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《Article》

The Plasticity of Persons and the Concept of Rights*

by Ko Hasegawa**

1. The most basic characteristic of the foundation of rights is often said to be “personhood”. It is claimed that the fundamental requirement of the concept of rights is to protect the dignity or integrity of individual persons in society, especially against the overall consequence-oriented administrations of society. Therefore, the objective of this concept of rights is to maintain and enhance the significance of individual persons which should be treated not as mere means but as ends in themselves. Furthermore, this view maintains, a variety of rights which are derivable from this valuation should also be protected as fully as possible.

Such a view is hardly open to disagreement. Few would deny the importance of persons in society and of the concept of rights which is based on this idea.

However, we have to be aware that more radical questions remain for this common-sensical view of the foundation of rights ; What are “persons” ? ; In what sense do persons have “dignity” ? ; And in what way can we connect the concept of persons to the concept of rights ? I believe these questions are fundamental ones which must be answered in a specifically philosophical manner, if one would like to truly defend the significance of persons and rights.

Before proceeding further, however, let me briefly note one problem which I will not discuss here in detail. It is the problem of the social undesirability of the emphasis on persons. What I would like to consider here is a criticism of the “inflatability” of rights-claims from a conservative viewpoint. I believe that this kind of criticism relies on a negative evaluation of the social importance of the concept of persons as the foundation of rights. To that extent, it may be of some value to forestall some points concerning this view.

The conservative critic maintains that, even if individuals as persons should be treated decently, this treatment is always conditioned and constrained by society. He notes that, in particular, individuals easily become egoistic and tend to demand too much from society without noticing the limits of their standing in society and of the capacity of society. Thus if the concept of persons is taken

seriously, the “inflation” of personal demands, a socio-politico-institutional disability, and also the “inflation” of rights based on those demands are unavoidable.

So, to prevent this danger, the concept of persons should be significantly qualified as existing only under certain social constraints.¹

This criticism seems to be functional and institutional in nature, which is different from a philosophical or analytical criticism of the concept of persons. So, it might seem easy to argue against this criticism, if only we emphasize the ideality of that concept. However, this is not an adequate stance. Because the point of the conservative criticism lies not in exposing the reality of persons, but rather in suspecting the possibility of the concept of persons itself, that is, the limited nature and scope of the independent characters of persons in society. Thus, if we, as defenders of the concept of persons and its related concept of rights, would like to argue against this criticism, we have to try to develop the concept of persons itself rather than blindly adhering to the ideality of persons.

At this point, I would like to suggest the distinction between the individual-based and individual-oriented conception of persons, and correspondingly, between the individual-based and individual-oriented conception of rights. Here, “individual-based” means that the core feature of the concept is identified privately in a certain character of the individual. And “individual-oriented” means that the feature is identified publicly in a certain constitution of values. Also I would like to distinguish the concept of *self* which is an empirical entity from the concept of a *person* which is a normative entity. And, finally, I want to emphasize the difference between the *standing* and the *exercise* of the normative concept such as rights.

The concept of persons in the conservative criticism is such that individual persons must be those who rationalistically deliberate their possible courses of action in society. For this view, persons can be egoistic because they can act rationalistically. And thus, when they demand something necessary toward others, their demands can be egoistic ones which have no inherent limitation on the part of claimers. So, it follows from this line of thinking that the concept of rights which is based on the concept of persons can also be egoistic and without any limitation in society.

But, here, we have to be careful that the concept of persons is different from the concept of self, and that the self is not necessarily rationalistic but rather can be reasonable in his deliberation.

First, as distinguished above, the concept of persons is normative, while the concept of self is empirical. So, while the concept of persons has a certain normative relationship with the concept of rights (which is, no doubt, a nor-

mative concept), the concept of self does not have a necessary relationship with the concept of rights. In other words, while the concept of persons represents the normative valuation and concern of the possible courses of action of individuals from a certain socio-political viewpoint, the concept of self represents an individual acting with a complex motivational set of desires, reasons and other objectives. The concept of persons shapes a certain normative space in which the self behaves in diverse ways. So, even if a particular self is egoistic, the concept of persons concerns him from a normative viewpoint which tries to maintain and enhance the possibility of that self as compatible as possible with certain public values. Thus, if some conservative would like to denounce the concept of persons and rights as apt to be egoistic, his contention should be formulated as such that the normative concern for individuals must be constituted as restraining the egoistic abuse of their demands, so that the concept of rights should be articulated as having significant limitations. However, not only theoretically but also practically, there has been no interpretation of rights which recognize the limitless exercise of rights. So this modified conservative view is quite trivial. The concept of persons and rights are themselves already moral concepts, and have an internal moderation backed by a certain set of values. Therefore, the problem is in the conditions of restriction of individual demands, and not in the very possibility of suppression of those demands.

We can say this situation in a different way. That is, we can say that rights might be exercised egoistically but the concept of rights itself cannot permit such an exercise by the very nature of its standing.

There is another defect in the conservative criticism. This criticism identifies the character of self as merely rationalistic and thus apt to be egoistic, while it bases its contention on sociality of human beings on the idea of the noble. But this identification is not necessary. For conservatives to make this identification necessary, they need an assumption that the concept of self excludes the sociality between individuals respecting each other. However, the self is not always egoistic. It is often altruistic or neutral. And selves can accommodate their interests for themselves. Even if a particular self or a group of selves is egoistic, it can be a contingent fact which is changeable. So there is no necessity to exclude the possibility of social co-operation and mutual respect between selves.

Furthermore, we should note that the concept of rights is individual-oriented and not necessarily individual-based. Rights can protect and develop individuals' concerns through the concept of persons which is normative and can be public, even if they are not based on individuals' own sets of motivations or values. But this is a part of my contentions in this article, which will be

explicated in the following.

What I have maintained so far is that a self-based understanding of the standing and exercise of rights is not the only way to explicate the concept of persons and rights as the conservative criticism suspects. We can explore another line of understanding, in which the concept of persons and rights have a more adequate articulation.

2. Now, returning to the dignity theory of rights mentioned at the beginning of this article, we have to say that the foundation of dignity itself is not so firm as it appears first. Individuals are changeable one to the other, group to group, and time to time. If so, what is the common and ideal feature called dignity and how is it possible? Does a terribly evil person still have dignity? If he does, in what sense? Does a terribly egoistic person still have dignity? If he does, in what sense? Or does a fetus have dignity? If it has, in what sense? It is not intuitively clear what the idea of dignity is. This idea might be utilizable due to its obscurity. But, philosophically, it does not make sense. I do not mean that this idea does not matter at all. On the contrary, I believe that there is something in this idea. However, if we would like to endorse the importance of dignity, we have to explicate it further. This is a philosopher's task.

There are certain theories which emphasize the importance of personal dignity which should be decreed by God or some other religious or super being, or be derived from the highest moral principles such as the order of Reason or autonomy. But, to secure these ideas, intuitions are not enough. If there is variability and relativity of individual lives, we cannot easily rely on these metaphysical intuitions. Rather, we have to explicate the very possibility of these ideas, taking seriously the changeability problem of individuals.

Even if not so metaphysical, theories of rights which try to give individual-based explications do not seem to succeed to justify the concept of rights.

For example, Alan Gewirth's program that the concept of rights is derivable from the substantive normative feature of the structure of human action² cannot attain the effect expected by himself. As already known, Gewirth develops his theory in such a way that the concept of rights is derived from the necessary conditions a moral agent has for pursuing his objectives, namely, freedom and well-being, which are incorporated as generic features of the normative structure of action. So, if the individual is a morally rational agent, as such an agent he already has made a valid claim to keep himself from the interference of others with his possible courses of action and achieve them, and, in this sense, therefore he has a general right to freedom and well-being respective-

ly. Furthermore, via the principle of universalizability, a certain maxim which requires every agent to act in accordance with other agents' rights to freedom and well-being can be established as a supreme moral principle. Consequently all agents have and respect their general rights with each other as primary moral objectives. Incidentally, well-being as a necessary condition for moral agency can be said to include, say, three kinds of goods, that is, the basic goods, non-subtractive goods and additive goods for subsidiary gains. So, in accordance with these, there are not only general rights to freedom but also basic rights, non-subtractive rights such as the right to freedom of expression or other political liberty rights, and additive rights such as the right to immigration or education, which can also be derived from the normative structure of action but does not have as much importance as basic or non-subtractive goods.

In a sense, Gewirth's theory is very unique. He pays attention to the structure of human action itself to derive the concept of rights, and reads substantive values in that structure itself to determine the content of rights. Also the agent's perspective in the derivation is constituted so as to avoid the logical difficulty concerning the fact-value dichotomy. But, still, there are serious difficulties.

First, even if it is sound that an individual qua rational agent commits himself to a certain action-structural values such as freedom and well-being, it is still different to say that he has a right which enhances his action-based demands to mutually valid claims. Gewirth maintains that recognizing necessary goods for the pursuit of actions is for agent himself logically identical with his having rights to those goods. But, as Loren Lomasky suggests³, Gewirth needs here other conditions concerning the environment of agents to secure the interpersonal normativity of rights which excludes the potential interference from others. As long as the explication of right is individual-based as Gewirth's, there will remain always this kind of subtle problem bridging the agent's personal set of objectives and the interpersonal normative force of rights.

Second, even if the agent behaves in the normative structure of action, the necessary goods he commits himself can be identified in a way other than as Gewirth describes. Gewirth maintains that the agent has voluntariness and purposiveness which implies the value of freedom and well-being. But this relationship is not necessary. An agent can voluntarily choose unfree environments. And he can also purposively choose lowering himself. These phenomena mean that the agent can choose whatever states of affairs he wishes. If this choice is said to be voluntary and purposive, and free and toward well-being, Gewirth's contention comes to be nonsense.

In addition, combining both points above, the concept of rights can be easily corruptible to an egoistic version, which has been already examined as inadequate.

Third, we should notice the basis for the relative difference in stringency between particular rights. It is supposed in this view that there is a difference in necessity between particular rights which is based on the necessity between prerequisites for moral agents, and that this difference also determines the priority a particular one has over another. We can say, for example, that, for moral agents, the first necessary conditions are those for life, physical integrity, mental stability and the like, the second conditions are those necessary to the attainment of the objectives of moral agents such as freedom of expression or other political libertyrights. The third conditions are those for enhancing the development of persons such as certain welfare rights. According to this view, rights can be ordered, corresponding to an ordering of these conditions, and, in the case of conflicts between rights, the first set of conditions is to have priority over the second one and so on. But, as far as there can arise problems about the universality of these alleged necessary conditions, that is, as far as there is a problem of variability and relativity in these conditions for diverse agents, we cannot determine unequivocally their ordering and so the ordering of rights. Even if it is true, it is not easily handled by the framework whether we should give priority for, say, the conflict between privacy and freedom of expression in which rights in the very same category are clashing.

A certain version of this kind of view might circumvent these problems. As a matter of fact, Loren Lomasky's theory of basic rights does just this⁴. This theory concerns the structure of action itself, that is, the feature of project-pursuing itself, and derives the necessity of rights from a sort of procedural requirement of that very activity. For this view, basic rights are necessarily introduced for individuals so that they can be continuous project-pursuers and be respected as such by others, no matter what they pursue and no matter what they value as worth protecting and promoting for their courses of action.

According to Lomasky⁵, if someone lives as an individual in society, he has something which sustains and develops his courses of action. He, as an agent, must have certain ends for his life which give him motivational forces to his activity. They persist into the future, playing a central role within his efforts and providing the structural stability to his life. They are called projects. They are personal, and can be heterogenous and diverse according to agents. But the existence of projects itself gives the agent the coherence of his activities, and the project-pursuit itself is considered invariable among diverse agents and their lives.

From this very fact of life, an agent encounters certain demands for his activities. That is, since the agent is a project-pursuer, he has some end which he values as the directive to his life. And thus he also values what is necessary for the promotion of that end. Then, without the ability of project-pursuing, the agent cannot attain his end. So this ability is necessary for his end, and therefore the agent values this ability as something worth securing. Also, by generalization, all agents become to value the ability of project-pursuing itself with each other. In addition⁶, particular necessary goods can be put into three categories according to the necessity for project-pursuit. Category-1 includes the motivational energy and self-respect of the agent, Category-2 includes economic goods which the agent himself provides or others give, and Category-3 includes goods which are derived exclusively from his socio-political relationships with others, of which non-interference is most unique. They are, of course, in a lexical order.

However, according to Lomasky, this is not sufficient for the agent to have rights. For, to value project-pursuit comes only to make the agent's own demand, and not to get normatively valid claims which should be recognized in society. Here we need another kind of explication for rights. Lomasky himself suggests the tripartite derivation of rights⁷. It consists of the biological possibility of human empathy, the rational recognizability of others and the game-theoretic strategy for moral deference between persons. These explications together are expected to give the normative significance of the concept of rights, especially of basic rights to non-interference with project-pursuit, which give the entitlement to public moral space to the agent's demands based on his own project-pursuit. But, I will not discuss here this tripartite explication of rights in detail. Instead, I will concentrate on the relationship between the concept of project-pursuit, the concept of persons and the concept of rights in Lomasky's view.

For Lomasky, the existence of projects and the ability of project-pursuing are the cores of personhood, and this will be represented, though in an indirect way such as the tripartite derivation, by the concept of rights. An individual is a person with these core characteristics. With them he gets coherent persistence and stability in his activities. This establishes his integrity not only in his personal path but also in his social life. It seems that project-pursuit can be the universal feature of a human being as an agent. Thus even a terribly egoistic person or an incredibly altruistic person has this feature as long as he does act. Unlike a Gewirthian agent, he does not need to hold certain substantive values which are assumed to be committed in advance. He needs more basic precondi-

tions to have certain demands as person to others in society. And, to get necessary goods for his life, he can ground his demands on these basic preconditions. This reasoning seems to be far less controversial than Gewirthian one. So, it will be easily recognized that every person has his own sense of personhood. Then, the primary demands of persons are concerned with the security of those core characteristics, which can be shared by every person. Here, we can expect that a certain social tendency to mutual respect of those characteristics between persons emerge in society. Thus the moral space which is to be respected mutually, that is, the topos of the concept of (basic) rights, can be established in a well-balanced relationship between persons.

Although Lomasky uses a complex method for the derivation of the concept of rights, his view of rights is individual-based as well as Gewirth's view. The core feature of rights is in a certain type of individual demands from an agent's viewpoint, though it is abstract and procedural. Even in the tripartite derivation which is developed in a different dimension from personal deliberation, this idea is still preserved. In biological empathy, rational recognition and strategic deference with others, the starting point for consideration is always in the possibility of development of individual demands to others. In this sense, Lomasky's view is individual-based. Of course, his view is more elaborated than Gewirth's especially as to the deficiencies of Gewirth's view. Lomasky's view can avoid the gap in explication of rights which Gewirth considers merely logically equivalent; it can avoid the relativity or variability problem in identifying structural values for agents which Gewirth identifies substantively with freedom and well-being; and it can make the standings of necessary goods for agents less controversial with its abstract idea of project-pursuit. Perhaps, Lomasky's view is the most elaborated individual-based explication of rights which we have ever had.

Thus, it might be fruitful if we utilize Lomasky's contribution to elucidate the idea of human dignity as the basis of the concept of rights. If we try to straightforwardly grasp the essence of the dignity in a certain empirical character of individuals, there appears a notorious problem of relativity and variability of human nature. On the other hand, when we propose the ideal of human dignity against a realism of human nature, it tends to become a dogmatic imposition without any foundation and any sensitivity to real life. It is surely difficult to steer between these opposites. But, as Lomasky proposes, it seems to be highly tenable that human beings are essentially "homo projectus", and that this gives, though minimal but still significant, meanings to the standings of persons in society. They are always project-pursuers, no matter what happens to their

personal or social conditions. They always have integrity with their project-pursuit itself. It is not the “full autonomy” in Kantian sense, nor developed “individuality” in the Millian ideal. But, project-pursuit is a radical human phenomenon, which can be the more deeper and firmer basis of the significance of persons in terms of philosophical explication of ideas for any kind of socio-political thought. In this sense, human dignity can be the very foundation for the protection and development of individuals in society. And, as to the concept of rights, it can be the significant basis for that concept, as long as this concept is individual-sensitive.

3. This perspective on the significance of individuals in society seems to be promising, if one would like to seek the firm basis of the dignity of persons for the concept of rights. However, there still are more radical problems concerning persons.

These problems are depicted by Derek Parfit⁸. He has developed many insightful arguments against the common-sensical, but actually naive, view of persons. His arguments are for the reductionist view of persons which grasps the concept of persons as plastic, that is, variable and extendable, and not as rigid and deep. All of Parfit’s arguments are provocative and worth serious consideration. However, I will concentrate here only on the arguments which are considered as relevant to the problems discussed in this article.

Among Parfit’s arguments, I think the following is relevant to the concept of persons as the foundation of the concept of rights; the plasticity of the *standings of persons*, the *plasticity of the rationality of personal projects*, and the plasticity of the principles of justice.

First, according to Parfit, the concept of persons is not necessarily limited to the very one individual at a particular time. The central object of a persons is the very me here and now, but it can be me and/or others who have certain relationships in a certain time-span. For example, if the division of persons can happen, namely, I lose my body and also my right and left brain are divided and completely transplanted to two separate bodies, what happens to me? Am I as an individual dead? Or am I one of the new individuals?⁹ Next, if, on the contrary to the division, a fusion could occur and I and others could get together into one body with two different sets of memories, what happens to us? Am I the new person or still the old self? Or am I already dead¹⁰? Finally, how about the case of successive selves who changes their life according to the stream of time? Is the past self still the present self? And is the future self the present self¹¹? All of these puzzling questions can show, according to Parfit, that there is no deep fact

of person such as personal identity which guarantees the one and only nature of the individual. In other words, the concept of persons can be more loose and indeterminate than usually believed. If this is the case, Parfit argues, we should not adhere to the non-reductionist view of persons which assumes the deep level identity of persons, but rather come to believe the reductionist view that the concept of persons is constituted solely of a certain plastic relationship, that is, a certain kind of connectedness between individuals¹². According to this view, the cases stated above can be solved pursuant to the question of degree concerning the relationship.

Second, it seems that, once we accept the non-reductionist view of persons, it is natural to deny the extreme claim that we have no reason to be specially concerned about our own futures¹³. In other words, once we believe the deep fact of identity of persons, it is impossible that we do not have to continuously adhere to our projects planned at a particular time and that we can change our projects at any time as we wish. But, Parfit argues, this can be the case in even the non-reductionist view itself, and this is not necessarily the case in the reductionist view. For example, in the case of division, is it really impossible for one divided me not to care about the other divided me as the non-reductionist view will maintain? If the non-reductionist view denies this possibility, it comes to commit the extreme claim which that view should deny. On the other hand, even if we take the reductionist view, it is not necessary for us to commit the extreme claim. If what matters between individuals is only a certain connectedness and not the deep fact of identity, the future of others or of the changed me can be also the objects of our concern to the extent that there holds a certain degree of that connectedness between us. While it is possible to take the extreme claim as the reductionist, it is not to be denied for us to take a moderate claim based on a matter of degree.

Incidentally, this plasticity of persons and of future concern can change the nature of commitment¹⁴. If we are living just in a certain connectedness relationship within and out of ourselves, the commitment does not place us and others into the rigid framework of duties or responsibilities. The force of commitments can be limited to the particular self at the particular time. Thus the commitment can cease gradually as the connectedness relationship fades away.

Third, the argument for the principles of justice such as freedom or equality are often based on the idea of separateness of persons. This idea is considered as having affinity with the non-reductionist view of persons. That is, when an individual is said to be treated as a separate, independent person in a socio-political institution, he is assumed to be the one and only person whose all kinds

of characteristics are inalienable and irreplaceable to and by others. And these characters usually implies the deep fact of identity of the person. However, Parfit argues, if we take the reductionist view of persons, the foundation of the principle of justice become not so determinate¹⁵. If the person as the object of the principles of justice is plastic as stated above, we have to make the scope of those principles greater in order to cover broadened or narrowed objects. Also, we can change the weight of the principles of justice. If the objects of those principles are plastic, we can think that they can be considered, say, less morally significant, and that the principles which should be applied to them can be morally less important and can be conceded to other kinds of considerations. Thus the principles of justice can be far less rigid than assumed usually.

Now, these Parfit's arguments can be extended into the examination of the idea of project-pursuit as the basis of the concept of rights.

If there is the plasticity of persons as Parfit argues, the presuppositions of the idea of project-pursuit can be undermined. The main elements of that idea are in persistence, directivity and stability in one's life. And, with these features, project-pursuit is assumed to be invariable and necessary requirements of individuals in society. However, the plasticity of persons implies that a project can be changed in a certain time-span; an individual who is the object of that project can be multiple and diverse; and also project-pursuit itself might have variable scope and weight. If so, the result is not only that there are more variability or relativity in the interpretation of the significance of project-pursuit for individuals than anticipated, but also that even project-pursuit itself is not so firm as it appears in the sense that it becomes just one of relevant considerations for rights which can be overridden and that, more radically, project-pursuit becomes an unnecessary illusion because there is no deep fact of identity of persons.

Two points are especially important here. First, if project-pursuit is not necessarily the feature of the one and only individual, then what kind of significance can be found as the basis of the concept of rights? If this basis can be plastic, how can we justify the individual-sensitive nature of the concept of rights? We might be able to think that the subject of rights is not necessarily the one and only individual because we can find other instances such as the rights of a nation or group. But, the problem here is not in the mere size of the subject but rather in the indeterminacy of the subject of rights. A nation or group has a certain boundary and a certain number of members. To that extent, even if the quality of the subject is different from the one and only person, that subject is still definite and said to be "individual" (of course in a fictitious sense) as the locus of

rights-claims. But, if every kind of individuals or groups of individuals can be said persons according to the relative degree of connectedness, how can we identify the very "individual" who should be the very locus of the concept of rights that has a certain dignity as a person in society? If we respond to this problem by invoking a more fundamental feature of persons other than project-pursuit, it will be a very difficult task to attain, because the idea of project-pursuit itself is already in a highly abstract level.

But, secondly, we have to face a graver difficulty here. That is, even if we can identify the radical phenomenon of a human being such as project-pursuit or some other feature, how is this tenable against Parfitian arguments for the reductionist view of persons which threatens the view that there must be a further deep fact of identity of persons. For example, assume that project-pursuit is the deep fact of identity of persons. If I as an individual who pursues a certain project am divided into two individuals P and Q, what happens to my project-pursuit? Perhaps, my project will be pursued by P and Q as their own projects according to the degree of division of me and of my feature which depends on my project. But, are not P and Q me? Perhaps, they can be me to a considerable degree. If so, how can my project-pursuit be the deep fact of my identity. That is, if my project-pursuit is a transferable state of affairs to other individuals, how can it be the deep, that is, unique and distinct fact of me? It might be replied that the idea of project-pursuit itself is constitutive of persons and not to be constituted by the concept of persons, so that the meaning of the deepness of project-pursuit is in a publicly identifiable level which is different from an inherent viewpoint of individuals. In this sense, project-pursuit can be said to be an abstract fact which is found in every dimension of the activity and relationship within and between individuals. However, if so, the idea of project-pursuit is no longer individual-based, but rather is just individual-oriented, which means that, on the contrary to this view's original motivation, there is no necessity between the explication of the conditions of human action and the justification of the concept of rights⁶.

I think that these questions aroused by the Parfitian arguments should be taken seriously. Because I believe that if we seek an individual-based explication of the concept of persons and rights we cannot but face the irresistible fact that persons are plastic. It might be maintained that the Parfitian perspective can instead yield a certain type of the concept of rights. That is, it will argue, even if persons are plastic, the concept of rights can be established within the limited range of persons and their interests. And, of course, the resulting concept of rights will not be absolute and rigid but moderate pursuant to the degree of the importance and scope of interests of plastic persons. However, I do not think

that this will work. For, if we derive the concept of rights from the interests of persons even in a limited way, we still need a certain identification of the normative relevancy of those interests which should be protected or enhanced as interpersonal demands. We have to get a certain normative criterium which fixates the public standing and significance of persons and their interests even in a limited manner. So long as the Parfitian perspective adheres to be reductionist, I do not think it can adequately reconstruct the concept of rights which is to be normative.

4. Thus, if one would like to try to constitute a more elaborated view of persons which can absorb Parfitian arguments but nevertheless secure the possibility of the significance of the concept of persons as the basis of the concept of rights, there will be two ways. One is to seek the highest-level individual-based feature of persons which is rich enough to sustain the concept of rights. And the other is to seek a different viewpoint for which it is not necessary to hold controversial individual-based contentions. To choose either of them will depend on a research perspective one would like to take. But, the former perspective will be very hard to look after. It is not only because what is sought is the highest-level abstract feature of human dignity but also because there are always persisting problems about the unique standings of persons. Perhaps, if we would like to pursue this perspective further, we need some real breakthrough in our ways of thinking, which can surely avoid those difficulties.

I am drawn to the latter perspective, though I am not really sure about its prospect. This perspective is not individual-based as is the Gewirthian and Lomaskyan view, but rather, as I mentioned before, is individual-oriented. It is a theory of persons and rights which gives them a significance not from a private but from a public viewpoint.

Here, we should notice Ronald Dworkin's theory of rights. He has been making very important points about the entire problems discussed here. But, I believe, few people have paid attentions to it seriously. Let me first quote his words to get his outlook, though it might be a little bit long.

Someone has a right, in this strong and useful sense, when he is entitled to insist on *doing something or having something even though the general welfare is harmed thereby*. So someone has a genuine right to free speech only if he is entitled to speak his mind on political matters even when, for some reason, the average person in the community is made worse off when he does so. Rights, on this account, are trumps held by individuals over the general or average good.

.....One virtue of this account of rights is that it shows that rights cannot be taken for granted, or simply taken as axiomatic, as Nozick takes his right to personal liberty and property to be. After all, if someone is entitled to insist on something even though others suffer more in welfare than he gains, then he is making a very strong claim that begs for a justification. If it really would threaten economic stability to permit an individual to criticize the Government whenever and wherever he wishes, and many people would then suffer, then it is not intuitively obvious that he is entitled to criticize it in that event. If we believe that he does have a right to speak freely even in that circumstance (which I do) then we must show why.

You might think that there are various strategies available. We might try to find some value that is different from and more important than the value of the general good, perhaps the value of individual self-development, or something of the kind. We might then say that since self-development is more important than the general welfare, and since freedom of speech even in situations in which the general welfare suffers is essential to self-development, individuals must have a right to free speech. That general strategy has in fact often been tried by people anxious to defend individual rights, but I do not think it can succeed. Self-development may be important, but if so then it is a value that *enters into* the calculation of the general welfare. If the general welfare would be advanced by forbidding someone to speak in certain circumstances, then this must be because the damage to the welfare of other individuals, collectively, outweighs the loss in self-development of the person forbidden to speak. Perhaps the self-development of others is threatened if they lose jobs because of economic instability.

I argue for a very different strategy in defence of rights. I want to show, not that rights are necessary because of a fundamental value that is in opposition to the general welfare, but rather that the idea of rights and the idea of the general welfare are *both* rooted in the same more fundamental value. After all, just as it seems arbitrary to insist on rights as fundamental and axiomatic, it seems equally arbitrary to insist on the general welfare as of fundamental or axiomatic importance.....

.....the idea of the general welfare is in fact rooted in the more fundamental idea of equality. But (as I said earlier) that fundamental idea also supports the idea of individual rights as, under certain circumstances, trumps over the general welfare. The apparent opposition between rights and the general good, on which the definition I proposed relies, is just an opposition on the surface. The package of the two ideas—allowing the general welfare to be a good justification of political decisions in the normal case but providing individual rights as trumps over that justification in exceptional cases—serves equality better than simply allowing the general welfare to be the ultimate justification in all cases¹⁷.

It will be fairly clear that Dworkin is proposing an individual-oriented view of rights from a certain political viewpoint. So let us notice especially two points he has raised ; that a certain kind of individual-based idea such as self-development actually belongs to the social domain such as the general welfare consideration ; and that the concept of rights is possible as the recovery or enhancement of a higher value such as the ideal of equality.

The first point is that if a certain kind of individual-based value is considered as worth realizing, the reason for it is not necessarily individual-based. For a value which aims at certain direct consequences to others can be treated as a factor in the calculation of overall social considerations, and if so, the distinctive contention of rights is not necessarily that that value must be invoked as inherent and immune from those social considerations. This means that we have to identify a value as a basis of rights which is excluded by the social considerations. This leads us to the second point. Dworkin suggests that the concept of rights and, if relevant, persons should be socio-politically framed so as to take into consideration individual demands in society from a public viewpoint. That is, the concept of rights and persons should be formulated to restore the socio-political concern for suppressed or growing individual demands from a viewpoint of the socio-political ideal. The concept of rights are necessary as a normative device to secure the ideal of equality, particularly against the defects of utilitarian policy-making of the government. And the concept of rights has its significance when there is a certain relevance under the ideal of equality in making counter-policy arguments for which the extent of the attainment of rights is to be determined by the comparative margin in stringency between those two kinds of arguments. In this sense, his theory of rights is sometimes called "functional". This means that the concept of rights is a kind of "function" of a higher value which publicly regulates the entire socio-political institutions in society. I think that this view has a significant uniqueness to be considered thoroughly.

However, there still are difficult problems in Dworkin's perspective. First, while he says that rights have certain limitations in terms of the justifiability against the general welfare considerations, Dworkin also says that the rights in the strong sense hold even if those considerations can be accepted. But, if so, what is the criteria between rights which can concede to the general welfare and rights which cannot? It will not be merely justifiability against majority considerations. Rather, it must be more than that, which includes a deeper consideration about the significance of individual demands against the majority. Second, how is the self-development supposed to be in the domain of the general welfare? If, as Dworkin says, the criteria is the possibility of mutual compari-

son of both interests, how can he exclude similar, but non-welfare, consideration such as self-respect? If he identifies self-development as concerning socially recognizable, say, economic, standings of individuals, and as in the domain of the general welfare, does this immediately mean that self-development belongs only to that domain? I think self-development is not necessarily reduced to the economic success of individual demands. Self-development can be just in maintaining the basic conditions of future activities of individuals, for example, as in the case of getting certain basic legal entitlements for social activities.

Lastly, has the ideal of equality been sufficiently articulated to produce the logic of accommodation with other kinds of social considerations? Regarding this problem, Dworkin presents a brief explication as follows.

Take economic rights, for example, like the right to a decent standard of living in a society with enough total resources to provide that standard for everyone. Overall economic policy should aim at improving the average welfare. That means that if one economic policy would improve the condition of the community considered as a whole it should be chosen over another policy that would improve the condition of some smaller group more. So much is required by a general egalitarian attitude, because otherwise the claims of each member of the smaller class would have been preferred over the claims of each member of the larger, more inclusive community. But if some people, because of their special circumstances—because they are crippled, or lack talents prized in the market, or for some such reason—end up below the minimum standard of living required to lead a decent, self-fulfilling life *at all* (italic-original), then the general egalitarian justification of the original choice has gone haywire in their case, and must be corrected by recognizing that they have a right to a minimum standard even if the general welfare is not as high as it would be by ignoring them. That is what it comes to, on this account, to claim an economic right for them.

The familiar political rights that form Rawls' basic liberties are also capable of an egalitarian justification. Parliamentary democracy is an egalitarian way of deciding what the criminal laws of a community, for example, shall be. The criminal laws are designed to protect the general welfare, and equality demands that each citizen have the same voice in determining what the shape of the general welfare is for this purpose. But suppose one citizen or one group is despised by the rest, for his race or his political convictions or his personal morality. In that case there is a danger that the rest will gang up on him and make criminal laws specifically aimed against him, not because the general welfare will really be improved in this way, but out of contempt and prejudice. Equality therefore demands that he has a right—perhaps embedded in a constitution, as such rights are in the United States—against the workings of the legislature. Even if

the legislature *thinks* [italic-original] that it would improve the general welfare to prohibit someone from advocating a particular form of government, or from criticizing the economic policies of the present government, he has a right that it does not actually do so. Once again, that is an egalitarian constraint on the workings of a fundamentally egalitarian institution¹⁸.

As a whole, his contention is understandable. However, in his argument, it is already presupposed that a certain distribution is too much for the majority if it ignores the minimum standard for the minority who can claim their rights to equal concern. That is, to explicate the background idea of rights to equality, Dworkin has introduced at least two different conceptions of equality and identified one as preferred by a genuine conception of equality before presenting the logic of accommodation by that idea itself. But this should be explicated further without creating a vicious circle. For, if not, how can we explicate the primacy of a conception of equality preferred by Dworkin? If rights are devices for the recovery and development of the ideal of equality and also are accommodated by this ideal, a genuine conception of equality must have a direction toward an individual or a group of individuals who is considered as suffering from a degradation or suppression of values which are originally endowed by themselves. Here, I believe, we have to introduce a certain theory of persons in society, at least in the same theoretical level as the idea of equality Dworkin endorses¹⁹.

I think we need a certain kind of individual-oriented theory of persons to explicate further a Dworkinian thinking about rights. It should be a theory of *public person*, which is identified publicly and is considered to give the substantial direction to Dworkinian conception of equality and rights without assuming any controversial features of individuals found in present theories of persons. I think that the concept of public person is the one which values the standings of individuals from a certain socio-political viewpoint and establishes the normative sphere in which individuals can maintain and develop their own lives. However, I will not discuss it here in detail, since I have suggested a basic perspective on it in other articles²⁰.

Instead, and also to conclude this article, I would like to briefly note a couple of fundamental problems of a theory of public person which are not discussed in those other articles: first, what kind of feature is given to this public person?; and second, how is it possible for us to take such a public point of view and give such a feature to it?

To these questions, I suggest the following explications.

(i) Looking at the standings of individuals from a public viewpoint, I

think that independence, potentiality and attainment should be important. Individuals are distinct units in society. No matter how they live, the sphere for their activities should be normatively secured as significant in any liberal socio-political thought. And, in order that this normative security is possible, the structural features of this security itself is to be publicly recognized, which become the features of public person. That security includes the establishment of the sphere, the variability in the sphere, and the filling of the sphere. Thus, as their interpretations, corresponding to them respectively, the idea of independence, potentiality and attainment can be constituted. Incidentally, these features of public person can be utilized for sorting the priority of a variety of values as to personhood. For example, freedom of conscience will be the most basic because of its relevancy to independence, freedom of expression the second most basic because of its relevancy to potentiality, and claims to standard living the third most basic because of its relevancy to attainment. And, of course, particular rights can be articulated according to this scheme.

(ii) The possibility of getting a public viewpoint which makes the concept of public person effective depends on the possibility of the substantive objectification, which can be derived from certain normative requirements. This possibility might be achieved through the centerless view of persons which Thomas Nagel suggests²¹. As he proposes very interestingly, we can transcend our particular selves to get the purely objective view of the place and meaning of ourselves, even if our particular selves are variable and diverse. In other words, we have the ability of objectification and can take the purely objective viewpoint as to ourselves and others in this whole world. If so, it will be possible for us to have a certain objective space in which everyone's particular features can converge. And then, we will have an objective viewpoint for articulating the universally recognized feature of individuals in society. But, Nagel is suggesting just a possibility of the (factual) objectification and not the substantive objectification. Perhaps, to suggest the latter might be more difficult, because of the common recognition that normative judgements are more hard to be objectified rather than factual judgements. Indeed, to add normative factors to the factual objectification would make the problem harder. Although, as Nagel believes, it is evident that we have a certain sense of impartiality in normative considerations, to explicate this sense by the objectification process will be very difficult. As a matter of fact, I am not sure how it is possible. I also feel that the opposite might be the case. That is, the fundamental form of objectification might be in normative domain, and, from that, the factual objectification can be abstracted. We might have originally a sense of normative objectivity, which produces

another sense of the significance of persons in society and of rights. Concerning this point, it might be argued that an ideal of community gives a certain basis of a public viewpoint from which the concept of public person is derived, so that such an ideal gives a certain basis of the concept of rights. In fact, Dworkin's view of community which has been developed recently might suggest a possibility of such arguments²². However, this problem should be discussed separately.

Notes

* This article is a result of my research stay in the United States between 1986–88. The topic discussed here was inspired by two seminars I could attend during the stay. One is the seminar on liberalism conducted by Professor Samuel Scheffler at the University of California at Berkeley in the spring semester of 1986–87. The other is the seminar on recent topics in moral philosophy conducted by Professors Thomas Nagel and Derek Parfit at New York University in the spring semester of 1987–88. Both seminars were so stimulating that I could have significant thinkings on the topic discussed in this article.

Also, let me add that this article is dedicated to Professor Kiyoshi Igarashi in the Faculty of Law of University of Hokkaido who retired in March, 1989. He has been giving me a warm support for my activity in the Faculty since my appointment in 1983. It is a great honor for me to have a chance to dedicate a result of my research in the United States, when one of the pioneers of the Faculty has accomplished his "mission".

Lastly, I would like to thank Mr. William Cleary very much for his friendly help in editing.

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1. E.g. cf. Morgan, R., *Disabling America* (Basic Books, 1984), Louden, R., "Rights Infatuation and the Improverishment of Moral Theory" (in: *Journal of value Inquiry*, vol. 17, 1983) pp. 87–102.

Historically, e. g. see Burke, E., *Reflections on the Revolution in France* (Penguin Books, 1969) esp. p. 106 ff.. Also, cf. Waldron, J., *Nonsense upon Stilts* (Methuen, 1987) p. 77 ff., p. 166 ff.

2. Gewirth, A., *Reason and Morality* (University of Chicago Press, 1978) chs. 1 and 2. Also, as a summary of his theory by himself, see his *Human Rights* (University of Chicago Press, 1982) pp. 1–38.

3. Cf. Lomasky, L., "Gewirth's Generation of Rights" (in: *Philosophical Quarterly*, vol. 31, 1981) pp. 248–253.

4. Lomasky, L., *Persons, Rights, and the Moral Community* (Oxford U. P., 1987)

5. *Ibid.*, p.25 ff., p. 56 ff.

6. Ibid., p. 97 ff.

7. Ibid., p. 62 ff.

8. Parfit, D., *Reasons and Persons* (Oxford U. P., 1984).

Incidentally, Lomasky mentions himself in the preface of his book that Parfit's book "is an enormously rich and stimulating investigation that poses clear challenge to the sort of position [he] wish[es] to advance", though he does not develop his response in the book.

9. Parfit, *op. cit.*, p. 253 ff.

10. Ibid., p. 298 ff.

11. Ibid., p. 302 ff.

12. Parfit argues that this relationship is a relation R which consists only of a psychological connectedness within and between individuals. But I am not concerned here with philosophical problems about the formulation of this relationship. cf. Parfit, *op. cit.*, esp. p. 199 ff.

13. Ibid., p. 307 ff.

14. Ibid., p. 326 ff.

15. Ibid., p. 329 ff.

16. In Lomasky's theory, there are other points which arouse the similar problem. First, according to his theory, the concept of rights is finally established when game-theoretic action strategies of individuals in society reach a certain equilibrium that they all mutually recognize the moral space for each. However, there can be several equilibria which accomplish different types of recognitions of the moral space for each individual. Here Lomasky suggests that we need a certain moral viewpoint in order to get one significant equilibrium for the moral space of individuals in society. But does not this mean that Lomasky implicitly relies on a certain individual-oriented view on rights? Second, when talking about the rights of children, of fetuses, of defective human beings, or of animals who cannot be considered as full-fledged project pursuers, Lomasky emphasizes the importance of some moral concern which makes it possible for those beings to have certain rights and to be protected. But does not this mean that Lomasky realizes the limitation of individual-based justification of the concept of rights and suggests himself the importance of the idea of Dworkinian equality of respect? See Lomasky, *op. cit.*, p.75 ff., p.154 ff., p.191 ff., p.202 ff., p.221 ff.

17. Dworkin, R., "Dialogue with Ronald Dworkin" (in: Magee, B., ed., *Men of Ideas*, BBC, 1983) p. 256 ff.

Dworkin has been developing this kind of view in a variety of articles. E. g. cf. his *Taking Rights Seriously* (Harvard U. P., 1977) p. 90 ff., p. 186 ff., p. 266 ff. Also, cf. his *A Matter of Principle* (Harvard U. P., 1985) p. 369 ff. I think that the words quoted here is one of the best to understand his outlook on the theory of rights.

18. Dworkin, "Dialogue with Ronald Dworkin", p. 258
19. Of course Dworkin has already been developing his theory of equality in a series of articles. As its critical note, cf. my "Byoudou, Jinkaku, Riberarizumu" (Equality, Person, and Liberalism) (in : *Shisou*, No.775, 1988, pp.53-71) The problem mentioned here is concerned not with the adequacy of this entire theory itself but rather with its expected relationship to the Dworkinian theory of rights.
20. See my "Byoudou, Jinkaku, Riberarizumu" and "Kenri no kannen wa muimi ka?" (Is the idea of rights nonsense?) (in : *Hokkaido Law Review* Vol. 40, No. 2, 1989, forthcoming). Also, regarding the theory of persons which has stimulated my view, see Harré, R., *Personal Being* (Basil Blackwell, 1983).
21. Cf. Nagel, T., *The View from Nowhere* (Oxford U. P., 1986) p. 54 ff., esp. p. 60 ff.
22. Cf. Dworkin, R., *Law's Empire* (Harvard U. P., 1986) Ch. 6 esp. p. 195 ff.