行政院國家科學委員會專題研究計畫　成果報告

Rawls 公共理性研究：以 Habermas 的批判為核心

計畫類別：個別型計畫
計畫編號：NSC93-2414-H-004-048-
執行期間：93 年 08 月 01 日至 94 年 07 月 31 日
執行單位：國立政治大學法律學系

計畫主持人：陳起行

報告類型：精簡報告

處理方式：本計畫可公開查詢

中　華　民　國 94 年 9 月 12 日

行政院國家科學委員會補助專題研究計畫成果報告

Rawls 公共理性研究：以 Habermas 的批判為核心

計畫類別：□X 個別型計畫　　□ 整合型計畫
計畫編號：NSC 93－　2414－　H－　004－　048　　－
執行期間：　　93 年 8 月 1 日至　　94 年 7 月 31 日

計畫主持人：陳起行
共同主持人：
計畫參與人員：

成果報告類型(依經費核定清單規定繳交)：精簡報告
本成果報告包括以下應繳交之附件：
□赴國外出差或研習心得報告一份
□赴大陸地區出差或研習心得報告一份
□出席國際學術會議心得報告及發表之論文各一份
□國際合作研究計畫國外研究報告書一份

處理方式：除產學合作研究計畫、提升產業技術及人才培育研究計畫、列管計畫及下列情形者外，得立即公開查詢

執行單位：國立政治大學法律系

中　華　民　國　　94 年 9　　月 12　　日

一方面，羅斯是德渥金思想上的啟發者，二者同為捍衛自由主義的主要學者；二方面，羅斯的公共理性概念，係以德渥金的理念為重要元素。進一步剖析哈伯瑪斯對羅斯公共理性的批判，除有助於初步掌握自由主義與論述倫理學兩項現今極為重要的價值取向外，亦可經由比較兩者之異同，初步浮現兩個不同思想的脈絡。就裁判理論而言，自由主義與論述倫理提供兩項不同的正當性基礎，理解哈伯瑪斯對羅斯公共理性的批判，亦有助於進一步探究裁判正當性課題。

關鍵詞：德渥金、羅斯、公共理性、哈伯瑪斯、論述倫理、自由主義

Dworkin and Rawls are the two important liberalists, and they have influenced each other. Especially, in Rawlsian public reason concept, one can find Dworkin’s element of thought. To study Habermas’s critique of Rawlsian public reason, one can trace the context of development of both liberalism and discourse ethics. These are also two important basis of legitimacy for adjudication.

Keywords: Dworkin, Rawls, public reason, Habermas, discourse ethics, liberalism

一． 前言

九十二年度執行國科會專題研究計畫:「裁判理論研究——以哈伯瑪斯對德渥金的批判為中心」。研究計畫期間，深感除方法論之外，兩位學者間的差異，亦涉及自由主義與論述倫理做為裁判正當性基礎之批判。

該年部分研究成果曾以「作為法律論壇的網際網路（Internet as a Forum of Law)」一文，發表於 92 年 8 月在瑞典召開的國際法哲學大會第 21 屆年會。文中論及 Habermas 與 Dworkin 裁判理論之異同，並指出其理論對於建構網際網路為法律論壇的指導意義。

本人隨後發現哈氏亦曾對羅斯的自由主義為文批判，羅斯亦予以回應，並引起學界的討論。這些論述涉及的議題頗多，申請人計畫以羅斯的公共理性，以及哈伯瑪斯理論中的一項核心論點，即公自主與私自主間(public autonomy and private autonomy)的內在關聯，作為研究重點。羅斯在政治自由主義一文中指出其極為重要的公共理性概念，以司法裁判最足以彰顯其精髓，並引註德渥金的理論為其註腳。九十三年度本人繼續研究並剖析羅斯公共理性的概念，以及哈氏對羅斯公共理性的批判，期有助於闡明自由主義與論述倫理的中心訴求，及其關係。

二． 研究目的

就本人長期關注的法律資訊系統建構議題而言，哈氏對羅斯的批判對於開展論述空間而言，深具觀念上引導的意義。尤其在裁判理論的反思，以及法官對於個案論述品質的正視上，均能有所啟發。

如何落實哈伯瑪斯公共領域於網際網路之上，是近年網路普及後廣為研討的課題。報告人認為建構此一公共領域，實涉及主導觀念的轉變。自由主義此一主導思想對於社會的定位，是其中重要的批判議題。

三． 文獻探討

羅斯哈伯瑪斯對於羅斯公共理性的批判，主現於： Habermas, Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism, 92 the Journal of Philosophy 109-31 (1995); 羅斯的回應則刊載同期刊物：John Rawls,

Political Liberalism: Reply to Habermas. 哈氏對於德渥金裁判理論的批判，主要出現在其主要法哲學著作：Habermas, Between Facts and Norms, 第五章. 批判的內涵及其他學者的探討, 請參考附於本報告後報告人所撰的文章： Toward a Discursive Public Reason in the Internet World, 第一及第二節.

四、研究方法與結論

報告人以哈氏對羅斯公共理性之批判以及羅斯的回應；以及哈氏對德渥金裁判理論的批判為核心，輔以其他學者就三人論述之批判為核心，指出羅斯公共理性對於涉及憲政核心議題之爭議，其解決過程亦應有公共理性之約束. 經由此項約束，應可導出當事人論述之義務.

就理論上的貫通而言，報告人的論述認為德渥金裁判理論也應有所修正. 社會道德構念之爭，不應僅僅是裁判者之詮釋, 而應實際客觀衡量論述上之融貫是否滿足，作為是否做出裁判的判斷標準.

六. 自我評估

本研究計畫獲致預期成果. 除在第二十二屆國際法哲學大會發表所附研究成果，並依據學者之建議增修成果報告外，亦請國內法學界相關領域學者就成果報告提出批判. 報告人收穫豐富，將修訂成果報告後，將之發表於學術期刊.

附件：

Toward a Discursive Basis of Public Reason in the Internet World

Chishing Chen*

* Bachelor of Law, National ChengChi University, Taiwan; M.S. Computer Science, University of North Texas; SJD, University of California at Berkeley, Professor of Law, National ChengChi University. This paper is first presented at the 22nd Congress of International Association for Philosophy of Law and Social Philosophy, held in Granada, Spain in May 2005. The paper is amended and extended thanks to the comments of the participators of the Congress, especially Professor Doctor Winfried Brugger. The author would also like to thank Professor Nancy Fraser for her illuminating lecture in the Congress.

Toward a Discursive Basis of Public Reason in the Internet World

Abstract

A paradigm shift is how the legal change after the advancement of information technology has been described. Looking for the next paradigm, this article suggests an approach to initiate the change. Rawls's concept of public reason and Dworkin's theory of adjudication form a consistent chain of thought and are consistently critiqued by the co-originality thesis of Habermas. The discussions of their theoretical exchanges lead to an idea of public conflict resolution emphasizing the dialectic relationship between the court and alternate dispute resolution. The latter can be a discursive public sphere on the internet.

Introduction

With the advent of computer technologies, there have been ongoing efforts in the legal community to explore ways of incorporating legal thought and methodology stimulated by the new scientific development into legal theories and practices. A legal information retrieval system was one of the first successes achieved in this field[1]. Artificial intelligence and law has drawn worldwide interests in both the field of law and computer science, but the legal expert system and knowledge base has advanced more in theory than practice[2].

The Internet brought legal informatics into a new era. However, the root of this change is not new at all. The memex machine formulated by Bush[3] half a century ago gave birth to hypertext and multimedia. The World Wide Web (www) of the Internet is indeed a realization of Bush's nonlinear network idea globally. The Justices of the United States Supreme Court also recognized that the Internet's potential was limited only by the limits of human imagination[4].

---

[1]Allen, L. E. & Saxon, C. S., Automatic Retrieval of Legal Literature: Why and How, Walter E. Meyer Research Institute of Law, 1962; Bing, J., Legal Information Retrieval Systems: The Need for and the Design of Extremely Simple Retrieval Strategies, 1 Computer/L. J. 379 (1978); Goedan, J. C., Legal Comparativists and Computerized Legal Information Systems. General Problems and the Present German Status of Computerized Legal Information, Intl. J. of Legal Information 1 (1986); Mueller, H., Legal Information Systems and Other Law-Related Databases in Germany, Australia, and Switzerland, 83 L. Lib. J. 253 (1991); Jeffries, J., Online Legal Databases: France and the European Communities, 83 L. Lib. J. 237(1991); Katsh, M. Ethan, the Electronic Media and the Transformation of Law, New York: Oxford University Press, 1991.

[2] McCarty, T., Artificial Intelligence and Law: How to Get There from Here, 3 Ratio Juris 189 (1990).

[3] Bush, Vannevar, As We May Think, Atlantic Monthly, 176(1), pp. 101-8 (1945).

[4] "[I]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought", Reno v. ACLU, 521 U.S. 844(1997), Justice Stevens quoted a finding of facts from the lower court.

Gimmler believes that the Internet can play a decisive role in future democracy if free and open discourse within a public sphere is valued as an efficient political instrument[5]. Froomkin shares Gimmler's positive point of view and further points out that the engineering community that sets the standard for Internet communication is the best model in existence for fulfilling Habermasian discursive ethics[6].

As a communication platform, the Internet is unique in terms of its autonomous and reciprocal nature. It seems we all agree that a free environment of exchange ought to be maintained on the Internet and in return, the Internet will secure and further human liberty. What do we mean when we talk about free environment of exchange, and the conception of liberty that we should pursue is also not in agreement[7]. Clarifying these ideas are crucial for any attempt to build "democratic-ware" on the Internet.

If we examine another thread of scholarly thought devoted to the legal challenges posted by the successive waves of information technology, we can also be certain that the new legal paradigm we are searching for will definitely involve an improved dialogue on the Internet.

Fiss points out that a paradigm shift is now underway in first amendment jurisprudence due to the development in information technology. This is not the first paradigm shift in this legal domain, since the first paradigm shift in the first amendment law was from street corner speaker to CBS[8]. Katsh believes that state law will be less effective as the first amendment issues relating to information technology grow, because issues growing out of the Internet tend to form a series of chains, and they may have branches extending to any conjunctive point[9].

---

[5] Gimmler, A., Deliberative Democracy, the Public Sphere and the Internet, 27 Philosophy and Social Criticism 21 (2001).

[6] Froomkin, M., Habermas@discourse.net: Toward a critical theory of Cyberspace, 116 Havard Law Review 749 (2003).

[7] Against plebiscites and postmodernists, Charles Ess defended a Habermasian sense of liberty to democratize the electronic forum. See Ess, C., the Political Computer: Democracy, CMC, and Habermas, in Philosophical Perspectives on Computetr-Mediated Communication 197 (Ess, C. ed. 1996).

[8] Owen Fiss, Emerging Media Technology and the First Amendment: In Search of a New Paradigm, 104 Yale L. J. 1613 (1995).

[9] "The ""information chain"" is a useful metaphor for the process of acquiring, processing and generating information. A chain that grows longer and longer indicates that existing knowledge is used and built upon. … A highly active and volatile chain not only gets longer, extending and adding to knowledge, but forms new branches and fosters connections between areas of knowledge that were previously isolated." Ethan Katsh, the First Amendment and Technological Change: The New Media Has a Message, 57 Geo. Wash. L. Rev. 1459, 1478 (1989). The way Katsh describes the nature of the first amendment issues relating to the information technologies seems to qualify as what Fuller has called the polycentric task, where there are multiple interrelated departing points in an issue. Such an issue, as Fuller believes, is not suitable for adjudication. See L. Fuller, the Forms and Limits of Adjudication, 92 Harv. L. Rev. 353

The First amendment is not the only area undergoing great change. The Internet brings the issue of copyright protection of digital contents to the forefront. It is convenient to make copies of and transfer large amount of information throughout the world using the Internet which thus tips the balance between copyright owners and users. In principle, legislation forbids any circumvention of copyright protection technologies[10]and copyright licensing contracts tend to replace copyright law as the main normative source on the net. As a result, the whole copyright regime maybe dissolved[11].

In addition, Balk further points out what is really at stake[12]; he believes the copyright issues in an information society have special meaning for first amendment protection. Previous focus on deliberative democracy in the political process ought to be expanded into a wider perspective of cultural formation. Copyright protection ought to be framed in light of this functional change in the freedom of speech[13].

This article grew out of a series of efforts to find a general approach to guide the development of the legal information system[14]. In this article, I want to focus on the debate on public reason between Habermas and Rawls (part II) and Habermas' criticism of Dworkin's adjudication theory (part III). I believe Dworkin's hard case metaphor is especially relevant in discussing the legal paradigm shift, since the legal problems generated by information technology are essentially hard and require a renewed effort

---

(1978). Critics said Fuller's adjudication theory is essentially based on a civil dispute resolution model and failed to consider the public litigation model where structural reform is the focus. Luban, D., Symposium: Rediscovering Fuller's Legal Ethics, 11 Geo. J. Legal Ethics 801, 805(1998), citing Owen Fiss, Forward: the Forms of Justice, 93 Harv. L. Rev. 39 (1979) and Chayes, A., the Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976). But see Robert Bone, Lon Fuller's Theory of Adjudication and False Dichotomy between Dispute Resolution and Public Law Models of Litigation. To find an adequate relationship between the adjudicative process and the computer mediated forum of law is the primary focus of this article, since polycentric task seems to have become the norm rather than exception.

[10] The U.S. Digital Millennium Copyright Act of 1998 (DMCA), following the 1996 Copyright Treaty of the World Intellectual Property Organization (WIPO), states the principle "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under the title', 17 USC 1201 (a)(1)(A).

[11] Goldstein believes the whole copyright law is on the intersection, which is unfortunate, since DMCA will raise the transaction cost. The copyright law has settled many major conflicts before and its wisdom ought to have a chance to influence the current debate. P. Goldstein, Copyright and Its Substitute, 1997 Wis. L. Rev. 865 (1997).

[12] Jack Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N. Y. U. L. Rev. 1 (2004).

[13] Id.

[14] Chi-shing Chen, Dworkin's Jurisprudence, Coherence and Legal Information System, 65 Chengchi Law Review 1 (2001) and Internet as a Forum of Law, in Law and Modernity: Particular Problems 159-78 (Ola Zetterquist ed. 2004). The latter paper was first presented in the 21st IVR Congress in Lund, Sweden, 2003.

to examine the core question: what is law.

In addition, Dworkin's theory of adjudication is considered an example of Rawls' public reason[15], but both ideas are consistently criticized by Habermas. This article would like to show that Rawl's public reason ought to include the parties engaged in public law litigation, and Dworkin's coherence judgment regarding the social conception of morality ought to have a threshold[16]. This will leave room for the forming of a forum of law for public law dispute resolution (part III). For example, an emerging online dispute resolution[17] model can be reconstructed based on the discussion in the article. Certainly however, many theoretical as well as practical issues still need be further worked out.

I. Habermas' Co-original Critique of Rawlsian Public Reason

Co-originality is an important concept in the procedural paradigm brought forward by Habermas, and is quite rich in meaning. In this section, I will explore its content and examine how it was used by Habermas to criticize Rawlsian public reason and also discuss Rawls' response[18].

Co-originality emphasizes the mediation characteristics of the dual roles of a person in a society; i.e. her capacity as a private person and as a citizen participating in the formulation of public opinion. In present day world where neither natural law nor religion serve as the basis of social unity, law becomes the primary coordinator of people's actions in a society. Viewed from such a perspective, the autonomy of a legal person is granted in both her public and private capacities.

Private autonomy secures a zone of liberty for an individual where one pursues whatever direction for whatever purposes. What is more, this pursuit may be strategical[19] without giving any explanation to others concerned. This suggests the zone

---

[15] Rawls believes the Supreme Court is an exemplar of public reason, and judges "must appeal to the political values they think belong to the most reasonable understanding of the public conception.and its political values of justice and public reason." See Rawls, Politcal Liberalism 236 (1993). And Rawls believes his view does not differ in substance from Dworkin's. Id., 236-7, footnotes 23.

[16] Just like his fit judgment which examines the coherence between the case on point and relevant precedents chains.

[17] Katsh & Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace (2001). This article argues that online dispute resolution could be developed to a public sphere where public conflict can be treated on discursive basis. See also, Wessel, R., Alternative Dispute Resolution for the Socio-scientific Dispute, 1 Journal of Law and Technology 1 (1986).

[18] Habermas's co-original critique of Dworkin's theory of adjudication is discussed in the next section.

[19] Habermas differentiates communicative and strategic action. They are well specified as followed:

"As long as language is used only as a medium for transmitting information, action

granted by private autonomy is not subject to the process of collective reasoning[20].

Public autonomy, or civic autonomy, requires "those subject to law as its addressees can at the same time understand themselves as authors of law"[21]. True participation in politically autonomous lawmaking and not simply the moral self-legislation of individual persons is what self-legislation by citizens mean. It is also through the civic autonomy that an "elaborated legal shape" is given to private autonomy[22].

The co-originality relationship between private and public autonomy therefore means the legal code, which specifies that private rights and the legitimacy of law making presuppose one another. Since human right is necessary for establishing the legal institution of democratic process for self-legislation and legal order in modern society expresses itself through the granting of individual rights of all kinds, the co-originality thesis points out that "neither human rights nor popular sovereignty can claim primacy over its counterpart"[23]. What is more, if we concern the equal sharing of private autonomy among citizens, which we should, then actively participating in the political process that leads to the granting of legal rights by each and every right holder is necessary. Public autonomy hence requires that the legitimacy of the lawmaking procedure be measured by whether all possibly affected persons could agree as participants in rational discourses[24].

Real communication among citizens, each with the intention of mutual understanding, is critical to the procedural paradigm of Habermas[25]. He believes such

---

> coordination proceeds through the mutual influence that actors exert on each other in a purposive –rational manner. On the other hand, as soon as the illocutionary forces of speech acts take on an action-coordinating role, language itself supplies the primary source of social integration. Only in this case should one speak of ""communicative action."" In such action, actors in the roles of speaker and hearer attempt to negotiate interpretations of the situation at hand and to harmonize their respective plans with one another through the unstrained pursuit of illocutionary goals. Naturally, the binding energies of language can be mobilized to coordinate action plans only if the participants suspend the objectivating attitude of an observer, along with the immediate orientation to personal success, in favor of the performative attitude of a speaker who wants to reach an understanding with a second person about something in the world."

See Juergen Habermas, Between Facts and Norms 18 (1996). The "objectivating attitude" "with the immediate orientation to personal success" is strategic in nature.

[20] "Private autonomy extends as far as the legal subject does not have to give others an account or give publicly acceptable reasons for her action plan" Habermas, id. 120.

[21] Id. 120-2.

[22] Id.

[23] Juergen Habermas, Introduction, 12 Ratio Juris 329,331-2.

[24] See Habermas, Between Facts and Norms 107.

[25] Speaking of the central role of public communication, Habermas points out "structural features of political communication are more important…", Habermas,, Introduction 333. Thomas McCarthy also points out that the procedural paradigm of Habermas does not locate its normativity on the "general or

intuition is overlooked by political theory[26]. Positivists, like Kelsen and Hart, emphasize the closed character of a legal system and purge any basis for suprapositive validity. Rules are valid because they are properly enacted by the competent institution and institutional history is given priority to demonstrate the rationality of legal decision making[27]. The juridification of the welfare state also reflects the difficulty rooted in the single point of view of private autonomy and the neglected need of participation and dialog to achieve public autonomy. As a result, the traditional debate focuses narrowly on state regulation v. deregulated markets[28]. Taking feminist legal theory as an example[29], Habermas believes they are wrong to base their critique of unequal rights protection on gender sameness/difference and to overlook the need to have specific groups of men and women in different living situations to "conduct public discourses in which they articulate the standards of comparison and justify the relevant aspects[30]."

The co-originality of public and private autonomy is one source of criticism Habermas raises against Rawls' political liberalism. Rawls differentiates the political and the social, and treats the social as a background culture sphere that is not subject to the restraint of public reason. This is not acceptable to Habermas who sees the social as the lifeworld which is the fountain enabling people to reach mutual understanding, and providing the essential basis for establishing any legitimate collective reasoning processes leading to the enactment of law and the granting of legal rights. The reason why Rawlsian public reason is limited to the political, Habermas believes, is because Rawls takes human rights precedented to popular sovereignty which is demonstrated in the first principle of justice as fairness[31]. Cutting public and private into two separate parts and focusing simply on the public, or the political, Rawls also intends to "collapse

---

united will of a people, in the form of universal rational consensus, but the structures and procedures that secure official and unofficial spaces for the public use of reason and the practically rational character of that public discourse." See Thomas McCarthy, Enlightenment and the Idea of Public Reason, in Questioning Ethics 164, 178 (Kearney and Dooley ed. 1999).

[26] "[L]egal persons can be autonomous only insofar as they can understand themselves, in the exercise of their civic rights, as authors of just those norms which they are supposed to obey as addressees. However, this intuition has never been quite convincingly explicated in political theory." Habermas, Introduction, supra note 23, at 331.

[27] See Habermas, Between Facts and Norms 201-3. See also, Habermas, Law as Medium and Law as Institution, in Dilemmas of Law in the Welfare State 203, 212 (Teubner, G. ed., 1986). Habermas believes that the positivists view the law as a medium. However, law should really be an institution which belongs to the social component of the lifeworld. They are embedded in a broader political, cultural and social context, and hence cannot be legitimated by the positivistic reference to procedure. Id. 212-3.

[28] Habermas, Introduction, supra note 23, at 334.

[29] See Habermas, Paradigms of Law, in Habermas on Law and Democracy 13, 21-5 (Rosenfeld and Arato ed. 1998), and Between Facts and Norms 418 – 27.

[30] See Habermas, Paradigms of Law, id. 24.

[31] Habermas, Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism, 92 the Journal of Philosophy 109-31 (1995).

the distinction between its justified acceptability and its actual acceptance[32]."

In his reply, Rawls explains that his theory is limited to the political domain rather than a comprehensive doctrine like that of Habermas, and this difference of position causes most of the criticisms raised by Habermas[33]. Political liberalism addresses a political conception aimed at a pluralistic society of multiple and possibly conflicting comprehensive doctrines. The original position states how such a society could be founded in a just way and how the overlapping consensus deals with the sustaining of the society so founded.

Constitutionalism is crucial in the two-phase process of political liberalism. Rawls believes Habermas fails to catch this point. The co-originality between public and private autonomy in the discursive paradigm of Habermas seems to address the legal and not the constitutional level[34]. As to the constitution, not every generation is called upon to its founding[35], and the design of a constitution is really

> not a question to be settled only by a philosophical conception of democracy – liberal or discourse-theoretic or any other – nor by political and social study alone in the absence of a case by case examination of instances and taking into account the particular political history and the democratic culture of the society in question[36].

The principles of justice as fairness also do not serve as a natural law external to political liberalism, and hence pose restraints on its co-original nature[37]. Rawls points out that justice as fairness is a political conception, and just like any other conception of justice, it "is always subject to being checked by our reflective considered judgment[38]." The selection of the principles of justice in the original position results in a constitution

---

[32] Id. 122.
[33] John Rawls, Political Liberalism: Reply to Habermas, 92 the Journal of Philosophy 132, 138 (1995).
[34] "…the context shows that he is referring to rights against the state in the form of rights embedded in a constitution… He is not discussing the individual rights persons initially cede to each other at his first step." Id. 165.
[35] "Whether a generation can do this is determined not by itself alone but by a society's history: that the founders of 1787-91 could be the founders was not determined solely by them but by the course of history up until that time." Id. 156.
[36] Id. 166, see also id. 160-1.
[37] "I believe that Habermas thinks that in my view the liberties of the moderns are a kind of natural law, and …are external substantive ideas and so impose restrictions on the public will of the people." Id. 159.
[38] Id. 153. Rawls believes Habermas does not understand his four-stage sequence correctly. The four-stages, namely, the original position, the constitutional convention, the legislation and the adjudication, do not describe a political process, neither are they theoretical; they are civil virtues required by justice as fairness. Though different levels needs different level and type of information, all four stages are in need of reflective considered judgments. Id. 152-3.

with a Bill of Rights does pose restraints to legislation, and thus to the formation of the popular will that lead to legislation. But the process of drafting the constitution just like the legislative process is not pre-political; it simply belongs to a different level, the higher law. Popular sovereignty as expressed in the widespread political debates is present at both levels[39].

Rawls accepts Habermas' description of the exchanges between them as a 'family quarrel'[40]. MaCarthy also points out that the two philosophical giants have traveled different paths from the same Kantian root, and remain close despite their differences[41]. Indeed, there sure are complementary features one can locate. For example, the civic virtue Rawls draws out may be part of Habermas' rules of communication in collective reasoning of fundamental issues in a society. McMahon believes collective reasoning involves not only information sharing, and that interaction itself does not provide needed impartiality. Rather, moral impartiality is constituted by "certain reasons relevant to the resolution of conflicts of interest[42]."

However, real communication conditioned on structure and procedure is crucial in Habermas theory[43], as empirical basis could be identified and provided for analysis in verifying certain discursive premises, including the separation of the private and the public, and their mutual presupposition. Rawls's separation of the public and the private is quite different. As MaCarthy points out, it is essentially the 'moral duty of civility that the ideal of citizenship entails' that separates the public forum and the background culture[44].

Rawls's public reason separates the political and the social. The social is also the sphere of background culture where there is no restraint as to how one ought to conduct

---

[39] Id. 157-8.
[40] Id. 160.
[41] Thomas MaCarthy, Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue, 105 Ethics 44 (1994)
[42] Christopher McMahon, Why There is No Issue Between Habermas and Rawls, 99 the Journal of Philosophy 111, 115 (2002). "…Habermas's account of the moral point of view can actually be combined with Rawls's. The idea of being in everyone's interests requires an interpretation, which Habermas does not provide. …the agreement about what would be in everyone's interests … is most likely to be achieved if the parties interpret this concept in terms of a fair resolution of their competing interests…' McMahon therefore believes there will be little difference between Habermas's theory and Rawls's. Id. 127.
[43] On the other hand, Rawls seems to rely on abstraction as his strategy. Rawls stated "…not abstraction for abstraction's sake. Rather, it is a way of continuing public discussion when shared understandings of lesser generality have broken down. …" John Rawls, Political Liberalism 45-6 (1993),
[44] MaCarthy, supra note 41 at 52. MaCarthy believes this seems to be 'an ironic variation on Kant's problematic distinction between the autonomous and heteronomous self.' Id. MaCarthy also believes that the restraint Rawls poses on the dialog in the public forum 'clash with our considered convictions about the openness of debate in the democratic public sphere.' Id. 53.

oneself politically. Public reason applies only to the political, and initially only to its strongest case, i.e. issues related to constitutional essentials and basic justice[45].

The content of public reason is not simply substantive[46]; it also contains procedural guidelines for the conduct of public inquiry. Rawls requires that the basic structure and its public policies regarding constitutional essentials and basic justice be justifiable to all citizens. Generally speaking, the duty of civility - a moral and not legal duty - requires an explanation of what one advocates and votes for which can be supported by the political values of public reason to legitimize one's exercise of political power[47]. And

> "in making these justifications we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."[48]

Instead of focusing on the duty of civility, discursive ethics does not forbid the claiming of a comprehensive doctrine so long as one states what one truly believes with an open mind, i.e. it is stated not strategically. Discursive ethics uses structural and procedural measures to gauge the legitimacy of the communication leading to public decisions. How open is the discussion? Does it include most or all affected parties? And, do engaging parties truly state what they believe and try to understand the differences raised by others?

It is the thesis of this paper that instead of focusing on voting related issues of public reason[49], Rawls ought to examine how conflicts relating to constitutional essentials and basic justice are resolved. Rawls is right to elaborate on the Supreme Court as an exemplar of public reason[50], but he focus more on the judges of the Supreme Court. He even uses Supreme Court opinions as the suggested measure for

---

[45] "If we should not honor the limits of public reason here, it would seem we need not honor them anywhere. Should they hold there, we can then proceed to other cases." Rawls, supra note 43 at 215. Here we consider only the initial case, like what Rawls considers mostly in political liberalism.
[46] Three things are formulated by the liberal political conception of justice for Rawls's public reason: 1. certain basic rights, liberties, and opportunities; 2. the general priority of these rights, liberties and opportunities over claims of the general good and perfectionist values; 3. measures assuring all citizens adequate all-purpose means to make effective use of their basic liberties and opportunities. Id. 223
[47] Id. 217. Here Rawls mentions both what one advocates and votes, later he seems concentrate on voting. See id. 240-4.
[48] Id. 224. Here is what I believe MaCarthy opposes the most. See supra note 41 and accompanying text.
[49] See supra note 47.
[50] Rawls, Political Liberalism 231 – 240.

checking whether we are following public reason[51].

As advocators, how parties of a conflict involving issues of constitutional essentials and basic justice should conduct themselves politically is an issue Rawlsian public reason needs to address. This article believes that conflict resolution does not simply involve Supreme Court adjudication, but also contains alternate dispute resolutions of all sorts related to constitutional essentials and basic justice.

We should not use the Supreme Court opinion to model the public reason of the parties involved in these conflicts since the parties are not judges and do not possess the capacity of judges. For example, they do not access and master the judicial experiences contained in the judicial records. Here we really should separate the moral and the legal. Morally speaking, parties engaging in fundamental conflict ought to follow what the discursive ethic requires as discussed above. Legally speaking, parties should follow what the law requires when they are in a court room and accept the legal decision as the law requires. One may add that civil duty as well as overlapping consensus asks that conflicting parties resolve their differences over comprehensive doctrine and legal decisions, should a difference exists. Certainly, this point can be fully elaborated only after we examine the criticism Habermas raises regarding the adjudicative theory of Ronald Dworkin in the next section.

II. A co-original critique of Dworkin's Theory of Adjudication

Rasmussen believes the core of the controversy between Rawls and Habermas is the law[52]. For Habermas, law is the primary coordinator of the modern society when religion or law of reason no longer serves that purpose. The sphere of private autonomy primarily expresses itself through legal rights that are the result of public will formation determined by public autonomy. The co-originality thesis essentially points out the needed discursive basis that link the two autonomies.

As for liberalism, Rasmussen provides an insightful background[53]. He believes

---

[51] "To check whether we are following public reason we might ask: how would our argument strike us presented in the form of a Supreme Court opinion? Reasonable? Outrageous?" Id. 254. See also MaCarthy, supra note 41, at 52.

[52] "We will see how 'law turns out to be at the centre of this controversy, whether one wants to see it in the form of Rawls's constitutionalism or Habermas's co-originality thesis. It will become clear that the question of the distinctiveness between the two may rest upon whether Rawlsian constitutionalism provides a genuine alternative to the co-originality thesis." See David Rasmussen, Accommodating Republicanism, in the Edinburgh Companion to Contemporary Liberalism 188 (M. Evans ed. 2001).

[53] David Rasmussen, Paradigms of Public Reason: Reflections on Ethics and Democracy, in Questioning Ethics 181-98 (R. Kearney & M. Dooley ed. 1999).

Aristotle's blending of ethos and polis and Augustine's radical rejection of that association set the tone for historical development and laid the ground work for the current debate surrounding democracy. Augustine basically believes in divine justice and excludes public autonomy[54]. Hobbes continues the Augustinian tradition, replacing divine justice by a sovereign with reason[55]. Rasmussen believes the Augustinian and Hobbesian lines of thought which separate public will formation from legitimacy are the historical roots for the republican attack on liberalism.

This paper argues that public reason connects Rawls's political liberalism and Dworkin's adjudication theory[56], and that both are consistently criticized by Habermas because real discursive effort is lacking in the derivation of the law.

Rawls constitutionalism can be seen as a reconstruction of liberal democratic traditions, in which the essentials of the constitution at its core are acceptable to all citizens free and equal[57]. Besides, in the stability phase of the political liberalism[58], judicial review is a critical function for building political conceptions of justice or establishing the depth of the overlapping consensus[59]. The reasoning of the Supreme Court opinions is 'part of the publicity of reason' and functions as the educative role of public reason[60]. It also gives public reason its 'vividness and vitality', and when the judges fail to fulfill their role, the terms resolving those conflicts usually address fundamental political values[61].

In terms of how judges ought to conduct themselves in deciding cases, Rawls cites Dworkin's "Hard Case" and believes they are compatible. As the exemplar of public reason, Rawls believes judges ought to interpret the constitution as it fits into the

---

[54] Id. 181-2.
[55] Rasmussen discusses the debate between Coke and Hobbes. Their debate centers on what kind of reason legitimates law. Coke relied on the practical wisdom of judges obtained through long study, observation and experience; Hobbes rejected this historical view and believed "rational consistency would extend beyond the claims of instrumentality to the issue of the normative status of sovereignty." Id. 185 – 9.
[56] See supra note 15 and the discussion in this section.
[57] See Frank Michelman, Rawls on Constitutionalism and Constitutional Law, in the Cambridge Companion to Rawls 394 – 425 (S. Freeman ed. 2003), especially 395-400.
[58] Prior to the overlapping stage are the steps leading to constitutional consensus. Rawls outlined one way how these steps may come about and their stability secured. See Rawls, Political Liberalism 158 – 64.
[59] "… In a constitutional system with judicial review, or review conducted by some other body, it will be necessary for judges, or the officers in question, to develop a political conception of justice in the light of which the constitution, in their view, is to be interpreted and important cases decided. Only so can the enactments of the legislature be declared constitutional or unconstitutional; and only so have they a reasonable basis for their interpretation of the values and standards the constitution ostensibly incorporates. …" See id. 165– 6. For the description of the steps to overlapping consensus, see id. 164 – 8.
[60] Id. 236.
[61] Id. 237.

relevant body of constitutional materials, including constitutional precedents[62]. Judges also ought not to invoke their own moral conception or moral ideals in general and they must appeal to the "most reasonable understanding of the public conception and its political values of justice and public reason[63]."

There are indeed more compatible features between Dworkin's theory of adjudication and Rawls's political liberalism. A plural society with a competing conception of morality[64] is the society for which Dworkin develops his theory of adjudication. To resolve conflicts over competing conceptions of morality, Dworkin believes judges adopt arguments of principle that weigh the value of each competing conception before making their final reasoned decision[65].

The right thesis of Dworkin's theory of adjudication provides further evidence of compatibility. Constitutional right serves as a trump to the policy preferences of the majority. Judicial review hence protects not only the dissipated values of democratic society, but also the minority within such a society. The decision is therefore essentially a grating of the legal rights which preexist in the law; Dworkin's judges, like those of Rawls's, must follow preexisting law, including judicial precedents, and may not appeal to a judge's personal moral conception[66].

When a hard case occurs, there is no definite way of determining pre-existing law and this is when judges engage in law interpretation and the argument of principle. Since Dworkin believes the background morality of a society may become law through the interpretation of law and the value weighing of competing moral conceptions involved in a hard case[67], it seems that the co-originality critique raised by Habermas against Rawls's political liberalism should not apply to Dworkin's theory of adjudication. This is not the case, however.

Citing Michelman, Habermas criticizes Dworkin's monological conception of

---

[62] Id. 236.
[63] Id.
[64] Rawls believes Dworkin's moral conception is too broad; he would rather use a limited public political conception of justice instead. But Rawls thinks there should be no substantive difference between the two. Id. 236-7 footnote 23.
[65] Ronald Dworkin, Hard Cases, in Taking Rights Seriously 81-130 (16th printing 1997).
[66] Id. Dworkin also points out that legal right is a kind of institutional right. When a hard case occurs, it is essentially the opportunity to redefine the institution. See id., especially 101-5. The hard cases discussed in the beginning of this article, signaling a paradigm shift as Fiss points out, thus require a re-examination of the nature of law itself.
[67] Id. 101-5. One needs to examine the relationship between the institutional right and background right in detail. It turns out that judges' interpretation rather than their conception of the background political morality of the litigating parties or their social class is what is meant by Dworkin.

judicial decision making[68]. Dworkin separates judicial decision making into two stages: fit and justification. During the fit stage, all prior judicial precedent chains that are above a specific threshold are identified. In the justification stage, the moral conception which best coheres with "the community's moral traditions[69]" is selected as the basis for a decision. Lacking dialog, Habermas believes, that from the observer's perspective, what judges enforce is "no more than a self-legitimating code of professional ethics"[70],.

According to the discursive ethics of Habermas,

> "[o]nce again it is a question of a sensitive, noncoercive coordination of different interpretive perspectives. Naturally, in application discourses the particular participant perspectives must simultaneously preserve the link with the universal-perspective structure that stands behind presumably valid norms in justification discourses."[71]

A. Rationality and Legitimacy of Adjudication

Lucy identifies rationality and legitimacy as the two primary criteria for an evaluation of the theory of adjudication[72]. Rationality has to do with the epistemological foundation of the adjudication. If adjudication is part of legal science, it must demonstrate a certain degree of regularity and predictability. Like cases should be treated alike and therefore should be approximated if adjudication could claim itself to be rational.

Legitimacy is related to rationality. During an era when rationality runs high, like the German Conceptual School of Law and the American Langdellian Legal Science School of the late Nineteenth Century, the legitimacy of adjudication or the law as a whole is determined by its rationality. Generally speaking, the legitimacy of adjudication has to do with why one should accept or obey the outcome of adjudication.

Fuller is one of the scholars who specifies the nature of adjudication in a pure and

---

[68] See Habermas, Between Facts and Norms 224. For an account of Habermas's criticism of the adjudication theory of Dworkin, see Hugh Baxter, Habermas's Discourse Theory of Law and Democracy, 50 Buffalo L. Rev. 205, 295-312 (2002).
[69] Dworkin, supra note 65, at 125. Dworkin adds: "at least as these are captured in the whole institutional record that it is his office to interpret." Id. 126.
[70] Habermas, supra note 68, at 225.
[71] Id. 229.
[72] See William Lucy, Adjudication, in the Oxford Handbook of Jurisprudence and Philosophy of Law 206,207 (Jules Coleman and Scott Shapiro Ed., 2002).

simple way[73]. The rationality of Fuller's theory of adjudication lies mainly on the fact that he thinks adjudication provides the disputing parties opportunities to attend the adjudication and raise reasoned arguments. The reasoned opinion of a third party who adjudicates the case is also another sign of the rationality of Fuller's theory.

I believe social interaction is the basis of the legitimacy of Fuller's theory of adjudication. He believes the only way the opinions of the court can derive legal doctrine and thus serve as the basis of social order is that the dispute which reaches for adjudication is one with sufficient social interaction. In other words, sufficiency of social interaction sets the limit and provides the threshold to determine whether a dispute is suitable for adjudication or not.

The legitimacy claim of Fuller's theory of adjudication has been under attack, however. In cases where public law issues are involved, what the public law judges want to achieve through structural reform may exactly be getting rid of the traditional social order; or they want to establish some new institution without any social interaction previously, but is deemed right[74].

Dworkin's theory of adjudication can be seen as a further improvement on that of Fuller's. I believe the right thesis provides the basis for the legitimacy claims of Dworkin's theory of adjudication. There are actually two levels of argument in the right thesis. Politically speaking, the right thesis argues that the right functions as a trump to the majority votes in a constitutional democracy. Within the judiciary, the right thesis maintains that the decisions of judges in lawsuits are not granting new rights to one of the parties, instead, they are deciding who ought to be protected under previously established legal rights.

The rationality side in Dworkin's theory of adjudication lies primarily in the idea that "like cases be treated alike[75]" or integrity[76]. Judges ought to function as the moral agents of a personified community that speaks with one voice. The coherence of the case in point and the judicial records is primarily what Dworkin's judges are to decide. In the first phase of this coherence test, all precedent chains which cohere with the case in point up to a threshold are identified. It is also called the fit phase. In the second

---

[73] Fuller, L., the Forms and Limits of Adjudication, In the Principles of Social Order, Selected Essays of Lon L. Fuller, 101 (Winston, K. ed. Revised Ed. 2001).
[74] See supra note 9.
[75] Ronald Dworkin, Law's Empire 165 (1986).
[76] Id., 176-275.

phase of justification, one of the moral conceptions of these precedent chains that coheres best with the personified community of integrity is selected as the right answer to the case in point[77].

The rationality claim of Dworkin's theory of adjudication has been criticized by Marmor[78] and Levenbook[79]. Levenbook pointed out that Dworkin's theory lacks a fixed point. It is especially so when judges can declare precedent chains laid down by the previous courts as a mistake and proceed to make new decision to the case in point. Marmor praised Dworkin's contribution to the methodology issues of legal philosophy, but criticized the epistemological foundation of Dworkin's theory since any conclusion seems to be derived from Dworkin's methodology.

The Habermasian critique of Dworkin's theory of adjudication as discussed in the beginning of the section II of this article derivesd from the same source, i.e. discursive ethics; but the criticism extends to both the rationality and the legitimacy of Dworkin's theory[80].

Generally speaking, viewed from the co-originality thesis of Habermas, the coherence reasoning of Dworkin's judge is unacceptable, since only the judicial records and the case in point are the primarily basis for the reasoning. According to Habermas, such reasoning is monological since Dworkin's Hercules is a loner and real dialog is lacking in the process[81].

We can also further analyze the critique of Habermas from the perspectives of rationality and legitimacy. Rationally speaking, two kinds of coherence need to be compared in an adjudicative setting, one of them is Dwrokin's constructive conherence and the other is the discursive coherence of Alexy and Peceznik[82].

---

[77] Id., 238-50.
[78] Andrei Marmor, Coherence, Holism, and Interpretation: the Epistemic Foundations of Dworkin's Legal Theory, 10 Law and Philosophy 383-412 (1991).
[79] Barbara Baum Levenbook, the Role of Coherence in Legal Reasoning, 3 Law and Philosophy 355-74 (1984).
[80] For a discussion and critique of the theory of adjudication of Habermas, please see, Shih, W, Reconstruction Blue: A Critique of Habermasian Adjudication Theory, 36 Suffolk University Law Review 331 (2003).
[81] See Juengen Habermas, Between Facts and Norms, 224 (1996).
[82] I use the term constructive coherence and discursive coherence to help differentiate the two conception of coherence. I use constructive coherence to denote Dworkin's theory of coherence. On the other hand, discursive coherence measures the degree of coherence by the quality of the statements and the length of the chains of the statements, etc., see Aleksander Peczenik, Why Shall Legal Resoning be Coherent?, 53 ARSP-Beiheft (1994); Alexy & Peczenik, the Concept of Coherence and Its Significance for Discursive Rationality, 3 Ratio Juris 130-47 (1990).

Based on the one right answer thesis of Dworkin, a judge can always construct the best coherence between rules and principles imbedded in the judicial records; i.e. the precedents chains, and the case in point. In the end, the principle coheres the best ought to be selected or constructed. During the reasoning process, a series of value weights and selects among the candidates need to be made by the judge. The discursive coherence, on the other hand, tends to reflect the true status of coherence of the discursive reality measured by the length of an argument chain and the structure of the formation of different argument chains, etc. I believe their difference can be better understood after the legitimacy analysis.

Nancy Fraser advocates a three-dimensional theory of justice[83]. The political dimension of justice is concerned chiefly with representation[84]. On a specific level of the political dimension[85] -the decision-rule level- 'representation concerns the procedures that structure public processes of contestation'[86]. It seems the legitimacy of Habermasian theory of adjudication can be derived along the same line from his general formula:

> "(D): Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.[87]"

As discussed in the previous section, real communication among citizens, each with the intention of mutual understanding, is critical to the procedural paradigm of Habermas. The co-originality thesis further tells us that such real communication is crucial to the rationality and the legitimacy of the adjudication in two senses. First, the adjudication is affected by the legislative process, and therefore its rationality and legitimacy[88]are determined indirectly by the general formula (D). Second, the

---

[83] I must thank Professor Fraser for my better understanding of the adjudicative legitimacy based on representation. I am benefited by her lecture "Re-Framing Justice in a Globalizing World" in the 22nd World Congress of the International Association for Philosophy of Law and Social Philosophy, held in Granada, Spain in May 2005 (IVR 2005).

[84] Professor Fraser believes that parity of participation is the most general meaning of justice. Another two dimensions of justice that can reflect the destruction of the social arrangement that permit all to participate are the economic and social dimension. The former impedes full participation by economic structures which deny the resources needed to participate as peers; the latter prevents interaction on terms of parity by institutionalized hierarchies of cultural values that deny requisite standing. See Nancy Fraser, id., in Plenary Sessions Lectures of IVR 2005, "Law and Justice in a Global Society" 88(M. Escamilla & M. Saavedra ed. 2005).

[85] On a higher level, representation is a matter of social belonging; the issue is inclusion in, or exclusion from, the community. Id. 89-80.

[86] Id. 90. The issue here is 'the terms on which those included in the political community air their claims and adjudicate their disputes'. Id. 90.

[87] Habermas, Between Facts and Norms, 107.

[88] Here Habermas disagrees with Alexy who considers legal discourse a special case of moral discourse. Habermas believes such assertion is 'burdened by the natural law connotations', id. 233. Alexy

resolution of the indeterminacy of the legal decision making in adjudication is directly tied to (D), which requires real communication among citizens and groups affected by the legal decision of the adjudication. That's why Habermas believes the constructive coherence alone is not sufficient to establish the rationality of adjudication, as Dworkin holds.

However, since Habermas also believes that justice enjoys normative priority, in the case of conflicts between the right and the good, 'the justice arguments are Dworkinian "trumps" that win out'[89]. Habermas also recognizes that 'the legitimization process itself has a need for legal institutionalization' and 'a specific feature of law is that it can legitimately compel'. The theories of adjudication unveiled by Dworkin and Habermas can be complementary to each other and draw great effect theoretically and in practice[90].

III. Hard Cases and the Public Sphere

The ways to realize Habermas's ideal of the public sphere aided by the internet are actively being pursued[91]. Based on the discussion of previous sections, this article believes that the way we resolve public conflicts involving issues of constitutional essentials and basic justice could be reconstructed. Adjudication in court and related alternate dispute resolutions in this area ought to be reconstructed to form a stronger link. In terms of the rationality of this public conflict resolution scheme, a complementary relationship between the Dworkin's constructive coherence for adjudication in the court system and the discursive coherence[92]measured by the real communication[93] in society needs be established both conceptually and in practice[94].

This article first tries to establish that in addition to the voters, the idea of public

---

understands that absolute rationality of the legal decision presupposes the rationality of the legislation. However, when such presupposition is not fulfilled, Habermas believes, 'the harmony between law and morality assumed by Alexy has the unpleasant consequence not only of relativizing the rightness of a legal decision but of calling it into question as such.' Id. 231-2.

[89] See the response of Habermas to the critics of McCarthy in Michel Rosenfeld and Andrew Arato ed., Habermas on Law and Democracy: Critical Exchanges, 400-1 (1998).

[90] Id. 396. See also supra note 14, Chi-Shing Chen, Internet as a Forum of Law, 171-5.

[91] Archon Fung, Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences, 11 the Journal of Political Philosophy 338-67 (2003); Heng & Moor, From Habermas's Communicative Theory to Practice on the Internet, 13 Info Systems 331-52 (2003); Philip Agre, Real-Time Politics: the Intenet and the political Process, 18 the Information System 311-31 (2002).

[92] See supra note 82 and accompanying text.

[93] The Internet is instrumental to uplifting such needed communication and its measurement.

[94] The idea was first inspired by Alexy, Legal Expert Systems and Legal Theory, in Expert Systems in Law: Impacts on Legal Theory and Computer Law (Fiedler, Haft & Traunmueller ed., 1988). In the paper, professor Alexy emphasizes that the research of legal informatics should not overlook the relationship among the discursive, the cohesive and the subsumptive levels of a legal system.

reason should also apply to parties involving in public conflicts related to constitutional essentials and basic justice. I believe such a conceptual basis is crucial to initiating changes in the following three directions which together are more likely to bring forward a public sphere that can substantially improve adjudicative law making:

First, advocators in a public conflict where public reason applies have a civic duty to sincerely conduct dialog as the ideal of democratic citizenship requires[95];

Second, public reason also requires judges to decide whether the minimum discursive coherence has been met[96]. Specifically, the social moral conception ought not to be simply a constructive concept. There should be a 'fit' judgment made as to whether the discursive coherence reflected in whether the communication by the affected parties passes a threshold set by the court. If the judge deems the threshold requirement has not been met, it is better to leave the dispute to public dispute resolution procedures described later in this article;

Third, overall speaking, the relationship between adjudication of the court and alternate dispute resolution[97] needs be developed[98] with each one of them informing the other.

In practice, there are many ways to realize the public dispute resolution scheme which serves as a public sphere where all affected parties a society can interact with each other discursively. Here I outline the general guidelines of one scheme by modifying the online dispute resolutions (ODR) developed over the past few years[99].

Here, the first critical issue is whether an ODR aimed at realizing (D) of Habermas[100] discussed in the previous section can be developed? The author of this article believes yes, at least it can be approximated to a level sufficient to claim significance both theoretically and practically speaking.

---

[95] Rawls, Political Liberalism 216-20.
[96] See the discussion in II.A Rationality and Legitimacy of Adjudication of this article.
[97] I.e. a public sphere for dialog among affected parties.
[98] Obviously, many theoretical and practical issues need be further explored. An unconstitutional decision by the court may also create a public sphere participated in by the affecting parties. See Sabel & Simon, Destabilization Rights: How Public Law Litigation Success, 117 Harv. L. Rev. 1015, 1022-9 (2004) (Improved participation as the result of a state supreme court's decision).
[99] See Katsh, E., & Rifkin, T., Online Dispute Resolution: Resolving Conflicts in Cyberspace (2001) for its current development, please see http://www.odr.info/index.php, visited July, 6, 2005.
[100] Namely: just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.

First of all, a discursive rather than an adversarial model needs be the basis of such ODR. Without sacrificing the private interest of the parties who bring the dispute into attention, an ODR with two levels of dispute resolution in mind should be designed. On top of the traditional dispute resolution, where arbitrators or mediators try to resolve the issues of the disputing parties, a discursive model should be adopted instead to serve as a public sphere to deal with the public issues involved in the dispute. How to arrange such a discursive part of the ODR (public-ODR) seems to be critical for success.

It seems openness and recording are the two main principles for the proceeding; the discursive coherence discussed in the previous section[101] should also be adopted as the primary principle for evaluation and decision. Though persons and groups that have long term interests with the issues related to the public-ODR should be the default members of the public-ODR, its membership ought to be open to other affected parties. All discussions in the public-ODR should keep records which can be accessed by all. The procedures to establish the algorithms to track the issues and manage its discussion are crucial to reflect the status of the discursive coherence of the public-ODR, and therefore are subject to a public-ODR itself, just like the standard setting community described by Froomkin[102].

IV. Conclusion

A paradigm shift is taking place. This is observed by many legal scholars from different fields impacted by the growth of information technology. To prevent the tragic conclusion of Kuhn[103], the conceptual debate that can initiate the change is critical. This article intends to contribute to such debate by discussing the co-original critique of Habermas regarding Rawls and Dworkin. I then experiment with the building of a public sphere to deal with the hard cases involved in the paradigm shift. My purpose is to invite comments and criticisms, and hopefully create a practical and meaningful[104]

---

[101] Please see Froomkin, supra note 6. Professor Froomkin described how the engineering community set the standard of the Internet. It is interesting to further investigate whether the self maintained consensus building and dispute resolution schemes are in essence based on discursive coherence. For an idea of the process, please also see Pahel, K., The Public Process of Moral Adjudication, 11 Social Theory and Practice 183(1985).

[102] Please see Froomkin, id. Whether and how discursive rationality could be reflected by software is a research issue. In practice, discursive rationality is decided by decision makers, like judges.

[103] I.e. new paradigm will reign only after the old paradigm collapses, where not only inefficiency but also fatal consequences may be the cost.

[104] See Tanaka, S., Metamorphous of the legal systems: Toward a pluralistic coordinating forum, in Das recht vor der herausforderung eines neuen jahrhundents: Erwartungen in Japan und Deutschland 91 (Z. Kitagawa ed. 1998). Such recorded and managed online public sphere can also be seen as a knowledge base to assist in judicial law making. See also Davis, K. C., Judicial, legislative, and administrative lawmaking: A proposed research service for the Supreme Court, 71 Minnesota Law Review 1(1986).

public sphere associated with public law litigation which can be developed and institutionalized.