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

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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 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.

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[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.

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

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

[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.

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.

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.

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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.

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.

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

[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.
[9] Id., pp. 121-2.

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 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

[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.

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

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 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.

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[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. .

[17] Id., 172.

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 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

[18] Id., 229.
[19] Dworkin too, but this paper will limit the discussion to Habermas.
[20] See supra note 2.

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 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]

[21] BFN, 109.

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]

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

[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 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.

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 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

[27] Id., 4.
[28] Id.
[29] Id., 3.

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 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]

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[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.

[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.

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 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

[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.

[37] Id., 389-90.

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

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 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

[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,

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 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

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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.

[46] Fuller, L., 1978, the Forms and Limits of Adjudication, Harvard Law Review, Vol. 92, pp. 353-409.

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 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

[47] Intermediaries are usually leaders of related fields who have a broader perspective.
[48] Farina C., 2011, 395.
[49] Id., 415.

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.

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