RIGHTS OF THE DEAD

(Volume One)

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Summary

This thesis examines *rights of the dead*, a subject on which there has been little previous research. Three predominant themes are explored in our endeavour, contrary to current philosophical and legal discourse, to argue for "*rights of the dead*".

First, we utilise several approaches to both clarify the interests of the dead and then the argument for *rights of the dead*, *rights* which are in any case *immanent in* contemporary human rights and other established general rights, e.g., a right to succession. We argue that the dead have an interest and, in limited cases, for example defamation of the dead, rights *can* be ascribed to the dead.

Second, in the process of examining the first theme, we analyse the arguments for and against whether interests of or *rights of the dead* can be justified and identify which current legal systems they are imbedded in. Comparing the situation involved by the living with that by the dead, we attempt to establish a new perspective of *rights of the dead* based upon the "social characteristics".

Third, we attempt to interpret *rights of the dead* from a point of view based upon the duties that the living are purported to hold with respect to the dead. Whilst we present a view which supports some previously under-valued perspectives of rights and duties, we moreover seek the possibility of establishing *rights of the dead* on the basis of these duties.

We do not argue that all rights the living hold are applicable to the dead. We merely maintain that there are some rights which can be ascribed to the dead, rights which are particular to the dead because of the succession of the dead person to some of the social characteristics they held whilst they were living.

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Table of Contents

Chapter 5: Dead bodies

Chapter 6: An antemortem promise and its posthumous performance

Chapter 7: Concluding remarks

Preface

Practical considerations have limited the scope of this study. It is devoted to a conceptual analysis of *rights of the dead* and an evaluation of the rights as employed by substantial law, judgements and analytical arguments.

Initially it was intended to develop an analysis based upon philosophical justification, but in the process of the research, it became obvious that the project required instead a broader multi-disciplinary analytical approach. Moreover, in order to explicate the concept of *rights of the dead*, it was felt necessary for reasons of clarity and edification to compare English law, which disregards such rights, to Japanese law in which such rights are in rare cases embedded, to an historical approach where such an approach appears useful.

The approaches employed in this thesis therefore, seek neither to reflect any specific movement of thought nor any practice of a systematic logic in a strict sense. We strive for success in this project through an overall avoidance of metaphysical debate, whilst making use of analytic strategies, specifying issues and, where appropriate sometimes, nullifying issues.

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It was fourteen years ago when I instinctively gained the main idea for this thesis. At that time I was desolately observing a line of smoke issuing from a crematorium chimney where Masanari, my father-in-law, was being cremated. I have to confess his spirit ubiquitously yet anonymously pervades the pages and arguments below and provides the support to and my initial justification for my search and work to attempt to establish *rights of the dead* as embedded in this thesis.

Finally, I should like to express my deepest gratitude to Chizuko, my wife and Masanari's daughter, who has shared with me this entire journey supporting me patiently and lovingly throughout its course.

Chapter 1

Rights regarding the dead

1.1 Introduction

In this introductory chapter we sketch not only some of the principal ideas of *rights of the dead* which we wish to examine and develop, but also present some approaches to examining diverse theories for explaining and developing these ideas. First, we view how the concept has been dealt with in English, Japanese and American discourse. Second, we argue that *rights of the dead* is historically a concept worthy of review, and point out that the concept is worth reviewing as the basis of a new framework of rights debate within legal discourse. This thesis examines a matter which is highly relevant to contemporary society. We undertake a thorough analytical debate, avoiding however the entanglements of metaphysics. Therefore, debate is conducted from multi-disciplinary perspectives including moral, philosophical, legal, sociological and anthropological levels.

This chapter provides the benchmark by which *rights of the dead* is discussed in this thesis. Some of the questions to be resolved include: "What is meant by and who are we intending to identify when we use the term *rights the dead*?"; "How different are the dead from the living?"; and "What, if any, shared attributes do the dead and the living possess?" Based upon discussion of these

fundamental, and other, questions, we will provide a schema of six approaches for the explication of *rights of the dead* reinforced by additional relevant explanations. Guided by these approaches, we aim to unravel the substance of the concept of *rights of the dead*.

1.2 *Rights of the dead* is historically a concept worthy to be reviewed

1.2.1 Historical grounds for *rights of the dead*

This thesis will interrogate a fundamental question—*rights of the dead* [1]: This interrogation will examine such intriguing and difficult questions as 1) "Can a deceased person be harmed[2] or have an interest[3]?" 2) "What is a *right of the dead*?" 3) "Is a *right of the dead* embedded in substantial law?" 4) "Is intention[4] as expressed in a will that of the living or the dead person?" 5) "Who owns *my* dead body?" 6) "Is a promisor obliged to a deceased promisee by the promise that the promisor made with the promisee before the promisee's death?" Through comparison between Japanese and English law, this thesis will examine the possibility of establishing an interest for the deceased, or *rights of the dead*.

In order to answer these questions, we have to transfer between levels of fundamental arguments when dealing with each question. In so doing orientations of moral philosophical debate and legal, social and anthropological

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[1] Logically speaking, the expression *rights of the dead* is bizarre. For "an inert hunk of matter thoroughly removed from the realm of moral significance" (Lomasky 1987, 213) cannot hold any rights. The reason why we dare to use the seemingly inconsistent words *rights of the dead* would be that we can embed in the expression the implication that, if an antemortem right can survive death, the posthumous right can be attributed to a living person. Nevertheless what we argue in this thesis will be more than that implication, i.e., that there is a right which can be attributed to a deceased person.

[2] Following Feinberg (1984), we can assume that "harms" are what occurs not when we are merely hurt or offended but when our "interests" are frustrated, defeated or set back.

[3] It is acceptable to define, as Feinberg (ibid.) does, interests as something in which we have a stake.

[4] In general intention can be defined as a power to determine a motive and a reason.

discourse are all taken into consideration. Legal debate mainly explores a comparison between Japanese and English law and court decisions. Social and anthropological debate furnishes the most significant concepts to develop the theme of "social characteristics" in this thesis.

The question of "whether the dead possess rights" cannot be considered to be irrelevant if we conduct a historical review. The question could however, be rephrased so as to ask "whether the dead can be considered to have a legal capacity". A brief review of history shows that non-humans have been considered to hold rights in the past. It is a truism that diverse legal systems have at different times and for diverse reasons guaranteed legal capacities to various "things" which could not be considered to be living human beings. In addition, there was a time when humans were not entitled to hold rights that are today considered self-evident and supposed to be guaranteed for all human beings. For example, in the Hammurabi Code, the oldest known Code of Law, "those who set slaves free or protect escaped slaves" were prescribed to be sentenced to death.[5] The code regarded slaves as property and disregarded the dignity of human life. In ancient Greece, the idea of human rights for slaves was also not recognised (Oakes 1990, 5). This was an historical phenomenon at the legal level but it does not follow that the slaves of the time had no human rights as derived from natural rights. However, interesting as a review of this history is, this thesis nevertheless does not rely on the past for its substance.

[5] See Article 15 of *The Oldest Code of Laws in the World: The Code of Laws Promulgated by Hammurabi, King of Babylon, B.C. 2285-2242*, (1911), translated by C. H. W. Johns.

Certain social orders have at certain times denied[6] the legal subject of slaves and sometimes even that of foreigners.[7] Not only did this allow for the exclusion of certain human agents at various times in history, but in addition given the contingent nature of beliefs at times non-human "things" were actually vested with rights. The significant point here is that law is justified according to people's beliefs at a particular time. Therefore, it is equally feasible given the changing nature of beliefs that something other than a living human being might be vested with the capacity to hold rights, perform duties, and incur liabilities. This can be proven by examining the many lawsuits[8] against animals and even non-living objects, or the diverse contracts with God (Lumia 1975 [1973]). Roscoe Pound pedantically introduced an appeal case from India, a case in which the Judicial Committee of the Privy Council adjudged that an idol should be regarded as a legal person under the specific customs of India:

> "When, however, legal rights are attributed to an idol and the Judicial Committee of the Privy Council can tell us that "the will of the idol[9] in regard to location must be respected"[10] and can appoint a "disinterested next friend" to represent it in court[11]" (Pound 1959 vol. 5, 201-2).

In modern times Capitalist nations, such as Japan and Britain, have awarded legal status to collective entities, e.g., corporations, which by themselves cannot be considered to be a human being. On this basis, is it therefore implausible to posit that an entity which similarly cannot walk, eat, and sleep in the same way

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[6] Of course, *ipso facto* there can be no logical grounds on the basis of these precedents to refuse *rights of the dead.* Our point here is that rights depended upon the prevailing legal systems.

[7] Sir Henry Maine (1912) remarks that, in the early Roman republic the principle of the absolute exclusion of foreigners pervaded the civil law and that the alien or denizen could have no share in any initiation supposed to be coeval with the state.

[8] See E. P. Evans (1884), "Medieval and modern punishment".

[9] See Pramatha Nath Mullick v. Pradyumna Kumar Mullick, L. R. 52 Ind. App. 245 (1925).

[10] Ibid. 259.

[11] Ibid. 261.

that humans do, is *legally* capable of enjoying rights and undertaking duties in a manner equal to ourselves *qua* the living human beings?

1.2.2 Modern legal conflict

Courts in modern society frequently have to deal with a conflict between the living and the non-living. In an American case where a claim was made against a resort development in the Mineral King Valley of California, the United States, the appellants, Sierra, sought to reverse the appeal court's decision overturning the district court's preliminary injunction.[12] The Supreme Court agreed with the appellate court that Sierra did not have standing to sue, because it lacked any personal interest in the matter. However, Justice Douglas dissented on the ground that it should be possible to litigate in regard to environmental issues in the name of the despoiled inanimate object where the injury is the subject of public outrage. Despite the difficulty of moral justification in that case he made a unique remark which implies that, although it was a civilian group that brought this action, the Valley *per se* should have been considered to be the plaintiff. His theoretical ground for dissent was based upon a challenging work "Should Trees Have Standing?" (1996, original in 1975), which Christopher D. Stones, Professor of the South California University, had written in preparation for the court dispute. In the work he suggested the possibility that even environmental objects, that are assumed to have no rights, have new rights on the ground of the historical facts that rights rendered to children, prisoners, aliens, women, the insane, Blacks, foetuses and Indians were ones of extension and furthermore that inanimate objects such as corporations, local offices and nations have been regarded as

right-holders. In fact, there are, in the United States, other such cases[13]—hearings have been conducted in which the plaintiff has been a wild animal.

The American statutory authority may explicitly grant or implicitly confer standing upon governmental entities to sue on behalf of wild animals, but unless the plaintiff has a personal interest or "injury in fact", private citizens, classes, associations, and special interest groups cannot sue under Article III of the Constitution. Sierra's case was fatally flawed because it lacked this element. However, in an appellant case[14] regarding the Palila, an endangered species, the court decided as follows:

> "As an endangered species under the Endangered Species Act ("Act"), 16 U.S.C. §§ 1531-43 (1982), the bird (*Loxioides bailleui*), a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court as a plaintiff in its own right. The Palila (which has earned the right to be capitalized since it is a party to this proceeding) is represented by attorneys for the Sierra Club, Audubon Society, and other environmental parties who obtained an order directing the Hawaii Department of Land and Natural Resources ("Department") to remove mouflon sheep from its critical habitat".[15]

Also in Japan, attempts to determine which rights should be rendered to natural objects which have been merely administered and protected by human beings have been practiced in some lawsuits.[16] Their theoretical grounds come from Professor Stone's perspective and some American winning cases such as the Palila example. On 23 February, 1995, a lawsuit was brought to court arguing for the "rights of nature", with the Amami Black Rabbit as one of four wildlife plaintiffs, although human plaintiffs joined in court proceedings. The claim was

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[12] Sierra Club v. Morton No. 70-34, 405 U. S. 727 (April 19, 1972). Also see < http://www.elr.info/litigation/vol2/2.20192.htm> available.

[13] E.g., see Lujan v Defenders of Wildlife, 504 U. S. 555 (1992). Also see < http://supct.law.cornell.edu/supct/html/90-1424.ZS.html> available.

[14] Palila v. Hawaii Department of Land and Natural Resources, 852 F 2d 1106, 1107 (9th Cir. 1988).

[15] 852 F 2d 1107.

[16] See <http://www.nifty.ne.jp/forum/fenv/prweb/press05/00305.htm> (in Japanese) which provides with the details on several Japanese "Rights of Nature" lawsuits.

made against a resort development by which much of the island's wildlife had been on the verge of extinction. On 22 January, 2001, the court held that the four types of wildlife had no standing to sue, and it rejected their demand. The court also understood that environmental value can be protected by Forest Law (Law 249 of 26 July, 1951) and the diversity of wildlife can be enhanced as a legal value. However, it suggests that this diversity still remains at an abstract level but does not reach the level of the individual's concrete interests. Nevertheless Takaaki Kagohashi (2002), a leading lawyer in this case, invited the court to understand nature's value from the viewpoint of the diversity of living creatures and considered that the Japanese policy for forests includes the protection of the diversity of the creatures whilst the traditional policy regards the nature as a mere resource. After the Miyazaki branch of the Fukuoka High Court affirmed the first instant judgement on 19 March, 2002, the appeal to the Supreme Court was given up.[17]

American case law, which includes cases where civil groups have brought an action in which wild animals were considered to be the plaintiff, and the Japanese legal reality of actions recently brought based on the above American perspectives demonstrate that it is not implausible to talk of entities other than live human beings having rights which are protected by and within the law.

Adherents of the radical ecology movements speak of *rights* of animals and plants and present *moral* arguments against the prevailing orthodoxy of morals, i.e., that humans are the measure of all values, including rights, in the natural world. The question therefore of whether the dead possess rights, is

[17] For a detailed explanation see <http://member.nifty.ne.jp/sizennokenri/AM020401.html> (in Japanese).

neither blunt nor bizarre. We can see from historical research that such a question and furthermore the study of such a question is both totally reasonable and feasible. Moreover, the finding that non-humans have, in the past, been considered to be entitled to be vested with rights and duties lends additional support to the thesis. As a matter of fact, there was a time when the dead did hold legal rights.

1.2.3 Old Germanic law accepts *rights of the dead*

A good example for the introduction of *rights of the dead* into a legal system is that of old Germanic law. Under the law the dead were vested with the same rights as the living, although it is unknown whether this law was universal throughout ancient Europe. According to Heinrich Mitteis,

> "Germanic folk religion is a belief in demons; natural forces are seen as being endowed with souls and able to be controlled by magic. This was significant for jurisprudence, which punished magic that caused harm and utilised the magic of runes in casting lots. An oath was also deemed a magic act (compare Chapter 10-III). The dead person lives on as a demon and can become a ghost. He demands victims (source of the law of inheritance), and can himself complain as well as be the object of a complaint and even deliver up a murderer to justice (court of justice held at the bier of a dead person)" (1968, 11) [my translation]

The court held at the bier was called *Bahrgericht*, a legal procedure of evidence based upon a sorcery belief that the dead hold a power by which they can prove their murderer's guilt. The murder suspect, nuded or wearing only a shirt, approaches the dead body and touches or kisses it. If the suspect is the real murderer, it is said that blood spurts from the wound of the dead body. This accounts for the belief that the physical phenomenon of the dead was regarded as a piece of evidence for proof of guilt (Brockhaus 1986).

According to Mitteis (1968, 12-14), the old Germanic law closely related to this magical religion of the commoners in these days was based on a distinctive community named *Sippe* (kinship) amongst the common folk. *Sippe* was a sort of collective law. It states that the community not only existed before individuals existed but also existed on, within and as part of the individuals. *Sippe* played an important role in introducing individuals into legal life and making them involved with the legal matters. Thus to understand law assumed the existence of the community. In this way we have substance for a theory that says that the dead and the living were considered to co-habit in old Germanic society.[18] In this old society the dead were incorporated into the legal system to a somewhat similar degree as the living. This sort of legal system, which stemmed from a very close relationship between the dead and the living, can be found in a society in which the idea and the worship of ancestors (*Ahnenkult*), plays a vital role in unifying clans and families, and strengthening their communal bonds[19] (Abe 1989). The idea of *rights of the dead* has been accepted at the historical, legal and social levels.

1.2.4 A background of Japanese history in support of the idea of *rights of the dead*

The connection between ancient Japanese laws and religious ideas is, as in the case of old Germanic states above, a key for observing a basis of the notion of *rights of the dead* in Japan. To explore this connection we will briefly investigate several historical epochs throughout which the relationship between the dead

[18] For details on dealing with the dead from the viewpoint of the change of the old Germanic tombs and ways of funerals, see U. Taniguch (1987).

[19] The idea of *Annenkult* of the old German distinguishes worshipped deceased persons from others who are feared and excluded (Abe 1989).

and the living has been strengthened by social institutions and systems. In so doing it should be possible to understand the power of presence within society of the deceased (i.e., here, *rights of the dead*) based on these relations. For instance, even with a brief historical review of burial modes,[20] it is possible to grasp the import and substance of the relation between the dead and the living. We will recall historically that there were five epochal dimensions closely related to the involvement of the developing relationship between the living and the dead.

A style of interment, called *kussō*, brings this relationship into focus. Diverse figures bending the arms and legs of the dead have been found in the *kussō* style[21] (Fujimoto 1964; Togashi 1985, etc.). One version of *kussō*, which refers to a burial figure of a dead person holding large stones by his/her arms, may suggest that those who feared ghosts or spirits of the dead attempted to imprison ghosts or spirits within the dead bodies. Furthermore evidence of clay items such as human-figured or animal-figured figurines, masks, boards, and stone tools, probably for use in magic rituals, were found buried alongside the body mainly in eastern Japan. This could suggest that the border of the worlds of the living and the dead was extremely vague in terms of people's religious consciousness. The *kussō* burial style prevailed during the Jōmon heyday period (c.5,000-500 B.C.). From this specific custom, it can be surmised that a religious belief, of whatever form, broadly and commonly dominated the consciousness of the people of that epoch. Apart from burial grounds where individuals were

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[20] <http://web.sfc.keio.ac.jp/~s01480ks/chousa/project/nenpyo/nenpyo.htm> (in Japanese) compactly explains the history on disposing of the dead.

[21] <http://www.museum.tohoku.ac.jp/1998SE/PHOTO_JPEG/Photo14.html> provides with a picture of *kussō*.

respectfully buried in shared *haioku-bo* (grave pits)[22], dilapidated house graves, made under the grounds of pit dwellings were used for collective burial of community members. It seems there hardly existed in people's minds and consciousness any separation between burial grounds and living places or between the domain of the dead and the living.

The first epoch was the period from the *Kofun* (gigantic burial mounds) era up to the genesis of the *Ritsuryō* state. During this period, the burials of nobles and commoners appeared to differ considerably in style and form. Strong cultural inferences from other countries, such as Paekche (*Kudara*), in the Korean Peninsula led the upper classes to, by building the *Kofun* mounds in a diversity of modes, to socially and politically display power with their ante-mortem and post-mortem presence. The enormous size of the burial mounds and the proliferation of grave goods, as found buried in and around the tombs of nobles, such as clay dolls, combs, earrings and other body ornaments, points to a tendency, amongst the clans and nobles of the times, of respecting dead persons and their bodies. On the other hand the methods of burial for commoners were coarse. As far as we observe the promulgation of several official orders, such as *Hakusō-no-mikotonori* Order (646) and *Sōsō-ryō* Order (701), in contrast with the fact that the common people ubiquitously left dead bodies unburied, the upper classes seem to have had a consciousness of specified contaminations, known as *kegare*, in regard to the dead and their bodies. They preferred purity, and regarded dead bodies as obnoxious to their religious beliefs. Since the national acceptance of Buddhism in the mid-sixth century, cremation, introduced by the elite of the society, gradually spread amongst the common classes. At that time

[22] See a fugure of *haiokubo* in http://kaizuka.tripod.co.jp/abs07_02.html#muko_pit.

a dead person referred to an entity representing the *kegare*. Excluded from the urban living space, therefore, dead bodies were buried outside the cities. Generally people lacked any moral consciousness that bodies and ashes should be respectfully disposed of. Bodies were abandoned in dumping grounds and bones were broken into pieces.[23] In times of the existence of a social aristocracy such as the Heian period (792-1182) social classes were divided according to family status or origins. People found the inevitable resignation and fatalism in the stagnant and closed society influenced by the webs of the elite's connections. There were few opportunities for self-advancement. Fortune-tellers (*Onmyō-shi*) dominated and controlled the minds of nobles within the Imperial Court. The Heian nobles considered burial grounds and tombs as symbolic objects of unluckiness, taboo, and detestation, not as places of worship. Often occurring cataclysm and epidemics frequently compelled people to experience the events of other people's death. Therefore people's experience of another's death did not arrive at considering the dead as an obnoxious impurity which should be kept away from their life. In order for burial grounds and dead persons to be regarded as objects of worship and a symbolic part of life, the grounds and deceased persons had to be incorporated into society vested with a special value or interest. This incorporation indicated that the burial grounds were conversely signified with a place of two contradicting values, i.e., impurity and sacredness. The burial grounds reasoned by these incompatible values implied a fruit of the people's mixed consciousness of death and the dead in those times.

[23] A will in which Emperor Junna ordered to scatter his ashes in a mountain in 840 exists. Two elegies regarding scattering human ashes can be found in the *Manyōshū* (an anthology of 4,516 poems made between the beginning of fifth century and 759 and compiled shortly after 759).

The second epoch was from the last years of the Heian period to the Kamakura period. *Jōdo-shinshū*, the idea of the Pure Land, shifted the social perception of graves from impurity to sacredness. Buddhist thought held a tenet of salvation of the dead. *Jōdo* refers to the purest world for Buddhists (i.e., the equivalent of the Western paradise), where *Amida* was said to reside and his ultimate enlightenment was assured. The *Jōdo* sect established as its tenet the *Amida* teachings, for example, that *Amida* and his host descend from paradise to receive their believers and escort them to paradise. After the upper-classes believed in and supported the tenets, because of the Amidism's exceptional simplicity and attractive narrative, the canon rapidly and steadily penetrated the daily life of the commoners. In addition proponents of the *Jōdo* movement implanted the idea of respecting human ashes into the minds of both the classes of warriors and those of common people.

Buddhism became closely related to funeral rites under the name of the salvation of the dead, in the posthumous world, where the dead were said to arrive at an ultimately peaceful place with Buddha's help. The fact that the dead were again buried in the urban space and place indicated that Buddhist temples were increasingly established, maintained the space of burial and took the initiative in supervising funeral rites. It gave birth to the idea of worshipping the memory of a deceased person.

The permeation of the idea throughout society illustrated that the custom of family tombs being inherited under the traditional *Ie*, family lineage group, was in accordance with the trend that family tombs functioned as an object for worshipping ancestors. These customs or trends meant, moreover, that family graves were regarded not only as the extension of the living's life where the dead

were grieved and given a peaceful place, but also as the burgeon of the social function that the nation controlled its people by taking advantage of the normative ideas of Buddhism, the dead and their graves.

During the third epoch, the early Edo times, Buddhism permeated throughout the whole country. The diverse sects of Buddhism proved particularly successful at promoting and strengthening the relation between temples and their believers mainly by making considerable use of funeral rituals. The key terms, here, are the funeralisation of Buddhism and political control through the registration of the dead. In his essay *Sōshiki Bukkyō* (Funeral Buddhism), Tamamuro (1963) contends that the main reasons why Buddhist funerals were accepted among the commoners are threefold:

> 1. there already existed in daily life a funeral custom interwoven with both affection and fear;
> 2. there evidently existed religious beliefs that fear the evil consequences; and
> 3. Buddhists and their sects propagandised Buddhism's imaginative ideas and thoughts of *jigoku* (the Hell) and *gokuraku* (the Paradise).

For purposes of social monitoring and control, the Tokugawa government established, as a specified social institution, *terauke seido*, the compulsory registration of all Japanese citizens as parishioners of Buddhist temples. The establishment of this social institution was an anti-Christian policy, closely related to abusing and suppressing domestic Christians. The Tokugawa Shogunate could not tolerate the explicit and implicit influence of an ideology that asserted loyalty to an overseas power more ultimate than its own, because power would exist in Rome or in Heaven, both of which cannot be controlled or governed by the government. The Shogunate often ordered bans on the involvement of Christianity from 1613, succeeded in quashing major Christian rebellions on Shimabara Peninsula in Kyushu in 1671, and required everyone to register at

local Buddhist temples as well as demonstrate a disavowal of Christianity by stepping on a *fumie* board on which was drawn a picture of Jesus.

This blasphemous practice, *shūmon aratame*, was a yearly scrutiny and purge of Christians. Human birth and death were required to be reported to Buddhist temples and to verify death Buddhist monks were present at burials and funerals. There were throughout the Edo period (1603-1867) conflicts between intellectuals of both political Buddhism and political Confucianism. The latter criticised the crematory practice adopted by Buddhists. The assumption that cremation was a cruel practice opposed to humanity was widespread amongst the Shogunate and *daimyōs*. Yet the diffusion of interment at the level of commoners was not only due to the influence of Confucianism, but also to the connection with indigenous religious beliefs that had existed before the import of Confucianism. The extreme political conflict between Buddhism and Shintoism / Confucianism led the latter to *haibutsu kishaku* or the radical political anti-Buddhist movement for abandoning and abusing Buddhism. As for this movement against Buddhism, Tsuji (1960), a leading Japanese historian, precisely points out that Shintoists, who had been subordinate to Buddhists, incorporated in the *Bakuhan taisei*, a single governing system in the Edo Era, and intended, on their own position, to claim to widely practice Shintoist rites of funerals and thus emancipate themselves from the subordinated relation to Buddhism and Buddhist temples.

The fourth epoch was characterised by the Meiji Restoration, a Japanese revolution to topple the Tokugawa Shogunate, restore imperial rule and transform the country from a federal to a modern nation. The new government grounded its fundamental policy on the restoration of the imperial regime and the unity of

religion, i.e., Shintoism, and politics. It espoused the "restored" Shintoism based upon a position and justification stemming from anti-Buddhist and nativist (*kokugaku*) perspectives, with the intention of the nationalisation of Shintoism.

When observing the policy for nationalising Shintoism, we will pay heed to the following three points. The first point is to understand how the rites of funeral were promoted by Shintoism. The Shintoism which the new government identified the "restored" Shntoism with, was distinct from the ancient Shintoism (Murakami 1982).

Murakami (ibid.) argues that the history of Shintoism formed and developed its own tenets through unification with imported religions. This suggests that the "restored" Shintoism of the Meiji Restoration is a peculiarly nativist one and, furthermore that its absolutism of the restored Shintoism and its exclusionism are clearly far from the orthodox Shintoism.

In this sense, the restored Shintonism of the Meiji Restoration had distinct political characteristics. Old Japan as a *Ritsuryō* nation exhibited a dislike of the impurity of the dead and formed the political system of *saisei itchi*, the unity of worship and rule, by excluding the impurity. In the *Heian* period, as mentioned above, nobles expressed extreme hatred of the impurity of the dead. If the Meiji Restoration Government had aimed at ruling the nation by the revised orthodox of Shintoism, this idea of hatred of the impurity would have been trivialized. Yet the government really evinced an opposite attitude toward the dead. For example they built the *Higashiyama-shōkon-sha* in Kyoto, a shrine for the spirits of the dead, to officially worship many of the pro-Meiji Revolutionaries, the so-called *Kinnō-no-shishi*, who were killed in Kyoto by the Bakufu. It is apparent that

this shrine was politically and ideologically built as one of the symbolic objects of national worship.

The second point bearing on the argument of this thesis was a ban on cremation promulgated by the *dajōkan* or Council of State on 18 July 1873. This measure, hastily taken was basically for the purpose of settling a problem of public health, that is, the smoke and smell created by the cremation process (Yamamoto 1982). However, the tendentious motive for this measure was that cremation itself was deeply related to Buddhism and from this viewpoint crematory practice is antithetical to Confucianism. The ban on cremation gave birth to much confusion in the centre of cities. There were not enough burial grounds in small scale Buddhist temples in the capital city Edo to bury dead bodies. Moreover, other temples that had been accepting interment failed to continue to do so due to their limited capacity. In submitting a paper called *kasō-ben-eki-ron* detailing justification for their position, crematory temples and crematoriums argued that they were seriously worried about these problems concerning the capacity required of them due to the ban on cremation. Two years after the promulgation, the ban was abolished on 23 May 1875. The reasons were not only that the abolition of the ban could be justified by the inconvenience of interment, the economy of cremation, and the scarcity of ground for burying dead bodies, but also that it became apparent that interference with conventional customs as cremation and interment, i.e., things that cannot be rationally understood or resolved, is difficult, at least politically.

The third point is that the Meiji government incorporated the idea of worshiping the ancestors into its national ideology. In order to resolve problems caused by the abolition of the ban on cremation, the government promulgated

kasōba-toriatsukai-kokoroe (Otsu 80 of the Ministry of Home Affairs), general directions for dealing with crematoria.

After the political failure of the cremation ban, the administration of the Meiji Government for graves and burial rapidly reduced the religious characteristics. This was not only because the government failed to nationalise Shintoism as a Japanese religion, but also because it acknowledged that customs strongly reflected by commoners' perception, such as funeral rites, should not be interfered with by the state. Instead of nationalising Shintoism the government successfully incorporated the administration of graves and burial under the policy of forming a national ideology which strengthens bonds between the nation and its people. The establishment of national Shintoism as one of the national ideologies, which succeeded in establishing worship for ancestors, suggested that such worship was placed as a moral ground shared by the whole populace and thus that it enabled the *Ie* ideology to deeply link to the national ideology. At the legal level the Meiji civil law supported this national ideology and it regarded graves and burial grounds as an asset of worship which should be inherited in the same way as a house and estate. That is to say, graves and burial grounds were strengthened as a symbol for worship of family ancestors. In other words, what happened in the fourth epoch was neither an historical necessity nor a universal idea, but a form of the ideology inculcated and reformed by the nation.

The fifth and last epoch occurred at the end of World War Two. Since the restoration in 1868 the *Ie* system based on worship of the ancestors had been functioning as an effective ideology for controlling the nation within the national policy under militarism and totalitarianism. This ideology could never be

accepted by Western values which espoused a rational civil family based on democracy and egalitarianism. On 15 August 1945, the end of World War Two, Japan initiated radical changes at such diverse levels as social, political and legal. For understanding the "role" and involvement in society of the deceased during the post-war period, we need to recognise three significant changes.

First, a systematic change. Although a change in the first three books of the old Civil Code, namely General Provisions, Real Property, and Obligations was implemented during the American Occupation, fundamental changes were required, in the field of family and inheritance law covered in the fourth and fifth books, to have constitutional principles such as dignity of the individual, equality of sexes, free choice of marriage partner, and freedom of movement implemented (Oppler 1976). This revision illustrated the replacement of the *Ie* system by the "conjugal" Western family centred around father and mother with their unmarried young children (ibid.) The power of head of the house disappeared with the abolition of the *Ie* system regulated by the Meiji Civil Code (ibid.). However, the existing Civil Code which prescribes on Article 897 over succession of genealogical records, etc., has some sentimental remembrance of ancestor worship: "Notwithstanding the provisions of the preceding Articles, the ownership of genealogical records, of utensils of religious rites and of tombs and burial grounds is succeeded to the person who is, according to custom, to hold as president the worship to the memory of the ancestors". Insofar as we look at this provision and the remembrance of ancestor worship, we cannot recognise the complete abolition of the *Ie* system even at the level of law.

The Meiji Civil Code provided the essence of succession of worship of the ancestors as a privilege of succession to the head of the house. In this aspect, it

seems that the present Civil Code abolished the privilege to the succession to the head of the house. We also appreciate despite Article 897 their democratic concept by which they reduced the concept of the *Ie* and aimed at democracy. For example, if we examine how the provision is generally understood as a norm of court decisions or alternatively what the provision is directed toward, the purpose of removing provisions on the *Ie* from the present Civil Code becomes realised. Yet Article 897 still remains to some extent unchanged when it comes to exercising the *practical* norms of court decisions and the interpretation of legal provisions.

At the administrative level, the concept of *Ie* still survives within the framework of "worship for the ancestors and *Ie*". Mori (1993) points out that regulatory provisions on the succession of "the Tokyo metropolitan cemetery park, burial grounds and their users" interpret "custom" as succession to the headship of the house, insofar as the succession to the right to using the park and grounds is concerned. In terms of the succession entitlement order, the provisions prioritise relatives by blood rather than those by marriage, lineal ones rather than collateral ones, ascendants rather than descendants, and males rather than females (ibid., 218). The effectiveness of the regulation at the administrative level would suggest that there still exists a gap between a norm of court decisions and administrative norm of practice in some cases.

Second, the change in the family structure, particularly the family model in Japan. During the high-growth post-war period, it was the lineal family that characterised the involvement of the pre-war *Ie* system, but a civil family that characterised democracy and modernity. In other words, the family during the post-war period was a nuclear family composed of husband and wife and their

unmarried children. It is, however, doubtful whether the family model completely erases the characteristics of the *Ie* system, because, whereas the Japanese post-war family modelled that of the Western families, there is a difference between them in terms of context. The Western family model refers to a family where couples marry on the grounds of the individual's autonomy, are independent from the family which raised them, and form another new biological family. Namely, the model is not only composed of a couple and their unmarried children but also has a form of independent residence rather than the traditional extended family model. Whilst similarly the Western model is separate from the family framework of blood, the Japanese nuclear family model nevertheless cannot separate itself from the lineal relations of blood and the idea of worship of the ancestors. We can understand from a typical model of graves that the Japanese family model is not emancipated from the *Ie* idea but maintains the idea of these worships. A husband as the head of a nuclear family that live particularly in cities tends to establish a new family tomb and burial ground in the newly developed suburbs and desires to be buried there even with his children after their own death. The husband purchases a tomb and its ground before his death and wishes his children to succeed to the tomb and ground. The tomb he purchased is inscribed with his family name and with the word *no-haka* (Tomb for). Recently such tombs have steadily increased in number. This trend would suggest that the continuity of the family is maintained and subdivided within the framework of the *Ie* system. Although it is a distinct mode in the *katoku* system, a pre-war one, it is not yet emancipated from the idea of the continuity of *Ie*. Thus it can be said that, although its structure is changed, the Japanese family

still embodies part of the old house system where the provision of worship for the ancestors is in effect.

Third is the change in Japanese ideas and consciousness of life and death. Western ideas such as liberty, individualism, equality, rationality, etc., all of which have been substantially imported since the end of World War Two, have dramatically influenced the traditional Japanese ideas and values of life and death. The change of attitudes toward death, for example, relates to complex issues on the donation of one's body after death, organ transplantation, judgement of brain death, the scattering of ashes, etc. Therefore it is important for an understanding of the post-war position on presence of the dead to view how the general Japanese consciousness of death based upon the conventional custom is moving towards the Western-model ideas and values. Reviewing briefly Japanese history by using key terms such as graves, funerals, dead persons and religion, we find throughout the distinguished presence of the dead who have been closely involved with the living in ordinary life and sometimes the presence of the dead as a national ideology. Especially in times of war, for example, deceased military persons who contributed to war battles were praised publicly as national heroes and functioned as a sort of strong social norm determining peoples' actions and thoughts. Thus, through Japanese history, it can be argued that Japanese dead persons have been related to religion and obtain a sort of social status as a social norm. The idea of the defamation of the dead that can be traced back to the Criminal Code of 1881 can be reduced to the dead regarded as a norm of ancestor worship or as a national symbol of religious and political ideology, as described in the third epoch.

1.2.5 Japanese legalization of defamation of the dead

There were the following two prescriptions set up in the Japanese Criminal Code of 1881: "Article 359: A person who defames a dead person shall not be punished in the consideration of the previous two articles unless the defamation is based on a falsehood" (my translation); "Article 361: The crimes of this section may not be prosecuted until the complaint is filed by a victim[24] or a relative of the deceased person" (my translation).

The former Criminal Code, based upon the draft by Gustave Boissonade, a French legal advisor, was in general influenced by the French Criminal Code. However, so far as defamation of the dead is concerned, the proscription was an indigenous one different to the French version. It is because Article 400 of G. Boissonade's draft prescribed "Although defamation of the dead shall be punished under Article 398, it shall be punished only if those who defamed had an intention to defame the bereaved of the deceased and it represented a falsehood to do so" (my translation). Although the draft mentioned in direct acts of defamation and falsehood against the bereaved of the deceased, the former Criminal Code highlighted defamation of the dead. There we would say that in the times when the Criminal Code was drafted and made up, the notion of defamation of the dead was accepted amongst the people of these times, because these times, as mentioned above, were understood to be when Japan set up its new government and the national Shinto placed worship for ancestors on the basis of its tenet. After revision, the present Criminal Code came into force in 1908. It prescribes defamation of the dead in paragraph II of Article 230. We can see little difference in contents between the present Criminal Code and the

previous one except in the change of the expressions used for defaming. The present Code was heavily influenced by the German one, except for the provision on defamation of the dead, because Article 189 of the German Code does not punish an act of defaming the memory of the dead.

In the same way, the previous Japanese Criminal Code was substantially influenced by the French excepting the provision on defamation of the dead. The previous Civil Code in 1896 prescribed *katoku sōzoku* (the succession to the house) as an asset of tombs and grave grounds in order to strongly symbolise worship for the ancestors of the *Ie*. We can easily imagine that the ideology of the worship was rooted in the society of 1907 when the transfer was made from the previous to the present Criminal Code. Thus as far as Japan is concerned it is possible to justify the rights of character of the dead at the historical, legal and sociological levels (the relation between the character right of the dead and the worship of the ancestors will be explicated further in Chapter 2.).

1.3 Advocates and opponents

1.3.1 Western discourse

Whilst Japan and Germany can justify grounds for *rights of the dead*, Britain and the United States have no such grounds. However, the rights have been discussed on the fringe of philosophical debate. Very few lawyers can be identified in English and American legal praxis and discourse who pay attention to the concept of *rights of the dead*. In comparison with the volume and numbers of literature on rights of the living, essays concerned with *rights of the dead* are

[24] "Victim" is a direct translation of *giseisha*. Here *giseisha* refers to a dead person defamed. However, because the dead have no legal capacity to sue someone, the term "victim" used in this context is not logical.

few. However, applying rights principles to nonhuman entities has been for over two decades attempted as a challenge against the prevailing orthodox moral theories of rights. The orthodoxy of morals assumes that humans are the measure of all value, but the orthodoxy in question is of meta-ethics. Christopher Stone points out that the ethicist's task is widely presumed "to put forward and defend a single overarching principle (or coherent body of principles), such as utilitarianism's "greatest good for the greatest number" or Kant's categorical imperative, and to demonstrate how it (the one correct viewpoint) guides us through all moral dilemmas to the one right solution" (1988, 143). This attitude, which Stone calls moral monism, takes the application of the orthodox moral principles for granted. The orthodox ethics tend to identify all ethics with "a relatively narrow and uncontroversial band of morally salient qualities" (ibid., 144) and properties of humanity.

However the position based on the conventional predominant ethics cannot provide any independent moral significance or standing. Stone contends that "monism's ambitions, to unify all ethics with a single frame work capable of yielding the one right answer to all our quandaries, are simply quixotic" (ibid., 145).

In contrast, the alternative conception, which Stone calls moral pluralism, refuses to reduce ethical activities to one principle. In order to extend and apply the concept of rights to nonhuman existence, it would be necessary to find and justify other attributes with human and nonhuman shares. In fact, modern laws show negative attitudes toward the "moral extensionism", the strategy of which is to apply a right to non human entity, based on moral pluralism arguments. The reason, it can be presumed for this situation is that, in democratic societies, when

we reflect on human rights, these rights are, in principle, in relation to those human beings alive at that time in contraposition to those who are dead.[25] Still moral monism has its seat in the mainstream of moral philosophy. Most democratic states, such as Japan and Britain, reject introducing the concept of *rights of the dead* into their present legal system,[26] not least because it might be presumed that the introduction would result in social political confusion over the ideology of fundamental human rights.[27] Moreover, when non-agents, such as land and animals, suffer damages, vicarious legal protection[28] is available in substantial law, a good example of which is *The Animal Scientific Procedure Act 1986*. One obstacle that the moral argument on nonhuman entities faces is, for example, to inject non-homocentric considerations into moral reasoning (Stone

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[25] Although we can identify juridical entities that are not human beings yet do have guaranteed legal rights, these entities have rights because they can be justified by an assumption that the artificial entities are composed of real human beings. The definitions of a right, the spectrum of which is broad and illuminating in its different implications and ideological positions, can be lucidly explained by the following four approaches by M. Freeden (1991, 6; footnotes omitted):
(1) that sees rights as ""normative attributes" that belong to persons—the term philosophers use for self-conscious human beings, conceiving of themselves as initiators of purposive action"; (2) that regards rights as entitlement to choose; (3) that regards rights "positively as entitlements to do, have, enjoy or have done"; and (4) that contends that rights "always and necessarily concern human goods, that is, concern what it is, at least in normal circumstances, good for a person to have." What the four approaches share is an agency, as a subject of rights, whose rights are "possessed, enjoyed, exercised" (Feinberg 1980, 239) and "claimed, demanded, asserted" (White 1984, 17). On the other hand, using the supreme principle of morality, i.e., the "Principle of Generic Consistency" (PGC), A. Gewirth (1978) dialectically establishes both a right to freedom and a right to well-being. Gewirth found in the PGC the conditions "without which rational autonomy is impossible and without which human agency cannot be realized" (Freeden 1991, 45). A conclusion Gewirth logically deduced from the PGC is that since rational agencies have an entitlement to the freedom to pursue their good, all human beings have an entitlement to do the same thing for themselves (Gewirth 1982; Beyleveld and Brownsword 1994). Rational ability by which logical inconsistency is avoided, and humans who have abilities for choosing purposes and measures and control their own action, are assumed. Gewirth's argument regarding a right has at its onset a pre-theoretical concept of agency and succeeded in providing what can be called the essence of transcendental agency (ibid.).

[26] For details on the legal movement of *extensionism* in Japan and the United States, see 1.2.2).

[27] Especially, since the concept of a right in a narrow sense assumed an individual as a subject of intention who was emancipated from the ancient regime and an autonomous individual who can determine by themselves and can endure what they determined seems to have formed a prevailing framework of human rights.

1988, 140). Even if nonhuman entities have value, it is only humans who do the valuing but not trees or mountains. We also have to resolve a problem on whether or not justification for the moral argument can possibly rest on rational foundations. Supporters for the taking into consideration of an inanimate object are required to provide "some comparable basis, some "intrinsic worth" of something that cannot be killed, frustrated, or pained" (ibid., 141). Moreover, obstacles on obligations have to be resolved. Even if moral obligations to a nonhuman entity are conceded to exist in principle, how can they be discharged? Thus these difficult problems are directed at the dead, a theme of this dissertation.

But, is conjecture of political or legal confusion raised by moral debate of extensionism axiomatic? Put another way, if there were a legal device on the basis of which the living do, or are necessitated to do, something for the sake of non-agents, then would the assumption that they, the non-agents, do not hold rights be self-evident? This line of reasoning suggests a way to circumvent potential confusion and has attracted the attention of some lawyers in an examination of the idea of *fringe* rights.

1.3.2 Advocates of *rights of the dead*

Using the expression *rights of the dead*, Lomasky (1987, 212) addressed the justification of such rights. Lomasky identified and discussed these rights as ones of *fringe* rights on the same level as rights of a fetus, defective [Lomasky's term] human beings and animals.[29] However, his discussion does not seem to

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[28] Although the availability is just a presumed need for *rights of the dead*.

[29] In this thesis, we oppose a right of animals. We never attempt to explain *rights of the dead* by taking advantage of the grounds for animal rights, in which, because animals partly share their attributes with human beings' (e.g., high intelligence), it is argued that rights

be successful. The dead are a psychological, physical reality which people personally and publicly wish to deny (Ariès 1981; Becker 1973). But they are also a sociological and legal fact very relevant to us from the perspectives of rites, inheritance and throughout the course of our lives (Finch and Wallis 1993). Lomasky is one of the pioneers who, in conflating the two terms "the dead" with its various shades of meanings and connotations at the various levels together with "rights", establishes and starts to explain a *new* concept in relation to rights. However, in substance his work, rather than resolving confusions and clarifying concepts, merely serves to map out some possible pathways into a deeper discussion of *rights of the dead.*

The main reason why Lomasky (1987) left the question unresolved is probably due to the conceptually difficult fact that the dead have, by definition, no life. When we review perspectives based on natural rights,[30] we recognise that they offered the prospect of a law of action which could be applied to any live beings, including humans, in the natural world. Moreover, it required a cognitive presupposition that the greatest value is life as opposed to death (Strauss 1953). Lomasky did not make a breakthrough in resolving this strict dichotomy between the living and the dead. In particular the following proved something of a conceptual obstacle:

> "It is nonsensical to suppose that corpses are the sort of thing that can have interests or rights. To attribute rights to one who has died must be to attribute them to the antemortem person he once was. ". . . person he once was"; the phrase expresses the crux of the difficulty. One who was *once* a person is *no*

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should be also vested in animals. Although we take the remark into account, we will not pursue this line in this thesis. If, as we intend to do, we can demonstrate interests or rights can be attributed to a deceased, then by explaining that the attributes of a living person can survive his/her death, we shall therefore present an argument for the interests and rights. What makes the attributes continue after death are the social characteristics of a person which can survive death (see Chapter 4).

[30] For example, Hobbes's concept of rights was in fact based on further assumptions about human attributes and the quintessence of human relationships (Freeden 1991, 14).

> *longer* a person and thus is not a potential repository of *current* harms and benefits. Indeed, one who was once a person is no longer anything at all; he has simply ceased to be. Left behind are his "remains," but the decaying body is not identical to the antemortem person whose body it was. If there is no subject who has rights, then there simply can be no rights" (Lomasky 1987, 218; footnotes omitted) [original italics].[31]

Reasoning "[w]hat I wish to maintain is that there "is" a subject of rights, though the one whose rights they are "is" no more. The seeming inconsistency is due to the grammatical usage in which the present tense is employed to refer timelessly to an entity" (ibid.), Lomasky attempts to resolve this obstacle by trying to deal with the issue of tense. But this strategy seems nevertheless to leave the dilemma posed by the obstacle unresolved.

The assertion that "[t]o attribute rights to one who has died must be to attribute them to the antemortem person he once was" can be rephrased by "although rights cannot be attributed to one who has died, they can be attributed to the antemortem person he once was". Namely, it is that, although the subject of rights does not exist at the present time, the subject existed in the past and therefore rights are *now* in the situation where they are attributed to the subject who existed in the past. According to Lomasky's explanation, rights that are attributed to "the antemortem person he once was" exist at the present time, whilst rights that are attributed to the posthumous person who is dead also exist at the present time. If this is correct, then in terms of the tense, *rights of the dead* does not refer to the dead person's rights but to the antemortem person's rights. If, when Lomasky uses the term "the living's rights", it means the rights that are attributed to the living, then he would fail to justify *rights of the dead*, i.e., rights that are attributed to the dead at the present time. Thus he demonstrates

[31] We will argue that the non-existence of a subject of a right does not necessarily mean non-existence of a right. See the discussion on defamation of the dead in Chapter 2.

at best his own desires and closes his discussion. They would be a sort of declaration of frustration at the level of moral debate:

> "Reference to the dead is a semantic mine field that always threatens to explode the unwary, and it is doubtlessly the case that there remain potentially damaging devices that this section has not defused. Whatever the logical pitfalls that remain, it seems unlikely that any are unavoidable. We can, then, with some confidence, continue to attribute to the dead interests, harms, and rights" (ibid., 221).

Although Joel Feinberg (1974; 1977) did not use the term *rights of the dead*, he argued, carefully and persuasively, a puzzling hypothesis that "a person is still harmed or his/her interest invaded after his/her death". Some pros and cons on the notion of harms *to* the dead and interests *in* dead were provided.[32] Those who considered the notion as paradoxical and wrong pointed out the dead person's lack of attributes as subjects for harming themselves.[33] For example, J. C. Callahan claims "[w]hat I want to suggest is that the reason that all argument for harm and wrong to the dead must fail is that there simply is no subject to suffer the harm or wrong" (1987, 347).

1.3.3 Opponents of *rights of the dead*

Like Lomasky, H. Steiner actually used the expression *rights of the dead* in *An essay on rights* (1994). Steiner completely rejects the notion of these rights:

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[32] The pros and cons are reviewed in 2.2.

[33] Joel Feinberg recognised the difficulty in ascribing rights and interests to the dead, and expresses this thus:

> "[t]he case against ascribing rights to dead men can be made very simple: a dead man is a mere corpse, a piece of decaying organic matter. Mere inanimate things can have no interests, and what is incapable of having interests is incapable of having rights. If, nevertheless, we grant dead men rights against us, we should seem to be treating the interests they had while alive as somehow surviving their deaths. There is the sound of paradox in this way of talking, but it may be the least paradoxical way of describing our moral relations to our predecessors. And if the idea of an interest's surviving its possessor's death is a kind of fiction, it is a fiction that most living men have a real interest in preserving" (Feinberg 1974, 57).

> "I want to argue that these views are mistaken. For, although we undoubtedly do have serious moral duties with regard to dead and future persons, these are not correlative ones. Dead and future persons have no rights" (ibid., 250).

Similarly, Thomas Paine, whose political remarks are quoted by Steiner, also rejects outright the concept of any such rights:

> "When man [sic] ceases to be, his power and his wants cease with him; and having no longer any participation in the concerns of this world, he has no longer any authority in directing who shall be its governors, or how its government shall be organised, or how administered" (ibid.).

To justify the assertion that, despite a subject of rights not being at the present time, the rights *per se* exist, J. W. Salmond (Williams 1957) counts on the concept of necessity based on a legal fiction. Being a corpse means not being a subject that can be harmed. However, lawyers fully accept that rights, duties and powers associated with testamentary succession are valid after the extinction of the subject. J. W. Salmond explains:

> "[t]he rights which a dead man thus leaves behind him vest in his representative. They pass to some person whom the dead man, or the law on his behalf, has appointed to represent him in the world of the living. This representative bears the person of the deceased...Inheritance is in some sort a legal and fictitious continuation of the personality of the dead man, for the representative is in some sort identified by the law with him whom he represents...To this extent, and in this fashion, it may be said that the legal personality of a man survives his natural personality...Although a dead man has no rights, a man while yet alive has the right, or speaking more exactly, the power, to determine the disposition after his dead of the property which he leaves behind him...This power of the dead hand (*mortua manus*) is so familiar a feature in the law that we accept it as a matter of course, and have some difficulty in realising what a singular phenomenon it in reality is" (Quoted in Williams 1957, 482-4).

As Callahan, Steiner and Paine criticise and Lomasky accepts the criticism, the refutation "there is no right where there is no subject" is the toughest obstacle for claimants of posthumous harms to overcome.

1.3.4 Japanese controversy: possession of the dead

The term rights of the dead has been traditionally customary in Japanese legal discourse in substantial law and case law, because there have been long-term discussions on "defamation of the dead" (see 2.7.3 and 2.7.4) and "the dead's possession".[34]

The debate on "possession of the dead" cannot be, in a sense, understood if we do not take into account Japanese attitudes toward death and the dead persons, attitudes which have persisted through the ages. As we conceive from the term, the debate is very relevant to whether a living person can possess his/her property even after his/her death. The law which covers "possession of the dead" is largely found in two articles of the Japanese Criminal Code:

> Article 235 [Theft]
> "A person who steals the property of another shall be guilty of the crime of theft and be punished with penal servitude for not more than ten years".
>
> Article 254 [Embezzlement of lost articles, etc.]
> "A person who wrongfully appropriates a lost article, driftage, or other property of which another person no longer has possession shall be punished with penal servitude for not more than one year or a fine of not more that one hundred thousand yen or a minor fine".

Issues concerning "possession of the dead" arise where after a person causes another person to die, the former deliberately attempts to obtain any property that the latter physically possessed at the time of death and actually succeeds in

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[34] The discussion on whether, at same time as when a subject of a right is extinguished from the dead, the right of its possession is extinguished is quite relevant to the following court decisions: Judgement of the Supreme Tribunal, 16 April 1906 (Keiroku 12, 472); Judgement of the Supreme Tribunal, 21 October 1913 (Keiroku 19, 982); Judgement of the Supreme Tribunal, 28 March 1923 (Hōritsushinbun 2247, 22); Judgement of the Supreme Tribunal, 11 November 1941 (Keishū 20, 598); Judgement of the Tokyo District Court, 3 December 1962 (Hanrei-jihō 323, 33); Judgement of the Tokyo High Court, 8 June 1964 (Kōkeishū 17-5, 446); Judgement of the Supreme Court, 8 April 1966 (Keishū 20-4, 207); Judgement of the Fukuoka High Court, 26 February 1975 (keigetsu 7-2, 84); Judgement of the Tokyo High Court, 13 September 1978 (Hanrei-jihō 916, 104); Judgement

obtaining it. The question is which crime should be applicable to this act, the "crime of theft" (Art. 235) or the "crime of embezzlement of lost articles, etc." (Art. 254). Apart from "robbery theory", which argues that such an offence amounts to robbery because the property was obtained by taking advantage of a situation in which the victim obviously could not defend him/herself, the decisive difference between the crimes of "theft" and "embezzlement" lies in whether or not the deceased should be considered to be in possession of the property at the time the property was taken.

The outline of this debate in Japan is as follows.

The concept "possession" in the Criminal Code is identified with the incorporation of two requirements: the will of possession and the fact of possession. The concept refers to the exclusive factual control over property, based upon the subjectivity of the former and the objectivity of the latter. It follows therefore, that if we highlight the dominance and the exclusion, then we have to accept the "embezzlement theory". This perspective interprets the case thus: as the original agent of possession is no longer alive—the subject of both "dominance" and "exclusion" simultaneously disappears—s/he can no longer be considered to be in possession of the property (Machino 1979, 190). As a result the property comes to be regarded as an article without a possessor—i.e., without a legal owner. The death of the agent of possession therefore renders it impossible to consider this a matter of straightforward theft.

By contrast, the idea of theft would be justified by the protection of the original possessory right. This perspective can be divided into three sub-theories: (1) that the possessory rights of the dead *per se* can be protected (Ono

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of the Tokyo High Court, 18 January 1982 (keigetsu 14-1/2, 1); and Judgement of the Nigata

1970); (2) that possessory rights of the dead can be protected for a certain limited time and include only a limited amount of property rights (Dandō 1990); and (3) that whether a case is one of embezzlement depends on the circumstances (Kōke 1963). In theory (1) it is argued that after death the possessory right of the victim continues. That is to say in terms of possession the situation is the same as it was before the victim died. On the other hand, theory (2) contends that the dead hold possession only because of the relations amongst the dead, time and space. Finally, for those that are less certain that the dead do hold rights, theory (3) argues, that by using a form of "common-sense" social awareness, we should judge on a case by case basis whether or not a particular situation should be regarded as being one where the original possessory right should be considered superior. However, when we review the three theories from the viewpoint of "embezzlement theory", the review suggests that embezzlement occurs irrespective of the length of time after the death of the original owner by virtue of the fact that another person illegally removed from the deceased the property that the deceased had formerly possessed; in so far as there is no evidence that the property involved was possessed by another living person, these actions establish the crime of embezzlement. In other words, this theory contends that in so far as the subject of possession (i.e., the deceased) has passed away, then the possessory right to the property has also disappeared. However we argue this argument is far too strict and fails to comprehend the full meaning of the situation.

Also this view rests on the understanding that, whilst a natural person and juridical objects can be agents of possession, the dead cannot. Therefore, if we

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District Court, 2 July 1985 (Keigetsu 17-7/8, 663).

emphasise this concept of who can and cannot be an agent of possession, it follows that, because the property of the dead cannot be truly said to be the property of any particular individual, it cannot therefore be an object of the crime of theft. However, applying this theory of embezzlement to the problem of the *rights of the dead* would be to jump to conclusions. The issue considered in Article 254 is the property that is "ishitsu-butsu", "hyōryū-butsu" and "sonota senyū wo hanaretaru mono". "Ishitsu-butsu" refers to lost articles, "hyōryū-butsu" to driftage, and "sonota senyū wo hanaretaru mono" to "articles which are wrongly possessed" in Article 12 of the Lost Articles Law. Thus Article 254 is concerned with situations where an article is too distant from its possessor to be considered to be possessed by others, or where it is next to impossible to return it to the owner of the property. Hence, where mail is wrongly delivered by a postman, this can be considered an example of "sonota senyū wo hanaretaru mono", in that the property concerned cannot be returned immediately to the real owner of the mail.[35] With this in mind, let us review the case where a person who caused another person to die with the intention of obtaining the dead person's property, and having committed the crime actually obtains it. Here we can recognise, by observing the situation, that the property concerned belonged originally to the deceased. Also the person who caused the victim's death can recognise that the property belonged to the victim. Therefore, the argument that regards the property as being too distant from possession cannot be valid here in the sense that it cannot satisfy the physical difference of time and distance. In other words for Article 254 to be of any use we would have to regard this property as property which is too distant from immediate possession to be considered to

[35] See Judgement of the Supreme Tribunal, 15 October 1917 (Keiroku 23, 11).

be physically possessed by the deceased. Here we encounter difficulties in filling in the physical gaps, such as distance and time, between the "senyū wo hanaretaru mono" and the "seeming" possession of the dead.

This is to say, that employing Article 254 alone, a rigorous interpretation of the law may lead to the conclusion that we should consider this case as one of "a crime of embezzlement of lost articles". However, it is suggested here that we should take into consideration the cause which leads to the possession of an article becoming distant from ownership. Evidently, the event that resulted in the removal of the dead's possession from him/her, was that another person caused the victim to die. Hence the argument put forward by the judgement that "the accused's acts allowed him to obtain the said article by taking advantage of his own act so as to remove the possession of the article from the victim, should be as a whole treated as the act that infringed the possession of the other person".[36]

By way of example: suppose that A died with a watch on his wrist. After B, who had killed A, had run away, he became aware that A possessed a watch. As a result, he returned to the place where the dead body lay, and took the watch. Using a strict interpretation of property ownership, we would be obliged to conclude that the person who holds the watch is A's rightful successor. If this is the case, therefore, this kind of embezzlement may be treated in the same way as if the article that A's successor recovered was lost or misplaced. However, let us note how this watch is understood by B. What there exists in front of B is A's dead body and the watch is physically attached to A's body.[37] Believing that the watch must be A's watch, B takes it. This case is not a case in which the watch

[36] Judgement of the Supreme Court, 8 April 1966 (Keishū 20-4, 207).

[37] A case that causes a problem on possession is one where others infringe the possession of a subject who is presumed to hold a possessory right. In this case the dead

is distant from the body, say five hundred metres away. The difference is that in the latter case, B cannot necessarily recognise that the watch belongs to A, whilst in the former case B can and must recognise A as the rightful owner. In order to resolve this "conundrum" we have to espouse a view in which the pre-mortal possession of the dead can be protected under the condition of a certain time and distance.

Another point that we must note from the previous section can be illustrated by a further example.[38] Professor Ohya (1990, 193) argues that "if in the example the accused returned and obtained the property after a full nine hours had passed from the time that he had killed the victim, we have to also argue that the possessory right of the deceased must continue for some period of time after death". If this is the case then the continuity of pre-mortem possession cannot be accepted, i.e. this is the case for the "crime of embezzlement". This argument is dubious. One could say that the judgement could treat the dead as a "fictitious" living entity in this case. The rationales for this kind of interpretation may be twofold: (1) the imbalance of punishment between Article 235 and Article 254; and (2) the emphasis on the time and space relationships between the accused and the victim.

Professor Ohya (ibid.), an advocate of the "embezzlement theory", argues that, since in "theft theory" whether an action is theft depends on the situation over time after the death and the nature of the act, this is not a proper standard for judging (see Ohnuma 1992). However, it could be legitimate to apply larceny to the case in which, even if one year has passed, the fact that the property is the possession of the dead person is self-evident. The application is useful for the

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physically cannot protect the right, but as will be mentioned in Chapter 4, the appearance of

resolution of cases in which a person other than the accused is concerned. Take for example a crime in which a third person takes the property of the victim. Here we cannot accept a consideration of the connection between the accused and the victim, (as argued by the judgement and the dominant theory) as the important factor. Instead we need to concentrate on the association between the victim and his/her property. It is, to reiterate an earlier point, precisely because for the third party it is self-evident that the property in this case prima facie belongs to the dead, that this event should be considered a crime. Yet this interpretation cannot meet with the stipulations laid down in Article 254. However, in Article 235 it is legitimate to treat the possession of the dead fictionally as that of the dead.

Examining the concept of "possession of the dead" by the way of Japanese discourse, we would acknowledge that the discussion on it is rooted in Japanese attitudes towards death and corpses. It is peculiar that "theft theory" assumes that even after death a dead person continues to hold possession as a right and that the illegality of theft can be grounded by the assumption. Also it is lack of logic to argue that, although within the context of the whole situation the possession of the dead is possible after the homicide, if nine hours had passed from the time of the homicide, then the continuity of the possession is not acknowledged. It is because the boundary of life and death is so fine that the separation of being a dead person and being a living one becomes vague, and interchangeable from one moment to the next.

Through the impression that Japanese legal discourse takes the debate on "possession of the dead" seriously, we would say that it may be a piece of

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the body tells as a strong impression that the body holds the possession.

evidence that the border line between the dead and the living is contemporarily vague even to Japanese. Mita (1992), a sociologist, provides us with the perspective that, whilst the culture of Christianity has an orientation toward the severe separation of the living and the dead, the Japanese traditional culture rejects such separation. It seems that such a Japanese sentiment is based on a human religion which does not know the world a transcendental god rules (ibid.). This Japanese religious belief can be placed in the "dialogue" between the dead and the living, the dialogue which is made by the regret, which the dead left in the living's world, and other regret, to which the living feel. This perspective is going to be related to an example pointed out by another scholar.

Namihira (1990) points out that the Japanese have a way of thinking by which they identify themselves with the dead and possess a tendency to convert their feelings into the deceased person's words. She draws attention to a Japanese jetliner crash on the Osutaka-Yama mountain, Gunma Prefecture, in August 1985. By due process the bereaved identified the victims' bodies that were collected at the scene of the crash. The relative's attitudes of identifying the bodies drew attention. When we read a collection of the relative's memoirs (8.12 *Renraku-kai*, 1987), we find that there were many expressions that the bereaved voiced about the dead, for example: "Father must have felt frustrated very much!" or "When I think about the regret that the victims have". These expressions suggest that the bereaved reconfirm that the dead persons can feel, think and suppose despite not being alive. Namihira understands that the bereaved, in a sense, put themselves and the victims in the same category. In other words it may be understood that the attitude is linked to the way by which

[38] Judgement of the Tokyo District Court, 3 December 1962 (Hanrei-jihō 323, 33).

the bereaved reconfirm their identity of themselves which is a sort of reflection within others —that is, the dead.

The way by which we understand the dead, in the relationship between the living and the dead, enables us to think that the dead can remain in the living's world in a similar existence to the living for a while after death, although that is a physically impossible understanding. This vagueness between the world of the living and that of the dead is a sort of myth and can be regarded as an approach to *rights of the dead*. As previously mentioned, the Western concepts of liberty, individualism, equality and rationality have had an influence. Nevertheless, the way of thinking that makes the Japanese create the boundary between being alive and being dead vague, at a certain level, is still found as a value which continues even in the 1990s. However, the *Nihonjin-ron* approach which accepts Japanese uniqueness of attitude towards death and corpses has not been adequately examined and holds diverse problems. We shall discuss the problems in the discussion related to *rights of the dead* (see 5.6).

1.3.5 Defamation of the dead

The controversy on defamation of the dead is, in Japan, one of significant legal ones regarding *rights of the dead*, but perhaps this easy embedding of the term *rights of the dead* in the discourse is based upon Japanese religious beliefs and/or traditional customs. However, this situation is not unique to Japan. As mentioned before, the history of defamation of the dead is very old, and can be traced back to Germanic times. In valuing ancestor worship (*Ahnenkultus*), ancient Germans considered defamation of the dead as punishable (Mori 1993, 72). It was assumed that successors had a duty to protect their ancestor's

reputation and/or honour. Thus, recently in Germany a view has been expressed that regards the honour of the dead as an interest worthy of protection and which claims that defamation of the dead should be treated equally to that of the living.[39] Details on the German cases will be discussed in Chapter 2.

Whilst the dead are not regarded as agents (Kimura 1948), there is in Japan a common view that regards the dead as "quasi-subjects"—i.e., whereby although the dead are treated in a very different way to the living, it is recognised that as an entity they do have a value over and above other non-human entities. Consequently we find a specific prescription regarding "defamation of the dead" in Article 230 of the Criminal Code (Ashitomi 1990). Also some judgements suggest that cases can be identified concerning the defamation of the dead where the concept is developed as a matter of general principle (Inoue and Etō 1994). There are several competing views in relation to defamation of the dead in Japan. For example, what is the object or purpose of law regarding the defamation of the dead? This object or purpose might include: The honour of the bereaved or their family; the feelings of devotion the bereaved hold toward their deceased; the public legal interest in the social reputation of the dead; and the honour of the dead *per se* (Japanese common theory) (Ashitomi 1990).

The social reputation of the dead can remain in people's memory. But even if this reputation can be regarded as a legal interest worthy of protection, how is the subject of the interest (see 2.2) to be explained? There are several views (ibid.): (1) although the dead are not the subject of defamation, the law can work so as to accommodate this problem; (2) the honour of the dead can be regarded as an interest which lacks a subject; (3) the dead are subjects of legal

[39] See BGHZ, Bd., 15, S.249; BGHZ, Bd., 50, S. 133.

interests and we can regard them as legally fictitious persons; and (4) a view that explains the honour of the dead through relationship with rights of character. In the last view, which emphasises the relation of rights of character to the honour of the dead, the rights of character are considered to endure beyond death, and therefore can become rights without a live recipient of the right (Igarashi 1977, 57-58). It should be noted however that the strength of this right holds only in criminal disputes, and not in civil cases. That this is so is due to the significance of the interest which requires protection and which overrides the otherwise essential need for a living recipient of the interest (Ashitomi 1990). In this thesis, we shall argue that a right of character can, as an example of *rights of the dead*, survive the right-holder's death and be regarded as a "right without subject".

With regard to English law the common law rule was expressed by the maxim "*actio personalis moritur cum persona*" ("a personal action dies with the litigant"). That is, when either the plaintiff or the defendant died, the right of action was thereby extinguished. *The Law Reform (Miscellaneous Provisions) Act 1934* totally overhauled this rule. However, by this Act defamation is now the only tort to which the Act does not apply. Since there is no common case law available, it is presumed that cases in other common law nations can be applied. On the strength of the precedents established in these cases wherein a person defamed does not bring a file or die during the proceeding, the claim thereby becomes extinct and the succession of the claim is not admitted.[40] This precedent exists precisely because defamation claims are of a peculiarly personal nature, and it may be very difficult to achieve justice in the case where

[40] E.g., see an American case, James v. Screen Gems, Inc., 344 p. 2d 799 (1957).

one of the parties is unable to give evidence (Stanton 1994, 442). Defamation of the dead in England will be discussed in detail in the latter part of Chapter 2.

1.3.6 Buddhists after death: *kaimyō* discrimination

The history of outcasts in Japan, although poorly documented, indicates that a minority of the lowest social class existed, which had been severely discriminated against ever since medieval times and that they still remain, to some extent, discriminated against in contemporary Japan.[41] They have been called diverse terms such as *eta*, *yotsu*, and burakumin, which are still in use today. After the Meiji government's reluctant policy for the emancipation of the burakumin, the National Levellers Association founded in 1922 (*Zenkoku Suiheisha*), gradually improved the burakumin's social status and situations by the steady endeavour of the buraku liberation movement, although events in World War Two suppressed the movements. A new constitution was, as a basis of Japan, established in 1947. Article 14 of the Constitution prescribes "All people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin". Registration caused and passed by liberal movements of the re-instituted National Committee for Buraku Liberation has dramatically bettered mainly education and housing conditions for Burakumin. However, researching the

[41] The history of Burakumin up to the modern times is compacted in "*A History of the Outcast: Untouchability in Japan*" (Price 1966, 6-30). Regarding the political movement of the emancipation of the burakumin up to 1960s, see "*Japan's Invisible Race: Caste in culture and personality*" (De Vos and Wagatsuma 1966). L. Clear explains especially the educational movement regarding Buraku amongst the Buraku liberation movements in detail in his PhD thesis "*Education for social change: The case of Japan's Buraku Liberation Movement*" (1991). For general questions and answers on the Buraku problems before and after 1990, see "*An Introduction of the Buraku Issue: Questions and Answers*" (Kitaguchi 1999). Also for the details on the situation of Buraku people who lived in pre-war, particularly

present society involved in Buraku issues suggests that the Buraku discrimination still remains unsolved, and that there are many cases of discrimination in terms of job opportunities, marriage and social relations. Such discrimination is against living people, but we have to discuss, in light of a posthumous discrimination against Buraku people, some issues on *kaimyō* or *homyō* of Buraku people, the issues that are deeply related to this thesis.

A religious custom prevails even in contemporary Japan. The custom is that Buddhists are given another name, called *kaimyō* or *hōmyo*, by monks whose temple the dead are/were once registered to. Generally different sects of Buddhism provide different posthumous names to their deceased believers. A *Kaimyō* is composed of eleven or twelve words of Chinese characters, each of which has explicit or implicit meanings. The bereaved of the dead are required to pay money as a fee for being given *kaimyō* according to the dead or family's social status. Originally, *kaimyō* referred to a religious name given to those who entered the Buddhist priesthood. In contemporary Japan, however, *kaimyō* refers to the posthumous name of the deceased. *Kaimyō* is an institution which exists within the frame of the family's religion which roots in the system of *terauke* but not in individuals. In reality, it not only implies the degree of the ante mortem contributions to the Buddhist temple made by the deceased, i.e., the amount of monetary offerings but also the deceased's ante mortem social status or the reflection of the degree of the bereaved's contributions to the temple.

Historically, Buddhist temples were, in the Edo period, firmly incorporated into the administrative system of the Buraku by the establishment, and enactment of the *shūmon aratame* system (see 1.2.4). The Buraku system

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in the times of the *Suiheisha* Movement, "*Political protest and social control in pre-war*

reinforced the control and *status quo* of the society by intentionally making class discrimination. Maki (1985) argues that the practice of discriminatory *kaimyō* should not be considered a product of uniform compulsion by the Buraku. Copies of a guidebook of how to name discriminatory *kaimyō* were already distributed amongst Buddhist monks in the late Muromachi Period (1338-1573). The book[42] had diverse flaws in its context. Without criticism and examination, however, it was cited by a variety of documents that were made by diverse Buddhist sects in the early Edo period. Apparently it played a significant role in maintaining social discrimination and segregation. Maki concludes that the *kaimyō* discrimination did not necessarily indicate the government's compulsion but the temples' intentional and autonomous action that meant an expression of espousing the feudal regime of discrimination (ibid.).

Hikoichi Yamamoto brought up an issue over the discrimination of *kaimyō* for discussion when the fifth convention at *Zenkoku Suiheisha* took place in Fukuoka City in 1926 (Kobayashi 1987). Yamamoto condemned the fact that one of the lowest Buddhist temples in Fukuoka Prefecture, under the supervision of Kyoto Chion-in Temple, confined the *kaimyō* given to registered Burakumin believers to four letters of Chinese characters, and that the reason for the discriminative manner was that the Buraku people were regarded as creatures inferior to human beings. The head temple of Chion-in rejected its own involvement and responsibility to the discrimination because the practice had been made by the autonomy of the temple that practiced the discrimination. Up to the 1980s, however, the issue over *kaimyō* discrimination had been regarded

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Japan: The origins of Buraku Liberation" (Neary 1989) provides with an excellent research.

[42] This is a reference called *Jyōgan-seiyō-kaku-shikimoku.*

as a minor issue through pre-/post-war Buraku liberal movements, and that there was not sufficient examination of the issue related to fundamental human rights. According to a record of the Buraku liberal movement, *Shinano Dōjinkai* (a Buraku association that was in activity in Ueda City of Nagano Prefecture), it is mentioned that the association ordered an inquiry into the registration books of two temples in 1936. These temples had had special registration books for Burakumin ever since the Edo period. The association made an issue of discriminatory *kaimyō* that were registered in the *kakochō* (listing book of *kaimyō*).

Taking some examples from *kakochō* books kept by Gangyō-ji Temple in Ueda City, Kobayashi (1987) found that amongst the *kaimyō* kept in the books, all words implying discrimination had been completely wiped out by black ink. Moreover, on the *ihai* (a small wooden "memorial tablet" kept in the temple), words implying vocational discrimination such as leather (*kawa* or *kaku*) had been shaven out. After World War Two, the investigation of discriminatory *kaimyō* has developed to some extent. In 1954, investigating Buraku villages in Komuro City of Nagano Prefecture, Keio University found some burial grounds where plenty of discriminatory Chinese words equivalent to "servant" or "maid" as epitaphs on their faces of tomb stones could be found (ibid., 13). The September issue (1960) of monthly magazine *Buraku* revealed the fact that a young monk who was hardly able to chant even a simple sutra came over to the bereaved for memorial services, and gave the awfully discriminatory *kaimyō* composed of Chinese characters such as literally "beast man" or "beast woman". Shibata (1972) researched the prevailing existence of discriminatory *kaimyō* at tombs with discriminatory epitaphs. In 1973 Y. Wakamiya (1988), staff writer of Asahi

Shinbun (a Japanese quality newspaper), started by covering the sufferings of Buraku people in a series titled *Gendai no buraku* (Contemporary Buraku). Matsune (1990), researcher with the Buraku Liberal League, published *Sabetsu kaimyō towa?* (What is discriminatory *kaimyō*?). It is a booklet for enlightenment on Buraku issues, and answers the question of "Why are there less cases of discriminatory *kaimyō* in Shinshū sect, which the majority of the Burakumin are registered to, than other Buddhist sects?" Using a survey, Matsune compared Buddhist sects that the Burakumin were registered to, with the number of the reported cases where discriminatory *kaimyō* were found. He found that there were fewer cases in the Shinshū sect than other sects. The reason for the difference was the existence of *Eta-dera* temples. The *Eta-dera* temples that administrated Burakumin with a discriminatory policy by the Bakufu existed in the lowest of the hierarchy of temples (ibid., 48-53). Monks in *Eta-dera* temples themselves suffered from severe discriminatory treatment at the stage of entering priesthood. Matsune also points out that, even in the 1980s, some executives of Buddhist sects still repeated discriminatory comments against Burakumin (ibid., 58-63). The Burakumin who have suffered discrimination throughout their life will die the same as any other. The dead persons are an entity who is different from the living and from the bodies that are "things". The dead persons are an existence that has a base of symbol, so that people have been taking special consideration to the dead. Therefore, the dead are given the category of "person" even if physically they are "things". That is why the dead are served as a special entity for the respectable treatment such as burial or worship. On the other hand, Burakumin have been posthumously discriminated against as Burakumin Buddhists by discriminatory *kaimyō* and tomb stones with

discriminatory epitaphs as well as having been antemortemly discriminated against. Discriminatory *kaimyō* should be viewed as a new discriminatory treatment that death of a Buddhist gives. Thus we can say that it is the infringement of the deceased's human dignity.

There are two reasons why the issue of discriminatory *kaimyō* is deeply related to the scheme of this thesis. One is, as mentioned in the previous section, that discriminatory *kaimyō* is a discriminatory practice given directly against the dead and an infringement of the dignity of the dead. Whilst discrimination infringes against the rights of character, the infringement of character by discriminatory *kaimyō* is directly against the dead person as it is a phenomenon that occurs after a person's death. The other point is that which is related to the grounds for being given *kaimyō*. As discussed in detail later, the ante mortem social status or reputation of a person, i.e., social characteristics explained ubiquitously in this thesis; for example, here the social characteristics of Burakumin survives death, and therefore the Burakumin were discriminated against after their death. However, although there are legal difficulties to overcome, there was no case brought into action in light of *rights of the dead* of defaming the dead by discriminatory *kaimyō* or tombs, or of recovering posthumous disgrace.

1.4 What shall be discussed in this thesis?

It was shown earlier that historically *rights of the dead* has existed: in other words, there have been times during which *rights of the dead*, currently not accepted by modern lawyers and legal philosophers, *were* actually accepted. In Japan and European countries, their substantial laws actually prescribe the

concept of "defamation of the dead". Especially in Japan, its legal discourse has been through the debate on "possession of the dead", examining the concept of *rights of the dead.* The debate is influenced by people's attitude towards death and corpses. The attitude which is cultivated by their own religious traditions. Moreover the scope and influence of rights-holders is increasingly being accepted and expanded upon both in philosophical debate and in the Law Courts (see 1.2.2 on "Modern legal conflict"). At present, there is a situation where old values have been modified in the moral debate of the non-human. Whilst all of the issues are not necessarily grasped as issues on *rights of the dead*, the Japanese historical fact of *kaimyō* discrimination would draw attention to the necessity of further examining and *establishing rights of the dead.*

Following this review of historical and present facts, we will address three crucial questions: first, "What is meant by and who are we intending to identify when we use the term "the dead?""; second, "How different are the dead from the living?"; third, "what, if any, shared attributes do the dead and the living possess?". A successful identification and elucidation of the concept of "the dead" as used in this thesis, hinges on the answers to these questions. However, in this quest we shall almost not deal with either the body of literature on the anatomical findings of corpses, nor on the philosophical meanings of death and death rites, notwithstanding that they are also to a great extent integral to an understanding of "the dead". Rather for the purposes of this thesis it will suffice to focus on three points. First, the sorting out of issues on *rights of the dead* at the levels of moral, law, sociology and anthropology; second, the *relationship* between the attributes of deceased persons and their corpses and the law with regard to deceased persons; third, with the *relationship* between two

opposites, i.e., the dead and the living. It is part of our argument that an understanding of these relationships is integral to establishing and explaining interests in "the dead" and their rights, because they are expressed in and through these *relationships*. Therefore, in the rest of this chapter, we will seek and examine forms of approaches appropriate to explicate these *relationships*.

1.4.1 What is "the dead"?

First, we will examine the question "What is "the dead"?", or put another way what we will do first is to set forth clearly both what we mean and to what or whom we refer to in this thesis when we use the term "the dead". A review of the literature on death evinces a considerable dispute over an exact definition of death (Evans 1994). Defining death *per se* is in reality a troublesome task.

In a section of *Death, Dying and the Biological Revolution* (1976), a stimulating book, Veatch analyses the debate over the definition of death. To define the death of a human being, Veatch argues that the answer to the discussion is not a single one but should be fourfold. First, the discussion on a pure formal analysis of the term "death"; second, the discussion on the concept of death, which satisfies the first one in terms of its content rather than the definition of death; third, the discussion on the position of death in society as a whole; and fourth, the discussion on the standard for determining death. The most significant discussions in this section are the first and the second. Veatch argues that "[t]he direct link of a word *death* to what is "essentially significant" means that the task of defining it in this sense is first and foremost a philosophical, theological and ethical task" (Veatch 1993 [1976], 604) [original italics] and that of other values.

> "Many elements make human beings unique—their opposing thumbs, their possession of rational souls, their ability to form cultures and manipulate symbol systems, their upright postures, their being created in the image of God, and so on. Any concept of death will depend directly upon how one evaluates these qualities" (ibid., 605).

For the second discussion on death, Veatch provides us with four approaches as the most plausible one. All of them are understood as the irreversible loss of a human: first, irreversible loss of flow of vital fluids; second, that of the soul from the body; that of the capacity for bodily integration; and fourth, that of the capacity for social interaction.

As understood as the first discussion by Veatch, many dictionaries formally illustrate that death is defined as "the extinction or cessation of life' or as "ceasing to be" and although life *per se* is difficult to define, most definitions of life whether at the level of physiology, molecular biology and biochemistry, or genetic potential lay stress on 'functional capacity". Death, thus, can be defined as the irreversible loss of "functional capacity". This formal definition of death is broadly applicable not only to human beings but to non-human animals, plants, etc. However if it is a case of defining human death, we have to recognise characteristics that are essentially significant to a human being. Therefore, we here define death simply as "the final and irreversible cessation of a person's life". Based upon both the definition and the four categories of the definition of death that Veatch mentioned in the second discussion, human death can be defined as a process in which a person's dead body becomes vested with the status of a vessel that both signifies his/her death and objectifies the concept of death. Our major concern here thus is with the blunt fact that the difference between the living and the dead is based on the fundamental existence or absence of life (Chadwick 1994). The dead by our definition are therefore those who formerly lived but who no longer have life.

An absence of life can be illustrated by the empirically recognised character of life, such as a lack of autonomy, self-constraint, reproduction, contra-action or adaptation. Lifeless beings are understood to move only in reaction to an external action, where they lack any determinant functions for their own motion. Conversely, something that is alive has, at least to some extent, a cause for determining its own motion, i.e., the capacity to function. If the principle of the potential to determine motion, whether or not a person is autonomous, can be identified as one of the defining characteristics of something said to be alive, then the significance of the dead, because they lack this defining characteristic, depends upon the living in every respect. Surely, therefore any purposeful attributes of the dead stem from this fact (i.e., no-life).

If the principle established above holds true then it is evident on account of the principle's logic that a chair and a desk have no life. Can we therefore treat dead human bodies that by definition have no life as if they were a chair and a desk? No, we cannot. Equally we can ask whether we can treat a chair and a desk as if they were analogous to a gravestone and an *ihai*, a sort of small wooden "memorial tablet" available to the bereaved and their families to hold daily services for the dead person? Yes, because a chair and a desk, a gravestone and an *ihai* are all items available for ordinary trading. However, what if a gravestone and an *ihai* are already located in a graveyard or a worship altar? We assume then that we cannot put them in the same category as a chair and a desk. The difference established here between a chair/desk and a corpse, or between a chair/desk and a gravestone/memorial tablet suggests the following three points:

(1) A deceased person was a person previously living;
(2) Any dead person has diverse characteristics or attributes;

(3) A deceased person should be extended different values to those which we extend to a chair or a desk.

In other words a dead body whilst being an object or vessel is nevertheless, *ipso facto* of what it signifies, more than an object or vessel and it is this signification which demands we extend to it values greater than and different to the values we extend to inanimate[43] objects or vessels.

1.4.2 Presupposition 1: A deceased person was a person previously living.

The first presupposition would suggest that a dead person is both that part of the person which continues to exist and that part which is changed in and through the process of death. What continues to exist first and most obviously is a body, unless of course it has been "blown to pieces", eaten by an animal or disappeared without trace. Whilst we can distinguish between a living and a dead body, both in reality form a continuum in that if it were not for a living body then the dead one could not exist. This continuum furnishes grounds for the continuation of a partial identity into death predicated in the presupposition that the right to control or govern[44] one's own body can and does survive death. The feasibility and importance of this continuation is, in this thesis, argued to be due to the presupposition that the continuation of a person's intention can survive death. This idea and the associated argument will be explored below.

In order to examine the continuation of the partial identity and the similarity between a person's living and dead body, we will focus on the effects and function of intention. This will illustrate that, in the legal process of a will and

[43] The question "what is the distinction between human bodies and animal bodies" will not be discussed in this thesis because of its *indirect* relevance to this thesis. However, the distinction is derived from the distinction between the attribute's of living humans and living animals. Part of these attributes are respectively transferred to the dead bodies. This distinction is also a product of human sentiments and interpretation.

succession, some significant and difficult problems arise. Whilst an ante mortem intention can survive, we will explore whether the intention of a will that actually takes effect after death is that of a living or dead person's.[45] A further important point is that, apart from such legally authorised intention as exemplified in a will, ordinary ante mortem intention can also survive death despite neither legal obligation nor legal enforcement. In the light of this we will also examine the question "How can a promise bind the parties to it?"

1.4.3 Presupposition 2: Any dead person has diverse characteristics or attributes.

For example, since a dead person who died a couple of minutes earlier still retains something in his/her body,[46] which is derived from the previous living body, s/he and a fossil of human bones cannot be placed in the same category even though they are both "the dead". This distinction serves the purpose of permitting the concept of "the dead" to be roughly divided into three distinct but overlapping categories:

> (A) The dead with existing corpses;
> (B) the dead who are alive in the sense of being symbolised by their ashes or an *ihai*; and
> (C) those who are both dead physically *and* forgotten by the living.

It may not be difficult to recognise that there is an important difference between your parent, who died a few minutes earlier; their ashes that, for instance, on their wishes might have been scattered at sea; and an ancestor who died in the

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[44] E.g., see Stephen R. Munzer 1990, Chapter 3; Alan Gewirth 1996, Chapter 5.

[45] The expression "the intention of a dead person's" *per se* is bizarre in terms of not only logic but also physics. Since a dead body is not a living human, s/he has neither a power to have a will nor an ability to express an intention. However, the meaning of "the dead's intention" is no less than a connotation that, since an intention can survive, the intention that still exists in a space and time, called "after death", separated from the living is, for a convenient reason, ascribed to the dead.

battle of Hastings in 1066. We cannot deal equally with these three categories of the dead. In particular, substantial law does not treat them equally. It may be also held that the differences between the three categories point to the differences between "what death is imbedded in" and "what death is symbolised by".

(A) The dead with their corpses

Dead bodies symbolise and objectify the concept of death. A dead body shortly after death is almost the same as the living body except that by definition it is lifeless. At death there is no immediate transition to a state where the dead are symbolised, for instance, by a gravestone, or in some cases recognised as a dead warrior of an ancient war. Rather it can be held that it is the relationship between death and the subsequent period of time which defines their attributes, i.e., what happens in this time with regard to the livings' interpretation of the way the person died and the accomplishments and/or glory that they were perceived or recognised to have achieved in their lifetime. The meanings and significance attributed to the dead are by virtue of the dead's relation to their previous existence as a living person.

Although diverse values are generated about and around a corpse, all these values are the product of the conceptions, recognition and relationships of the living towards the dead person. Nevertheless, in modern societies the handling and preservation of corpses are regulated by diverse laws which effectively require no act of interpretation, but rather adherence to specified rules and regulations, for example, those dealing with disposal. In practice, how a

[46] This may be conceived on the basis of a sort of moral conviction based on our

corpse is dealt with is contingent on its characteristics, in conjunction with the appropriate regulations. Procedures for post-mortem examinations and the disposal of corpses, burial ceremonies, etc. are for almost all nations prescribed in relevant laws,[47] but to what degree is the legal legitimacy[48] of these laws based on the actual characteristics of the dead? The procedures for dealing with corpses and hence the values thus evinced may well be the result of the living's consciousness towards the dead (e.g., respect or fear) (Polson and Marshall, 1975) in tandem with considerations of sanitation. If it were not for the living's consciousness toward the dead, the corpse would merely be a physical, lifeless vessel or object which merited no special relationship, based on symbolism, with the living and had few social meanings regarding the living. It may therefore be held that insofar as the corpse exists and has social relevance, it exists within the prevailing framework of laws, consciousness and values of the day.

In many old laws religious institutions such as churches, temples and shrines took advantage of the values of the dead to maintain their own power of authority on a daily basis. The most effective general way for them to do this was to establish the rites of death, to sophisticate them and to express their authority

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pretheoretic intuitions.

[47] In England and Wales, the meaning of the corpse is reflected in the diverse laws relating to burial, cremation and exhumation. These include, for example, the Anatomy Act 1984; the Public Health (Control of Disease) Act 1984; The Registration of Births and Deaths Regulations 1987; the Coroners Act 1988; the Environmental Protection Act 1990; the Criminal Justice Act 1991; the Church of England (Miscellaneous Provisions) Measure 1992 and Amending Canon No. 15; and the Still-Birth (Definition) Act 1992 (Smale, 1994). Likewise, in Japan, the following examples are pertinent to dead bodies: Criminal Code 1907; Family Registration Law (Law No. 224., 1947); Code of Criminal Procedure 1948; Law on the anatomy and preservation of corpses (Law No. 204., 1949); Law on Organ Transplantation 1997, etc.

[48] For example sanitary considerations. On investigating the scandalous condition of burials and burial grounds in England, Dr Walker proposed in the 1940s the complete abolition of inter-mural burial, with the establishment of cemeteries for rich and poor, because the smell that emanated from the graveyards was poisonous and sapped the general health and physique of those who lived and slept nearby (Jupp 1990, 6-7). As a result, the law regarding disposal of corpses was established.

through the rites. It could be argued that the religious institutions, and even states, took much use of the events of death to enforce and maintain their own political power. In the religious and social sense different from those connoted by Egyptian mummies, there are, in Japan, 19 mummies in existence (Sakurai *et al* 1998, 308-328). Some priest mummies are preserved at some Buddhist temples at the foot of Mt. Yudono-san[49] located in Yamagata Prefecture, and support local religious authority and influence. For example, the mummy of priest Tetsumonkai preserved at Chūren-ji Temple,[50] Asahi village, abstained from *gokoku* (or the five cereals: rice, barly, corn, millet and beans) for his desire or hope for human peace (ibid., 311). The fasting practice led him to approach the condition of a mummy, and at last his attainment of *nyūjō* (death of a revered priest) in 1829. Sakurai describes: "[P]riests surrounded his body with numerous candles, drying it out by means of the candles' heat" (ibid). Thus mummies of Buddhist priests played a significant role in enforcing the bond of the community and religious beliefs of the commoners through such religious attainment.

Recently, values of dead bodies have dramatically changed. Whilst corpses have traditionally been objects of rituals and cadaveric specimens, they have also served a very important social function as an invaluable source for organ transplants and as a resource to further medical development. It may be a fact that, although the dead with existing corpses and the dead without corpses are both categorised as the dead, the former in particular point to the significant difference of values in terms of the relationship between the dead and the living. This relationship between the dead and the living will be explicated in Chapter 5.

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[49] See <http://www4.ocn.ne.jp/~yuko2000/shonai-r/asahi/sh/yudono-san.html>.
[50] See <http://www4.ocn.ne.jp/~yuko2000/shonai-r/asahi/sh/churen-ji.html>.

In light of both the utilisation and the recycling of corpses, our discussion will also focus on the recent heated arguments over organ removal and transplants, and reflect on some fundamental issues such as proprietary rights over human tissue. Our inquiry will be developed to consider "whether or not a corpse is or can be property" and "what legal interests of the dead are protected?" These two questions will be linked to a further discussion on "how is a corpse dealt with in the case of organ transplants?" Given that a person's corpse is effectively their successor, how therefore a corpse is dealt with can have been previously directed by the intention of that person when living as stated in either their will, or through the possession of an organ donor card. If this line of reasoning is accepted, then even the intention of the dead, although the relation with the dead will make things complicated, can influence the disposal of corpses. Therefore, we will examine the intention expressed by the living that, on or after death, their corpse can be used as a resource for organ transplants.

(B) The dead who are alive in the sense of being symbolised by their ashes or by their tablets

The dead as symbolised by gravestones, for example, may remain *alive* in the living's memories. The dead who through the necessary social and natural processes and law have been divested of their bodies and resultantly are either buried, cremated and therefore as ashes,[51] or symbolised by an *ihai* are logically and necessarily dealt with by the different rules and regulations governing the

[51] In general ashes are, in Japan, regarded as a memorial symbol or something beyond it, but, in Britain, as a by-product of a disposal process which most people then scatter.

disposal of corpses. This transformation of the dead's attributes requires further and different legal treatment.[52] Even though the symbols commemorating the dead may have religious significance, they are, in terms of the bodies of the dead, less significant.[53] For example, in Japanese law an indignity against an *ihai* or a gravestone is dealt with differently from an infringement against a body *per se* (see 5.2.3). The former indignity is considered to be equivalent to an abuse of the bereaved's sentiments; hence it is not a direct infringement against the dead. Conversely, direct and invasive action against a dead body is an action directly against the dead, although there is a discussion on whether the dead can be harmed (see 2.2). In short, the dead as symbolised by a gravestone or an *ihai* are those recognised by the living. This recognition is dependant upon the mutual relationships of society, community and social groups.[54] This notion of relationship[55] is a key term that this thesis has to explain.

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[52] See Chapter 24 of the Japanese Criminal Code "Crimes Concerning Places of Worship and Graves". The chapter prescribes "Indecency Against Places of Worship and Obstruction of Sermons, etc." (Art. 188.), "Excavation of a Grave" (Art. 189.), "Damage, etc. of Dead Body, etc." (Art. 190.), "Damage, etc. of Dead Body, etc. by Excavation of Grave" (Art. 191.) and "Secret Burial of Person Whose Cause of Death Is Unknown" (Art. 192.). The respective penalty and fine are dependant upon the content of the crime.

[53] Of course the symbols are, to some extent, representatives of the body—in effect they have replaced the body as the physical thing or object and provide a point of focus for respect and memory, certainly in the case of a gravestone, perhaps not the case with ashes. The point however at which the body was cremated and / or ashes were scattered or placed would be marked and this mark, whether a plaque, a rose-bush, a bench or an entry in a memorial book would thus become symbolic of the physical body.

[54] Simultaneously the values *per se*, of the dead should be reasonable and practical.

[55] As Durkheim (1915, 347) said "... It is real only insofar as it has a place in human consciousness, and this place is whatever one we may give ... Society cannot do without individuals any more than these can do without society". This quote can be applied to the case of the dead. The dead remain a reality insofar as their social character exists in the living's perceptions and memories. As the dead cannot exist without the memory of the living (except they could exist in the pages of history books or archive records and yet not be in the conscious memory of those living at a particular time), so a society cannot exist without its dead. Needless to say, the relationship between the dead and society is different from that between the living and society. This difference stems from the difference between the attributes of the dead and the living. Insofar as the dead can no longer wield direct control over their own affairs, unlike the living, they cannot directly involve themselves in society.

Deepening the discussion on relationship may lead to an answer as to whether or not it is proper to argue that the dead discussed in (B) above can hold character (e.g., reputation) which is vested in the actions and memories inherited from when they were living. Deepening this discussion will further enable a discussion of the defamation of the dead; and moral rights in Japan, Germany and other European countries. This might include "copyrights of the dead",[56] which objectify moral rights. Although a moral right of a deceased person can, in Japan, be found in copyrights, justification for the moral right may require a development of the argument "Can a deceased person be defamed? Namely, can the reputation of a deceased person be harmed? Or can s/he be harmed?"

(C) The dead who are both dead physically and forgotten by the living

The dead who have been forgotten by the living, for instance unknown dead soldiers from the Battle of Hastings, 1066, can be contingently given a value by virtue of the living's imagination or through an evaluation of their archive records. The extended time period and the relationship between present persons and such dead ones may suggest any consideration of *rights of the dead* is not practical. Yet, importantly, this distance of years serves to highlight the need to consider and discuss issues surrounding "How many years copyright can be valid

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Their involvement is instead solely through the living, namely the living's perceptions and actions. This relationship can be considered to be a normative one. This means that the equivalent interaction to that which is generated between the living and the rest of society, is not generated between the dead and the living. Therefore, we can call the relationship a "quasi-interaction" because the relationship between the living and the dead takes place within the interaction between the living and the rest of society, all of who are conscious in some measure or form of the dead. It follows that some patterns of interaction, such as exchange, co-operation, sympathising, compulsion and conflict, can be considered feasible within the world of the living.

[56] See Article 60 of the Copyright Law (Law No. 48, Japan, 1970) regarding "Protection of Moral Interests after the Author's Death".

after the author's death" and "How many years after death can a claim for defamation be valid".

1.4.4 Presupposition 3: The corpse of a deceased person should be extended different values to those which we extend to a chair or a desk.

The third presupposition would suggest that we refrain, in most cases, from disposing of dead bodies as soon as they pass away in the way that we might dispose of a desk or a chair when they are no longer of any value to us. The self-evidence of this is based both on the bereaved's emotions toward the deceased person and prevailing social beliefs. The bereaved can recall from the dead body the past images of the dead person and the reminiscence of the experience with that person. Through such an action they can understand the dead as an irreplaceable symbol which holds characteristics. Given our interpretation above regarding the relationship between the living and the dead, the reason why we cannot regard a dead body as a mere *thing* is, as argued in this thesis, both that the dead have social characteristics[57] which survive death and that the living recognise the function of these characteristics. Below we will explore and discuss what these social characteristics comprise and how the inherited social characteristics can give influence to *rights of the dead*.

We have written and demonstrated above that questions regarding the dead are, at least in this thesis, diverse. In addition, further and fundamental questions related to presuppositions (1), (2) and (3) will also be explored, including "Do the dead have interests?" and "If they do, what kind of interests do

[57] Here suffice it to say that "social characteristics" refer to the roles that a person plays in society and as something from which it is justified to demand performance in certain circumstances, based on the stipulations of a moral "ought". Of course this definition can be

they have?" If it is argued that the dead have rights, then to assert that the dead have interests should also be justified (although not all those who have interests are right-holders). Put in that manner, in order to explain this thesis's most important hypothesis "*Rights of the dead* can be justified", some supportive sub-hypothesises will be derived. These will be discussed under the following approaches in their respective chapters.

1.5 Six approaches for explication

1.5.1 *Approach 1 (Chapter 2): Can the dead be harmed?*

To ask whether "the dead can be harmed" is to court controversy. Joan C. Callahan points up this potential when she suggests "...the reason that all arguments for harm and wrong to the dead must fail is that there is simply no subject to suffer the harm or wrong" (1987, 347). Callahan's point here raises several questions which need to be addressed if such controversy is to be resolved. In particular, we need to examine first: what is meant by being harmed? Second: what or who is a subject who is harmed? Third: if the who or what which suffers loss is not a subject can they be harmed? Finally: is being harmed associated with the degree to which a subject is conscious of, or recognises the harm? These questions will be discussed in Chapter 2. Our response will be grounded in the following counter-argument to Callahan's position on the subject.

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applied only to a living person, because, apart from the dead, s/he has a good reason to expect some form of performance, interest, claim or duty.

Our response can best be presented and illustrated by the use of a theoretical case example[58] in which contrary to their wishes both living person A and dead person B have their hair cut off. A, a person in a coma, wished to grow her attractive hair before she was involved in an accident. Her wishes are valid even given her present circumstance. However, her doctor requires that her hair be cut off for the convenience of brain surgery. Whilst cutting off her hair without consent would be an action against her wishes, the action can nevertheless be justified on the grounds of both the impossibility of obtaining her consent and the legitimacy of the medical aim. Yet regardless of this justification we can still maintain that the fact of this matter is that A would be harmed as a result of her hair being cut off. Counter to Callahan's position, the fact that A, the subject being harmed, is still alive, although in a coma, is sufficient justification in itself to justify the claim for harm. Therefore, insofar as the consciousness-lacking patient is a subject, a status gained by virtue of being a living person, a conclusion that she can be harmed and hence wronged is warranted.

Now let us examine the situation in which contrary to her antemortem wishes and intention dead person B similarly had her hair cut off. Given that B is dead prior to having her hair cut off we can reasonably ask whether there is a difference between A and B in terms of being harmed? First, when it comes to being harmed, something has to happen to the party claiming or experiencing harm as a result of an action alleged to have caused the harm. In the case of A above, nothing except for the cutting off of her hair happens to her. Very similarly, in the case of B, the deceased person, nothing excepting for the cutting off of her hair happens to her. In short, in both cases the actual action of the

[58] In the discussion on "uneffecting harm" Feinberg (1977, 305) argues a similar

cutting off of hair is indistinguishable and therefore the action produces the same result in both cases. Both A and B are harmed as a result of the action of the cutting off of their hair, against their wishes, by a third party. If it is possible to argue that A, despite being in a coma, is harmed by the action of the cutting off of her hair, then it should equally be possible to argue that B, despite being dead, is also harmed by the action. In both cases neither person at the time their hair is actually cut has the capacity to know and recognise what is happening to them. In terms of the possession of such capacity, the circumstances for both A and B are similar.

Suppose that A had a definite intention up to the point when she lost consciousness to reject having her hair cut off. Likewise B had the same intention and expressed up to the time of her death the undesirability of losing her hair. In the case of A there is a characteristic to which intention can be attributed, *ipso facto* A is alive. Notwithstanding her lack of consciousness, she can be categorised as a living person. On the other hand, B's death extinguishes B as a subject. However, precedents established by virtue of the legal institution of a will or the binding of a promise would suggest that B's intention can nevertheless survive death. Put that way, the emphasis placed on the import and effect of intention would suggest that the object of harm after death is, in the case of B, in fact, B when B was still a living person. Given it is *physically* impossible for a living person to be harmed after his/her death, we would have to say that those harmed after death are the dead who succeed to the characteristics of their former living selves. This hypothesis will be discussed in Chapter 4.

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perspective to ours. He tries to apply the idea of "harming a living person" to that of dead

We can examine "posthumous reputation" similarly. When a living person's life is ended as in the circumstance of being killed, this harm is categorised as the killing of a person, i.e., murder or manslaughter. But the action of harming a corpse cannot be similarly categorised as the killing of a corpse, because it is impossible to kill someone twice. In terms of the form of being harmed, both offences have a difference which lies in the different attributes belonging to the living and the dead respectively. However, defamation is a rare example by which both the living and the dead can be harmed notwithstanding their different attributes. In this thesis we will justify defamation of the dead. Moreover, we will argue that it is possible to achieve this justification not by relying on the attributes of the living and the dead, but rather through an analysis of the very nature of defamation.

In Chapter 2 we examine the *harm* thesis in the light of some specific questions: When a corpse is damaged or the reputation of a deceased person is sullied, what or who is actually being harmed? If the dead cannot be harmed, then is it possible for nobody to be harmed? If a living person is otherwise harmed, is the person a former living person of the damaged corpse? Any answer to this question is *prima facie* at least bizarre. It is difficult to justify the posthumous harm from a moral point of view, in particular because dead persons cannot perceive of damage or harm against them. If it should be possible for the formerly living person of a corpse to be harmed, then it would follow that time goes backward. We, despite the apparent bizarre nature of any answer, nevertheless will argue that the dead can be harmed both in the case of damaging a corpse and in the circumstance of defamation of a dead person.

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persons (see Chapter 2).

More precisely, this implies that any intention embedded in a dead person by virtue of succession to the characteristics they held as a living person can potentially be harmed. This kind of intention can be rephrased as the "expectation of a living person after death". However, expectation or intention of a living person cannot be embedded in a corpse or a dead person *per se*, because they are lifeless. Such expectation and intention are embedded in the legal instruments (e.g., the will) that belong both to the dead and the law which is established to deal with death. There is actually an expectation or intention that people desire their interests to be protected, that their interests be treated with respect and dignity in accordance with their beliefs they held whilst alive. Although these mental activities are not necessarily legally binding in the way that an authorised intention as expressed in a will would be, they are, nevertheless, in most societies, worthy of respect. Thus giving up the moral justification, we will justify legally and sociologically for the posthumous harm. Our theoretical grounds are what are relevant to the relation between the dead and the living and to social and psychological concepts based upon minds, beliefs and myth.

On the basis of the *harm* thesis, we will conclude that the expectations or intentions of living persons, regarding their death, are embedded in the legal and personal instruments and that that which is harmed is the expectation or intention which survives death. Given the argument above which postulates expectation or intention is embedded in death and from the point of death cannot be regressed to the situation before death, we can logically argue a further step and claim the dead can be harmed. This further step permits us to challenge Callahan's claim: "I want to suggest that our pretheoretic intuitions regarding harm and wrong to the dead are not genuine moral convictions at all but are,

rather, judgments we are inclined to make simply because we *think of* the dead as the persons they were antemortem" (1987, 347) [original italics]. It is worth reiterating at this point that, since a subject which is harmed does not exist, it follows a dead person cannot be harmed. Rather, we are claiming that regardless of whether or not an actual harmed subject exists, if harm is done to a dead person then that harm is to a dead person regardless of whether their corpse is or is not physically present.

1.5.2 *Approach 2 (Chapter 3): Intention*

This chapter examines a fundamental question: "why can the intention of a person survive his/her death?" To address this question our discussion will focus on some issues of intention raised by testate or intestate succession. The discussion then moves on to examine some controversial issues raised by the concept of intention. Based on the moral discussion about intention, this examination will develop to the legal discussion.

A will gives legal effect to the final intention the deceased expressed before death, and constitutes a form of guarantee that the intention will be carried out. A person expresses his/her intention in documentary form; moreover, compliance with the relevant legal provisions triggers the institutional device that enables the appropriate actions to be taken after death.

What should be noted here is, however, that it is not uncommon for there to be a considerable time lapse between the time of making a will and that of its execution. The subject of the will ceases to exist upon death. Still, despite the fact that a subject who autonomously made a will no longer exists, law regards the will as a living person's will. In this chapter, we shall examine the will's form

at two distinctive time periods, i.e., before and after death. We will attempt to answer whether the intention of a will that takes effect after death is that of a living or a dead person's. In so doing we will not resort to sophist methods, for instance the *nominalism* of medieval times.

Such a question is very important. If a will belongs to its maker and is enforced on death, then law is faced with and has to justify a paradox. That is, law is granting a right to something without a subject.[59] If, a will's existence and its enforcement can be justified post-death, the acceptance of this notion may provide support to the presupposition that there is a *right of the dead*.

The approach taken in Chapter 3 would lead to this conclusion. Although, in testate succession which closely mirrors the deceased's intention, the succession commences on death, logically in both the Japanese and English systems of law, the right that is transferred from the dead who are succeeded by the living can be regarded as a "right of the dead".[60] Logically a *right of the dead* can therefore exist in succession. Also, in intestate successions, although the intention used is different from the intention used for testacy, it can, as quasi-intention, maintain the order of succession. Insofar as the quasi-intention is succeeded after death and the effect of the intention is implemented after death, we logically cannot but adopt the term "intention of the dead". Thus it follows

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[59] E.g., one can understand that, in English law, the person having made their intentions and wishes clear is represented after death by their executors, who execute the will according to the intentions and wishes of its subject in accordance with the law, but this understanding is not clear in terms of identifying the jural or juridical status of the parties (see Steiner 1994, 254-5).

[60] If we view from the eyes of a living person, the subject of a will is a person who was once alive, i.e., the dead. On the other hand, at the time when the person expressed his/her intention in a written will, the intention will be expected to take effect after his/her death. This intention is a posthumous one but at the same time any posthumous events are future ones to the person who made a will.

that, in the same way as intention of a will, *rights of the dead* can logically exist in the legal principles of succession.

1.5.3 *Approach 3 (Chapter 4): The social characteristics of the dead*

Moral discussion shifts to legal and sociological justification. As a result legal and sociological terms will be necessarily used as key ones of this thesis. An important component of this thesis is the realisation that the primary justification for the right of succession lies not only in the intention of the dead, as Hugo Grotius (1950) argues, but also in the social character of the dead. The social characteristics of the dead include a proper expectation, interest, claim, and duty justified in terms of their particular social roles and situation within society (Nisbet 1970). There is, therefore, a strong association between: the social characteristics of a dead person and the prevailing social climate; the availability and nature of different social roles and hierarchies; and the varying forms of social authority. It is worth noting that when it comes to succession in modern society, succession is usually considered to refer to property only. Historically, people in Japan and England succeeded not only to property but also to legal or social status and roles. In this construction, although the social character of the dead is not so complex or multi-faceted as that of the living, the dead do nevertheless maintain a distinct and stable character which is on a par with the living. The social character and significance of the dead are composed in and given relevance and meaning through the daily activities, needs and interests of the living. Namely, the explanation for moral justification shifts to an attempt for sociological justification.

Any human society is composed of diverse types of social roles, social status, and social interactions between different social members. Membership of any society places obligations on its members with regard not only to their relations with the living, but also to the way in which they deal with the dead. Broadly speaking there are four ways in which we can categorise the attributes of the dead with regard to the role they play in society and hence establish relationships between the living and the dead. First, the dead as an object for human action. A dead person, as an object and symbol, is one of things that can be used and manipulated by the living. Second, the dead as a catalyst for succession. This suggests that the dead are, under the regulations succession law prescribes, fundamentally treated equally. Third, the dead as a successor. This refers to the dead who on death then succeed to part of the character and status they held before death. Take for example two traffic victims. If the victims were an unemployed elderly woman and a president of a large conglomerate, the social treatment toward these two people would be different. The difference would involve not just the resultant financial compensation to the bereaved, but also the values attached to the victims as well as the scale of their funerals. This difference potential implies a difference in the power succeeded from the pre-death social character, former social authority, status, and roles. Fourth and finally, the dead as a symbol. This category refers to the dead who come to possess an historical status through memory and a celebration of their lives.

What these four modes suggest is that when considering any society and its social norms, in the same way that we do not ignore the role of its constituent living members, we cannot ignore the role of the dead. We can therefore conclude from this that the living and the dead are equally significant social

components in any society. Social character refers to the substance of this social involvement and the symbol of the social relations. It is incorporated into the relation between the living and the dead, which have, in some cases, the impossibility of substitution but not in other cases. We would note that analogously to the living, the dead also possess a social character. Obviously, there are many similarities and yet also many differences between the character of the dead and that of the living. Needless to say, unlike the living, the dead cannot of themselves labour or act. Nevertheless, they do obtain a place, which does not have the possibility of substitution, in the meaning of the living through social associations. Character, meaning, and value exist in the social characteristics of the identities of the deceased, for instance as traffic victims, donors, or in social situations such as emergencies or festivals and public holidays. Death and the physical appearance of the dead do not necessarily determine the social character, meaning, and value of the dead, all of which would exist, as an irreplaceable symbol, behind the physical appearance. The distinguishing example for the irreplaceable symbol is a brain-dead body. In a work (Deguchi 2001) where the symbolism of inner organs is discussed from an anthropological point of view, Professor A. Deguchi strongly suggests not only that a brain-dead body is not a mere dead one but something which still retains the characteristics of the pre-death person, but also that the body reminds us of the irreplaceable relation between a deceased person and his surviving relatives (ibid., 57). In a case without recalling the past images of the dead and reflecting oneself one would treat a human body as a mere thing. However, as far as we live in society, we are necessarily involved in the relation between the dead and

the living and provide, within the relation, symbolic meanings and values to a deceased person and his/her body by the medium of the social characteristics.

Understood in that way, the idea of "the characteristics of the dead" will be used, in this thesis, to explicate two presuppositions: first, "since persons can succeed to their former characteristics in the transition of death, dead persons cannot be regarded as mere things"; second, "if we can accept that dead persons have their characteristics and influence the living, then it follows that there are some cases in which we can regard the dead as right-holders". This would be an attempt to explicate a hypothesis based upon person's beliefs or a theology distant from moral debate.

1.5.4 *Approach 4 (Chapter5): Dead bodies*

This chapter first attends contemporary discussion on body and evolves it from the association with the debate over dead body. The main discussion here focuses on the following four points. The first bears the question: "what is a dead body?". With regard to what a dead body means and implies in society, the discussion will be influenced by interdisciplinary points of view such as philosophy, law, sociology and anthropology. Philosophically, on the application of some perspectives on self-ownership to the paradigm of a corpse; legally, on the dead body as a traditional object for burial and as a socially useful resource for medical use such as organ transplantation; sociologically and anthropologically, on the ambiguity between a living body and a dead one that arose from the concept of brain death. This ambiguity suggests that the concept of brain death altered the traditional definition of death and that, in a circumstance where the concept of brain death is against traditional culture and

attitudes toward death; the boundary of life and death becomes vague. This, entwined with organ transplantation, creates the ambiguity of death concerning organ transplant procedures. This ambiguity is not necessarily a Japanese phenomenon based upon Japanese culture but we can find it even in the Western dualism of mind and body. In the process of developing a discussion on what constitutes a dead body, we will explicate that the ambiguity is in reality associated with the symbolisation of a dead body and its character of commodity under the market's logic.

The second point is to discuss a question "Can a corpse be a commodity?", whose framework of discussion is offered in the debate on "What is a corpse?". Since a corpse is a symbol that lets us identify a dead person with his/her pre-death diverse attributes and characteristics, heated debate on regarding a corpse as a replaceable commodity will take place. When we accept a view that a corpse is one of commodities we will discuss it, regarding it as an object for a property or succession right. Therefore most discussion here will be provided at the legal level.

The third point is that the discussion on *rights of the dead* will here focus on the right to dispose of a corpse. The discussion will be subdivided into three parts. The first one is on whether a right to dispose of a corpse is of the living or of the dead. Is it possible to ascribe a right, which survives death, to a deceased person despite the rule that the deceased person is no longer a subject of rights? If such ascribing is possible, then how can we justify the retroaction to the past person? When an infringement against a person's right really takes place after his/her death, is it not impossible to retroactively ascribe the posthumous interests and protection to the pre-death person? The second discussion is on

whether perceptions of the concept of "rights" are different between Japan and Western nations, especially England in terms of a right to dispose of a corpse. The examination of the concept "rights" *per se* leads us to explore a right to posthumously dispose of a body. In addition we will discuss the difference between Japanese and English positions regarding the consent of the removal of organs; and on how the difference, if any, affects that right. One of our arguments is that in the case where a will regarding posthumous disposition causes competition between a dead person and his/her surviving relatives in Japan, an individual's right often comes to be converted into a collective one. As the third discussion, making a careful comparison between Japan and England, we will examine why the Japanese are reluctant to accept organ transplantation as a standard form of treatment. We challenge the belief and assumption of the reluctance. In doing so, we will justify our position by using the argument of our own *Nihonjin-ron* (the discourses on the Japanese) whilst we refute the grounds from other *Nihonjin-ron* perspectives that the "reluctant" assumption is taken for granted. In the comparison between Japanese and English law, we will find that there is a considerable gap between them in terms of the practice of organ transplantation. We will argue that the difference can be identified with that of the concepts of "public interests" and "rights" and it can be beyond cultural justification. Based on the consideration of the sociological concepts of "social characteristics" and "relation", the difference of the concept of 'public' between the two nations' discourses will be articulated in the discussion. One example will be signified and suggested by the term "request" (see Section 1 of the Human Tissue Act 1961). "It will be argued, additionally, that the Japanese concept of "rights" includes connotations different from English ones, which affect

the Japanese perception of donating organs". In Japan the belief that a dead person is given "personhood" and can continue to be "alive" in society, namely when "a dead person has his/her inner organs" is not necessarily ridiculous; and another belief, that a dead person is as if he/she were still alive, is not in short supply. In terms of the strength of theological briefs, it is an actuality in Japan that the relationship between the living and the dead is significant, for example the legal fact that "possession of the dead" is conceded in Japanese legal discourse (see 1.3.4).

The fourth discussion is on why it is possible in Japan to justify the concept of *rights of the dead*, but not necessarily in England. The main reason is explained by the argument that there is a difference of symbolising "social characteristics" between Japan and England. We ground *rights of the dead* on the posthumous social characteristics of the dead, based on the understanding that a corpse is a type of symbol which awakens a variety of attributes or characters. Logically, it is difficult that rights can survive death. However, once we have recognition that "a dead person has a right", then part of the contradiction connoted in legal systems will be resolved by an institution or devise of legal fiction despite the impossibility of, logically, surviving rights after death.

1.5.5. *Approach 5 (Chapter 6): An antemortem promise and its posthumous performance*

In this chapter, we will discuss, in light of morality, "how a promise can bind the related parties to it even after death". The reader might ask how the discussion on binding promises are related to the *rights of the dead* and why this chapter

requires the discussion? It is related to what we presuppose in Chapters 2, 3, 4, and 5. At the moral level we will argue here that a promise survives and binds its parties after death because the value of making and keeping a promise is significant to the parties concerned, and moreover, they value the fairness of a promise. We will also argue that promises are made and taken advantage of on a daily basis by parties, for the usefulness of a mere promise is often recognised. The promise is regarded as an institution that morally binds parties to it, even if subsequently either or both of the parties change their minds. In addition, we will explain the promise using the concept of "social person" (identified in Chapter 4), a role which all the parties of the promise possess and play out. This explication is based on the argument that a person's social characteristics can survive his/her death.

Considered in this way, the surviving social characteristics of a person may bind his/her survivors in the same way as a living person's social characteristics can bind other persons to a particular course of action. Such characteristics of the dead function as a quasi-right via an impression. One reason why the living fulfil pre-death promises is that they might recognise that the dead person still "holds" a quasi-right. Thus, discussion of "how a promise can bind the living and the dead to an action or series of actions" is highly relevant to *rights of the dead.*

1.5.6 *Approach 6 (Chapter 7): more than traditional debate*

In the concluding chapter, using a different approach from the line pursued in the first five approaches, we will briefly answer the question: "Is the justification for *rights of the dead* based upon *Will Theory* or *Interest Theory*?". In order to

answer this question, the two traditional theories could have been employed to provide a framework for the examination of rights. Such theories are generally linked to the debate on "life" rather than that on "death". It may have been interesting to know how rights can be established when such competing theories are linked to the debate on "death" or how rights can be frustrated. If the term *rights of the dead* itself assumes the need to "*hold* a right", then it would seem any argument for *rights of the dead* is fundamentally flawed given it is absolutely impossible for a dead person to hold anything in that to hold requires an ability which a dead person quite clearly cannot possess. In the perspective based on the characteristics of the dead, we would have connected the dead to society or communities and derived some bases of rights from the position of *Interest Theory*.

Thus re-examining whether it is possible to apply the traditional theories for establishing *rights of the dead*, we will discuss not only right-based perspectives but also duty-based ones, and furthermore develop to the debate on the association with the *posthumous harm* thesis and the *social characteristics of the dead* thesis.

Chapter 2

Can the dead be harmed?

2.1 introduction

This chapter consists of two main parts. In the first part we concentrate on discussing the philosophical questions: "can the dead be harmed?", and "does a dead person have an interest?" We will not adopt a metaphysical argument, rather we will claim the view that the dead can be harmed and that they have interests. We will highlight the argument regarding defamation of the dead and review the characteristics of reputation. In the second part of this chapter, by examining the attitudes of Japanese and English law toward defamation of the dead, we will argue that subjectless rights exist in Japanese substantive law; and that it would be possible to prescribe for "defamation of the dead" in English law. The reason that this chapter is composed of two parts is that we will attempt to justify our arguments not only through philosophical debate, which is provided in the first part on "can the dead be harmed?"; but also by the second part, which examines the legal or social examples of "defamation of the dead", a typical concept of "posthumous harm" thesis, provided by substantial law and court decisions.

2.2 At the outset of the discussion

In his two elegant essays[61] published in the 1970s, Joel Feinberg asserted both that the dead can be harmed and that the dead have an interest. Feinberg argued that a person can be defamed after his/her death and the presupposition that this could occur can be justified. According to Feinberg, harms are concerned with the "frustrating", "defeating" and "setting back" of interests that include possession, privacy, friendship, reputation, health, career, etc. Identifying interests in that manner, he addresses the relation between interests and harm:

> "Interests can be blocked or defeated by events in impersonal nature or by plain bad luck. But they can only be 'invaded' by human beings, either oneself, acting negligently or perversely, or by others, singly or in groups and organizations. It is only when an interest is invaded by self or others that its possessor is harmed in the usual legal sense, though obviously an earthquake or a plague can cause enormous harm in the ordinary sense" (1977, footnote 1 in p. 283).

Strictly speaking, the term "interests" that is used in this paragraph is not necessarily used in the same way as other uses of "interests". The change in terminology took place mainly because of traditionally different attempts to examine the connection between the law and the needs of man as a reasonable being. As a matter of fact, even Roscoe Pound (1959) pointed out that the concept of "interests" may be identified from many angles. Evaluating any available definitions that have been provided, we will adopt a pertinent classification of interests (Beyleveld and Brownsword 1994). The authors classify interests as:

> (a) Personal Interests. These divide into two categories:
>
> (i) Biological or Life Interests. This category includes interests in life, health, comfort, food, sex, fun, knowledge, and control of nature. Such interests are common to most human beings, and are functions of the fact that human beings are biological creatures.

[61] *The Rights of Animals and Unborn Generations* (1974) and *Harm and Self-Interest* (1977).

(ii) Purely Individual Goals. These are interests which derive from differences between individuals, rather than from factors which human beings share in common.

(b) Moral or Reciprocity Interests. This category includes interests in mutual accountability or responsibility for action, mutual care or concern for the welfare of persons, respect for persons, and empathic knowledge (ibid., 121).

In the debate on the dead, evidently category (a) should be excluded because it assumes life. Also, even when we discuss category (b), the elements based upon being alive should be excluded. Therefore applying category (b), we can consider privacy, friendship, reputation, career, etc., which Feinberg took for example, as interests in which the dead would be posthumously harmed.

In the most significant section of "Harm and Self-Interest", Feinberg (1977) argues the following four presuppositions:

(1) To harm is to invade interests.
(2) To have interests at a particular time, a person must have the capacity to experience "awareness, expectation, belief, desire, aim and purpose", but s/he does not have this capacity after death.
(3) There is a difference between a person having an interest at a time and that interest's existence at that time. The person's interests, which might continue to exist independently after his/her death.[62]
(4) These surviving interests may be harmed posthumously by being posthumously infringed.

2.2.1 *Presupposition 1: To harm is to invade interests.*

According to Feinberg (1984), harm occurs not when a person is merely hurt or offended. Rather, it occurs when a person's interest is frustrated, defeated or set back. What Feinberg means by interests is something in which we have a stake. Therefore, many of our interests are obviously linked to our wants and desires, so that a mere want does not constitute an interest. Minor disappointment for instance is not a frustration, defeat or setback of an interest. Taking advantage of W. D. Ross's (1939) distinction between "want fulfilment" and "want

[62] Defamation is a good example provided by Feinberg.

satisfaction",[63] Feinberg highlights the directional nature of interests and points out that interests are "ongoing concerns" rather than temporary wants:

> "[H]arm to an interest is better defined in terms of the objective blocking of goals and thwarting of desires than in subjective terms; and the enhancement of benefiting of an interest is likewise best defined in terms of the objective fulfilment of well-considered wants than in terms of subjective states of pleasure" (Feinberg 1977, 303).

The objective of an aim (i.e., the basis of an interest) is "not simply satisfaction or contentment, and the defeat of an interest is not to be identified with disappointment or frustration" (ibid., 304). Although we can accept this explanation, it does not necessarily lead to the following claim:

> "[D]eath can be a thwarting of the interests of the person who dies, and must be the total defeat of most of his self-regarding interests, even though, as a dead man, he can feel no pain" (ibid.).

This claim is logically incorrect. Since death is, before a thwarting of the dead's interests, a thwarting of the living's interests and the dead can feel no pain, the above quote should be corrected to read "death must be the total defeat of most of the *living's* self-regarding interests".[64]

Feinberg defines the moment of death as, "the terminating boundary of one's biological life" (ibid.). It is itself an important event within the life of one's future-oriented interests (ibid.). In short, he grasps death as a cause of thwarting an interest. He argues that "[w]hen death thwarts an interest, the interest is harmed, and the harm can be ascribed to the man who is no more" (ibid.). However, there is no explanation of how and why the dead can have an interest, or how and why the thwarted interests of the previously living person can be

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[63] These two concepts were developed in *Foundations of Ethics* (Ross 1939) and can be readily understood by the explanation that a person can be fulfilled without satisfaction and s/he can feel satisfaction without fulfilment.

[64] Our attempt at rephrasing this may be considered as being superficial or reiterative. However, the phrase in question should be changed into, at least, our rephrasing, because the wording of the original phrase is ambiguous in terms of the logical explanation of the living and the dead.

transferred to the now dead person. He likens the harm that can be ascribed to a dead person to the debts that can be charged to his estate (ibid.). This analogy is misplaced. The analogy means that a living person's debts are cleared after his/her death by being charged to his/her estate, but does not include any subsequent debts the dead person incurs after his/her death that are cleared by him/herself (i.e., a dead person). In other words the living persons would clear any debts that can be incurred by death, e.g., the costs of funeral, probate, etc., either through the resources of the dead persons estate or from other monetary sources.

2.2.2 *Presupposition 2: To have interests at a particular time one must have the capacity to experience "awareness, expectation, belief, desire, aim and purpose", but one does not have this capacity after death.*

This presupposition raises the question: "can interests that we cannot hold unless we have the capacity to experience those things, be held by the dead who do not and cannot have the capacity?" As a matter of fact, Feinberg accepts that death extinguishes the relationship between a person and his/her interests (1984, 248). He states that a necessary condition of the concepts of "harm" and "interest" is the capacity of the "person" to be affected. However, no events after death can change even a moment of a person's death. Nothing remains to be affected. Given this, we must wonder if the following passage is therefore compatible with his argument "the dead have interests": "without awareness, expectation, belief, desire, aim, and purpose, a being can have no interests" (Feinberg 1974, 61). This suggests that Feinberg explicitly claims that the extinction of a person's interests is concomitant with his/her death.

Nevertheless, Feinberg argues that interests do survive the death of the interest bearer so that the dead can be harmed by the invasion of their interests. However, as Earnest Partridge points out, "it would seem, by Feinberg's own rule, that if a person cannot be affected, he cannot be harmed" (1981, 249). Unless harmed, "he cannot be a relatum in the relationship of 'having an interest in Y'" (ibid.). Partridge offers a pertinent analogy when he comments on this strand of Feinberg's argument, "posthumous interest" is paradoxically "the sound of one hand clapping" (ibid.).

As for interests that die with a person, Feinberg would argue that these are the interests that "can no longer be helped or harmed by posthumous events" and include most of the person's self-regarding interests (Feinberg 1977, 304). He admits therefore that interests become extinct on the holder's death. Thus, two questions arise: first, why can interests that become extinct on death nevertheless survive death; and second, how can a dead person whose interests are extinguished on death be harmed by the invasion of the interests that survive his/her death? He attempts an answer to these questions in the discussion of the third presupposition.

2.2.3 *Presupposition 3: There is a difference between a person having an interest at a certain time and the existence of the interest at that same time. The person's interests might continue to exist independently after his/her death.*

The argument of "Unaffecting Harm" is, as Partridge suggests, Feinberg's most persuasive defence. Feinberg attempts to apply the concept of harm equally to the dead as to the living. In this application he answers our question. He argues:

> "How can a man be harmed, it might be asked, by what he can't know? Dead men are permanently unconscious; hence they cannot be aware of events as they occur; hence (it will be said) they can have no stake one way or the other, in such events. That this argument employs a false premiss [sic] can be shown by a consideration of various interests of *living* persons that can be violated without them ever becoming aware of it" (1977, 305) [original italics].

Examples proposed by Feinberg include "possessary interests" and legally recognised interests "in domestic relations", which are invaded when a person's spouse engages in secret adulterous activity (ibid.). In the former example, he points out that a landlord's interest in the *exclusive* possession and enjoyment of his land "can be invaded by an otherwise harmless trespasser who takes one unobserved step inside the entrance gates" (ibid.). In the latter case, the interest lies "in being the exclusive object of one's spouse's love" (ibid.). The interest can be harmed even if the spouse is unaware of the fact of the secret adulterous activity. However, he takes human reputation as being the best example of the argument of "unaffecting harms":

> "If someone spreads a libellous description of me, without my knowledge, among hundreds of persons in a remote part of the country, so that I am, still without my knowledge, an object of general scorn and mockery in that group, I have been injured in virtue of the harm done [to] my interest in a good reputation, even though I *never* learn what has happened. That is because I have an interest, so I believe, in having a good reputation *as such*, in addition to my interest in avoiding hurt feelings, embarrassment, and economic injury. And *that* interest can be seriously harmed without my ever learning of it" (ibid., 305-6) [original italics].

According to this argument the subject of the libel can be harmed even if s/he does not hear/know of it and, in the above case, the subject's reputation *per se* is harmed: apparently the people did harm "my reputation". It seems that Feinberg puts "the reputation being harmed" and "the subject of the reputation being harmed" in the same category. He understands that if the interest known as "a good reputation" is, irrespective of knowledge about the defamation, harmed, then it means that the reputation of the subject and the subject *per se* are harmed. In short, he argues that in addition to being able to distinguish between

a person's having an interest at a certain time and the existence of the interest at that same time; it is possible to argue that if the interest is harmed, then its subject can be harmed. If his argument is correct a further inference becomes logically valid, a mere feeling of insult that we hold towards someone in our *minds* means that we harm that person. We surely however cannot accept this ludicrous claim.

Suppose that a thief stole the one and only draft of a novel that took me many years to write from my office cabinet, and tore it up. In applying the reasoning of Feinberg's "Unaffecting Harms" rule to this case, even though I am unaware of the damage, my interest is harmed at precisely the time when the draft is torn up. In applying this logic to the case of defamation, those who criticise Feinberg's perspective have to address the point that, although the draft was harmed, the person whose draft was harmed is not harmed insofar as s/he does not hear about it. However, this is bizarre. For, despite a lack of knowledge of the damage to the draft, any project or plan (e.g., publication) for the draft had already been frustrated at the very time when the draft was torn up.

Therefore, the harming of the interest was, in this case, already complete before the knowledge of the harm. The time when the subject of the interest knew about the harm includes not only the time when the subject is harmed but also the time when the subject learned of the draft being torn up—his/her interest was harmed. Likewise, in the case of defamation, the act resulting in the harm to a person's reputation could have occurred at an earlier time unbeknown to the subject of the interest. If this explanation is correct, insofar as the interest is something that can be harmed, the interest can be harmed and the subject who holds it can be harmed, even if s/he is unaware of the fact of being harmed.

Extending the notion of "unaffecting" to posthumous harm, Feinberg questions: "If knowledge is not a necessary condition of harm before one's death why should it be necessary afterward?" (ibid., 306). His answer to this question, as we will recognise in the following passage, evades the most important question "why does the interest of reputation continue to exist after one's death?":

> "Can there be any doubt that I have been harmed by such libels? The 'self-centred' interest I had at my death in the continued high regard of my fellows, in this example, was not thwarted by my death itself, but by events that occurred afterward. Similarly, my other-regarding interest in the well-being of my children could be defeated or harmed after my death by other parties overturning my will, or by thieves and swindlers who cheat my heirs of their inheritance. None of these events will embarrass or distress me, since dead men can have no feelings; but all of them can harm my interests by forcing non-fulfilment of goals in which I had placed a great stake" (ibid.).

2.2.4 *Presupposition 4: These surviving interests may be harmed posthumously by being posthumously infringed.*

Suppose again, only this time after my death, someone tore up the draft of my novel that had been kept in my cabinet. This action absolutely invaded the interest in my novel. However, after my death this interest is no longer mine. Rather on my death my interest was transferred to my successors and it became their interest. That is why the invasion against the interest does not harm me, as a dead person.

Can the interest of reputation be transferred after death in the same way as the interest in the draft? By paying attention to the different attributes of reputation and the draft, we will find an answer. First, the draft is a proprietary object. It is also an object for trade so that it can be evaluated by a monetary standard. On the other hand, reputation as referred to here is the social

evaluation of a person's value. It is not an object for trade or for succession. Does a person's interest of reputation perish with the person on his/her death? We argue that the answer is no. The interest can survive his/her death. Since both the pre-death and the post-death reputation are a social evaluation, they can exist in an "alive" form in and through the living's memory and recollections. Since a person's reputation can survive his/her death, the posthumous reputation is, as that of the living, harmed.

However, even though the claim "the posthumous reputation can be harmed" is justified, the further claim "the reputation *per se* is harmed after death" does not lead to the conclusion that "the dead are defamed". Feinberg's "Interest Principle" suggests that to have an interest is to hold the capacity to experience a mental activity, such as awareness. Feinberg reiterates that a dead person does not have the capacity to be aware of being defamed. Feinberg does not therefore provide an explanation for the crucial question "how can the dead be harmed?". He concludes:

> "Events after death can thwart or promote those interests of a person which may have 'survived' his death. These include his publicly oriented and other-regarding interests, and also his 'self-centred' interests in being thought of in certain ways by others. Posthumous harm occurs when the deceased's interest is thwarted at a time subsequent to his death. The awareness of the subject is no more necessary than it is for harm to occur to certain of his interests at or before death" (ibid., 308).

It is correct to say that posthumous events can thwart or promote the surviving interests. Posthumous reputation is not only an interest of those who *were* once living persons, but also an interest of their family or friends. When, in this way, Feinberg's conclusion is translated into a model of reputation, we become aware of a question of whether a person can be posthumously harmed by defamation of him/herself. It is not denied that there are some cases in which the family, the nation and even the populace are harmed by the defamation of the person.

Family and friends are the living persons who, of course, have possession of a capacity to experience awareness of defamation. Given that such defamation can be conceived by the living after death, we have to accept that reputation can survive and its interest can be harmed posthumously. Yet, this explanation still leaves a most difficult question to be answered: "*how* can the dead be harmed by defamation?" Feinberg is very unlikely to have provided an answer to this question, which necessarily involves the harm of a dead person.

2.3 Partridge's criticism of Feinberg's position

In the paper *Posthumous Interests and Posthumous Respect*, Earnest Partridge (1981) has argued that "the dead...have no interests and are beyond both harm or benefit" (ibid., 244). These arguments, in the first half of the paper, challenge Feinberg's perspective. In the second half of the paper Partridge argues, "an analysis of the conditions of moral agency may account for an individual's desire to affect events and to be well thought of after his death" (ibid.). He also attempts to claim that "warrant for respecting these desires, after a person's death, may be found in the traditional notion of 'the social contract'" (ibid.). His motivation for involvement in these debates is demonstrated as follows:

> "I will further argue that an examination of our personal and philosophical motives for believing in "posthumous harm and interest" may yield significant dividends for moral philosophy. In particular, this examination may provide clarification of, and warrant for, the fundamental concepts of moral agency and moral personality, and for the theory of the social contract. Through a utilisation of these concepts, I will argue, we may account for and justify posthumous respect for the reputation and wishes of the deceased" (ibid., 245).

2.3.1 Detachable interests

Whilst his discourse over the social contract is carefully and persuasively argued, Partridge's criticism of Feinberg's position is not necessarily successful. Partridge divides Feinberg's basic argument into three separate arguments.

First, in "the argument from detachable interests", Partridge points out the paradox in Feinberg's argument. Against Feinberg's proposal that posthumous interests may survive to be fulfilled only by the coming into existence of that which is desired (Feinberg 1977), he pitches the question "but "desired" by whom?". He states, "while we may casually talk 'elliptically' or figuratively about the 'interests of the dead', closer analysis seems to indicate that, without an interest bearer, such talk is senseless" (Partridge 1981, 247). Based on the acceptance of the distinction between "want fulfilment" and "want satisfaction", he develops his argument as follows:

> "[T]hus, while it is true that interests are, or may be, fulfilled by objective events and circumstances, these objective conditions are "interests" only insofar as they matter to someone. Take away the personal concern or "stake," say by death, and what remain are mere pointless happenings and conditions, not "interests"" (ibid., 247).

However, his argument is incorrect. For death does not necessarily deprive the person of interests (e.g., posthumous reputation) fulfilled by objective events and circumstances.

2.3.2 Life is relational

Second, in the argument that "life is relational", Partridge pays heed to Feinberg's claim that an interest is responsive to "a person's desire to stand in certain relations to other people" (Feinberg 1977, 305). He argues further:

> "In truth, our lives are extended by our cognitive, emotive, and conative relationships with persons, places, plans, intentions, and so forth. In some cases, relations can obtain between persons and events that are not concurrent

> with their lives ... in many cases, a person may correctly be said to be "related to" others even after his death" (Partridge 1981, 248).

However, he denies Feinberg's argument by asserting that, the relation "P has an interest in Y" cannot survive the death of the interest bearer (ibid.). The reason for this denial is focused on the point that the dead have no capacity to be affected by someone (ibid.). He points out that in the circumstance of the dead, there are, after death, no events or any other thing that can either alter a moment of a person's life, or which remain to be affected. He argues that this is a decisive difference between the unborn and the dead. The reason why the former have an interest but the latter none, is:

> "[I]t is not the case, strictly speaking, that the lack of present desires and concerns, per se, disqualifies the dead from having present interests. Rather, they have no present desires because they are dead, and, more to the point, they have no interests now because, being dead, nothing that happens now can affect their final, immutable, and completed desires and prospects. In contradistinction, unborn persons, who likewise have no present desires and concerns, can be affected by what happens now, and thus can be said to "have an interest" in present policies (e.g., concerning resources and environmental preservation, etc.)" (ibid., 249).

However, this claim courts controversy. According to Partridge, to have an interest or not is determined by whether the conditions of life can be affected at the present or in the future. The concept and the meaning and scope of "being affected" are not clear. If the concept of "interests being affected" is interpreted differently, it becomes possible for the dead to have interests. Presumably Partridge compares, as an example of interests "directly" affected, the dead with the unborn. But if the concept of "being affected" is considered more loosely and expanded to include that of "being indirectly affected", then the dead too can be affected by what happens now.

The living can "indirectly" alter the completed lives of the dead. When posthumous reputation is defamed, the dead, Partridge argues, have no interests

in the reputation. As nothing can affect the dead person's final and immutable desires and prospects, the dead do not have an interest. Nevertheless, the interest must be that of the dead. Unless it is, the living cannot deal with a resort to posthumous insult against them using the same justification as that used to deal with insult against the living. Of course, we can have a way in which we could rely on the morality of the living to deal with the insult, but that is another matter. It is merely a resolution to stop immoral actions occurring to a person after their death.

Can the living affect, whilst alive, their own posthumous interests? When a living person learns of the defamation of a dead person, does s/he consider the possibility of his/her defamation after his/her death? When person B defames A, we take action to enforce B to stop insulting A. This action can apparently affect both the subject of the defamation and B. It is possible that, when we ourselves are dead, this kind of action might indirectly affect our interests. What we mean by "being indirectly affected" is this: if the concept of "directly" can be possible, then through a complicated relationship in which the dead, after being observed and perhaps defended by living others, can hence affect the way in which other dead persons are treated, then so should the concept of "indirectly" be possible. The dead can therefore be involved in posthumous interests. Further discussion on this topic will be referred to later in the discussion on the idea of a "social contract", which Partridge argues for.

2.3.3 Unaffecting harm

Partridge asserts, in his third argument, that Feinberg's claim of "unaffecting harm" is senseless:

> "Nothing happens to the dead. No posthumous events can in any way alter a single instant of the full scope of events that constitute a completed life. Accordingly, after death, with the removal of a subject of harms and a bearer of interests, it would seem that there can be neither "harm to" nor "interests of" the descendent. Because in such a context, these phrases (i.e., "harm to" and "interests of") use prepositions with no objects, they are, strictly speaking, senseless" (ibid., 253).

However, Feinberg's claim is not senseless. Let us demonstrate this by revisiting and developing the earlier discussion on "hair cutting" (see 1.5.1). We argue that a patient in an irreversible coma who has a stated wish not to have her hair cut off, is harmed, regardless of the present situation, i.e., her complete lack of awareness, if in fact her hair is cut off. She is so harmed because the relevant persons such as medical doctors, nurses and her family know "objectively" that cutting off her hair is an action against her wishes and therefore an action by which she is harmed.

On the other hand, if a person has stated that their wish is that their hair is not to be cut off after their death and yet their hair is cut off after their death, then whom does the action harm? If Partridge is right it would be that no one is harmed. However, similarly to the case of the patient in an irreversible coma, there is in this case, a relationship between the action of the harm and the object of harm, and between the object and the dead person. If Partridge accepts the premise that awareness is not the only necessary condition of the interest, then he logically should also accept the above relationship. Moreover, if the dead have no interests to be harmed by the action of the cutting of the hair, then who does have that kind of interest? Is it rather the living person who does not wish to have their hair cut off? But this surely could not be possible, the person is already dead.

Considered in this way, we can understand how difficult it is to account for how and who does the harm. It has already been explained that there is a

particular attribute to cases of defamation of the dead: a person's reputation can survive death. The manner of this survival is somewhat different to the way in which property can survive death. Basically, property such as a desk and a chair can remain, after the owner's death, as they are. Since, however, reputation is a social evaluation of a person's personality, it is neither property nor has a visible, tangible existence. On or after death it may be modified. In terms of being affected, reputation can be altered or affected before death by the person or others. It may also be altered or affected after death by the living or the antemortem action of the person. Thus, reputation on or after death can be affected.

Therefore, an interest is not relevant to whether the subject is living or dead, or whether the subject is aware or not of the interest being harmed. Both the patient in an irreversible coma and the dead person has an interest in the cutting off of their hair, and both the living and the dead have an interest in defamation. Given this, a somewhat ironic question arises: "can a desk or a chair have interests?" Needless to say, neither a desk nor a chair can be aware of being harmed, nor of being affected. What, therefore, is the difference between a desk/chair and a dead person?

It should be recognised that the interest of a dead person is part of the interest that the person previously living possessed. This means that the main reason why we are struggling with the problem of the dead and their interests, is the fact that the dead person was a person who was previously alive. A desk and a chair could never have an interest because they are not and never could be living entities. In other words, conceiving whether the dead can have an interest relies on being able to identify what it is that the dead succeed to.

Whether, for instance, it is derived from what they used to be or whether it is in how the actual succession comes about. When we identify the principles of succession, we will recognise that an example of succession is reputation. Moreover, once the principles of succession are successfully identified, it is logical to think that interest in reputation can be succeeded to.

2.3.4 Another perspective

Dispensing with the issues of "posthumous interests" and "posthumous harm", Partridge, in the second half of his paper, deals with the analysis of cases of "posthumous defamation" and "the posthumous breaking of promise". His persuasive perspective to some extent resonates with our argument. Partridge suggests that "in our society the morally mature person perceives the "badness" of betrayal as a generic evil that can happen to, and be bad for, anyone who shares our moral conceptions" (ibid., 257). The shared concept of our moral conceptions means that, dispensing with the concept of "posthumous interests", we can understand that a good reputation is a fine thing to have. This is to say, we can have both the viewpoint of an observer: "it is good ... to have a good reputation, even though unknown to the subject thereof" (ibid.) and that of the subject: "it is good for him to have a good reputation, even though he is completely ignorant thereof" (ibid., 257-8). According to Partridge, one is morally persuaded that unaffecting and posthumous harms are invasions upon a person's interests (ibid., 258). Therefore, he argues that since we live in a moral society, we can think of ourselves after death as an object of our moral reflection during our lifetime (ibid.). Thus, Partridge argues that even if the dead have no interest and irrespective of whether we are concerned about the concept of the

posthumous interest, we do not care about anything that happens after death because our moral reflection in the living world will be applied to the posthumous situation. He claims:

> "Unaffecting and posthumous "harms," then, make sense only from the point of view of the objective observer detached from the personal, time- and space-bound perspective of the immediate subject of experience. It is manifestly not from this latter (subjective) perspective that legal wills are drawn up, long-term promises given and accepted, and other such moral and legal transactions made. To be engaged in a moral enterprise is to treat oneself objectively, as a moral personality in a community of such personalities. From such a point of view, things and persons cared for are regarded for their own sakes, and thus one's concern extends beyond the limits of his own lifetime ... I have an interest in affecting events beyond my death because I can imagine, anticipate, and evaluate such events now, I can now perceive their impact upon things and persons I care for now" (ibid.).

His above premise suggests that unaffecting and posthumous "harms" are senseless from the subject of experience. Who he regards as a subject of an interest must be a living person who can affect, as the subject of experience, something that happens after his/her death. The interest that a dead person has after his/her death is actually ascribed to the living person who has,

> "the abilities to transcend, through imagination, the bounds of one's immediate time and place, to consider oneself as an object of conscious reflection, to care for things, ideas, and persons beyond oneself, and to reflect in terms of abstract moral conceptions" (ibid.).

Why, however, is it not acceptable to label this interest as "interests of the dead"?

Partridge would respond to this question as follows: from the point of view of an objective observer of to-be-posthumous events and circumstances, a perspective necessarily adopted by a person when drawing up his/her will and making promises, etc., s/he can conceive of being potentially harmed, although some readers may wonder if many people ever do think they will be harmed. Partridge says "[o]ne can be quite validly concerned now about events in the future that, by hypothesis, one will not see, but can imagine seeing" (ibid., 259). We can wish anything well after our death. However, he points out that we must

acknowledge limits and draw the line because the well-wishing, i.e., the interests, ends with the agent's death. Beyond a person's death s/he cannot be harmed by events (ibid.).

In order to clarify this difficult idea we must establish the difference between antemortem and posthumous interests, notwithstanding that they are very similar in attributes and character. Reputation *per se*, as an object for defamation, has almost the same attributes insofar as posthumous reputation is what is succeeded to from the antemortem reputation. Therefore, we must ask whether it is only if the subject is alive that matters? Partridge would not deny that interests can survive death and posthumous interests *per se* can be harmed. Again, the problem is whether the dead *per se* can be harmed. We concur with the assertion that the dead, who are not the subject of experience, cannot become the subject of harm. However, if interests harmed after death cannot be retroactively ascribed to the living, the view that ascribes posthumous interests to the dead who succeed to the interests is thwarted. He claims:

> " [B]ecause the living have expectations and concern for having their own wills respected, they also have an interest in respecting the will of the deceased. That is to say, it is in the interest of the living (out of concern for their own to-be-posthumous "interests") that they maintain the stable and just institutions that secured the wishes expressed by the deceased during their lifetimes. The to-be-posthumous "interests" of the living are protected by their resolution to respect, in their own time, the "quasi-interests" of the deceased" (ibid., 261).

In short, the posthumous interest is an interest of the living. If a person violates this kind of interest of the living, s/he diminishes her/his own anticipation of favourably affecting the conditions of life beyond the time of her/his own life. This view is against the temporal direction of past to future. The person cannot confirm a person's antemortem interest such as expectations that a will he/she made will be legally exercised after his or her death. However, the person can expect, by observing the fact that other dead person's expectations are realised,

that his/her posthumous interests will be exercised upon or after his/her death. On the contrary, if the person becomes aware that their expectations will not be honoured after death, he/she must, whilst alive, seek a means by which the problem can be resolved. When said in that way, a person has no means by which they can confirm any posthumous infringement of his/her interest not only whist alive but whilst dead. All he/she can do is to imagine their own posthumous situation through his/her observation, whilst alive, of posthumous situations. Partridge's comments can be interpreted in this light.

It seems, nonetheless, that Partridge is attempting, by observing one person's antemortem interest and another person's posthumous interest, to find a kind of continuation in both. If such a view were warranted, he would be attempting to attribute a person's interest to another subject. This is ridiculous. If we can acknowledge that one person's interest is distinct and separate from another person's interest and yet at the same time recognise that the person's antemortem interest is also his/her posthumous interest in that it can survive death, then it would be logical to ascribe that interest to the dead, insofar as the posthumous interest is associated with the dead. There are no reasons for ascribing the person's interest to another person.

2.4 Levenbook's criticism

2.4.1 Two presuppositions

In drawing the same conclusion as Feinberg, Barbara Baum Levenbook, in her paper *Harming Someone after His Death* (1984), develops a characteristic perspective. Levenbook first uses "A's death" to name an event or process. She defines person A's death as "what occurs at the first moment at which A no

longer exists" (ibid., 410). If the premise is acceptable that A can lose something at the first moment at which A no longer exists, then a further premise follows that A can also lose something at a later period after death. For example, A can lose his/her mental functions at the moment of death, but cannot however lose his/her reputation after death. She argues that there is no problem with ascribing losses to him/her at any time after his/her death. Thus since A can lose something after his/her death, he/she can be harmed after death.

Levenbook argues: "*Einstein* has not lost his reputation as a scientific genius, even though he had that reputation until his death. One must claim either that he cannot lose it now, having retained the reputation until his death and now being incapable of losing anything, or that he still has the reputation and can lose it now" (ibid., 417). Of course she supports the latter position. Callahan points out that "this...is not a description of something *Einstein* has or has not got" (1987, 343). It is a description of "us . . . It is an assertion of what some in the existing community of believers believe" (ibid.). She argues further, ""Einstein has not lost his reputation as a scientific genius" does not imply that *Einstein* has something that he could now lose. What it implies is that we, the living believers, have beliefs that *we* could lose" (ibid.) [original italics]. Is Callahan's criticism of Levenbook's argument valid?

For Callahan, to say "A lost his mental functions at the moment of death" is merely to say "The mental function of A ceased at his death". Since A's death is the termination of A and all his capacities, including his capacities to gain or lose, there is nothing that A can gain or lose after his death. If there should be a flaw in this plausible counter-argument, it would be ignorance towards the ambiguity of the concept of "losing". Can the concept of losing as used by

Callahan in "the living losing" and "the dead losing" be taken to mean the same thing?

2.4.2 The concept of "loss"

Compare "the loss of reputation" with "the loss of life by homicide". A person as the subject of his reputation conceives loss when it is harmed. Take for example the personal reputation: "He is an honest man". This reputation could be undermined or lost by, for instance, a false accusation such as "He is a hypocrite". However, this kind of loss can be recovered. A can have many occasions by which to regain his previously good reputation. His reputation cannot be lost on his death, rather it can and does survive his death. Reputation therefore is an example of what is not affected by the loss of "all his capacities, including his capacities to gain or lose". Therefore, to say "*Einstein* as a scientific genius has not lost his reputation" suggests not only that we believe he may lose his reputation but that *Einstein* has, in a form irrelevant to his capacities, something which can be lost.

Conversely, in the case of "loss of life by homicide", A's death, Callahan points out, terminates A's life and all his capacities. The loss of life is irreversible: A can never regain his/her life. Logically, there can be no further occasions when the deceased A can be harmed by a loss of his life: A cannot die twice because of the very attributes and meaning of "homicide". However, his/her reputation can be, in terms of its attributes, harmed after the homicide; precisely because the attributes of reputation are now (i.e., after death) irrelevant to all his/her capacities which are already lost.

2.5 Callahan's criticism

2.5.1 The definition of interests

As mentioned in the previous section, Callahan points out, "Levenbook has been led astray by ordinary talk about losses to the dead" (1987, 342). In a counter argument, we have pointed out that since Callahan misrepresents the concept of "losing", she overlooked the existence of "the interests" that can be gained or lost after the bearer's death. She rebuts Feinberg's claim that "the dead can be harmed" with the argument that "the dead *cannot* be harmed". Is the argument of her rebuttal valid?

Callahan first denies Feinberg's account of the problem "If dead persons do not exist as interest bearers, how is it that they can be harmed?" (ibid., 344). She criticises Feinberg's reasoning that even though a person no longer exists, the person's interest can survive in the same way that his/her obligations and claims can survive death. She argues that these obligations and claims are no longer A's but his/her family's. Her argument thus accords with the line pursued in this thesis. However, if she conceives of A's reputation as surviving in the same way that we think of his/her table and chairs surviving death, i.e., by the principle of succession, then her argument must fail. A person's reputation is a prime example of an interest surviving a person's death.

However, Callahan does not accept Feinberg's definition by which the sense of "interest" is taken to mean "having a stake in". She argues that if this definition is adopted the following incoherence results:

> "Doe's interest in moving to the country does not become the city-bred Doe children's interest on his death. But responsibility for debts Doe incurred and what had been his property become theirs. Interests, then, simply do not survive a person after his death in the way some of the obligations and claims he had do. For those obligations and claims now transfer to living debtors and claimants. This is how they survive. But the interests a person had before death only survive *as interests* if they are carried on by living interest bearers --

> that is, if the living take up (or had and continue to share) the stake a former person had (to put it badly) in some matter" (ibid., 344) [original italics].

2.5.2 Inheritance of interest

Let us apply the precepts of our argument above to "reputation", as an example of interest. A person's reputation is an interest that a person bears. According to Callahan, if reputation is to survive a person's death this can only occur in an instance when his/her family or someone else takes up the stake they had. By implication, the reputation that no one takes up cannot survive the person's death. This argument can be found not only to be inconsistent but also false in the following account.

If Callahan's account is right, then this "reputation" is not effectively the deceased person's reputation at all, but rather the reputation of those (e.g., his family) who take up the interest in it. However, when we consider the attributes of a person's reputation, we become aware that reputation is a social evaluation of the person and that this evaluation is personal, not inheritable. If this rebuttal is valid, then Callahan's argument fails on two counts.

First, the social evaluation can neither be inherited nor can a person's reputation be shared as another's interest. On the basis of Callahan's claim, even though, after death, the reputation shared by the person's family, for example, is harmed, the harm is actually to the family's reputation and not to the reputation that the person held whilst alive. Therefore, if Callahan's claim is right, it follows that there is no reputation that can survive death. Second, insofar as reputation is personal, we cannot discuss reputation in the same way that we can discuss an object for succession (e.g., obligations, claims, and even desks or

chairs). By placing reputation and inheritable things in the same category, Callahan fails to acknowledge that there *is* an interest that can survive death.

2.6 Summary

From the above controversy over "can the dead be harmed?", we will at least arrive at a following perspective as a resolvable approach to the debate on "defamation of the dead".

What has been overlooked in the debate is a proper understanding of the concept "reputation". If we identify reputation with social evaluation, we can distinguish it between a living person's and a dead person's. Reputation can be understood to have a twofold structure. One is the "subjective" reputation attached to the person's personality that can be recognised through his/her actual experience and emotions. The other is the "objective" reputation as something distant from the person's own perception: acknowledgement and recognition.

In many cases of defamation, the structure is not considered as double but as sole. If we accept that the concept "reputation" has a twofold structure in light of "subjectivity" or "objectivity", we will understand that the reputation which survives death is only that of the latter. It follows that death deprives a person of the reputation that the person recognised as a part of their personality, while the other social reputation continues to exist after the person's death. The latter reputation can be harmed and lost, both while the person is living, and after their death.

Therefore, a case of defamation of the living refers to the case in which a person's personal reputation, that the person can perceive of or recognize as a

part of his/her character, is damaged; to the other case in which his/her social evaluation is damaged; to both cases. On the other hand, a case of defamation of the dead refers only to that in which the person's social evaluation is damaged. The proper understanding of this difference is quite vital because a feature of reputation enables a person's repute to survive his/her death. That is why, even if the subject being harmed is extinct, the subject's reputation that survives death can still be harmed.

That the person's reputation that survived his/her death is harmed refers to the event in which the person's posthumous social reputation was altered. Therefore, the social evaluation that was altered after death cannot be attributed to the person who was once alive. It should be the dead who have the reputation that exists after death. Otherwise, if it is possible to attribute the posthumously harmed reputation to the person who was once alive, then it becomes possible to attribute the defamation which was done at time 1 (when the person was once alive), to the person who was alive at time 2 before time1. This is ridiculous. It is so because, by understanding that the defamation which was done is against a personal reputation, one of the twofold reputation structures the living perceive of, the subject recognizes the defamatory action and therefore the reputation can be to the person who can recognize it at the time of the defamation. Thus, there is a considerable difference of characteristics in the way that one maintains one's reputation between the stages of "before one's death", and "after one's death".

Nevertheless, the problem of whether the defamation can be attributed to the dead in a case where the reputation that survives death is damaged still remains unsolved. This reputation is related to "social characteristics", one of the main concepts in this thesis. As explicated in Chapter 4, "social characteristics"

is a sociological concept which can be applied to the dead and which can be extracted only from its relevance with society or communities. Where the social characteristics link themselves to rights, they link themselves to interests of society or communities. That is to say, they necessarily open the way to answering the question: "do the dead have interests?". As an example of social characteristics, as far as damaging the reputation of the dead is concerned, its interest and the attribution of the interests can be understood within the dependent relation with the living or in the place of the dead in society.

2.7 Examination and review in substantial law

2.7.1 Community and reputation

In the introduction, the initial discussion on whether the dead have an interest suggested, in the light of philosophical examination, that there are both advantages and disadvantages in admitting the dead have interests. A further dichotomy is evidenced in Japanese and English substantive law which evince markedly different attitudes in belief and approach to "defamation of the dead": the central subject of the dead's interests. In this section we will examine to what extent and how "defamation of the dead" is recognised, dealt with and justified in both Japanese and English law.

Unlike the philosophical discussion in the previous sections, the diverse debates based on the substantive law of Japan and England oblige us to recognise that any attempt to promote and protect the reputation of the dead through the incorporation of a right, raises a number of important, practical questions which need to be addressed by the legal system in a modern nation. The true importance of the reputation of the dead lies in social praxis. Within the

dynamics of any community[65] we can find recognition of the significance of the role of the dead: the reputation of the dead arises from analogy or extension to the reputation of the living. The dead represent an important means through which the living can express their identity. At the same time the dead are intimately embedded in the living's consciousness of their community. If the significance of the reputation of the living has a function in assisting the bonding of community, then that of the dead also has the same functional explanation. Therefore, we might say that the dead may be involved at a deeper level in the community than the living. They may be so because they are dead and therefore work through the consciousness of the living; in that sense it would be at a deeper level, insofar as such influence is not easily accessible.

If, when observing the modes and functions concerning the way that reputation is protected and valued in the community, mutual concern between the members is understood to be not only a fact of human psychology and inclination but also a normal mode of interdependence, then the value of the law of defamation can be seen as a defence against the latent danger inherent in the relationship between individuals in a social organisation where extensive libertarian rights can be claimed. The Communitarian perspective (e.g., see Sandel 1982) suggests that we can grasp the essential structure of a community as a transition from the interaction of individuals to solidarity through interdependency. However, when we analogise the defamation of the living to that of the dead, we recognise that a theoretical grasp of the idea of a reputation of the dead is complex. This is because, in addition to the conflict between

[65] The term "community" is used here to refer to "society not as an aggregate of individuals, but as an interactive entity that reflects and enhances human sociability" (Freeden 1991, 69) and that leads the members of society into co-operation through mutual sympathy and interdependency.

individuals, a new conflict arises between individuals and the dead (this conflict will manifest through the actions of the living). Yet, it must be emphasised that respect for individual ends is upheld even in the Communitarian perspective: the theory of collective action *and* that of personal freedom are both fundamental. Whilst the issues on defamation have been debated in relation to the greater social whole, they must now be debated in relation to the individual.

If we consider defamation of both the living and the dead as a potential danger to the functional bonding of the community, it should also be accepted that the dead as well as the living are involved in interests that should be protected to some extent at the least. As mentioned below, many of the nations which evaluate the functional advantage as important, further accept the concept of "reputation of the dead"—notwithstanding how "interests of the dead" should be construed is controversial—so as to promote social interest (even England may be considering integrating the concept into its substantial law).[66] It is evidenced by the fact that laws with relation to defamation of the dead, as well as that of the living, exist in criminal codes, which, in general, protect and value public interests in many countries.[67] At the same time, the individualist argument can also be invoked to justify a claim for this kind of protection of interests. That is to say, whilst the arguments are endorsed in favour of a highly mutual and interdependent community, the protection of *rights of the dead* can be couched in terms favouring the individual as well. Thus *rights of the dead* comes to be a distinguished value that both the community and individuals can take advantage of. Therefore, when we recognise that the rights of reputation

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[66] See paras 419-420 of Report of the Committee on Defamation (1975).

[67] Basically, even in England and Wales defamation of the dead have been dealt with as an issue on criminal law (see per Lord Kenyon C. J., R. V. Topham 100 R.R. 931, 933 (1791); Woolman 1981, 31-32).

serve to enhance both the value that the living enjoy in their community and the value *per se* of the community, we will understand that defamation is one of the most significant modes of *rights of the dead*. Nevertheless, there are markedly different attitudes prevalent in particular legal systems with regard to "defamation of the dead". An exegesis of these differences as exhibited in Japanese and English law provides an insight into the problems proposers of the *rights of the dead* argument necessarily have to confront and redress.

2.7.2 England's ignorance

The English principle toward defamation of the dead[68] is pronounced. In the 1934 debate in the House of Lords, the then Chancellor stated "...no action will be able to be brought for a libel on a dead man". But, he added the following proviso: "[t]he day may come when this particular matter may have to receive further consideration but ...". This implies the reason given by the Law Revision Committee 1934 that "the presence of the plaintiff or of the defendant may be of the greatest importance" is unconvincing (see The Lord High Chancellor and the Lord Advocate 1975, 114).

In 1948 the Porter Committee explained the principle of excluding consideration of a case when the defamed is dead as follows (The Lord High

[68] The legal history of defamation of the dead can be traced back to Roman law, in which it was not *iniuria* (the relevant bodily injury) to defame the character of the dead, but it was *injuria* and illegal to insult their bodies or their funerals. Such action granted their heirs the right to sue for defamation (Buckland and McNair 1936). Likewise, their family cannot sue on the ground for the defamation of the dead, "but criminal proceedings will lie if the libel amounts to a "vilifying of the deceased with a view to injure his posterity"" (ibid., 299). In this way the Roman approach to remedies was similar to the present one adopted by those countries with defamation laws for the dead. In the same way that crimes have been influenced by the relative values of society, so the meanings of defamation of the dead have been affected by the different styles of politics and culture, and the social beliefs of the day. Nowadays, defamation of the dead is categorised not just as an infringement of the dead person's peace, but also as an infringement of that person's reputation.

Chancellor 1954, paras. 27-28). The entire two paragraphs will be quoted for greater understanding.

> "27. Under the existing law, statements about the dead, however false and malicious they may be and however much distress they may cause to friends and relatives of the deceased, do not form the subject of a civil action, nor - except to the limited extent mentioned above - of a criminal prosecution. The essence of civil proceedings for defamation is the damage caused to the reputation of the plaintiff. It is, therefore, difficult to see any logical basis upon which to found a proposal that the relatives of a deceased person should be entitled to bring an action for statements defamatory of the deceased alone. If such statements are also defamatory of the living they are, of course, actionable under the existing law. It would be equally difficult to find any sufficient justification for granting such right of action to the personal representatives of the deceased. The basis for a right of action on the part of personal representatives is the injury suffered by the estate of the deceased; and his estate cannot normally be damaged by defamatory statements made after his death.
>
> "28. The essentially personal character of a man's right to his good reputation and of the action for defamation which exists for this protection was recognised in 1934 in the Law Reform (Miscellaneous Provisions) Act 1934, which excepted actions for defamation from those categories of personal actions which survive for the benefit of the estate of the plaintiff. We do not think that a sufficient case has been made out for a departure from this principle".

The English principle infers that a human's right to good reputation and privacy belongs to him/herself and no others have any entitlement to any action to defend him/her against defamation (Gibbons 1996). Therefore, in the case of defamation of the dead, the bereaved cannot enforce the right in place of the dead and for the benefit of him/her. When, for example, the victim of defamation dies during the proceedings of an action the action becomes extinct and the relatives cannot bring a further action to protect the estate of the deceased using legal mechanisms such as succession or personal representatives.

One state of Canada, a member of the Common Law nations, prohibits an administrator from bringing an action for defamation of the dead. But when a case of defamation of the dead simultaneously corroborates defamation of living persons such as the dead person's relatives and friends, then the case is held to

be absolutely relevant to the living's defamation. The reasons why Anglo-American law demonstrates such limited provision towards defamation of the dead and their bereaved need explication.

The first reason is derived from the characteristics of reputation. Reputation can be characterised as pertaining to the personality and exclusiveness of a person. It refers to the evaluation of a person as made by others. It is not that which is worthy of being given, but that which a person is credited with.

In 1948 the Porter Committee explains the reason for not dealing with defamation of the dead in the following manner (The Lord High Chancellor 1954, para. 29):

> "29. Similar objections do not exist in the case of criminal proceedings for libel of the dead; but there are practical disadvantages in so extending the existing law which satisfy us that it is not in the public interest that such an alteration should be made. Historians and biographers should be free to set out facts as they see them and to make their comment and criticism upon the events which they have chronicled. But to produce the strict proof of the statements contained in their writings which the English law of evidence requires, becomes, increasingly difficult with the lapse of time. If those engaged in writing history were compelled, for fear of proceedings for libel, to limit themselves to events of which they could provide proof acceptable to a Court of law, records of the past would, we think, be unduly and undesirably curtailed".

To this report, the Committee on Defamation (The Lord High Chancellor 1975) expresses the following doubts:

> "419. We do not think these paragraphs (27-29) take sufficiently into account the interests of the public and of the near relatives of the deceased. It is quite true that to introduce and action for defamation of the dead is to introduce an entirely new course of action. It would be an action to prevent people from telling defamatory lies about a dead man shortly after he is dead. Why should it remain lawful to add to the grief of a widow by stating falsely just after her husband has been buried that he was a criminal? We think that there should be a limited protection for such near relatives".

Moreover, the Committee provides criticism of Paragraph 29 of the Porter Report, as follows:

> "420. Paragraph 29 of the Porter Report does not deal sufficiently with the question whether a person should be allowed to publish defamatory statements about a dead man *within a short time* of his death. Records of his past will not be "unduly and desirably curtailed" if for a few years after a man's death historians and biographers are limited to saying what they can prove to be true. Where publications contain false accusations against dead men, they constitute a highly objectionable method of profiting out of his death and in our opinion, while grief is fresh and for rather longer, such accusations should be actionable. We put the period at five years, but some of us would prefer three. Five years we regard as a limit, however, which means that, greatly through we sympathise with the complaints expressed to us by descendants of Earl Lloyd George and of Frances, Countess of Warwick (who have been most unflatteringly portrayed on television), there is nothing we can do for them. It is just not practicable nor desirable to equip the law to deal with "old unhappy far off things and battles long ago"".

The exclusion rule is related to freedom of speech. However, the criticism made by the Committee is justifiable. Even in cases where an executor and the relatives bring an action of defamation of the deceased, the freedom of speech of historians and biographers should not be infringed. Nevertheless, whether they be historians or biographers, intentional defamation made by distorted facts should be sanctioned. Such defamatory action is in any event inimical to the promotion of accurate history and biography. The principle of the freedom of speech should be guaranteed in the social order. Insofar as an attack of defamation is deemed illegal, it would not be appropriate for the current English law to protect infringement of the dead's reputation.

The second reason bears on the limitations of the "exclusion" principle. This principle emphasises reasons for exclusion based on history and literature, but seems ignorant of the need to apply the principle more universally. In consequence, the principle seems to fail in light of legal generalisation. Based on the reasoning of the "exclusion principle" it would seem reasonable to infer that the majority of English people are subjects of description in history and biography. Needless to say however, in most cases concerning the general population, the problem is not with defamation in historical and biographical

accounts but with defamation at a mundane level. In a case where the defamation is levelled equally at the dead and their relatives, there would be a remedy by litigation. But even in a case where there are no relatives, there is no reason why protecting the dead should be ignored. It would be a very unreasonable state of affairs if, when a person is alive, the defamation against him/her is regarded as an illegal infringement, yet when they die such a claim should be rejected on account of their being dead. If the protection of reputation should be rejected by the fact of death, for example, when a person breaks a promise made to a deceased person before their death, there is also by the same logic no possibility of claiming against the breach.

It should be noted that this review of the Anglo-American law's very limited provision to embrace issues of defamation of the dead locates the basis of this limitation in the report of the Committee on Defamation (1975). Given this, it would be significant to review why English law still continues to reject claims of defamation of the dead. The common law nations, such as the United State of America, Canada, and Australia exhibit an equally limited provision for defamation of the dead. It should be appreciated that the essence of this limitation is grounded in their links with English law. To reiterate, therefore, we should ideally review why defamation of the dead remains a largely ignored subject in Anglo-American law. However, such a review is beyond the present scope of this thesis.

2.7.3 The reality of the Japanese substantial law

Where, by defamatory statements against a deceased person or by an infringement such as disclosure of details of private life, the reputation of the

dead is damaged, there are two kinds of legal remedy. One is that law concedes the concept "defamation of the dead" to be available and regarded as the infringement against moral rights of the dead and directly protects interests of the dead. The other is that, although law does not concede the direct protection of rights to the dead's character, it instead protects the bereaved's rights of character when the infringement is against the relatives closely related to the dead. The former can be called "direct protection" (DP for convenience) and the latter "indirect protection" (IDP) (ashitomi 1990, 171-2).

The IDP theory has a twofold structure. One aspect states that a defamatory act is directly committed against the bereaved. This is the same form as general defamation. The other aspect is that a defamatory act is directly committed against the dead but in consequence it harms the bereaved's respectable and devoted feelings for the dead. In the latter case the bereaved may bring an action to claim for a legal remedy on the ground that they hold their own rights of character. In the light of protecting the dead from an infringement against the rights to character of the dead, both can be justified by the IDP perspective. As a matter of fact, however, both DP and IDP camps seem to lack conclusive grounds for their own justification. We will espouse the DP thesis and develop our position for justification.

Defamation of the dead in Japan[69] is associated with both civil and criminal law. There are however merely two specific prescriptions regarding defamation of the dead in Japanese law:

> (1) Article 230 (Defamation) of the Criminal Code:
> "1. A person who defames another person by publicly making an allegation shall be punished with penal servitude or imprisonment for a period not exceeding

[69] Except Japan and Germany, cases where moral rights of the dead are protected are found in Art. 85-3 of the Hungarian Civil Code and the interpretation of Article 101 of the Chinese Civil Code (see Wang and Mo 1999).

three years, or with a fine not exceeding five hundred thousand yen, regardless of whether or not the said allegation is true. 2. A person who defames a deceased person shall not be punished unless the defamation is based on a false allegation".

(2) Article 60 of *Copyright Law* (Law No. 48, 1970)
(Protection of Moral Interests after the Author's Death)
"Even after the death of the author, any person who offers or makes such author's work available to the public may not commit an act which would harm the moral rights of the author if he or she were alive; provided that this shall not apply, if an act is found not to be against the will of the author in the light of the nature and extent of the act as well as changes in social and other conditions".

Article 230 is divided into two paragraphs: the first prescribes for defamation for the living and the second, for the dead. This division suggests there is difference in the requirements for bringing a criminal action on behalf of the living and the dead. The Article does not punish those who defame the dead in the same way as those who defame the living. The conditional character of the Article of the Criminal Code lies in the respect that only a case of false accusation can lead to punishment for the crime of defamation of the dead. The question of "why this conditional requirement is needed" will be explained later. Moreover, since this crime is regarded as a crime requiring a complaint from the victim for prosecution to ensue (*Shinkoku zai*), we will need to review the question of "why defamation of the dead is regarded as a crime". In addition to such debate on "defamation of the dead", it will be necessary to discuss in this chapter several derivative issues: first, whether an act of defaming the dead can be sued by tort law despite there being no civil prescription for defamation of the dead; secondly, if that proves to be the case, who can claim against those who defame the dead; and third, whether the victim in the Criminal Code can be a claimant in the Civil Code. Whilst the issues of defamation of the dead is closely linked to both the Criminal Code and the Civil Code, we have to note that this linkage is not uncomplicated mainly because of the diversity of views on interests of victims.

If that which is protected in Article 230 I is a right of reputation, we need diverse devices of justifying how there exist crimes against a right of reputation of the dead under a general rule that the dead have no rights. Even if a view argues that rights of reputation are only for the living but not for the dead, some devices for its justification are required. Professor T. Uematsu (1974, 333; see Kawabata 1996, 117) contends that, despite an extreme exception from the coherency of the legal system, the reputation a person once held should be protected even after his/her death, due to the social consensus that a person's reputation is recognized as a decisively high value and importance in human life. In Uematsu's view the dead's reputation would be actually the reputation which the dead had when he/she was alive. This view is in accordance with the DP thesis. On the other hand, Professor Maeda (1995) considers the reputation prescribed in Article 230 II as the devoted feelings that the bereaved hold for the dead. This view is in accordance with the IDP thesis. Although legal remedies can be justified by either of the DP thesis or IDP thesis, the discussion on "what the interest of Article 230 I is" enables the third thesis to stand up. R. Hirano (1972, 79) claims that the article of the Criminal Code was prescribed for protecting the living's expectations regarding the posthumous dealing with the reputation of the dead. He also argues that, although there is found the term "defamation of the dead" in the Article, it expresses no more than the feelings that members of society do not want to be defamed after their death as well as in their life. Evidently, the second view and third one regard the living, not the dead, as the subject of interests.

We are required to regard the term "defamation" in Article 230 I in the same light as the term "defamation" in Article 230 II, because the same words

exist in the same provision. We should understand that both the first section and the second one of the article are provisions for the infringement against rights to reputation and thereby the concept "reputation" *per se* is dealt with in the same way. Although we point out, in reiteration, that there are structural differences between the living's reputation and the reputation of the dead, the first view is legitimate in that an interpretation is required for consistency of the Article that the antemortem reputation survived death. However, we still remain with a question unsolved, that is the question of "why the dead can be legally protected despite the fact that the dead do not physically enjoy interests in life if the interests in the provisions are for individual's life" (Yoneyama 1998, 90). With regard to this point, the second view attributes reputation, an interest in life, to the bereaved. To its advantage this view has coherency in that it accords the interest of the deceased to the claimant for its protection. The third view thinks the legislative intent of the provision lies in protecting the individual's abstract and general expectations rather than individual's interests in life from the infringement against them. This view considers the legal interests in Article 230 as public interests but not as personal ones. Therefore it regards the substance of the defamation prescribed in the first subsection as an individual's feelings of disgrace and that prescribed in the second subsection as an infringement against individual's feelings of how they are being posthumously dealt with. It follows that, whilst they are according with each other in terms of an infringement against feelings, their contents of feelings are different. Namely, the feelings that individuals can recognize and the expectations that individuals can create after their death in terms of their being treated.

In the debate on interests of protection concerned with the dead who can not be the subject of rights or interests, Dr. S. Ono (1970) espouses, under an understanding that the reputation of groups which do not hold the legal capacity of juridical persons can be allowed to be a object for legal protection, the extension that the dead can be regarded as a subject of legal interests. He contends that a deceased person exists in a family relation as a moral entity (ibid.) and further that social and external reputation can be thought to exist as a legal interest for the sake of the dead, and therefore there is no difficulty in regarding a deceased person as a passive subject of the defamation (ibid., 209). Professor Hirakawa (1995, 227) also argues that views which do not accept the dead as a subject of legal interests are not appropriate because they stand on the ground of the human-centric orientations, and that, since the dead are entities included in the composition of the world, they can be a subject of legal interests.

What should be emphasized here is that, irrespective of the fact that the Japanese criminal code has a provision of "defamation of the dead", Japanese law does not concede the dead to be subjects of rights. Being a subject refers to an entity who enjoys interests identified with contents of the right. The dead can not be a subject who enjoys rights of reputation or moral character. Yet even if it were not for the dead's rights of reputation or moral character, it does not follow that the dead have neither reputation nor character. Professor S. Machida (1996) criticizes the view which argues that the character of personhood survives death as being fictitious, but, despite such a criticism, in the light of recognition, the surviving character really functions in society (Yoneyama 1998, 94; footnote 25). We do not stand on the recognition that if a person dies then nothing of the

person remains. Since our culture is composed of what has been produced and accumulated by the character of the living and the dead, the provision on "defamation of the dead" was created on the basis that the deceased are entitled to protection. To reiterate, the dead cannot enjoy profits even if this reputation is legally protected. Nevertheless, the dead are definitely a subject to which the damaged reputation is attributed. As Hirakawa (1995) addressed, the event of a person's death does not alter the person's character *per se*, but people's evaluation of the character and concern drawn from the character are likely to be changed. In this sense, the Criminal Code does not apply the reputation of the living to that of the dead, but protects the dead's reputation that the dead have at present (Yoneyama 1998, 92-3). Thus our position suggests that DP of the bereaved's feelings to the dead and of the expectations of being posthumously treated is not the substance of the legislative intent of Article 230 II. Protection is no more than indirectly and partially functioned by the obedience of the provision.

In addition, thus regarded by the Japanese as an unlawful act, law prescribes tortous liability in Articles 709-724 of the Civil Code. The principle of this "unlawful act" is "[a] person who intentionally or negligently violates the rights of others shall be liable for the loss caused by the act". If this violation against the rights is interpreted into illegality and only if there is an infringement against an interest that is worth legal protection, even a weak interest can be protected although it is not established as a new right. As mentioned below, Japanese case laws and leading theories accept reputation, as an interest worthy of protection by the Civil Code (see Igarashi 1989). In that case, however, it takes for granted that the protected subject is a living person. An important question of

how an interest worthy of being legally protected exists should be asked in a case of posthumous defamation.

With the above discussion in mind, we will examine the reality of law cases in practice.

There are no judgments of the Supreme Tribunal or the Supreme Court with regard to defamation of the dead. There are a few court decisions and reconciliation cases in lower courts and high courts. It should be noted that these cases are not relevant to the prosecution by Article 230 II of the Criminal Code, but to tortous liability caused by damaging the dead's reputation. However, the scarcity of cases does not mean that the importance of the concept is worthless. Rather it should be appreciated that the provision of the Criminal Code plays a functional role in protecting legal interests and deterring offenses.

In the first civil case[70] regarding defamation of the dead, the Tokyo District Court held that, even though defamation of the dead can be sued under the Criminal Code, any claim under the Civil Code is not feasible. The reason is that a claimant for compensation caused by unlawful act should in principle be a subject to whom is attributed infringed rights and that where a deceased person is defamed the deceased person cannot claim for the compensation nor can his/her relatives (children in this case) claim for the compensation on the grounds that the dead was defamed. Needless to say, in a case where the infringement to the reputation of the dead resulted in the relative's infringement, they can claim for a legal remedy on the ground of the infringement against their "own" rights.

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[70] Judgement of the Tokyo District Court, 20 November 1903 (Horitsushinbun 175, 17).

In a novel *Jiko no tenmatsu* (written by Toshimi Usui) published in Tenbō, a general magazine, the writer concluded that a main reason for the motivation of the suicide of Yasunari Kawabata, a Nobel-prize novelist, was his obsession with a young maid who took care of him. Kawabata's bereaved took legal action against the writer and the publisher. However, reconciliation between the parties was made on the 16th of August in the year before the judgement of the Tokyo District Court.[71]

In a *Rakujitu moyu* case[72] of 1977, a member of the family of the deceased sued a novelist for defamation. In a biographical work titled *Rakujitsu moyu* (The Sunset Is Flaming), Saburo Shiroyama described the whole life of Kouki Hirota, a former Prime Minister. Presuming about the mysterious suicide (in 1929) of Sadao Saburi, a Minister of China and Hirota's political opponent, Shiroyama described Saburi's reasons for suicide as follows:

> "In addition, it is said that he [Saburi] not only involved himself in women of red-light districts but also with some wives of his subordinates. The very dignified Hirota was reported to have said 'he is not worthy of being called a minister', and frowned severely towards Saburi's wholly improper personal behaviour" (1974, 71) [my translation].

The plaintiff X, a nephew of Saburi, claimed these paragraphs defamed the deceased Saburi's reputation. He also claimed that the author should make a public apology and be liable for monetary compensation, a million Yen. The Tokyo District Court showed a positive attitude towards defamation of the dead in the decision: "When, by the action of defaming the reputation of the dead (e.g., by means of an abuse of the reputation of the deceased) the living involved, such as the bereaved, are defamed, it goes without saying that the action should be argued as tort on the grounds that the defamation is against the living

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[71] For the details on the beginning of the file up to the reconciliation, see Igarashi 1977, 55.

themselves." As a matter of fact, however, the court did not take "defamation of the dead" into consideration. It dealt with the case as a case of damaging the respectable feelings of the bereaved for the dead by defaming the dead. The court held "it should be understood that the action of defaming the reputation of the dead can be illegal only insofar as the defamation is the result of a false allegation". Thus the decision was against the plaintiff's claim because there was no evidence to prove the action as false allegation (see Igarashi 1977, 55).

The appeal court dealt with this case, as well as the first instant judgment, as a claim for a tortous remedy against the infringement of the bereaved's devoted feelings to the deceased. Yet, in terms of regarding the judgment of the illegality, the appeal judgment is different from the initial instant judgment. One point is that despite addressing both the rights of character of the dead and Article 230 II of the Criminal Code, the appeal court judged whether the action of defaming the dead can be applied to the illegal infringement against the bereaved's rights of character. This is evidently inconsistent. The other point is that the appeal court emphasised the consideration on passing years. The implication of the passing years suggests that consideration should be given priority to the freedom for seeking historical facts or the freedom of speech, not only because passing years reduce the bereaved's devoted feelings to the dead but also because facts concerned with the dead are changed, year by year, into historical facts.

The fact that people's memories of the dead inevitably fade away accords with one of the reasons why English law rejects the protection of the rights of character of the dead. In this appeal case, the court held that, because of

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72 Judgement of the Tokyo District Court, 11 July 1977 (Hanrei-jihō 857, 65).

publicly making an allegation after forty-four years of death, a condition should be satisfied that the allegation should be serious falsehood or lie or that the infringement should be beyond endurance. Moreover, it should be noted that since we cannot find a provision, in the present laws, regarding who excises a right for the sake of the dead the court rejects any DP remedy for defamation of the dead.

In a district court case,[73] 1981, Y newspaper publishing company published an article describing a supposed extra marital affair between A who was stabbed to death and the offender. A's parents and elder sisters claimed not only that the dead's and their own reputation were damaged, but also that their respect and memory of the dead were harmed. They sued for seeking a notice of apology and monetary compensation against Y newspaper publishing company. In this judgment, since the claimants did not claim for a remedy grounded on defamation of the dead *per se*, resultantly the court did not form a judgment on it. The complaints made by the claimants were based on defamation of the bereaved's through defamation of the dead, so that the court accepted the mother's alleged claim but rejected the two elder sisters'. The court maintained that in a case where publishing an article damages the reputation of the dead by a false allegation and as a result reputation of the relatives, unlawful act can be constituted under the consideration of the real situation where the decrease in reputation of a person involving in social life influences reputation of his/her relatives. The mother's claim for pecuniary compensation was accepted, but her claim for an apology was not because of a lack of its perceived necessity.

[73] Judgement of the Shizuoka Discrict Court, 17 July 1981 (Hanrei-times 447, 104; Hanrei-jihō 1011, 36).

In the *Shōsetsu Mikkoku* (Novel "Secret Information") case,[74] a Sanki Saitō's second son claimed for a remedy against the damages of his own reputation, his deceased father's reputation and his respect for and memory of his father. Shōzo Kosakai, novelist, published a non-fictional novel "Mikkoku" (Self information) regarding the event of a crack down on a Haiku poet group suppressed by the Special Higher Police (Tokubetsu Kōtō Keisatsu or Tokkō)[75] in World War Two. The author provided a false allegation that the deceased Sanki Saitō was a spy for the police. The son claimed, in place of the deceased, for the author and the publisher to publish an apology to the deceased and to pay pecuniary compensation for the defamation of the son and the damage of his respect for and memory of his deceased father. The court pointed out the defendants' negligence and held that the defendants were liable for paying pecuniary compensation and taking an appropriate measure for the recovery of damaged reputation on the ground of Articles 709 and 723. Regarding as an issue on whether the plaintiff, son of the defamed deceased can claim, in a place of the deceased, for a remedy of recovery of the damaged reputation of the deceased, the court maintained that whilst it acceded the possibility of establishing unlawful acts because of the precedent case (the *Rakujitsu moyu* case), exercising the right of the dead lacks reasons based upon substantial law and it should be rejected. However, this is the first case where a remedy for unlawful act on defamation of the dead *per se* was admitted by the court. The alleged claim for publishing an apology for damaging the deceased Saitō's reputation was acceded and despite "indirectly" the reputation of the dead *per se*

[74] Judgement of the Osaka District Court, Sakai Division, 23 March, 1983 (Hanrei-times 429, 180; Hanrei-jihō 1071, 33).

[75] Their principal duties were the control of social movements and the suppression of radicals and advocates of dangerous foreign ideologies (See Aldous 1997).

was protected by the decision. With regard to an issue on whether the plaintiff's claim, in a place for of the dead, is possible, the DP for defamation of the dead was rejected.[76]

In a case[77] where the reputation of a deceased politician was allegedly damaged, his son and brother's claim based on defamation of the dead was that a newspaper company should publish an apology for the dead and at the same time there be made monetary compensation for them because of the argument that defamation of the dead can be identified with that of the bereaved in this case. Acknowledging that a person's reputation and rights of character can survive death, the court decided that the existence of Article 230 II of the Criminal Code and Article 116 of Copyright Law cannot be applied to an unlawful act that should be judged by general civil law. For the same reason as the decision of the *Mikkoku* case, the court held that a claim, in a place of the dead, against defamation of the dead lacks grounds in substantial law. This decision denied the possibility of the protection for damaged reputation of the dead and their rights of character.

In the latest *Eizu praibashii soshō* (Lawsuit of AIDS and Privacy) case,[78] *Fōkasu* (Focus), photograph magazine weekly published by Shinchōsha, carried a story which covered A's prostitution activities with her photograph surreptitiously taken by the magazine. She had been suffering from AIDS (Acquired Immune Deficiency Syndrome) and died of the disease. The plaintiffs, A's parents, made a claim for damages against the reputation of the deceased daughter, her right of privacy and her rights to refuse to be photographed, and

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[76] For interpreting the *Mikkai* case, see Ajitomi 1983, 47; Urakawa 1983, 113; Awaji 1985, 102. Except for Awaji 1985, the IDP thesis of the court cases is rejected there.

[77] Judgement of the Tokyo District Court, 26 May, 1983 (Hanrei-jihō 1094, 78).

[78] Judgement of the Osaka District Court, 27 December, 1989 (Hanrei-jihō 1341, 53).

moreover the plaintiff's rights of reputation and privacy, their rights to peacefully perform a religious rite, and rights of their respect and memory to the deceased. The claim was that the company, Fōkasu's chief editor and a photographer under exclusive contract should publish an apology and pay monetary compensation. But the court held that the deceased's rights of reputation, privacy and portrait should be regarded as personal rights protected only in their life because of the characteristics of the rights and furthermore it also maintained that one loses the capacity of legal rights at one's death and at the same time one loses one's right of character. With regard to rights of character, the court asserted that there are no general provisions which can justify for providing the bereaved and relatives with the establishment of the same categorised rights that a deceased person enjoyed whilst he/she was alive and that there are no substantial provisions for acceding the enjoyment and excise of rights of the dead person's character. Regarding the significance of Article 230 II of the Criminal Code which the plaintiff took as sufficient grounds, the court contended that the provision in question should be interpreted as no more than a provision prescribed for the nation's purpose of protecting social or public interests. Regarding as other grounds, i.e., Articles 60 and 116 of Copyright Law, the court decision was that the reason why Articles 60 and 116 were prescribed, despite the presumption that an author's right of character becomes extinct at the time of the author's death because it is a personal right (see Article 59), is the necessity for protecting posthumously the rights of character and therefore the deceased author's relatives are vested with the same rights. Accordingly it should not be assumed that one's right of character can continue to be effective after one's death. The existence of the provisions cannot be a good reason for justifying the acceptance

of the deceased right of character. With regard to the infringement against the plaintiff's right of reputation and privacy, the court did not accept the alleged claim and then it rejected the claim for a public apology in publication and rights to peacefully perform a religious rite.

As reviewed above, Japanese court decisions on defamation of the dead reject the DP thesis, which refers to a perspective that defamation of the dead is an infringement directly against the dead and the harmed dead should be vested with a remedy for directly being protected. In early cases, regarding Article 230 II of the Criminal Code and Articles 60 and 116 of Copyright Law, the court accepted the posthumous existence of rights of character and examined whether an application of those provisions contain the possibility that defamation of the dead and infringement of the deceased's character can be regarded as an unlawful act in the Civil Code. The court rejects the DP thesis because there are not any substantial laws on the infringement against the dead's rights (see the *Rakujitsu moyu* case and the *Mikkoku* case). However, in the *Mikkoku* case, the court definitely denied that these provisions in question can be applied to another area of law. In *Fōkasu* case, arguing that these provisions are not for acceding rights of character, the court rejected a ground for the IDP thesis.

Nevertheless, the courts consistently have accepted a claim for protecting the bereaved's reputation, their respect for and memory of the deceased, the infringement against their rights of character, although there are some differences in the details. For example, in the dispute on whether defamation of the dead can be identified with that of the bereaved there are the pros (see the *Mikkoku* case and the *Fōkasu* case) and cons (see the first instant and appeal cases of *Rakujitsu moyu*). With regard to the protection of the bereaved's

respect and memory of the dead, the court accepted a claim for monetary compensation based on unlawful act in a case where defamation of the dead is illegal and the infringement against the feelings is liable. This judgment is a legal practice of the IDP thesis for defamation of the dead. As an orientation of the court cases of defamation of the dead we would say that a remedy for momentary compensation based on the infringement of the bereaved's respect and memory to the dead has been so far established (see Ashitomi 1990, 183-4).

2.7.4 Japanese discourse

Concerning the dead person's reputation, Japanese scholar's perspectives are strongly influenced by German references (e.g., Ajitomi 1990). As previously mentioned (see 1.5.4), the present Criminal Code is influenced by the German Criminal Code, but insofar as this provision is concerned, it is not. In the social tradition of Japan and Germany, however, both nations have a very similar history in terms of "ancestor worship". The discourse of *rights of the dead* deeply linked to history is more abundant than the English and Anglo-American discourse. Therefore when we are examining details of the Japanese theories, it is appropriate to cite from German legal discourse and debate on the subject.

To reiterate, there are two distinctive perspectives: the DP thesis, which agrees with the views that a person's moral interest can survive the person's death, that the infringement against the interest can form an unlawful act, and that law can directly relieve the defamed dead by legal protection; and the IDP thesis which asserts that law can indirectly protect the interest of the dead by protecting the bereaved's interests when the bereaved's rights of character are infringed.

(1) Legal grounds

The substantial ground of the DP thesis rests on the perfect protection of human rights of character (ibid., 185). Since one's posthumous situation that one takes interest in is likely to influence behaviours, emotions and lifestyle of other people and oneself, one's rights of character cannot sufficiently be protected unless it is protected after one's death (ibid.). In the current of the past, present and future, the DP theory requires human character to be protected even from a viewpoint concerning the dead. Its substantial ground is resonant with Article 13 of the Constitution, which provides the protection of the dignity of individuals. If reputation and moral character of a deceased person are harmed and there is no remedy for the infringement against the dead, and even if the remedy for the bereaved is available, it should be understood that the availability of protection of the dignity of the dead is insufficient (ibid.). Addtionally, the DP theory points out that there are not so many cases in which the infringement against the dead's rights of character is simultaneously identified with the infringement against the bereaved's right of character, and furthermore that there are many cases in which the infringement against the dead's rights cannot be regarded as legally remediable interests for emotional or psychological damages, for example the bereaved's respect for and memory of the dead. Also the IDP theory is criticised on the basis that, in a case where a dead person happens to have no relatives, there cannot be damages to the relatives or remedies which should be offered (ibid.).

The DP thesis rests substantial grounds of law on Article 230 II of the Criminal Code, Article 233 of the Criminal Procedure Code and Articles 60 and

116 of Copyright law (ibid.). The thesis understands that in the Criminal Code and the Criminal Procedure Code, rights of character continue to exist after death. The DP theory's interpretation of the Copyright law is that the author's interest of character remains even after the author's death. If the view is accepted that interests are worthy being protected, the continuity of a right after death can be accepted as a right without its subject. Therefore it is understood that the bereaved or appointee have an entitlement to exercise the right of moral character for the sake of the author. The DP theory positively argues that justification for the author's posthumous moral rights in Copyright Law can be applied to other moral rights such as rights of reputation.

The German court decision and leading theory rest on the DP thesis (ibid., Ashitomi 1980; Igarashi 1977, 56-7 etc.). The substantial reasons for protection of the dead's rights of character is, as Japanese DP thesis argues, that protecting legally a right of character even after the person's death results both in perfectly performing human dignity and in developing freedom of character (Ashitomi 1980). It is because from the point of view of the living, their expectation that their interests of character can be protected after death influences their own and others' behaviour, emotion and way of life that the protection of character can see it become perfect in the current of the past, present and future.

The DP perspective in Germany is based upon two court judgments: the first in the First Civil Division on 26 November, 1954; the second in the same division on 20 March, 1968. In the former case, the key question concerned whether or not the deceased's (Cosima Wagner) diaries, letters, etc. could be published (see Bar 2000, 130, footnote 772). The decision of the court stated:

> "The right of character endures after death when the original legal entity, i.e., the person, passes away. The author's right of character is unanimously admitted in both jurisdiction and bibliography. This applies in the same way also to the general right of character; because the values of the character worthy of protection outlive the legal capacity of the subject, which expires on death" (BGHZ15, 249) [my translation].

The second judgment involved "Mephisto: a story of career", a contemporary critical novel. The dispute in this case concerned whether the description of the deceased in the novel represented an infringement against the rights of character of the deceased. The federal court based their judgment on the earlier decision. They held that the value of a person's character can be an object worthy of protection after the death of the person concerned, and that therefore, the rights of general character can continue to endure after death.[79]

The gist of both decisions is that the right of character that endures after death is a right that can exist without the living subject. This concept however does not necessarily have relevance in criminal law. If we can understand that the concept of legal interests is a concept that does not necessarily have to be associated with human rights and the individual living subject, then we can accept the view that even though the right of character endures after death despite the absence of a living subject, it can be regarded as a legal interest worthy of protection. However, civil cases of this nature may generate new problems which will need to be resolved. The most serious problem is the explanation for whether or not rights can exist even if there is no subject. This problem will be discussed in a later section.

The IDP theory argues that when the dead were defamed, rather than the infringement against the dead's right of character, a remedy for the protection of the bereaved's right of character is required. Obligation on unlawful act and

[79] BGH June 4, 1974, VIZR68/73.

other remedies are directed to the bereaved who are considered to be indirectly damaged through defamation of the dead. This theory rests the ground on the provision of the Civil Code on unlawful act and general procedures such as an injunction based on rights of character. Conceptual grounds for a legal remedy are defamation, feeling of worship and damaging reputation, respect and memory to the dead.

(2) Scope of protection

Regarding the scope of protecting the value of the dead's character, the DP thesis confines the scope of protection to what is worth being protected after death. It understands as being not protected at death the value of character which evidently can be ascribed to the living and that the existence of such character assumes the existence of the living. To rephrase, the protected values and interests are objectified ones of character that a person made up in his/her whole life, such as author's right of character and rights of portrait, naming, reputation and privacy (Ashitomi 1980).

However, in observing the modes of the infringement against the dead's rights of moral character, the IDP thesis judges what range of the infringement can be identified with the infringement against the bereaved's respect and memory to the dead. The notion of "the respect and memory to the dead" is so broad that it can be understood that the range of the infringement against the dead's character, which can be protected by the DP theory, generally overlaps with the range of the infringement against the bereaved's respect and memory of the dead.

(3) Claimants

Who is a claimant for legal relief? The DP thesis takes it for granted that the dead are physically incapable of defending themselves against defamation so that they need others who can execute defense on their behalf. Claimants are not necessarily in accord with successors, for successors are entitled to inherit the property rights from the deceased and are definitely different from those who execute the rights of character on the dead's behalf. Professor Ashitomi (1990), espouser for the DP thesis, argues an analogical application of Article 116 of Copyright Law. This article provides that the order and scope of the bereaved only embraces spouses, children, parents, grandparents and siblings, and that, in a case where the bereaved for the dead exist, or where they do not exist, it is possible for the dead to appoint a person to act on their behalf. The DP theory appreciates that this is in accordance with the draft of German law except for grandparents. The order based on blood connections means that in a case where relatives in higher rank do not exercise the right in his/her manner against the dead's will, other relatives of a lower rank can exercise it on the dead's behalf. Moreover, the reason that there is instituted a system of claiming by the appointment is that in a case where a right is not exercised by the relatives, and at the same time where the dead's interests of character are concerned with studies or vocations, it would be possible for non-relatives to exercise the right on the dead's behalf.

In the IDP theory the core of the protected interests is the bereaved's respect and memory of the dead. The theory stresses human relationships that produce the interests. Therefore it argues that, since a claimant can exercise a right of the dead person's in a case where the infringement against the right is according

with that of his/her own, it is possible for not only relatives but also close friends of the dead person to have an entitlement to pursue action as the claimant. Whilst there is a view which argues that even a group has an entitlement to claim for a remedy against its own defamation when its own social reputation is damaged by the speech, for example, by which its founder's reputation is damaged, some scholars doubt whether subjective feelings such as the respect and memory to the deceased can be applied to the group. In addition the IDP theory contends that there are not any problems on the order of claimants and that in light of feelings of reputation and memory to the dead claimants have an equal entitlement to claim.

(4) Periods of protection and contents of remedy

The DP theory accepts application of the concept "moral rights" of Copyright Law to "defamation of the dead". In claims made by relatives they are entitled to claim up to the time of their death. In claims made by appointees they are entitled to claim up to the expiry of the year, fifty years after the author's death, and for the relatives' lifetime if they are alive. A criticism is however that such a period for protection is so long that the characteristics of the dead can be changed along with the times and academic studies, historical descriptions and reviews should take priority over protection of moral rights.

The IDP theory argues that protection can be claimed as far as the above claimants are alive.

As regards contents of the relief, the DP theory acknowledges that the dead do not and cannot perceive or experience mental suffering whether it be caused by defamation or any attack. Also, present and future momentary loss is

irrelevant (to the deceased, but not of course to the estate of the deceased). Consideration of events, loss, outcomes etc., that may be generated in the future is not appropriate. It may even be possible to argue that, since the dead cannot experience their own agony, even the bereaved are not entitled to claim in place of the dead (Hubmann 1953). Therefore any compensation for damages and consolation money cannot be accepted by the court. As a relief for the protection of the dead, remedies such as injunction and recovery for defamation would be available. An example of the latter is publishing an apology. Publishing an apology refers to, in magazines or newspapers, a withdrawal of the defamatory statements and the making of a formal offer of amends. As for the requirement of the apology, although there is a view that the case of a dead person seeking a withdrawal is sufficient (Igarashi 1977, 59), the claim for the right to reputation has been recently argued. Thus, as understood above, the legal remedy for defamation of the dead can be theoretically acceptable, but as an actual effect, it may not be feasible. As Igarashi (ibid.) points out, it may be plausible that the principle of journalism "speech against speech" could matter in some aspects.

The IDP theory considers a relief for defamation of the dead as one for the infringement against a relative's reputation. It expands the limitation of the protection and relief for the dead to the relatives. In other words the relief has a twofold structure: a relief for defamation of the dead and a relief for the relative's devoted feelings to the dead. The former is possible for monetary compensation, recovery of harmed reputation and injunction; and the latter for monetary compensation. There are no definite guidelines for determining the amount of compensation. The circumstances that the dead were involved in should be taken into consideration for determining the amount. In addition, not only the

circumstances but also the social character of the dead, such as social status, vocation and position, are evaluated. An examination is required as to whether recovery for damaged reputation and injunction can be applied to cases of the relative's devoted feelings to the dead, namely cases where reputation of the dead is recognized as indirectly infringed.

2.7.5 Developing to our arguments

In criticism of the DP theory utilising the IDP theory, two points come into question. One is whether the concept "defamation of the dead" *per se* can be justified. The other is whether a problem of the infringement against the dead's rights of character does not need to be resolved at the level of litigation but can be sufficiently resolved at another level such as vicarious protection. The review of the IDP perspectives suggests that there are no problems on the legal and theoretical composition in terms of their position that indirectly protect the damaged dead by evading a problem as to whether the dead who are not subjects of rights in legal system have their own rights of character. However, even so, once a person's character is damaged after the person's death, we cannot disregard this reality of what happens.

The first discussion in this section is on whether the right of the dead's character can be justified. The IDP theory argues that the contents of rights of character are to protect the subject of the rights so that in principle a person has no rights after the extinction of the subject. The provision of the Japanese Civil Code prescribes that a person's death deprives the person of an entitlement to be a subject of rights and duties and the procedure for succession of the rights and duties should commence. The IDP theory, based upon the above general

rule, argues that rights of character such as personal reputation and privacy cannot be succeeded at the time of death but should lapse. However, as mentioned in a previous section, this thesis pointed out that the mode of reputation, an example of object for rights of character, has a twofold structure and explained the contents of the rights of character that can endure after death. Social reputation of the dead is composed of both the personal contents ascribed to those who were once alive and the objective social evaluation which can be separated from the person and be altered due to social factors and posthumously personal factors (see 2.6). At the person's death the former becomes extinct but the latter still remains. The latter can become a reality in the form of reputation ascribed to the dead. In this sense, it is wrong to think there is no right of the dead's character.

A point, stemmed from this point, to be considered is that it is evident that, even after a person's death, the value of his/her character can continue to be an object for legal protection, seen as court judgments suggest that a right of character endures after death, though the subject *per se* no longer exists. It is not denied that this reality imposes certain restrictions on the rights of character of the dead, confined to that which should be protected after death. The reason why the scope is restrained is that it is impossible for the death to freely develop their character and that the infringement of feeling cannot be generated, that is, the dead can no longer experience. Thus the dead have different character attributes to that of the living and this difference generates the difference in the scope of protection between the living and the dead.

The difference of attributes can be explicated by the following case of defamation of the dead. Even if the character of the dead is succeeded from that

of the living, there exists an infringement against specific character after death. As mentioned, the good example is *Kaimyō* discrimination, namely religious discrimination against Burakumin. This discrimination is against the dead Burakumin's character, but never the living. It is so because *kaimyō*, an object for discrimination, is evidently given after death.

It follows that there are substantial grounds for justifying rights of the dead's character and therefore to protect rights of character succeeded from the living results in perfect protection of a human being's character. Yet in the discussion on legal grounds for rights of the dead's character, the opponent to the DP theory criticizes an analogical application of Article 230 II of the Criminal Code and Articles 60 and 116 of Copyright Law. The reason for it is that these provisions have their own reasons for provisions, that is, Article 230 II can be exceptionally justified on the ground that the Criminal Code, the fundamental law regarding crimes and punishment prescribes for the purpose of the state's public interest, for example, social order, and that Articles 60 and 116 of Copyright Law, by taking the peculiarity of the Law into consideration, prescribe protection of the author's moral rights. Therefore the IDP theory argues that to be an exceptional provision does not result in justifying general rights of the dead's character. This argument is wrong. Theorists who attempt to justify rights of the dead's character by the existence of the three Articles do not attempt to extend them to the rights of the dead's character or to claim for the acceptance rights in other provisions as rights of character. The theorists are interpreting the provision which refers to the concept *rights of the dead* expressed by, in reality, some phrases such as "defamation of the dead" and "rights of the dead's moral character". If it is the case, it is natural that we understand that the phrase "rights of the dead's

character" should be understood as what the law suggests as rights of the dead's character. There is no reason that, despite such a provisional declaration, we have to interpret an infringement against rights of the dead's character as those of the relative's ones. In other words, the strict position of legal interpretation would argue that, even if there are any rights of character law protects, the IDP theory can be considered as a sort of an analogical interpretation based on relief-oriented interpretation. However it is possible to criticize the view that the justification by the strict interpretation is no more than that on the ground that there are really such phrases in the provisions.

To avoid the criticism, we have to return to the principle of Article 230 II of the Criminal Code and Articles 60 and 116 of Copyright Law. It is apparent that Article 230 II suggests that the provision's interest to be protected is the reputation of the dead. Reputation has a two-fold structure (see 2.6). There is no doubt that reputation related to feelings or emotions no longer exists in the dead, but the social reputation that can be succeeded after death does exist even in the dead. In a case where "the dead can be a subject of reputation" or "the dead have character" is expressed by ordinary terms, in the light of the contents, this is the same as stating the "reputation of the dead can be infringed" but is different from claiming that the "living have character". When we talk about the dead, their subjects are not subjects of rights or their character is not character in terms of law. Namely, the criticism would be plausible that, even if in a case where reputation of the dead is regarded as a venerable interest it is asserted to be an object for protected character, the assertion *per se* does not necessarily admit an entitlement of "a subject for rights" for the dead. Although personal attributes such as reputation and social evaluation for physical and

material nature of a person can become extinct, the social evaluation drawn from the person's mental nature can continue after death as a character of the person. This suggests that character of a person still exists in the deceased person. Since interests in the Criminal Code are mental fruits of substance and values, protection for the dead is required by the Code. The dead are no longer subjects of rights, but it is still possible for their reputation to be infringed. Therefore it should be understood on the grounds that defamation can be made in cases of the dead, interests in defamation of the dead can be identified with reputation of the dead *per se*.

As for Copyright Law, the DP theory's criticism is that the provision on protection of moral interests of the author's death does not mean that rights of author's character can survive author's death. The IDP theory argues the moral right is personal and therefore it becomes extinct at the time of author's death. The reason for establishing the provision is that the provision does not protect interests of moral character of the deceased author, but works are worthy of protection after the author's death as representations of the author's objectified spirit, and furthermore that there are any interests that should be protected as national and cultural production. Therefore law admits relatives to have the same right as the moral right of the author. Thus the IDP theory contends that the provision was made for a special aim and interest and that it cannot be generalised to other civil cases. Works represent their author's objectified spirit. These works he/she produced are a reflection of his/her spirit. These works come to represent his/her objectified spirit when he/she transferred his/her ideas onto paper. Therefore, copyrights play a role in protecting and perpetuating the work of the original "living spirit" in a form called "objectified spirit". The spirit

continues to exist within these works, and can be constantly recognised after the author's death. In other words, what should be emphasised here is that rights of character may continue to exist in a form separate from the subject of the rights. Therefore, even if the rights lack a subject, it should be quite plausible to think that the rights per se continue to exist after death. This is the principle ground for admitting, in Cosima Wagner's case, that "[t]he right of character endures after death when the original legal entity, i.e. the person, passes away".

The second main debate in this section is on whether rather than at the level of litigation, the problem of the infringement of the dead's character can be sufficiently resolved at other levels. We can rephrase it as "the protection for the dead can be sufficient by protecting their relatives". There are, in the debate on rights, many problems regarding the infringement of the character of the dead to be resolved. So it would be a good way to use a framework such as vicarious protection to circumvent the difficult problems. This view interprets the infringement against the dead's character as that against the relative's character, but as Heldrich (1970, S.170) argues, there are some situations in which the interests of the deceased and that of his/her relatives do not necessarily accord with each other. He also points out the disadvantages of a situation where, whilst a statement about the dead is favourable to them, it is against the interests of their relatives so that the relatives have to file a separate action based on their own rights of character (ibid.). Or, there can be a situation in which, whilst a statement about the deceased considerably damages his/her reputation, the relatives still remain silent about it. Furthermore, there could be a situation in which the image of the deceased is distorted by his/her relatives (ibid.). It is uncertain whether any relatives know or take into account that the deceased's

reputation should be protected by any means. This consideration of the reality in which the protection of the dead's reputation is dependant on the relative's discretion, of necessity leads us to register an objection against a rigid determining of the qualification for being a claimant. This problem would be especially pertinent in a situation in which there are no relatives of the dead. In these circumstances, it is possible that the deceased's right to character is almost entirely unprotected. This is the reason why it should be argued that in respect of defamation of the dead Article 234 of the Japanese Code of Criminal Procedure should be applied, thus making a provision that a claim can be made by a prosecutor. Paragraph 2 of Article 12 of the draft of BGB (the German Civil Code) also admits a way in which the deceased can appoint a claimant on their behalf. However, the expansion of the qualification of claimant admitted by this Article may generate a conflict between the application and freedom of speech (Igarashi 1977, 58). Furthermore, the provisions of the Article may have implications for legal stability. However, even if such a criticism is taken into account and if under the aim that a person should be protected from the posthumous event concerned with the person, the solution by using the concept "rights" is not feasible, then reputation of the person cannot be protected before and after his/her death.

As for what legal remedies for the relief of an infringement against the deceased's character are feasible, as an actual effect, it may not be feasible. Publishing an apology is in general available as a remedy, but a criticism points out that the remedy is not appropriate as a remedy for recovery prescribed in Article 723 of the Civil Code. As a remedy for recovery of social evaluation, rather than publishing an apology, publication of a cancellation or the court

decision would be sufficient. In general, it is understood that, since a remedy for restoring matters to the *status quo ante* should be claimed in an extreme case where the damage is beyond a standard, the view that argues that a claim, based on the devoted feelings to the dead, for re-establishing the *status quo ante* is feasible, is too subjective, because of the subjectivity of the feelings and the strength of the emotions, to be acceptable. Can injunction rest its ground on feelings? Ashitomi (1990, 190) argues that, whilst interests of the devoted feelings, both in scholarly discourse and in court decisions, are not defined as specified personal rights of character, such as life, body, freedom, reputation, names, portraits, these feelings refer to the generic rights of independent character and furthermore can be categorised as a right of character which is an inclusive concept including interests that in Japan is not sufficiently defined—e.g., privacy, personal documents, spoken words, personal information. Nevertheless he also points out that there is a problem on whether, even if the specific right of character can be grounded for injunction, the right of character which is not sufficiently defined can be grounded in it (ibid., 191). In the present situation where injunction even in respect of the living's is restricted, cases in which injunction could be applied would be confined to extreme cases of defamation (Igarashi 1977, 59).

2.7.6 Even if there is no subject can rights exist?

"Defamation of the dead" and "infringement against character of the dead" are, as explained in this thesis, a typical example for *rights of the dead.* Our argument is that an infringement against interests discussed in "defamation of the dead" can be interpreted into that against rights, but nevertheless still the

most difficult problem remains insufficiently unsolved. The problem is on "how it is justified that even if there is no subject, rights can exist".

To repeat, the dead have no capacity for rights because they are dead. Therefore they cannot be the subject of a rights claim. The presumption for being a subject of a rights claim is that you are a living human being and therefore a person entitled to enjoy rights. In this respect, foetuses and artificial persons (e.g., corporations) can qualify but not the dead. However, the mere fact that an entity is not a living subject does not necessarily lead to the conclusion that non-living human beings do not have interests worthy of protection. A counter-argument to the existence of such interests is that this might include interests for such things as chairs and stones. But we have already resolved this problem by demanding that such interests are linked to a concept of social characteristics. Nevertheless, to avoid any misunderstanding on this issue the relationship between non-subjects and rights will need further development.

Rights maximally provide the priority normative protection to individual's values and interests within a society. As a matter of fact, the rights we enjoy in modern society give priority to the fundamental values related to individuals and the interests derived from these values. These values and interests express: the inner worth generated from human dignity; the inner freedom related to conscience and beliefs; and the desirability for the welfare to advance the individual potential in life (Hasegawa 1992, 158). However, according to Waldron (1987, 183ff), some problems arise in the interpretation of the rights.

First, the values and interests conceptualised by rights are in pursuit of individualistic, private desire. But, it should be noted that individual responsibility, liability to others, communal duty of obedience to law and promise and further

social feelings, such as devotion, respect, loyalty and patriotism, all play a vital role in society. These are said to be the empirical, communal and moral heritage that has passed down through history. Consideration for these collective social values is significant, at the least as significant as the protection of private values. But, rights-based theory has ignored this significance. When the importance of the communal association is recognised, it will be appreciated that the position of no-subjects is congruent to that of the living. Being without a subject does not damage the significance of the values *per se*.

Second, it should be noted that, even if the justification of individualism can be allowed, moral desirability to individuals presupposes a further desirability that is presupposed in the very constitution of community. This communal desirability is a value that should be greater than each individual's worth in order to sustain every individual human's well-being. In other words, it is possible that even the rights of no-subjects can be justified on the grounds of the communal desirability.

Third is the understanding that rights are, when viewed from the rationality of individualism, no more than a form of ideal. The reality rather is that rights based on and justified in individualism generate a conflict of rights between and amongst individuals that requires reconciliation. When the dark side (i.e., anti-community) of rights is emphasised, a negative effect of the subject *per se* is illuminated as a conflict, for example. Rights based on individualism have many self-interested, prudential elements which override the sense of a moral and responsible community—itself a contradiction in terms unless community is understood to be more than a group of individuals in the same spatial locale, rather we should consider community to be taken to mean a community of

interdependent and duty conscious beings who have the interests of their community as their prime concern rather than self-serving interests. When the communal order, an order greater than the worth of any single individual is presupposed, then "no-subjects" can be interpreted to be a form of legal requirement in the presupposed order by communitarianism.

Understanding "subjectless" as a form of legal requirement in the presupposed order by communitarianism does not always apply to any situation where rights lack their subjects. For example, whilst a subject who holds a personal right of reputation dies and his/her rights of reputation can survive death, his/her rights to vote, another example of personal rights, cannot survive death. The difference rests on the characteristics of interests between reputation and the ability to vote. The former has a twofold structure: rights of character as being attributed to individuals and rights of character as a social reputation. On the other hand, the latter has legal interests that cannot be realised after death but are feasible only whilst a person is alive.

A criticism may be made on the basis that even if this value of evaluation belongs to a right of character that an individual holds, it is not an exclusive right for an individual, i.e., a right that an individual possesses within his/her life, but when the contents of the right of character are reviewed, the argument that the right of character is extinct at the instant of death and thus an attribute only the living can hold is questionable. A right of character gives entitlement to legal protection of the social evaluation and is, therefore, composed of genders, ages, beliefs, social status, names, social requirements, roles, authorities, etc.

As mentioned in a previous section, the living's rights of character have a twofold structure. One aspect is character which can be attributed to a person

but cannot survive the person's death. The other is a social evaluation which can endure after death. Take an academic degree for example. When a person enjoys holding the degree, it is an example of character attributed to the person, but when the person dies, the degree can survive death and it can be held by the dead as a social evaluation of historical record. In the same way, social status is a reputation that a person recognised through a social activity, but after death it is expressed as an objective evaluation. The reputation can survive death as an evaluation separated from the person. Values of both characters of the cases can be attributed to the posthumous person.

A claim "the deceased's social evaluation can continue in the form of the mere impression of the living's right of character" (ibid.) is attempting to essentially differentiate between the social evaluation of character of the living and the dead in an evaluation of character that can continue to exist after death. The claim is not acceptable. The living has a social evaluation that can be claimed as a defined legal right, whilst the dead "have" a mere impression of it. Yet again this is questionable. For instance, in any calculation of compensation for death caused by a traffic accident sums awarded are based on the social evaluation that victims held before their death. We do not evaluate the dead in this circumstance by an impression of his/her right of character but by the right of character that the dead *per se* "have". This social evaluation is not an impression but a reality underpinning monetary compensation.

There is a view that the difference in requirements between the first part and the second paragraph of Article 230 is due to the differences of social character of a living and dead person. We do not agree with this view. That this difference pertains does not lead rationally or logically to the further claim that the

dead have no rights of character. Article 230 states defamation of the dead is not punishable unless the case is proven to be one of false allegation, and in the context of the Article's requirements for claiming defamation, this point states a decisive difference between the living and the dead. So even if, by stating an historical fact, a person intentionally damages the dead's social evaluation and therefore reputation, the action is not punishable. However, and crucially, this principle cannot lead to the conclusion that the dead's right of character should be denied. The reason why a case of false allegation is punishable is due only to the different attributions of character and social evaluation the living and the dead are held to possess. Therefore our position suggests that the discussion on the social evaluation of character should be reviewed by analysing the difference in the social character of the living and the dead. The dead's reputation, protected in criminal law, is not only referred to by their objective and social reputation. It is also a reality that the fixed character of their social evaluation endures after death. The character of the dead endures in the form of memories. It is formed and memorised in the same way as the social character of the living. The substance of rights of character cannot be differentiated between the living and the dead *ipso facto* the substance is an abstracted social evaluation. Yet, the difference of the Criminal law's attitudes toward the living and the dead resulted in producing a requirement of "false allegation". The living have to live on the basis of real social evaluation and relationships with others based on the evaluation, while on the other hand the dead can exist on the basis of objective evaluation which does not need a fictitious name.

Moreover, if reputation is considered as the sum of evaluation that the living hold toward other people whether living or dead, then rights of character necessarily pertain not only to the living but also to the dead.

Pointing out that using an historical fact which results in defamation is punishable in the case of the living and not in the case of the dead is neither incompatible nor contradictory with regard to rights of character. This difference in punishable outcome is due to no more than the difference that which was generated in the first place on the basis of the attributions of the living and the dead's character. A person has, at the time of death, an historical status which is predicated in their characteristics, works represented and achievements as a living person.

2.8 Conclusions

In the first discussion "can the dead be harmed?" and "do the dead have interests?" we presented some positive arguments to support *rights of the dead* from the perspective of social character and reputation. But difficulties of a metaphysical and metaethical nature still remain in the discussion. In the second discussion of this chapter, examining the attitudes of Japanese and English law toward defamation of the dead, we demonstrated that the *right of the dead* for a claim of defamation, the right that exists in Japanese legal discourse as well as that which exists in Germany can be justified. We also established that it would be possible to prescribe for *rights of the dead* in English law.

However, the Japanese criminal law and civil law show a different attitude toward defamation of the dead. The Civil Code does not admit the ground by which it is possible to change an unchangeable rule that a person loses a subject

of rights and duties at the time of the person's death. Even if the dead's right of character is accepted, a remedy for the infringement against the right would be taken through the relative's claim for the remedy. The dead *per se* have almost none of a remedy under his/her name. Therefore as a remedy there are almost no differences between the DP thesis and the IDP thesis. To establish *rights of the dead*, we will have to develop and deepen not only substantial discussion but also philosophical discussion.

Chapter 3

Intention

3.1 Introduction

The aim in this chapter is to explicate intention in relation to making a will. The first part of the chapter will review what is the intention of a will. The meaning of intention will be reviewed differently in the pre-death and post-death stages in relation to the question of whether or not the maker of the will exists. The second part of the chapter will discuss some cases of intestacy and conclude that there is, in a broad sense, an intention element to intestacy and it can be considered to survive death by a legal fiction.

3.2 Definition of succession

3.2.1 Two groups of rules

The essence of succession in modern law is "the transmission of property vested in a person at his death to some other person or persons" (Parry 1953, 1). Succession is regarded as a legal institution of private ownership; succession and private ownership can be said to have the same foundations (Hagiwara and Nagata 1958, 161). The continuation of a person's legal personality or estate after death is considered possible by virtue of the two point legal classification: dying testate or dying intestate. In simple terms, the former describes the situation in which the deceased has made a legally valid will; in the latter, the

deceased has not. Both situations use different means for the transmission of property. There is however no difference in the respect that the property of a deceased passes to other living persons with legal capacity and thus the purposes and functions of succession are fulfilled (Akeyama 1979, 5).

Almost every modern and contemporary law of succession is broadly classified into two groups of rules: first, rules deciding who can inherit the person's rights and duties after his/her death; second, rules transferring the deceased's rights and duties to his/her successors (Itō 1981, 14).[80] These ideas are not controversial.

There are various definitions of a will (e.g., see Atkinson 1953, 2-3), in Japanese and English law; Mellows, an English lawyer, defines a will as:

> "A declaration in prescribed form of the intention of the person making it of the matters which he wishes to take effect on or after his death, until which time it is revocable" (Margrave-Jones 1993, 6).

A will gives legal effect to the final intention with regard to succession that the deceased expressed before death. Therefore this constitutes a form of guarantee that the intention will be carried out: a person expresses his/her intention in documentary form and compliance with the relevant legal provisions triggers the institutional device that enables effect after death.

3.2.2 Two questions to be answered

It is not uncommon for a considerable time to lapse between the making and execution of a will. Importantly also the subject of the will ceases to exist upon death. Still, despite the fact that a subject who autonomously made a will no longer exists, the law regards the will as a living person's will. This is a legal

fiction. As for the assumption of the legal fiction, in this chapter we will attempt to answer two questions:

> (a) the intention of a will that takes effect after death is that of a living or a dead person; and
> (b) the intention of intestacy is that of a living or a dead person.

As mentioned in 1.5.2, if a will belongs to its maker and is enforced on death, then the law must resolve the paradox that it is granting a right to something without a subject and justify the continuation of the intention of a will. Justifying a will's post-death existence and its post-death enforcement may, therefore, make it feasible to presuppose there is a *right of the dead*.

3.3 Intention of a will

When observing the process of a will's inception to its execution, one can see two wholly different procedures operating and co-existing. The first procedure commences at the point when the will is made and governs all stages of the will pre-death including amendments, revocation, and the creation of a new will up until the last will. The second procedure commences upon death. Here, the execution of the will takes place, that is, the transfer of what was once the deceased's property to the beneficiaries. What are the different characteristics of the intention shown pre-death and post-death in these procedures?

3.3.1 The pre-death stage

The nature of intention with regard to a will should not be considered as different to a general intention, but rather, as belonging to the same category of intentions

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[80] James Phillips (1989) states the point in a similar manner: "[r]ules governing the distribution of property after death...must be designed to solve two main problems. 1. "Who is to receive the property"? 2. "How is the distribution to be effected"?" (ibid., 518).

that are connected with other legal acts. The fact that this intention can refer to specific and often various objects makes no difference. The action of making a will leads in time to the creation, transfer and extinction of rights and duties to the beneficiaries and the executors of the will. From a legal and philosophical point of view, a question concerning intention arises: did the intention exist before or after law? We will not answer this directly, but instead focus our discussion on examining intention as expressed in wills as an autonomous action. It is important to note that, whilst this intention is categorised alongside other intentions, the fundamental distinction between the intention of a will and other variants arises post-death. That is, since the testator is dead, further clarification of their intention is not possible; moreover, it becomes extremely difficult to prove any sleight of hand (Nakagawa and Izumi 1988, 448). In this sense, an intention in the guise of a will is final.

The intention underlying a will is derived from a certain state of mind. In general intention can be defined as a power[81] to determine a motive and a reason. It follows that we understand that whilst intention exists beyond both mechanical determination and human determination by instinctive behaviour, animals are determined by their functioning power whereas humans possess the capacity to determine their own actions. Whilst it would be possible, on occasion, to manifest one's intention by temporary impulsive desires and

[81] Hans Kelsen (1973, 32-33) rejected the psychological approach of *Will Theory*. He argues that intention discussed in psychology is a fact that is empirically verified by observing existence and belongs to the sphere of existence. He also claims that intention in ethics and law is composed by the viewpoints of norms and what ought to be. He emphasises that there is no concrete phenomenon in human minds according to law and ethics. Thus, he claims that it is necessary to acknowledge the difference between the psychological and legal concepts of intention. However, a legal fact generated by making a will is originally a result of two kinds of mental elements called desire and determination. Evidence would be that a will is always revocable by changing the mental elements. We can recognise intention not as ideal but as an actual point.

emotions, the legal act of making a will demands more than this, and thus is at the least caused by motives composed by some rational elements (e.g., duties and knowledge of interests). The reason why the intention underlying the will is generally considered as reasonable is that an integral part of the intention is to recognise the desire of making a will.

Making a will comprises two mental activities. First, there is *desire*. This is a mental process in which a certain juridical effect (e.g., a transfer of property after death) is "desired emotionally" (Finnis 1991, 38). In general, desire covers a wide range of words including a mere want; wish; a longing for; and devotion and covetness. Also, desire is a kind of motive that urges a person to find a means to realise what is desired. Nevertheless, the mental activity of desiring to dispose of property is still short of conducting the necessary action of making a will. In other words it is not about desiring to dispose of property, but about desiring to make legal provision so that those who follow will legally be entitled to it. The second mental activity is *determination* that enables the realisation of the desire. To express something that is desired may be a declaration of desire, but this is not the same as a declaration of intention (Satō 1988, 142). The declaration of intention must also include the means to realise the desire.

The testator's aim, by employing the legal device called a will, is to create new relationships that will have legal effect. The legal relationship is considered chiefly to be concerned with disposing of the testator's property after his/her death. For example, person A makes a will that directs the distribution of A's property after death. The law does not concern itself with how or why the testator came to hold these aims—insofar as the maker was of sound, rational mind, and there is no possibility of coercion, particularly in the instance of a last minute

codicil. Thus, personal motivations and purposes do not normally effect the validity of the will. For the intention to be performed after death, it need only comply with the relevant legislation or laws.

The task here then is to distinguish between declaration of intention and declaration of desire. The former is an action fulfilling the latter (ibid.). Making a will *per se* is the declaration of the testator. It is more than an action that transmits a mere desire of leaving a bequest. A declaration of an intention encompasses the idea of setting up rights and duties. Thus, what is meant by the declaration of intention for the transmission of property?[82] It is a declaration of intention for generating new relationships of rights and duties.

However, this does not resolve all of the difficulties relating to the declaration of the intention. Understanding the concept of intention in this way, we find ourselves unable to grasp the idea of a declaration (ibid., 144)[83]. Take the following analysis: if the idea of a declaration contains within it the contents of the intention, it is meaningless to declare the intention itself. Thus, a will is defined as a means for specifying how a testator wishes his/her property to be re-distributed or otherwise disposed of (ibid., 142). Put another way, the means by which the testator's intention for the disposal of his/her property is performed is by the means of making a will. Therefore, according to Satō's view regarding the

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[82] For example, what does a will, in which certain property is left to a wife, declare? It is not a declaration of desire that binds the recipient to perform what the will declares. For the actions that are the means for achieving the purposes of the will lie in the declaration and act of making the will. Does the relationship between rights and duties already exist in the declaration? The answer is no. This is because the act of making a will can create new relations between rights and duties. So, does the will declare rights and duties that arise in the future? The answer is sometimes "Yes!" and sometimes "No!" Whilst the intention for the bequest is declared, the will cannot dictate all the respective relations between rights and duties that follow.

[83] Whilst Grotius (a leading natural lawyer in the Enlightenment), distinguished inner intention (*animus voluntas*) and its sign (*signum*) and explained some of the relationships between the two elements (Arai 1987, 656), he did not examine the relationship between intention and its declaration.

declaration of intention, the intention of a testator can be considered as something that includes not only a desire or wish but also a *means* by which the desire or wish is performed.

The characteristics of a testator's intention suggest that the intention as expressed in a will is an act generated by desire and determination. Testamentary intention presupposes a motive for bringing about a post-death disposal of assets or one for causing a pre-death disposal of the assets to change. Thus, the testamentary institution of a will refers to a document, which meets formalities that law requires, defining the declaration of the testator. It follows that, provided the will is not amended or withdrawn, the will shall be regarded as final. That is why law requires strict formalities for the creation of wills. Thus, certainty of the testators intention is based on the requirements of a strict adherence to formalities.[84] These formalities are essential because the characteristics of a will have no effect until the testator's death. This explanation applies to both Japanese and English laws of succession.

3.3.2 At the posthumous stage

In Japanese law, succession commences at the moment of death.[85] The terms of the will are revealed and carried out by the executor. The rights and duties are distributed amongst beneficiaries. There is a difference between English and

[84] Mellows suggests that the main arguments for a will's formalities are: "first, that forgery is made more difficult; secondly, that there can be no dispute as to the identity of the testator; and, thirdly, that the likelihood of a will being signed under coercion is reduced" (Margrave-Jones 1993, 60). Still, Mellows has his doubts. He makes two further contentions: "[t]he first is to achieve certainty of the testator's intention, and this is indeed a reason for a will being in writing, and signed. The second is that by requiring the formality of witness, a person will think carefully about what he is doing, as there will be little doubt as to what was in fact intended to operate as a will" (ibid.). These latter points are made in order to guarantee the initial points.

[85] Article 882 of the Japanese Civil Code.

Japanese procedural rules. Japanese law allows creditors to claim directly against the beneficiaries, whereas in English law claims by creditors are made against the deceased's personal representatives.[86] In other words, in English law, specific legal authority is given to an intermediary. This procedure was adopted from the ecclesiastical courts; in this process, when a person dies, all the property that the deceased owned might be temporarily transferred to a representative appointed by the courts. Then the representative, under the court's supervision, may pay creditors and collect debts; once this has been completed, the remaining assets are transferred to the entitled beneficiaries under the rules of testacy or intestacy.

Despite this difference, what is notable here, in both of the legal systems, is the time lapse between making the will and its taking effect. The execution of a will is finished at the point at which all the terms of the will have been completed. At the moment when the will comes into play (i.e., after death) the subject of the will no longer exists. Despite the non-existence of the physical subject of the intention, the will is considered legally valid and consequently generates legal effect. We are left with the question: "what is the rationale for this inconsistency?"

A will takes legal effect and is legally valid, despite the physical non-existence of the subject of the will. This necessarily raises the question: "why is it that it is only necessary for the action of the making of a will to enable the intention without its subject to be effective?" Normally, if an intention continues to exist after a person's death, insofar as it is a type of intention, it is assigned to a seat or subject. So in context, at the time of extinction, what or who is the seat

[86] Personal representatives, or executors as they are more commonly called, are

or subject? Is it the deceased, the testamentary document, or the executor? The inconsistency does not lie in the content of the intention, before or after death, but rather in terms of its seat and subject. Thus, we have returned full circle to our starting-point: that is, is the intention as expressed in a will that takes effect after death, that of a living or a dead person?

Since the deceased is no longer the subject of his/her property from the moment of death, it would be possible to assume that at the moment of death, any rights of a person are extinct. Their estate incarcerates and upholds the interests, rights, etc. of the deceased until such time as it is no longer necessary—so in a sense the deceased, as represented by their estate remains the owner. There is a problem in the arguments of the Liberals based on the views of natural lawyers following Grotius: that is, the right to make a will is a form of a right to transfer which is a concomitant of a property right. For transfer cannot be brought about between living persons and a deceased person who is no longer a subject of the property. Therefore, Itō (1984, 342) claims that we cannot deduce a right to make a will directly from a right to property. Moreover, he argues that only when a presupposition is accepted that there exists a different agreement, for a right to making a will, from the social contract that established a property right, can *Will Theory* be justified (ibid.). *Will Theory* presupposes that the intention of the dead at the time the will is executed is *of necessity* the same[87] as the intention of *inter vivos* (Itō 1981, 24). This however merely raises the question: "what is the foundation of a testamentary right?"

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appointed by the person who dies testate, whereas administrators represent the interests of those dying intestate (Margrave-Jones 1993, chp. 17; Kerridge 1996).

[87] A will is like a container, inasmuch as various declarations of intention can co-exist. The characteristics of a will suggest that independent declarations of intention in a will, on the testator's death, takes effect at the same time. But, on the other hand, a will is *a* document. If a description of a date when the will was made lacks a legal requirement, and

There are various theories accounting for the foundations of testamentary inheritance. For example, Leibnitz links the will with the doctrine of immortality of the soul (see McMurray 1969 (1919), 452). Put another way, the foundation of testamentary disposal is founded upon a kind of religious belief that the soul remains after death; that is, acts without subjects can still be carried out. This utilises the typical sophistry of the medieval lawyer.

As for *Heredity Theory*, Hozumi summarises:

> "First of all, an asset is utilised for maintaining its owner's life and is likened to part of his/her body. Therefore, where the owner has descendants, the requisites of the owner for maintaining his/her own life should be transferred to them. This is the fundamental reason why law allows a right to succession" (1990, 6) [my translation].

It appears that part of maintaining life implies the continuation of the partial continuity, although to a small extent, of an intention in order to justify the continuation of property rights.

W. von Blume (1913) prefers the notion of character and value succession. In short, his theory is based upon two elements. One is the continuity of "blood"; the other is the continuity of assets. The former was conceptualised by ritual succession, the oldest form of succession. Blume points out that the former is not necessarily connected to the latter. Nonetheless, to establish the connection, he develops a conceptual tool of "character" which comprises the individual's intention. He developed the idea of *Werk*, that is, all that an individual produces in his/her lifetime that is left after death is an embodiment of his/her character (Ohtsuka 1993, 178). By developing this idea he is attempting to liken the connection of assets and blood to the correlation between body and soul. To enable succession and to facilitate the development

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even if there are many declarations in the will, they cannot take effect. *Will theory* has to address this point in order to be coherent.

of *Werk*, it is central to his thesis that the producer's death cannot destroy them. If this kind of succession can be allowed, the succession of the producer's intention is justified. Thus, the testamentary right becomes the testator's intention which here comprises his/her proprietary right.

Logically speaking, a supposition that the dead are not the subject of assets is antithetical to the idea that intention can survive a subject's death. Nevertheless, if the intention has posthumously legal validity as the intention of the dead, it has to be a legally fictitious intention. In English law, some have argued this does not matter. J. W. Salmond explains the orthodox position:

> "The rights which a dead man thus leaves behind him vest in his *representative*. They pass to some persons whom the dead man, or the law on his behalf, has appointed to represent him in the world of the living. This representative bears the person of the deceased ... Inheritance is in some sort a legal and fictitious continuation of the personality of the dead man, for the representative is in some sort identified by the law with him whom he represents ... To this extent, and in this fashion, it may be said that the legal personality of a man survives his natural personality" (quoted by Williams 1957, 482-3) [original italics].

3.3.3 The intention underlying a will

A will is a person's declaration of what is to be done after his/her death; the intention is that of a living person about what is to happen to their estate post-death—*ipso facto* the intention as declared here is that of a living person. The declaration has three defining characteristics as a juristic act: i) it is revocable at any time during his/her lifetime, ii) it does not become operative until death, and iii) it is to be executed after death no matter what (Atkinson 1953, 1; Margrave-Jones 1993, 8-9; Kerridge 1996). Much like a unilateral contract, the moment when the will is made is understood to be at the point of declaration of the intention. Of course, it is after the testator's death that his/her will takes effect.

One view that identifies a will with a declaration of intention considers the execution of the will as a juristic act. But rather than this kind of analysis, more

profitable discussions focus on accounts of: "what is the legal effect of a will?", "where and how is the effect?" and "why is the effect generated?"

The legal effect of a will can be analysed at two levels: first, legal effect in the form of an actual action; and second, purely legal effect generated by a juristic act. The first category is dependent upon the testator's action in making a will. The resulting will can take an infinite number of guises dependent upon a multitude of factors. Some examples of these factors include: varying degrees of duties required of parties once the will is executed; the economic status of each of them at the time when the duties are performed; their ability to understand the relevant laws; the lawyer's interpretation of the precise contents of the will; and the availability for legal means, etc. However, the effect of the second category is not dependent upon contingent factors at all. Rather this category is regarded as certain in effect. This is because it refers solely to the transmission of property rights (i.e., their creation, transfer and extinction) on and after the testator's death.

In Japanese law, a will's nature is considered different from the corresponding relationship between rights and obligations that exist in a general contract of sale. For example, when assets are bequeathed, an obligation is imposed on the testator to transfer the property to the beneficiary who then becomes the owner. On the one hand, although the testator has a right to leave a bequest there is no correlative right to attain the beneficiary's rights; likewise although the beneficiary has a right to reject the bequest, s/he still has no correlative obligation to the testator's other rights. Thus, whilst, despite the fact that the action is a kind of unilateral act generated by the making of a will, it is not

clear where the effect of the action of the will originates, it is clear where the effect of a bilateral contract originates.

A contract of sale can be, in general, explained by the following correlation of a right and an obligation (Satō 1988, 146). A contract of sale creates an obligation-right; this means, there is an obligation to transfer the ownership from the seller to the purchaser and correspondingly, an obligation-duty to be performed by the purchaser to seller. A seller has a right for the obligation to be performed much like the purchaser has a right to receive the object for sale. These rights effectively form an invisible bond between the parties. By this, they may play a role in binding the parties. As such these rights are by-products of logical thinking and are not tangible. However, when the right is infringed, the correlative secondary right refers not to a mental power but to a physical power. Satō (ibid., 147) names the former a primary claim and the latter a secondary claim. She also specifies a difference between the two claims:

> "The primary claim means a right which can create, by a declaration of one's intention, an active and autonomous relationship between the parties and their object. On the other hand the secondary claim means a right that is passive in nature. Moreover, implicit within the claim is the idea that it is not unfair to use legal means to recover the right infringed" (ibid.) [my translation].

As for an obligation, Satō points out:

> "The creation of an obligation by paying the purchase price to a seller refers to a binding duty on the seller's mind. If the seller does not perform his/her obligation subject to this inner binding duty, there lies a possibility of actual enforcement against him/her" (ibid.) [my translation].

If the correlation of a right and an obligation is thought of in this manner, it becomes possible to think that, in a contract of sale, there is a two-way relationship between a right and an obligation. First, the mental power of the primary claim and the binding duty may take place in both the parties' minds. Secondly, there may be physical power in the secondary claim by virtue of the

potential for enforcement of the obligation. We would argue that it is these powers which are the legal effect of a contract of sale.

Since, however, the act of making a will is unilateral, the effect of a will must also be unilateral; consequently, the correlation between a right and an obligation cannot be found in the act. When the declaration of a will is analysed, a binding power to the parties can however be identified. Yet, even then, what binds the parties does not present the full picture, for we ought to note that there are cases in which a party is not subject to what binds the other party. In Japanese law, for example, a testamentary recipient may give up the testamentary gift at any time following the death of the testator (Art. 986 of the Civil Code). Hence, there is no absolute requirement that the recipient must take the gift. Moreover, in a case where by the provision of "Disinheritance of presumptive successor by will" (Art. 893) such procedure is adopted, a question arises: to whom or what does the presumptive successor make his/her objection?

The reason why the answer to—"where and how is the effect of a will"—is not altogether clear stems from the idea that the relationship between the parties' rights and duties is rather complicated. As stated hitherto, in order to examine this complexity, English law utilises a legal fiction in the process of transferring ownership from the testator to the beneficiaries. H. Steiner questions whether what the executor has is a power or a duty (1994, 255). If it is a power, how did he acquire it? (ibid.) Whilst the testator is alive the executor is the same as everyone else, under a duty not to interfere with the testator's possessions. Put another way, s/he lacks any power to dispose of the testator's property (ibid.). It is precisely because the will is only legally valid and effective when its maker dies. However, Steiner remarks that if it were possible for the testator

posthumously to transfer the power of disposal to the executor, there would be no call for an executor (ibid.). It would be possible for the testator to transfer the property directly to the testamentary donee. In fact, this is precisely what happens under Japanese law. Here, the testator's rights are not transferred to the executor after his/her death but directly to the testamentary donee. The executor merely acts for the testator and the testamentary donee. Steiner's answer to this is:

> "It would appear that if the executor *does* have a duty, and moreover one which is correlative to a right, this duty is one correlative to a right held by the state which is the only possible author of the requisite fiction" (ibid., 257) [original italics].

Namely, the right to demand compliance with duty vests in the state.

Then, why is it that a will takes effect? In other words, how is the transfer of property by a will justified? Legal fictions assist to overcome technical difficulties in legal coherence and, as a result, bring about the effect of a will. The effect of the will is derived from the duality of legal relations between private persons. Rights, duties and powers created by the will are not only the residue remaining from the will's effect but are creations of law. They do not result from a deduction from the state of nature. Therefore, "there can be no *moral* counterpart to the *legal* power of bequest. So the justification of bequest, if there is one, cannot lie in the demands of justice" (ibid., 258) [original italics].

If that is the case, and those elements rely upon a universally binding fiction, then, if the testator declares an intention to make posthumous gifts, should the act be regarded as a renunciation of his/her property at the moment of death? Proprietary rights obviously belong to the living. Death leads to the removal of the rights of the living. The fact that a person's lost rights are transferred to someone else is another matter. People lose all other rights along

with their personal rights at death. Legal fictions merely make the posthumous transmission of property possible. Subsequently the fictions enable the rights of the living to survive his/her death. If a testator declares the intention that s/he will permanently own his/her property even after death, Japanese law and English law disregard this declaration. This is precisely because succession inevitably starts by reason of death.[88]

3.4 Intention of intestacy

Succession is the posthumous transmission of property or status. Nonetheless, the question—"what is the basis for succession?"—is not easily answered. Historically, changes in political and cultural norms have influenced succession in its various forms. Succession's diverse forms indeed make it almost impossible for us to seek a single answer to its basis. Current analyses have approached the idea of succession at different levels, for example, the examination of succession's interpretation; its systems and sometimes the synthesis of both.[89] Examining this discussion is outside the scope of this thesis. Rather we will concentrate on explaining the intention underlying intestacy. Of course, before we can explain such intention, its foundation must be established. We have already seen that a will is an example of intention; can the same be said where a person dies intestate?[90] We shall argue that there is intention *even* in intestacy.

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[88] See Art. 882 of the Japanese Civil Code.

[89] For example, Grotius's discussion on intention was controversial both in its interpretation and systemisation. The controversy stemmed from using *Will Theory* not only as a basis for the interpretation of freedom to leave testaments, but also, as a basis for connecting the foundation stone of the system of succession to private ownership (Itō 1981, 13-14).

[90] Intestacy refers both to a situation where a will has not been made and where a will is deemed to be invalid. We will be referring to the former only.

This argument is justified not only by the claim that intestacy may be founded upon an intention not to make a will,[91] but also, by the following explanation:

> "The rules relating to beneficial entitlement on intestacy are designed to reflect the wishes of the average testator, and are in fact based on an analysis of a large number of wills" (Margrave-Jones 1993, 173).

This is to say that, although intention of intestacy is not as clear-cut as the intention underlying testacy, which lies more in the order of systematised intention, there is a kind of order of *quasi-intention* within intestate succession.

We would argue that in cases where succession occurs in the absence of a will, and this succession leads to the disposal of property and inheritance, human intention still lies at the centre of intestate succession. The intention is broader in conception and, yet to some extent more confined. It can be understood in terms of the temporal continuation of present, past and future.

The intention of those who can legally act, despite being constrained, is directed towards the future. Irrespective of making a will, the assumption is his/her intention will be carried out. But so far as the transmission of property is concerned, few deny that the power of intention is at the heart of succession and is its very essence. At death however almost all of the individual's intention is extinguished; the remaining part has a new binding power and new characteristics, which are directed by law. As shall be examined later, a comparison between the nature of pre-death and posthumous intention evidences significant differences. In order to argue that the existence of *quasi-intention* is a ground for intestate succession, we will explain how the order involved in the intention at the pre-death and the posthumous stage differ.

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[91] This expression *per se* is seemingly bizarre. The reason why we make use of that the connotation is required that there would be not an intention of a will but one of the

3.4.1 The pre-death stage

Some are conscious of death on a daily basis. This consciousness may in turn motivate them to arrange for the posthumous disposal of their property and assets. The living have expectations that their respective wills will be executed once they are dead. This assumption of expectation stems from the knowledge of there being a deep-rooted system in modern society for property disposal. This expectation is embedded in a desire, such as a wish or a hope, but it is not as definite as the intention which underlies the will. When intention is respected, the expectation may be considered the presumed intention that has been processed through the legal system. In circumstances of intestacy the law has possibly considered taking this "presumed intention" into consideration. Given the emphasis on intention, the following definition of succession is plausible:

> "Whilst testamentary succession is subject to the testator's definite intention regarding his/her property, intestate succession can be attributed to the presumed intention based on legal provisions" (Takashina 1958, 47) [my translation].

In the Japanese Civil Code, regulation based on the intention of the ancestor and the descendant, as opposed to the division of the estate *per se*, influences co-succession.[92] However, in practice, the majority of succession cases do not follow the Civil Code. Successors appear to determine their actions under diverse social restraints. A good example is the renunciation of their rights to succession.[93] These practical cases should at least be supported to some

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general people.

[92] Examples respecting the intention of ancestors include provisions such as "designated share in succession" (Art. 902.), "designation or prohibition of partition by will" (Art. 908.), "the spouse becoming a successor" (Art. 890.), and "Lineal ascendants, brothers and sisters" (Art. 889.) and "statutory shares in succession" (Art. 900.). Examples of respecting intention of successors are provisions such as "procedure of renunciation" (Art. 938) and "execution of partition" (Art. 907.).

[93] To avoid dispersing assets, it is not uncommon for a successor (e.g., other siblings) to, in terms of practice, exclude a sole successor (e.g., an elder brother) who then may be compelled to renounce their rights to partition of the estate. But the renunciation

degree by an implied-shared intention existing amongst Japanese people. Yet, it is not true to say that, in all cases, a sole successor is advantaged whereas those compelled to renounce their newly found inheritance are not (ibid.). It should be acknowledged that a sole successor is often disadvantaged if left with assets of little value, particularly in situations where these assets incur debts.

Taking a functional approach to objects of succession, it can be the case that not all the objects belong solely to the deceased. For example, there are cases in which a wife contributes to maintaining or increasing the property holdings of her husband; or in which an elder son's assets are absorbed into his parents' assets. Here, the property to be passed on cannot be wholly considered the deceased's *personal* assets; rather the evaluation of ownership lies in the nature of *co-operative* shares.[94] This analysis of social structure suggests the intention of a deceased and their successors is not subject to the absolute autonomy assumed by the Civil Code, but, is more akin to a compromised intention affected by the deceased's or successor's expectation or by the necessity or consciousness of posthumously supporting the surving family (ibid., 50).

Conversely, Akeyama (1979, 12-16) argues, the one-sided posthumous distribution of property is most often the passing on of a kind of unearned income, particularly in situations where shared property becomes the survivor's personal property. To circumvent this result, inheritance and gift tax play a role in redistributing the possible unfairness of unearned capital.

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seems to be based on intention, so far as the procedure is subject to the provision on renunciation.

[94] One radical view accepts the remains of the credit for rewards and the existence of the claims for unjust enrichment (see Art. 703 of the Japanese Civil Code.) (Endō 1980, 1-14).

Although a deceased's intention affects the phenomenon of succession *vis à vis* a will, the order of quasi-intention affecting the living can also influence succession. If succession stems from a family's co-operative relations whilst living, succession and support are correlated to each other. For example, we can consider the following two things as restraints to freedom in making a will: first, when a wife is implicitly a co-owner; and second, where parents have a duty to support their dependants. "Co-operative relations for the living" refers to "limited family co-operative relations based on the principle of self-responsibility" (Izumi and Nakagawa 1988, 10-12). Succession can be considered a liquidation of the deceased's assets for guaranteeing provisions for the surviving members of the family. There are many lawyers who espouse this view. This view assumes that there is *quasi-order* between parents and their children. Their present life first has to be taken into consideration by succession law. Yet, the question of how successors of surviving grandparents and siblings are justified and associated with *quasi-order* still remains unresolved. Although this can be explained by the blood relationship, the question "how can the blood bond make succession possible?" also remains unanswered. Moreover, this view on the blood bond does not explain succession between spouses (Nakagawa 1963, 179-180).

Even so, we will argue that a "blood" base for succession can be justified by the historically prolonged use of *quasi-order* formed as a result of an ancestor's conscious recognition of blood relationships.[95] Moreover, we will argue that other quasi-order forms can justify succession between spouses, particularly those, who are not blood related. Again, these forms have arisen

[95] For example, Doma (see Itō 1981, 184-5) argues that the family right to succession is akin to natural rationality, and that a will is no more than a supplement for intestate succession. Although Doma attempted to justify the family right to succession by

because ancestors consciously viewed their spouses as blood relations. It appears to follow from this context that a blood relationship is nothing more than a mechanism that forms order in society. It is often presumed by other documents that a person did not wish his/her property to be transferred to his/her heirs. In a case, for example, where there is an inhuman act that was committed against an ancestor by his/her heir, since s/he failed to express his/her real intention in the document of testacy, the procedure of succession is executed regardless. Generally speaking, in cases of intestacy, it appears that the intention of the deceased is regarded as a desire to leave one's estate intestate; this is, however, not the same as the presumption of intention seen in testacy. The ground for this legal presumption can be found by using the concept of *quasi-order* of intention. To recapitulate, this is conceptually different from the intention seen in cases of testacy.

It could be argued that the *quasi-order* of intention rests upon its purpose or function, justified by society (Akeyama 1979, 12-16). According to this view (ibid.), the argument justifying succession lies both in the potential accomplishment of the function of domestic production and in specifying guaranteed provisions for family members. These two elements stem from maintaining or holding together a domestic bond. Via these three kinds of functional grounds, the general welfare and kinship of family members can be furthered by posthumous support. The deceased presumes that s/he has a duty to support those remaining after his/her death; moreover, potential successors also take it for granted that, so far as there remains the posthumous asset, the potential successor's should acquire it. Thus from the successor's point of view,

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using the term "the right of blood", he still failed to justify a spouse's right to succession

a successor's claim is transcended into a right to succession. Basically therefore it should be noted that the scope of the claim of the claimants for support and the scope of the claim of the successors as justified by law are essentially in accordance with one another (Hagiwara and Nagata 1958, 163).

3.4.2 At the posthumous stage

Here, law governs succession. People are compelled to trust in and obey such law. It could be argued that even obeying the law is akin to reflecting and meeting the intention of the deceased and their descendants. For it is possible to say that there is a kind of intentional order in peoples' attitudes toward law. Against this, it can be argued that there is a different order in quasi-intention. Under this order, in cases of intestate succession the posthumous disposal of property is still maintained. The underlying reason for this disposal is to provide support for families with limited means. So, as stated earlier, intestate succession can be considered the liquidation of the assets of the dead family member in order to support the remaining family. Succession is a mechanism to modulate competing interests within the family. Broadly speaking, it can be argued that law maintains this order of interests, moreover, members of society support it.

3.4.3 Analysis on intention of intestacy

H. Grotius (1853) and I. Kant (see Endō 1980, 8), both natural lawyers, sought foundations for both succession from an individual's intention, and the transmission of other rights. Grotius and Kant argued that we could deduce the

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(ibid.).

foundations of the posthumous transmission of property from the pre-death transmission of an individual's intention to his/her successors. *Will Theory* seems to succeed in logically explaining the succession of debts. If a society admits the principle of successive ownership, because it is based on the intention of the deceased, then primitive ownership, a situation in which nobody owns the property, is a corollary. Given successive ownership, there would be no alternative but the conclusion that attributing the intention of the deceased and that of his/her successors should be legally fictionalised.

As for intestate succession, Kant and other natural lawyers argued that, whilst a right is based on an agent's intention, the death of the right-holder results in non-ownership of the property. The law then transfers the subject to the successors, on the grounds that it is considered the presumed will of the ancestors, that enables transmission of the proprietary right (i.e., the object of rights) (ibid.). The "presumed will" of the owner is a product of legal fiction so that intention can survive human death. Moreover, this point suggests that the distinction between human life and death can be placed on a time continuum of past, present and future.

Moreover, whilst a further ground for intestate succession is based upon on maintaining the stability of general traders (Izumi and Nakagawa 1992, 2-3), it is worth noting that the succession of private property is guaranteed and this practice is welcomed in society. Guaranteeing the possibility of family succession prompts people, although they are imposed on by death duty, to maintain and increase their assets in order to support the remaining family (ibid., 3).

On this analysis, we can now see why most continental legal provisions including Japanese law use the principle of statutory succession. Successors are guaranteed their shares in succession. Justification for any restraint (e.g., legally secured portions) of testamentary freedom should be predicated on the following argument. Izumi and Nakagawa (1992, 16) argue that *even* in societies where principles of *Privat-autonomie* (private autonomy) and *Vertragsfreiheit* (contract freedom) are generally valid and where private property can be autonomously disposed of, the societies are nevertheless composed of co-operative relationships between family members.

The co-operative life implies there are duties to support children, spouses and parents. A spouse's right and rights based on blood ties, to succession, is necessarily accepted in the life based upon the co-operative relationships. Izumi and Nakagawa remark that:

> "when the system of modern private ownership faced the family of limited means, ideally, responsibility ought to be have been taken individually but this was not always feasible. Although there is no family responsibility *per se*, guaranteeing the maintenance of the family has to be undertaken by an individual within the family" (ibid.) [my translation].

Such theoretical insufficiency is a reality that liberal countries cannot avoid. "The reality lies between family responsibility and individual responsibility" (ibid., 17).

Modern society assumes individualism and self-responsibility. A right is exercised under the individual's name; therefore the family community cannot be regarded as a legal person. Nevertheless, the family's continuing existence and function depends largely on unpaid labour (ibid.). In addition, guaranteeing the living of family members may be governed by the morality of family responsibility and solidarity. For this reason, almost all liberal nations accept testamentary freedom and domestic responsibility within families; nevertheless, they restrain the freedom for the sake of the presumed successors (ibid.). An example of this

kind of restraint is *reservation.* It originates from ancient German law, and has amongst its supporters the French. The idea of *reservation* refers to legally secured portions of property. Another example is duty portions, derived from Roman law, which the Germans have adopted. Despite having different legal characteristics, the two kinds of restraint are the same in terms of their logical basis for which restraining freedom to dispose of property can be justified. One view is that the minor difference between the two institutions is that

> "the *reservation* refrains a testator from autonomously disposing of his/her property beyond the allowed limits, i.e., it restricts the action of disposal. Conversely, the *duty portion* refers to a device that effects the disposal action thus transforming it into monetary credits. In this situation the validity of the action itself is irrelevant, the focus being upon crediting those who have duty portions, with any surplus beyond the line being transformed into debt. In light of these requirements for the stability of trading, the institution of duty portions may be more modern than reservation" (ibid.) [my translation and italics].

It is argued that restraints on the freedom to dispose of private property rest upon the order where the accumulation of the deceased's and successor's intention, instantiate and reflect the temporal continuation of the past, the present and the future. It can be argued that as a result of this consciousness and intention, the law includes the intention of ancestors. This intention is not formalised like a testamentary disposal, rather it is a quasi-intention. Even primitive societies, to some degree, have complex systems of succession that have been influenced by diverse factors. It follows that more developed systems of modern law cannot attribute succession to a sole cause. Rather amongst the many causes, the main factor is legal consideration of the development of the deceased's intention and the concomitant change in people's legal consciousness.[96]

[96] In Japan, the reformation of the Civil Code in 1980 changed the shares of the spouse from one-third to one-half, and added a provision concerning the amount of contribution, i.e., the amount of contribution can be added to the share in succession (Art. 904-2). It appears this reformation is based on a change to succession's social basis that has been influenced by factors such as the conscious enhancement of female rights.

3.5 Conclusions

In the light of the analyses concerning succession of testacy and intestacy, the following reasons are proposed as to why a person's intention in succession can survive his/her death:

(1) For testacy, the right of ownership cannot be directly deduced by virtue of the transmission of property post-death. For death is the cut-off point for the continuation of pre and post-death ownership. English law allows the testator's property to transfer directly to his/her executor, but at this point a logical fallacy takes place. For if the transmission were executed from the testator to his/her personal representative, logically it means the transmission from a living person to another living person. However, since a will takes effect on death, the legal effect cannot be between living persons. Therefore, how can there be a transmission from the deceased person to his/her personal representative? The answer is it cannot take place between the living and the dead. This is because the dead ceases to be the subject of rights. Having said that, in order to succeed in the posthumous transmission, there is no alternative other than by using a legal fiction. That is, because the deceased's intention is succeeded by the living's intention, the once owned property could be transferred to the personal representative. This legal fiction can be applied to Japanese cases in which property is transferred from the testator directly to his/her beneficiaries. If it were not for this legal device, it is not justifiable that the executor in English law or the beneficiaries in Japanese law can legitimately receive property from their dead testators. It follows that if the beneficiaries can directly receive from the dead,

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Similarly, raising the profile of human rights has been instrumental in reducing inequality

then the property that the dead bequeathed can apparently be regarded as a *right of the dead*. Although the legal fiction is often bewildering, *logically* a *right of the dead* can exist in the institution of succession.

(2) It is argued similarly that for intestate succession, the intention of a living person can survive his/her death. The intention used here is different from that used for testacy, but it can, as quasi-intention, maintain the order of succession. For the purposes of legislation, this kind of intention is also fictionalised. The law presumes intention is fictional which in turn presumes an individual's intention can survive his/her death. This is to enable the continuation of individual intention from the past, to the present, to the future. So, the living's person's intention that is extinguished by death, paradoxically becomes the intention that survives. The point is that, removing the legal fiction from succession leaves intention cut off without foundation. Logically, intention that exists posthumously should be a new form of intention for the dead. Insofar as life upholds intention, intention is necessarily broken at death. An individual's daily life consists of countless desires, determination and intention. Most are cut off at death. The fact is however, a very small amount of an individual's intention, perhaps equivalent to desire—e.g., for the disposal of the corpse or the property—can survive death due to legal fictions. Hence there is no alternative but to express this idea as "intention of the dead" given that intention as it is usually understood is discontinued by the event of death. Further, whilst the expression "an inert hunk of matter thoroughly removed from the realm of moral significance" (Lomasky 1987, 213) is correct, if the succession of intention is sought, the

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between legitimate and illegitimate children.

expression "intention of the dead" should be accepted. This is because if succession of intention is legally fictionalised, then "intention of the dead" has to be likewise fictionalised. It therefore follows that, in the same way as intention of a will, the *rights of the dead* can logically exist in succession law.

Chapter 4
The social characteristics of the dead

4.1 Introduction

In this chapter we will explain our four presuppositions relating to the social characteristics of the dead. The first is concerned with the categories by which the dead can be recognised in their relationships with and between the living and society. The second explores the concept of social characteristics and we present the argument that social characteristics *per se* contain concepts of both rights and duties. The third proposes that both the identity of the living and their social characteristics can partly survive death. This is one of the reasons why the dead are different from other things and they are recognised as an entity close to the living. The fourth which we elucidate in the final section of this chapter argues that the social characteristics of the dead entails deeply rooted rights. Throughout this chapter, an attempt will be made to justify the *rights of the dead* by using the concept of the social characteristics of the dead.

4.2 Relationships between the living and the dead

4.2.1 Identity of the dead

The dead have a central place in the living's mental activities such as consciousness, memory and recognition of their character and achievements.[97]

[97] Some terms used in this paragraph, such as consciousness, memory, recognition, existence, are sometimes used as philosophical terms. Many definitions abound for each of

Since the dead, whose life is, at least in terms of cellular activity, completely terminated, have no resources for autonomous motion, it is clear enough therefore that they cannot be the subject of motion. On the other hand, unless the living are conscious of the dead, there would be no continued meaningful existence of the dead. Any meaningful existence of the dead is therefore derived from and within the mental activities of the living. The living can *actively* involve themselves in the memory of the dead, in contradistinction to the *passive* involvement the dead have with the living. This relationship is exemplified by the medical circumstance where even if the organs of a patient who is brain dead are functioning, the relationship nevertheless between the living and the patient is unilateral, due to the patient's lack of consciousness, and is not a social interaction.[98] The active/passive roles are inherent in this relationship when translated into the case of dead persons. Additionally, long after death the dead lack any cellular activity whatsoever, which fully highlights the point that human corpses are categorised as "real" (*res* in Latin), which means something relating *to a thing* rather than *to a person*.

However, it is true, that despite such a clear-cut distinction between a person and a thing, we believe that a thing, e.g., a desk or a chair, should not be placed in the same category as a corpse. The reason for this is that we hold an assumption that the relationship between a living and a dead person would in normal circumstances be qualitatively different to that between a person and a thing such as a desk or a chair. T. Yōrō (1996), prominent anatomist, notes that,

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these terms. However, general meanings will be used in this chapter for explaining such concepts referred to above, by which consciousness is defined as "direct recognition that a person holds about a mental fact that arises inside his/her mind".

[98] E.g., although a decaying corpse which emits an offensive smell can affect a living person, this phenomena does not mean an exchange of actions between one subject and

on the side of those who observe the dead and the corpse, the difference in such an assumption raises a problem. He also states that as viewing a dead body as a mere thing cannot convert the subject from being a body to being a mere thing, so the failure to view a dead body as a mere thing cannot change its state of being a thing to a state of being a body. A corpse is a more emotional object than a thing by far. An aversion to dealing with a corpse as a mere thing would be, as T. Tachibana (1992, 17) addressed, an instinctive reflex. It is considerably difficult to refrain from the emotional resistance, because people have, although there is the difference of degrees / extent, common religious thoughts and beliefs of death so that although the dead have been objectified in the process of the advance of natural science, the dead still remain insufficiently objectified.

In most cases we conceive the relationship between a living and a dead person to be much stronger than that between a person and a thing. The grounds for this difference in relational power lies in the different degrees of perceptual strength a person projects towards objects of consciousness, perception and recognition. The degree of strength projected to any particular perceptual "object" can be attributed to the impression that a person receives from the object: expectation and desire for it, for example.

Moreover, the source of the perceptual power can be ascribed to the living persons' memory, where the situational details of how a dead person was as a previously living person are retained. Influenced by such memories, the living resultantly relate to the dead in a different way from that of relation to things (see 1.4.3). A person as a social being cannot consider biological death of humans as the extinction of them. Human death is regarded as something containing a

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another. The corpse is a source of the smell but it cannot get rid of the smell by its intention

higher value than something in a thing. Therefore even to utter strangers' corpses, we hardly have the nerve to treat them as a thing like a broken chair and a desk. This is a brief explanation bearing on empirical recognition. Additionally logical recognition can be explicated by recognising the relational strength or bond between the living and the dead. Directing attention to the relationship between the dead and the living and excluding any psychological impressions we may have of the previously living person *per se*, point out a form of universality that invokes the notion of a causal relationship or a substantially or necessarily dependant relationship. Given the fact that any dead person used to be a living person, the experiential and logical recognition suggests both that a dead person inherits something, i.e., a partial identity as mentioned below, from his/her former entity and that s/he demonstrates that this "something" is a reality. An example of the "something" is a status which the dead draw from the living, and which is recognised in the relation between the dead and society. Traditions of sociology divide status into two categories: an ascribed status and an achieved status (Linton 1936). The former derives from "attributes over which a person has no control—age, sex, or colour, for example—or from membership in a group to which he is assigned by others—family, religion, nationality" (Chinoy 1968, 67). The latter is a status which can be obtained by an endeavour and competition and which is distributed by the result of the performance—vocational status, educational background, wealth. Yet there is an achieved status which is almost recognised as a kind of ascribed status, once it is achieved, in evaluating the person. Some of such ascribed statuses and achieved statuses can survive the person's death as his/her identities. For example, a Japanese female is still

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or will. In this regard, the corpse is the same as a fish that emits an offensive smell.

Japanese and female after she dies. Moreover even her educational background and vocational status can survive her death as a social evaluation which continues to be after death (see Chapter 2).

Notwithstanding the brevity of our adumbration above we propose it is plausible, without further argument, to postulate that one of the main factors that we as living persons are conscious of when relating to the dead is a natural assurance that the dead physically retain a partial identity of their previously living bodies except in circumstances where there is no body after death, for instance after an horrific accident or following an atomic bomb attack. At death when a living person hence becomes a corpse, what is assumed not to undergo substantial transformation whilst alive does undergo transformation upon death into another thing. However, this is not a total transformation, rather there is in death a partial retention of the characteristics and form of the previously living person.

Although, the issues surrounding identity or partial identity are the topics of a multidisciplinary subject encompassing the discourses of philosophy and psychology, a brief discussion of the general theory of identity is necessary here to clarify our argument. Whilst most discussions on identity have focused on people, identity appertaining to things has also been discussed (e.g., see Baker 2000, esp. Chapter 4). The morning star and the evening star have different meanings despite being identical with Venus. Apparently, however, both stars have the same identity. It would, in this regard, be essential that things have their own names for the sake of being identified but their names are not interchangeable insofar as they have their own identity.

If we regard naming as part (further discussion on names, see 4.6.2 and 4.6.3), at least, of the substance of identity, then we should pay attention to the term "body" which is common to both the living and the dead body at the transition from life to death. As long as the dead body has not been destroyed or has not disappeared, those who attend a person's death, i.e., his/her transition from life to death, are in no doubt about the fact that his/her dead body is derived from his/her living one. The retained partial identity of the dead body derived from the living one therefore provides a visible continuity between the dead person and the person they were when alive.

A new corpse, whose tissues and organs are, in a broad sense, still alive immediately after death starts to undergo physical alteration and sooner or later begins the process of decomposition. However, what allows us to recognise the partial identity of the dead person is first an attempt to identify the shape of the living body in the corpse. A living body can be represented as a conceivable mode. It exists as not only a physical figure, including a carriage, but also a representation of characteristics. In a sense, the living body can be viewed as a being seemingly in the most natural situation, but its visible shapes (e.g., physique, height and weight) are social products. For the feature of a living body may be characterised by multiple social conditions that the person has been involved with. For example, coalminer's shapes of fingers, legs, hands, etc., can be, to some extent, deformed by their vocational conditions. Other similar examples are pianists' long fingers, sumo wrestlers' obesity and boxers' somewhat deformed faces. Any physical features of hair, carriage, action, body, etc., play a vital role in a guide for understanding their social meanings. A living body is located in the structure of signified symbols. The meanings and values of

the symbols are determined by the locus of the symbols in society. In comparison between a living body and its dead body one discerns physical similarities in most cases. If there is in terms of forms or shapes a similarity between the previously living person and their corpse, then this enables us to recognise the partial identity of the corpse. This recognition is frequently found not only in the process of change from a living body to a corpse, but even in circumstances where a corpse is drastically altered into, say, ashes (although this is, admittedly, an extremely thin example of identity[99]). However that case does not suggest that the corpse has a visible partial identity of the living body, but rather that any evidence for proving the partial identity should be required. For example, a corpse's false teeth may serve to identify a badly damaged corpse involved in an aeroplane crash. In this case evidence for the partial identity is linked to the victims' antemortem images that are kept in the observer's memories. In short the observer can experience the reconstruction of their memories through the evidence.

4.2.2 Partial identity

Whilst the issue of the identity of a corpse can be developed through an application of a body-identity theory, it seems that the traditional discussion[100] on personality identity developed not only the *body-identity* theory but also a

[99] Although the term "identity" has several definitions in sociology, psychology, etc., it is used in this paper to refer to "sameness", in so doing it reflects the way Locke (1960 [1690]) used the term.

[100] Psychological theorists, such as Parfit (1986), Shoemaker (1984) and Perry (1976), who accept the neo-Lockean theory personal identity mainly ask a question: "what makes A at *t*1 the same person as B at *t*2" (Campbell 2001).

memory-and-character theory [101] (Locke, 1988 [1690]). The latter theory suggests, as its name implies, that on the assumption that human memory and attitudes of personality toward a person are important for the construction and maintenance of identity, then the continuity of the living's memory activities constitutes a personality identity of the dead. In particular circumstances therefore, it could be argued that if there was a lack in the continuity of memory and personality then this could equate to a lack of identity for that particular dead person (Shoemaker and Swinburne 1984).

It is verging on the ridiculous, however, to think that, as suggested by the discussion on the continuity between a living body and its corpse, the latter still holds the memory and personality of the former entity. It is also not plausible to believe that human ashes retain the memory and personality of the living person. However, in order to argue the plausibility of partial identity even throughout the process of transition from living body to ashes, the role of memory in this process is instrumental. Yet we have to recognise that it is the living who directly or indirectly observe the dead body who form and hold these memories and not the dead person who has the partial identity with his/her previously living body. For further discussion, it is worthy of note that we as living persons involve ourselves in and with other humans. Apart from indirect relationships, in most cases, the memories we have and develop of these other humans are as a result of our mutual involvement. This kind of memory can be called "personal memory" which is chiefly based on our personal experience.

Furthermore, our memory of a deceased person may be expressed in such terms as "weak" and "strong". Suppose that someone died of an illness. Of

[101] Collins suggests that "[t]he setting for the introduction of the idea of *q*-memory is

those who were involved with the deceased, some hold strong memories about her/him and others hold weak memories about her/him. The strength of a person's involvement with a deceased person may determine the strength of their memory of the deceased. Those who were closely involved with the deceased may have strong memories of how and what the deceased person was and did. But those not closely involved may hold a vague, or weak, image of the deceased person. On the other hand, however, it is clear we can argue that this kind of memory, irrespective of whether it is strong or weak, not only constitutes the partial identity of the deceased but plays a role in enabling us to recognise the partial identity of the body. What allows us to recognise the deceased person is something that is formed from our memories of that person, and moreover is something that is held in our memories, therefore memory has a very active role in constituting, shaping and reconstituting the partial identity of a deceased person.

At any rate, those who remember the dead reconfirm by their memory that the dead inherited their bodily identity from their former living body (i.e., the memory of the physical continuity of the partial identity). Whilst it would be possible to think that the dead were changed into something which is totally physically different from a living person, it would be very difficult to think that a living person loses everything s/he held at death and, after death, becomes something new. Death is the situation which generates them rather than vice versa. However, if it were not for this partial identity of the dead, we would lose the focus of our sentimental activities, e.g., when we grieve a death in front of the corpse, precisely because the corpse *per se* cannot be identified with the living

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the widely concept of memory presupposes personal identity, so that no reductive analysis

person we remember. Therefore, if it is warranted to assert that the dead inherit something from their former living selves, then the first of several presuppositions follows. This can be stated as:

Presupposition 1: There are four ways in which we can categorise the attributes of the dead with regard to the role they play in society and hence establish the *relationships between the living and dead: (1) the dead as an impression of the human character, (2) the dead as a catalyst for succession, (3) the dead as a successor and (4) the dead as a symbol. These categories lead in turn to the social characteristics of the dead.*

4.3 Four modes

4.3.1 An impression of the human character

The universal ground which distinguishes humans from animals, plants and inorganic substances is the concept that humans have agency. Agency entails that people are moral subjects. Each subject has the dignity of being a person[102] and that of being alive. Although there are some compelling views[103] as to

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based on memory in the spirit of Locke's view is workable" (1997, 73).

[102] Many scholars attempt to identity with the criteria of personhood. For example, Dennet (1978) considered six conditions for personhood: (1) persons are *rational beings*; (2) they are beings or objects to which *mental (intentional) predicates or states of consciousness* apply; (3) we take a *personal stance* toward us; (4) they are capable of taking a *reciprocal* personal stance toward us; (5) they are capable of *verbal communication*; (6) they are capable of a form of *self-consciousness* not found in other species [original italics]. Barresi (1999, 79-98) provides with six criteria for understanding personhood: 1) Persons are *constructed* out of natural but organic materials; 2) Persons emerge as a form of adaptation through the process of *evolution*; 3) Persons *develop* ontogenetically; 4) Persons are created through the unifying activity of *self-narrative*; 5) Persons are constituted through *socio-historical and cultural* processes; 6) The concept of person is a *normative ideal* [original italics].

[103] See the debate after *The Case of Animal Right* (T. Regan, 1983), e.g., *The animal issues* (P. Carruthers, 1992) and *Animal Factories* (2nd ed.) (J. Mason and P. Singer 1991).

whether or not some non-human animals have a moral significance as an agent, this thesis accepts an assumption that law regards all non-human animals as *res.*

The term "personality" as well as "person" is a Latin derivation of *persona* referring to a mask used for theatrical performance. *Persona* through usage over a long period has come to represent the role that people play in life and furthermore to mean the multiple characters that they hold. Both philosophers and psychologists have explicated the notion of personality. In psychology an understanding of personality has largely been developed on the basis of positivist assumptions as the sum of the patterns of thinking, feeling and behaving that manifest to some extent the consistent characteristics of a person which endure even when that person is involved in changeable situations. Personality has also been worked up as a concept to be employed to understand, explain and predict such actions and behaviours. Personality cannot be directly observed, perceptually experienced, as a *desk* and a *chair* are, but is rather a constituted concept, which whilst based upon observation and experience, is also to a certain extent beyond observation and experience. In attempting to define personality from a psychological point of view that emphasises individuality, we define personality not only as an integrated system of traits of body and mind that enable us to consistently, although to some extent, act, behave and experience, but as a vital manifestation for allowing us to predict a person's action and behaviour (see some traditions of sociology, e.g., G. W. Allport 1951; R. B. Cattell 1950). The common ground of both philosophical and psychological theories of personality is their assumption of rational agency.

Many great philosophers have attempted to explicate the transcendental essentialism of agency. In *Two Treaties of Government* (1988 [1690]), for

example, John Locke provided an assertion, based on an empirical and psychological perspective, that agency is an intellectual entity that possesses rationality and reflection and simultaneously thinks at different times and places. To Locke, the essential trait of agency was consciousness regarding self. For in order to sustain the identity of agency, we are dependent upon our consciousness. Kant (1998 [1785]) derives the Categorical Imperative, which he identified as "the supreme principle of morality", from human dignity. Kant considered agency as a human who is morally responsible. To Kant, a morally responsible human refers to a human who holds as a subject of freedom a capacity of autonomy and who enables him/herself to be subject to the Categorical Imperative. Hegel (1942 [1821]) interpreted the concept of personhood as a transcendental individualistic agent. Thus he also accepted rationality as a main requirement of agency.

In a current discourse, Gewirth (1978) argues agency on the basis of any prospective purportive agent who eschews logical contradictions (see Beyleveld and Brownsword 1994). These philosophers commonly emphasise rationality as a distinguishing nature of agency. Rationality enables agents to construct abstract concepts, to combine these concepts beyond time and space and to make presumptions upon them.

Thus philosophers recognised the brains functions which control rationality and the self-consciousness as the central character of personhood. When we discover the basis of human dignity and personhood in biological facts, we recognise that we attempt to understand a personhood from a different viewpoint from biological aspects. The world determined by casual conditions can be grasped by facts, but the world where personhood exists cannot necessarily be

determined by causal conditions. Said in that way, when a person emerges in the world where personhood is not ascribed to the casual conditions or requirements and where his/her attitudes are determined by him/herself, and not by others, there is an irreplaceable personhood there. If personhood possesses dignity, this dignity may be identified with the irreplaceable nature of personhood itself.

An agent or person[104] acts as a moral subject. The agent is, even after his/her death, associated with his/her survivors through their memories, and to some extent his/her antemortem actions and behaviour, whilst nevertheless as a result of death the agent loses the status of moral subject. Suppose that person A, an acquaintance, dies. A was a rational human and led a social life as a moral agent. She was responsible for her vocational assignments and kept her promise so that we would adequately memorise the minutiae of her daily actions and discourse. Also we might recollect some of her physical characteristics and distinctive talents such as singing and playing tennis. All of her facets and characteristics are registered in and recalled through our memory. Once she is dead, she is no longer able to sing, to keep promises or to demonstrate her distinctive skills when playing tennis. We, depending on the nature of our acquaintance might feel grief at her death. Nevertheless, the relationship between her and us is that of an acquaintance, we are not part of her family.

[104] Actually, there are many different ways of identifying personhood. Sapontzis analyses that "[moral] discussions concerning or even just involving personhood commonly employ both moral and metaphysical concepts of personhood" (1981, 607). To him, a "moral" concept refers to "an evaluative concept concerned with assigning rights, duties, obligations, and respect" (ibid.). On the other hand, a "metaphysical" concept refers to "the sort of thing Strawson discusses in *individuals*, that is, a part of the basic structure of our experience of the furniture and arrangement of the world" (ibid., also Strawson 1959) [original italics]. He thus distinguished the two kinds of concepts with their functions, evaluations and descriptions, but we will take them as a moral concept in this thesis.

Here therefore a question arises: how is deceased A related with society and us?[105]

Before her death A was able herself to alter her relationship with society and us. Given that, if she had committed a crime, she would not only have been legally punished but also socially sanctioned. If she had breached her promise with us, we might have re-estimated our opinion of her or in some cases may have broken the relationship with her. Whilst alive A was positively involved in a relationship with society and us and at the same time as an agent she could establish many relationships in and with society and us. However on death she loses her agent status and is thus no longer able to be positively associated in or with anything and anyone. This change in status can also be expressed grammatically, where, for instance, a dead person is a subject of a sentence: "A dead person scares other persons", "A dead body emits offensive smells", and "A dead body starts with rigor mortis". In our discussion the phrase "A dead body or a dead person does X" evidently uses an *active* verb, but this does not mean that they do a purportive action by themselves. For example, the sentence "A dead person scares a person" would suggest that scaring a person is not a conscious action committed by the dead but rather is equivalent to what is rhetorically expressed as "A person fears a dead person". Although in the case of the emission of the smell and the rigor mortis the active voice is also used, their usage of language can be categorised as a description of natural phenomena, such as "the wind blows" and "the rain falls". Going back to A's case once she is dead, we have to recognise that she will always be an object not a subject. Thus a further question arises, what is the objectivity of the dead?

[105] Relation is called *lien*, which is derived from a Latin term *ligare*. Also another

The concept of a *res,* or a thing, is opposite to the concept of personhood. Only persons govern almost all things, to enjoy them for their own sake and to dispose of them. In order to satisfy their own physical, mental, personal or social necessities, persons utilise things in the way they wish to do so, although this doing so is limited by prevailing laws and / or regulations. For example, persons may make use not only of property, animals, plants and inorganic substances, but also of air, sunlight, space and even the moon or social status, social position and social reputation, or even other people's roles and pieces of work—insofar as they do not infringe any copyright. Therefore, the relationship between people and *res* can be ascribed to that of governing and being governed, that of using and being used, that of possessing and being possessed. Even if a corpse is not used in the same way by which a desk and a chair are used as *res*, we may categorise the dead as an example of *res* by virtue of the simple dichotomy of a person and non-person.

The dead are nonetheless objects that are considered differently from other things. The reason for this is that they inherit part of what they had as living persons. The reason why, despite not being alive, the dead are considered as different from other objects is that they generate morally different meanings to that of other things. We bury varied objects for instance, rubbish, dead mice and time capsules. However, the action of burying a corpse is assumed to be different from burying these things because the characteristics or implication of the dead *per se* is significantly different. This characteristic is in most cases derived from how a person was living his/her life before death and the kinds of relationships s/he had with others and society. The dead as an object signify

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Latin term *lex* is stemmed from *ligare*. Thus it would be presumed that *lien* refers to legal

part of who and what the person was before his/her death and that they have a different meaning or connotation from other objects.

It is appropriate in relation to a dead person's possessions to give meaning to actions regarding a dead person or corpse. In general there are in the field of social psychology numerous references analysing the relationship between people and their possessions. According to one leading view, possessions are interpreted as a person's extension of self (see e.g., Dittmar, 1992). Given this view is justifiable, it would be possible to argue that the dead person's articles are an extension of the self that the person possessed. To sum up, the dead can be understood as a surviving impression of the characteristics of the living, although there are their own characteristics, through the succession of the partial identity such as bodies, figures, shapes and images deeply associated to the dead. In most cases where a dead person comes to our minds, his/her carriages, looks, behaviour and the fragments of words and voices recall our memories to the deceased. We can recognise the image of the person's characteristics in a way that manners, behaviour, values and beliefs the person held evoke our memories through the partial identity. The characteristics that the dead had and our memories of the dead person's actions and behaviours are bound to affect the dead person's relationship with society and us. Unless we are conscious of the dead by recognising the partial identity between the dead and their previously living selves or by using photographs of the dead in tandem with our memory, the dead cannot have a relationship with society and us. Unless therefore the dead are dependent upon us for their meaning and significance, any impression of their enduring human character

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relation.

would be meaningless to us and thus the dead could not be objects for the living. The reason why we recognise that a person leaves the impression of his/her character after his/her death is that the dead person with no ability of consciousness exists in almost the same figure as that in which the person exists, and moreover continues to show so much of a similar continuum and image of the original person that we can discern no differing feelings from those for that original person. These images enable us to confirm the impression of the living person in the dead one.

4.3.2 A catalyst for succession

The second mode of the dead suggests that the dead have a character in succession law. This character is not intrinsic but extrinsic. This is solely on the basis that the character of the dead person is determined entirely on the grounds that the person is dead. It is assumed that under the authorised standard succession law in modern democratic nations it has been established that death *per se* will be treated equally. On the basis of that premise the dead can therefore be a catalyst for succession. For example, on death a prime minister and a salesman are both subject to the same law (e.g., succession law): which is to say that on death there is no discrimination between bodies on the grounds of race, wealth, class or character. This also means that under the laws pertaining to death different people, upon registration of their death, are treated equally although they may be unequally treated on the ground of taxation, for example. It follows from this that this equality of treatment towards all dead bodies constitutes an extrinsic characteristic of the dead and that is the reason why the

characteristic is, irrespective of whether there are posthumous assets, treated equally under succession law, at least in Japan and England.

Whilst the dead, in terms of a catalyst for succession, have equality or formality, they also have other characteristics at the stage of "effects" of succession. When we add the term "deceased" to some social elements of identity, such as a person's name, social status, social roles and vocations, this addition enables us not only to draw a clear linguistic distinction between the person living and the person after death, but also to find, in addition to the equality identified above, other extrinsic characteristics. We now refer to the characteristics that are suggested when the following contrasts are considered—Mr Smith V's. deceased Mr Smith, parents V's. deceased parents, children V's. deceased children, civilians V's. deceased civilians, neighbours V's. deceased neighbours, sellers V's. deceased sellers, and buyers V's. deceased buyers.

The term *parents*, especially in Japanese family law, suggests not only that parents have a social status and a social role, and both the right to parental authority and the duty to bring up their children, but also that they have a lineal relation of ascendant to their children. Even on their death when they become "deceased parents" they retain the identity "parents" (i.e., the identity of this social status remains a social fact), provided that they were parents who entered into the social relationship of parenting, and not merely the biological act of child production. In this latter case the term *parents* is really empty of meaning. Nevertheless, that which the deceased parents have and are after death is markedly different to that which they had and were when alive. Given this, would it be correct to think that they lost, on death, all rights and duties warranted by parenthood? We contend that the dead upon death lose the status of subjects of

rights and duties but nevertheless that some rights and duties *per se* remain after death.

Regardless of whether succession is testate or intestate, it was argued in Chapter 3 that general succession is based on both the blood and the co-operative relationship. What this entails is that, even if the parents died intestate, they are, in a sense, still involved in their rights and duties. In this regard, we are not claiming that the deceased parents as subjects of these duties and rights *can* perform the duties and exercise the rights. Rather, despite the absence of the deceased parent's stated intention, succession law contains the rights and duties expected normally of living parents within its effects. In other words, whilst the rights and duties are weakened and restricted to a greater extent, they are still broadly the same as those for the living in the system of succession even after death.

Therefore, it can rightly be claimed that succession law not only acknowledges the type and status of this relationship but, in addition, that succession law does not deny that the status and role the living parents held continues to have affect after their death. Human death is treated legally in the association of the dead with succession law and society. It seems, through the association, that the dead are not merely a leading actor of the physiological events, but also that of the social and legal events. The details of a person's funeral may be determined not only by what is derived from the person's social relation with people and society whilst alive, but also by the reflection of predicting the change of the personal relation of the person's death. For example, supposed that dead person was the president of a large corporation, his antemortem position or status which survives his death is inevitably subject to

succession law relating with the management of the company. For a while after death and the funeral, the deceased will have to be "alive" as a deceased president up to the election of the next president, for example (Wakimoto 1997). In short what the person held whist alive continues to be alive—legally and socially after his death. The dead cannot complete his/her social death until, at least, a new president is elected in the shareholder's general meeting, a new personnel system of the company is arranged, and a commemorative event for a new start of the company and praise for the dead, is held. Midst the uncertainty of the relation, the deceased president is considered as socially alive until the reunite of the community that he had been involved. The cases of sellers and buyers can be explained in the same way. Salesmen have a social role during their life according to their profession, and, upon death, they do not lose all of the facets of this role. Even after sellers and buyers die, i.e., become "deceased," and despite the differences in succession in Japanese and English law (see Chapter 3), they nevertheless are obliged under the precepts of succession law, through the mediation of a living party to "settle their affairs". This implies that deceased sellers and buyers, for example, do not necessarily lose all of their former social status on their death, e.g., parents, lawyers, thieves, doctors, or indeed several combinations of these. Therefore, the obligation to "settle one's affairs" is an obligation of '"human agents", rather than different obligations according to roles or status one had when alive. The point that should be emphasised here is the import of the presuppositions that succession law is based on, i.e., that in order to "settle affairs" the previous roles of the person are invoked and recognised to enable this process. The other point we wish to reiterate, is that people hold many roles etc. when alive, and frequently at the

same time (see Goffman 1959; Berger and Luckmann 1967), therefore when we refer to a person as a "buyer or seller" we are not describing the person *in toto* but rather the person as they are at that time to us in that particular relationship, interaction. For instance, a person whilst being a parent, might also be an employee, a dreamer (whilst awake/asleep), a customer (in the shops, a restaurant, or perhaps of insurance policies etc.), a seller (of unwanted items), a patient (ongoing minor or major illness), a taxpayer and of course more generally, a citizen. Who a person is at a particular moment, depends on what or who is in relationship with them at that particular moment.

4.3.3 A successor

As mentioned in the previous section, there are common cases in which the dead both inherit what they had and were whilst alive and are the subjects of that which will be dealt with after death. However, it is normally argued that such processes of succession are merely arrangements where, for example, any pre-death debt is dealt with post-death. In this interpretation, there is no need to think that what the living hold is retained after death. Instead this line of reasoning legitimates the possibility that debts existing or incurred after death (e.g., funeral expenses) can be retroactively dealt with at the time when the debtors were alive. In other words, to espousers of this argument, death is no more than a point in time that is ongoing and insofar as what is dealt with after death is concerned, the distinction between the dead and the living cannot directly affect how any debts are handled. However, this view is not nevertheless justifiable as in, for instance, the following case.

Take for example a circumstance where a mining accident leads to a coal miner's death. In this case his right to life is compromised to some extent by the fact that the nature of his job is such that he is more likely than most to suffer severe injury or death as the result of an accident. In the event that he is killed as the result of an accident he is entitled to compensation in a way that takes into consideration the nature of his job, i.e., the fact that he was prepared to risk his life. In this circumstance then, the vocational attributes of the deceased before his death can be regarded as an important and relevant factor in the compensation claim. However, he is not confined only to his vocational attributes. The miner, as a member of a society has many and multiple social characteristics, e.g., as a subject who complies with and reflects the rules of the moral "ought" as based upon claims, duties, circumstances, expectations, and interests, all of which are distributed throughout "real" society.

Yet once he has been involved in an accident which leads to his death and the claim of compensation for this fatal result has happened, he is necessarily regarded as a deceased miner, and simultaneously the diverse relationships or social status he held would be revealed by any press releases involved. These circumstances raise the broader issue of how we are associated with such relationships and status in some pre-death and post death cases. Irrespective of whether, for example Mr. Jones is still alive or has been dead for twenty years, it is acceptable to use the phrase "Jones is my father". It follows that Jones, whether indexed in a past-regarding sentence "Jones who died twenty years ago is my father" or in a present-regarding sentence "Jones who works with the ABC Company is my father" is, regardless of the passage of time, my father. That is to say, Jones' parent-child lineal relation survives his death. Since it is possible

that such a pre-death relation continues to exist after death, the ground of the relation enables Jones' survivors to deal with his debts after death. Otherwise if a different relation in the parent-child lineal relation were suddenly generated after death, then succession law, especially intestacy, would break down.

However, the above explanation does not answer the question "why can the parent-child relation survive death?" To address this question consideration of a different relation might be fruitful: suppose that a person has a "relation" with an employer based on an employment contract. The contract establishes a relation between an employer and his/her employee. However, if the employer died, the employer-employee relation would not survive that death. Is it therefore plausible to argue that the lack of survival in the employer-employee relation lies in the difference between the relations based upon family status or ones that is based upon contract? Our argument is that the only relations which can survive death are those relations which persons are unable to dissolve by their own intention whilst they are alive. The parent-child relation can be divided into two, a biological relation and a legal one. It is a relation based on a blood relationship that cannot be changed by anyone. On the other hand, the relationship established through employment is contingent and an employee can dissolve the relation with his/her employer whilst alive. Tomorrow, for instance, the employer may close down the business, or the employee may leave his/her job. Nevertheless, in the case of adoption, the parent-child relation can be legally dissolved but this means no more than that law treats it as a quasi blood relation.

How about the relation established by marriage? Contrary to the case of the parent-child relation, when a person talks about his deceased wife "Ann", in terms of logic, he should say, "Ann was my wife" but not "Ann is my wife". There

can be no rational objection to this observation. Therefore, in light of this expression, it is clearly signalled that the husband's relation with his wife cannot survive her death. Indeed, as pointed out above the marriage relationship is a further example where a relation can be dissolved by his or her intention whilst both parties are alive. Moreover, a person can choose a new spouse after his/her ex-spouse's death, however the parent-child relationship cannot be changed, one cannot "choose" a new parent after one dies, in the same way parents cannot "choose" a new child to replace the child lost, although of course they can elect to try to have or adopt another, different, child.

If this explanation is warranted, then it could be argued that an intestate case, for instance, in which a widow is an heiress is based not upon the relation that can survive death but upon the legal status that she *was* a spouse of the dead. However, in the case of the parent-child relation, both the relation and the status can, as mentioned, survive the parents' death. For example, where a wife and a child have a claim on the deceased husband's or father's compensation for his death, his status and relations that survived his death must be evaluated to determine the amount of the compensation. If so, this suggests that, where a wife and a child have a claim to the compensation, the various aspects, relations and responsibilities of the deceased whilst alive must, on the assumption that some of what the deceased had whilst alive can survive, be taken into consideration.

Thus, with the exception of a straightforward case in which post-death payment is easily executed, in most cases of post-death settlement of debts, consideration should be given to the power of the status and relation of the deceased that can still remain after death. What the death of a person implies is

not that the death commences the mere arrangements for any pre-death debt posthumously dealt with, but that part of what the person, whilst alive, holds can survive death and at the same time the death starts with generating something new, such as a claim to compensation and an assessment of the compensation, by posthumously taking advantage of what can survive death.

4.3.4 A symbol

The dead can be considered "alive" in and through the living's memory and recollections. The dead are internalised in the consciousness of the living. This consciousness is intrinsically so social that it can be formed through the relation between the living and the dead. In this way they can be conceived as a form of historical living spirit; this is not merely an idea, but is instead a vital function of the human psyche. This distinction is important because unlike an idea a spirit is an immaterial existence and transcends time. The spirit is a source of thought or deep reflection so that it prevails over the idea and exists as a universal reality in real events. In other words, it would be possible to believe that the dead *can* exist in and through the living. If the living are barely conscious of the dead and even if the dead as a physical corpse exist in front of us, we may regard them physically in the same way as stones and furniture and the dead which are not regarded as an example of a spirit may fade away from our memory.

The dead have significance as a social symbol and can be viewed as such in the manner that we deal with the dead as well as in the way that we feel towards the dead (emotions, perception, etc.). Our character and some of our activities are directly affected by the role and status that the dead play in society (and the status that they involve themselves), as is the law and the social norms

within it. In this regard the dead as a symbol resemble a norm, especially a social norm, but not a rule. A rule is a statement of a norm, and it prescribes behaviour. It prescribes that X behaviour may be done (permission to do X), can be done (authorisation to do X), or ought to be done (obligation to do X), or the converse of these (Beyleveld and Brownsword 1994, 171; and see footnote 5).

If the definition of a norm is, as mentioned, warranted, the dead which resemble a norm and are also a symbol can generally express the idea of a question relating to human social action and seem to require us to do the three kinds of behaviour above. There are some cases in which corpses exist as a symbol, or where the dead are symbolised by a particular form, e.g., *ihai* in Japanese traditional practice, or exist as a real symbol and therefore even if their normative meanings are not expressed by words they are an objective existence that is independent from the living's consciousness. It may be possible to say that the dead can convey a norm to the living. Needless to say, the dead as a symbol play a role in normatively binding the living in many ways, but we assume that members of society involved with the dead accept this role. Whether the contexts of the norm are right is not necessarily required as an assumption. What should be emphasised is that the dead function as a normative power in the form of a symbol or through the consciousness and memory of the members of society.

In applying Weber's classification (1922) we find that the normative role of the symbolic dead is grounded in: our obedience to long-held traditions and convention; our emotional submission to what is shown as a prototype of norms; and our respect for the norm imposed on the relationship of domination and obedience that were regarded as justifiable *per se*. The normative role and the

emotional submission were approved during the pre-history stage of the human; and the respect for the norm subsequent to the development of human history. Thus the dead as a symbol exert a normative influence in the relationship between a society and its members.

If the dead can be conceived as a form of historical living spirit, then copyrights, for example, that embody a deceased person's spirit and recognition can be considered to represent the dead's antemortem social attributes. The copyrights may be regarded as symbolised spirit. The spirit of the dead can be embodied in these copyrights and can exist as a visible phenomenon of their spirit, a phenomenon that we can see and understand. If an argument that before death the person was historically a living spirit and the works he/she produced were a reflection of his/her spirit is acceptable, we can say that these works came to represent his/her embodied sprit when he/she transferred his/her spirit and ideas onto paper.

After this transference their spirit and ideas come under the auspices of the legal device called copyrights, which exists so as to protect material from being claimed as the production and property of another living spirit. In other words "copyrights" exist to protect and perpetuate the work of the original "living spirit" in the form, as it will be termed in this thesis, of "symbolised spirit". Thus, we contend that the person's spirit which produced the object of the phenomenon, i.e., the copyrighted works, continues to exist within these works, and can be constantly recognised as a symbolised form, as works or copy rights for example, after his/her death.

The copyrights thus represent the living spirit of the deceased person. S/he, prior to death, would have had an expectation based on an appeal to both

legal and moral rights that after her/his death, the copyrighted works as instantiations of her/his spirit would be vested with legal and moral eternal life through the protection afforded by copyright law, although in reality there is a time limit. A person, post-death, is therefore wholly reliant on the co-operation of the living to preserve and maintain the ideas and spirit of his/her work.

Thus where the form of the symbolised spirit is a real object, the dead can still be considered as a living spirit the living can recognise. If this is so, the expectation that the spiritual eternity can be perpetuated could represent the justification and explanation of the interest that the living have in extending copyright to the work of the deceased, and could therefore provide an ontological rationale for the value and priceless capacity of the symbolised spirit of the dead. It follows that things, as a symbolised spirit, attributed to the dead are thought, character, reputation, religion, art, etc. Yet it is worthy of note that not all of these are categorised as things to be associated with their significance as a social symbol. Instead, as mentioned previously, some may be merely associated with the third category of attributes.

Whether the dead have a kind of normative place or role amongst society and people or whether the presentation of their values in the form of works which symbolise their spirit, they may be regarded as an existence that is signified differently from the way in which we ordinarily apprehend and conceive people, events or objects. If and only if the dead function symbolically in this way can they gain power as a symbol. The contexts that the symbol signifies become complicated through rites such as funerals or memorial gatherings, in a circumstance where the tradition and custom involved in treatment of the dead have spread amongst people, or through the living's actions and emotions.

To sum up, it was argued there are four modes by which we can categorise the attributes of the dead with regard to the role they play in society. All of these can be part of that which survives death of the previously living person's character, spirit, status and roles. A principal phenomenon of that which survives a person's death is the social characteristics.

4.4 The social characteristics

Presupposition 2: Social characteristics[106] refer to the roles that a person plays in society and from which it is justified to demand performance in certain circumstances, based on the stipulations of a moral "ought". This definition contains the concepts of rights and duties. Therefore both are immanent in the concept of social characteristics.

4.4.1 Persons and social characteristics

Engelhardt (1988) identifies two categories of person: "persons in the strict sense" and "persons in various social senses". The former refers to moral agents, who possess moral rationality in the sense of being able to appreciate that actions can be tied to a sense of blameworthiness or praiseworthiness. The latter refer to those who are to be treated as being persons for social consideration: they are important on "general secular grounds to justify practices through which infants, the profoundly mentally retarded, and the very senile might in general secular terms be assigned a portion of the rights possessed by entities who are persons strictly, including rights not to be killed nonmalevolently at whim"

[106] In the traditional debate on "social interaction", two kinds of status characteristics are used as a similar concept of social characteristics: diffuse status characteristics (race,

(Engelhardt 1996, 147).[107] Engelhardt argues, based on his interpretation of a Kantian idea, that to find grounds for protecting such individuals:

> "[O]ne will need to look at the justification for certain social practices in terms of their importance for persons so as to justify for a particular community a social role one might term "being a person for social considerations". Since this sense of person cannot be justified in terms of the basic grammar of morality (i.e., because such entities do not have intrinsic moral standing through being moral agents), one will need rather to justify a social sense of person in terms of the usefulness of the practice of treating certain entities as if they were persons. If such a practice can be justified, one will have, in addition to a strict sense of persons as moral agents, a social sense of persons justified in terms of various utilitarian and other consequentialist considerations" (ibid.).

This meaning of "being a person for social considerations" could provide a ground for justifying the way of dealing with not only infants but also the profoundly mentally retarded and those suffering from Alzheimer's disease. Despite a lack of personhood as based on rationality and morality, they are in fact to be treated as if they were persons. Engelhardt (1988) argues that being a person in various social senses establishes their place in the social relationship with persons in the strict sense and that what vests certain cases of human biological life with personhood is the moral practice of persons in the strict sense. Therefore, unlike persons in the "strict sense" who have rights and duties, persons in "various social senses" have rights but are not necessarily expected to perform duties (ibid.). Evidently Engelhardt's view on duties is wrong. For even persons in "various social senses" whom he identifies may be under duties or obligations to pay succession tax.

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age, sex) and specific status characteristics (mathematical ability, artistic skills, mechanical aptitude) (see Berger et al. 1972; Knottner and Greenstein 1981).

[107] Engelhardt attempts to modify the flaws in the concept of persons that Michael Tooley (1972) proposes by categorising two kinds of persons. To persons in the strict sense, acceptance of the notion of persons in various social senses has a two-fold advantage: first, it enables us to draw a prudent line between those who and who are not subjects of rights to life; and second it makes virtues such as benevolance to the vulnerable acceptable in a society or community.

Such an argument would suggest that his concept of "persons in various social senses" is not necessarily in accordance with the concept of "social characteristics of human beings" that we are referring to in this thesis. However, the latter concept shares to a great extent the concept of "persons in the strict sense" to which Engelhardt refers. "Social characteristics" can be defined as "the roles that a person plays in society and from which it is justified to demand performance in certain circumstances, based on the stipulations of a moral "ought"". Whilst persons in various social senses have only a limited role in the practice of social relationships with other persons in the strict sense who conversely play a central role as moral agents, the "social characteristics" we refer to here relate to the substance of humans who live in their society or community. Therefore, this view is linked to the argument that the concept *per se* contains the notions of rights and duties.

4.4.2 Existence outside society

Human death is generally a natural state generated by biological mechanism. However, insofar as it exists in human society, it can be inevitably identified with signified social characteristics and can be composed as a social event or phenomenon arising from socially organised actions and procedures. The reason why we have decisive interests in human death is that the natural phenomenon of or event of death definitely has a social base. David Sudnow, who adopted ethnomethodological approaches for his Ph.D. thesis *Passing on: the social organization of dying* (1976), expresses his hope that he shows "the relevance of a sociological perspective for the description of even that hardest and coldest of biological facts—death" (ibid., 9). His grasp of the concept of

death in his book was an attempt to recognise that in a constructed social situation, death is not only thought of as a social fact that is recognised for any practical purposes and treated as a social product. Thus the occurrence of a death can be generally regarded as "something that occurs as a unit event, as a happening of the group" (ibid., 165). Sudnow addressed how deaths are conceived is "seen in such paradigmatic remarks as "the nation mourns its loss", ... "the family lost a son in the war", and others" (ibid.):

> "Characteristically, in announcing deaths, offering sympathies, describing the deaths of others, etc., relational categories and the collections of such categories are conversationally employed, e.g., "I'm sorry to hear about your father's death," "his brother died," "closed because of a death in the family." In conceiving deaths as unit affairs, a powerful basis for the enforcement of rights and responsibilities associated with the death of a unit member is thereby provided for, namely, that those rights can become linked to a member's status as a member" (ibid.).

In short the rights and responsibilities can be thought to be linked to the social statuses of the members of some unit, the statuses that the members have their membership associated with the rights and responsibilities.

Sudnow points out that if clinical indications of dying are revealed in patients there are quite large differences of degree in the medical staff's, at the County hospital, endeavour to resuscitate the patients, via the criteria of ages, social status and physical appearance. These conditions that differentiate between the patients are much in accordance with the "social characteristics" conceptualised in this thesis. At the County hospital there was no medical endeavour to resuscitate patients, except for wealthy patients who died at its centre of emergency unit. Sudnow never saw any patients of the age of 40 or over as the subject of an emergent treatment—an external massage for the halted heart confirmed by auscultation. Physicians, in treating and attending their under-20-year-old patients, attempted to resuscitate them by using oxygen

inhalation and stimulants. In the circumstance of dying, the treatment is determined by the patients' social statuses or positions. Being an attempted suicide, drug addict, prostitute, assailant, or homeless person, greatly influences how they are treated at the time of their dying (see ibid., chap. 4). Very often such people who are considered as morally low are used, as sort of guinea pigs, for medical drills and tests which have no relevance to the cause of their death.

Social roles may be determined by gender. Despite the feminist social movement against patriarchy, which assures a gender's inferiority of women, there are a number of societies that still accept, to some extent, the universality of patriarchy. Since masculine identity is conceived as sexual strength, power over women and political dominance, females are forced into dependent social roles by the acceptance of patriarchal values on their daily basis. However, unlike their social locus in society, women have been long educated by the emphasis on their assumed biological characteristics, such as "maternal instincts", "affection" and "emotions", based on the traditional dichotomy between reason and desire. On the other hand, men are supported by the social structure that the biological superiority, contingently produced, to women, where men are allocated into the psychic space such as "reason", "reasonableness" and "reliability" (see Turner 1984). It follows that men still manifest the superior characteristics in society. Yet the interpretation of this assumption is significantly difficult to be explained. One of the reasons for it is that it is obscure how the biological difference between men and women is constructed by social aspects. Especially in modern society the difference of nature/culture and nature/society is dependent on individual's recognition or perception. Once even a natural biological phenomena such as birth is related to the advancing genetic

technology—embryo, transplants, sperm banks, artificial insemination, sterilization, contraception and prophylactic hysterectomy, it can be put on the social agendas. This means that "cultural massively intervenes in natural processes" (ibid., 117). The cultural expansion of "natural reproduction" may illustrate that it is in accordance with the process where the status or social characteristics of women are loosing the strands of the biological character of women.

Historically, women were forced into the social system of patriarchy by the emphasis on their biological attributes. The system confined women to child-rearing, home discipline, subordination to husbands, the management of health and household. Whilst they advantaged the remoteness from the social competition, they were compelled to show a passive attitude toward the physical activities (sports) or psychological activities (political movements).

The above historical views would suggest that, insofar as humans live in society, that is to say, they continue to exist from birth to death (and thereafter as entities which can remain in certain post-death forms such as ashes), it would be warranted to say that they have a social and legal existence. It is therefore highly improbable they would possess no social characteristics within the society.[108] Nonetheless the recognition of these social characteristics is subject to speculation. Georg Simmel (1958) provides some pointers to aid recognition in his essay titled *Wie ist Gesellshcaft möglich?* (*How is society possible?*):

> "We see the other not purely as an individual, but as a colleague or friend or party-member, in short, as a fellow inhabitant of the same special world, and this unavoidable, wholly automatically-operative, assumption is one of the means of transmitting his personality and reality in the imagination of the other

[108] E.g., Montgomery (1998) capsules a Wittgenstein's argument relevant to individuals, "individuals cannot hold a private conception of self that makes no reference to social categories". Individuals can interpret themselves only as a composition of socially constructed roles (ibid., 98).

> into the quality and form required for his sociability" (ibid., 25; translated by Poitz 1972, 31).

Therefore, it is warranted to point out that "the other constantly appears to us in generalised social form, as an officer, a believer in Christianity, an official, a scholar or as a member of a family. The role-image distorts and obscures perception of individuality" (ibid.). One criticism which arises here would be that the attempt to construct social characteristics often leads us to distort, supplement and typify the true picture. That is to say, to construct social characteristics would reveal the impossibility of constructing the true nature of an individual and yet this "true picture" is the very condition and ground for our perception of social characteristics. Conversely thus the concept "social characteristics" that can veil the purely unique enable us to recognise personality and reality *existing* in the imagination of the other. Needless to say, although this recognition is far from that of the true nature of an individual, it would not be denied that irrespective of "*existing* in the imagination for the other", the social characteristics play a vital role in society.

Furthermore, Simmel goes on to argue:

> "We know of the official that he is not only an official, of the merchant that he is not only a merchant, of the officer that he is not only an officer; and this extra-social existence, his temperament and his personal destiny, his interests and the worth of his personality, however little he may modify the central fact of his official, mercantile, and military activities, each time gives him a certain nuance for each person who comes face to face with him, and interweaves his social image with extra-social impondarables. All intercourse between people inside social categories would be different if each person confronted another only as that which he is in his category at that point in time, i.e. as the bearer of a social role devolving upon him at precisely this moment" (ibid.).

Simmel illustrates that it appears "an individual is, as regards certain aspects, not an element of society" (ibid.). However, he overlooks the plausible claim that one's extra-social existence, such as one's temperament, personal destiny, interests and the worth of one's personality, can be sometimes recognised as

being part of all social existence, although he did use the term "interweave". For example, actions such as awakening, eating and walking have been regarded as purely individual actions that have always been carried out by humans since pre-history. However, it can be argued that even those actions are on occasion *social* actions. For so far as persons live as a social existence, we can understand that the actions that they do cannot be purely individual actions but actions sometimes associated with interaction with society. Namely, an individual's biological instinct is oriented to culturally formed channels or processes by the association with society—e.g., learning social roles, internalising social customs, etc.

Contrary to this argument, Simmel contends that "an individual is, as regards certain aspects, not an element of society...forms the positive condition for the fact that he is so as regards other sides of his nature: the nature of his societated being is determined or co-determined by the nature of his non-societated being" (ibid.). This fact "an individual is not an element of society" may illustrate that each individual has his/her own biological and genetic natures. However it is plausible to argue that such natures do not merely form an individual's character through social interaction with society but also even our genetic and biological natures can be, on occasions, *social* when they are recognised by us. Thus it is possible to argue that, so far as we coexist with others, we are not beings whose social characteristics can be separated from the beings *per se*. Rather they are the substance of the meaning of our existence in society.

4.4.3 The concept *Alssein*

On the basis of the above discussion, we argue that social characteristics related to humans involved in society and law are not mere attributes but the *very* substance of the existence of humans who live in society. In accordance with this regard, the concept "social characteristics" all but accords with the concept *Alssein* or "being-as", which Maihofer (1954, S. 114; 1956, S. 47), the German philosopher, used in an attempt to explicate the substance of being a human, publishing three essays on legal ontology in the 1950s. He argues that, in "the co-operative world", a person is associated not with indiscriminate others but with "certain" others. This *Alssein* is not a mode of relationship between a person and indiscriminate others but that of a person's relationship with "certain" others.

Maihofer identifies *Alssein* in the following way. First, "the co-operative world" refers to the place and space where the social beings exist. Although generally it is called human society, it is the social world constructed by objects which hold their significance in the daily practical activities based on the necessities of everyday life and human concern with those necessities. In this social world we encounter diverse objects and persons and always seek to discover our relationship with objects and other persons.

Even in dilemmas, where if it were not for mutual dependency we could not live independently, we build relationships with others. Whilst we depend upon others in the meaning relations of the co-operative world where we labour and act, others illustrate the many different possible meanings of existence that constitute the total meaning of the relation we and others within society share.

A being associated not with indiscriminate others but with "certain" others in such a daily co-operative domain is called *Alssein* by Maihofer. This *Alssein* is

a mode of social existence. It is a form of existence that is capable of being compared with everyday life and plays a vital part in the functioning of society. For example, it is the role-playing involved in parenthood, in the relationship between a landlord and a tenant, or a seller and buyer, or a citizen and neighbour. The essence of such "being-as" could be the social element, which would involve consideration of a person's social status, authority and their various roles. When we recognise that we, as human beings in the world, can exist in terms of *Alssein*, we also become aware that *Alssein* can lead us to the normative world, i.e., the world which is controlled by norms.

4.4.4 The structure of relations

Maihofer attempts to find the grounds for explaining / justifying rights and duties from the concept *Alssein*. First he explains the notion of "culture affairs", which refers to certain everyday phenomena, that is to say, social situations such as a person's social status (e.g., as purchasers, fathers, and citizens), self-defence, and emergencies (1958, S. 156f.). Therefore the notion should not be defined as a phenomenon which is only applicable to isolated objects. The "culture affairs" can be interpreted as the complex phenomenon of human life generated between subjectivity (human beings) and objectivity (the world) or the existence of human beings. What comprises the existence of the "culture affairs" comes to be mutually associated with *Alssein*. Thus, as mentioned earlier, we who co-exist with others in everyday life encounter, in any "culture affairs", humans involved in interactions founded on characteristic relationships such *as* a purchaser and a seller, a landlord and a tenant, a doctor and a patient, a teacher

and a pupil, a father and a mother or/and a farmer and his/her staff (ibid., S. 161-162).

In analysing the structure of the "culture affairs" as the reciprocal relationship of *Alssein*, Maihofer abstracts some important elements from the concept of *Alssein* relating to rights and duties.

(1) Instructions and responses

First the social order structure of the "culture affairs" imposes parameters on the concepts of "instruction and responses". In the "affairs", in relationships between for instance a buyer and a seller, a medical doctor and a patient, or a teacher and a pupil, one person, the instructor, instructs another person, the instructed (ibid., S. 163). This kind of instruction directed from one person to another brings about a response from the latter to the former. Thus the instruction corresponds with its response (ibid.).

(2) Circumstance and significance

A response corresponding with an instruction generates an "affair" between one person and another, the "affair" where the person is directed by others—for example, a buyer is directed by a seller (ibid., S. 163f.). Maihofer identifies this "affair" with circumstance. This circumstance provides the significance whereby a person is understood to be a being for others—for example, a buyer is a being for a seller. This significance which can occur on a daily basis, provides an ontological rationale for the meaning which a person has for others and others have for the person (ibid.).

(3) Expectation and interest

We base this significance on the expectation that is mutually *Alssein* between two or more parties—for example, the expectation of a father for his son or of a pupil for his/her teacher. This expectation furnishes a rationale for the interest that each *Alssein* holds in another's existence or actions (ibid., S. 164). Since this interest arises from the "culture affairs", it can be called "natural rational interest". The interest provides a rationale for values and valuelessness that the existence and action of each *Alssein* holds toward another *Alssein*. Each *Alssein* requires others in order to realise its own existence. With regard to law, law makers have important agendas that enable us to realise the "expectation" that one *Alssein* holds to another (ibid.).

(4) Request and duties

According to Maihofer, the transition from a "being" to an "ought" is not difficult. The "natural rational expectation", as mentioned above, from one *Alssein* to another necessarily generates a request which is to commit an act in accordance with the expectations of another *Alssein*, that is, to act properly as an *Alssein* (ibid., S. 166f.). This request is an ontological rationale for natural rational duties. When we act as an *Alssein*, we recognise that these duties play a vital role as a standard for controlling our actions. We also know that to obey such duties is to determine whether our actions toward others are appropriate (ibid.). Therefore we would conclude that duties are ascribed to each *Alssein* (ibid.).

(5) Existence and "ought"

According to Maihofer, "from being to ought" can be explained in the following way (ibid., S. 167-168). In nearly all circumstances, we place ourselves in roles and situations that involve other people, and on that basis, we ask ourselves a question: what do we as an *Alssein* expect of another *Alssein* and therefore what do we request of them as a justifiable action? Take for example a teacher and a pupil. A pupil asks him/herself a question: what do I, the pupil, expect as "a necessary action" from a teacher and therefore what does the pupil expect of or from an action such as being right"? This leads us to a command, an instruction or rule governing how we should act in cases where a request is legitimate to all who exist within similar roles and situations. As a fundamental rule of order, the request can gain legitimacy. At the same time it can raise itself to a legitimate duty in accordance with the request. Maihofer contends that this refers to the Categorical Imperative that Kant called the Supreme Principle of Morality. Maihofer would conclude that we are subject to a moral rule based upon a proper expectation, interest, claim, and duty justified in terms of our particular social roles and situations within society (ibid., S. 171f.).

4.4.5 The concept of "being-as"

If Maihofer's argument is credible, our perspective cannot concur with Engelhardt's claim that fetuses and patients in an irreversible coma can be necessarily categorised as "persons in diverse social senses". For if it is right to presume that social characteristics are of central significance to human existence *in society*; the fetus, for example, has a social characteristic *as* a fetus, and likewise the patient in an irreversible coma has a social characteristic *as* a patient

in an irreversible coma. Their characteristics have a central meaning to the substance of their existence. It would follow from this point that our treatment of both the fetus and the patient should not be regarded in the same as the way in which Engelhardt regards the status of fictitious persons. Both the fetus and the patient have social roles, social status and even authority[109] on the ground of "being-as".

Nonetheless some will be dissatisfied with the above view. It would seem to suggest that the social characteristics, as a sort of role theory, are about filling, holding or playing roles. However, some doubt how it can be the case that a fetus can play a role as a fetus. It is a fetus, and only a fetus, it is its "being". They would argue that this cannot be called holding, filling or playing a role. Equally the patient in an irreversible coma can hardly be said to be filling a role. To do so surely requires an active aspect to it. In other words the criticism of the "social characteristics" perspective would be that being in an irreversible coma is a very passive existence.

A role that a fetus holds is one of numerous roles in society. However, the attributions of a fetus that, for example they cannot speak, claim or do what a person can do, would not necessarily support a criticism that the role of a fetus is very passive. Its role is formed by being a fetus. Therefore in its role it is not passive. Or rather, we can regard the role of a fetus as a distinctive one that cannot be substituted by others. Likewise, a patient in an irreversible coma holds his/her own distinctive role as a patient of that kind. The role can be clearly differentiated from other roles.

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[109] There are some cases in which "messages" uttered by fetuses and patients in an irreversible coma (e.g., the heart beats of fetuses and the regular breathing of patients in a coma) can be spontaneously understood by their family and doctors. Their authority refers to that a meaning.

Before discussing the concept "as a fetus" using the concept *Alssein* or "being-as", we will review the argument that one could appeal to a concept of potentiality in order to claim that embryos and fetuses will be moral agents in the future; they are potentially a person, and they therefore should be given the rights and standing of a person. Engelhardt's criticism of this position is:

> "[I[f X is a potential Y, it follows that X is not a Y. If fetuses are potential persons, it follows that clearly that fetuses are not persons. As a consequence, X does not have the actual rights of Y, but only potentially has the rights of Y. If fetuses are only potential persons, they do not have the rights of persons. To take an example from S. I. Benn, if X is a potential president, it follows from that fact alone that X does not yet have the rights and prerogatives of an actual president" (1996, 142).

In Englehardt's argument, supplemented by the explanation of probability and potentiality, that "the value of zygotes, embryos, and fetuses is to be primarily understood in terms of the values they have for actual persons", it could be suggested that, even if fetuses are physically harmed, the action can be justifiable because it does not harm a person but only a potential person. Thus we have to return to the concept: "as a fetus" (ibid.). For our purposes, an understanding of the concept "as a fetus" can explicate that, whilst an action of harming a fetus is not to harm a rational agent, it is to harm the social characteristics of a fetus, which are the substance of being a human.

Generally, we involve ourselves in diverse correspondences within society. It is worth noting that these correspondences link us to the meanings associated with society, which pre-exist us as individuals and give us our roles. We can identify a person as acting out or filling a role amongst his/her many available roles according to that particular role.

For instance, let us presume my neighbour, who is a judge, is at the same time my landlord and is therefore, as my landlord, involved with me not as a judge but as my landlord. In the courtroom he is, as judge, associated with the

suspect, equally the suspect is, as defendant, associated with the judge. In that way, diverse relationships can be established on the ground of "being-as". As for a legal relationship, for example, a person as a tenant is associated with the judge as their landlord in the regard of rights and duties to their rental contract. On the other hand, he as a judge, is associated with the regulations in the courtroom. We can apply the same mode of reasoning to cases regarding fetuses. Irrespective of whether or not fetuses have consciousness, they can be also, as a fetus, associated with their society.

4.4.6 Ascription and governance

However, it may be inappropriate to use the term "correspondence" in order to state the relation between fetuses and their rights. Although it would be *an* answer to express the relation by "correspondence", when we accept that, irrespective of whether or not fetuses have consciousness, they hold rights. However, it would be permissible to say that the rights belong to the fetuses. Jean Dabin (1977, 111-120), a French lawyer, identifies that relation with *appartenance* in French. Its literal meaning is "membership" in English. *Appartenance* may be interpreted as "ascription". According to Dabin, rights present themselves in a form of ascription between a subject and his/her object. Dabin contends that the concept "ascription" is a substance of relations between a subject and his/her object (ibid.).

Therefore, when the concept is applied to a human who has no capacity of intention or will, it would be plausible to say that even if a human has no legal representatives they nevertheless hold rights, the reason being that s/he has diverse kinds of interests which they ascribe to his/herself. That is to say, it is

possible for a person to unconsciously have a right, as being that it is possible for the person to have interests without possessing an actual knowledge of them. These can be involved in the being of themselves in their various roles, acted out or potential. If the concept of "ascription" were accepted as valid as a substance of rights, then Rudolf von Jherings's argument that rights are always enjoyed would be infallible, although it still remains that interests can justify rights (ibid., 112-113). Dabin explains a right in the following way:

> "Those who hold a right are neither those who desire it, or who know it, or who act, still less those who are harmed. They are those who hold it *ipso facto* it is what each person holds. A right can be identified by holding, that is, based upon the existence of the entitled holder or upon his/her capacity of action ascribed to the right" (ibid., 114) [my translation].

Although fetuses cannot be moral agents in their mother's wombs, they have the benefit of being a subject of the right. One pertinent example would be that they have a right to receive medical benefits on the grounds of or in accordance with the ascription that they intrinsically hold as a fetus. Supported by the concepts "being-as" and "ascription", fetuses have rights even if they have neither any necessary contact with their intention or will nor are able to express their will to other persons. Insofar as the object of the right is ascribed to fetuses, fetuses *hold* their right.

Moreover where law forbids abortion, and even if consideration for a mother's life is a main justification for the acting against the law, we cannot deny that fetuses have the right not to be aborted on the ground of being a fetus. This means that fetuses are a subject of rights, interests or a relationship between rights and their ascription. To restate thus, we have not been maintaining, in this discussion, a view that a subject of interests can be identified with a subject of rights. Rather, it has been argued that, apart from a fetus's mother receiving the

benefit of rights for the sake of the fetus, the fetus merely has its own interests on the grounds of social correspondence and the relationship of ascription.

Stated in this way, the concept "being-as" can be identified with a form of legal capacity and of governance. Borrowing Dabin's words, since an object for a right is ascribed to the subject, i.e., the person, the person has a power and is master of that power (ibid., 120). Ascription here means attributes that are connected to the subject by the bond of being assigned. "Being-as" and governance are further attributes associated with those who ascribe their entitlement to the object ascribed by the subject.

This interpretation would be useful when answering the following question: "is it right to say that, in a case where a guardian for a patient in an irreversible coma is appointed and executes a right for the patient's sake, the guardian can be entitled to the right because they execute the right for the sake of the patient, but the patient can nevertheless reject it?" No one would think of this as correct. For a right and its subject can be justified by ascription, and "being-as", legal capacity and governance does not function if there is lack of ascription.

If a patient is in an irreversible coma where s/he has no consciousness, s/he still has governance of objects or a right to own objects. The reason is that the objects are ascribed to the patient and therefore "being-as" and governance are a consequence of that ascription. In other words, rights that are the relationship of ascription and that of "being-as" and governance exist for the patient. So even if the actual execution of the rights is exercised by the guardian, the object of the execution is no less than for the patient's rights partly included in the guardian's vocational duties.

4.4.7 Roles in social characteristics

Our next task is to identify the power of "being-as". So far as humans live in society, they have a power of governance of "being-as". Whether or not it is permissible as a right is a matter we will examine later, we argue here that the objective attributes of "being-as", which is an attribute associated with objects ascribed, are social characteristics. That is to say, we claim that social characteristics are an essence of the existence of humans who live in any society. Therefore, why is it possible that the argument—social characteristics refer to the substance of the existence of humans who live in society—leads to a further claim that the concept of social characteristics *per se* contain the concepts of rights and duties? Our understanding and definition of social characteristics are the roles that a person plays in society and from which it is justified to demand performance in certain circumstances, based on the stipulations of a moral "ought". Therefore the answer to the above question would require an explanation that illustrates that the central concept "roles" does, in terms of its intrinsic attributes and contents, contain rights and duties. We will therefore employ role theory[110] as a key concept to explicate the concept of social characteristics as used in this thesis[111].

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[110] Although B. J. Biddle and E. J. Thomas's *Role Theory: Concepts and Research* (1966) obviously does not cover the development of role theory after 1966, the book is available as a reliable reference for reviewing role theory. It is worth reading because there is limited evidence in the current writings on role to suggest that contemporary thinking on role is basically different to that which emerges from the analysis conducted before 1966. For reviews of various versions of role theory since 1966, Montgomery (1998, 97-104) provides us with an outline on the concept of "embeddedness".

[111] It is not denied that, as other writers have done, we are also using "role" as an adjective to modify such concepts as behaviour, relationship, network, conflict, etc.

In general, the concept of role in sociology is discussed as a social role. The writings of Mead, Merton and Linton[112] made contributions to establishing role—both as a term and as a concept. The concept of "role" which despite strong criticism[113] has progressed, been refined and been elaborated upon can be roughly divided into branches. Our focus in this sub-section will be, based on the greatest common measure of the concept of role provided by the three authors named above, to explicate the grounds for the presupposition that role includes rights and duties.

Primarily, the school of thought which prescribes the import of role in the dynamic process of the development of personality. This school has two streams: one position stems from Mead's (1934) perspective and views role as a fundamental element in the process of socialisation; the second position stems from T. Parsons (1952) and focuses on role as a cultural pattern. A second school prescribes the functional aspect of role from the angle of the whole society. It includes such anthropologists as Ruth Benedict (1946). A third school

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[112] Proposing a distinction between status (position) and role in his book *The Study of Man* (1936), Ralph Linton, anthropologist, makes some notable comments: "A status, as distinct from the individual who may occupy it, is simply a collection of rights and duties. Since these rights and duties can find expression only through the medium of the individual, it is extremely hard for us to maintain a distinction in our thinking between statuses and the people who hold them and exercise the rights and duties which constitute them...A *role* represents the dynamic aspect of a status. The individual is socially assigned to a status and occupies it with relation to other statuses. When he puts the rights and duties which constitute the status into effect, he is performing a role. Role and status are quite inseparable, and the distinction between them is of only academic interest. There are no roles without statuses or statuses without roles. Just as in the case of *status*, the term *role* is used with a double significance. Every individual has a series of roles deriving from the various patterns in which he participates and at the same time *a role*, generally speaking, which represents the sum total of these roles and determines what he does for his society and what he can expect from it" (ibid., 113-114) [original italics]. Linton's concept of inseparability of status and role regarding rights and duties does assume, at least, that status and role includes the concepts of rights and duties.

[113] E.g., Collins (1994, 266) criticises "role theory" as follows: "[r]ole theory continues to work toward an advancing scientific model, but it has cut down its scope to the fairly narrow question of the self is embedded in social roles. This not only loses the dynamic side of the individual, which Mead had stressed, but also it becomes only partial theory of the

focuses on role from the viewpoint of particular groups in society. This school includes Merton (1968), and Berger and Luckmann (1967). Although it would not be practicable here to analyse the arguments of these different schools in detail, at least three points can be identified and abstracted as common to all three schools and thus as common elements of role theory.

First, almost all prescriptions of role theory contain prescriptions regarding an individual in a particular situation *or* an individual's acceptance of the group's prescriptions regarding a particular situation. These prescriptions can be employed as a basic pattern in classifying rights guaranteed by law. Second, whether or not role action is prescribed, the action assumes that interaction between symbols and communication is possible and enables us to generalise social behaviour. Rights can be regarded as an important means for controlling society. At the same time they contribute to generalising social behaviour, that is, forming and maintaining social order. Third, human action cannot be adequately explained or described on the basis of observations of the activities and behaviours of several characters or other isolated ideas. Rather it should be observed and then explained on the basis of systematised or integrated patterns of action. The conflation of these common elements suggests that rights are systematised and integrated in law and laws. When so understood, the three common elements would suggest that rights are immanent in the concept of role.

A review of the definitions of role yields a striking diversity of definitions (Biddle and Thomas 1966).[114] Here we will attempt to employ the most common

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self...Role theory loses focus on this internal structure and merely points to ways in which the self becomes attached to one or another part of society".

[114] E.g., Levinson (1959) capsules three specific senses of "role": (1) the structurally given demands (norms, expectations, taboos, responsibilities, and the like) associated with a given social position; (2) the member's orientation or conception of the part he is to play in the organization; and (3) the actions of the individual members—actions seen in terms of

definition: role is the mode of action attached to a position expected by a group and community, and acted out by the actor in that position. Therefore, role is a concept related to the combination of positions that are systematically associated within the structure of society and the personality of the actor. Role can also be simultaneously self-constructed in the regard that expectations of others and institutions of society can be learnt and obtained.

On the other hand, according to Berger and Luckmann (1967), it would be possible to explain role not as an expectation or norm that prescribes individuals but as a category which classifies others. This perspective intends to distinguish itself from other role theories based on functionalism, which view role as a substantial entity that binds actors externally. It contends that when we encounter an actor we have to interpret the actor and their behaviour, whoever s/he is, and that we locate the actor in role-patterned categories. For example, even if an action is so extraordinary that it is beyond our expectation and norms we can, in principle, categorise the actor as a lunatic. Put in extreme terms, this means of category patterning enables us to categorise things that cannot be categorised by other means.

Where the contents of role that an actor performs are independent of the actor's personality and the role is played out artificially, the role exhibits independence, restraint and externality. On the other hand, where a role is considered as reflecting an actor's significant attitudes and attainment it is regarded as a process in which we can recognise the actor's attitudes and interpret their meanings, and is construed as a cognitive category related to the interpretation of significant symbols. Obtaining such a role would permit the

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their relevance to the social structure (that is, seen in relation to the prevailing norms) (ibid.,

possibility of positively reconstructing situation prescriptions and developing the imagination.

Observed in that way, a traditional definition defines a role as the mutual expectations that are socially recognised and standardised (Emmet 1966). It would be possible therefore to say a role based on such mutual expectations is substantially a claim at least based on social status and formally no more than rights and obligations. However, on occasions, roles have to moderate conflicts with others, conflicts which result from a lack of resources required by an actor. In observing the contents of roles which are constructed of mutual expectations and their respective actions, we recognise that the relationship between the expectations and actions contains both rights and duties that require an according reaction of a certain type that an actor can expect others to recognise, and duties involved in performing an action of a certain type that an actor believes others expect of the actor.

The above explanation is based principally on the classical work of Parsons (1952, 114-121; 1954, 197-200). Parsons points out that rights and duties can objectify diverse *facilities*. According to Parsons, facilities refer to "possessions which are significant as means to further goals in complexes of instrumental orientation" (1952, 119). Therefore the criteria of a facility that he identifies are "intrinsic transferability between actors, individuals or collective, and relevance to instrumental orientation" (ibid.). The fulfilment of human desires is, whether the objects are physical, social or cultural, performed through the means of diverse facilities. Therefore, the issue of rights and duties is ascribed to

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172).

possession of those facilities. In this regard, Parsons classifies rights and duties according to the difference of the nature of the facilities.

Where facilities are physical or cultural, the possession of the facilities can turn into a particular person's right because the facilities *per se* are limited and costs are incurred in their generation. However, where facilities are social relations, the categorisation and systematisation of rights and duties are also prevalent because the facilities typically function to fulfil desire-oriented allocations. This situation emerges mainly at the point where one's rights are correlative to another's duties and where the matter is dictated by their degree of social power.

We have identified that when role is interpreted in the context of facilities then the correlative of rights and duties immanent in roles emerges. Furthermore our concern is that there is also a diversity of facilities because of the degree of whether or not the prescription of the significance is ambiguous or of whether or not the maintenance is strictly performed. The interrelationship of role can be divided into two: the first based on an *inherited* ascription between relevant persons and the second on their *posterior* achievement. An example of the former is the relationship between a husband and his wife and that of the latter between a doctor and his/her patient.

Now we will return to the reference of "being-as" or *Alssein* that is a central tenet of this thesis. Earlier we pointed out that humans can co-exist as a collective entity in a certain form. This form is the social order that contains rights and duties. Correspondences with the social characteristics of the social members, such as "as a judge", "as a tenant" and "as a father", can be interpreted to be constituents of the social order. That is, the social order is

greater than any respective *res* or any particular human characters. It establishes the relation and direction of relation between the respective social entities. Moreover it is that which prescribes the significance of relation to entities relevant to each other. Its substance lies in one's relation to others: the correspondence that exists between mutually related things or *Alssein* of the human character. This understanding leads us to the conclusion that this correspondence contains the concepts of rights and duties.

4.4.8 Rights and social characteristics

A question that has remained to be addressed in this section is whether or not, even if rights can be derived from both the concepts of "rational persons" and "social characteristics", we can deduce rights and duties from those who are not rational persons but who nevertheless have social characteristics. We contend that it would be possible to deduce rights but not duties. If the systematisation of role requires explicit prescriptive or prohibitory role-expectations (e.g., laws) enunciated by actors (Parsons and Shils 1954, 203) and this kind of explicit entitlement can be viewed as a right, then we are able to deduce rights from the social characteristics of those who are not rational persons in the strict sense mentioned above, based upon Engelhardt's argument that in diverse social senses they are to be treated "as if they *were* persons".

In his argument Engelhardt (1996) claims that considerations of beneficence protect infants, the profoundly mentally retarded, and those who are suffering from very advanced stages of Alzheimer's disease. The justification for their status based on his concept of their being "persons" in diverse social senses leads to their entitlement as right-holders (ibid.) He justifies this as follows:

> "[I]n general secular terms a protected social role might be justifies, or at least established within particular formal or informal agreements, for embryos, infants, and others in terms of (1) the role's supporting important virtues such as sympathy and care for human life, especially when human life is fragile and defenceless. In addition, with respect to infants and other humans ex utero there is the advantage of (2) the role's offering a protection against the uncertainties as to when exactly humans become persons strictly, as well as protecting persons during various vicissitudes of competence and incompetence, while (3) in addition securing the important practice of child-rearing through which humans develop as persons in the strict sense" (Engelhardt 1996, 147-8).

It follows that the considerations of beneficence are based on the consequentalist perspectives.

An infant is not, in the strict sense, a moral rational agent, but a being of its social character. This would suggest that an infant has rights based upon its existence "as a successor" and "as a recipient of the benefit", "as a consumer of powdered milk", and so forth. The concept of *Alssein* or "being-as" *per se* includes the infant's entitlement to legal claims. Likewise, a patient in an irreversible coma has diverse rights based upon their status "as a recipient of medical benefits", "as a patient", "as a father or mother or child", and perhaps "as a landlord or "as an unemployment person". Thus since the concept of *Alssein* does, as mentioned, include rights and duties, the justification based on the considerations of beneficence by the Consquentalist viewpoint is not only unnecessary but incorrect.

4.5 The succession of the social characteristics

Presupposition 3: The dead differ from other inanimate objects in that they retain some aspects of their former social characteristics when they make the transition from life to death.

4.5.1 Entities which are not persons in any strict sense

Engelhardt asserts that the following entities are not persons in any strict sense: infants, the profoundly mentally retarded, those who are suffering from very advanced stages of Alzheimer's disease, and patients in an irreversible coma. This entails that they are not moral agents. One cannot blame and praise them. However, our argument is that they can have their own characteristics on the ground of "being-as" ("governance" in Dabin's argument), i.e., "being as" infants, the profoundly mentally retarded, patients of Alzheimer's disease, and patients in an irreversible coma and that the "being-as" can provide the ground for their holding rights. But it is worthy of note that we cannot necessarily say they have equivalent rights to a person in the strict sense. In a case, for example, where a patient in an irreversible coma receives particular public benefit from the NHS, his/her entitlement stems not from "being as" a person but from "being as" a patient in an irreversible coma: that others who have no entitlement to receive such benefit do not possess the social characteristics of the coma patient, the characteristics must therefore be the substance of his/her being in society.

The general definition of the roles that a person plays in society and from which it is justified to demand performance in certain circumstances based on the stipulations of a moral "ought" may even be applied to the social characteristics of patients in an irreversible coma and patients at the very advanced stages of Alzheimer's disease. We will avoid here discussion of the problem of the justification of the fact that human beings who lack the entitlement of persons in a strict sense are exempt from the duties that can be derived from their social characteristics. However, it could be argued that when the patients were persons as defined in the strict sense they, in certain circumstances (i.e., in the state of

an irreversible coma or Alzheimer's disease), accorded to the normative standard. That is, they exchanged expectations with others, and that, even if they are now in altered circumstances regarding their health, the expectation that their society has toward them is effective, especially in terms of the social and legal significance.

Next, we have to address the question: "how are the social characteristics of such patients ascribed to the patients?" If the social characteristics are an example of objects or things, then they may be ascribed to us in the similar way as objects or things are allocated to us. As a matter of fact, such characteristics are basically, as objective reality, ascribed to the patients in an irreversible coma or suffering from Alzheimer's disease. Yet this ascription is irrelevant to our sense of autonomy or intention. This is so because, as the following example suggests, infants enjoy their rights to life by ascribing an object (i.e., life) to themselves. The reason why patients hold rights on the ground of their social characteristics is, irrespective of intention, that they ascribe the social characteristics to themselves. Therefore there is no doubt that the characteristics presuppose they are potential or living human beings. On the basis of foregoing that which requires discussion, is whether presupposition 3 is warranted. In other words, whether it is plausible to argue that the dead, who by virtue of being dead, have lost the status of moral agents nevertheless have their own social characteristics.

4.5.2 The character of the dead

Suppose that a patient in an irreversible coma is pronounced brain dead in accordance with proper medical judgement. He/she immediately loses the rights

that living persons can enjoy, and obtains the position of being appropriately dealt with as a dead person. Irrespective of a body's warmth, the law deals differently with the body before and after death.

Most of the rights that the patient lost constitute a package of fundamental human rights. On the other hand, after death s/he is subject to the laws prescribing how to deal with dead persons. Legally, dealing with the dead does not mean that laws deal with them in terms of the rights and duties of the dead. The rights and duties that pertain after death have a measure of continuity with the living's rights and duties. However, insofar as the concept of the social characteristics contains rights and duties, the concept *Alssein* of "being as" a dead person is the same as that of "being as" a patient. That is to say, the concept of "being as" a dead person can contain rights that are as the social characteristics of the dead.

What the patient held until his/her death was a set of social characteristics, such as social status or social roles based on the concept of "being as" a patient. These are significant elements related to a legal relationship. They exist in the relationship with persons associated with legal relations. Therefore the social characteristics function as a means of the social interests. The social characteristics of the patient are worthy of protection, and to protect them is an enforcement of rights. Thus, despite losing consciousness, the patient is a subject in terms of medical benefit.

Based on the above discussion, is it right to say that the patient, on death, lost all the social characteristics that s/he held whilst alive? If the dead lose any social characteristics ascribed to them, then there would be no need to examine whether or not the dead have rights. However, the social characteristics of a

dead person can survive his/her death. The characteristics are associated not only with the common attributes or concepts such as social status or social roles but also with categories such as nationality, family, class and vocation.

If a patient in an irreversible coma dies in Britain, and yet for example he is a tourist of non-British nationality, then the body will be dealt with as a foreigner's body (Green and Green 1992). The different treatment to English bodies implies the deceased non-British tourist still retains its pre-death social characteristics, i.e., being non-British. Contrary to this, if his/her body is treated in the same way as bodies belonging to deceased British persons, then we can say that the dead non-British tourist has not retained the pre-death social characteristics. However, we cannot deny that the tourist's body still retains some of the social characteristics that s/he had whilst alive.

In outlining the history of the development of organ transplantation, Baker and Hargreaves (2001) cited a classic essay "Use of the Dead to the Living", which T. Southwood Smith (1788-1861), a physician and Jeremy Bentham's friend, published to urge "expanding the supply of cadavers by appropriating the unclaimed bodies of the poor" (ibid., 6). What should be noted in the essay is not only that Smith persuaded physicians to use the unclaimed bodies of the poor, but also that "if the dead bodies of the poor are not appropriated to this use, their living bodies will and must be" (cited in ibid.). And Smith concluded "[i]t is time that the physicians and surgeons of England should exert themselves to change a system which has so long retarded the progress of their science, and been productive of so much evil to the community" (ibid.). This argument may suggest that the social characteristics which people in those times had—here, being poor—manifest the locus where the people were placed in society. The social

characteristics of the poor can be understood to have been deeply connected with the infringement against or disregard to their rights.

Under strict class rules and traditional values such as loyalty to their master or lord, samurai displayed their social characteristics in the way of death (see Satō 1995; Turnbull 1996). The way of capital punishment[115] to convicted samurai was composed by different manners or modes (e.g., performing *seppuku*) from those of people in the inferior class (Varley 1970). In addition, samurai's dead bodies were treated differently to those of commoners as a posthumous extension of the superior samurai status. As people of humble social standing were treated after death as an extension of what they had been, so samurai were treated as noble even after death. Although, biologically, samurai are human beings in the same way as commoners, their status and social positions were inevitably related to cultural construction.

Illness or disease as natural scientific phenomena can be converted into cultural meanings or implications in social structure. Even walking is often considered a manifestation of a walker's social characteristics. In the same way, Hansen's disease may be part of the social characteristics, stigma or disgrace branded in social structure. The disease incorporated into the characteristics has a special image or role that can affect the society and reflect it. In Japan, the sufferers' bodies manifest the discrimination and isolation under the conventional assumption, prejudice or misunderstanding (Shima 1988, 117-133). In May 2001

[115] In the late Edo period, there were some cases where common criminals of the commoners who had been publicly executed contributed their bodies to anatomical studies at the dawn of modern medicine. These cases evidently suggest that the antemortem social characteristics of the criminals deeply influence the disposal of the bodies. Since the social characteristics can survive death, such harsh treatment was realised.

the Japanese government gave up the appeal to a high court.[116] Despite the government's attitudes, Hansen's disease is still, in Japanese society, assumed to be an incurable disease. The suffered bodies have often been buried in a way that their characteristics influence—segregation.

4.5.3 Do the dead have social characteristics?

The dead are not moral agents. They can therefore be categorised as a thing or *res*. However, a dead person, through the intimate connections with their status as a formerly living person, retains in death part of the social characteristics they held while living. This is why it is justified to argue that the dead hold social characteristics. If this line of argument is warranted, can a further premise be supported that a thing that succeeds part of the dead's identity, say, the gravestone and *ihai*, also possesses the relevant social characteristics? (Morimura 1989, 100)

As stated in Chapter 1, the dead as symbolised by gravestones and *ihai* are those that are recognised—presumably valued—by the living. This recognition is dependent upon the mutual relationships within society, community, family and groups. The gravestones and *ihai* are thus imbued with a meaning and significance that transcends their physical status as an object for commercial transactions, such as a new gravestone or *ihai* might be. They are a commemoration, an objection for religious rites, symbols for ancestor worship or reminiscence and a tangent of the living and the dead. The reason why modernised people nevertheless establish a family grave and make their relative's *ihai* is that they understand the belief that human death is far more than

[116] For understanding the Hansen's disease case, see<http://www.lawyer-

natural events or facts. In short, humans do not wish to dissolve themselves into the natural circulation of things but to dare to reserve themselves in tombs or *ihai*.

However, it would not be right to say that things such as gravestones and *ihai* with cultural or religious meanings have their own social characteristics as the dead person. We have to make a distinction between the continuity of a partial identity brought about by the linkage between a dead person and their status as formerly living persons, and the relation between the dead person and their gravestone and *ihai*. The difference between the two kinds of continuity lies in whether or not they are based on the continuity of the body. There is, in the former, a continuity of a body but not in the latter. Thus, part of the transfer process of the social characteristics from the previously living to the now dead person is through the memory or recognition of living persons.

4.6 Names and *Rights of the dead*

Presupposition 4: Since the dead have social characteristics and moreover govern them, they therefore have rights.

4.6.1 The concept of "governance"

On the way to establishing the *rights of the dead*, we induced the concept of the dead's social characteristics, which can survive death, from the relationship between the dead and society/individuals. Since the characteristics include rights and duties and therefore can survive death, we expanded the possibility of rights and duties of the dead. At last we are to explicate the fourth

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koga.jp/hansen-jb1.htm> available (in Japanese).

presupposition that since the dead have social characteristics and moreover govern them, they also have rights.

Dabin (1977) explains rights from the ideas of "ascription" and "governance". According to Dabin, the ascription of rights refers to the actual objective facet of rights and governance to the subjective facet. Whilst the former is related to the facet of the rights as a subjective reality of moral agents, the latter is related to an objective relationship with other people. Moral agents who are the subject of ascribing to things can, as a master of such things, utilise and dispose of them. Dabin calls this situation "governance". Therefore, rights identified with "ascription" can exist without necessary contact with intention or declaration of intention. The reason why those who have strictly limited legal capacities of intention and no representatives for themselves can hold rights is that they can hold interests which they do not know or recognise the existence of. In other words, the essence of having a right refers to the desire made by intention, the perception of the objects, the enjoyment of interests, the performance of an action, or the suffering of damages. It refers to the fact that each right holder has each right as each holder. Therefore, there is not always a need of intention and interests in order to justify having a right.

"Ascription" is a common feature of all rights. Using this feature, we can explain why the concept of property expands to incorporeal property such as copyrights and patents. Also, rights to life that are held naturally to the subject, or moral rights, e.g., reputation, that are held in connection with society are examples of "ascription" based on substantial norms. Economic rights or social rights that the present constitution of Japan forms are deeply correlated with "ascription".

On the other hand, things are governed by the autonomy of moral agents who are fundamentally the masters of things. To govern things is the matter of substance but not that of the actual function or action. "Ascription" equates to attributes of things that are, through the ties of "ascription", linked to the subject of the things. "Governance" is another attribute that correlates closely with things ascribed by the subject (ibid.). For example, infants and fetuses that lack the capacity of intention cannot use their rational morality to protect their life. However, the law enables them, as a master of the thing, i.e., their life, to govern it. The governance is a form of reality but not a matter of intention or psychology. Moreover the reason why, in this case, intention is not required for exercising the right to protection is that, for example, infants who inherit a house can live in the house despite their lack of intention to do so. Another aspect we should note is that the capacity for governance itself does not necessarily entail the capacity to enjoy the interest. There are some cases in which, for example, an owner of goods, which are subsequently stolen, remains the authentic owner and retains governance of them even though the goods are physically in the possession of a third party. Thus, in the light of "ascription" and "governance", rights do not necessarily need intention or interests as their requirements. However, both rights and their subjects exist on the side of the ascribed, so that "governance" does not exist in the locus where "ascription" stands. As a matter of fact, a person can be the subject only of interests that are ascribed to the person, but not to other interests. In the following sections, we will take some examples (e.g., names and naming) to provide further explanation of "ascription" and "governance" and to examine whether such explanation can be applied to matters involving the dead.

4.6.2 Names as social characteristics

Names of people, objects, spirits, and God emanate from a great of deal of interplay of religion, mythical, social and historical realities (Abraham 1962; Abarry 1991). Human names that we investigate in this section are based on the culture's expectations and identification of personality (ibid., 157), and are concerned with individuals' beliefs, birth order, social circumstance, social status and roles, and attributes (see Quartey-Papafio 1913). In this regard, names have not only characterised entities of individuals and groups, from ancient times to contemporary times, but also signified their characteristics and attributes in society. By their function they have affected people and society.

E. S. Azevēdo (1980), who researched family names in Bahid, Brazil, recognised that the main reason why cultural anthropology has begun to question its methods and results "seems to be difficult in producing reliable variables from research material such as culture and behaviour" (ibid., 360). He defined a form of variable for cultural anthropological studies that he called a universal variable —"one that (a) needs no definition by the investigator ... (b) is not artificially produced by the investigator, and (c) is naturally present in every population" (ibid.). Thus his conclusion is:

> "[T]he methodological value of a universal variable lies in its suitability for cross-cultural studies, its freedom from investigator bias, and its informational richness. One universal variable is family names" (ibid.)

Besides anthropology, human names have been studied in various disciplines such as history, sociology, law, religion, folklore, etc. The fact that the Encyclopaedia of Religion and Ethics (1917) edited by J. Hastings, covered items on names and naming over 48 Pages is proof that theology is profoundly

concerned with names. In 1996 a symposium of the Japanese Comparative Family History Society provided animated discussion, abundant research fruits and published a compiled book (Ueno and Mori 1999).

Anthropologist Sir Frazer (1936) investigated names from the viewpoint of taboo. Nobushige Hozumi (1926), an outstanding Japanese legal scholar, also paid attention to "name taboo" in Japan which refers to a custom that people avoid calling others by their names. In order to confirm whether the custom is unique in Japan, he researched folklore literature found in the Pacific islands extensively. The reason why he attended the study is that he thought a taboo is one of the early stages of a law. A. R. Radcliffe=Brown (1948), social anthropologist, analysed the "name taboo" in the Andaman Islanders of which elements were birth, marriage and death. He concluded a name to be a social status. Toshiaki Harada, Japanese theologist, published many articles on names through 1927-28, and asserted the "spirit symbol" thesis that names can vest spirits in bodies produced by birth. Kunio Yanagida, distinguished Japanese folklorist, carried out the first nationwide research on the customs and practices of names and naming in 1935, and compiled a book (Boshi-aiiku-kai 1975). C. Levi-Strauss (1966) paid attention to naming, names and the system of kin from the viewpoint of structural anthropology, contributing a great deal to the development of the studies on the epistemology of names and the theory of symbolism.

A brief grasp of the above references on names enables us to recognise that names play an important role in those times and that names signified differently. Names reflect the society and culture of the times when the names were actually used. They also reflect the character of groups, roles and statuses

of individuals. Additionally names show the power symbolised by themselves. In this way, since names have their own characteristics, connotations and roles, we understand that names are a reflection of the social political structure from a viewpoint of their function in society.

Levi-Strauss identified two types of name: an identifying mark and a free creation (ibid., 181). The identifying mark "establishes, by the application of a rule, that the individual who is named is a member of a preordained class" (ibid.). Names indicate the social identification of individuals (Wilson 1998). Although in modern society their typical examples are surnames or family names, African names that Levi-Strauss uses as an example are more complicated. In an African tribe, stocks of names are kept in each group of a single clan. The newborn baby is given its name from the stock, so that the identification of the group that the baby belongs to can be recognised by others. Since the name existed before the baby was born, the name and the baby are not a united existence. Moreover, since others use this name after the baby's death, unlike the function of names in Japan and Western society, the name does not work as a function for identifying an individual. In addition, since the names of tribes or those of family express the identification of the groups, the concept "individual" or "self" is likely to be considerably weak.

On the other hand, the name is "a free creation on the part of the individual who *gives the name* and expresses a transitory and subjective state of his own by means of the person he names" (Levi-Strauss 1966, 181) [original itarics]. A typical example is that in certain African tribes, names such as "In-laziness", "Give-not" or "In-the-beer-pot" are chosen by the father's mother to express her antagonism towards the wife of her son (ibid., 179).

Ueno (1999) provides another perspective from the debate on the two kinds of names identified by Levi-Strauss. He frames the two models of society in terms of kinds of, and amounts of, names: "closed structure society" and "open structure society". In the former, the kinds and number of names are limited. From the name stock, the name is chosen for the baby according to the situation of its birth and the social statuses of its parent or parents. Despite deaths in the society, the stock of names continues to exist. In this society, there are a number of persons with the same family and personal names. In fact, these names hardly function as identification. Oka (1993) found a model of this society in the Inuit society, where new names are not produced. In the criterion of its psychological character and physical features, the Inuit baby is given its name from the prepared list of names. Generally it is given a dead person's name.

"Open structure society" refers to a society where there are various kinds of and amounts of names, and new names are generated within family units. Generally the trend of names in that society is alterable. The names belong to individuals and have a highly individualistic function. Insofar as the names exist in the society, their basic character lies in creativity. Modern Japan has taken a policy for developing the open structure society. Although commoners were not always allowed to have their family names until the early Meiji period, the new government prompted a new policy for modernising the system of names and naming. Its fundamental principle was to improve individualistic functions of names and to smoothly run the management of national conscription, taxation and education. As Plutschow (1995) points out, "[e]very major political change in Japanese history led to new name regulations and, at the same time, to an extraordinary proliferation of names" (ibid., 200). The number of family names

that exist in contemporary Japan is presumed to be approximately 140,000. However, since new names are produced daily, the number could be infinite. The political and social change provided people with names and their identities. Names and society are profoundly associated with each other not only in Japan but also in the Western countries. In this section, first, a question will be discussed "what characters do names have in the society where they are used?"

Although family names are inherited, first names are in principle attached, personally, to individuals. At the time of birth, in most cases, parents give a name to their child and therefore, except for the special case of changing names in litigant, an individual is not allowed to give a name to him/herself.[117]

In a case where an individual can give a specific name to him/herself, it is confined to some specific cases such as pennames or stage/screen names. Nicknames, which are generated in casual relations, are often given by others and changed to other names by their holders, but in a case where an individual has to be identified by their nickname, it would be regarded as personal and as a function for identifying the individual.

The distinguishing character of names is linked to the relation between names and gender. If gender is defined as the cultural difference of sex, names very often have the difference of gender. Ueno (1999) provides four categories for examining the problem over names and gender. First, the difference between male and female names. Where a name is given after the confirmation of the new baby's gender, either a male or female name is chosen. Second, in the classification of a gender's names, the difference in the kinds of name and of the

[117] English contemporary law seems to recognise that a name is simply a label for identification. Since English law stresses the function of the identification of names, if only there are reasons for the alteration of the name and the procedure is completed, the alteration is comparatively easy (see Josling 1985; Pearce 1990).

treatment of the names may exist. Female names have a higher rate of similar names than that of male names. Korean names have a remarkable tendency in the rate of difference. This would suggest that, in Korea, female names function less weakly in identifying an individual than male names, and that by stressing classification rather than specification, the social status of women is inferior to that of men (Che 1999). Moreover, the fact that there are no women's names in genealogies of families or clans in some areas of East Asia convinces us that evidently, there are practices of discrimination against women in the treatment of their names. Third, a name custom whereby, despite the existence of female and male names, a female name is given to a male, or a male name to a female. According to a reference (Boshi-aiiku-kai 1975), there are some areas of Japan where people believe that if they give a female name to a male, or a male name to a female when they want to have a second baby with a different sex, the desire will be achieved. The commoner's desire for the birth of a male as a successor of the household seems to be entrusted in this kind of superstition. In addition, by giving a male name to a weak female baby at the time of birth, people made use of the custom for the desire for recovery of the health and for the long continuity of good health. Fourth, *tome-na* (literally stop-name) as a specific custom of female names. In a case where parents do not want another next baby, a name implying the unwillingness of birth is often given to the last child. These kinds of name carry connotations of the emphasis on a patriarch and the expectation for having a mascline labourer.

The second distinguishing character of names is linked to the social structure. In a specific African society, as previously mentioned, a single group of a clan keeps each specified stock of names, and a name chosen from the

stock is given to a newborn baby. The stocked names are regarded as symbols of the clan and a device for the identification of the clan. In this way, names manifest, in a sense, part of the social structure. Names in clans basically function as a symbol of the single clan in Korea and China. The number of Korean surnames per 160,000 persons, with an estimate of 260 different names is much lower than that of Japanese surnames. Thus, Korean surnames can be understood to be a symbol of the family's identity. A single Korean clan shares the same surname and is composed of the same genealogy. In China, each clan has a line of surnames—about 25 *bai tsu*. They are the first and single Chinese character of the individual's name shared in each generation. They function as an indication of the order line of the large-scale generation that assumed ancestor worship. In the Chinese system of names, surnames indicate an identity of a single clan and the line of *bai tsu* including individual names, and illustrate the generation of the clan.

The third distinguishing character of names bears the policy of the nation. In East Asia, including Japan, family registration was used as national policy from ancient to modern times. The state managed the populace's names in order to strengthen its control over them and to use as vital measures and institutions. The policy of modernising names carried out by the Meiji government, as previously mentioned, dramatically changed Japanese society from a "closed structure society" to an "open structure society". The policy concentrated on the simplification of names, the establishment of the freedom of naming, one name to one individual, and the prohibition of changing names (Ueno 1999). A problem of the relation of names with the nation is the compulsory changing of names as a measure against the ethnic minorities in the nation and/or colonialism. Miao, a

Chinese minority, has both its own traditional system of names and a newly introduced one of the Han race. In pre-War, Japan compelled Korean in the Japanese colonies to change their own names to Japanese ones. The compulsory change of names resulted in the harming of their ethnic dignity so strongly that the serious problem of changing names is still discussed in contemporary Japan in the context of Korean people's temporary Japanese names (Kim 1997). This problem may suggest that names are more than an individual's mere identification, and that they are a cultural product that functions as a cultural and historical symbol.

The above reference from Frazer's to some contemporary research indicates that names are deeply relevant to culture and society where the holders act and behave, and that in most cases they can partially manifest the character of the holder. Whilst names are, in various aspects, confined by the nation, society and convention, individuals are themselves prescribed by their own names. The way of the prescription is that an individual is required to have his/her own name insofar as he/she lives in society. Having a name is a duty imposed by the nation or society and if an individual has no name, then the individual has a right to own a name. If we adopt Levi-Strauss's "ethical identity symbol" thesis, names function as a manifestation of the individual's character and that of the group the individual belongs to. Also, if we adopt Radcriffe-Brown's "social status" thesis, names manifest social status or roles of the individual. Adding the Frazer and Hozumi's "taboo names" thesis, we may recognise that names *per se* function as a normative power by which our behaviour or acts are prescribed or regulated.

Going back to the case of Korean people's change of names, their ethnic names play the vital role of a norm by which they condemned Japan and regulated their acts. This kind of function of names is linked to the problem of the difference of gender. For, it is obvious that names that distinguish gender have an influential power by which holders are encouraged to behave manlike or womanlike. Or we may understand the norms of names or their power as a symbol by the superstition of "*tome-na*".

The above anthropological discussion convinces us, for example, that holding a name overlaps with holding a right and duty. A name is a symbol to an individual. It is a manifestation of the society and culture that its holder has been involved in. Additionally, it expresses the individual's social status or roles. By expressing the diverse symbolised or implied things concepts, a name manifests the social characteristics of its holder. In Christian culture, a believer can be given a Christian name by the rite of baptism and at the same time given the social characteristics relating to the religion. In the world of religion, a believer can be evaluated by the identifiable social characteristic. Thus, on the basis of the manifestation of social character, for example, when one's name is harmed, one can claim a legal action for stopping the infringement or have the right to seek a legal remedy for the infringement from the court. These necessary measures are granted by both the undeniable fact that one has one's own name, and the credible supposition that "having a name" accords with "having a right and duty".

In English common law, however, no absolute right to a name exists (Bar 2000, 96). The violation of the right constitutes a delict in all other European countries due to the fact we are individuals by virtue of our names (ibid.). The

relative case whereby the right to a name is violated, is that an individual pretends to be the person whose name he uses. Or, the case of defamation may be that an individual's name is "used in advertisements and commercials to give the impression that he recommends the relevant product" (ibid., 97).

How do bearers have their own names acknowledged as a right? Shortly after its birth, a baby is given a name that will be used throughout its life and even after its death. An individual name may function in a separate situation from the individual or in ways that the person cannot predict. As far as the person can be identified by the name, the name is the person's own "property". For example, to exclude an individual who belongs to a social club is to remove the name from the membership list. The death of a person is also to eliminate the name from the registration in Japanese registration law. That is the way in which a name is ascribed to its bearer. At the same time the bearer governs his/her own name. Even if person A pretends to be person B, and use person B's name, person B's name is not ascribed to person A or governed by person A. The name is not what person A holds. The fact that a name accords with its holder suggests both that the name is ascribed to the subject of the name and that the subject has a right to use the name—i.e., as a deniable fact the name is governed by the subject. Although using the accordance of the name and its holder, when we obtain information regarding the holder, this information is not always sent by the holder. By others using the name, the name *per se* often independently affects society. Nonetheless the name remains ascribed and governed by its real holder. In this way, the concepts "ascription" and "governance" can explain the situation in which the name is the holder's and an object of a right.

4.6.3 Names and reputation of the deceased—the *harm* thesis and the *social characteristics* thesis

Our main concern here is twofold: whether or not it is possible to apply the above explanation of names to the dead, and how the objection against the *harm* thesis (see 2. 3, 2. 4 and 2. 5) in the discussion on harmed names, is associated with the *social characteristics* thesis and linked with *rights of the dead*. Our answer for the former is "yes".

A person's name is very often used after the person's death. In the community that the person belonged to, using the "past tense", people talk about him/her. People use the person's antemortem name for identifying the person. Thus, it is plausible to say that the name survives death. The description of the person's ante mortem situation and the identification of the person, in practice, affects the mind of others who know the person. What is identified by the name comes to be an object for social evaluation. The dead function as an existence that influences people in a similar way to the living. Therefore, a name, which can identify the dead, can survive death as a manifestation of the social characteristics. For example, a surname "Yoshida" manifests, as known from some examples such as "Shigeru Yoshida" (the deceased Japanese prime minister) and "Shōin Yoshida"(the deceased Japanese political philosopher), being Japanese, even if there is no blood linkage with other Yoshidas. The Chinese characters of the name manifest being a person with Japanese nationality. The first name "Masayuki" can be identified with a Japanese male. If a person named "Masayuki Yoshida" dies in England, his body is, as a Japanese, subject to English regulation (see 4. 5. 2). Thus, his name is part of his social characteristics that identify him with nationality and gender. That is why a

person's name can survive the person's death as a manifestation of the person's social characteristics.

Cast the same question on the dead: how do the dead have a name? No one denies that a person had his/her name. Having a name was explained by the association of the rights with the concepts "ascription" and "governance". Needless to say, the dead are required to have names in order to be identified. Unlike *kaimyō*, a Buddhist posthumous name, a dead person's posthumous name is used as, for example, "Jones died in a traffic accident". Strictly speaking this expression is no more than the fact that the deceased Jones is called by his ante mortem name.

When Jones is called by his name, despite the caller's perception, the name "Jones" manifests the identification that can survive death—the deceased's social characteristic—and his image kept in the survivor's memories or consciousness. The name is a manifestation of Jones's posthumous identity and can be understood to be a manifestation of being Jones *per se*. In short, although the name is a manifestation, it is firmly connected to the essence of the identity and its reality, and not separated from the connection. Insofar as the name of the dead and the identity of the dead cannot be separated, the manifestation of the name can be regarded as Jones *per se*. Therefore the infringement against Jones's name can be considered—even if he is dead—as being harmed.

Yet, the connection between the living and their names would be different from that between the dead and their names. In the former relation names serve as a manifestation for confirming identity. For example, names are used for the confirmation of identity at the time of booking a hotel. It should be noted that,

even if a person is not a real Jones, in the process of the booking, he is regarded as Jones, whilst the person who pretends to be Jones can recognise who he is, even if no one knows it.

However, in the case of the dead, they cannot confirm their own identity by themselves. Whilst the identity of the deceased Jones, as the name manifests, is "being Jones"; if it is not so, there is merely the fact that it is not. The dead Jones cannot prove it, because he is dead.

Suppose a case where an individual's name is harmed. Novelist Jones's penname was harmed because of the error in typesetting such as "Janes". Jones can claim for correction and apology against the publisher. That is his exercise of rights. Since he holds his name on the basis of "ascription" and "governance", he can claim for a remedy against the infringement. Interests he can obtain exist in a correction and an apology.

How about the deceased Jones? His name continues to serve as a social characteristic after his death. In the same way of the living Jones's case, the incorrect name is an object that requires correction and apology. His relatives or readers may require the correction of the error, and moreover conditions of the contract of copyright or law on copyright can justify the request or claim. This posthumous error of the deceased Jones's name is an infringement against his name and, at the same time, the interests Jones holds in his name. This can be explained by using the concepts "ascription" and "governance".

Suppose another case where Jones's dead body was buried under a tombstone where the name "Jones" is carved, the date of his death, the name of the founder of his tomb, etc. These facts evidently suggest that this tomb is a place that the body of Jones is laid in. Its manifestation of this is his name as a

social characteristic. Therefore, the body of Smith is not laid there in place of Jones'. Even if Smith's corpse is wrongly buried under Jones's tomb, the grave is not Smith's. He does not physically have the locus of the tomb but does so on the basis of the concepts of "ascription" and "governance".

It follows that it would be possible to explain the relation of the *harm of the dead* thesis and the *social characteristics thesis in this way.* The connection between the dead and their name is in essence "ascription" and "governance". Despite whether or not the dead can exercise rights, their interests are infringed and the dead are harmed. In analysing the relation of the dead and their names through the concept of "social characteristics", we will discuss, from the same viewpoint, the rights to reputation and rights to posthumous reputation. The question could be rephrased in this way: "in the same way that the living hold their right to reputation, do the dead thence govern their own pre-death reputation?" If it were possible for the dead to govern their posthumous reputation, then we would have to agree that *things* can govern other things. Our argument is that amongst numerous things only the dead, as *res*, have the capacity to do so.

Dabin (1977) claims that such governance needs two kinds of requirements in the relationship with other persons. First, admitting that a certain thing is ascribed to a certain moral agent and that s/he is the master who governs the thing, there is a requirement by law for others not to intervene with the agent. Second, the agent has a capacity to decide whether or not s/he demands this requirement of others. Unless s/he gives up the decision, s/he has the possibility of a recourse to legal means to protect against any infringement. In association with the legal protection this possibility could bring about a right to employ a

lawsuit. Exercising this right basically requires legal capacity. However, the possibility of exercising the original protectable right or that of being against the intervention *per se* is no less than a legal practical demand of the governance, irrelevant of intention and interests.

If the above explanation is valid, then establishing *rights of the dead* would be feasible: it is possible for the antemortem reputation to survive its holder's death as the social characteristics. Therefore we cannot deny that the dead have reputation. The reputation has to be distinguished with that of the bereaved's. It is the dead's own reputation (see Chapter 2). Therefore the reputation is ascribed to the dead who can neither take advantage of, nor directly protect the reputation. On the other hand, admitting that the reputation is the dead's, others have a duty not to defame the dead. Moreover, as the second requirement, the dead have a possibility of exercising a legal means against posthumous defamation (although this means is exercised by the living, i.e. the dead person's family or representatives). Thus, the second requirement can be feasible even after death. The main reason why the dead have such rights to reputation after death is that they continue to have names that were used whilst alive. Names enable the dead to have them by "ascription" and "governance".

4.7 Conclusions

The dead hold their social characteristics. The characteristics are the dead's roles and statuses manifested by a real thing such as names or reputation. The grounds on which the protection of names infringed is required, or on which a remedy against the defamation is claimed, are that the social characteristics that a person continues to have after his/her death contain the concepts of both rights and duties. Thus we would suggest that the concept "social characteristics of the dead" will benefit the possibility of establishing *rights of the dead*.