行政院國家科學委員會專題研究計畫 成果報告

H1N1 治理網站之建置(第 2 年)
研究成果報告(完整版)

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計 畫 主 持 人 ： 陳起行
共 同 主 持 人 ： 劉宏恩
計畫參與人員： 碩士級-專任助理人員：陳重基
碩士班研究生-兼任助理人員：徐敦品

報 告 附 件 ： 出席國際會議研究心得報告及發表論文

公 開 資 訊 ： 本計畫可公開查詢

中 華 民 國 101 年 10 月 05 日

中 文 摘 要 ： 本計畫透過實際建構 H1N1f 防治之治理網站，進一步檢驗法學上人際互動（human interaction）模式，公自主與私自主之互生性（co-originality），多觀點(multi-perspective)的社會規範正當性等多項理論； 並驗證，改良電子法律參與，電子治理網站等跨領域發展領域的研究成果。本計畫實際建構的 H1N1 治理網站，將進一步透過與國外學術社群的交流，得到深入檢討的機會，也期待能為電子法律參與等新興領域，提供發展方向及基本理論。

中文關鍵詞： 治理網站　人際互動 互生性 多觀點 電子參與

英 文 摘 要 ：

英文關鍵詞：

國家科學委員會補助專題研究計畫成果報告

H1N1 治理網站之建置

H1N1 Governance Web

計畫類別：X 個別型計畫　　□ 整合型計畫

計畫編號：NSC 99-2410-H-004 -141 -MY2

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計畫主持人：陳起行 特聘教授

共同主持人：劉宏恩 副教授

計畫參與人員： 徐敦品 研究生

陳重基 專任助理

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1. 前言

國際間, 資訊科技運用於法治的理論, 制度,以及實做研究與應用, 發展蓬勃, 消長也互見.報告人在貴會補助下, 1999 至2000 年間曾經前往研究, 由極有遠見的德國法哲學家Kaufmann 所發展的德國慕尼黑大學法學院下法哲學與發資訊學研究所, 前幾年便不再發展法資訊學領域. 目前, 較具規模的國際間法資訊學領域的學術社群, 有國際人工智慧與法律學會(International Association for Artificial Intelligence and Law, IAAIL), 至今仍然每兩年召開一次國際研討會.其前任主席是一位美國律師Tom Gordon, 在德國取得電腦博士學位, 目前在德國資訊研究所進行研究工作.

Gordon 教授多年來也參與歐盟FP7 計畫. 目前主持一項計畫:IMPACT, 為期三年,致力於政策分析以及論證過程的模型化(modeling).經過將報告人有意發展H1N1治理網站的想法與Gordon 溝通後, 氏願意反映給歐盟官員,將政大資科系教授胡毓忠博士與報告人加入該計畫. 若日後確實能夠加入該計畫,本計畫將擔負起實做治理網站,並確實運用於台灣社會。歐盟計畫IMPACT 則注重治理網站與Gordon 論證結構,政策模組的連結,進一步分析治理網站的資料,並進一步帶動治理網站上的法律論證。為該計畫其他成員有意見而作罷。

國際間另一個由荷蘭1988年起發展的法律知識庫系統基金會(foundation for legal knowledge based systems, JURIX), 主導者是阿姆司特丹大學萊布尼茲法律研究中心(Leibniz Center for Law). 報告人與該中心主任透過電子郵件及SKYPE溝通多年, 今年首度在貴會補助下, 於十一月造訪該中心主任Tom Engers, 深入討論了一整天. 該中心除參與前述由Tom Gordon 主持的FP7 IMPACT計畫外, 也於明年一月開始, 參與另一項由Italian National Research Council - Institute of Legal Information Theory and Techniques(CNR/CNR-ITTIG)主持的FP7 Listen2me計畫. 以三年的時間, 試圖整合過去參與的七個單位所 研發的立法整合資訊系統, 並支援多國語言, 以合於歐盟不同語言的各成員國之需要. Tom Engers 教授表示, 願意將報告人加入該計畫, 以利將此一系統引進台灣, 報告人仍在評估中. 主要考量是, 國內法學院不似歐洲, 以Tom Engers 教授主持的阿姆司特丹大學萊布尼茲法律 研究中心為例, 一共有三十多位研究者及博士級學生, 從事研究工作, 研究能量極強.此外, 報告人由治理的理念出發, 重視由下而上以及真實對話的情境, 有必要先有本土實做的網站發 展作為基礎, 才能在國際合作上, 不只是技術輸入的一方.

以上兩個法學社群主導的國際法資訊學研究社群, 重視法律知識的表示, 論證的模型化及論證結構的維護等理論課題. 此外,近年來, 由與網路的發展, 如何運用網路以增強民意的參與, 成為跨領域研究的重點方向. 各國相關研究中心不斷出現,報告人所參與, 由美國政治學學會下資訊科技與政治(Information Technology and Politics)研究社群
1,經常透過電子郵件, 傳遞最新研究訊息
2 發展快速, 各種路徑, 彼此參照競逐,是國內學界值得重視的一個方向.

國內法學界，陳顯武教授在人工智慧與法律相關領域，有數篇論文，涉及法律知識表示新的嘗試，如法律本體庫（legal ontologies）之介紹3
http://61.222.4.242:8000/phpBB3/dtc/dtc-forums.php?m=news&sid=c77d7a029a52857a903cf63b08380e71.

報告人過去受有電腦碩士訓練，也有實際發展資訊系統的經驗及在lexis法律資料檢索系統研究發展的經驗．過去數年，重視由下而上，重視對話的治理網站的建構．去年在貴會的補助下，目前初步利用網路論壇（forum）公用軟體（open source software），依據報告人的設計理念，修改建置完成以性騷擾為主題的治理網站(網址為:該網站之首頁，請見附件一)，試驗發展實際可行可用的治理網站，一 方面作為不同社群意見的交流與彙整；另一方面，法規範可以透過一般以及與具體情境相契合的資訊，提供相關知識；並透過社福團體積極主動將網站的服務帶入社會各個角落，將與主題相關的個人及各個社群，引導進入網站的互動範圍。

2. 研究目的

本研究係在前一年國科會專題研究成果的基礎上，進一步以 H1N1 防治為主題，進一步研究治理網站基礎理論，制度，以及網路平台實做上的課題。

3. 文獻探討

Ergazakis, Metaxiotis and Tsitsanis, 2011, A State-of-The-Art Review of Applied Forms and Areas, Tools and Technologies for e-Participation, International Journal of Electronic Government Research, Vol. 7:1, pp. 1-19. 是最新的一篇文獻，檢討電子參與領域的發展，顯示這個領域仍然蓬勃發展，並且在各研究路徑之間，有明顯的差異，反映出此一領域不但在量方面，有可觀的表現，在質方面，也相當豐富，各家努力發展出可以接受的模式。

報告人在此領域也發展出獨特的系統，並且有其理論依據。

Sturm 的實證研究，是報告人建構治理平台制度面的基礎。S. Sturm, "The Architecture of Inclusion: Advancing Workplace Equity in Higher Education", Harvard Journal of Law & Gender, 29, 2006, pp. 247-334. 是其中之一，有參考價值。尤其由這篇文章的討論，報告人領會治理網站需要中介者主動協調的必要，而非靜態被動地提供公共領域，由參與人自動上平台互動。

R. Alexy and A. Peczenik, “The Concept of Coherence and Its Significance for Discursive Rationality”, Ratio Juris, 3, 1990, pp. 130-147. Alexy 等提出的論述融貫理論，是報告人據以評估以及提升治理網站討論品質的評量標準，使得參與平台只能單純提供討論管道，而無法理解或帶動論述品質的提升。與康乃爾大學電子法規形成實驗室對話過程，該研究團隊也再探詢衡量討論品質的標準，對報告人提出的論述融貫想法，十分雀躍，報告人已經一齊要求，提供個人研究成果供參考，該團隊計畫在明年正式完成一個具操作性的電子法規

形成系統。

在理論基礎方面，Cohen 改良 Teubner 自發性法律的新法律典範，則一直是主要的設計原則，可以參考其所著：Cohen, Jean, The New Legal Paradigm, 2002.

本報告附有執行期間所撰寫兩篇論文。第一篇提出治理網站的基本設計原則; 第二篇針對 Habermas 論述理論之發展，提出其分散式公共領域更為融貫即可行的論述。兩篇文章所列參考文獻均為最新國外相關研究成果。

4. 研究方法

報告人就治理網站的研究一直以德握金所受到的批判為切入點, 主張如果只重視以國家法律內部觀點的思辨為主, 其正當性會因為法的事實性(facticity)的缺陷而受損. 透過納入人際交往與對話的過程, 以補足社會意義脈絡與論述理性, 有助於法的事實性乃至於整體法治正當性的提振. 問題在於：應當如何落實於制度？

過去數年, 受到Jean Cohen 及Susan Sturm研究之啟發, 申請人將治理網站訂位於銜接國家法律與社會對話及規範發展的橋樑地位. 簡言之,治理網站的主導者，是一個群體，而非個人. 質言之，是由足以充分代表與主題相關社群的代表人物所主導. 這群與主題相關領域或社群領導者（例如在該領域有經驗並有影響力的意見領袖）組成促進小組(catalyst group), 透過對話，是治理網站的主要決策者. 政府相關部會的主，也是促進小組成員4

其加入有助於國家法規範與社會規範之間的戶生性，有如前述。與主題相關的社福團體代表,也是促進小組成員之一.社福團體則負責將治理網站與社會網絡充分聯繫. 如何透過治理網站的設計以及相關資訊技術,協助各類型治理網站參與者能有效率地運用該網站,將難以處理的社會情境反映出來; 另一方面,經由多面向（multi-perspective）專業對話形成的行動方案, 能透過社福團體帶到社會網絡的各個角落,是治理網站運作成功的第一個挑戰.

對話是治理網站重要的一環. 對話的品質, 包括參與者的代表性, 對話者的互為主體性（inter-subjective）。 首先，如何鑑別對話的品質,便是一項十分重要的研究課題。這方面國際間文獻的探討, 尚不深入.本計畫目前提供促進小組瞭解治理網站上的對話，並可以經由增加某項專業領域（如法律）志工，進入某項對話，以改善對話品質。這種得以運用網站工具, 選擇適當志工人選, 加入某項網路對話, 以協助對話之進行的作法，深具原創性，其實做效果如何，則有待進一步觀察。至於客觀評估對話品質之研究, 有待日後與國際合作計畫進行時, 透過跨領域的學術合作,再進一部深入研究.

綜合言之，本計畫所採取的方法，注重同時在基礎理論，制度理論，以及治理平台實作三方面，同步進行。

5.結果與討論

依據計畫先前的規劃。本計畫並在本學期，利用報告人開設：法與資訊課程，有六十多名大三，大四學生，以及兩名碩士生參與修習，報告人運用發展中的治理平台，做為學生分組報告的各自討論平台，並在學期中之後，開放該平台，讓各組學生得以觀察其他小組的討論以及報告大綱的形成，並做為課堂上互動，以及討論的延續，初步收到良好的效果。

執行此計畫兩年中，完成兩篇學術論文，均發表於國際研討會。第一年論文提出治理網站設計原則。強調治理網站應當由深具經驗的相關跨領域領導者帶領，主動引導，協助，治理網站對話的進行，互動式引導主題發展，並協助解決議題發展期間的爭議。第二年論文則注重治理網站基礎理論的發展。

實做的治理平台用於課程並支援數位典藏計畫上的實驗。惟並未能夠實際用於H1N1之防治。該議題過於敏感，相關單位無意願引領風氣之先，率先使用此一平台，是主要原因。

6. 計畫成果自評

本研究成果可分為理論，制度以及網路平台實做三方面。
理論部分：本計畫針對公共領域的重要理論，Habermas的程序性典範，提出批判。habermas co-originality理論，指出公自主與私自主之間的互生關係。Habermas公共領域的架構，近年來，也有從國家立法的模式，轉型為網絡式，主張公共對話與參與，遍及行政立法與司法各個環節，分散式的公共領域（distributed public sphere）得以形成。報告人認為這些轉型都是正面的。然而，這項發展，卻更使得 Habermas 在Between Facts and Norms一書，裁判理論一章，以application discourse強化裁判論述性一節，顯得難與其整個理論相連。報告人認為，habermas若能正視訴訟外爭議解決的論述架構，應當會使其分散式公共領域理論上更為融貫，實踐上也更能引領變革。此一論文發表於2011年德國法蘭克福舉行之國際法哲學大會，電子出版於法蘭克福大學機構典藏資料庫。

制度面，本計畫運用過去國科會計畫成果，以Alexy 以及Peczenik發展出的論述融貫，作為評估論述品質的客觀依據。與國外研究團隊交流時，發現這方面十分受到需要，日後值得進一步發展。

網路平台實做部分，本計畫完成平台原型。惟在試圖將該平台付諸實際社會上實驗上，遭到困難。相關主管機關配合意願不高。報告人利用相同平台，卻時代動另一計畫，將該平台用於高中生霸凌法律表達競賽。這部分，請進一步參考報告人執行國家型數位典藏計畫之報告。

綜論之，本計畫在理論，制度以及平台建置方面進行順利。遭遇最大的困境還是整個大環境方面，認識到電子參與重要性不足，這是各國面臨的共同困境。本計畫也試著找到可行的突破性模式。曾經透過其他計畫的執行，例如經濟部委託資策會執行廠商智慧財產管理認證機制。本計畫向執行廠商介紹如何利用此計畫所發展平台，協助廠商提供其下游協力廠商，共同參與認證機制，並利用此平台降低學習門檻，獲得好評。惟整體發展上，

仍面臨誘因不足的缺陷。本計畫將持續努力說明，推廣，也注意其他國家團隊的作法。

附件一

Toward a General Design for e-Participation: Multi-partiality, Context Reflection, and Dialog Management

Chen, Chi-shing
cschen@nccu.edu.tw

Abstract

Whether e-participation will make a difference, or it is simply business-as-usual, except internet is involved, is still a debated issue. This paper believes that if we can catch the three essential elements of e-participation, i.e. multi-partiality, context reflection, and dialog management, e-participation can really make a needed difference. How to use an e-participation web discussed in the paper to improve the regulation of sexual harassment is demonstrated in the end.

Keywords: e-participation, multi-partiality, context reflection, dialog management, sexual harassment, digital copyright

1. Introduction

Using internet to expand the civilian participation to the regulatory process has been an attractive idea. After years of experimenting, however, whether e-participation can really make a difference is still not clear. A workshop was devoted to this subject in a recent conference [1].

In an empirical study, Stanley and Weare found broader representation was achieved as a result of the adoption of an online forum in a proposal for future change in highway traffic regulation. Drivers who were traditionally ignored in a paper based commenting process for making highway rules and regulation did voice their valid concern for the condition of the road in the online dialog forum [2]. However, in the legal field, this debate ranges from an optimistic view [3] to a cautious one [4] [5].

I believe the real issue lies in whether we are willing to seriously reexamine the traditional idea of the law, and develop the e-participation in a new legal paradigm that emphasizes human interaction, social dialog, and the context of the application of the law [6]. In the following section, I present three basic elements I believe is critical to the success of e-participation. They are: multi-partiality, context reflection, and dialog management. I would like to argue that these three elements are necessary for deriving a general design of e-participation.

The general design discussed in the paper is based on an ongoing e-participation design work that is in its initial stage. Many detail design decisions are still to be learned and explored. The purpose of the paper is really to test the three basic design ideas discussed in sections 3 - 5. Before I deal with the design ideas, However, I want to discuss the legal theoretical basis for these ideas first. Please refer to [7] for a prior and detail analysis of the legal theory discussed in the next section.

2. Legal Theoretical Basis

There is a steady movement of the legal thought moving away from a top-down and command-and –control idea of the law, toward a bottom up and dialogical one. The advent of the internet age seems only to require speeding up the process.

In addition, when we think of law, we usually think of a system of rules and regulation laid down by the legislative, administrative and judicial law making bodies, what we call state-made law. As the bottom up, or governance, idea of the law receives more and more attention, what comes with this development is the admission of an added dimension of the law, the so called social norms. In other words, law is made up of the state-made law as well as the social norms. They are, at the same time, in a complementary relationship.

Sturm calls such an idea of governance, the institutional citizenship [8], which also derives many important design principles discussed in the following sections. Generally speaking, institutional citizenship represents a movement to bring democracy from a national level to the institutional level; partial views within an institution ought to be equally treated. Participation means that each and every partial view should be able to be raised, exchanged, and genuinely considered. In this way, the condition of multi-partiality could be met, and the basis of legitimacy for social norm derivation could also be reached.

With this general development of the legal thought in mind, this article can examine the three basic e-participation design principles in turn.

3. Multi-partiality

The contemporary society is known for its pluralism, multi-partiality essentially tends to reflect this social reality which is valuable. For any designer of an e-participation system, multi-partiality requires she understand that for any issue, there exist multiple voices and interests in the society. And it is the first priority for an e-participation system design to include all the different views on the issue as best as one could.

Since different point of views may usually derive from different personal experience, therefore people holding different jobs that are related to the issue, or people belong to different associations that would like to express certain related view point regarding the issue, are usually the groups worthy of examining first.

Since each group related to the issue may hold only part of the knowledge needed to the resolution of the issue; to be able to include as many social groups related to the issue tends to approximate an overall community possessing the full knowledge necessary for the resolution of the issue. Likewise, the inclusion of as many related groups as possible makes the final acceptable resolution scheme more legitimate. Both the criteria of epistemology and legitimacy point to the importance of full representation of groups with different viewpoints.

In order to make the participatory process effective and manageable, a core cluster of catalysts selected from all

groups that are involved in the e-participation process should be elected and form an important managerial board. The selection process itself is indeed a research issue needs be resolved, which I am not ready to discuss at this initial stage of coming up with a general design for e-participation. Here, we can simply select the persons that are considered most knowledgeable of the issue and who has demonstrated leadership during the development of the issue.

According to Sturm, catalysts are “information entrepreneurs and bridge builders at pivot points that can leverage change. The need for their role stems from the institutional underpinnings of persistent bias.” They “are individuals who operate at the convergence of different domains and levels of activity. They leverage knowledge, ongoing strategic relationships, and accountability across systems.” And a core group of catalysts “places individuals with knowledge, influence, and credibility in positions where they can mobilize institutional change. [8]”

Once we have all the groups related to the issues and the catalysts that can best mobilize the needed changes in place, we still need the basic principles direct the interactions on the participation web to reach a resolution scheme that is acceptable. In the following two sections, I discuss context reflection and dialog management that are helpful for reaching such goal.

3. Context Reflection

Context reflection first acknowledges that facts related to the issue are imbedded within context. These contexts are important and should be kept intact, in order to effectuate the needed reflective efforts throughout the participation. Adequate disclosure of the identity of the participants is therefore inevitable. As a consequence, how to maintain privacy and trust of the participants becomes a real challenge for the success of the e-participation.

Context reflection requires a multiple and network of groups as well as discussion forums form the participation web, not a simple and single group or discussion forum where everyone joins. This does not mean that one participant can join only one group and discuss at only one forum on the participating web, and she also must stay in the same group throughout the whole participating process. As discussed in the next section, based on primarily the rule of mutual consent, any participant or group of participants can join other groups for discussion. Anyone or any group can also invite participants from other groups. Catalysts in the core group may also initiate such change, on the basis of mutual consent.

I believe context preserving is crucial for keeping track of the migration of the interaction pattern throughout the participation process. Discussions on the web may be conducted in the general forum of the web where all participants can join; or it can be conducted locally within a specific group on the web. Members of the core group have the privilege to observe all communications on the web, in order to detect any insufficiency of information, knowledge or perspective that may prevent the dialog become a fruitful one in terms of participation. A macro view of the whole participation may be obtained as a result.

The emphasis on context reflection also indicates the requirement of strong involvement of the social, public interests groups in the participatory process. Not only representatives from the social group should be in the catalyst

group, social workers are also vital to bring the e-participation web to the related parties in the society, provide consultation to the public, and raise controversial issues that need attention from the core group.

Although, physically speaking, a participation web can be reached by anyone in the world having access to the internet; there is no natural match between a particular participation web and parties that may share similar interests in the public. Social groups can serve as the vital bridge linking the web and parties of interests, since they are part of the social network show concern of the issues discussed in the participating web. In a sense, the participating web can be viewed as the tool available for the social groups to provide their help more effectively.

4. Dialog Management

Dialog is the fundamental element of the participation web. Its purpose varies, and could be for voice advancing; idea exchange; dispute settlement; information provision; or knowledge transfer. Dialog management on the web is critical, and how to shape the discursive structure of the web, adequately involve relevant parties to engage web dialog, and build up an environment of trust for the actual exchanges are all factors contributing to the success of the participation web.

The catalyst group is primarily responsible for the management of web dialog. The all inclusive character of the core group is meant to approximate needed multi-partiality perspective. Decisions based on sufficient dialog among members in the core group are therefore the basis for claim for epistemology and legitimacy of the participation web. Members of the core group are also responsible for diagnosing any deficiency in the communication on the web. Such defect may be due to insufficient information or knowledge; unconscious unequal relationship due to embedded pattern of interaction.

Under a general principle of mutual consent, new members may be added to a discussion forum; a local discussion within a specific group may also be invited to the general forum where all participants of the web can join. These dialog management mechanisms are primarily based on the following two theories.

4.1 Structural Holes

The idea of structural holes believes that people in the society tend to get together to form groups; people as well as groups are associated with each other and form networks which are again the basis of the overall social network. A structural hole comes into being "[w]hen two networks are distinct and lack ties to each other, the gap between them are a structural hole. [9] [8]" The existence of a structural hole indicates partiality may dictate the interaction or communication. The general guideline of multi-partiality suggests that introduce more perspectives are needed to amend the insufficiency as the result of such hole.

4.2 Discursive Coherence

In a participating web, the issue under investigation is the focus of the whole web activities of exchange. Various theories and plans of action may be brought up during the interactions and we therefore need objective criteria to

measure the acceptability of any one of these theories or plans of action. Coherence is one of such measurement.

Generally speaking, coherence asks first that the set of statements themselves supporting a certain theory or plan of action must not be inconsistent, i.e. no logical contradiction between any two statements within the set of statements supporting a certain theory or plan of action. In additions, once all statements pass the contradiction test, they must also demonstrate some common value to hold them together. If some statements tend to suggest different purpose or value and cannot be added to the rest of the statements to show an overall meaning or value, the theory or plan of action cannot claim coherence and thus is poorly justified as the candidate to be acceptable by all participants of the e-participation web.

Discursive coherence further claims that the supporting structure of all statements justifies a certain theory or plan of action reflects the level of coherence of the theory or plan of action. The number of supported statements, the length of the statements; the length of the chain of reasoning, if statements refer to each other and form a reasoning chain; and the number of connections between various supportive chains are all objective measurement for the level of coherence of a particular theory or plan of action.

In this paper, I do not intend to discuss how to measure discursive coherence on the web, technically speaking. Here, I believe discursive coherence is an objective criteria available for the members in the catalyst group to identify where in the web may have need for help to make the discussion or interaction more effective in terms of exploring the issues the web is studying.

5. An Example in Practice

In this section, a design based on the general principles discussed in the previous sections is introduced. The issue to be explored is sexual harassment.

First of all, a group of catalysts is formed, including key researcher, government official, social worker, and human resource manager, people that have demonstrated leadership in sexual harassment law making and made progress in sexual harassment protection in their work. The web provides tools for the core group to exchange opinions, make decisions related to the web management, especially the dialog management discussed in the previous section. A document archive is also managed by the core group, containing materials related to sexual harassment rules and regulation, and other information and knowhow for individuals or companies to prevent sexual harassment before hand; or resolve sexual harassment disputes afterwards.

In addition to the forum attached to the catalyst group for internal discussion; a forum, also managed by the catalyst group, is also created for all participants of the web to exchange ideas and views. The document archive is accessible by all participants, and any document in the archive can be commented and/or linked to the discussion in the forum of the web.

Any company can apply for participation to the web. Once completing the registration, a web space is reserved for the company. Members of the company can come to the web, either present her/his view on the overall forum

that all participants can access; or on the company forum where only her working associates can interact.

It is a hypothesis that the catalyst group can have meaningful interaction with all companies joining the web. As an experiment, all discussions on the company web are transparent to the catalyst group. On a mutual consent basis, the catalyst group can introduce new participant to the dialog on the company web, if the catalyst group believe that will help such dialog become more productive. The company can certainly also ask the catalyst group to send someone for help. Wherever interesting talks are developed, either on the web forum, or the forum on one of the company web, the catalyst group can ask to move the discussion to other forum to include more people to the discussion. The catalyst group can also choose to introduce the same topic of discussion to other forums on the web.

The catalyst group can also develop hypothetical harassment cases and introduce them to a company to activate a discussion. This test is also meaningful for the company to examine reflectively their own infrastructure and procedure in response to a sexual harassment. Members or someone designated by the catalyst group can then join the company web to comment or make suggestions to the company to improve their sexual harassment mechanism. A certification system can also be developed in the future to accredit companies with sound sexual harassment prevention and dispute resolution institution.

Starting with company webs, the system can involve government, academic or educational institutions, and other groups of the society to join the sexual harassment e-participation web.

6. Conclusion

This paper did not explore the potential for new research and scholarship of the e-participation web discussed. Many interdisciplinary research issues need further developed. For example, the web discussed is more of a knowledge transfer web. If serious difference of opinions occur on the company or even the catalyst group, how the web approach such disputes and what mechanism can be developed to response to those disputes?

The main purpose of the paper is to test the basic design element discussed in the paper. More research and experimental effort are certainly needed in the future.

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附件二：

ChiShing Chen, Taipei/Taiwan*

A Co-original Approach towards Law-Making in the Internet Age

Abstract: There is an increasing interest in incorporating significant citizen participation into the law-making process by developing the use of the internet in the public sphere. However, no well-accepted e-participation model has prevailed. This article points out that, to be successful, we need critical reflection of legal theory and we also need further institutional construction based on the theoretical reflection.

Contemporary dominant legal theories demonstrate too strong an internal legal point of view to empower the informal, social normative development on the internet. Regardless of whether we see the law as a body of rules or principles, the social aspect is always part of people's background and attracts little attention. In this article, it is advocated that the procedural legal paradigm advanced by Jürgen Habermas represents an important breakthrough in this regard.

Further, Habermas's co-originality thesis reveals a neglected internal relationship between public autonomy and private autonomy. I believe the co-originality theory provides the essential basis on which a connecting infrastructure between the legal and the social could be developed. In terms of the development of the internet to include the public sphere, co-originality can also help us direct the emphasis on the formation of public opinion away from the national legislative level towards the local level; that is, the network of governance.[1]

This article is divided into two sections. The focus of Part One is to reconstruct the co-originality thesis (section 2, 3). This paper uses the application of discourse in the adjudication theory of Habermas as an example. It argues that Habermas would be more coherent, in terms of his insistence on real communication in his discourse theory, if he allowed his judges to initiate improved interaction with the society. This change is essential if the internal connection between public autonomy and private autonomy in the sense of court adjudication is to be truly enabled.

In order to demonstrate such improved co-original relationships, the empowering character of the state-made law is instrumental in initiating the mobilization of legal intermediaries, both

* Distinguished Professor, College of Law, National ChengChi University, Taiwan; SJD, LLM, University of California at Berkeley; MS, Computer Science, University of North Texas, USA.

[1] A substantive theory of co-originality is presented and recommended by Rummens. See Rummens, S., 2006, Debate: The Co-originality of Private and Public Autonomy in Deliberative Democracy, The Journal of Political Philosophy. Vol. 14:4, pp. 469–81. This article intends to bring co-originality into the network world of the internet based on the model of governance. Governance here refers to regulations that emphasize a bottom- up and not top-down approach and a dialogical instead of command and control approach. See Lobel, O., 2004, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought. Minnesota Law Review, Vol. 89, pp. 342– 470.

individual and institutional. A mutually enhanced relationship is thus formed; between the formal, official organization and its governance counterpart aided by its associated 'local' public sphere. Referring to Susan Sturm, the Harris v Forklift Systems Inc. *(1930) decision of the Supreme Court of the United States in the field of sexual harassment is used as an example.*

Using only one institutional example to illustrate how the co-originality thesis can be improved is not sufficient to rebuild the thesis but this is as much as can be achieved in this article.

In Part Two, the paper examines, still at the institutional level, how Sturm develops an overlooked sense of impartiality, especially in the derivation of social norms; i.e. multi-partiality instead of neutral detachment (section 4). These two ideas should be combined as the criterion for impartiality to evaluate the legitimacy of the joint decision-making processes of both the formal official organization and 'local' public sphere.

Sturm's emphasis on the deployment of intermediaries, both institutional and individual, can also enlighten the discourse theory. Intermediaries are essential for connecting the disassociated social networks, especially when a breakdown of communication occurs due to a lack of data, information, knowledge, or disparity of value orientation, all of which can affect social networks. If intermediaries are used, further communication will not be blocked as a result of the lack of critical data, information, knowledge or misunderstandings due to disparity of value orientation or other causes.

The institutional impact of the newly constructed co-originality thesis is also discussed in Part Two. Landwehr's work on institutional design and assessment for deliberative interaction is first discussed. This article concludes with an indication of how the 'local' public sphere, through e-rulemaking or online dispute resolution, for example, can be constructed in light of the discussion of this article.[2]

Keywords: citizen participation, law-making, internet, public sphere, e-participation, theoretical reflection, institutional construction

I. Introduction

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[2] What is more, the persistent judges' point of view seems to indicate that real dialogs among participants do not present the whole picture in discourse theory; any individual discourse participant may also rise up to a public role and express to others from the point of view of the whole community. For example, a judge express to the public through her decisions. Public autonomy hence does not simply means participating in public opinion-forming and law-making; it may also point to the occasions where public decision-makers reach their decision as well. Ronald Dworkin, once in his speech, explained the idea of sovereign as: any one in her capacity to affect others. He meant to point out that equal concern and respect ought to be the sovereign virtue. In other words, anyone making decisions affecting others' lives ought to proceed with equal concern and respect in mind. Whether there is a need and how to incorporate this role of decision-making into the discourse theory where the role of discourse participant reigns is an issue I would like to, but cannot pursue.

The Internet is a medium that provides users with great autonomy. Anyone can decide whether to access the net and when to do so. Anyone can decide with whom he or she wants to connect and by what means. Unlike the mass-media where the majority of people can only receive information, the Internet is bi-lateral. Communication on the internet is facilitated by the computer; the possibilities in the design of both hardware and software need only be limited by the human imagination. The internet, therefore, would seem to offer an effective public sphere where participants can join freely and exchange ideas and information. This should result in enhanced mutual understanding and it would seem to be a natural process to submit universally acceptable proposals for certain actions. However, the reality seems to paint a different picture; at least for the present.

In this paper, I will restrict my discussion, especially the theoretical aspects, to the public sphere of law-making, specifically, adjudication. I would like to show that if we examine the major theoretical developments, such as the discourse theory of Habermas, we will find that they lack the dimension that substantially connects the judicial and the social.[3] Habermas's theory is the most likely to accommodate a social point of view[4] since the theory is developed on the basis of communicative actions among interactive individuals.

To illustrate my point, I will use Postema's three layers of intersection between the law and social life where significant coordination problems are experienced. The first layer refers to the coordination problems involved in social interactions among law-subjects; the second layer refers to those between officials (like judges) and law subjects; the third layer refers to coordination problems among officials. Since adjudication is our focus, we will take a closer look at the second layer – the relationship between judges and law-subjects.

Coordination problems on the second layer, according to Postema, refer to the need for consistency. There needs to be mutual expectations between the judges and law-subjects so that in terms of their understanding of what to expect, there are no surprises. In other words, the effectiveness of the law is maintained because the understanding and expectations of the law subjects about what is legal is compatible with the judges' understanding and expectations.[5] Different legal theories place different emphases on the second layer of the coordination problems.

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[3] I am referring to Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), which will be discussed in later sections. Such empowering decisions are important for social interaction and dialog. This article believes that it is unfortunate that such empowerment exists only in isolated practice and is ignored by the theory.

[4] I examined another social legal theory of Lon Fuller, please see Chen, C., 2011, Greek Idea of Justice and the Contemporary Need to Expand the Internal Legal Point of View, in Liu and Neumann ed., Justice – Theory and Practice, Nomos, pp. 41-59. The discourse theory of Jürgen Habermas is better developed and more complete than Fuller's. I hope the internet could be an opportunity for us to construct the law responsive to our society and resolve value conflict legitimately in a discursive sense.

[5] Postema, G., 1982, Coordination and Convention at the Foundations of Law, The Journal of Legal Studies, Vol. 11:1, pp. 165-203; esp. 186-93. To raise the structure of a three-layer coordinating problem involved in law making, Postema "argue[s] that the law-identifying, law-applying, and law-interpreting activities of both officials and lay persons essentially involve a complex form of social interaction having the structure of a coordination problem – or, rather, of an interrelated, continuous series or overlapping network of coordination problems." Id., at 187.

In the internet age, more channels of communication exist which could improve the consistency of the mutual understanding and expectation between the courts and lay people. In view of this, this article advocates a greater degree of interdependence between officials and lay persons and promotes, both theoretically and institutionally, the facilitation of this interdependence so that the law-making efforts can be enhanced. I believe this is the best way of understanding co-originality even though such interpretation may not be what Habermas had in mind.

II. The Co-originality Thesis

I believe that the co-originality thesis, central to the discourse theory, (with some amendments) can resolve all the coordination problems in the three layers of Postema's analytical framework as discussed in the previous section. In the next section, I will analyze and provide a critique of co-originality and elaborate on the possibility of a better version.

Habermas introduces the thesis of co-originality in a series of specifications, each followed by a concrete level of the specification.[6] At the conception level, rights in a post-conventional society, unlike that of Plato's or Kant's, do not derive from metaphysics. A post-conventional society "presuppose[s] collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens." As a result, subjective rights and objective laws are co-originally shaped; i.e. mutually generating and enhancing. None of them can simply be deduced from metaphysical norms.[7]

The discourse theory removes the omnipresence of metaphysics. This is certainly a giant step for mankind. However, the theory needs to be justified by a new scheme. Habermas responds with another round of co-originality by demonstrating the co-original relationship between moral and civic autonomy. What justifies both is the principle of discourse;

Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.

What he basically means is that one can only claim moral or civic autonomy through a discursive process where equal participants join and rationally discuss the effects and acceptability of their joint decision. The moral and civic sphere delimits the area in which the action norms rule; the moral sphere is not limited by time and space while the civic sphere is.[8] If one further zones into the civic sphere, one finds another layer of the co-original relationship.

[6] See Habermas, J., 1996, Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy, trans. Rehg, W., MIT; esp. pp. 88-128.
[7] Id., pp. 88-9.
[8] Id., pp. 107-8.

In a post-conventional or modern society, the law is the medium, and the only medium, which coordinates the whole of society. If rights are what autonomous citizens grant each other, as shown in the first level co-originality, we can further derive civic autonomy in such a law-coordinated society by ensuring the addressees of the law in such society must at the same time be the addressers of the laws. Habermas calls this the co-originality between the principle of democracy and legal code or legal form.[9]

The last level of co-originality, which is most important for our purpose here, is what Habermas describes as the co-originality between civic (public) autonomy and private autonomy. Since we are both the addressers and the addressees of the law, we are at the same time private persons and citizens. The former refers to us being protected by the law to pursue whatever life we see best; the latter refers to our roles in joining the public in the legislative process. Neither basic rights nor popular sovereignty can claim priority because they complement each other. It also means that we can secure our protection by the law only if we can and do participate in the forming of public opinion where legislation is based.[10]

I want to raise an issue associated with the co-originality thesis. It has to do with the seemingly simple circularity nature of the thesis, i.e. we are protected by the law, which is enacted by ourselves; or we are legislators of the law that protects us as private persons. The reality, however, seems to suggest that few of us can be involved in legislative law-making, compared to adjudicative or administrative ones. I want to use adjudicative law-making to illustrate my point.[11]

Authentic communication is at the very core of Habermas's discourse theory. The performance of all participants of such communication must also demonstrate openness to newcomers to the communication. Such openness includes listening to what others have to say and being willing to change position in the process of interaction. It requires a frank sharing of one's own feeling and perspectives. These informal and diffused networks of communication, which can be understood to be the public sphere, will interact with and influence "formally organized public will and opinion formation processes first embodied in the legislative and judiciary complex."[12]

Based on her exploration of the development of Habermas's idea of the public sphere, Maia believes there is a major transformation of the idea of the public sphere in the writings of

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[9] Id., pp. 121-2.
[10] Id., pp. 127.
[11] This article, to me, follows naturally from my previous work which criticizes the theory of adjudication of Ronald Dworkin from a social interactive perspective based on Lon Fuller. See Chen, C., 2011. Again, following up the point I raised in supra footnote 2, we are not always participants in a discursive process; equally important is our capacity to be public servants who need to make decisions affecting others, based on our belief that shows all circles of the society, including the society itself, in its best light. Discourse theory cannot only deal with participants of dialogical communities.
[12] Please see the introduction to the book "Between Facts and Norms" in Habermas, J., 1999, Introduction, Ratio Juris, Vol. 12:4, pp. 329-35, 33.

Habermas; *Between Facts and Norms* represents a replacement of the bipolar model of state v. civil society in the *The Structural Transformation of the Public Sphere* by a decentralized network metaphor, where "discursive arenas spread throughout civil society."[13]

However, such a praiseworthy adjustment was not fully reflected in Habermas's discussion of his theory of adjudication in *Between Facts and Norms*. The network model of public spheres in today's society indeed better reflects the reality of the emerging network society, where the internet and its associated information technologies represent one of the major sources of influence. Such networks in the public sphere are not only much needed, but they can also be designed and constructed by multi-disciplinary experts, under the name of e-participation, e-government, e-rulemaking, etc. What is really lacking is a well-founded theoretical basis to guide the institutional design. The co-originality thesis is one of the best of such theories which can reflect and provide the guidance for the transformation. However, I believe there is significant room for improvement before Habermas's theory of adjudication can live up to a co-originality thesis that can assume the transformation task.

III. Co-original Adjudication

Habermas's theory of adjudication is controversial, especially the idea of application discourse he adopted from Guenther.[14] Habermas supports much of Dworkin's theory of adjudication but criticizes Dworkin's judges for conducting monologues.[15] Habermas reconstructs the theory of adjudication with his discourse theory.[16] Using the ideas of Klaus Guenther, Habermas believes that there are two kinds of discourses involved in adjudication; the discourse of validation and the discourse of application.

> "In legal discourses of application, a decision must be reached about which of the valid norms is appropriate in a given situation whose relevant features have been described as completely as possible. This type of discourse requires a constellation of roles in

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[13] Maia, R., 2007, Deliberative Democracy and Public Sphere Typology, Studies in Communication, pp. 69 – 102, 74.

[14] Alexy, R., 1996, Habermas on Law and Democracy: Critical Exchanges: Law's Reconstruction, Justification, and Application: Jürgen Habermas's Theory Of Legal Discourse, Cardozo L. Review, Vol. 17, pp. 1027-34 (Habermas's attitude towards coherence is ambiguous; his theory of principles creates many questions; and the idea of the discourse of application is at the same time correct, empty, and easy to misunderstand); Michelman, F., 2002, The Problem of Constitutional Interpretive Disagreement: Can "Discourses of Application" Help? In Aboulifa, Bookman and Kemp, ed., *Habermas and Pragmatism*, pp. 113–38, Routledge (reasonable interpretive pluralism poses problems for Habermas's constitutional rule application and renders his constitutional contractarianism incomplete. Even Habermasian discourse of application deviates somewhat from Guenther; and Shih, W., 2003, Reconstruction Blues: A Critique of Habermasian Adjudicatory Theory, Suffolk University Law Review, Vol. 36, pp. 331-90 (Habermas's theory does not meet the criteria with which he invalidates other theories of adjudication, and it cannot and does not even meet his own commitments). But challenging Lefebvre's reading of Habermas's theory of adjudication, Peterson believes in the theory of adjudication of Guenther, upon whom Habermas relies heavily, norms are creatively generated or modified in application discourses. See Peterson, V., Creativity in Application Discourses, to be published, manuscript on file with the author.

[15] Previously, I examined this criticism in detail in Chen, C., 2011, pp. 44, footnote 8 and accompanying texts.

[16] Habermas, J., 1996, pp. 172; 217-9; 229; 231; 235-6. .

> which the parties (and if necessary government prosecutors) can present all the contested aspects of a case before a judge who acts as the impartial representative of the legal community. Furthermore, it requires a distribution of responsibilities according to which the court must justify its judgment before a broad legal public sphere. By contrast, in discourses of justification there are in principle only participants."[17]

In a specific case, no one can foresee all the future developments and the validity of the decision can never be realized. This is because the discourse of justification requires participation of all the parties affected by the decision regardless of time and space. Two qualifications therefore must be the result.

Firstly, one can only determine the validity of a specific case by considering the relevant facts and norms of the case provided by a constellation of the roles actually involved in adjudication, i.e. the application discourse only needs to justify the appropriateness of the decision by considering all the aspects voiced by the affected participants of the adjudication. Secondly, the impartial judge, representing the "the perspectives of uninvolved members of the community",[18] merges the application discourse and the justification discourse by using the civil or criminal procedural codes to mitigate the strategic nature of the adversarial behavior of the litigating parties.

Indeed, if we use the same criteria to evaluate the judges of Dworkin and Habermas, we would find that they are both conducting monologues, since both of the judges are isolated from the society and are dealing, equally impartially, with the case at hand. Dworkin's judge may score more by explicitly admitting related chains of precedents into consideration. In this paper, we want to focus on the area to which Habermas[19] did not pay sufficient attention. Once improved, we can expect a true thesis of co-originality that is urgently needed to guide the development of the network of the public sphere connected to formal institutions, such as, but not limited to, courts and administrative agencies.

The core of the problem in Habermasian theory of adjudication lies in treating judges as both participant and decision-maker for the discursive community of the case at hand and the representatives of all involved in the social context affected by the decision of the case. I want to show that better models for mutual transformation do exist and need to be recognized and empowered by the judges.

A successful example can be found in an American Supreme Court case – *Harris v Forklift*

[17] Id., 172.
[18] Id., 229.
[19] Dworkin too, but this paper will limit the discussion to Habermas.

Systems Inc. (1993)[20](hereinafter, 'Harris'). This case can be used to show how the interaction between officials and citizens can be improved. (This is Postema's type-two interaction as discussed in the previous section.)

In the case of Harris, the judges re-affirmed an established principle by finding that sexual harassment was an instance of discrimination. In addition, Justice Ginsburg elaborated a reciprocal test: "[t]he critical issue, as Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

After the Supreme Court established that sexual harassment constitutes discrimination, Harris built on this definition by outlining "a framework that is capable of providing for dynamic interactions between general legal norms and workplace-based institutional innovation." At the same time, the court refused to substantively define what constitutes sexual harassment. It provided affirmative defense for the defendant companies that had done their best to institutionalize an effective internal protection scheme to prevent sexual harassment and fair dispute resolution mechanisms, in cases of real offense.

Harris is significant and, indeed, could legitimately serve as a demonstrative case where court decisions could empower and guide better social interaction to derive social norms by establishing legal principles while not providing substance for the construction of the principle. Courts could further provide incentives to the affected parties to actively search for outside help to meet the requirement of the law. Such a guideline is significant, since it directs attention to the examination of patterns of interaction and to other organizational, social, and cultural factors that may twist an interactional pattern into one that is biased but unnoticed.

In the Harris case and subsequent cases, the courts, while refusing to define what constitutes a hostile environment of sexual harassment have provided companies with an affirmative defense if they "exercised reasonable care to avoid harassment and to eliminate it when it might occur." Together, the courts have fostered both the need and an incentive for companies to open themselves to outside intermediaries, like lawyers, consultants, non-profit organizations, and insurance companies: the premise is that this kind of exposure would help the companies to institutionally regulate and prevent sexual harassment and the courts have encouraged or demanded that companies implement effective procedures for settlement of internal sexual-harassment claims. In this way, better practices should become more prevalent, since institutional internal data are accessible to intermediaries who would presumably be able to fully understand the problem. The pooling and the sharing of information, knowledge and experience among intermediaries has also improved society's focus on the issue.

Using Habermas's terms, the application discourse (which takes place inside the courts) and the justification discourse (which is affected by social dialogue and interaction taking place

[20] See supra note 2.

outside the courts) can be mutually enhanced by the courts initiating a relationship between the two and providing principled guidance for such interaction. Harris is just one model that can be used to establish a successful co-original relationship between the public and private sectors, in the sense of court adjudication. Innovative ways to further the co-originality cause is by no means limited by the Harris model.

IV. Efforts of Institutional Building for Co-originality

Harris is one institutional example that could enhance the thesis of co-originality. Its theoretical as well as institutional meaning is worth exploring. Especially, for discourse theory, the institutional level is not simply a stage of realization for the theory. Discourse theory is critically dependent on the performance intention of and the real communication conducted within a dialogic structure that needs to be objectively examined and evaluated.

> "For the justification of moral norms, the discourse principle takes the form of a universalization principle. To this extent, the moral principle functions as a rule of argumentation. Starting with the general presuppositions of argumentation as the reflective form of communicative action, one can attempt to elucidate this principle in a formal-pragmatic fashion."[21]

Alexy and Peczenik provided the concept of discursive coherence. This is worth considering as one of the criteria for a structural evaluation of communication.[22] The idea of discursive coherence is intended to be an improvement on Dworkin's idea of coherence,[23] which may be understood to be deliberative. Dworkin's theory requires that judges select the interpretation that sheds the best light on the law or makes it the most meaningful as a whole. This would apply during the stage of selecting relevant precedent sequences for the case at hand and later when the judge conducts the argument of justification.

Discursive coherence evaluates the degree of coherence by its observable supporting structure of statements: "The more the statements belonging to a given theory approximate a perfect supportive structure, the more coherent the theory."[24]Generally speaking, the more that statements support a theory, the more coherent the theory; the longer the chain of reasons belonging to a theory, the more coherent the theory; the more statements belonging to a theory are strongly supported by other statements, the more coherent the theory.[25]

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[21] BFN, 109.

[22] See Alexy and Peczenik, 1990, The Concept of Coherence and Its Significance for Discursive Rationality, Ratio Juris, Vol. 3, pp. 130-47 (1990). See also Peczenik, A., 1994, Why Shall Legal Reasoning be Coherent? ARSP-Beiheft, Vol. 53 pp. 179-84.

[23] Alexy and Peczenik, 1990, 131.

[24] Id.

[25] Id., 131-35; other factors include: number of conclusions which are supported by the same premise belonging to

This article believes that these criteria are important to not only gauge the effectiveness of authentic communication but also to evaluate the level of legitimacy of the decisions reached from claims made during authentic communication. In the Harris model, the communication of different claims would also be important for judges to consider when adjudicating related cases. Certainly, in an internet world, assuming these discussions would be conducted over the internet and be accessible to the courts. The institutional design of these real communications, whether an online dispute resolution, e-rulemaking, or for other e-participation settings, is being actively pursued in academic circles, as discussed in the following sections. Theoretical guidance, like an improved co-originality thesis, and institutional design principles derived from Harris and discursive coherence are vital for the success of these new academic endeavors.

Sturm's concept of multi-partiality[26] is also relevant here. Multi-partiality challenges the monopoly of detached neutrality as the basis of legitimacy in the legal world. The latter represents an aspect of a persistent internal legal premise that the decision maker, such as a judge, must be detached and neutral to both parties in the case at hand. However, the process of deriving social norms through the interaction of the public as represented by various groups and by individuals as representative of the social world, lacks the relevant legitimacy base. Sturm suggests multi-partiality as a possible solution. Certainly, Sturm's challenge also goes deeper. Not only is detached-neutrality under dispute, but she also confronts the unitary concept of the law based on a dominant internal legal point of view. Law-making ought to be by the cooperation of and interaction between state-made laws and social normative derivation processes. These two law-making processes are co-original.

Multiple perspectives do exist in the social world; their existence should be treated as a virtue and not a vice. We need an institutional design in which every perspective can be considered and be subjected to thoughtful examination. Such examination should be an obligation. In other words, we could build participatory accountability that requires "ongoing examination and justification to participants and a community of practitioners".[27] It is inevitable that these participants may very well hold different perspectives due to their different professional experiences, academic disciplines, or values. Those involved with conflict resolution should also "subject their analysis to the scrutiny of their peers and to explain and justify their choices as part of doing their work."[28] Multi-partiality therefore opens up a new source for the cultivation of

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the theory in question; number of priority relations between the principles related to the theory; number of reciprocal empirical relations between statements belonging to a theory; number of reciprocal analytic relations between statements belonging to a theory; number of reciprocal normative relations between statements belonging to a theory; statements without individual names a theory uses; number of general concepts belonging to a theory, and the higher their degree of generality; resemblances between concepts are used within a theory; concepts a given theory has in common with another theory; number of individual cases a theory covers; fields of life a theory covers. id., 135-42.

[26] Sturm and Gadlin, 2007, Conflict Resolution and Systemic Change, Journal of Dispute Resolution, Vol. 2007:3, pp. 1 – 63.

[27] Id., 4.

[28] Id.

public norms; these public norms can derive from sources other than the traditional adjudication process.

> "They also emerge when relevant institutional actors develop values or remedies through an accountable process of principled and participatory decision making, and then adapt these values and remedies to broader groups or situations. ADR can play a significant role in developing legitimate and effective solutions to common problems and, in the process, produce generalizable norms."[29]

Another aspect of Sturm's theory is her contention that the involvement of intermediaries, both individual and institutional, is critical. Though more empirical research is needed, it is certain that in any community where social dialogue takes place, there will be obstacles. We cannot merely hope that multi-partiality will be successful.

Intermediaries are persons or organizations that function as bridges to connect different social networks. They can successfully bridge seemingly dichotomous groups such as the public and the private, the legal and the non-legal, the general and the contextual, and the coercive and the cooperative. Intermediaries can serve a vital function because they can pool information or knowledge and they can filter the context of the interaction without being influenced by embedded cultural, social, or organizational factors. The intermediaries usually build up their working relationships with multiple social networks in the institution. These long-standing connections provide the basis for communication and mutual understanding. The strength of the intermediaries who work within an organization lies in the fact that they can counteract the obstacles such as traditional institutional practices. They have access to external intermediaries, whether organizations or individuals, and can pool information, thus obtaining cross-contextual perspectives.[30]

One of the deliberative democracy research communities is also actively pursuing the institutional issues associated with deliberative democracy. At the end of this section, Landwehr's recent works[31] is examined based on the discussion in this paper.

Landwehr first points out that "[t]he success of deliberative democracy has in the last two decades shifted the focus of democratic theory, and increasingly also of empirical political

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[29] Id., 3.

[30] These discussions of Sturm's ideas are based on her three empirical studies published in Sturm, S., 2001 (empirical study of three major American corporations' effort to invite outside help to build internal infrastructure for sexual harassment prevention and dispute resolution); Sturm, S., 2007 (empirical study of the dispute resolution center inside the American Institute of Health (NIH) to resolve internal conflicts); and Sturm, S., 2006, the Architecture of Inclusion: Advancing Workplace Equity in Higher Education, Harvard Journal of Law & Gender, Vol. 29:2, pp. 247-334 (empirical study of the ADVANCE program administered by the American National Science Foundation (NSF) to advance workplace equity in Higher education).

[31] See Landwehr, C., 2010, Discourse and Coordination: Modes of Interaction and their Roles in Political Decision-Making, The Journal of Political Philosophy, Vol. 18:1, pp. 101–22; and Landwehr and Holzinger, 2010, Institutional Determinants of Deliberative Interaction, European Political Science Review, vol. 2:3, pp. 373–400.

science, from matters of aggregation and regulation towards communication."[32] Landwehr believes that as decision-making processes always involve both informative and distributive aspects, we need to do justice to both discursive and coordinative issues involve in these processes. The informative aspects incline the decision-making process towards discourse; the decisions reached will inevitably have a distributive impact on the affected people; this tends to drive the decision-making process toward coordination. This theory criticizes Habermas's discourse theory as it emphasizes discourse but lacks the coordination dimension. "In rare cases, coordination may be achieved through argumentation alone."[33]

Regarding the discursive dimension, Landwehr prefers

> "to use a notion … that is neither as normatively charged as Habermas's, which entails strong requirements of equality and freedom from coercive power, nor as encompassing as the Foucauldian. I suggest to describe interaction as discursive in so far as it has both public and dialogical qualities."[34]

A less rigid discursive requirement could, Landwehr believes, provide room for coordination, where reciprocity based on the basic principle of tit-for-tat reigns.[35]

To develop her balanced approach toward incorporating both discourse and coordination, Landwehr conducted an empirical study of two forums in Germany. These were constituted in response to an ethical debate of stem-cell research which had been triggered by a neurobiologist at the University of Bonn who submitted a proposal to the German Research Foundation in August 2000 for a research project using imported ES cells. One forum was a German parliamentary debate, which was celebrated as one of the parliament's finest hours; the other was a citizens' conference modeled after the Danish consensus conferences. The Speech Act Analysis (SAA) techniques were adopted to examine the hypothesis: "[t]he more discursive and coordinative communicative interaction is, the more preference change is likely to occur."[36]

This could be considered to be pioneering research. Landwehr found that the Bundestag debate did not qualify as discourse as it lacked dialogical interaction. The sequence of speakers was pre-determined according to the number of signatories and members took turns to speak, resulting in the division of speakers and listeners. The content of the speeches was typical of public monologue and the speeches were dominated by words such as 'to ASSERT' and 'to

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[32] Landwehr, C., 2010, 101.

[33] By being closer to discourse or coordination, Landwehr describes a total of four ideal-typical modes of interaction: discussion, deliberation, bargaining and debate. Id., 102-4.

[34] Id., 105. Baechtiger also finds one type of deliberation research now that is more flexible to the forms of dialog, emphasizing more on outcome than process; unlike the deliberation research approach based on Habermasian discursive logics. See Baechtiger, Niemeyer, Neblo, Steenbergen and Steiner, 2010, Symposium: Toward More Realistic Models of Deliberative Democracy. Disentangling Diversity in Deliberative Democracy: Competing Theories, their Blind Spots and Complementarities, The Journal of Political Philosophy, Vol. 18:1, pp. 32–63.

[35] Id., 105-7. However, Landwehr also notices a recent change in Habermas to leave more rooms for non-deliberative and non-democratic modes of political interaction, so long as the overall discursive structure remains both deliberative and democratic. Id., 119. See also the Habermas's work that Landwehr cites: Habermas, J., 2006, Does Democracy Still Enjoy an Epistemic Dimension? Communication Theory, Vol. 16, pp. 411–26.

[36] Id., 381.

ESTABLISH'.[37] The citizens' conference took place after the Bundestag had made the decision on the stem-cell matter which significantly reduced the coordinate nature of the forum.[38]

In light of the discussion of the co-originality thesis and associated institutional improvement, this article raises two issues worthy of further investigation. First, as demonstrated in Landwehr's study, legislative procedures are not ideal for empirical communicative studies. The maxim for scientific investigation is that if the problem is divided into manageable-sized portions, there is a higher likelihood of success. The highly strategic and indeterminate nature of legislative issues exacerbates the difficulties of such a study; it is difficult to anticipate reasonable results for the accumulation of information. For this reason, this article focuses more on governance, especially the interaction between the public authority (mainly the courts in this paper), and its mutually related public communities. Authentic communication in the local public spheres which deal with better defined and delimited issues may provide discursive experiences that are easier to analyze.

Second, the co-original nature of public and private autonomy between courts and its social counter-parts, as revealed in this article, may significantly reduce the academic burden of analyzing real dialogical communities. To mix the dialogical and coordinative dimensions in the study of a forum seems to blur the data by placing the two dimensions in a bipolar relationship. It may also be more difficult to exchange interpretations of the findings. In short, observing how a group conducts dialogue and how members of the group bargain with each other to reach joint decisions tends to lose the focus of our study.

Actually reaching a decision is not always desirable. If we can find out the structural determinants of a true multi-partiality public norm derivation process, we can know whether the end result of the political interaction, no matter whether a decision is reached or not, has a legitimate basis. Alexy and Peceznik's concept and criteria of discursive coherence have made a significant contribution to our progress in this area. We certainly will debate the question of what structural formation provides us with the confidence to affirm the legitimacy of the dialogic efforts and to what extent this occurs. It is anticipated that such arguments will result in progress.

The dialogical structural and formal research is especially important for the measurement of the legitimacy of the end result reached by the local public spheres. Such research is also critical to evaluate further decisions made by local authorities, courts and administrative bodies in response to the dialogic efforts of social political interactions. An example of this is in the context or e-rulemaking. If there is participation on the internet dialogue platform with people commenting and arguing about the rule-making proposal of an administrative agency, then the result reached by the dialogic public ought to be binding on the administrative agency which would be obliged to amend the rule accordingly. In essence, co-originality makes us understand that decisions reached by a dialogic community may have two public consequences at the same

[37] Id., 389-90.
[38] This is one of the three factors reducing the level of coordination, see Id., 392.

time; one is internal in nature and has to do with whether participants of the dialogue ought to accept and follow the decision reached; the other is public in terms of the impact of the decision and to what extent it ought to influence or change the other, especially formal organizations in their public decision making. There ought to be correspondence between the quality of the dialogue and its public influence.[39]

V. The Internet and Law-Making -- Conclusion

Though the introduction of the internet brought tremendously high hopes, so far, it has not brought about any major changes at the macro level, compared with other media.[40] From a bottom-up and dialogical point of view, which is what this paper emphasizes, e-participation is a general field with multiple approaches and use of different software tools. It is a field that is attracting great interests and it is showing rapid development.[41] Applications with a specific purpose, like e-rulemaking,[42] online dispute resolution,[43] e-petitioning,[44] etc. also keep progressing.[45] It is hoped the theoretical and institutional discussion in this paper can provide new thinking toward the development of these fields.

Overall, it is appropriate for Habermas to coin the discourse theory as a paradigm, following

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[39] I hope the discussion here can somewhat relieve Chambers' concern. See Chambers, S., 2009, Rhetoric and the Public Sphere. Has Deliberative Democracy Abandoned Mass Democracy? Political Theory, Vol. 37:3, pp. 323-50. Chambers raises a legitimate issue regarding mini-publics. "Mini-publics do not replace representative democracy, mass elections, or referendum campaigns; they supplement these other mass institutions. Unless we have a good grasp of how the broader democratic context can be shaped to compliment, or at least not undermine, deliberative experiments then many of the democratic advantages of mini-publics will be lost." Id., 331.This paper believes the bottom-up and dialogic approach of the governance model and its associated co-original theoretical as well as institutional research, specially the formal and structural analysis of the communication may represent a solid way to complement the mass democracy.

[40] Gerhards and Schaefer, 2010, Is the internet a better public sphere? Comparing old and new media in the USA and Germany, New Media & Society, Vol. 12:1, pp. 143–60 (Suddeutsche Zeitung, the Frankfurter Allgemeine, The Washington Post and The New York Times. These are the national quality dailies with the largest circulation in the two respective countries which were selected for the time period from 1999 to 2001, in which coverage on human genome research peaked worldwide. Every section of these newspapers is searched. On the internet, the same key words are used in the most widely used search engines in the two countries and only the top 30 results from each search engine are included in the analysis. The results indicate that internet communication is not equal to communication in print media.)

[41] Ergazakis, Metaxiotis and Tsitsanis, 2011, A State-of-The-Art Review of Applied Forms and Areas, Tools and Technologies for e-Participation, International Journal of Electronic Government Research, Vol. 7:1, pp. 1-19 ("[d]uring the past years, the e-Participation landscape has been growing and developing. Currently, there are many applied forms and areas of e-Participation. At the same time, there is a growing variety of tools and technologies that are available to enhance e-Participation").

[42] Farina, Newhart, Cardie, and Cosley, 2011, Rulemaking 2.0, University of Miami Law Review, Vol. 65, pp. 395-447; Schlosberg, Zavestoski, and Shulman, 2009, Deliberation in E-Rulemaking? The Problem of Mass Participation, in Davies and Gangadharan eds., Online Deliberation: Design, Research, and Practice, pp. 133 - 48, CSLI Publications.

[43] Turel and Yuan, 2010, Online Dispute Resolution Services: Justice, Concepts and Challenges, in Kilgour and Eden eds., Handbook of Group Decision and Negotiation, Advances in Group Decision and Negotiation, pp. 425 - 36, Springer.

[44] Jungherr and Juergens, 2010, The Political Click: Political Participation through E-Petitions in Germany, Policy & Internet, Vol. 2:4, pp. 131-65.

[45] It is hard to keep up to date in this fast advancing area. Previously, I reviewed these related areas under the common idea of e-Government. See Chen, C., 2011, Digital Copyright Law-Making and the Future Development of E-government, Soochow Law Review, to be published soon; especially section V., Reflexive DMCA and the Future Development of E-Government.

his insightful advocacy of a new social movement. This is true because what is really needed is a fundamental change in the traditional patterns of thought of our time. One of these is that communicative action is the bedrock of discourse theory. When we consider the use of the internet in law-making, we need to commence from the perspective of society rather than that of the empire of the law. Using adjudication as an example again, it is best for the courts not to hand down substantive and concrete decisions, especially when more social interaction is needed, as demonstrated in Harris. Actually, this is exactly Lon Fuller's theory of adjudication; without sufficient human interaction one cannot expect the court to provide needed opinions. These opinions are based on arguments derived from legal doctrine which serve as the basis for the social order.[46]

What Harris did, following Fuller's adjudicative theory, was to provide needed guidance and create the environment for further social interaction concerning the issues at hand. The theory of discursive coherence developed by Alexy and Peceznik, in this context, can be developed into a general criterion for the courts. It can be developed for any decision making body; public or private, a group or an individual, The criterion would be to determine to what extent the decision-making body can be specific about the required norms for the issues at hand, and what ought to be left for others to develop further through interaction. The legitimacy of such public norms derived through the network of dialogic communities can be expected.

The idea of multi-partiality and Sturm's intermediaries go hand in hand. Here again, we need a basic conceptual change, from an acceptance of the point of views of judges, to the perspective of social interaction. Social interaction must always be constructed through the aid of intermediaries,[47] for reasons of both epistemology and legitimacy. Multi-partiality demands that the composition and structure of the intermediaries, both institutional and individual, be plural in background and value orientation. In addition, intermediaries themselves are dialogic communities where rules for communicative action equally apply internally.

With these reconstructed ideas of co-originality in mind, some suggestions can be made for the further development of e-rulemaking and online dispute resolution. Farina summarizes the problems facing current development of e-rulemaking as:

1) Ignorance of the rule-making process;
2) Lack of awareness that rule-making of interest is going on; and
3) Information overload from the length and complexity of rule-making materials.[48]

Bearing multi-partiality in mind, intermediaries of related perspectives, including government officials, may be a better option for reaching the social networks that are interested and affected by the rule-making. Leaders, or catalysts, as Sturm calls them, in the intermediary

[46] Fuller, L., 1978, the Forms and Limits of Adjudication, Harvard Law Review, Vol. 92, pp. 353-409.
[47] Intermediaries are usually leaders of related fields who have a broader perspective.
[48] Farina C., 2011, 395.

group can communicate and interpret the rules in the languages familiar to their circles of influence. They also serve as a bridge, both mutually inside the catalyst groups and for the platform-wide dialogue. Again, conflicts may not always need to be resolved; discursive coherence provides a good indication of the level of readiness in terms of reaching decisions acceptable to all. Society as a whole is not always ready to solve all kinds of issues at any given moment.

Farina points to another important insight for the development of online dispute resolution. In order to search for more and better public participation:

> "ODR (online dispute resolution) is largely confined to systems for resolving consumer complaints and other financial disputes. Online conflict resolution in the policy area is barely nascent. This is an area that may particularly benefit from multi-disciplinary thinking".[49]

Here, we note another prevailing perspective rooted in the courts and internal legal processes; namely adversarialism. ODR, in addition to e-rulemaking, can make a contribution to the internet world by facilitating the derivation of public norms, directly, and legal norms, indirectly. All we need is simply to change our basic pattern of thought to the new paradigm based on discourse. In reality, such a shift seems to be a long way off and will take a great deal of effort. Hopefully, this article will contribute to a little momentum to facilitate such change.

Address: ChiShing Chen, Taipei/Taiwan, National ChengChi University, College of Law, No. 64, Sec. 2, Zhi-Nan Rd., Taipei, Taiwan. Chenchishing@gmail.com

[49] Id., 415.

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行政院國家科學委員會補助國內專家學者出席國際學術會議報告

100 年 9 月 5 日

附件三

報告人姓名	陳起行	服務機構及職稱	國立政治大學 特聘教授
會議 時間 地點	2011.8.15-8.20	本會核定補助文號	計畫編號： NSC 99-2410-H-004 -141 -MY2
會議名稱	(中文)2011 第二十五屆年國際法哲學及社會哲學大會 (英文)2011 25th World Congress of Philosophy of Law and Social Philosophy		
發表論文題目	(中文)由互生性論網際網路與法律形成 (英文) A Co-original Approach towards the Internet and Law-Making		
(其餘各節見附件)			

一、參加會議經過

國際法哲學大會成立剛滿一百年，是歷史悠久，深具學術傳統的法哲學盛會，報告人能夠參與兩年前北京大會及此次回到發起國，德國法蘭克福大會，深感榮幸。本次會議主題「法律，科學，技術」是當今重要的法哲學議題，與報告人的研究主軸十分契合，因此對於本次法哲學大會，懷抱更高的期待。

二、與會心得

本次法哲學大會，有相當多場次，與主軸相關。報告人被分在 Working Group 19 – Inernet 1. 由於論文眾多，所以網際網路工作坊，也分爲兩個，Internet 1 and Internet 2。

報告人除在 WG 19 – Internet 1 工作坊報告外，並擔任該場次主持人。該場次報告人及報告題目，除報告人外，尚有：（有兩篇報告因報告人不克出席，所以未列入）

Wouter De Been + Khaibar Sarghandoy (Erasmus University, Erasmus School of Law, Legal Theory / Netherlands): Leaking by the Bucketload: The Nature of Database Leaks

Alexandra George (University of New South Wales / Australia): The Metaphysics of Intellectual Property and the Challenges of Scientific Progress

Raylin Tsai (Department of Mass Communication and General Education Center / Taiwan): A Virtual Justice in the DocumentaryFilm of 'Rebiya Kadeer: The 10 Conditions of Love'

Elif Küzeci (Bahçesehir University Faculty of Law / Turkey): Digitized Personality: The Rise of the Surveillance, the Fall of the Personal Integrity

除了主持，報告以及與各國學者對話上的收穫外，與該場次的參與者之一，Wibren Van der Burg 教授的互動，值得一提。

本次法哲學大會，別於以往，特別將部分研討場次，包括報告人主持的場次，安排依共約四小時的研討時間，讓每篇報告都有充分的討論時間，值得肯定。Wibren 教授是荷蘭 Erasmus 大學法哲學教授，多年前曾共同編了 Rediscovering Fuller 論文集。報告人也對該書多有引用。沒想到，Wibren 教授等一直有一個以富勒(Lon Fuller)人際交往爲主的法理學研討社群，彼此持續對話。本次法哲學大會也安排的一個特別工作坊（SWG 66），針對富勒法理學，及其進一步發展，進行研討。筆者也參加了該特別工作坊，回台後也進一步將個人作品寄給 Wibren 教授，日後正面的學術互動，可以期待。

五．攜回資料名稱及內容

2011 25th World Congress of Philosophy of Law and Social Philosophy：Abstract. 每個場次的主題，報告者及時間等資訊也整理於後。

國科會補助計畫衍生研發成果推廣資料表

日期:2012/10/01

<table>
<tr><td rowspan="3">國科會補助計畫</td><td>計畫名稱: H1N1治理網站之建置</td></tr>
<tr><td>計畫主持人: 陳起行</td></tr>
<tr><td>計畫編號: 99-2410-H-004-141-MY2 學門領域: 基礎法學</td></tr>
<tr><td colspan="2">無研發成果推廣資料</td></tr>
</table>

99 年度專題研究計畫研究成果彙整表

計畫主持人：陳起行			計畫編號：99-2410-H-004-141-MY2				
計畫名稱：H1N1 治理網站之建置							
成果項目			量化			單位	備註（質化說明：如數個計畫共同成果、成果列為該期刊之封面故事...等）
			實際已達成數（被接受或已發表）	預期總達成數(含實際已達成數)	本計畫實際貢獻百分比		
國內	論文著作	期刊論文	0	0	100%	篇	
		研究報告/技術報告	0	0	100%		
		研討會論文	0	0	100%		
		專書	0	0	100%		
	專利	申請中件數	0	0	100%	件	
		已獲得件數	0	0	100%		
	技術移轉	件數	0	0	100%	件	
		權利金	0	0	100%	千元	
	參與計畫人力（本國籍）	碩士生	1	1	100%	人次	
		博士生	0	0	100%		
		博士後研究員	0	0	100%		
		專任助理	1	1	100%		
國外	論文著作	期刊論文	0	0	100%	篇	
		研究報告/技術報告	0	0	100%		
		研討會論文	1	1	100%		
		專書	0	0	100%	章/本	
	專利	申請中件數	0	0	100%	件	
		已獲得件數	0	0	100%		
	技術移轉	件數	0	0	100%	件	
		權利金	0	0	100%	千元	
	參與計畫人力（外國籍）	碩士生	0	0	100%	人次	
		博士生	0	0	100%		
		博士後研究員	0	0	100%		
		專任助理	0	0	100%		

其他成果 (無法以量化表達之成果如辦理學術活動、獲得獎項、重要國際合作、研究成果國際影響力及其他協助產業技術發展之具體效益事項等，請以文字敘述填列。)	無

	成果項目	量化	名稱或內容性質簡述
科教處計畫加填項目	測驗工具(含質性與量性)	0	
	課程/模組	0	
	電腦及網路系統或工具	0	
	教材	0	
	舉辦之活動/競賽	0	
	研討會/工作坊	0	
	電子報、網站	0	
	計畫成果推廣之參與（閱聽）人數	0	

國科會補助專題研究計畫成果報告自評表

請就研究內容與原計畫相符程度、達成預期目標情況、研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性）、是否適合在學術期刊發表或申請專利、主要發現或其他有關價值等，作一綜合評估。

1. 請就研究內容與原計畫相符程度、達成預期目標情況作一綜合評估

■達成目標

□未達成目標（請說明，以 100 字為限）

□實驗失敗

□因故實驗中斷

□其他原因

說明：

2. 研究成果在學術期刊發表或申請專利等情形：

論文：■已發表 □未發表之文稿 □撰寫中 □無

專利：□已獲得 □申請中 ■無

技轉：□已技轉 □洽談中 ■無

其他：（以 100 字為限）

3. 請依學術成就、技術創新、社會影響等方面，評估研究成果之學術或應用價值（簡要敘述成果所代表之意義、價值、影響或進一步發展之可能性）（以 500 字為限）

本研究成果可分為理論，制度以及網路平台實做三方面。

理論部分：本計畫針對公共領域的重要理論，Habermas 的程序性典範，提出批判。habermas co-originality 理論，指出公自主與私自主之間的互生關係。Habermas 公共領域的架構，近年來，也有從國家立法的模式，轉型為網絡式，主張公共對話與參與，遍及行政立法與司法各個環節，分散式的公共領域（distributed public sphere）得以形成。報告人認為這些轉型都是正面的。然而，這項發展，卻更使得 Habermas 在 Between Facts and Norms 一書，裁判理論一章，以 application discourse 強化裁判論述性一節，顯得難與其整個理論相連。報告人認為，habermas 若能正視訴訟外爭議解決的論述架構，應當會使其分散式公共領域理論上更為融貫，實踐上也更能引領變革。此一論文發表於 2011 年德國法蘭克福舉行之國際法哲學大會，電子出版於法蘭克福大學機構典藏資料庫。

制度面，本計畫運用過去國科會計畫成果，以 Alexy 以及 Peczenik 發展出的論述融貫，作為評估論述品質的客觀依據。與國外研究團隊交流時，發現這方面十分受到需要，日後值得進一步發展。

網路平台實做部分，本計畫完成平台原型。惟在試圖將該平台付諸實際社會上實驗上，遭到困難。相關主管機關配合意願不高。報告人利用相同平台，卻時代動另一計畫，將該平台用於高中生霸凌法律表達競賽。這部分，請進一步參考報告人執行國家型數位典藏計畫

之報告。