FREEDOM IN THE PUBLIC SPHERE AND DEMOCRACY – WHAT TIES THEM TOGETHER?

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ABSTRACT

This article examines the role of the concept "public sphere" in the theoretical framework of constitutional jurisprudence. Through this concept, the modern individualistic constitutional jurisprudence which considers the state and individuals as confrontational entities may be criticized as failing to take into consideration the structure of the state constructed by its citizens. This article will examine such argument by looking at, first, one of the leading Japanese liberalists, Yoichi Higuchi, and then Carl Schmitt, who has theoretical influence on Higuchi. Next, theories of John Rawls and Yasuo Hasebe will be examined. Rawls attempts to restrict, by "public reason," activities of citizens who participate in political decision-making in order to maintain reasonable pluralism. Hasebe, on the other hand, though he shares some views with Rawls, suggests that speech in the public space itself should be restricted by reason. The author then presents the view that their theories fail to represent the political meaning of citizens' freedom correctly. Furthermore, the author presents that a free and democratic government can be justified by adopting Kant's concept of the "public use of reason" and by referring to the theory of Jürgen Habermas who finds the legitimacy of forming a public opinion in the intersubjective reason that functions in the free discussion in the public sphere. Finally, the author argues that this insight supports the view that democratic governance requires time, and justifies the theory of the chilling effect advocated in the discussion of freedom of expression.

KEY WORDS ■ Carl Schmitt ■ John Rawls ■ Jürgen Habermas ■ public sphere ■ democracy ■ public reason ■ public use of reason

1. Constitutional Jurisprudence and "Öffentlichkeit (Public Sphere)"

The concept of Öffentlichkeit (public sphere) is somehow foreign to traditional constitutional jurisprudence. Before discussing about this unique concept, we must first consider whether the concept actually needs to be intro-

duced into constitutional jurisprudence. It was many decades ago when "The Structural Transformation of the Public Sphere (Strukturwandel der Öffentlichkeit)" by Habermas first drew people's attention. At that time, constitutional jurisprudence did not have a need for the introduction of such a concept into its area of study. The reason why the term "sphere" properly represents the German word "Öffentlichkeit" is that "Öffentlichkeit" refers to, on the one hand, a space in which the *general public*, as distinguished from the state power, engages in discussion, and on the other hand, a space in which the general public engages in *discussion*, but does not act as private economic people. This realm is sometimes described as being "non-state and non-economic." The use of this concept might have a positive meaning because political activities in this public sphere have the potential to change political and economic orders that have been systematized.[1]

In recent years, various views regarding the public sphere have been presented by scholars throughout the world. In discussion of theories of democracy in general, this concept may already be an issue that "no one can avoid talking about." However, this is not the case in constitutional jurisprudence. There is a specific reason for the lack of discussion on this issue in this area. In constitutional jurisprudence, "public" is a characteristic of state power, and "private" citizens are considered to be entities whose rights are protected against the state. How to exercise the right to freedom is left to each individual, and the exercise of state power must be restricted in light of its public nature. At the same time, this public nature, i.e., "public welfare" in the most abstract sense, is used by the state as grounds for restricting the freedom of individuals. The meaning of "public" has long been a subject of discussion within this theoretical context, sometimes in the form of criticisms against its ideology. "Public" was considered a characteristic of state power, and not a characteristic of freedom. The arbitrary exercise of its power is not permitted because the state is public in nature. Therefore, traditional constitutional jurisprudence is cautious about widening the definition of "public" beyond state power, as typically seen in the discussion of the public nature of political parties.[2] It must be noted that there is a danger that any discussion using the concept of the public sphere might lead to an acceptance of the state's control, based on the notion that what is public should not be completely free. Given this risk, the global popularity of the concept is not sufficient to introduce it into the field of constitutional jurisprudence. In order to do so, it is necessary to further

[1] In Japan, the term "Kokyo-ken (public sphere)" became widely accepted as a translation of the term "Öffentlichkeit" by the use of the term by Tatsuro Hanada. Tatsuro Hanada, *Kokyo-ken to iu Na no Shakai-kukan [The Social Space Called Public Sphere]* (1996).

[2] *See* Hidenori Moto, *Gendai Seito-kokka no Kiki to Saisei [The Crisis and Renewal of the Modern Party-State]* (1996); Hiroyuki Kamiwaki, *Seito-kokka-ron to Kenpo-gaku [Theories of the Party-State and Constitutional Jurisprudence]* (1999); Hideki Mori, "Nihonnkoku-kenpo to Seito [The Constitution of Japan and Political Parties]" ~~*Jurist* No.1192~~, 50 (1990).

clarify the purpose of this new concept.

So far, constitutional jurisprudence has considered democracy without the concept of the public sphere. The freedom to conduct political activities has been recognized as an essential condition for the legitimacy of democratic governance. The starting point of the governing mechanism is, however, election, by which public opinions are systematically presented. In this manner, the freedom to conduct political activities and elections (the right to freedom and the right to vote) are theoretically severed. Although the exercise of the right to freedom of each individual is assumed prior to an election, the public opinion that legitimizes state governance is presented at the election. This theory is similar to the "majoritarian conception of democracy" named and criticized by Ronald Dworken.[3] Theories that sever human rights from government organizations are likely based on this concept. The "semi-representation (la démocratie semi-représentative)" theory also assumes the existence of "public opinions" by which members of parliament are factually bound. Because of this assumption, public opinions have legitimate power to bind members of parliament. In light of the principle of democracy, the argument that state power should not be legitimized by itself has been successfully presented in constitutional jurisprudence without the concept of public sphere. In other words, traditional theories of human rights and government organizations have successfully presented a systematic theoretical structure without the concept.

Why, then, is it necessary to introduce the public sphere theory into constitutional jurisprudence now? Koji Aikyo recently expressed the view that non-existence of the public sphere theory in constitutional jurisprudence should be criticized, particularly by criticizing a famous constitutional liberalist scholar, Yoichi Higuchi. Higuchi argues that the sovereign authority of the state and individual human rights have emerged as two conflicting elements of the modern state. Although the order of the modern state contains a therefore inherent tension, the fact that "individual" freedom has been recognized here is important. We should assume the possibility of "creating a 'res publica' based on each individual's independence and autonomy."[4] However, according to Aikyo, Higuchi's theory of "bipolar confrontation between the state and individuals" has "almost no room to accept the process by which individuals become 'citizens' by forming public opinions through dialogues with others."[5] Aikyo's criticism is that without considering the place in which citizens can exchange their opinions, Higuchi's "res publica" by free individuals will be impossible to realize. As Aikyo criticizes, this issue is even more problematic because Higuchi's theory leans towards agreement with Carl Schmitt. In fact, Schmitt advocated in his book "Constitutional Theory (Verfassungslehre)," a theory that clearly sev-

[3] Ronald Dworkin, *Sovereign Virtue* 356-367 (2000).

[4] Yoichi Higuchi, *Kindai Kokumin-kokka no Kenpo-kozo [The Constitutional Structure of the Modern Nation-States]* 90 (1994).

[5] Koji Aikyo, "Liberalism Kenpo-gaku ni okeru 'Kokyo' ['Public' in Constitutional Liberalism]" Hideki Mori (ed.), *Shimin-teki Kokyo-ken Keisei no Kanosei [The Possibility of Formation of a Civil Public Sphere]* 58, 72 (2003).

ers the portion of the constitution with political nature from its rule of law. If Higuchi's constitutional theory presupposes this severance, yet aims to reconnect the two, the possibility of successful reconnection will depend on whether and how Schmitt's theory can be conquered.[6]

2. Carl Schmitt's Theory as an Example of "Severance"

Schmitt is another leading scholar who used the term "Öffentlichkeit (public sphere)," giving a very specific meaning to it. According to Schmitt, citizens who take responsibility for democratic governance "only exist in the public sphere (Öffentlichkeit)." However, the meaning of "public sphere," as used by Schmitt, is significantly different from that assumed by current advocates of public sphere theories. Schmitt used the phrase to mean the way citizens, as "political beings," act to publicly gather and cheer by "simply raising their voices." This place where people gather and cheer is not a place for the exchange of opinions. For Carl Schmitt, "citizens are not able to discuss."[7] In contrast, basic rights that are the primary elements of the rule of law in the constitution are the pre-state rights of isolated individuals, and are therefore absolutely protected, at least in principle. If the freedom of expression or freedom of association is exercised in a political way, however, this absolute protection will be withdrawn. Such activities will be subject to restriction as "irresponsible social forces" that might bring confusion to the identity of the nation.[8]

It is well known that Schmitt viewed the parliamentary system from a liberal perspective rather than a democratic one. According to Schmitt, in parliament "true discussion can be made as far as the parliament represents the cultural accomplishment and reason of the nation, and is a collection of the entire intelligence of people."[9] Members of parliament must remain independent of outside influence and possess dignity. Truth is found through their free discussion. At the same time, freedom of expression is also considered an element of the parliamentary system because liberalism requires such freedom. However, this freedom outside of the parliament has no political meaning. Schmitt's position is well explained in his statement that "the public nature of opinion (Öffentlichkeit der Meinung) is more important than the public opinion (öffentliche Meinung)."[10] The "public nature of opinion" contains a concept contrary to the concept of secret politics.

[6] The author shares views with Hideki Moto who suggests that "discussions in Japan lack attention to the theories about the aporia that 'private' existence creates a 'public = universal' thing." Hidenori Moto, "Gendai Shihon-shugi-kokka to 'Shimin-teki Kokyo-ken' [The Modern Capitalist State and the 'Civil Public Sphere']" *Shiminteki Kokyo-ken Keisei no Kanosei [The Possibility of Formation of a Civil Public Sphere]* 103, 109. It might be criticized that the author's view creates too much tension.

[7] Carl Schmitt, *Verfassungslehre* 243f., 315 (1928).

[8] Id. at 163-166, 247.

[9] Id. at 315.

[10] Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* 47 (1926).

Liberalists believe in the restraint of power through transparency, and to discover truth through parliamentary discussions, the parliament must be open. Although activities outside the parliament are necessary to ensure its openness, this is the only role such activities can play. The place to exchange opinions is, in any respect, the parliament.

This theory of Schmitt's is based on his strong sense of vigilance against the risk of the exercise of freedom becoming political. For Schmitt, who attempted to stop the collapse of the Weimar Republic by the monopolistic decision-making of the state, free political activities were considered to be something that would jeopardize the political stability of the nation. For Schmitt, the emergence of media that had great political influence upon people also meant the collapse of his mythical parliamentary system and the end of the liberalist era. The principally private nature of the freedoms of expression and association became no longer practical. Any state that cannot ignore the basis of its existence is forced to take counter measures against restrictions imposed by influential media on its capacity to make its own decisions.[11] Schmitt's view that such activities are "social" instead of "public" represents his view that the concept of the public sphere (Öffentlichkeit) refuses to recognize that free political activities are "öffentlich (public)." Political activities are, for Schmitt, an explosion of partial interests that are detrimental to the sense of identity of nation. The public (öffentlich) nature is limited to the "citizens who cheer," individuals separated from political activities that gather together only with a sense of substantial identity.

Schmitt's sense of vigilance against the exercise of freedom becoming political may have been an overreaction due to the German situation of his time. However, changing the interpretation of the exercise of freedom from "social" to "public" is not an easy task. Free political activities are always partisan, and unless political activities are partisan, they cannot be called free. If this is so, then why are political activities public? In what sense can we recognize the public nature of political activities? Free speech is made randomly at various occasions, and thus it appears natural to believe that the exercise of freedom of speech becomes public only at an election, where anonymous individuals with voting rights gather together (even if not to cheer).

3. Public Nature by "Public Reason"

One of the ways to solve this problem is to limit speech containing political meaning to ensure its public nature. John Rawls initially appears to support this view when he wrote "Political Liberalism." As is widely known, Rawls' political liberalism suggests that even in a society with incompatible yet reasonable comprehensive doctrines, his liberal principle of justice can be supported as an overlapping consensus if it is limited to a "political con-

[11] Schmitt, supra note 7, at 165-168.

ception" of justice, and not as a competing comprehensive doctrine. Such political justice is able to maintain a stable and just society. Being reasonable means believing in the truths of one's own world view, yet accepting others with differing views as free and equal citizens. It also means being ready to cooperate with others in a fair manner. This view presupposes citizens with "two types of commitments and attachments – political and non-political."[12]

The primary criticism against Rawls' view has been that his concept of justice is fixed at the stage of its original position, and little consideration is given to the process of democracy. Rawls denies such criticism and argues that even under his theories, citizens are able to continuously discuss political justice and improve their society. "A just regime is a project, as Habermas says."[13] However, discussions regarding politically important issues will be restricted in light of political justice. This is so-called "public reason." For Rawls, on the "constitutional essentials" and "questions of basic justice," rationales that can be reasonably accepted by all citizens should be presented. Although a comprehensive doctrine can be used as grounds for the argument of one's specific public reason, such a comprehensive doctrine itself is not allowed to be used as a rationale. This is, Rawls says, the "duty of civility" for the maintenance of fair social cooperation.[14]

However, is this demand not a violation of guarantee of the freedom of expression that is itself part of political justice? It is important to note that the issue to be addressed here is not about "militant democracy" (the idea that no free activities should be allowed for any political force that does not accept the basic free and democratic order of the society). What "public reason" requires is that no comprehensive worldviews, even if they are assumed reasonable, should be presented in important political discussions. Rawls himself accepts that this "duty of civility" will conflict with freedom of expression. Therefore, he emphasizes that such duty is a moral duty, not a legal duty.[15] This defense still does not eliminate the following question: is requiring a citizen, even one who supports constitutional democracy, to not express his rationale for his belief compatible with the purpose of guaranteeing freedom of expression? Michael J. Sandel questions this conflict. He criticizes Rawls: if an individual cannot express the reason she thinks important, the cost of the doctrine she supports will become too high, which will not lead to the construction of a stable political body.[16]

However, the place Rawls assumes "public reason" works is not a place where freedom of expression is completely guaranteed. "In a democratic society, public reason is that of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and amending their constitution." In other words, public reason is required to justify the exercise of coercive power. It is true that Rawls' argument is

[12] John Rawls, *Political Liberalism* 31 (1993, paperback ed. 1996).
[13] Id. at 402.
[14] Id. at 213-217.
[15] John Rawls, *The Law of Peoples* 136 (1999).
[16] Michael Sandel, "Political Liberalism" 107 Harv.L.Rev. 1765, 1789-94 (1994).

somewhat ambiguous on this point. He primarily assumes a situation where citizens are required to exhibit public reason to be an election in which important issues are to be determined. At the same time, Rawls' arguments can be interpreted as broadly restricting citizens' political activities.[17] Charles Larmore also points out this ambiguity: it is not clear whether public reason is required for "every kind of political deliberation" or for "deliberations which form part of the official process for arriving at binding decisions." Sandel's criticism against Rawls is based on the former of the above two interpretations, but Larmore suggests that this is not the only possible interpretation of Rawls. Larmore suggests that the idea that citizens should not know what others are really thinking about is not ideal, but in interpreting Rawls, the latter view should be adopted.[18] It appears from Rawls' statement "public reason sees the office of citizen with its duty of civility as analogous to that of judge with its duty of deciding cases," that the narrower interpretation should be supported.[19]

A more fundamental problem is, however, that this narrow interpretation is based on a narrow interpretation of the political role of citizens. In other words, Rawls sees citizens involved in political activities as officials who exercise state power. The reason why Rawls was ambiguous on the point raised by Larmore is that Rawls considered citizens, from the beginning, to be those who exercise state power, and found the meaning of political deliberations only in preparation for their own binding decision-making. Because citizens have this power, it is justified to require them to restrain themselves. The only area in which Rawls allows citizens to use non-public reason is the "background culture," that is, "social culture, not political culture." Rawls then suggests that the "public sphere" advocated by Habermas refers to this "background culture." Therefore, for Rawls, citizens are allowed to act in the public sphere (background culture) without being imposed any duty of civility.[20]

However, the theory of the "public sphere" advocated by Habermas and others obviously contains political meanings. The fact that Rawls failed to adopt this very obvious political nature of the "public sphere" in his theories proves that his theories failed to include situations where the public nature emerges from citizens' discussion. The distinction between political

[17] Rawls, supra note 12, at 214-219.

[18] Charles Larmore, "Public Reason" Samuel Freeman (ed.), *The Cambridge Companion to Rawls* 368, 380-384 (2003).

[19] Rawls, supra note 15, at 168. Shojiro Sakaguchi also points out this distinction. Shojiro Sakaguchi, "Liberalism to Togi-minshusei [Liberalism and Deliberative Democracy]" *65 Koho Kenkyu* 116, 122-123 (2003). Kent Greenawalt states that the imposition of duties on citizens by regarding them as "officials" of the state who exercise coercive power creates a tense relation with the acceptance of right to secret vote. Kent Greenawalt, *Private Consciences and Public Reasons* 111-113 (1995). When realizing Rawls' theory as a whole, at an election concerning important political issues, citizens are bound by public reason internally in addition to the external reasoning which they are not forced to express. Public reason will conflict with freedom of thought as well as freedom of expression.

[20] Rawls, supra note 12, at 14, 382 (note 13).

and non-political by Rawls is a distinction between the state power, which must be restricted, and the private realm, where private doctrines can be freely expressed. This view supposes only two types of political discussions: private discussions that are free but should not have any political influence and public discussions in preparation for binding decision-making that can be restricted, if necessary. In fact, Rawls' theories do not contain any terms on the concept of spaces such as the public sphere and public space. This is because, for Rawls, the public nature was basically considered an attribute of public power.

In contrast, a Japanese scholar, Yasuo Hasebe, who constructs his own theories with the influence of Rawls' political liberalism, appears to understand the concept of the public space more broadly. Hasebe suggests that discussions in the public space should be limited to those regarding "common benefits of society." Hasebe considers the people's ability to support both comprehensive worldviews and political justice to be "schizophrenic," and suggests that the liberal democracy it supports is an "artificial system supported by unnatural choices."[21] Although the construction of his theory is similar to Rawls, their difference must be clearly noted. For Rawls, pluralism of reasonable comprehensive doctrines is a natural phenomenon of free society. Rawls' theories are based on this assumption. Therefore, as long as political justice is an overlapping consensus, a stable society can be maintained.[22] Rawls also thinks that ordinary "reasonable" people have the ability to use the two kinds of commitments because he assumes that, with regard to important political issues, ordinary people would think exercising state power based on certain comprehensive doctrines and suppressing other comprehensive doctrines is unreasonable, even if they believe in the truth of their own doctrines.[23] Here again, the duty of the self-restraint is required to restrict state power. In contrast, if Hasebe's argument is interpreted such that participation in public discussion itself should occur in light of the common benefits of society independent of the concept of private goods, then he is requiring individuals to have "strong personalities," much stronger than that required by Rawls.[24] This is probably why Hasebe must emphasize the artificial and unnatural nature of liberal democracy.

This theory raises even more serious doubt than Rawls' theories regarding its compatibility with guaranteeing freedom of expression. Hasebe argues that public space premises the guarantee of the freedom of expression. However, if discussions in the public space are so limited, then the "freedom" of expression he assumes appears to be quite different from the general interpretation of "freedom" of expression. Hasebe suggests no

[21] Yasuo Hasebe, *Kenpo-gaku no Frontier [Frontier of Constitutional Jurisprudence]* 3, 7 (1999); Hasebe, *Hikaku-funo na Kachi no Meiro [The Labyrinth of Incommensurable Values]* 60 (2000).

[22] Rawls, supra note 12, at xvi, 36. Tatsuo Inoue criticizes the "conversion" of Rawls because Inoue thinks this assumption of naturalness is theoretical retrogression. Tatsuo Inoue, *Tasha heno Jiyu [Freedom to Others]* 17-20, 117-121 (1999).

[23] Rawls, supra note 12, at 60-61.

[24] Hasebe, supra note 21 "Frontier" at 14.

doubts that the freedom to express private speech must be guaranteed in order to enrich public space.[25] However, according to his theoretical framework, the expression of private speech should be treated separately from discussions about political issues. Rawls addresses a similar issue in his counter-argument on "public reason." He states that if comprehensive doctrines are expressed only as a "declaration" without the attempt to convince others, then they will be allowed even in important political discussions. This "declaration" is, for Rawls, useful in helping citizens realize that they share incompatible yet reasonable comprehensive doctrines, and in fostering "civic friendship."[26] It is not clear how "civic friendship" will emerge here, beyond confirmation of their absolute differences between unilaterally declaring doctrines. In any event, in this argument, the insistence of private goods by individuals is limited to saying, "some people think this way," and the possibilities of developing discussions by asking "don't you think so?" are eliminated. Freedom of speech is only guaranteed provided the content of the speech is private. Political influences are not allowed. The reasoning of political decision-making for important issues, or speech itself regarding such issues in the case of Hasebe, requires moral duties. This theory is similar to Schmitt's theory in the sense that exercising the right to freedom is "social" and not public.[27]

In conclusion, Rawls' theories have no room to accept the "public sphere." Only without the concept of the public sphere, the stability of society where a political concept of justice is supported as an overlapping consensus is ensured. In contrast, Hasebe's theories have room for accepting public space. However, in a strict sense, Hasebe's public space is not a place to enjoy freedom. In addition, individuals who support a regulated public space are required to have strong personalities.

4. Public Reason is Not Public Use of Reason

The "public reason" of Rawls explained above is a completely different concept from the "public use of reason" advocated by Kant, who influenced Rawls in his use of the term "public reason." The "public use of reason" supported by Kant in his "What is Enlightenment?" is to express one's opinion to the general public, "as a member of the entire community" and "in his capacity" (Kant also refers to "as a scholar"), not as an official. In contrast, the "private use of reason" is the speech of state or church offi-

[25] Id. at 16-17 (Note 6).

[26] Rawls, supra note 15, at 155.

[27] The view emphasizing similarities between Schmitt and Rawls focuses on very limited aspects. For Schmitt, state power exists (or does not exist), and its legitimacy is not an issue to be discussed. Liberalism is a theory to restrict state power, which already exists. In contrast, for Rawls, "political liberalism" justifies state power by restricting it. Schmitt is also often cited in criticism of Rawls' theory as ignoring the meaning of political struggle and as being "non-political." *See* Chantal Mouffe, *The Return of the Political*, Ch.7 (1993).

cials to its people, which may be restricted in order to maintain the orderly control of the institution. It has been pointed out that the terms "private" and "public" are used by Kant in an opposite way from their general use. According to Kant, the "public use of reason" means that a powerless individual expresses his opinion to an unlimited number of people. The free "public use of reason" is essential for the enlightenment and autonomy of both individuals and political bodies. It is important to note that, in reasoning this freedom, Kant emphasizes that public use of reason is harmless. Public use of reason allows free discussion, and does not have any adverse effects on the authority's order to obey. The point of this concept is that although the public use of reason is free because it is harmless, it is not hopeless. The public use of reason has the potential to gradually change people's conceptions and realize social reforms. Therefore, public use of reason gains public meaning.[28]

Public use of reason is therefore paradoxical – powerless freedom has public meaning. Habermas describes: "the moral self understanding of the civil public sphere imposes the duty to abstain from methods of political coercive power (politische Gewalt) even on those movements from which it only gains the political function."[29] His conflicting phrase, "coercion without coercion," also implies this concept. On the one hand, "the possession of coercive power necessarily harms reason's free judgment." On the other hand, "free and public" discussions by "philosophers" = "enlighteners" can require state power to respect them.[30] By recognizing a sphere where discussions take place apart from the exercise of coercive power, it will be accepted in a positive manner that individuals can freely express what they believe to be true, and yet the reasonable public opinion will autonomously emerge from this sphere of discussion. The positive meaning of "public sphere" emerges only when this paradox is accepted. However, if the paradox remains as a paradox, such concept cannot be accepted. Is there any logic that can explain this?

Behind Rawls' view, where social stability is realized by an overlapping consensus on political justice, there also exists a concept that the rule of political power is accepted on a continuous basis only when various comprehensive doctrines support political justice in their own ways.[31] The reason for this support depends on private free judgment, and such reason does not need to be justified for the public in general. Habermas is skeptical about this view. He considers this an attempt to justify the rule with the pri-

[28] Immanuel Kant, "Beantwortung der Frage: was ist Aufklärung? (1783)" in *Werkausgabe* Bd. XI, 51 (Wilhelm Weischedel ed., Suhrkamp, 1977). For the detailed comparison of Kant and Rawls, *see* Peter Niesen, *Kants Theorie der Redefreiheit* 205-220 (2005).

[29] Jürgen Habermas, *Strukturwandel der Öffentlichkeit* 185 (1962, new ed. 1990).

[30] Immanuel Kant,"Zum ewigen Frieden (1796)"in *Werkausgabe Bd. XI,* 191, 227f. (Wilhelm Weischedel ed., Suhrkamp, 1977); Kant,"Der Streit der Fakultäten (1798)" in *Werkausgabe Bd. XI,* 261, 362-364.

[31] Rawls, supra note 12, at 420, 433. Here again, the "free political culture" of Habermas's theory is considered equivalent to the "background culture."

vate use of reason, and that it is not likely to succeed. Habermas' basic opposition to Rawls is expressed in his view that, particularly for important political issues, a consensus through the public use of reason, reached by allowing individuals to freely express what they believe to be true, is necessary.[32] In opposition, Rawls criticizes Habermas and supports his own view that, although Habermas advocates so-called "proceduralism without substantive restrictions," his ideal speech situation is, as a device that leads to a correct conclusion, derived from the idea of substantive justice. Furthermore, there is always a risk of coming to a wrong conclusion from procedures without public reason, i.e., "substantive guidelines."[33] Habermas' response is that his theory is in fact not normless proceduralism, but presupposes "practical reason embodied in procedure." By participating in public discussion, each individual's argument will be tested from "a more comprehensive and intersubjectively shared point of view." Tested through discussion, norms that can be generalized will emerge. "Formal characteristics of procedures and conditions of discourse that force participants to adopt views for making non-partisan judgments have the power to authorize the rule."[34] This rational discussion process which allows the comprehensive participation of citizens also allows a sense of "civic friendship" for people with various comprehensive doctrines, advocated by Rawls, and therefore the sense of "us" of a communal society.[35]

Unlike the time of Kant, democracy is in progress in modern society. However, Kant's paradox should still be maintained. As stated earlier, Rawls thinks that democracy is a system under which all citizens make decisions as "officials." However, this does not reflect reality. As often said when criticizing its ideology, democratic governance does not necessarily mean that politically important issues are truly determined by all citizens. Real freedom should not be restricted based on such an idealized conception. The point to be emphasized here is, however, that democratic governance should not, even as an ideal, be understood in such a manner. The fact that citizens do not have the actual decision-making power has rather a positive meaning in terms of their political participation. When democratic governance is considered to be an accumulation of individual decision-making by all citizens, each citizen who undertakes such decision-making is the entity who exercises state power, and therefore owes responsibilities associated with such power. Based on the principle of the rule of law, the exercise of state power should not be free. This would lead to the conclusion that citizens should also be restricted by public reason. However, the political meaning of freedom of citizens cannot be correctly understood from such a

[32] Jürgen Habermas, "»Vernünftig« versus »Wahr«" *Die Einbeziehung des Anderen* 95, 105-116 (1996).

[33] Rawls, supra note 12, at 425-31.

[34] Habermas, supra note 32, at 119-125.

[35] Jürgen Habermas, *Die postnationale Konstellation* 112-117 (1998). This statement does not mean to deny the fact that Rawls and Habermas share many views. For fundamental similarities between them, *see* Thomas McCarthy, "Legitimacy and Diversity" 27 *Rechtstheorie* 329 (1996). *See also* infra note 39.

view. To understand the formation of free will of citizens in a consistent manner, the conversion of viewpoint – from subjective to intersubjective reason – must take place. Rational will can only emerge from free discussion among people who have no power. When we think that the reason that creates public will functions in the intersubjective communication process, it becomes useful and necessary to understand the space where such reason functions as the "public sphere." When we recognize that freedom of political activities is not limited to the expression of the opinions of each isolated individual, but that it instead contributes to the formation of public opinions through attempts to convince others, it becomes important for democratic governance to ensure that intersubjective reason functions in the discussion process without being twisted. The important issue is not the requirements of each individual citizen, but the way to maintain a free public sphere. Hasebe does not realize the powerlessness of each political speech, which allows its freedom, as well as the power of the freedom of speech in general, which authorizes the democratic rule via public opinions. Furthermore, decision-making through citizen voting can have legitimate democratic meaning as a legally-approved means of reflecting public opinions if such public opinions are formed in the public sphere. The voting itself does not have meaning in the formation of democratic opinions.

As to the question of whether the "public sphere" should be singular or plural, the view that assumes the singular "public sphere" is sometimes criticized: under such a view, reason is assumed to be universal and functions in a repressive manner for those who do not have the power to present their opinions. However, assuming the public sphere is universal does not necessarily deny the truth supported by the minority. When reason is proceduralized, differences between us will be accepted and even promoted. "The unification of reason is the source of the diversity of its parts."[36] As far as the intersubjectivity of the public sphere remains, we can accept various opinions as public opinions that can claim their general validity. On the other hand, opinions presented to members of a closed institution are not eligible to claim validity based on the public use of reason. Those who argue that public spheres should be plural also recognize that they contain normative contents and can be maintained in connection with the general public sphere.[37] The demand of groups to be recognized in the public sphere can be achieved only when such demand is voluntarily supported by each individual member initiating an open discussion on "what is politically relevant" for their identity.[38]

[36] Jürgen Habermas, "Die Einheit der Vernunft in der Vielfalt ihrer Stimmen" *Nachmetaphysisches Denken* 153, 180 (1988).

[37] Aikyo, supra note 5, at 74. *See also* Masao Higurashi, "Taiko-teki Kokyo-ken no Keisei no Tameni [For Formation of a Counter-Public Sphere]" Yuibutsu-ron Kenkyu Kyokai (ed.), *Aratana Kokyosei wo Motomete [Seeking a New Public Nature]* 91, 101-107 (2000).

[38] Jürgen Habermas, "Kampf um Anerkennung im demokratischen Rechtsstaat" *Die Einbeziehung des Anderen* 237, 242-260 (1996).

5. Suggestions to Constitutional Jurisprudence

Habermas suggested once, by using the expression "partisanship for reason," that either attempting to construct a society by communicative reason, or denying such a concept, is a partisan choice. This does not mean the denial of reasoning of such a choice in a practical manner. Rather, such reasoning is required.[39] Whether the concept of the public sphere needs to be introduced into constitutional jurisprudence also appears to be the question of partisan choice. The author prefers to make a positive choice. In the author's opinion, intuitive views of free formation of public opinion through freedom of expression and its internal relation with democracy can be explained most appropriately by adopting the concept of reason in the public sphere. Freedom of political activities is free but not private. Public opinions created through public discussion based on such political activities have legitimate political power that can influence democratic governance. The exercise of right to freedom does not aim directly to seize state power, and for this very reason, leads to governance of the state by "us." By conceptualizing the public sphere between the state and private citizens, the reconnection of these two elements of the modern state can be properly understood.

For this view to contribute to relevant discussion in constitutional jurisprudence, the author examined in his *Minshusei no Kihan Riron [A Normative Theory of Democracy]* how to understand and respond to the distortion of communication in the public sphere (i.e., the problem of accepting freedom of existing social interests to the maximum extent). The author also examined the appropriate way to make the state power more sensitive to the communicative power arising therein.[40] It will be probably easier to discuss these issues if we focus on the concept of the public sphere, but doing so will not easily lead to a specific conclusion.

Instead of delving into the details on these issues discussed in the book,

[39] Jürgen Habermas, *Legitimationsprobleme im Spätkapitalismus* 194-196 (1973). Yasuyuki Funaba presents a similar view regarding the debate between Rawls and Habermas and points out that Habermas does not justify the Discourse Principle entirely. Its factual acceptance appears to be assumed as in the case of Rawls' "reasonable pluralism." Yasuyuki Funaba, "Habermas to Rawls [Habermas and Rawls]" Akira Nagai and Masao Higurashi (ed.), *Hihanteki Shakai-riron no Genzai [Current Situation of Critical Social Theories]* 111 (2003). However, the communicative reason was originally insisted to be a "partisan commitment to the 'reason in history.'" Takeharu Nagai, "Jürgen Habermas no Seiji-riron [The Political Theory of Jürgen Habermas]" *Nenpo Seiji-gaku* 133 (2002). One of the characteristics of his theory is the insistence of the normativity that is surely contained but not completely developed in the modern era ("unfinished modern") instead of transcendental justification. This creates inevitable tension between facts and theories. It might be true that recent views of Habermas tend to lack this tension, and to that extent, Habermas is getting closer to Rawls.

[40] Toru Mori, *Minshusei no Kihan Riron [A Normative Theory of Democracy]* (2002). *See also* Toru Mori, "Die staatliche Willensbildung in der differenzierten gesellschaft," 86 *Archiv für Rechts- und Sozialphilosophie* (ARSP) 185 (2000); Mori, "Plurality *in* 'Acting in Concert'" 89 *ARSP* 538 (2003).

some other relevant points should be addressed here. The first point is: even though it is likely intuitively known by many, the fact that realization of democracy takes time can be theoretically explained through the concept of the public sphere. Not all decision-making is democratic just because freedom of expression is recognized prior to the decision-making. A "public opinion" on a certain issue that will have the authority to influence relevant politics cannot be created unless opinions are freely exchanged and discussed in the public sphere. It takes time for comparative merits and demerits of certain public opinions to emerge.[41] Those who oppose this view would insist that "heterogeneity of various language games cannot be conquered by proceduralization," and that the above view is an indication of a "hope of left wing intellectuals... who think that delaying decision-making on the grounds of rational discussion is itself the success."[42] On the contrary, the reason why delaying decision-making should be thought meaningful is that if a public opinion goes through sufficient discussion in the public sphere, such public opinion is assumed to be tested from non-partisan points of view and can legitimately support democratic decision-making. Needless to say, there is no yardstick to measure whether sufficient discussions have been made. There might be cases where a bill must be forced through the parliament. However, it appears that the classic theory of representation failed to construct a theory to restrict such forcible passage that is in fact always possible by the governing party. Since seats of the parliament are definitely distributed to each political party, regardless of whether any discussion takes place in the parliament, the outcome is likely to be the same. Similarly, as far as definite supporting bodies and supporting interests are assumed to exist in the background of such political parties, the outcome will be the same regardless of the existence of discussion. In contrast to this view, if the relationship in and outside the parliament is viewed in light of communication, the parliament is required to be sensitive to the *process* of discussions in the public sphere which needs time. The normative theory of democracy should not take the existence of people's will for granted.

The second point is that the concept of the public sphere might prove the importance of eliminating the "chilling effect" that has been discussed in relation to the theory of freedom of expression. The theory of the chilling effect is, in general terms, that in order to eliminate risks of deterring expression which is intrinsically permitted (chilling effect), even expression that could intrinsically be restricted should be allowed.[43] Although this the-

[41] Jürgen Habermas, *Faktizität und Geltung* 438 (1992). This means that where democratic decision-making is necessary and possible by the political power, superiority or inferiority of public opinions as a result of discussion should have influence on such decision-making. As stated earlier, even after going through discussion, minority opinions are not "wrong."

[42] Karl Heinz Ladeur, *Postmoderne Rechtstheorie* 57 (1992).

[43] *See e.g.* Frederick Schauer, "Fear, Risk and the First Amendment" 58 B.U.L.Rev. 685 (1978); Richard H. Fallon, "Making Sense of Overbreadth" 100 Yale L.J. 853 (1991). Attention to the chilling effect plays an important role in the decisions of the

ory of the chilling effect is frequently referred to in the discussion of the freedom of expression doctrine, the author is not sure that it has been theoretically justified enough. There is in fact a criticism against this theory that even if freedom of expression is essential for democracy, it could lead to the conclusion that protecting freedom that should be protected is sufficient for the guarantee of the human right, and the choice to speak should be left to each individual based on her own risk calculation. The view supporting a wider protection of freedom of expression in order to eliminate the chilling effect does not derive from the idea that the expression of individual opinion is the exercise of freedom of isolated individuals. However, in the author's opinion, by recognizing that expressing one's opinion is part of free discussion in the public sphere and that public opinions can be formed only through people actively providing subjects of discussion, one can conclude that risks taken by people in expressing their opinions should be generally reduced. In other words, under this view, the introduction of issues to be discussed in the public sphere itself has a public nature which ought to be specially protected. In relation to this point, it is important to note that Yasuo Hasebe suggests that special consideration should be given to the wide acceptance of "expression that contributes to public interests" in light of "securing the space for free expression as a public good."[44] In Hasebe's theory, however, there might be a danger that requirements for "contributing to the public interest" could include substantial restraint. With regard to this point, the author rather agrees with Shigenori Matsui's view that "the process of democracy will not be ensured" unless freedom of expression is "protected to an 'unreasonably wide' extent."[45] Freedom of expression serves the public good, not because each individual expression presents "public reason." It serves the public good because it is essential to introduce propositions that can be generalized through discussion. Therefore, the public good of freedom of expression should be accepted only when intersubjective reason in the public sphere is assumed.

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German Federal Constitutional Court too. *See* Dieter Grimm, "Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts," Neue Juristische Wochenschrift, 1697 (1995).

[44] Yasuo Hasebe, "Kokka ni yoru Jiyu [Freedom by the State]" *Jurist* No.1244, 31, 36 (2003).

[45] Shigenori Matsui, "Henbo suru Meiyo-kison-ho to Hyogen no Jiyu [Changing Law Concerning Defamation and Freedom of Expression]" *Jurist* No.1222, 77, 92 (2002). Matsui is struggling to widen the guarantee of free speech in Japan with the help of American jurisprudence, including the "chilling effect."