sen 2009). First two arguments concern the subject of choice – a sovereign agent of choice – whereas the remaining relates to the institutions that support the subject of choice.

First, a point of departure for moral discourse is the emphasis upon the subject of choice, which is an inviolable basis of liberalist ethics and whose hedonist turn constitutes the consequentialist ethics in the corporate world. In particular, each person is assumed to be a capable moral subject who is the sole judge of his or her moral end. It follows from moral plurality that a chosen end should vary across persons inasmuch as each person is a unique moral subject. The emphasis is then given to the fact that a person has a complete capacity to choose an end whose contents are not guided by the third party, whom liberalists thought of in the age of Enlightenment as either a pre-capitalistic family or the Catholic Church (e.g., Pieper 1966). In the hedonist turn, which limits paradoxically the scope of moral plurality, this claim is rephrased as the sole judge of his or her own pains and pleasures, i.e., sensations. Whatever ends chosen are thus a good reflection of well-informed preferences or sensations.

Second, consequentialist ethics presumes instrumental rationality for the subject of choice i.e., utilitarian calculus, indicating that the person is capable to identify a moral act or a means that results in the maximization of his or her preferences. The knowledge of alternative acts and their consequences is available to the subject of choice. For the computation of pains and pleasures at the society level, whose sum serves as a standard for evaluating the morality of an act, interpersonal comparisons of pains and pleasures are allowed, albeit partially. More importantly, such comparisons remain neutral to the person in question such that each person's comparison of the pains and pleasures do not differ from that of the observer (e.g., Smith 1759). One notable exception is positional objectivity by Amartya Sen (2009), whose comparison varies with the perspective of the person making the utilitarian calculus.

Third, the freedom to act upon the means chosen is an institutional condition for moral plurality as well as instrumental rationality. To the extent that my own happiness, i.e., pleasures minus pains, is all that matters, consequentialist ethics does not

suggest anything about how to secure my happiness in the social context where one needs to justify the authority of his own ends in the eyes of the others. The freedom to choose is a necessary, social condition for unleashing the potentiality of the choosing self. Classical utilitarianism is indifferent to this social condition, for it does not deny the role of the third party to provide the means that would maximize the happiness of the other. The elements of liberalist ethics are implicitly and often incompletely invoked to identify social arrangements that are consistent with the utilitarian subject of choice. The freedom to choose is such a condition.

Fourth, a consent-based contract is a decentralized institution for resolving interpersonal conflicts when a person pursues a means that may interfere with the consequences of the means chosen by the other. The clash of interests is unavoidable once moral plurality is imposed upon the subject of choice. Instruction or direct supervision is one option available in the authoritarian society. In contrast, a liberalist solution to the clash of interests or collective action problem in general begins with the metaphor of contract where each person voluntarily negotiates with the other to obtain a contract that both parties agree upon (Buchanan and Tullock 1962).

Two competing views have been presented as to whether a contract draws on the agreement or the consent of the responsible, legitimate persons. The first view, opted for by the utilitarian approach, revolves around the empirical consent such that a well-informed choice, not forced by the others, should constitute the consent of the person in question (Harsanyi 1977). The free choice of rational actors is a good reflection of their consent. This view stands in sharp contrast to the second view of the hypothetical consent that a choice obtained through a fair and impartial procedure may reflect the true and legitimate consent of the persons in question.

The nature of a procedure that leads to mutual agreement helps characterize that of the consent of parties involved. When attention is given to the symmetry of the initial bargaining situation, i.e., each party having comparable outside options, the outcome agreed may indicate the true and unforced consent. When emphasis is given to the impartiality of the initial bargaining situation, each party being ignorant of her own position in the society (Rawls 1971) may represent the legitimate and moral consent of the parties. This hypothetical consent is critical to the idea of social contract (Locke 1980; Rousseau 1985). In the utilitarian twist, however, the first

view of consent is employed to justify the minimum provision of an institution that supports consequentialist ethics in the corporate world.

In short, consequentialist ethics appeals to such principles as the self for the only judge of one's own hedonistic ends, the instrumentally rational assessment of means to the ends chosen, the freedom to choose and the contract of the empirical consent. One important implication of this ethics with respect to the firm is that the manager is the ephemeral basis of the firm. Good company is one with less bureaucratic control and more self-autonomous work.

Consequentialist ethics has been consistently invoked to save the free enterprise from the command of the state while justifying the authority of managers at the workplace; however, it paradoxically precludes any role available to managers who are themselves the third and illegitimate party to the production of the firm. Managers do not produce. Rather they coordinate actions of input providers or measure the outcomes of those actions. The moral status of the manager in the web of contractual exchange between input providers is the third-party expert who serves as a contractual agent to correct the metering problem or collective action problem at the workplace. The measure-specialist thus mirrors the ends of input providers and does not presents his or her own. From the perspective of consequentialist ethics, the only legitimate parties to the production of the firm are the providers of labour and capital. The firm is merely a social identity arbitrarily assigned to the bundle of contractual exchanges between input providers.

The view of shareholder value maximization is a natural evolution of this line of reasoning. To the extent that a contract agreed reflects the consent of trading parties, the increase in the welfare of one party signing a contract should match with at least no decrease in the welfare of the other accepting the contract. On the basis of empirical consent, the welfare of shareholders remains a sufficient standard for judging the morality of corporate behaviour.

The following four folklores demonstrate the paradoxical marriage of the firm and consequentialist ethics. The cases put forth by this paper concern the here and now practices of contemporary business, which echoes and is discursively redeemed in the common law tradition. These cases are empirical facts, which describe morality here and now and which are distinct from and therefore do

not exhaust the meta-ethical claim of this study that avoids moral relativism.

First, de-regulation is always on the top of the consequentialist agendas (Mandeville 1989). The structure of the argument is the following. The best allocation of resources is locally known to those who own such resources so that those who do not own are not legitimate parties to the exchange. The government is a notable example of the third party who is not the legitimate party to the local exchange of resources. It follows that decentralized coordination without government intervention improves productive and allocative efficiency in a society. Lee Hae-jin, Global Investment Officer of Naver, for example, in an interview of a Korean academy of management, observed that government regulation of domestic monopolies may undermine the global competitiveness of those monopolies, which should be detrimental to the welfare of the domestic market and that stakeholder pressure on CSR (corporate social responsibility) is unjust and irrelevant to innovators when the less productive and thus unemployed farmers complain of the productive makers of value-creating tractors.<sup>1)</sup> The logic of de-regulation, as demonstrated above, serves to externalize the welfare-loss associated with production to those who are outside the empirical consent given to the production. Indeed, de-regulation is a feature of a state of nature, which was warded off by Locke (1980).

Second, measure-supremacy is the ground for placing consent-based contract over any other institutions that may govern the allocation of resources. It runs as follows. Parties to the exchange may make their best efforts to enforce their contract when the outcome agreed is correctly specified by the contract a priori and when the outcome fulfilled is correctly judged according to the contract a posteriori. The provision of outcome-based incentive as a solution to allocative inefficiency is a case in point. When the East Asian financial crisis in 1997 demanded a regulatory reform in the Korean industry and when the fairness of admission to tertiary education was in question, a new set of metrics for outcome-based incentive circulated widely in the hope that a better-measured outcome may guarantee that the outcome intended arrives to the parties of the contract.

Third, cultural irrationality is a one-fit-all excuse for any

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1) <https://www.hankyung.com/it/article/2019061815741>

inefficiency or welfare loss that is observed in the consent-based contract. It posits that whenever you have inefficiency in the corporate world, it is because you are not utilitarian enough. The more hedonistic and the more instrumentally rational you are, the better off your company and society are. Business practices unique to Korean context are viewed as the source of inefficiency and are readily attributable to the irrationality of Korean culture that downgrades the honest pursuit of one's own pleasure, rather than to the outcome of the computation by rational persons over their pains and pleasures in the Korean context. The following claim by Chu Jin-hyung, former CEO of Hanwha securities is typical of this line of reasoning: Korean firms are too bureaucratic to support individual autonomy and creativity, the two major sources of competitive advantage, which are the natural surroundings of American counterparts, and the inefficient bureaucracy observed in Korean firms is the outcome of irrational managers that are bound by the Korean tradition, pre-modern and ignorant of the authority of hedonism.<sup>2)</sup>

Lastly, managerial realism is invoked to discourage any attempt to explore alternative institutions that may secure the morality of acts. The strategy employed to defend the consequentialist ethics is rather eclectic. Its advocates apparently acknowledge that consent-based contract is not the first best and yet persuade that it is the only feasible option to preserve the liberalist ideal i.e., liberty. The first best is not feasible and the consequentialist society is at least feasible and the second best. It is akin to the end-of-history position (Fukuyama 1993). The naturalistic fallacy remains at the core of managerial realism. The fallacy, albeit varied in its details (Moore 1988), refers to a consequentialist claim that good, i.e., the standard of judgment, is reducible to being, the object of judgment, and that an act or a trait is morally right as long as it makes to flourish here and now the subject of the act or the trait (e.g., Haidt 2012).

The fact that you survive the competition does not necessarily mean that you are morally superior to those who fail. To the extent that the moral basis of desert draws on the subject of choice, your success should not be attributable to unchosen contingencies, which include your location in the society (Rawls 1971; Sandel 1982). Big success should demand more unchosen contingencies.

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2) <http://www.hani.co.kr/arti/opinion/column/892105.html>

The naturalistic fallacy however permeates the other three folklores of consequentialist ethics. The advocates of de-regulation that combines empirical consent with individual autonomy view the local and productive efficiency of the free enterprise as reflecting the global and allocative efficiency while pointing to the price mechanism that supposedly measures the ends as well as their means that are pursued by the rational subject of choice. Evolutionary fitness at the firm level is then equated with the good at the society level.

Moreover, in the name of science such as evolutionary psychology and brain science, which covertly invites the authoritarian view of knowledge to the public sphere or namely *Offentlichkeit* (Habermas 1991), naturalist ethics repeats the fallacy and yet emerges as the reservoir of consequentialism. This study however takes one step further and suggests that the marriage of liberalist and utilitarian ethics is detrimental to the very status of the choosing subject. The following section concerns this unavoidable ending of the marriage.

### **THE TRAGEDY OF CONTRACT**

Consequentialist ethics builds on the provision of a minimum institution, namely, consent-based contract, which is the weakest argument to defend. Drafting a contract is a process of specifying contingent claims that bind parties to an exchange. The knowledge of the unforeseen future state of the nature that may affect these claims is essential to efficient contracting. The knowledge however is not and cannot be perfect. The future is by definition a set of events that are unknown. Accordingly contract is inherently incomplete, leaving much room for competing interpretations of a contract signed and agreed. Neo-institutionalism in economics is a direct application of contract incompleteness such that an alternative institution of governing exchanges is crafted to cope with conflicts or transaction costs that arise from contracts that are incomplete (Hart 1995; Williamson 1985). A consequentialist correction for incomplete contract is efficient contracting, i.e., designing a new contract that better measures the contingent claims specified by well-informed parties. As is the case with agency theory (Jensen and Meckling 1976; Lazear 2000; Predergast 1999), a high-powered incentive scheme is strongly recommended as a tool for this contract.

The problem with efficient contracting is two-fold. One is the



validity of empirical consent per se. Does an observed choice really reflect the preference of a well-informed person in the symmetric, i.e., power-balanced, bargaining situation? A contract signed may not converge onto a contract freely agreed when one party has multiple outside options that the other lacks. Such asymmetry is a typical unchosen contingency that plagues the ability of the rational subject to choose. The second problem is with contract incompleteness, which renders consequentialist ethics to collapse from inside. The reasons are the following.

First, efficient contracting precludes the autonomy of the choosing self. An attempt, if possible, to alleviate the incompleteness of contact would undermine the autonomy of the choosing self. Knowing the future state of the nature, i.e., prediction, is equivalent to fixing its future state, irrespective of whether it is fixed stochastically. Besides the feasibility of such prediction as well as measurement errors of comparable and commensurable utilities, the future that is fixed cannot be compatible with the freedom to choose, for the freedom presupposes the uniqueness of the individual whose road not taken cannot be fixed a priori (Kant 2005). A sequence of acts or the history of acts is then brutally collapsed into one point in time, i.e., the present when a well-informed and forward-looking person knows the future and makes a choice now; if so, this would not be a choice at all, but a disquieting ending of a choice.

A choice with the fixed future is a choice with no process of discovery. A love that builds on the fixed and known future is not a love that one falls in. It simply indicates that the future of a love is already reflected in one's present decision to love. This is exactly the way Nozick (1974) deconstructed the mode of utilitarian thinking by opting for the metaphor of the experience machine. Efficient contracting precludes the value of getting to the outcome and it limits substantially the autonomy of the self. Consent-based contract that is efficient, the fourth element of consequentialism, cannot but limit the freedom to choose, the third element of consequentialism.

Second, efficient contracting invites the influence of the third party. One way to go around incomplete contract is not to draft a contract. This is the direction in which neo-institutional economics proceeds. The instruction issued by the third party, namely, managerial fiat, takes the place of consent-based contract (Williamson 1985; Masten, Meehan, and Snyder 1991). In contrast, efficient contracting seeks to

solve contract incompleteness by designing a better contract, which should deny the intervention of the third party. Nonetheless, the influence of the third party remains intact behind the appearance of consent-based contract, for efficient contracting actually invites the third party and yet without consent.

A contract agreed and signed by well-informed and rational persons is efficient (more precisely, Pareto efficient), for they find the contract good to them and decide to agree to the contract. Contract incompleteness is then a problem of information that rational persons are not fully informed. A ready-made solution to this problem is to get the rational person more information (Shiller 2012). Such information includes the details of alternative contracts, i.e., alternative means to their ends, the future state of those contracts, i.e., the consequences of chosen means, and metrics to prove the arrival of the future and promised state of those contracts, i.e., the measurement for the consequences of chosen means. In particular, parties to an exchange look for and rely on the contractual metrics of chosen means in response to incomplete contracts that yield competing interpretations of the outcome agreed. A better metric is supposed to resolve differences in competing interpretations. Attention is naturally given to the design and provision of a better metrics (e.g., Biernacki 1995).

The third party who is called an expert takes the centre of consent-based contract as experts or measure-specialists are called upon to mitigate the problem of incomplete contract and to provide a better metrics. The name of such an expert at the workplace is the manager, whose authority resides in the Benthamian ideal of utilitarianism, i.e., the expertise to meter the pains and pleasures of persons (Alchian and Demsetz 1972; Davies 2015). An attention to the third-party expert corresponds to the belief in science, which comprises the tenets of modernity together with the emphasis on liberty. The concern for incomplete contract induces consequentialists to call for the third-party expert on top of consent-based contract.

The third party, subsumed in the role of a contractual agent to shareholders or shielded in virtue of scientific neutrality (see Williamson (1985) for trilateral governance), paradoxically emerges as an unregulated power in the uninformative name of liberty and efficiency. The third party tends to monopolize the interpretations of the outcome agreed when contract incompleteness is routinely

attributable to human factors that are irrational or boundedly rational. Big data or AI algorithms popular at the workplace is a case in point. Contracts then cannot be enforced without the help of the third-party expert.

Third, as is the case with individual autonomy, efficient contracting impedes moral plurality. Apart from the tenuous position of a hedonistic value of means as a sufficient statistic for unspecified ends, efficient contracting remains open to the criticism of internal consistency such that the instrumental rationality of efficient contracting may deplete any possibility of individualism. Everybody would follow the best practices that are dictated by efficient contracting. No irrational outliers would be tolerated. This end state is fundamentally incompatible with moral plurality, which is the building block of liberalism, classical or not.

When the future state of nature is stochastically fixed and when the hedonistic or monetary value of means serves as a sufficient proxy for unspecified ends, the best course of action will be known and chosen by rational and prudent parties to an exchange. Consent-based contract that is efficient should vindicate the best course of action available to parties to an exchange. Of course, there are a set of behavioural norms such as promise-keeping that are imposed on and welcome by any rational actors who find it instrumental to the satisfaction of their respective ends to conform to the norms imposed. Yet, such norms are basically content-independent, which means that they are the rule of the exchange and that they do not specify or instruct a specific content of a contract. On the contrary, the problem with efficient contracting is that instrumental rationality seeks to dictate the content of a contract, leaving no room for the imagination to think and act differently.

When the best course of action is uniquely identified, the content of the contract should be uniform, inducing trading parties to opt for the single and the best practice, which is also endorsed by the impartial spectator, i.e., the third-party expert. A different course of action would be disavowed as being irrational. Even though the best course of action is not unique, the same logic is still applicable. A wide range of actions would be forfeited, as being irrational to the parties in question; the end state of efficient contracting would be a substantial reduction in or the absence of behavioural heterogeneity.

In theory, the best course of action dictated by efficient contracting

should be prudently chosen in a way that minimizes the influence of irrational considerations that arise from arbitrary contingencies of the society. This line of reasoning suggests that behavioural diversity is a mere reflection of the influence of arbitrary contingencies. To the extent that choices mirror (hedonistic) ends, however, the emphasis on the best course of action to be chosen implies that the (immediate) ends pursued by rational actors are virtually identical: the maximization of (means to) an end. Behavioural diversity would be then nothing but the arbitrariness of ends that are diverse. The conclusion that ends or preferences are arbitrary is fundamentally incompatible with moral plurality, an essential aspect of individuality.

Note that the course of action is frequently indeterminate for a person who constantly discovers the future state of nature and modifies his or her end accordingly. To the contrary, consent-based contract in the scheme of consequentialism denies the autonomous subject of choice. The third-party expert comes to overwrite differences in individual ends. A contractual solution to incomplete contract leads to the denial of the freedom to choose.

### **THE MISTAKEN METAPHOR OF CONTRACT**

Would that be possible to sign a contract that does not limit the subject of choice? Could we have a promise that does not bind ourselves? Contract is however a device with which one voluntarily binds oneself to a certain set of agreements. This is why efforts spent away to secure a complete contract may undermine the very basis of the freedom to behave differently. Accordingly, the liberalist subject of choice cannot find his or her place in the economist metaphor of contract that draws upon empirical consent. This does not suggest that incomplete contracting be conducive to the autonomy of the subject, for competing interpretations in the outcome agreed are readily open to competition to influence in one's best interest the interpretation of the outcome agreed. Those who have power may monopolize the interpretation, precluding the autonomy of the weaker party to an exchange.

The problem with efficient contracting, namely, the tragedy of contract, therefore, entails the denial of freedom covertly induced by empirical consent, which is efficiently and thus forcefully selected

out and the content of which is residual at best, i.e., arbitrary ends and preferences that are inserted by the expert of the price measurement (Habermas 1990; MacIntyre 2007). A discourse on efficient contracting typically circulates in the form of efficient selection such that the weak and the less-efficient should be eliminated in virtue of the welfare of the community that survives the natural selection. Morality is then calibrated by the process of efficient selection, namely, free and perfect competition, and the solitary and cognizing subject of moral judgment accepts passively as the standard of morality or validity claims the non-personal price mechanism, which should consistently reflect and measure the hierarchy of means and ends pursued by heterogeneous persons.

The following example is the *déjà vu* of praise commonly given to both competition and innovation in the modern economy. “(...) *the weak in body or mind are soon eliminated and those that survive commonly exhibit a vigorous state of health (...) We must therefore bear the undoubtedly bad effects of the weak surviving and propagating their kind*” (Darwin 1871: 161-162).

The tragedy of contract discussed above leads to giving an impetus to hypothetical consent, which is commonly confused with the economist metaphor of contract. The challenge of liberalist morality is to resolve the problem of collective action by actors of differing interests or ends while preserving the autonomy of the self to choose one's own end. The logic of hypothetical consent has been put forth as a viable solution to this challenge (Kant 2005; Locke 1980; Rawls 1971; Rousseau 1985).

It runs as follows. The quality or morality of the outcome agreed cannot be independent of that of the process to get to the outcome agreed. In particular, a procedure is set up by rationality or hypothetical consent. Under the ruling of a procedure that is rationally and then morally acceptable, a choice is given to you, the subject of choice. The agreeable outcome obtains as you make a choice offered by this procedure. Contract that is based on hypothetical consent is a content-free procedure that is agreed by rational actors; that applies evenly to those actors agreeing to the contract; and that yields the outcome acceptable by rational actors who are symmetrically situated in the society. When this procedure operates as a podium for expressing and collecting opinions of legitimate parties to an exchange, it comes to be the public sphere for deliberation (Habermas 1991).

A procedure for deliberation is content-independent. It deviates from an attempt to stipulate precisely the content of a contract, depleting the autonomy of the subject. A contractual solution, preferred by consequentialists, to cooperation or conflict presumes that parties to an exchange would make a better choice when they are disconnected from the influence of the others. One may try to design with good intention an institution that guides or helps the choice of the parties to an exchange. Yet, the contractual approach posits that the third-party intervention, even with good intention, may end up providing a subsidy to the bad choice of the individual, a case that is inefficient at best. In contrast, the procedural approach to contract suggests that a better contract be derived from a better procedure, not from the voluntary bargaining between interested parties (Habermas 1991; Rawls 1971). The symmetry of the bargaining situation would not be automatically obtained, which calls for additional institutions to keep actors being symmetrically situated.

A procedure for deliberation is an impersonal third-party that serves to convert the private zone of activity within which the individual is left alone into the public ritual in which legitimate parties come to promote overlapping ends or aspirations (Arendt 1958; Cyert and March 1963; Ranciere 2014).). For consequentialist ethics, the scope of legitimate partners to an exchange is narrowly defined as those who are directly affected by the consequence of an exchange and who express their concerns over the exchange. It is none of one's business when he or she is outside the scope of such legitimate partners. On the contrary, the procedural approach to contract allows the third party to coordinate the bargaining of the legitimate partners. The third party in this context is however not the third-party expert but the impersonal procedure that invites impartial spectators who judge the content of a contract at their own costs. The reason is the following.

Publicness is commonly understood as an event or a state that affects the welfare of a majority of the society. As Arendt (1958) has clearly pointed out, publicness defined as above is not being public at all but a sum of private welfare or interests. The capitalist market in this regard is not a place for publicness. Rather it is a space in which private interests are weighed against one another. Alternatively, publicness is viewed as the concern for polis, i.e., the others whose welfare apparently does not have a direct impact

on your welfare. Your attention to a public affair may improve the welfare of the other and yet at your own cost, which is more than what is required for contractual relationships and which does not improve your welfare. Publicness is thus the target of altruistic cooperation. The only motivation behind this cooperation and the concern for publicness comes from sympathy, an affect that a person has about the other whose welfare has no implication for the person except for “the pleasure of seeing it” (Smith 1759).

When the third party is invited to the bargaining of persons to an exchange, the third party is assigned either of two distinct roles. One is the agent who has a contractual obligation to either of persons to an exchange and who coordinates the bargaining process in a biased manner, i.e., on behalf of his or her contractual party, namely, the principal. The other is the middleman who with neutrality mediates the bargaining of persons with competing interests. Court ordering is a representative case.

In comparison, the third party that is called upon in a procedure for deliberation may coordinate the bargaining of persons impartially and yet not neutrally. The third party has then a fiduciary, not contractual, relationship with the persons in question (e.g., Brudney 1997; Gibbon 1999). The impartial third party is one who sympathizes with the others (Smith 1759); whereas, the neutral third party keeps a distance from the persons in question. The impartial third party is therefore one who coordinates with the concern for publicness.

The third party would not be impartial enough when he or she is more easily attached to either of parties to an exchange. However it is rather natural for the third party to feel closer to one person than to the other. This is why the requirement for the middleman is often not sympathy but neutrality, which is a mechanistic and non-emotional judgement of the situation at hand. In contrast, a procedure for deliberation is to secure sympathy and thus impartiality by summoning as many third parties as possible to the bargaining of persons whose ends are competing.

Persons in conflict would accept the outcome finally agreed not because the outcome is discovered by the advice of the impartial third party, but because it is obtained through a procedure that is expected to summon as many third parties who are impartial. Hypothetical consent, as opposed to empirical consent, rests with the bargaining parties' trust not in the third party as a person but



in the procedure that governs the bargaining of dissenters. Now the procedure per se operates as the third party that governs. At the workplace the formal, complex organization emerges as a procedure for deliberation that should arise from hypothetical consent (Bae 2016).

The number of third parties invoked in the bargaining of persons does not automatically guarantee the impartiality of the process. The preferences, ends, or tastes of third parties are as important. Liberalists may ensure that these third parties should be disconnected from the arbitrary contingencies of the society. The veil of ignorance is a reflexive device that John Rawls (1971) employed when he attempted to secure the impartiality of deliberation. Economists may derive the general will that governs from the average opinions of the third parties, namely, the representative third party (e.g., Harsanyi 1977). The procedural approach to contract however draws a special attention to the views of the weaker party (Rawls 1971; Ranciere 2014). The reason is that for the persons embedded in the society, the symmetry of the bargaining situation will obtain when the view of the strong party is discounted. The voice of unheard third parties who are summoned by the procedural approach to contract is the way out vis-à-vis the tragedy of contract that is inherently incomplete.

The procedural approach to contract is formalistic and Kantian by nature. It is eventually a hermeneutic act of speaking not to the particular parties of specific exchanges but to the potential and thus unheard members of the community. It stands in sharp contrast to voting behavior, which aggregates individual computation of their respective decisions and which is fully manifested by the utilitarian and thus neutral price in equilibrium. The case of deliberative poll opted by the Korean government on the construction of the nuclear plants in 2018 where independent verdicts were aggregated and the rounds of discussion were neither detailed nor accessible comes closer to the very act of computing the consequences of decision, i.e., voting behavior.<sup>3)</sup> In contrast, procedural morality is and should be inherently 'negotiated impartiality' (Habermas 1990), whose claims are constantly open to revisions or politics off the equilibrium. Deliberation without being revisable may dislodge the weak from the community of moral practices, leading to violent consensus, which

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3) <https://www.nature.com/articles/d41586-018-03264-8>



refutes moral plurality and only controls the bare life of atomistic persons (Agamben 1998; Girard 1977).

### A CONCLUDING REMARK

Kant (2005: 59) warned against the naturalistic fallacy, saying that “a philosophy which mixes up these pure principles with empirical ones (...) undermines even the purity of morals themselves and act against its own proper purpose.” An instance of mixing-up as mentioned above is found in consequentialist ethics, which draws on empirical consent that denies the role of the manager at the workplace and which paradoxically precludes the autonomy of the subject. A natural degeneration of such mixing-up leads to the firm with the third-party expert, whose influence is again incompatible with the promise of consequentialist ethics, i.e., the freedom to choose. The condition for the freedom to choose is not with the subject radically disconnected from the public sphere, an institution a priori that invites the impartial third party. The firm with a procedure for deliberation may work as a remedy for the tragedy of contract, which is unavoidable in the de-regulated bargaining of empirical consent.

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