

THE NECESSITY AND POSSIBILITY OF DELIBERATIVE DEMOCRACY*

Toru Mori**

INTRODUCTION

“Deliberative democracy” has been a major topic of the literature on constitutional and political theory in recent years. David M. Estlund writes, “Deliberative democracy is an emerging ideal. The phrase was apparently coined only recently, and it encompasses a cluster of views about politics that previously had long been unfashionable.”⁽¹⁾ But why must we want “deliberative” democracy? If we are satisfied with the real political outcomes, we need not to ask how democracy should be. Deliberative democracy is advocated with a critical viewpoint toward the real democratic process. The deliberativists cast doubt on the legitimacy of today’s politics.

In this article I want to show why we need deliberation generally and present my interpretation of deliberative democracy suitable for today’s society, at first (Chapter I). In Chapter II we look into Cass R. Sunstein’s theory, which ardently claims the legitimacy of deliberative democracy but fails to clarify its possibility in today’s society. In doing so, the theory tends to forget its democratic components and gets closer to elitism. To avoid this danger we must take notice of civil society. In Chapter III, therefore, we investigate Jürgen Habermas’s work regarding political will - and opinion-formatin which pays attention to the relationship between

civil society and political system. Finally we examine remaining problems. These relate to the reality of the concept of civil society and the institutional mechanism of reflection of public opinion in political system (Chapter IV). This section aspires to show the real possibility of deliberative democracy.

I. WHY DO WE NEED DELIBERATION ?

Seyla Benhabib argues in a recent article,

The basis of legitimacy in democratic institutions is to be traced back to the presumption that the instances which claim obligatory power for themselves do so because their decisions represent an impartial standpoint said to be equally in the interests of all. This presumption can only be fulfilled if such decisions are in principle open to appropriate public process of deliberation.⁽²⁾

She further “investigate[s] the *institutional possibilities* of realizing a democracy centered around a procedure of free, public deliberation.”⁽³⁾ She also, however, argues, “ In existing Western democracies ... the public sphere of democracy has shrunk. ... The autonomous citizen, whose reasoned judgement and participation was the sine qua non of the public sphere, has been transformed into the ‘citizen consumer’ of packaged images and messages. ...”⁽⁴⁾ Her pessimistic perspective does not let her give up the attempt to realize the deliberative democracy. On the contrary, I think, this very judgement has demanded that she should make a more legitimate theory

of democracy.

We can easily refute the insistence that politics must seek to make a “right” society and only the deliberative democracy can lead us to it. What is poitically right? Obviously, today’s multicultural society has made such a goal seem romantic and indeed impossible. Rather, the reason why deliberative democracy is needed today is the necessity to make current democracy more legitimate. We cannot agree which conclusions are right about social problems, but if citizens’ preferences that are brought into the political process are badly affected by the existing circumstances, which contain institutional and uninstitutional barriers to free political thought and behavior, the intuitive legitimacy of the democracy is threatened, because we must doubt whether the institutions truly realize “government by the people,” not by the existing order.

And this is the reason deliberativists criticize the idea of the predetermined preferences. Bernard Manin clearly points out that “in the real world” people have only insufficient information and time, and “[t]here is also no reason to suppose that individuals have from the first a complete set of preferences.” “In the course of deliberation and the exchange of points of view, individuals become aware of the conflicts inherent in their own desires,” and “acquire new perspectives.”⁽⁵⁾ In other words, citizens are able to be really autonomous only in the arena of deliberation. And the legitimate democracy must rely on those citizens’ judgements. It is with this recognition that the deliberative theorists criticize the market-model idea of politics. They additionally stress the important role of reason in public deliberation. From these assumptions this conclusion seems

natural because there remains no standard for evaluating argumentations in deliberation except for the persuasiveness of their reasoning. “When presenting their point of view and position to others, individuals must support them by articulating good reasons in a public context to their co-deliberators.”⁽⁶⁾ Selfish assertions cannot get many supporters and superficial reasoning will be exposed by the exchange of views. Because deliberation is open to the public, the claims made therein must pay attention to the entire community. So-called common good means this common persuasiveness of an argument.

It is important here to stress that this persuasiveness is “always relative to its audience.” “The listener remains free to give his agreement or to withhold it.”⁽⁷⁾ Participants themselves judge how persuasive or reasonable each statement is. It is to attain this forum for judgement that deliberative democracy is necessary. The “reason” here does not, and must not compel participants to agree. Common good is not something that exists before deliberation. Reason is necessary in the deliberation because autonomous citizens, liberated from the restrictions and pressures of existing order, use it to act in the deliberative arena. A political decision seems legitimate when most people agree freely and autonomously that it has enough reason to persuade them.

But the difficulty in realizing this ideal as well as the attention to the important role of reason often lead deliberativists to cut the relationship between “deliberation” and “democracy.” We shall focus on Cass Sunstein’s valuable but ambivalent theory and his critics in order to look more carefully into this problem.

II. DELIBERATIVE ELITISM? — CASS SUNSTEIN'S REPUBLICANISM

Cass R. Sunstein writes on the first page of chapter 1 of his “THE PARTIAL CONSTITUTION,” “In American constitutional law, government must always have a reason for what it does. ... The required reason must count as a public-regarding one. Government cannot appeal to private interest alone.”⁽⁸⁾ It is well known that he criticizes the idea that government can act on “naked preferences.” I believe, however, that this is an intuitively obvious point, and that a government cannot appear to act only on the basis of the interests of one part of its society. For example, it goes without saying that American Government must act for America, not for only one company in it. Government must always show that its policy regards the public good or welfare.

Rather, I think that Sunstein’s contribution lies in his effort to guarantee this condition through deliberative democracy. He criticizes the legitimacy of the market-model idea of democracy perhaps even more severely than any other deliberativist. His argument develops from the assumption that the pluralistic model of politics — where the interest groups struggle to attain their own goals — regards the existing political and economic structure as natural and neutral, and misses the social distortions lying in it. Even though private preferences are permitted to affect the political process directly, “[c]ollective action problems — the fact that some groups are very well organized and others are not organized at all — will make it hard to ensure that politics accurately aggregates” them.⁽⁹⁾

We cannot say that this kind of institution takes all individuals equally. “Moreover, private preferences sometimes adjust to undue or unjust limitations in current practices and opportunities” which have been created by the existing legal rules. “There is no acontextual ‘preference.’” Consequently, “respect for preferences seems unjustified on the grounds of autonomy and perhaps welfare as well. A legal system that has produced preferences by limiting opportunities unjustly can hardly justify itself by reference to existing preferences.”⁽¹⁰⁾

We must take further notice of the really autonomous “formation” of citizens’ political will. “One goal of democracy, in short, is to ensure autonomy not merely by allowing satisfaction of preferences, but also and more fundamentally by protecting free process of preference formation.” This formation should take place in the process of deliberation, and “social aspirations and collective desires” should follow from it. “[T]he central idea of deliberative democracy is founded on this conception.”⁽¹¹⁾ As a result, the act of government can rely on “not what [citizens] ‘want,’ but instead who they are — what their values are and what those values require”, not an aggregation of predetermined preferences but a reasoned judgement by citizens’ deliberation.

He asserts, “[T]he American Constitution was designed to create a deliberative democracy,”⁽¹²⁾ and draws a number of conclusions about constitutional problems. Above all, he stresses the importance of citizenship and political equality. Deliberative democracy “seeks to ensure that political outcomes benefit from widespread participation by the citizenry,” and “requires that people have a large degree

of security and independence from the state.” Or “the commitment to political equality, viewed through the lens of deliberative democracy, bans large disparities in the political influence held by different social groups.”⁽¹³⁾ He therefore finds that deliberation must take place among the people, at least as the starting point of constitutional interpretation.

Steven G. Gey, one of the harshest critics of republicanism, first criticizes Sunstein for disregarding “losers.” He points out, “[A]t some point the dialogue must end, a decision must be made, and the community’s decisions must be enforced.”⁽¹⁴⁾ A loser is a loser, even if after long deliberation, and he is concerned about losing loser’s guard as a result of the idea like “distorted preferences.” He is afraid that if the majority controlling the government could regard the minorities’ opinions as distorted, their rights might be easily suppressed. But I think that his theory criticizes only his own one-sided interpretation of republicanism. As we have seen, Sunstein stresses the importance of “citizenship.” Obviously decisions create losers. But the state must take citizens as autonomous. The Constitution prescribes that the government maintain the arena of deliberation in order to help citizens act autonomously. The government cannot judge losers to be wrong, because that would deny their autonomy. Deliberative democracy respects participants’ *self*-reflection in deliberation, and stands above all against the coercion of one answer as “right.”

Gey’s criticism focuses on the defence of losers. This is clearly an important task, but the creation of a majority is also a significant problem. Gey argues, the civic republicans “focus almost exclusively

on the means by which political majorities controlling a democracy create, legitimate, and enforce policy decisions.”⁽¹⁵⁾ This sentence reveals that he assumes the preexistence of some majority, or that he ignores the majority-making problem. But “[i]n a society composed of many different types of people,” no pre-political majority exists. Gey says, “[F]action is inevitable.”⁽¹⁶⁾ But no faction has a priori ruling power. As a result, the process of making a majority should be considered as a political and constitutional problem. The Constitution of course defends the fundamental rights of losers, but to defend them is not enough. If some portion of the people has a persuasive opinion but does not have a strong organization or coalition partners, how should they be treated in the political process? This is the very problem deliberative democracy theory faces. Unless self-reflective deliberation operates in the political process, those people will be always “losers with constitutional rights.” Is that enough?⁽¹⁷⁾

Nevertheless we can draw a lesson from Gey’s criticism mentioned above. It is true that “a decision must be made.” That is one of the *raison d’être* of the state, and this necessity burdens the deliberative process. We cannot always wait for the rise of a deliberative, freely-made majority. We must emphasize, however, that dialogue must not end at the time of decision. To deliberate about something continuously and to enforce one decision about it are different matters. In the existing constitutional system, too, the legislative power belongs to Congress, and even if the discussion in it ends at the time of adoption, the discourse outside it need not end. Rather, the neverending external deliberation secures the lasting legitimacy of laws made by Congress. From this viewpoint we may

say that Congress and the free arena of deliberation have a close relationship but at the same time play different and complementary roles in the political process. Congress has direct legislative power, but for this very reason it must make decisions according to political circumstances, even if the time is not yet ripe. The deliberation of the people has no such power, but for this very reason it is able to escape from the pressure to decide. And the latter must have influence on the former in order to make laws more deliberatively legitimate. We will examine this problem in detail below.

We must turn here to another problem of Sunstein's deliberative democracy, which is identified correctly by Gey and which has something to do with the problem mentioned just above. It is related to the place of the today's public deliberation. Gey remarks that the ancient small political community was lost, and adds that, in a modern society "Dialogue' is transformed from a conversation among specific individuals into an exchange between representatives of groups of individuals."⁽¹⁸⁾ If reflective deliberation is left to representatives, it cannot be called deliberative "democracy" in any sense of the word, but Sunstein himself admits this transformation. Truly he says, "[P]olitical behavior reflects a variety of influences that are present only in the context of political deliberation,"⁽¹⁹⁾ and interprets the Constitution to guarantee the wide arena of deliberation, on the one hand. On the other, however, he embodies the place of deliberation in Congress, which, according to him, should be guarded to some degree against the direct pressure of the people. "[P]ublic representatives were to be ultimately accountable to the people ; but they would also be able to engage in a form of deliberation without

domination through the influence of factions.” He also believes that the framers of the Constitution had sought to realize deliberative democracy in a modern society by means of indirect election of the Senate and the President.⁽²⁰⁾

Paul W. Kahn correctly notes, “Once that community of discourse has been located in Congress — Sunstein’s legal and historical move — the normative appeal of positive freedom, of giving the rule of law to oneself, loses its power outside the elite membership of that institution.” We can then say, “The legislature may or may not be a self-generative, dialogic community, but whether it is has nothing to do with the authority the institution exercises over the rest of the political community.”⁽²¹⁾ It appears that Sunstein truly believes that today’s ordinary people have no ability to take part in deliberation. It is true that he describes a policy as “a product of deliberative processes on the part of citizens and representatives,”⁽²²⁾ but he does not explain the relationship between citizens and representatives. One gets the impression that citizens outside Congress are understood only as members of interest groups. In any case, the role of ordinary citizens in the political process remains unclear. On the one hand they have the right to take part in deliberation, but on the other they are expected to remain outside the deliberation which is left to the elite. And this ambiguity may weaken the grounds for recognizing the individual rights of autonomy, as Gey concludes.

Moreover, from an aristocratic interpretation of republicanism like this, “A Civic Republican Justification for the Bureaucratic State” can follow. The author of this article, Mark Seidenfeld, claims, “Administrative agencies ... may be the only institutions

capable of fulfilling the civic republican ideal of deliberative decision-making.” According to him, even Congress lies *too close to constituencies to deliberate*.⁽²³⁾ In his article, ordinary people play only an obstructive role to deliberation, captured by their own interests. But we must say that this type of republicanism has nothing to do with democracy and that it resembles a good king’s ruling. It does not respect citizens’ autonomy at all.

H. Jefferson Powell finds; “Republicans ... ‘will attempt to design political institutions that promote discussion and debate among the citizenry,’ but they will also ‘attempt to insulate political actors from private pressure.’ How are these two goals to be combined?”⁽²⁴⁾ As we have seen, Sunstein does not answer, but an answer is needed in order to save the concept of deliberative democracy. Sunstein himself criticizes “giv[ing] up too quickly and with too little evidence on the possibilities of democratic politics.”⁽²⁵⁾ Deliberation among the people does exist, and we must help the persuasiveness of the opinions arising from there, not the pressure of interest groups, have a greater effect on politics. Of course in a modern nation-state Congress plays a critical role in legislation and other political processes. It is true that “so long as the nation continues as a central political unit, republicanism cannot promise immediate citizen control at the national level.”⁽²⁶⁾ But “a variety of influences that are present only in the context of political deliberation” outside the center of the politics must and can have an effect there.

Moreover, this argument — that in today’s society representatives and the bureaucracy are more suitable for deliberation than citizens — seems groundless. The former have the privileged power to

decide and so interest groups may seek ardently to influence them in order to effect favorable decisions. Today's representatives and bureaucracy members do not have a special ability to deliberate, too. The concealed negotiation of the elite would, under these circumstances, decide state policies. The prevention of this danger lies only outside the government. Public deliberative forums of citizens do not have such power, and are too differentiated for interest groups to influence easily. The cases for individual arguments can be made more truthfully and powerfully there. We must therefore face the question of the ideal and possible structural relationships between Congress and the public. We must find ways to make state policies decided by representatives arise from and rely on wide and public deliberation. In this area we can get an useful idea from Jürgen Habermas's recent work.

III. CIVIL SOCIETY AND POLITICAL SYSTEM

It follows from what has been said that, to save the concept of deliberative democracy, we have to show clearly a deliberative arena separated from both interest groups and the state power, and then to highlight the relationship between them. Jean Cohen and Andrew Arato call this area "civil society." Civil society means "a normative model of a societal realm different from the state and the economy and having the following components": plurality, publicity, privacy, and legality. It is "normative," because we need it to "explor[e] the concepts of democratic legitimacy and basic rights." "The frameworks of politically relevant discussion ... and parliamentary discus-

sion and debate are continuous,” and “only on the ground of civil society can an institutionalized plurality of democracies be conceived.”⁽²⁷⁾ They use Jürgen Habermas’s discourse ethics theory to explain the importance of civil society to democratic legitimacy. He has also discussed the ideal structure of modern democracy more clearly in his recent book “FAKTIZITÄT UND GELTUNG.”

Habermas also claims to take notice of the normative process of political opinion- and will-formation. To notice only the output of state power and to take note of its danger to the private sphere are not enough for political theories. On the other hand, however, he denies that public deliberation needs an ethical understanding shared by the community members. Such a presumption is unrealistic for today’s multicultural societies and unnecessary for deliberative democracy. “The discourse theory does not let the success of deliberative politics depend on an ability of citizens to act collectively, but on the institutionalization of adequate procedures and presuppositions of communication, as well as on the teamwork of institutional consultations and informally built public opinions.”⁽²⁸⁾ To explain the structure of this teamwork, we must look into his key concept: communicative power.

The *common conviction* between speaker and listener which is produced or only supported by the intersubjective acknowledgment of a validity claim raised with a speech act means the silent acceptance of obligations relevant to action. To this extent it brings a new social situation. Now, owing to the mobilization of citizens’ communicative freedom to make legitimate laws, such

illocutionary obligations condense into the potential power which the holders of the administrative power must take into consideration.⁽²⁹⁾

He calls this “consensus-productive power of communication aiming an understanding” “communicative power” along with Hannah Arendt. We can see easily that “such communicative power can be built only in the not deformed public sphere” from his standing insistence on the communicative action.⁽³⁰⁾ He had earlier written,

[The] concept of *communicative rationality* carries with it connotations based ultimately on the central experience of the unconstrained, unifying, consensus-bringing force of argumentative speech, in which different participants overcome their merely subjective views and, owing to the mutuality of rationally motivated conviction, assure themselves of both the unity of the objective world and the intersubjectivity of their lifeworld.⁽³¹⁾

And so, in rational argumentation “[t]he ‘strength’ of an argument is measured in a given context by the soundness of reasons; that can be seen in, among other things, whether or not an argument is able to convince the participants in a discourse.” In order to communicate rationally and to understand mutually, it is necessary for the participants to “exclude[] all force — whether it arises from within the process of reaching understanding itself or influences it from the outside — except the force of the better argument.” Of course, “[i]n virtue of their criticizability, rational expressions

also admit of improvement.”⁽³²⁾

In other words, power arises from a mutual understanding resulting from free communication. But he departs from Arendt when he says, “By the concept of communicative power we can only understand the *origin* of political power, not the administrative use of the power which has been constituted already, that is, the process of the exercise of power. Neither can this concept explain the struggle for the position which authorizes the exercise of administrative power.”⁽³³⁾ Arendt was too much of an Aristotelian to grasp the modern differentiated society.⁽³⁴⁾ Rather, “by the concept of communicative power the concept of political power should be differentiated.” He concludes, “the idea of the state ruled by law (Rechtsstaat) should be generally interpreted as the demand to bind the administrative system ... to the legislative communicative power and to keep the former free from the influences of social power, that is, the factual force which the privileged interests have in order to accomplish themselves.”⁽³⁵⁾

As a result, it is clear that a social sphere separated from both the political system of state and the economic system, a *civil society*, must be the basis of democracy. The differentiation of the lifeworld and systems is also a modern phenomenon, but the systems cannot legitimate themselves independently of communication in the public sphere. Free and not deformed deliberation in civil society (where the persuasiveness of an argument, not group-interest behind it, talks) raises rational communicative power which can bind the state power as the legitimate origin of state’s will.⁽³⁶⁾ This is, in fact, the ideal of modern deliberative democracy.

In order to realize “the idea of the state ruled by law,” we must have the “deliberative and decision-making body of representatives,” the parliament, or Congress in the U.S.. Its members can meet and argue more easily and make decisions more effectively than the public sphere, and show more clearly the binding will of the people. Without it, public opinion would remain unclear and could not sublimate into law. On the other hand, however, it is also an institutionalized organ of the state and not a substitute for civil society. It is necessary to “complement the parliamentary opinion- and will-formation which is performed with the help of political parties with the informal opinion-formation in the political public sphere open to all citizens.”⁽³⁷⁾ The latter is not institutionalized and not burdened with making decisions (consequently, there is no “will-formation.”). Communicative power arises from such a free arena and prepares and influences will-formation in the parliament. This is the “*normative concept of the public sphere*” for the political will-formation.⁽³⁸⁾

He also calls this arena of informal opinion-formation “weak public”, as contrasted with the parliament (=“strong public”). Now we can understand easily that “this ‘weak’ public is the bearer of ‘public opinion.’”⁽³⁹⁾ and that the public opinion earns its significance from free communication in civil society. So “it is not an aggregation of individual opinions asked separately and expressed privately”⁽⁴⁰⁾ Communicative power results only from free deliberation and the freely agreed-upon persuasiveness of arguments. Now there is no pre-political majority-group and pre-politically individuals’ preferences are constrained by the existing, maybe illegitimate order. The due

basis of democracy exists only in the open critical argumentation, which is performed free from administrative and social power and does not know the end, though of course the state must make a decision at some time. Communicative power mediates between the two and “functions as the most important sluice for the discursive rationalization of the decisions ...”.⁽⁴¹⁾

IV. REMAINING PROBLEMS

Habermas’s theory seems to provide a clear picture of the normative structure of deliberative democracy. The understanding resulting not from violence or money but from critical communication by autonomous citizens legitimates political power and arises only from civil society. The members of parliamentary organs argue under the influence of that power, which prevents them from acting strictly on their own ideas or as messengers of interest groups, and sublimate it into laws which bind administrative and social powers. The decision of the parliament, however, does not mean the end of communication in civil society, which remains uninstitutionalized in order to make communicative power from free discourse.

Several problems still remain in the theory of deliberative democracy. The first relates to the real plausibility of the contention that communicative power arises from deliberation in civil society. The answer depends on how one recognizes today’s western society. For example, Karl-Heinz Ladeur understands it as “the organized society.” The organized society in the postmodern era is essentially different from the modern “society of individuals.” Each organiza-

tion has heteronomous structure and “the inequality of the potential of action and information undermines the Christian and idealistic component of the *one* person as independent center of action.” Each organization follows heteronomous logic. In other words, “the subject is segmented.” Then “the communicative relations make sense only by the situational, strategic and systematic compatibility of language-games.”⁽⁴²⁾ From this system theory one might conclude that “the public sphere is not a privileged position which could give one perspective a stronger claim for the ‘assumption of practical rationality.’”⁽⁴³⁾ Habermas’s refutation is what one would expect from the description above. The system theory cuts off the opinion – and will-formation from the “roots of lifeworld in civil society,” and so it cannot contemplate “the normative control over the circulation of power regulated by the rule of law.” In short, “the system theory provides no framework of a *characteristic* theory of democracy.” But if so, we cannot know “how the political system is able to integrate the whole society, though it is specialized in steering” the subsystems.⁽⁴⁴⁾ As long as “the break between the autonomy of different function-systems”⁽⁴⁵⁾ exists, we need civil society to legitimate the control over it, as Habermas points out.

Another question is posed by Michael Walzer. It is true that Walzer admits the significance of civil society, and criticizes the communitarianism and Marxism as super-political and anti-political. But he takes more notice of the impression that “[i]ncreasingly, associational life in the ‘advanced’ capitalist and social democratic countries seems at risk.”

[M]any people, perhaps most people, live very loosely within the networks, a growing number of people seem to be radically disengaged — passive clients of the state, market drop-outs, resentful and posturing nationalists. And the civil society project doesn't confront an energizing hostility ... ; its protagonists are more likely to meet sullen indifference, fear, despair, apathy, and withdrawal."⁽⁴⁶⁾

He proposes that we “call the state to the rescue of civil society.”⁽⁴⁷⁾ But how? Although of course the serious inequality of wealth among people must be amended by the state in order to save free communication in civil society, we cannot imagine the way how the state power stops dissolution of civil society in the rich countries. It contains the danger of suppression of freedom in civil society. Civil society must save itself for itself, in principle. As for Habermas, he admits that “the guarantee of fundamental rights alone is not able to save public sphere or civil society from deformation, of course.” “Rather, the structure of communication in public sphere must be kept unwounded by an energetic society of citizens.” and “it can be developed only in a lifeworld which has been already rationalized.”⁽⁴⁸⁾ He further stresses that we can find the potential for civil society in the social periphery. At least, when a periphery gets sensitively conscious of social crisis, its power resulting from persuasiveness of its claim starts mobilizing and controlling politics. According to him, we can recognize this structure from the experiences of 1980s.⁽⁴⁹⁾

This attention to the social periphery is one aspect of his theory, and allows us to turn toward an examination of the (usually small)

movements of citizens within a large political framework. When we examine the deliberative legitimacy of democracy, we must take into consideration not only major interest groups or political parties but also associations in the periphery which resort almost only to the persuasiveness of their own arguments. They ought not to be regarded only as minorities with constitutional rights, but rather as essential parts of political opinion- and will-formation. The existence of these groups is both real and necessary for the realization of deliberative democracy, while one cannot exaggerate their role.

A final remaining problem is that it remains unclear through what structures public opinion in civil society is able to influence the parliament. In “FAKTIZITÄT UND GELTUNG” Habermas treats the U.S. and F. R. Germany, which have very different constitutional structures, as undistinguished. “[I]t is not clear what specific proposals for mediating between weak and strong publics would follow from his model.” Moreover, “[i]n a deliberative politics attention shifts away from the final act of voting,”⁽⁵⁰⁾ because now we cannot regard the result of voting as the exact will of citizens. The election compels constituencies to decide about controversial problems, even if the discourse over them has not developed yet. Of course elections, through which people select members of strong public, still remain one of the important means of “mediating,” but we must not expect too much from them. Furthermore the election means the selection of holders of state power too (The German Basic Law provides that “the Federal Chancellor shall be elected,” at first, “*without debate*, by the Bundestag...” (Article 63(1)), emphasis added). This means that the main purpose of the election there is to decide the top holder of

the administrative power directly. All the elections in parliamentary systems have the same character, I think.), and so it increases the danger of deformation and corruption of the public sphere. We can easily recognize that at the time of election the power of money and administration increases.⁽⁵¹⁾

To consider this problem it is more useful to look into the division of powers and the structurally-regulated pressure on them to respect public opinion. For example, in the British and Japanese parliamentary systems Parliament has the competence to pass a vote of nonconfidence in the Cabinet, and the Cabinet has the competence to dissolve Parliament. "In order to prevent each other from using its arms, it is necessary to stand nearer to public opinion than the other. ... Therefore the constant competition between Parliament and the Cabinet for approaching public opinion results from this structure." As for the U.S., the President is selected almost directly from the people and so has the same democratic prestige as Congress. He/She leads politics, but "he/she does not have effective institutional means to pressure Congress, which has the competence to legislate. The most effective means is the support from the people. Then he/she must have the policies approach public opinion."⁽⁵²⁾ From the viewpoint of deliberate democracy, we can grasp the significance of these structures more clearly. Communicative power arises from daily deliberation and desires to influence politics constantly. To realize this task we can take advantage of the pressure existing between state powers.

Moreover it seems to be important to take note of the role of individual representatives more positively. Ordinarily, the leaders of

the majority party in parliament form the Cabinet. It is necessary, therefore, that each representative should have some room to act freely from the orders of the party, in order to make the system of mutual pressure mentioned above operate successfully. If the Cabinet can trust the loyalty of all the members of ruling party, this pressure will be lost. Furthermore, when a new political problem arises from the social periphery, its meaning is usually discovered by some sensitive representatives, because the leaders of political parties are eager to deal with the struggle for state power rather than to approach the grass roots. Additionally this sensitivity is necessary to build up the deliberative character of parliamentary proceedings. In order to increase the chance of deliberative democracy, one must not regard the parliament as composed of some clusters of parties. Of course political parties are major means of mediating the inside and outside of the parliament. We cannot, however, expect them to be enough sensitive to the social periphery. Therefore we demand that each representative's freedom (especially outside the parliament, where he/she gets in contact with civil society) should be guaranteed as widely as possible within the limits of basic policies of his/her party. We can also examine from this viewpoint what is a more desirable election system. In general, such a system should be avoided as makes each representative's position exclusively depend on the center of political party. We want representatives with various interests.

Of course "it is a different question whether such a mechanism operates really as expected."⁽⁵³⁾ But these attentions to the structure of a political system are crucial features of an evaluation of the

possibility of deliberative democracy. We have noted that deliberation is necessary for the legitimacy of democracy, and through an examination of Habermas's theory established the conditions for legitimate deliberation. What we seek to show in this article is the necessity and possibility of deliberative democracy, and I think the task has been already carried out. As a result, the next step for theorists ought to be the discussion of the creation of structures that will more certainly link the continual deliberations within civil society (especially persuasive arguments in the social periphery) with the decisions made by state representatives. It is true that we do not have an ideal society. The following sentence is correct: "[T]he idea that civil society is something we *have* in the West needs to be nuanced. In one sense we do; in another sense it is a goal that has to be striven for against the grain of modern democratic government."⁽⁵⁴⁾

Perhaps the difficulty comes from the fundamental structural tension in constitutional states. Habermas says,

In the democratic constitutional state the exercise of political power is coded *in a dual manner*: the institutionalized handling of problems and the procedurally regulated mediation of interests must simultaneously be understandable as actualizing a system of rights. But in the political arena those who encounter one another are collective actors contending about collective goals and the distribution of collective goods.⁽⁵⁵⁾

For this very reason, however, we must analyze and propose how the collective will should be formed. We must have free individuals and legitimate government simultaneously.

Notes

* I would like to thank David Leheny for corrections of the English text. The responsibility for this article lies with me alone. This research has been supported by Grant-in-Aid for Scientific Research (Grant-in-Aid for Encouragement of Young Scientists (A)).

* * associate professor of law, University of Tsukuba

- (1) David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 *TEX. L. REV.* 1437 (1993).
- (2) Seyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 *CONSTELLATIONS* 26, 31 (1994).
- (3) *Id.* at 43.
- (4) Seyla Benhabib, *Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas*, in *HABERMAS AND THE PUBLIC SPHERE* 73, 93 (Craig Calhoun ed., 1992).
- (5) Bernard Manin, *On Legitimacy and Political Deliberation*, 15 *POLITICAL THEORY* 338, 349-50 (1987). *See also*, Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17, 25-28 (Alan Hamlin and Philip Pettit eds., 1989).
- (6) Benhabib, *supra* note 2, at 32. David Estlund stresses the role of political deliberative process. He nevertheless asserts that we must assume the existence of political truth independent of procedure. Deliberative democracy is legitimate because it tends to approach the truth, he says. *See*, Estlund, *supra* note 1. One can doubt, however, the usefulness of such an idea. When political deliberation over a community takes place, we need not justify its conclusion with such an idea.
- (7) Manin, *supra* note 5, at 353.
- (8) CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17 (1993).

- (9) *Id.* at 125.
- (10) *Id.* at 168, 187-88.
- (11) *Id.* at 177-78.
- (12) *Id.* at 20.
- (13) *Id.* at 135-37.
- (14) Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 840 (1993).
- (15) *Id.* at 881.
- (16) *Id.* at 890.
- (17) See, SUNSTEIN, *supra* note 8, at 146. Gey introduces the “civil rights progress” as having “more to do with fractious conflict than with republican dialogue and consensus,” and pays attention to the leading role of the courts which “refus[ed] to engage in a dialogue with segregationist political actors.” *Id.* at 852 n. 178. But I think that what finally supported and legitimated the courts’ progressive attitude was the persuasiveness of the blacks’ opinion in the public discussion. Without the support from a social environment the courts’ hard attitude would perhaps have been frustrated. And this wide support arose from the wide discussion about the racial problems. It opened many whites’ eyes to the blacks’ suppressed conditions. See, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 244-72 (1962).

Hendrik Hartog claims, “[W]e need to remember the liberating potential once identified with the idea of contractual, self-seeking, self-creating behavior.” Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75, 78 (1987). The importance of his point of view cannot be denied. But in this article we deal with the political process in today’s societies and investigate the possibility of deliberative *democracy* — government by all the liberated people — there. See also, Martin H. Redish and Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory : The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

- (18) Gey, *supra* note 14, at 858-59.
- (19) SUNSTEIN, *supra* note 8, at 180.
- (20) *Id.* at 19-22.
- (21) PAUL W. KAHN, LEGITIMACY AND HISTORY 186-88 (1992).
- (22) SUNSTEIN, *supra* note 8, at 179.
- (23) Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541-45 (1992). For a criticism of this article, see, Note, *Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARV. L. REV. 1401 (1994). (About this problem, Shusuke Osawa, *Kyowashugi-teki Kenpo Riron to Tan'itsu Shikkofu Ronso* [*Republican Constitutional Theory and the Controversy over the Unitary Executive*], 68 HOGAKU KENKYU 147 (1995) was suggestive for me.) Such concern is the reason we do not deal with Frank I. Michelman, who pays much attention to the Supreme Court as a representative and dialogic body, in this article. As for the criticism of his "republican elitism," see, KAHN, *supra* note 21, at 179-84.
- (24) H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L. J. 1703, 1708 (1988).
- (25) SUNSTEIN, *supra* note 8, at 146. Sunstein claims that the First Amendment's protection of free speech ought to be interpreted as protecting free political deliberation, and this claim itself is rather persuasive. However he tends to secure the public deliberative arena from distortion easily by the intervention of state. This somewhat paternalistic idea about the free speech right of individuals may threaten the idea of autonomy. Here also appears his ambivalent attitude toward the ordinary people. Compare CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993) with ROBERT POST, CONSTITUTIONAL DOMAINS 268-89 (1995).
- (26) Richard H. Fallon, Jr., *What Is Republicanism, And Is It Worth Reviving?* 102 HARV. L. REV. 1695, 1734 (1989).
- (27) JEAN L. COHEN AND ANDREW ARATO, CIVIL SOCIETY AND

- POLITICAL THEORY 345-46, 412-15 (1992).
- (28) JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 360-62 (1992). Ingeborg Maus simply points out that the idea that some obligatory value is necessary for the identity of political society does not belong to the domain of modern constitutional theories. It means only re-feudalization. See, Ingeborg Maus, *Volkssouveränität versus Konstitutionalismus*, in AUF DER SUCHE NACH DER GERECHTEN GESELLSCHAFT 74, 78-82 (Günter Frankenberg ed. 1994). On the contrary, in the modern era communicative rationality has developed fully for the first time and as a result it has been able to operate to integrate society.
- (29) HABERMAS, *supra* note 28, at 183.
- (30) *Id.* at 183-4.
- (31) 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 10 (Thomas McCarthy trans., 1984).
- (32) *Id.* at 18, 25.
- (33) HABERMAS, *supra* note 28, at 185-86.
- (34) See, JÜRGEN HABERMAS, PHILOSOPHICAL-POLITICAL PROFILES 173 (Frederick G. Lawrence trans., 1985).
- (35) HABERMAS, *supra* note 28, at 186-87.
- (36) Peter Dews clarifies the relationship between Habermas's two main works referred above. He says that The Theory of Communicative Action had left unresolved the problem how the lifeworld controls the systems without hurting the latter's functions. In *Faktizität und Geltung* Habermas uses the concept of public sphere and civil society to solve it. These seem to be the key concepts for his ideal of democracy. Peter Dews, *Faktizität, Geltung, und Öffentlichkeit*, 41 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 359 (1993). See also, Michael Rosenfeld, *Law as Discourse: Bridging the Gap between Democracy and Rights*, 108 HARV. L. REV. 1163, 1172-76 (1995). For the relationship between communicative freedom and political will- and opinion-formation, see also, Klaus Günther, *Die Freiheit der*

- Stellungnahme als politisches Grundrecht*, 54 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE — BEIHEFT 58 (1992). Incidentally, ULRICH RÖDEL ET AL., *DIE DEMOKRATISCHE FRAGE* (1989), which has spread the idea of civil society in a new meaning (Zivilgesellschaft) over Germany, seems to have left unclear the relationship between civil society and political institutions. Habermas clarifies this point.
- (37) HABERMAS, *supra* note 28, at 210-11.
- (38) *Id.* at 225.
- (39) *Id.* at 373.
- (40) *Id.* at 438.
- (41) *Id.* at 364. For the significance of the distinction of informal and formal opinion-formation, *see also*, Kenneth Baynes, *Democracy and the Rechtsstaat: Habermas's Faktizität and Geltung*, in THE CAMBRIDGE COMPANION TO HABERMAS 201 (Stephen K. White ed., 1995); Simone Chambers, *Discourse and democratic practices*, in THE CAMBRIDGE COMPANION TO HABERMAS 233. The “weak” and “strong” publics were mentioned first by Nancy Fraser. *See*, Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun ed., 1992).
- (42) Karl-Heinz Ladeur, “*Abwägung*” — *ein neues Rechtsparadigma?*, 69 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 463, 463-71 (1983). *See also*, Karl-Heinz Ladeur, *Subjective Rechte und Theorie der Prozeduralisierung*, 27 KRITISCHE JUSTIZ 42 (1994).
- (43) KARL-HEINZ LADEUR, *POSTMODERNE RECHTSTHEORIE* 62 (1992). Niklas Luhmann also points out simply, “There is no civil society at all.” Niklas Luhmann, *Quod omnes tangit ...*, 12 RECHTS HISTORISCHES JOURNAL 36, 46 (1993). Although Luhmann admits the significance of the public for politics, its meaning is very different than that of Habermas. *See*, NIKLAS LUHMANN, *POLITICAL THEORY IN THE WELFARE STATE* 46-51 (John Bednarz Jr. trans., 1990).

- (44) HABERMAS, *supra* note 28, at 405-07. *See also*, Benhabib, *supra* note 2, at 42-43.
- (45) HABERMAS, *id.* at 407.
- (46) Michael Walzer, *The Civil Society Argument*, DIMENSIONS OF RADICAL DEMOCRACY 89, 89-94, 105-06 (Chantal Mouffe ed., 1992).
- (47) Michael Walzer, *Constitutional Rights and Civil Society*, in "THE CONSTITUTION OF THE PEOPLE" 113, 125 (Robert E. Calvert ed., 1991).
- (48) HABERMAS, *supra* note 28, at 447-49. *See also*, Jürgen Habermas, *Postscript to Faktizität und Geltung*, 20 PHILOSOPHY AND SOCIAL CRITICISM 135, 147-48 (William Rehg trans., 1994).
- (49) HABERMAS, *supra* note 28, at 460-61.
- (50) Baynes, *supra* note 41, at 215-18. *See also*, MICHAEL WALZER, SPHERES OF JUSTICE 306-08 (1983).
- (51) *See*, Chambers, *supra* note 41, at 250-55.
- (52) KAZUYUKI TAKAHASHI, KOKUMIN-NAIKAKU-SEI NO RINEN TO UNYO [THE IDEA AND OPERATION OF THE REGIME OF POPULAR CABINET] 370-74 (1994).
- (53) *Id.* at 395.
- (54) CHARLES TAYLOR, *Invoking Civil Society*, in PHILOSOPHICAL ARGUMENTS 204, 207-08 (1995). Stephen M. Feldman proposes just another "postmodern" criticism of Habermas. He stresses, "[P]ower, in various forms (or forces), is so pervasive and persistent that the political dialogue must always be, in part, distorted and exclusive." But because he says that a reconstructed civic republicanism pursues an interpretative, not objective, common good and says, "[T]his postmodern interpretivist approach encourages (or structures) us to reflexively confront the question of how we are to participate in the constant reconstruction of our community and ourselves," the distance between the two is much shorter than that between the system theory and Habermas. Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Consti-*

tutional Jurisprudence : Michelman, Habermas, and Civic Republicanism, 81 GEO. L. J. 2243, 2245, 2288-89 (1993).

- (55) Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in CHARLES TAYLOR ET AL., *MULTICULTURALISM : EXAMINING THE POLITICS OF RECOGNITION* 107, 107-08 (Shierry Weber Nichol森 trans., 1994) (emphasis added).