

Chapter 2

Contract Theory and Perspective-Taking

2.1 Introduction

Contract theorists defend a particular standard of moral justification: they hold that actions or practices are justified if and only if they conform to principles that would be the object of agreement. As I mentioned in the previous chapter, contract theorists assume agents can apply this standard as a ‘test’ to evaluate actions and practices. In the following chapters I shall investigate what empirical findings show about our ability to apply this contract test. In the present chapter I shall explain why this is of relevance and what approach I will take.

There are at least two reasons why it is of interest to investigate how good we are at applying the contract test. The first is associated with agents who are motivated to rely on it as a moral standard. An investigation into our ability to apply the contract test can help them to become better at doing so. The second reason is associated with the adequacy of the contract test as a procedure for justification. For the contract test to be an adequate procedure, it must be the case that people are able to apply it under the appropriate circumstances. I shall elaborate on this second reason in the following section.

This chapter will also be concerned with the question of how the ability to apply the contract test can be investigated. How able agents are at using the contract test depends, quite obviously, on what doing so requires of them. More precisely, it depends on what psychological capacities are required for applying it and to what extent agents have those capacities. Distinct procedures of moral justification may draw on different mental capacities or place different demands on them. Compare for example the principle of utility with Kant’s categorical imperative. The principle of utility states that the right action is the action that maximises aggregate happiness. Applying this standard to assess the justification of actions requires a diverse range of capacities, and most centrally a capacity to estimate the consequences of one’s actions on everyone’s happiness. Applying Kant’s categorical imperative places different demands on our capacities. Kant states that actions are justified if and only if they are based on a maxim that one can, at the same time, will to be a universal law. While applying this criterion certainly involves a capacity to think of the consequences of actions, it does not require one to calculate aggregate happiness. It does, however,

require some capacities not involved in applying the greatest happiness principle. For example, it requires the capacity to make explicit the maxim of one's potential action, as well as the capacity to think of this maxim as a universal law.

I will argue in the fourth section of this chapter that the contract test essentially involves a capacity to consider points of view different from one's own. To determine whether other persons would or could agree to a given principle one must consider the principle from their perspectives. If applying the contract test requires such a capacity, which is usually called *perspective-taking*, empirical findings on perspective-taking are relevant for examining how able we are at applying the contract test. While I shall leave the presentation of such findings for the following chapters, the fifth section of this chapter discusses in what way empirical findings may be relevant. This section also introduces two concerns with respect to our ability to use the contract test, which may either be confirmed or removed by a careful consideration of the evidence.¹

2.2 The Practicability Assumption

The justificatory procedure that I refer to as the contract test has a central place in contract theory. As I described in the previous chapter, contemporary contract theorists use the idea of hypothetical agreement for moral justification (D'Agostino et al. 2011). They use it to show that certain objects—be it actions, treatments, practices, policies, arrangements, or institutions—have certain normative properties, such as permissibility or justice. Contract theorists either hold that such objects have the relevant normative property if they would be agreed to under appropriate conditions, or, which is more common, if such objects conform to *principles* that would be agreed to. The moral contract theories of Gauthier and Scanlon are of the latter type: both hold that actions are justified if they conform to principles that would be the object of agreement under appropriate conditions.²

¹ It is worth noting that the contract test is not the only procedure for justification to require a capacity for perspective-taking. Take for example the Impartial Spectator test that some utilitarians have defended. Determining which principles would be endorsed by an Impartial Spectator requires one to consider a perspective quite different from one's own. While I concentrate on the contract test, the following investigation may thus also provide relevant information regarding our ability to apply other reasoning procedures.

² It may be worth noting that both Gauthier and Scanlon have used the term 'test' in this regard. Thus Gauthier (1991) writes, "although we should not suppose that our actual moral practices and social institutions result from agreement, we may nevertheless hold that the appropriate justificatory test for the principles, practices, and institutions that govern and structure human interaction in ways that constrain the individuals involved is whether they would have been accepted by those individuals were they fully rational persons, each concerned to advance his own good (or the realization of his substantive aims), and collectively able to determine ex ante their terms and conditions of interaction by voluntary and unanimous agreement" (p. 324). And Scanlon writes, "the contractualist test of justifiability [explains] why failure to guard against harm in certain ways (but not others) is wrong" (Scanlon 2003, p. 184).

By proposing the contract test as an instrument for moral justification, contract theorists of course suppose it is adequate for that purpose. It should therefore satisfy the criteria that we may expect of such an instrument. A first criterion for such an instrument is *determinacy*: that when designated agents apply it under the appropriate conditions, it provides an answer. If the contract test is indeterminate, it would not be useful as a procedure for moral justification. A second criterion that we may expect a procedure of justification to satisfy is what I call *correct-usability*: that when designated agents apply the procedure under the appropriate conditions, they tend to do so correctly (i.e. without making mistakes). If the contract test would not satisfy this criterion it would not be a suitable justificatory device, as agents would have no reason to trust the conclusions they draw with it.

As I mentioned in the previous chapter, a recurring criticism of contract theorists is that their contract test is not in fact determinate.³ This criticism sometimes concerns the *possibility* of hypothetical agreement.⁴ It may also be *epistemological*, however: that even if there would be an agreement, we may not be able to determine its content.⁵ In the following, I will suppose for the sake of argument that the contract test is determinate in the first sense. My interest lies with the epistemological question of whether persons are able to find out which principles would be the object of agreement. The criterion of determinacy concerns whether persons are able to draw conclusions about which principles would be the object of agreement. I suspect that this criterion may well be satisfied: contract theorists at least themselves seem to be able to derive such conclusions. It is, however, another matter whether these conclusions are correct: whether the principles derived do indeed meet the contract test in that they would be the object of agreement under the conditions deemed appropriate. This is what the criterion of correct-usability is about.

I do not think that for the contract test to be an adequate instrument for moral justification it needs to be the case that it is always determinate and that a designated user always applies it correctly. No procedure of moral justification would satisfy these criteria to the fullest extent. I shall therefore say that the contract test can be used adequately by designated users if and only if these two criteria are satisfied to an appropriate extent. I do not have an exact measure for when this is so. Clearly, it should not be the case that the test tends to be indeterminate and that agents typically err when applying it. In addition, I assume it requires that the test is determinate and correctly usable with regard to certain important types of cases. I shall use such cases as a benchmark.

A crucial idea in the present investigation is that whether a procedure for justification such as the contract test can be used adequately depends to an important

³ Both Braybrooke (1987) and Sugden (1993) have criticised Gauthier's theory in this respect, whereas Gauthier (2003) himself has argued that Scanlon's theory faces this problem.

⁴ For example, Sugden (1993) claims that there may not be a unique solution to a bargaining interaction as envisioned by Gauthier.

⁵ Braybrooke (1987) accuses Gauthier's contract theory of this type of indeterminacy when he argues that persons cannot determine which arrangements satisfy his contract test because they cannot know under which arrangements they would be best off.

extent on the abilities of its intended users. They provide the ‘hardware’ on which the instrument must run. By proposing a procedure for moral justification, moral theorists commit themselves to psychological assumptions about its intended users. They must assume that its intended users are able to use the test adequately as a procedure of moral justification. This is what I have called the Practicability Assumption.⁶

The Practicability Assumption can be made more precise by distinguishing several variables. The first variable concerns *which agents* can use the procedure adequately to form moral judgments. Given that contract theorists propose their contract tests as procedures for real beings rather than ideal beings, they suppose that at least some of us are able to use them to form judgments about normative properties. This variable may, however, still range from including only a selected minority to including everyone.

A second variable, that has as yet remained implicit, concerns *the circumstances* under which agents can apply the procedure. This variable may range from including only the relatively ideal circumstances under which philosophers engage in moral reflection to including also the more time-constrained circumstances of everyday moral practice. Clearly, under what circumstances a procedure for justification should be applicable depends in part on what its objects of evaluation are: whereas a procedure for evaluating the justness of societies does not have to be applicable in everyday situations, this may be different for a procedure intended to evaluate actions.

A third variable that we may distinguish concerns what we could call *the potentiality* of the agents’ ability to apply the procedure. A proponent of a given procedure for moral justification may in principle assume that designated agents are *presently* able to apply it. However, they are more likely to only suppose that agents can *become* able to apply the procedure. Different suppositions may then be made about how far away they are from this point. They may be very close, only having to become aware of the distinct steps included in the test. But it is also possible that their present capacities are a long shot from what is required for applying the test adequately, and that much training is required to become an adequate user.

Given a particular procedure for moral justification, the Practicability Assumption is thus the assumption that designated agents are, after more or less preparation, able to apply this procedure adequately in the relevant circumstances. Contract theorists are committed to some variant of this assumption with regard to their procedure of justification, the contract test. The next section will specify the contract theorist’s Practicability Assumption further.

2.3 Specifying the Practicability Assumption

The aim of this section is to specify the contract theorist’s Practicability Assumption by considering how each of its three variables should be filled in by contract theorists. I will argue that moral contract theorists such as Gauthier and Scanlon assume that

⁶ Whereas I will be interested in the contract theorist’s Practicability Assumption, I take it to be the case that any moral theorist who puts forward a procedure for moral justification is committed to such an assumption.

(1) actual agents can learn to apply the contract test (2) in the circumstances of everyday life (3) without too much difficulty.

2.3.1 Which Agents Should Be Able to Apply the Contract Test?

Simply by publishing their contract tests as procedures for addressing questions of justification, contract theorists suppose they have an audience that can use it. Rawls, Gauthier, and Scanlon justify their respective moral conceptions by means of a contract test. Rawls, for example, defends his particular conception of justice by arguing that his two principles of justice would be the object of agreement in the original position. In so far as contract theorists believe their readers can understand such an argument, they suppose them to be able to apply the contract test.

Of course, it does not follow from this that they take *everyone* to be able to apply the contract test. The readers of philosophy books form a set of individuals with relatively uncommon properties. In theory, a contract theorist could suppose that only this exclusive set of individuals can adequately use the contract test. Like Sidgwick, who suggested that none but the ‘enlightened few’ are able to fully understand utilitarianism, this contract theorist may deem it sufficient if only a few can use the contract criterion to address questions of justification. Indeed, if he thinks, as Gauthier (cf. 1977) once did, that public knowledge of the contractarian basis of society may lead to social problems, he may even intend that only an exclusive group of individuals can apply it adequately.

Most contract theorists assume not only that their readers can apply the contract test, however, but that *all* actual moral agents can come to do so.⁷ This has to do with their view on the conditions a moral conception should satisfy. Contract theorists hold that a moral conception must be such that it can be rationally accepted by everyone, that it can play an effective social function, and that it can be fully public. I shall now briefly explain why each of these three conditions implies that actual moral agents must be able to learn to apply the contract test.

First, contract theorists hold that moral principles must be rationally acceptable for each of us. Gauthier, for example, writes on the first page of *Morals by Agreement* that he seeks to defend a morality that “is in each individual’s reason” (Gauthier 1986, p. 1). Similarly, Scanlon holds that the basic characteristic of moral principles is that they are justifiable to everyone. As both authors hold that moral principles are justified if and only if they would be the object of agreement, they must assume that actual persons can in principle see whether or not a principle would be the object of agreement. That is to say, they must assume that persons can come to apply the contract test.

⁷ Agents may have to satisfy certain standards of rationality or reasonability in order to be able to apply the contract test. The point for now is simply that their procedures of justification are not meant for ideal beings but for normal moral agents.

Second, contract theorists hold that it is a necessary condition of a moral conception that it can play an effective social or public function (Freeman 2007). A moral conception should enable members of society to interact with one another on terms they can all rationally accept. This includes providing agents with moral principles as a shared basis for discussion, argument, and agreement. As Freeman (2007) writes, a moral conception should enable agents to “assess and criticize actions and institutions using shared criteria, and justify them to one another, when they are justifiable, on the basis of reasons all accept” (p. 6). It is worth noting that different contract theorists may provide a different rationale for the importance of public justification. Whereas Gauthier would argue it is of instrumental value for each individual as it enables mutually beneficial cooperation, Scanlon and Rawls would emphasise that mutual respect requires that we are in the position to justify ourselves to others on terms they can accept.

Part of the social function of a moral conception is that it must enable agents to assess and attribute accountability and responsibility. A moral conception should enable people to hold themselves and each other accountable. It is generally recognised that a person can only be held accountable for a wrong action if she is able to recognise the reasons for not performing the action. Given that for a contract theory the justification of moral principles lies in their being the object of hypothetical agreement, a contract theory must hold that agents are able to recognise this and thus to apply the contract test.

The third reason why contract theorists require that actual moral agents can apply the contract test is that they believe a moral conception must be such that it can be public: that agents who are supposed to comply with the conception can know its justification (D’Agostino et al. 2011; Freeman 2007). As a contractarian conception of morality is justified by being the object of hypothetical agreement, this requires that persons can apply the contract test. Contract theorists place importance on the publicity of a moral conception’s justification for several reasons, two of which tie in with the above (for an extensive discussion on this condition see Freeman 2007). First, as mentioned before, one of the essential ideas in the contract tradition is that a moral conception must be such that rational persons can freely accept the constraints that it imposes. Contract theorists therefore reject the idea of a moral conception that people would not accept once they knew its real justification.⁸ Second, contract theorists hold that publicity is required for a moral conception to be stable, in the sense that people will be moved to comply with its principles. People who cannot grasp and endorse the rationale of moral principles can hardly be expected to accept the constraints it proposes.⁹

⁸ Several contract theorists have argued that utilitarianism, at least as a conception of distributive justice, is a conception that does not satisfy this criterion (e.g. Rawls 1999).

⁹ Gauthier, for example, takes publicity to be required because otherwise individuals cannot count upon their peers complying with moral arrangements, without which they have no reason to comply themselves.

I have argued that there are at least three reasons why contract theorists require that actual persons can understand which moral principles would be the object of agreement. The upshot is an answer regarding the first variable of the Practicability Assumption, regarding the question of which agents are supposed to apply the test: contract theorists assume that *actual persons* can come to apply the contract test adequately. (That is not to say, however, that they assume persons can *presently* apply the contract test to form moral judgments without any help or training; I return to this below.)

2.3.2 *When Should Agents Be Able to Apply It?*

I now turn to the second variable of the Practicability Assumption, which concerns the circumstances in which persons must be able to apply the contract test. This turns out to depend on what purpose the test is to have in our moral lives.

One evident purpose of the contract test is for philosophical reflection on the justification of actions and practices. This is the way in which one uses Rawls's test when attempting to understand what a just society looks like, or when one uses Scanlon's test to determine how much persons ought to give to charity. Such questions can be addressed under circumstances in which there is ample time and opportunity to access certain relevant information and consider all the details. I can take another look at the relevant pages in these authors' books, or call for the advice of other parties more experienced than I am.

Justificatory problems may, however, also arise in everyday moral life. Persons continuously have to form judgments about what they have reason to do; to judge whether actions they may perform are morally permissible or not. They have to justify their own behaviour to others, or to assess whether the behaviour of others was justified. Contract theorists may assign their contract tests the purpose of solving such problems as well. I will say that contract theorists in that case propose the contract test as a *moral guide*.

If the contract test is proposed as a moral guide, agents must be able to apply it under conditions that are typically less ideal than those of philosophical reflection. In our interactions with others we often only have a short period to make up our mind and decide what to do. Moreover, we are typically ill-informed when choosing our actions, and under the influence of "stress and temptation" (Hare 1973, p. 153). The circumstances of philosophical reflection and those of day-to-day moral judgment differ in a way that may reflect how able people are to use the contract test under such circumstances. Whereas during philosophical reflection there are no evident constraints on the time, attention, and effort that can be put into using the contract test, there are such constraints in situations of everyday life. In one word, there is a difference in available cognitive resources.¹⁰

¹⁰ While time is not a cognitive resource, it affects how many cognitive resources are available for using the contract test.

I take moral contract theorists such as Gauthier and Scanlon to be committed to the assumption that the contract test can be relied upon as a moral guide and thus be applied in everyday situations.¹¹ Moral contract theorists use the idea of hypothetical agreement to identify our obligations towards each other. They claim that our actions should be in conformity with principles that would be the object of hypothetical agreement. By ought-implies-can, they must then also hold that agents are able to act in conformity with such principles. For agents to be able to consistently do so, they must also be able to *assess* whether possible actions are in conformity with such principles or not. As such justificatory problems come up in situations of everyday life, agents must be able to apply the contract test in such situations.

Remarks by Scanlon and Gauthier suggest they indeed assume persons can use the contract test for moral judgment in everyday situations. Scanlon (1998) writes that “in order to decide whether it would be wrong to do X in circumstances C, we should consider possible principles governing how one may act in such situations, and ask whether any principle that permitted one to do X in those circumstances could, for that reason, reasonably be rejected” (p. 195). This remark and many others like it suggest Scanlon’s contract test can be used to make decisions in everyday life. Similarly, Gauthier (1986) writes that “the narrowly compliant [that is, moral] person [...] is prepared to be co-operative whenever cooperation can be mutually beneficial on terms equally rational and fair to all” (p. 179). Given that on Gauthier’s view terms are rational and fair if and only if they approximate terms that would be the object of rational agreement, and assuming it will not always be evident in practice that possible terms of interaction are rational and fair, this presupposes that persons can apply his test in everyday situations.

It is important to emphasise that this does not imply that the contract test is a *decision procedure* that agents need to apply consciously *whenever* they make choices. As Mill already pointed out, behaviour may satisfy a moral standard without being based on it. A person may choose in conformity with principles that satisfy the contract test without choosing on the basis of it. However, a person is highly unlikely to *consistently* satisfy this standard if he is unable to assess whether his actions conform to principles that would be the object of hypothetical agreement. Persons do not need to be able to use the contract test as a decision procedure in order to live according to a contractarian moral conception, but it must be available to them as a guide.

It may be objected at this point that if the contract test is first and foremost a guide to examining moral principles and not a decision procedure, persons do not need to be able to apply it in everyday life. It would be sufficient if persons can use the test to reflect on moral principles in a cool hour, to borrow a phrase of Hare’s, internalise principles that satisfy the test, and rely on these to evaluate actions or practices in everyday situations.

¹¹ More so than Gauthier, Scanlon is relatively explicit about this. When comparing his own theory with Rawls’s, he writes: “there are important differences between the subject of Rawls’s theory and the one being considered here. To begin with, Rawls’s principles of justice are not intended to guide every choice and policy” (1998, p. 228).

Although I endorse the idea that persons can learn and internalise conclusions of the contract test so as to economise on cognitive resources (§ 3.2.1), it is unlikely that they can fully prepare themselves for moral practice from a cool hour. First, the moral principles that persons may adopt in such moments will be insufficiently detailed to cover all the situations in which they will find themselves. In order to be memorable, moral principles that would be adopted in such a cool hour must be verbally succinct and general. However, moral situations are often too complex to be assessable by such principles. As Scanlon writes:

even the most familiar moral principles are not rules which can be easily applied without appeals to judgment. Their succinct verbal formulations turn out on closer examination to be mere labels for much more complex ideas. (Scanlon 1998, p. 198)

Second, given the wide range of situations in which persons may find themselves, they cannot from a cool hour adopt all the principles that they are going to need in practice. As I mentioned before, Scanlon points out that there is an “indefinite number” of valid moral principles. I take this to imply that for persons to be able to ensure that their actions are in conformity with principles that satisfy the contract test, they must at least *sometimes* consider the justification of such principles in everyday situations. They must thus be able to apply the contract test in everyday situations.

In order to find out to what extent agents can rely on the contract test as a moral guide, I will assess under what circumstances they can apply it. For expository purposes, I shall distinguish between three types of circumstances on the basis of available cognitive resources; two extremes, and one in the middle. The one extreme is circumstances of high cognitive resources. Our cognitive resources are high when we have plenty of time and attention to reflect. When a student uses the contract test in the course of writing a paper about the question of whether one ought to give to charity, she does so under circumstances of high cognitive resources. The student would not be under direct pressure of time when using it and can thus carefully consider all the relevant details. The other extreme is circumstances of low cognitive resources. If I were to use the contract test to judge whether I should give money to charity after just having been asked to do so by a collector on my doorstep, I would be using it under conditions of low cognitive resources. I have only a short time for making my decision, as the collector is waiting for my response. The third type of circumstance that I shall distinguish is that of medium cognitive resources. If a person in the course of his day uses the contract test to think about whether to give to a charity from which he received a donation letter, he would be using it under circumstances of medium cognitive resources. He has some time to think about it and can consider some details, but the resources that he spends on it are limited by all the other things he has to think about and do.

I take situations of high cognitive resources to be uncommon for most of us. Through the day we have to fulfil a large number of aims and goals, and have little time or cognitive resources to stand still and reflect on moral principles. We are usually surrounded by others, who are unlikely to leave us uninterrupted for long. We may have short periods for reflection when we drive to work, when we wait in the elevator, or when we answer an email message, but due to the constraints

of everyday life I would say that such a situation only involves medium cognitive resources. Everyday life, I take it, includes for most of us few situations of high cognitive resources. Our available cognitive resources are usually either medium or low. For the rest, when I speak of everyday situations I will be referring to situations involving either medium or low cognitive resources.

2.3.3 *After How Much Preparation Should Agents Be Able to Apply It?*

That brings us to the third variable of the Practicability Assumption, which I called in the previous section the potentiality of agents' ability to apply a procedure for moral justification. How much training does it require for persons to become able to apply the contract test adequately?

It is interesting to note first that Scanlon at times suggests persons are *already* able to apply the contract test.¹² More precisely, some of his phrases suggest he thinks persons already *actually use* it sometimes. Scanlon writes that his aim is to "characterize the method of reasoning through which we arrive at judgments of right and wrong" (1998, p. 2). When he gives his answer to this question later on in the book, he writes that "when we address our minds to a question of right and wrong, what we are trying to decide is, first and foremost, whether certain principles are ones that no one, if suitably motivated, could reasonably reject" (p. 188). As I mentioned before (§ 1.2.3), statements such as these suggest that Scanlon does not just propose a normative theory, but also, as he calls it himself, "an account of moral thinking" (p. 6). This interpretation is supported by the fact that Scanlon often appeals to commonalities between his contract test and our actual moral thinking. For example, Scanlon argues extensively that the ideal of being able to justify ourselves to others, which is the basis of the contractualist test, plays an important role in our moral experience and our practical reasoning (pp. 155–158).

Despite these suggestions, contract theorists do not require that persons can already apply the contract test. They require, and so does their Practicability Assumption, that agents can *learn* to use the contract test for moral justification, but it is not a problem if they require some practice before being able to do so adequately. Note, however, that it may be a problem if this learning process turns out to be very difficult or effortful. For one, persons may in that case not be sufficiently motivated to adopt the contract test as a standard of conduct, such that the associated

¹² Although in *Morals by Agreement* Gauthier does not suggest that his justification of morality fits actual moral thinking, he does so in his earlier essay 'The Social Contract as Ideology'. Gauthier argues there that contract theory is part of the "deep structure of self-consciousness" (Gauthier 1977, p. 326). He claims that citizens in Western society have come to conceive of their relations with each other as contractual. The contractarian conception is "gradually increasing its influence on our thoughts and leading us to abandon earlier ideas of human relationships as natural or supernatural rather than conventional" (p. 330). By doing so, it affects our practices and the arguments that we accept. Indeed, Gauthier argues that persons more and more think of their obligations towards one another in terms of contractual agreements.

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