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A Discourse on discours : Habermas, Foucault and the Political/Legal Discourses in China

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Domaine : Sociological Theory and Political Philosophy

Sujet de la thèse :

**A DISCOURSE ON DISCOURSE
Habermas, Foucault and the Political/Legal Discourses in China**

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A DISCOURSE ON DISCOURSE

**Habermas, Foucault and the Political/Legal
Discourses in China**

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Abstract

The adaptability issues of Western democracy in the context of China have always been an important academic concern. This research was intended to study the adaptability of deliberative democracy in the Chinese context in terms of a normative perspective. At the beginning, this research focused on Habermas's *Discourse Theory of Law and Democracy*, because it is one of the most discussed normative deliberative democratic theories in China today. Taking into consideration the normativity and ideality of Habermas's theory, Foucault's discourse theory of power relations is then introduced to illustrate the tensions between different Western discourse theories. In order to investigate the adaptabilities of these two discourse theories in the Chinese context, and to balance the tension between them, another normative concept, namely the Confucian Rationality, is then drawn upon from traditional Chinese cultural sources. Accordingly, these three dimensions of discourse theory, as well as the relations between them, are presented. The employment of some empirical descriptions of certain Chinese historical-political facts is also necessary to explain, to supplement, or to question this theoretic framework. Two tension perspectives are critical throughout the research: the tension between universality and particularity, and the tension between normative theories and social-political facts.

Through the approaches of textual studies, aided by conceptual and empirical studies as complements, the research is conducted as following: Chapter 1 discusses the tension between Habermas's normative discourse theory of law and democracy and social facts; Chapter 2 analyzes the tension between Habermas's discourse theory and Foucault's discourse theory of power relations, and proposes to rethink the tension problems. Chapter 3 tries to search for the resources in traditional Chinese political cultures, and to put forward another normative discourse theory- the discourse theory of Confucian rationality- to balance the

tension between the foregoing two normative discourse theories. It is argued that an ideal type of Confucian rationality (a kind of normative value rationality) can be used as a bridge between the two opposite discourse theories. Chapter 4 further explains the normative theory that was proposed in Chapter 3, and tries to re-examine and redefine the concepts of “Public Sphere” and “Deliberative Politics” in the context of traditional China through empirical descriptions on the “Public Sphere” and political/legal discussions in traditional Chinese society. Finally, Chapter 5 focuses on the descriptions of the political and legal discussions in China's new media public sphere today. It is an empirical response to all the normative studies mentioned above, and at the same time an investigation on the tensions between the normative theories and the social experiences.

We argue that, because of the different cognitive structures and diverse modes of thinking in specific cultures, there should be different normative paradigms of discourse democracy in corresponding cultural contexts. Normativity and reality are the two sides of the same coin. Normative discourse theories serve as the guidance for the practices of deliberative democracy, which can, in its turn, verify, supplement, improve and challenge the normative discourse theories.

Apart from demonstrating of the multiple dimensions of discourse theories, another practical intent of this thesis is to promote an approach leading to discourse democracy that would combine elements of both Chinese and modern, consistent with both the fundamental predilections of Chinese civilization, and the practical needs of a modern China.

Key words: Discourse Theory, Power Relations, Habermas, Foucault, Deliberative Democracy, Confucian Rationality, Public Sphere, Tension

Plan

Introduction

Chapter 1: Between Normativity and Social Facts: A Sociological Interpretation on Habermas's Discourse Theory of Law and Democracy

Chapter 2: Discourse of Power or Communicative Rationality: Foucault's Challenge to Habermas

Chapter 3: Confucian Rationality: Another Normative Interpretation on Discourse Theory

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Chapter 5: Rationality and Power in the New Media Public Sphere of China

General Conclusion

Résumé

L'adaptabilité de la démocratie occidentale au contexte chinois constitue depuis longtemps une interrogation forte. Notre thèse vise à poser la question à partir d'une perspective normative liée à une réflexion sur la démocratie délibérative telle qu'elle est développée par un auteur comme Jürgen Habermas. Nous nous sommes concentrés sur la théorie de la discussion telle qu'elle ressort de l'ouvrage majeur d'Habermas *Droit et Démocratie* parce qu'elle constitue à ce jour une des théories normatives de la délibération démocratique les plus discutées en Chine. Prenant en compte la normativité et l'idéalité de la théorie habermassienne, nous avons choisi de la confronter à la théorie du pouvoir telle qu'elle relève de la pensée de Michel Foucault afin de mettre au jour les tensions les plus significatives qui sont au cœur des théories du discours dans le monde occidental. Afin d'étudier la pertinence possible de ces différents modes de raisonnement avec la situation de la Chine, il nous est apparu nécessaire de les mettre en relation avec la rationalité confucéenne telle qu'elle découle des sources culturelles chinoises. Ces croisements permettent en particulier de spécifier la double tension entre universalité et singularité ainsi qu'entre normativité et factualité qui traverse toute théorie du discours. À partir de là, il nous a été permis de réexaminer et de préciser les concepts d'espace public et de politique délibérative tant dans la société traditionnelle chinoise que dans l'espace public des nouveaux médias dans la Chine d'aujourd'hui. Il en ressort en conclusion que les différences de structures cognitives propres à des cultures spécifiques conduisent à la pluralité des paradigmes normatifs de la démocratie délibérative. Normativité et réalité sont les deux faces d'une même médaille, mais leur combinaison reste le produit d'une histoire et de contextes toujours singuliers.

Mots clés: Théorie du Discussion, Relations de Pouvoir, Habermas, Foucault, la Démocratie Délibérative, Rationalité Confucéenne, Espace Publique, Tension

Introduction

1. Discourse Democracy is a Kind of Local Knowledge?

For most modern Chinese scholars in humanities or social sciences fields, the questionable adaptability of Western democracy into the Chinese context has always been an important concern. Since the *May Fourth Movement* in 1919, as the concepts of *Democracy* (德先生, Mr. De) and *Science* (赛先生, Mr. Sai) were introduced into Chinese society on a large scale, democracy has been regarded as the inevitable issue in the modernization process of Chinese society. For more than one hundred years, the Chinese society has witnessed many revolutions and reconstructions, and the issue of democracy has been mentioned numerous and countless times in this process. Some questions were addressed constantly: Is it possible to build a Western democratic system in China? What kind of democracy could be accepted by the Chinese people? How would democracy be built upon the traditions of China? Some of these discussions are conducted on empirical level (e.g., Zhao Yuezhi, 1998; Shih, 1999; Guo Xiaoqin, 2003; He Bao-gang, 2008), and some of them are normative (e.g., Pye, 1968; Svensson, 2000; Tan, 2004; Bell 2006; Shin, 2012). From a normative aspect, this issue can eventually be boiled down to the following questions: Is there any universal value in human society? If there is, how can we resolve the tension and sometimes dilemma between Universality and Particularity? If human nature is perceived and practiced differently in different cultures, would the institutional designs of democracy be different accordingly? That is to say, in a normative sense, the adaptability of democracy may be closely linked to the different understandings of human nature and different cognitive structures in different cultures.

In recent years, among various theoretic paradigms of democracy, *Deliberative Democracy* (in some cases, also known as *Discourse Democracy*) is one of the most discussed ones all over the world. It has been seen, by various political theorists, as a very important form of democratic practice and theoretical resource to supplement Electoral Democracy (Cohen 1996; 1997; Benhabib 1996; 2002;

Bohman 1997; Dryzek 2000). Meanwhile, some researches have also pointed out some drawbacks of Western theories and practices of deliberative democracy. For instance, the individual competence of deliberation is overestimated, the dynamics of the communicative exchange is misunderstood, and the affective connections between deliberators are ignored (Rosenberg, 2006). Thus, deliberative democracy is suggested to be reviewed in an unlike context (Fishkin & He & Siu, 2006; He Bao-gang, 2006b).

In China, this democratic form also embraces symbolic meanings and its significance. Firstly, according to the official discourses of Chinese government, the *Socialist Democratic System of China* today is a mix of electoral democracy and deliberative democracy¹ (Hu, 2012; Xi, 2014b; Jia, 2013). Those in power of China believe that deliberative democracy is one of the fundamental political systems of China which is derived from the Chinese traditional culture and fits the national conditions today (Xi, 2014b). The Chinese People's Political Consultative Conference (CPPCC), which started in 1949, and the Chinese People's Congress from 1954 are seen as the institutional embodiments of deliberative democracy in China (Jia, 2013; Xi, 2014a). Many researches focused on the relationship between the CPPCC and the concept of deliberative democracy, as well as on the effectiveness of the CPPCC as the official mechanism of deliberative democracy, in both Chinese and Western academia (e.g., He Bao-gang & Thøgersen, 2010; Yan, 2011; Truex, 2014). These show that the concept of deliberative democracy is quite important in the official political life of China.

Secondly, in civil political life, due to the short of the institutional democratic participant channels of the people, the non-institutionalized and somewhat government-leading deliberative democracy are always seen as a very important

¹ The terms of *Deliberative Democracy* and *Consultative Democracy* share the same Chinese translation, “协商民主”. In most cases, the Chinese government employ the English term of *Consultative Democracy* to define its CPPCC system. But it is often used in a loose way. Usually in Chinese official discourses, “协商民主” refers to the democratic forms apart from electoral democracy, including deliberative democracy and consultative democracy. See: Zhou Wei, 2012; Lieb, “The Chinese Communist Party and Deliberative Democracy”, 2005; Zhang Yonghong, 2014; and Sun Cun-liang, 2009.

dynamic for the democratization of China (Latham, 2007a; Latham, 2007b; He Bao-gang, 2008; Lei, 2011; An, 2012; Zhao Ding-xin, 2012). And many related studies in political or social sciences also focus on this topic (e.g., Latham, 2007b; Lei, 2011; Han, 2013). The foregoing materials indicate the importance of studying deliberative democracy in a Chinese context. Actually, in the fields of politics and sociology, many researches had deeply discussed this topic and achieved impressed results (e.g., Leib, 2005; Leib & He, 2006; Fishkin & He & Siu, 2006; He Bao-gang, 2008; Zhou Wei, 2012, Yan & Xin, 2014, Tang Bei-bei, 2015). But most of them were conducted only in an empirical level. In the researches of this thesis, this problem is partly or maybe mainly viewed using normative method.

Among all the normative theories about deliberative democracy, Habermas's *Discourse Theory of Law and Democracy* might be the most influential one and the most discussed one in China today (Cao Wei-dong, 2005; Honneth, 2009; Sausmikat, 2011). On one hand, as a *Western Marxist theory*, it could be accepted more easily and earlier in China. On the other hand, the translators and researchers of Habermas's theory in China, represented by Professor Cao Weidong and Professor Tong Shijun, had effectively promoted the spread of Habermas's thoughts in China. According to our statistics, by the end of 2013, there have been 220 Ph. D dissertations which focus on Habermas's discourse theory in China.²

To sum up these questions above, what I was originally thinking about is whether the normative theory of deliberative democracy, especially the Discourse Theory of Law and Democracy of Habermas, as well as the political practices closely related to it, can be transplanted to the soil of China. Moreover, what are the influences its arrival would bring to the original local political culture? In the Chinese original local political culture, which parts can be geared to or make dialogue with these modern foreign theories and practices? In order to combine

² Statistics from *China Knowledge Resource Integrated Database* (www.cnki.net).

both, which perspective should we take to explore the connections?

With these questions in mind, at the beginning of Ph. D study, I came across Habermas's Discourse Ethics, Discourse Theory of Law and Democracy, and the practices of political / legal deliberations in Western societies today. From plenty of reading on this topic, I found that the Discourse Theory of Habermas has always faced a major challenge: a too strong normativity and the lack of empirical dimensions. Actually, it was a result of over corrections. When criticizing his teachers, Horkheimer and Adorno, Habermas thinks that their theory had an overly strong empirical dimension, and the normative dimensions are missing (Cao Wei-dong, 2014). He insists on employing more normative researches in order to create a new path for the critical theory school.

The normativity of Habermas's theory makes it difficult to dock with the reality. As a result, I noticed another discourse theory which is opposed to Habermas's: Foucault's *Power Discourse Theory (Discourse Theory of Power Relations)*. Foucault, who had described himself as an empiricist once, criticized the metaphysical color of Habermas's theory, and emphasized on the practical state of discourse, although he and Habermas do not agree upon the definition and usage of the term *Discourse*. In order to indicate the tension between different discourse theories, as well as the tension between the normative theories and social facts, it is better to put these two theories together. By doing this, we could not only show different aspects of the discourse theories, but also explore the weaknesses of these theories and to improve them by a more holistic perspective. Therefore, the original problematic concern was revised: from studying the adaptability issue of one kind of discourse democracy theory to studying the adaptabilities or applicabilities of two kinds of discourse theory in the context of China.

In order to study the adaptability of discourse democracy theories, here, I would like to introduce an anthropological term, *Local Knowledge*, to highlight these problematic concerns. This term comes from an American anthropologist -

Clifford Geertz's theory. It is the idea that the understanding or application of any kind of knowledge, theory and system are required to be rooted in the culture soil where they were generated and grow up. Geertz is the representative figure of symbolic anthropology, a framework which pays prime attention to the role of symbols in constructing public meaning. He is affected by Max Weber's sociological thoughts, and he regards the culture as "webs of meaning" which is spun by the human beings. The culture study, thus, is not an "experimental science in search of law but an interpretative one in search of meaning" (Geertz, 1973). Accordingly, the anthropologists' works are no longer attached with the laboratory color like the works of zoologists or geologists, but focusing on the text analyses and interpretations of meaning like what the literary critics do. The essential task of theory building here is not to codify abstract regularities but to make thick description possible, not to generalize across cases but to generalize within them (Geertz, 1973). *Thick Description* is a term Geertz borrowed from Gilbert Ryle (1968), and here it refers to an anthropological method of explaining the reasons behind human actions in detail. Geertz had also created and developed a concept of "Culture as Text", in which not only the significant symbolic ceremonies can be analyzed as text, but also the other common activities of human being, such as the daily language behaviors, can be interpreted as the carrier of meaning. However, Geertz's cultural semiotics is totally different from the Semiotics of Structuralism as it mainly deals with his own concept of *Local Knowledge*, rather than the *general laws* which can be abstracted as the *Grammar*.

In terms of the theoretical framework of Geertz, Habermas's *Discourse Theory of Law and Democracy*, Foucault's *Theory of Power Relations (Power Discourses)*, and the practices of *Deliberative Democracy* in Western societies, perhaps, are all productions and applications of local knowledge, because all of them are somehow interpreted and constructed in the Western contexts.³ When this kind of local knowledge was transplanted into another cultural soil, what would happen

³ Foucault was regarded as a contextualist (Flyvbjerg, 1998a: 221; YF, Chapter 2), but Habermas discussed a lot on the relation between universality and particularity which would be analyzed in the following parts.

then? Whether there would be the tension problems of universality / particularity?

In fact, some scholars have noticed that the human nature assumptions and normative cognitive structures behind the theories of deliberative democracy were somehow colored with the shades of Western Centralism (e.g., Madsen, 2003; Rosenberg, 2006; He Bao-gang, 2006b). Especially in Habermas, his theory of Communicative Rationality has set a very high request for human's ability of rational thinking and expression. And these requirements and assumptions are largely rooted in the tradition of the Western culture. For example, neither Habermas nor other Deliberative Democrats has paid much attention to the role of emotional factors in communicative actions. They only emphasized the normative foundation of the deliberative democracy: everyone has the ability of rational thinking and arguing. But emotional dimension is seen as an important aspect of Chinese culture (Weber, 1951; Lai, 2003; Liang Shu-ming, 2005; Li Ze-hou, 2011). In this light, the differences between the Oriental culture and the Western culture are highlighted.

Professor Shawn Rosenberg (2006) believes that the Western deliberative democrats arbitrarily assume a series of logical, rational, and reasonable capacities for all the participants of deliberative democracy, and “this preoccupation with citizens’ freedom and equality reflects a specifically Anglo-American view of individuals, society, and politics.” (Rosenberg, 2006: 78) However, in China, especially in traditional China, the concepts of *Rationality* and *Power Relations* were viewed in a very different approach. For instance, basing on the Confucian values of *Ren* (仁) and *Li* (禮), Traditional Chinese culture emphasizes the emotional bonds in rational thinking and communicative actions, and it gives priority to collectivity over individuals. Thus the hierarchies and the unequal distribution of power are necessarily common in the Chinese traditional political and legal discourses. (Chapter 3)

Even for the tension between Foucault's power discourse theory and the theory of

Habermas, in our points of view, it is also a kind of Western-styled inherent tension. This cognitive structure of dichotomy, to a certain extent, is also rooted in the Western cultural traditions (Chapter 2). Therefore, it is needed to re-discuss them within the context of China. I hope to present another more holistic interpretation for the discourse theory (Chapter 3), before which, we need to study the existing discourse democratic theories, mainly the theories of Habermas and Foucault (Chapter 1 & 2), in order to point out their problems and the tensions between them. These will constitute the main content of the theoretic discussions and analysis of this thesis.

2. A Chinese Question to Habermas and Foucault

Whether the Discourse Theory of Habermas is universal all over the world or somewhat particular in the background of Western modernity? Habermas never gave a clear and satisfactory answer. People could even find many contradictions in Habermas's works.

In his late works on philosophy of religions, Habermas admits that the modern liberal democratic state has a strong relation with its religious tradition, namely the Christian tradition (Habermas, 2004; 2006). Once he said: "reason, reflecting upon its most basic foundation, discovers that its origin lies in an Other." (Habermas 2006: 256) This Others, in Habermas's words, as "anonymous gods of post-Hegelian metaphysics", "are easy prey for theology". He even had some examples to explain how those normative political concepts in modern democratic constitutional state were translated from Christian content. "The translation of the notion of man's likeness to God into the notion of human dignity, in which all men partake equally and which is to be respected unconditionally, is such a saving translation." (Habermas 2006: 258) These indicate that Habermas's theoretical

building is somehow rooted in a Western context and grew out of it later on.

By sometimes, Habermas had also criticized the *Western Logocentrism*. While constructing his concept of Communicative Rationality, he said: “A step-by-step testable critique of the Western emphasis on logos starts from an attack on the abstractions surrounding logos itself, as free of language, as universalist, and as disembodied. (...) As long as Occidental self-understanding views human beings as distinguished in their relationship to the world by their monopoly on encountering entities, knowing and dealing with objects, making true statements, and implementing plans, reason remains confined ontologically, epistemologically, or in terms of linguistic analysis to only one of its dimensions.” (Habermas, 1987c: 311) He thus argues that the Communicative Rationality should jump out of the Western emphasis on logos and corresponds with meanings in People’s daily practices (Habermas, 1987c: 294-326). However due to the close linkages between *Discourse* and *Logos* in Western context (Section 4 of Chapter 3), I will argue that the discourse theory of Habermas could not completely get rid of the shades of Western Logocentrism, and it is not universalist enough for all cultures as Habermas has argued.

Even, in our views, the Discourse Theory of Law and Democracy is somehow rooted in the soil of Western modern Liberal Democracy and Constitutionalism. Habermas himself is somehow an universalist while regarding the concept of Western human rights. During his visit to China in 2001, he has also talked about the differences between Western traditions and Asian values. He admits that, from a certain perspective, the concept of human rights is the specific manifestation of the unique Western rationality which can be traced back to the Platonism. At the same time, in many parts of Asia, especially the places under the Confucian culture influence, collectivity does take precedence over the individuals (Habermas, 2001b). But, he still emphasized on that point that the modern legal system is based on the economic actions and behaviors, and “Asian societies cannot realize the capitalist modernization without the legal system of

individualism. They couldn't be attentive to one thing and lose another. If they want to solve the integration problem in highly complex society through modern legal means, the abstract united form of citizens must be established. The final result depends on whether the basic human rights can be realized.” (Habermas, 2001b) This represents that Habermas is partly negative on the issue of so-called *Unique Asian Value*, and believes in the universality of human rights. He had once defined the universality of human rights as following: “Western science and technology are not just convincing and successful according to Western standards. And obviously human rights, despite ongoing cultural controversies over their correct interpretation, speak a language in which dissidents can express what they suffer, and what they demand from oppressive regimes - in Asia, South America, and Africa no less than in Europe and the United States.” (Habermas, 2001c: 149)

One of his important translators, Thomas McCarthy (1991a: xii) has directly raised an important question in the introduction of the English version of *The Structural Transformation of the Public Sphere*. – “In a post-liberal era, when the classical model of the public sphere is no longer socio-politically feasible, the question becomes: can the public sphere be effectively reconstituted under radically different socioeconomic, political and cultural conditions? In short, is democracy possible?” McCarthy’s question also pointed to the adaptability of discourse democracy in an idiosyncratic soil, such as in China. In fact, the normative premises of Habermas’s discourse theory are questioned in both the vertical level (between different times) and horizontal level (between different cultures and societies).

If it is believed that Habermas’s Discourse Theory of Law and Democracy has such a hidden normative premise, this research would seem to be more significant. If Habermas unconsciously set some Western normative premises for Discourse Theory of Law and Democracy, this research may focus on the other normative premises or contents of discourse theory in a Chinese context.

Habermas's Discourse Theory of Law and Democracy, as well as the related Deliberative Democracy, is one of the most discussed topics in China today and in China studies field (Cao Wei-dong, 2005; Honneth, 2009; Sausmikat, 2011). But most of these discussions are somewhat biased (Jin An-ping & Yao Chuan-ming, 2007). Some of them are pure theoretical researches through Western philosophical approaches. Since Professor Tong Shi-jun's translation of Habermas's important book of legal philosophy, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, in 2003, this kind of researches have never stopped appearing. There emerged a lot of Ph. D dissertations and monographs related to it. But most of them are merely trying to interpret Habermas's philosophical thought, rather than making comparisons and integrations with Chinese thoughts or practices (e.g., Xia Hong, 2004; Wang Ming-wen, 2005). Other studies claim to combine Habermas's theory and the practices in China, but in fact, they just borrow the concept of Deliberative Democracy or Discourse Theory of Law and Democracy to study China's CPPCC system today (e.g., Jin An-ping & Yao Chuan-ming, 2007; Zhu Yi-fei, 2008).

Differently from the foregoing researches, I hope to discuss the relations between Habermas's theory and China from two aspects – the normative and the practical. On the normative level, it focuses on the following issues: how the Discourse theory of Law and Democracy was put forward by Habermas? How this theory was challenged “normatively” by Foucault? And what are the differences between Habermas's propositions and the normative construction of discourse of Confucian Rationality. From the practical perspective, on the one hand, Habermas's Discourse Theory is examined by many empirical researches of social / political sciences (Chapter 1); On the other hand, the historical and contemporary experiences of China may help us to obtain a new understanding of this theory (Chapter 4 & Chapter 5).

Foucault's power relation theory is another theoretical dimension of discourse theory I employ to challenge the Habermas's. Both Habermas and Foucault had

set the term *Discourse* as the core of their theories. But for Foucault, it refers to the embodiment of power rather than the carrier of rationality as Habermas has suggested. Some researchers believe that the difference between Habermas and Foucault is the distinction between idealism and realism (Flyvbjerg, 1998a). I will argue that Foucault's negation of rationality, which Habermas advocates, is partly still on a normative level, since Foucault had inherited and carried forward the tradition of Deconstructionism of Western philosophy which may be defined as Negative Normativity (Chapter 2).

Foucault's theories are also much discussed in Chinese academia. Even during Habermas's visit to China, he was asked a lot about his relations and differentiations with Foucault (Habermas, 2001d). And Foucault's theories are employed more often than the Habermas's to interpret the political and legal facts of China (e.g., Jiang Shi-gong, 1997; Zhu Suli, 2000).

When Foucault talked about China in his masterwork –*The Order of Things (Les Mots et les choses)*, he imaged China as an *Utopia of Discourse*. He said: “There would appear to be, then, at the other extremity of the earth we inhabit, a culture entirely devoted to the ordering of space, but one that does not distribute the multiplicity of existing things into any of the categories that make it possible for us to name, speak, and think.” (Foucault, 1970: xx-xxi) Foucault was not a sinologist, but he noticed the totally different orders of discourse in China and the different thinking way and cognitive structure of Chinese people. To a certain extent, this research would investigate how far the traditional Chinese thinking way (Confucian Rationality) is from Foucault's theory. I would try to explain how to re-understand Foucault's power relation theory in the context of Confucian traditions and practices.

Additionally, it will also pay attention to the relationship between the normative theories and social practical experiences. Theories are used to explain the experiences; and the experiences can in turn prove, correct, challenge theories, or

even create new theoretical models. These are the missions for all the social scientist. So, by either Habermas's discourse theory of law and democracy or Foucault's discourse theory of power, both of them are too abstract from the social practices. When they are jointed with China's social / political / legal practices, what would be the outcomes?

3. Multivariate Rationalities? A Weberian Question

These discussions are also related to Weber's concern of the concept of rationality. As I argued, Habermas's concept of Communicative Rationality faced many challenges from the empirical domains. That is to say, people would wonder: how the normative concept of Communicative Rationality can be expressed and be deconstructed in practice? (Chapter 1) At the other end of discourse theory, I discovered Foucault's power relation theory. Foucault made a very fierce criticism on the normativity of Habermas's theory. However, in my views, there existed another kind of normativity, the Negative Normativity, in Foucault's theory. Foucault had thoroughly negated the concept of (subjective) rationality, but it is believed that his genealogical negation is partly still on a normative approach. (Chapter 2) Therefore, I intend to introduce another normative concept of rationality, Confucian rationality, to try to balance the tension between the two. (Chapter 3) As a result, the three different normative interpretations on the concept of rationality are gathered together, which is somewhat ultimately a Weberian question.

The concept of rationality in Weber is very complex and diverse. Stephen Kalberg (1980) used to classify these Weberian usages into four types: practical, theoretical, substantive, and formal. But it was not a classification based upon Weber's original intention. Weber often employed this term in the following four

senses: purposive / instrumental, value / belief-oriented, effectual, traditional or conventional. Weber's usages also illustrate that he considered the first two more important than the latter two, and the third and fourth are subtypes of the first two. Purposive / instrumental rationality is related to the expectations on the behavior of other human beings or objects in the environment. It serves as a mode of thought and action that identifies problems and works directly towards their solution.⁴ Value / belief-oriented rationality refers to that human action is undertaken for reasons intrinsic to the actor: some ethical, aesthetic, religious or other motives, independent of whether it will lead to success.

Weber thinks that instrumental rationality is characterized by *Calculability* and *Predictability*, and it sets *Effectiveness* as the only judgmental standard. The process of development of Modern society is accompanied with the expansion of the instrumental rationality. He names this process *formal rationalization*. The results of formal rationalization, as Weber argues, would be the *Iron Cage* phenomenon of modern society. But when it comes to the aspect of value rationality, modern societies are still unable to achieve consensus on value issues. According to Weber, the bureaucratic "iron cage" is only one side of the modernity that rationalization has brought in with; the other one is the "polytheism" of value-fragmentation. Thus he thinks that modern society is still a society of "the Clash of the Gods", and there are still the polytheist values that cannot be conformed through formal rationalization.

In this light, the research of this thesis is also considered as a further analysis of Weberian concerns of the concepts of rationality. Firstly, these two Weberian types of rationality were often mentioned and critiqued by Habermas. He thinks that it is very meaningful to distinguish between the two but Weber had not explored deeply enough on this point. Habermas thus puts forward the concept of Communicative Rationality. This is the point which we would like to present in

⁴ See: "Instrumental Rationality" in *Stanford Encyclopedia of Philosophy*. (<http://plato.stanford.edu/archives/fall2013/entries/rationality-instrumental>)

detail in Chapter one. Secondly, Foucault had inherited the post-modernist tradition from Nietzsche. He believes the meaning of Enlightenment is to criticize constantly (Foucault, 1984). So he is object to any type of systemized construction of rationality view. This point will be well reflected in chapter two. Thirdly, on one hand, as Weber thought, it was very unusual to find only one of these types of rationality in one action. On the other hand, as Kalberg (1980) has pointed out that, according to Weber, only “ethical substantive rationality” introduces methodical ways of life, and long-term rationalization processes are seen to be rooted in values rather than in interests. The interpretation of Confucian Rationality as a kind of value rationality would like to follow these directions in chapter three. Discussions and interpretations on the plural views of rationality would be carried out through these three approaches above.

In sum, as one of the founding fathers of modern social theories, Weber had discussed the roles of rationality in modern society, and attempted to comb different kinds of meaning of rationality. Based on this premise, this thesis would explain and compare different meanings of rationality which includes: Habermas’s Communicative Rationality, Foucault’s negation of (subjective) rationality, and the Confucian Rationality. It is believed that this thesis would also be a further discussion on Weber's concern.

4. Methodology

To investigate the practical performances of certain social philosophies, of course, it does not mean that all social philosophical theories must be proven by experiences. It is believed that one of the most important characteristics of social theories is just their ideality which is abstracted from the social reality. The normative social theories thus could be the guidance for social changes. In this

light, the European tradition is partly different from the Anglo-American tradition and the Chinese tradition. Intellectual revolution promotes the social and political revolutions. This process has always been a major paradigm of social development of modern European continent. And this point has also been proved by the philosophers' practices in ancient period and the interactions between intellectuals and society / politics since the Enlightenment. What most intellectuals today have to do is to constantly hover between the radical idealism and the reflections on reality, and become the conveyor belt between theory and reality. On one hand, I hope to discuss the relationships between Habermas's, Foucault's theories and traditional Chinese thoughts in a normative level; On the other hand, it is hoped to discuss the relations between normative theories and the social practices to some extent.

As Richard J. Bernstein has argued in the conclusion of his famous book, *The Restructuring of Social and Political Theory*, "An adequate social and political theory must be empirical, interpretative, and critical" (Bernstein 1978: 235). The integration of these three dimensions is just the methodological aim of this thesis. That is to say, as a research on sociological, political and legal theories, this thesis would strive to employ an integrated approach.

Generally, text studies would be the main approach of this thesis, while some first-hand and second-hand empirical materials would be the complements. Specifically, the first half of the first chapter would like to interpret Habermas's discourse theory of law and democracy which is very complicated and abstract. It is not only related to the precedentialist paradigm of law, but also closely linked to his early theories, such as the theory of public sphere, the theory of communicative action and so on. So the interpretation must be integrated and holistic. Additionally, the normativity of Habermas's theory has always been criticized by the empiricists. Therefore, in later sections, the tension between the normativity of his theory and the social facts would also be presented from a critical angle. These criticisms, to a large extent, are done through empirical

researches. In the second chapter, I will put together the Foucault's discourse theory of power relation and Habermas's theory, in order to interpret the tension and mutual criticisms between them. In this light, I will try to do some re-interpretations on them and the tensions between them. The third chapter would be another normative interpretation and building of discourse theory. On the basis of criticizing and inheriting predecessors' researches, I would try to construct another normative paradigm of rationality, the Confucian Rationality. Of course, the comparisons with Habermas's and Foucault's theories are still necessary in this chapter.

The fourth chapter and the fifth chapter tend to interpret, explain and criticize the theoretical views through empirical descriptions. The fourth chapter would focus on the traditional Chinese society. I will collect the materials from others' historical researches, and make a comprehensive analysis on them. The fifth chapter will discuss the new media public sphere of the Chinese society today. It will be divided into two parts. In the macro level, I will use some empirical materials to illustrate the macro power relations. These materials come from the Internet databases, media reports, citations of other researches, public archives and my interviews. In the micro level, I would like, through a case study, to illustrate the roles of power factors and rationality factors in a micro deliberation. I will try to employ the method of discourse analysis⁵ which is a common method in Political Anthropology or Anthropology of Law. This method is also influenced

⁵ *Discourse analysis* is a general term for a number of approaches to analyze written, vocal, or sign language use or any significant semiotic event. The objects of discourse analysis - discourse, writing, conversation, communicative event - are variously defined in terms of coherent sequences of sentences, propositions, speech, or turns-at-talk. It aims at revealing socio-psychological characteristics of a person or persons. Discourse analysis has been taken up in a variety of social science disciplines, including linguistics, education, sociology, anthropology, social work, cognitive psychology, social psychology, area studies, cultural studies, international relations, human geography, communication studies, and translation studies, each of which is subject to its own assumptions, dimensions of analysis, and methodologies.

Political discourse analysis is a field of discourse analysis which focuses on discourse in political forums (such as debates, speeches, and hearings) as the phenomenon of interest. Policy analysis requires discourse analysis to be effective from the post-positivist perspective. Political discourse is the informal exchange of reasoned views as to which of several alternative courses of action should be taken to solve a societal problem. See: "Discourse analysis" http://en.wikipedia.org/wiki/Discourse_analysis & Teun A. van Dijk: "What is Political Discourse Analysis?" :

<http://www.discourses.org/OldArticles/What%20is%20Political%20Discourse%20Analysis.pdf>

profoundly by Habermas and Foucault's theories.⁶ Through analyzing the discourses (statements, dialogues, speeches, texts, etc.) in the legal / political actions, power factor and the rationality factors would be presented. Discourse analysis is very frequently applied in social sciences today. But since this thesis is mainly conducted on a normative level, in order to highlight the normative part, I would like to do just a few discourse analyses in chapter 5. Detailed explanations on the methodology will also appear in the following each chapter.

From another perspective, the research methods of this thesis can be classified into three: conception study, text study, and empirical study. All of them are employed throughout the whole thesis, and each accounts for different proportions in different chapters. Generally, the **text study** is the most important approach throughout the thesis, although the conception study plays a significant role in the Introduction, and the empirical study is used more in Chapter 5. Text study not only refers to the original works of Habermas, Foucault, etc., but also the second-hand studies, which includes the existing empirical studies. Text studies would account for the main contents from Chapter 1 to Chapter 4.

5. Structure

The main structure of the thesis is as follows. It would start with the interpretation of Habermas's Discourse Theory of Law and Democracy. The first chapter would introduce how this normative theory was put forward by Habermas. A brief summary of Habermas's theory and the relevant key concepts would firstly be presented in Chapter one. In addition, given this theory meets many challenges

⁶ Foucault is generally believed as one of the key theorists of the discourse analysis, especially for his masterwork, *The Archaeology of Knowledge*. The term *Discourse* in Foucault firstly refers to institutionalized patterns of knowledge that become manifest in disciplinary structures and operate by the connection of knowledge and power. Since the 1970s, Foucault's works have had an increasing impact especially on discourse analysis in the social sciences. Thus, in modern European social sciences, one can find a wide range of different approaches working with Foucault's definition of discourse and his theoretical concepts. See: Chapter 6 of *Power and Its Disguises*.

from experienced area, not only some famous debates but also some sociological empirical researches in different contexts had shown us its empirical dimensions and the tensions between normativity and practice. These tensions would also be presented and discussed in later sections of Chapter one.

The second Chapter would introduce Foucault's power relations theory to challenge the theory of Habermas. Foucault's theory can be used as another dimension of discourse theories, which is opposed to the theory of Habermas. The differentiations between Habermas and Foucault would be presented in 8 themes in both philosophical perspective and sociological perspective. Although there were many researches on the differentiations between them in Western academia, I would like to discuss and define it in a new aspect. Chapter two would conclude that the differences between Foucault and Habermas are a kind of fundamental tension in Western cultural context, and we may find other resources to balance the tension out of Western traditions.

The third chapter is an important part of theoretical construction of this thesis. It is mainly to generalize the concept of Confucian Rationality of traditional China, and to do some comparisons with Habermas's concept of Communicative Rationality and Foucault's power relation theory. Although the conception of Confucian Rationality here is also a kind of normative interpretation, I do think that it may play a very important role in balancing the tension between Habermas and Foucault's two normative theories.

The rest would be the part for empirical interpretations and explanations. Firstly, it is about traditional China. I would try to answer the following questions: In accordance with the "Public Sphere" and the "political/legal deliberations" in traditional China under the influence of Confucian Rationality, what were they like, and what are the differences if comparing to Habermas's claims? Details on these questions would be discussed in Chapter four.

The Chapter five would like to discuss and analyze the situation of current China which is a very complex and diverse society. What is the general role of new media public sphere in China's politics today? What are the power relations and power factors around the new public sphere? How are the performances of Habermas's conceptions, Foucault's claims, and Confucian Rationality in China today? In order to answer these questions, the Chapter five would be divided into two sections: general study and case study.

6. Concepts

In this thesis, there are two very important groups of concepts that need to be specified and explained in the Introduction.

Reason / Rationality

The two key words, Reason and Rationality, in Chinese they are both usually translated as "Li Xing" (理性), and they are also often confusedly used in Western languages. The German subtitle of the first volume of Habermas's *The Theory of Communicative Action* is "Handlungsrationalität und gesellschaftliche Rationalisierung". The English version translated by McCarthy had translated the term "Rationalität" (Rationality) into "Reason". This translation received a positive affirmation of Habermas, because his original meaning in the book is to treat the discussion on Rationality as a continuation of the discussion on Reason in the ancient Greek (Habermas, 1984: 1). It is obvious that, in the discussions of Habermas, Reason and Rationality are basically synonymous. But there are still some minor differences between them. In Western thought, Reason is something concerning to philosophical ontology, and it mainly refers to some transcendental phenomenon; Rationality is related to the abilities of human beings.

According to Professor Tong Shijun's (2012: 7-8) research, since the time of Max Weber, the emphasis of Western academic world has shifted gradually from Reason to Rationality. Habermas was influenced much by Weber, and used more Rationality in his works. Continuing the usage of Habermas, this thesis would generalize the concept of Rationality in a loose way: not only including the meaning of Reason in the sense of classical philosophical ontology, but also referring to the usual usages in modern philosophy and social science, and even being used to summarize the traditional Chinese thinking and acting ways influenced by Confucianism.

Discourse / Deliberation / Discussion

For other three important words, Discourse, Deliberation and Discussion, they are also terms which are often confusedly used. Habermas's German term, "Diskurstheorie", was translated into "Discourse Theory" in English, but into "Théorie de la discussion" in French. Given different meaning in different languages, the English term Discourse here is somehow employed in a loose sense which includes the meaning of "Discussion". Moreover, Discourse and Deliberation are often used confusedly. For example, the Discourse Democracy is equivalent to the Deliberative Democracy in many academic papers. To some extent, Deliberation is more normative, as it refers to some kind of ideal types of discourse; and the meaning scope of Discourse is much broader. But the two words are often confusedly employed even in Habermas's own works. Additionally, Habermas and Foucault are both inclined to set the term of Discourse at core position of their theories. But the usages are completely different from each other. Habermas's concept of Discourse is closer to "dialogue" and "discussion"; and Foucault's term of Discourse refers to a series of statements or speeches, or even ideologies. More often, Discourse in Foucault's theory is synonymous with the term of "knowledge". Therefore, this thesis would employ the concept of Discourse in the most generalized and loose sense: it covers all the aforementioned meanings. In different contexts, it refers to different meanings.

But sometimes, it could also be replaced by more specific terms, such as Deliberation and Discussion.

**Chapter 1. Between Normativity and Social
Facts: A Sociological Interpretation on
Habermas's Discourse Theory of Law and
Democracy**

Introduction

This thesis focuses on the applicability of Habermas's *Discourse Theory of Law and Democracy* in a given cross-cultural background, as well as its conflicts and interactions with other social theories. In the first chapter, a sociological interpretation on the Discourse Theory of Law and Democracy, which often seen as a legal philosophical theory, seems to be necessary.

There are many approaches to introduce Habermas's legal theory. Scholars from different disciplines and different perspectives choose different ways. One approach is based on how the 20th century *Linguistic Turn* influenced Habermas and how he challenged the traditional philosophy which was considered to be antagonistic by the subjective and the objective. Another way is, in accordance with the clues of development of legal philosophy, to regard Habermas's discourse theory of law and democracy as the third perspective of legal philosophy which is beyond the *Natural Law* and *Positivist Law*. The jurisprudence researchers prefer this approach. Habermas (1996) also reiterated that one of the important aims of the discourse philosophy of law is to reconcile the Natural Law and the Legal Positivism. The third one is to take the approach of intellectual history by combing Habermas's thinking process to demonstrate how he put forward this theory step by step.

In this chapter, a sociological way is taken to approach this topic. From the very beginning, which dated back to the classic ages of Marx, Weber and Durkheim, sociology has always been too dimensioned – theoretically and empirically. For the first one, sociology seeks for the answers of social problems in a normative way; for the second dimension, it prefers to take an empirical way to demonstrate the social facts. Sociology, thus, is good at showing the tensions between normative theories and social facts. By using a sociological approach, I hope to explain both the theoretical side and the empirical side of Habermas's Discourse

Theory of Law and Democracy, and to show the tensions between the normativity of this theory and the social experiences. That is, in the planning of this thesis, to set a foundation for the analyses of following chapters. Because basing on the tensions between the normativity of Habermas's theory and the social facts, the relation between universality and particularity, and the relations between normativity and social reality could be further discussed.

In the first three quarters of this chapter, I would like to make a brief overview of Habermas's Discourse Theory of Law and Democracy in terms of theoretical history. I will start out with Habermas's diagnosis on modern society: the Colonization of the Life World and the Crisis of Legitimation. Then I will direct our attention to how Habermas extended the conception of rationality and set forth the concept of Communicative Rationality. After that, I will move on to Habermas's legal philosophical solution: reconstructing the modern society legitimacy with Communicative Rationality. In the two latter quarters, I will illustrate and underscore on some important theoretical issues of Habermas's Discourse Theory of Law and Democracy, especially the role of Public Sphere and Proceduralist Paradigm of Law.

In the last quarters, possibly the most important ones, I will primarily point to the lack of empirical dimensions of Habermas's normative theory, and then introduce and analyze some empirical researches on the discourse theory of law and democracy to demonstrate its empirical dimensions and the tensions between theory and practices. These issues, as well as the aforementioned concepts (the concept of Communicative Rationality, etc.), are all closely tied to the later chapters.

The complete portrayal of the Discourse Theory of Law and Democracy is mainly involved in the two late works of Habermas - *The Theory of Communicative Action* (volumes I and II), *Between Facts and Norms* and other articles or speeches, such as "The Three Normative Models of Democracy", "Law and

Morality”, and so on. It is worth to mention here that the French version of *Between Facts and Norms* is just titled as *Law and Democracy - between facts and norms (Droit et Democratie)*. We could see that it aims to talk about a new theoretical paradigm of law and democracy. These theoretical aspirations and interests can lead back to Habermas's early thoughts.

1. Colonization of Life World and Legitimation Crisis of Modern Society

Since the era of Enlightenment, as Max Weber had argued, “(Instrumental) Rationalization” is the most important feature of modern Western societies. This process was accompanied with the coinstantaneous modernization of the Western societies. But this kind of rationalization has a fatal flaw – “falling into the trap of transcendentalism and metaphysics.” (Habermas 2001: 176). As the 20th century approached, this “one-side rationalization” of Capitalism has increasingly gone towards extreme. The first generation of Frankfurt School, Herbert Marcuse and Horkheimer, had fiercely criticized and deprecated this phenomenon, and they left Frankfurt School a tradition of critical thinking. As one of the most famous alumni of the second generation of the School, Habermas inherits this tradition. His criticisms direct toward Weber's concept of (instrumental) Rationality.

Habermas argues that Weber failed to continue to dig and accomplish something significant on the most important part of his thought - the distinctions between the instrumental rationality and the rationality of value. Weber's thought of *Iron Cage* has exaggerated the importance of instrumental rationality in modern society. The key flaw of instrumental rationality is that it turns the reasonableness of the problems into the reasonableness of the procedures, methods and means to solve the problems, and makes the judgments of correctness of one thing's content into

the judgments on the solution approach for one thing. The advocates of instrumental rationality put all the problems from the field of human life and human relationships into the management scope of bureaucracy, and simplified many complex social phenomena into “typical cases”, which can be dealt with by rules, that obliterated the personal freedom and individual differences. Here, the money and power have become the decisive adjustment levers. Habermas (1984: 18) believes that his theory uses a scenario to explain the increasingly visible pathological phenomenon of today’s society. The scenario is that the life world which is built upon communication is following through the commands of an independent and formally organized action system. Habermas named the social crisis, which was the consequence of the continuous and ultimate development of instrumental rationality, “the domination of the System on the Life World” or “the colonization of the Life World” in his grand two volumes book, *the Theory of Communicative Action*.

System and *Life World* are the terms Habermas employs to classify the human society, basing on his critical theories. For Habermas, the division of system and life world is based on the different functions of social integration. The system refers to the approaches through which the social structures and functions can restrain people’s actions by using monetary means and power means. System realizes social integration through the material reproduction. It has to be through “the media of action of aims”, therefore it is conceived as the system of a “rationality of purpose”. The most important standards of the system of rationality of purpose are the instrumentality and the strategy; a lot of institutionalized organizations had been produced upon the rationality of purpose. Therefore, the system is a functional field which is complicated, bureaucratic and constructional. It is closely corresponded to a variety of complex administrative and economic organizations in modern society.

The other integration mode is named social integration by Habermas. This mode is mainly related to the reproduction of the mass culture which hinges on the

cultural renewal and cultural socialization. Mass culture's main integrational media is the mass language and mass symbols. They all exist in the life world. Habermas thus believes that the life world is the key part of social reproduction, and ideal civil society would be created and re-created through the daily practices of life world.

System exists as different groups of institutions in fields such as economics, state systems and laws. And the life world is divided into the separated knowledge of culture, society and personality. In *The Communicative Action Theory*, Habermas (1987a: 164-197, 264-282) revealed how System rised up and got out of from the Life World, and then feeds back to the Life World, in which process the institutionalization of money and power played a very important role. He argues that, in modern society, due to System's holding of the political and economic running, it is more powerful than the life world. "[T]he mode of operation of the political system is gauged by a rationality of self-reflexive steering that has lost all traces of the normative content of democracy (beyond an alternating allocation of power between the incumbent Government and the opposition)." (Habermas 1996: 333) When the instrumental rationality of the System world invades the Life world, the productions of mass culture and mass knowledge have to follow the principles of instrumental rationality. Thus the phenomenon of colonization of Life world would occur. This is Habermas's pathological analysis on the advanced capitalist society.

The consequence of the colonization of life world is the *Anomie* which Durkheim had diagnosed or the *Loss of Meaning* of Weber. In Habermas, it is known as the *Crisis of Legitimation* of modern society. The constantly instrumental-rationalized life world got out from the increasingly complex and formally organized action sphere, and fell into a dependent status. This is what Habermas had interpreted by the concept of *Internal Colonization*. (Habermas 1987a: 452) For Max Weber, the key concept to understand modern society may be the *Bureaucratization*. But in Habermas, the Internal Colonization may have the same meaning as

Bureaucratization: a variety of political and economic organizations got out from the symbolic structure of life world, and took an indifferent attitude to culture, society and individuals.

In the book of *The Legitimation Crisis*, Habermas (1975) had discussed the characteristics of the legitimation crisis of advanced capitalist societies when and where the instrumental rationality overflows: First of all, for the three production sectors, private sector, public sector and the monopoly sector, the last two can rationalize (justify) themselves with their own advantages. Only the private sector, as a civil (unofficial) subject, can't justify itself because of the extrusions from the last two; Second, in the advanced capitalist societies, governmental functions were mostly confined to adapt to economic development and to serve the economic development. It can merely alleviate the crisis by finance, taxation and other means, but it can't radically cure the crisis; Last but not least, although the advanced capitalist societies had established a democratic political system, the government could still control the democratic system by creating false public opinions and limiting citizens' real participations. Therefore, the law-making is not founded on the basis of citizens' autonomous agreement which accurately reflects the genuine will of the public. Consequently, the governmental policies of the advanced capitalist countries drift farther and farther from the real needs of people, and had lost the trust of people. These caused the legitimation crisis of their rules. These are the most serious crises of the advanced capitalist societies.

2. Communicative Rationality, Communicative Action and the Ideal Rational Discourse

As mentioned above, Habermas attributes the legitimation crisis of modern society and the colonization of life world to the flooding of instrumental

rationality. Habermas's given solutions to this problem are different from the post-modernists (or whom we called post-structuralist) who considered that it has to deny or suppress the role of rationality, but to further develop the concept of rationality, which means to correct the shortcomings of rationality itself within modernity. Habermas did not hold a pessimistic attitude toward the modern society like Weber who thought that the modernity is a self-referenced cage of rationality, or like some post-modernists who ask for some irrational thoughts to replace the modern rationality. Instead, Habermas believes that modernity is an *Unfinished Project*. In order to improve the project, it is necessary to develop and enlarge Weber's concept of rationality.

The classical social theories, such as Karl Marx's theory of Capitalism, maintain that economic production is the most important approach for social integration. That is to say, people are the subjects, while other people and the nature are the objects, and this subject-object dichotomy is absolutely confirmed. Habermas argues that Marx's ideas were somewhat prejudiced and narrow-minded. He observed subtly the *Linguistic Turn* in the 20th century with whose inspiration he borrowed the concepts of *Inter-subjectivity* into his own social theories. Language is a core part in Habermas's theoretical system since very early times. In *The Logic of the Social Sciences*, published in 1967, he held the point that language is somehow like the yarn fabric, and the subjects are hanged on the yarn. Thus there forms the relation between subjects. Habermas thinks that people's language communicative behavior is crucial in the process of human survival and social development in modern society. It is the fundamental activity for human beings. Communication and labor have different functions in shaping the human society. The System is corresponding to the labor, preferring the instrumental reasonableness with practical and purposeful significance. But the most important constructional approach, which the life world corresponds to, is the language communication between subjects. The rationality, which the communicative action prefers, is called the *Communicative Rationality* by Habermas.

In 1981, Habermas published two volumes book, *The Theory of Communicative Action*, which was an exceptional achievement, even a milestone, of Habermas's grand social theory of discourse. In this book, he tried to develop and enlarge the concept of rationality, and to transcend Descartes's philosophy of idealism and the dualist cognitive structure of "subject-object" with his own critical theory. Habermas thinks that rationalization is not a single-side process, but dual sides. On the one hand, rationalization contains the instrumental rationalization, whose flowage is the reason for the legitimation crisis of modernity; On the other hand, since the era of Enlightenment, the Western rationalization also contains a positive side: the Communicative Rationality.

Habermas thinks that Communicative Rationality is implied thoroughly in the human linguistic structures, and shared by everybody who can speak. In terms of traditional instrumental rationality, rationality has one single dimension, and it is undoubtedly the core of all the thoughts and individual subject behaviors. Instead, Communicative Rationality has double dimensions. It involves the dialogue relationships between different speakers. Traditional rationality could be embodied through our cognitive behaviors toward the objects, while Communicative Rationality was expressed in the mutual understanding paradigm between subjects. According to him, "it is only through language, under conditions of rational argumentation, that social actors [Subjects] can coordinate their actions in terms of an orientation to mutual understanding." (Deflem 1996)

In Habermas's normative construction, the subjects can speak and act with a non-self-centered world view in their minds. Communicative Rationality is the rationality of life world. It pays more attention to the realization of intersubjectivity. Its effective space overlaps with the domain of human language. The discourse interaction inside the life world (Habermas calls it communicative action) is a kind of action aiming to the mutual understanding between subjects with language. According to him, Communicative Rationality is the foundation of the Communicative Action. He calls it "communicative rationalization" that the

process in which the communicative action takes place of purposive action. This Communicative Action of Habermas serves as “not only the reciprocal influence exerted by actors oriented to success but also the communication among persons engaged in argument for the purposes of reaching understanding - then he must acknowledge a rational core to norms and value orientations and correspondingly enlarge his concept of rationality.” (Habermas 1996: 339)

Another important point that has to be emphasized here is that the concept of Communicative Rationality has to be broadly understood. For Habermas, it is the ideal mode of thinking for people to make deliberation, and the “‘Deliberation’ should be broadly understood here and it covers a wide range of reasons. Depending on empirical, technical, prudential, ethical, moral and legal reasons we distinguish different types of rational discourse and corresponding forms of communication.” (Habermas 2000: 17) Actually, as some James Bohman and William Rehg (2011) point out, Habermas proposes a multi-dimensional conception of Rationality that was expressed itself in different forms of cognitive validity: not only in truth claims about the empirical world, but also in rightness claims about the kind of treatment we owe each other as persons, authenticity claims about the good life, technical-pragmatic claims about the means suitable to different goals, and so on.⁷ We thus could argue that the Communicative Rationality is a collective conception rather than an exclusive conception. In the process of deliberation / communication, actions of subjects can be oriented by all kinds of rationalities (value rationality, instrumental rationality, etc.) in order to reach consensus.

With the theoretic tools of Communicative Rationality and Communicative Action, Habermas aims to build a social and political **universalist** paradigm of discourse. The key concept to access Habermas’s grand theory of discourse is the “**equality**”.

⁷ James Bohman and William Rehg , "Jürgen Habermas", The Stanford Encyclopedia of Philosophy (Winter 2011 Edition), Edward N. Zalta (ed.), forthcoming URL = <<http://plato.stanford.edu/archives/win2011/entries/habermas/>>. Or <http://plato.stanford.edu/entries/habermas/>.

He had emphasized several times on the equality between subjects (participants) in *Between Facts and Norms*. He believes that equality of subjective rights is the foundation of modern law. “Modern law is supposed to grant an equal distribution of subjective rights for everybody.” (Habermas 2000: 12)

With this equality, participant can express and criticize others **freely**, which is another normative promise of rational deliberation. Habermas (1979: 177) says, “if we are not free...to reject or to accept the validity claims bound up with the cognitive potential of the human species, it is senseless to want to ‘decide’ for or against reason, for or against the expansion of the potential for reasoned action.” That shows, according to him, the equality between deliberative participants and the expressive freedom are both the most important normative premises for discourse theory of law and democracy.

Additionally, the standard of **truthfulness** was weighed a lot as another prerequisite of the mutual-understand orientated rational discourse by Habermas, which meant that the speaker had to ensure the authenticity of the contents he had said and they are not going to cheat or confuse others.⁸

Basing on equality, freedom and truthfulness, Habermas set an “ideal speech situation” for the communicative action.⁹ By this term, Habermas was initially inspired by Charles Sanders Peirce who argued that an ideal speech situation where people can discuss and criticize each other freely may exist in a scientist community. Habermas enlarges the notion to the level of whole civil society. According to him, the “ideal speech situation” is not only a kind of ideal life style, but also an obligato hypothesis when people enter the rational deliberations, even the criteria for rational consensus. He says that “Rational discourse is

⁸ Early Habermas regarded understandability, together with the truthfulness, as the two prerequisites. But latter, he no longer treats the understandability as a normative requirement. He thought it as a premise for all the successful communications.

⁹ The concept of Ideal Speech Situation played an key role in early Habermas’s theoretical building of communicative action. But for late Habermas, it was somewhat replaced by the concept of “unrestricted communication” (Habermas, 1990: 88)

supposed to be public and inclusive, to grant equal communication rights for participants, to require sincerity and to diffuse any kind of force other than the forceless force of the better argument.” (Habermas 2000: 16-17) That indicates the “ideal speech situation” includes four components: 1, In the process of rational argument, all potential participants have equal opportunity to engage in communication. That donates to the equality of opportunity as the former paragraph has pointed out. 2, the communication parties, on the basis of equality of opportunity, can fully express their views on issues, and wholly criticize the views of others. 3, the participants of rational deliberations, on the basis of equality and truthfulness, can use expressive actions, and freely express their attitudes, intentions and emotions in order to make the participants get to understand each other. 4, the rational deliberation participants can use the regulative actions, which means all unilateral privileges must be removed and the participants must outright comply with the regulations which are established in the communication.

Habermas believes that only by positively enunciating the role of communicative rationality, can we stop the erosion of instrumental rationality over the life world, and avoid the colonization of life world, and then rebuild the legitimacy of the modern society.

3. Rebuilding the Legitimacy of Modern Society with Communicative Rationality

According to Habermas, with the tool of Communicative Rationality, we can then solve the systems colonization of life world and the legitimation crisis of modern society. And thus the legitimacy of modern law would be no longer rooted in the national history and culture, and “it thus fits the situation of pluralist societies where legal norms are no longer embedded in an encompassing ethos shared by

the population as a whole.” (Habermas 2000: 12-13)

Habermas made critics on two mainstream legal philosophical ideological trends, *Natural Law* and *Legal Positivism*, and tried to rebuild the legitimacy of modern society with discourse theory of law and democracy in terms of communicative rationality. He (2000: 13) says, “Positivists, on one side, conceive legal norms as a binding expression of the superior will of political authorities. Like legal realist who treats legal norms just as the result of policy-decisions, positivists cannot explain how legitimacy can spring from sheer legality. (...) Proponents of natural right theories, on the other side, derive the legitimacy of positive law immediately from a higher moral law. Positive law here figures as the lowest level in a hierarchy of law, the top of which is occupied by natural law which is explained in metaphysical or religious terms. (...) Such an assimilation of law to morality blurs important differences between the two.”

Habermas argues that, in the context of colonization of life world and legitimation crisis in modern society, neither natural law nor legal positivism could fully fit the situations, and there emerged a fundamental paradox in modern law: “Legitimacy through legality.” The legal positivists regard this phenomenon as a *fait accompli*; but the opponents are opposed to the idea as it is a fact due to several examples they listed, such as the example of Nazi has demonstrated, the laws produced through legal procedures are not surely legitimate. “Habermas thinks like the former, that ‘Legitimacy through legality’ is a fact. But at the same time as the opponents, he thinks this fact is also a problem, and it should be the starting point for new researches and reconstructions.” (Tong, 2010)

Habermas’s normative solutions were mainly embodied in the reconstructing the facility-validity relationship, or reconstructing the legality-legitimacy relationship of law through the method of deliberative democracy. He thinks that in modern society, to ensure people’s compliance with laws, there are two requirements that it should fulfill at the same time. First, the laws must be forceful to the public.

Secondly, the laws are worth to abide for the people. He called the former as facility of law, and the latter as the validity of law. The ideal situation of social integration occurs when the facility and validity of law are coincident. In Habermas's point of view, throughout all the explorations on facility-validity relations of law in Western modern times, only the democratic viewpoints of Kant and Rousseau can touch the essence of the problem. However, "the contractarian tradition up to Rousseau and Kant has also referred to 'reason' as a post-metaphysical base for legal and political orders. This mentalist conception of reason is now translated, however, in pragmatist terms and spelled out in terms of practices of reason-giving, i.e. as conditions for deliberation." (Habermas 2000: 16)

According to Habermas, only through the democratic legislation in terms of the citizen autonomy (especially the public deliberation), can we fundamentally solve the tensions between the facility and validity of law, and the laws thus can both have the legality and real legitimacy at the same time. It is discussed as the following points.

First, in modern society, if citizens' complying with the law is not only due to the fears that may arise from political powerful enforce and sanctions, we must make laws worth to abide. So law-makers should not only be satisfied with the facility of law, and also they must make the laws validate; they should not only be satisfied with the legality of law, and they must make the laws legitimate.

Secondly, in the modern society, which means a secular society, the legitimacy of law cannot appeal to the God or resort to the tradition; neither get hopes up on the political elites, nor resort to the abstract concept of natural law. According to Kant, this law might be justified when and only when all the people agree upon the just of one law. Habermas thinks this is the essence of Kant's legal philosophy. He says: "Only this kind of laws can be legitimate validate - they were agreed by all the legal partners in the process of deliberative legislation" (Habermas 2003: 141)

“The idea of self-legislation by citizens, that is, requires that those subject to law as its addressees can at the same time understand themselves as authors of law. (...) It is only participation in the practice of politically autonomous lawmaking that makes it possible for the addressees of law to have a correct understanding of the legal order as created by themselves.” (Habermas 1996: 120-121) In other words, the legitimacy foundation of modern law should resort to the “Inside” rather than the “Outside”, and the inside path is just the autonomy law-making of citizens. According to the principles of communicative action, only when the citizens are not only the passives of law but also the creators, the laws are legitimate, and only legitimate laws are must be abided and worth be abided. In terms of inter-subjectivity, legitimate laws can be produced in a democratic process through rational deliberations and interactive communications which are based on communicative rationality.

Thirdly, the legitimacy of democratic law-making in terms of the communicative rationality theory does not lie in the substantive transcendental basis, but lies in the reasonable process, that means achieving the consensus or compromise of legal issues in a process which is close to the “ideal speech situation”. It also lies in its acceptable reasonings, that means the reasons are convincing enough. The former one constitutes the external elements of legitimate law, while the latter one constitutes the core of legitimate law. Only at this rate, can the tension between facticity and validity of modern law be accomplished substantially. As a result, the legitimacy of modern law is no longer only or mainly from its coerciveness but more from its validity which is consequential to the reasonableness of the productive process and the acceptability of its reasons.

Finally, since the tension between facticity and validity of law cannot be completely eliminated in modern society, it can only compromise to the second choice: to ensure the legitimacy of law through the reasonableness of the legislative process and the acceptability of legal reasons. Comparing to the only one source of the making of law, it is no doubts that resorting to the procedural

reasonableness and acceptability can make the law to get rid of the factuality. But the validity or legitimacy it produced is only relatively certain and temporarily correct, because in most cases, the legislative process can only be close to meet the requirements of the “ideal speech situation”; the argumentative reasons are somewhat flowing and they are subject to some limitations. Therefore, the legitimate law in terms of Discourse Theory admits that it’s fallible. In order to ensure that the law would play a role of stabilizing people’s expected behavior, the law would be regarded as validate or legitimate law, and be implemented by force, once through a reasonable process and getting good reasons to support. Until the defects are detected, it could be modified by new discourse process and re-argumentations. Because the democratic legislative deliberation is a continuous process, the corrective opportunities of legal development are thus setted in a dynamic and open position.

4. The Role of Political Public Sphere

If the concept of Communicative Rationality is considered as the core of the grand normative theory of Habermas, the Public Sphere is another important clue in his thoughts.

Habermas (1974) says: “By ‘public sphere’ we mean first of all a domain of our social life in which such a thing as public opinion can be formed. Access to the public sphere is open in principle to all citizens. (...) Citizens act as a public to deal with matters of general interest without being subject to coercion; thus with the guarantee that they may assemble and unite freely, and express and publicize their opinions freely.” This is obviously a normative definition of public sphere. Actually, he has also some empirical describes on this term in the book, *the Structural Transformation of Public Sphere*. He believes that in modern societies,

the newspapers, periodicals, radios and televisions etc. are the carriers and media of public sphere. The opposites of public sphere are the private space on one hand, and the coercive power of the state on the other hand. Although sometimes the latter is also known as the public power, as they are using the word of “public” in different senses. Only when the public sphere and the legislative bodies within the state system were attached by following appropriate procedures, “public sphere” and “public power” could share the term “public”.

S. Benhabib (1989) had divided the public sphere into three types. The first is Hannah Arendt’s idea of an Agonistic Public Sphere, which is a public opinion expressive space embracing the tradition of civic (republican) virtue. This kind of public sphere has a distinguishable character of republicanism. The second is the legalistic public sphere of liberalism tradition. According to Benhabib, Habermas’s normative conception of public sphere is the third type. In the preface of the second edition of *The Structural Transformation of Public Sphere*, Habermas made a further clarification on the origins of the public sphere. Habermas thinks that the life world is initially composed by private spaces, then there generated a civil society gradually. After that, the labor market, commodity market and capital market were gradually separated from the civil society, and became a self-referenced economic system together. As a result, for the main body of civil society, “its institutional core comprises those nongovernmental and noneconomic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the lifeworld.” (Habermas, 1996: 366-367) And then, there emerged the public sphere which was based on civil society and rooted in the life world, to play an important role of mediation between the political system, economic system, and the private spaces. Habermas suggests that the political public sphere should be a sensor or a resonance plate which can put those public problems together and highlight their pressures, and cause a certain momentum, to get attentions and solutions.

Historically, Habermas (1991: 57-67) points out that, the political public sphere

with political functions first appeared in England in early 18th century. The abolition of News Controlling System in the end of 17th century demonstrates that the public sphere had developed to a new stage. This abolition made a new phenomenon possible as the rational critical spirits could be shown on the newspapers and magazines, which turned newspapers and magazines into a tool, and then submitted the political decisions to the new public forum. He listed the three most influential magazines back then in England: *Review*, *Tatler* and *Spectator*, argued that they linked literature and politics together through a particular approach, and regarded them as the typical examples of public sphere. He also examined the cafes and salons in London and Paris at that time, and investigated their role as political public sphere. He defines this kind of ideal public space as the *Bourgeois Public Sphere*. However, up to the 20th century, after a series of great economic and social changes, the mass consumption became the main integration approach of the capitalist societies. Ideology of economic system eroded the life world and the public sphere gradually through commercialization and consumptive culture. The rise of mass commercial communicative media gradually collapsed bourgeois public sphere. Political power system, as well as the economic system, gradually dominated the bourgeois public sphere. He calls this process as the transformation or “re-colonisation” of the public sphere.

In fact, Public Sphere in Habermas’s works was not clearly defined, so that people cannot employ it easily in sociological or historical studies. There may be some contradictions in the usage of this term which is somewhat double-faced in Habermas. On one hand, as sociologist and historian, he tried to define it by an empirical approach; on the other hand, as a political philosopher, he has to make this term more normative in order to critique the real practical politics. Therefore, we often see two different kinds of conception of public sphere in his works. By the narrow sense, it refers to the bourgeois public sphere which existed only in the Britain of late 17th century and in the France of 18th century. Just as he said in the preface of *the Structural Transformation of Public Sphere*, “We conceive

bourgeois public sphere as a category that is typical of an epoch. It cannot be abstracted from the unique developmental history of that ‘civil society’ (Bürgerliche Gesellschaft) originating in the European High Middle Ages; nor can it be transferred, ideal typically generalized, to any number of historical situations that represent formally similar constellations. Just as we try to show, for instance, that one can properly speak of public opinion in a precise sense only with regard to late-seventeenth-century Great Britain and eighteenth-century France, we treat public sphere in general as a historical category.” (Habermas, 1991: xvii-xviii) In this important book, Habermas constructed the term mainly in this narrow sense. But sometimes, he also employs this term in a broad sense. It refers to a kind of social phenomenon where the bourgeois public sphere is just one variant type in it. In addition, there are also other types of public sphere, such as the liberal type of public sphere, the plebeian public sphere and the dominated public sphere in highly advanced industrial society. So, according to Habermas, the term of public sphere is either too specific or too broad (Huang, 2003: 261). In the following part, when we say “Habermas’s concept of public sphere” or “bourgeois public sphere” or “the normative public sphere”, I use them in the narrow sense; if I just said “public sphere”, it refers to a broadened meaning. Actually, I also would like to bring another normative type of public sphere in the following chapters.

In Habermas’s critical theory, the modern society is highly systematized and the political system is relatively independent from society. Even in a democratic state, what the political system attains from the negative voters is merely the general and highly centralized trusts which cannot offer enough specific sources for its social policy making. The political power system itself, apart from constantly changed distributions of power between the government and the oppositions, is becoming more and more self-referenced. Not only that, the political system will also initiatively control the public opinions by some specific approaches like “directing the legislative process by government proposals, and connecting the public’s allegiance with the party which is linked to the country.” (Habermas, 2003: 417) The result of systematization is the hollowing-out of democracy, or

what we mentioned above: the System's domination over the life world. In order to solve this problem, He resorts to rediscover the potential of the public sphere. Habermas (2000: 18) argues, "Collective actors of civil society who are sufficiently autonomous, and a public sphere that is sufficiently sensitive and inclusive, can both be instrumental for the perception of problems of society-wide relevance, translate them into public issues and thus generate, through various networks, the 'influence' of public opinions." So, normatively, he believes that the public sphere of life world is the source of communicative rationality for curing the legitimation crisis of modern society.

It is also easy to find that in Habermas's building of discourse theory of law and democracy, the public sphere plays an extremely important role. Through the free, equal and rational discussions of citizens in public sphere, the consensus of intersubjectivity can be achieved; public rationality can be enlightened; the power domination of political system and economic system would be excluded; the rational reflective public opinions would be presented. Here, according to him, public sphere is the birthplace of new democracy, is the origin of the communicative rationality, is the ideal treatment for legitimation crisis of modern society, and also is the way to realize the unity of facticity and validity of law.

Habermas's assumption no doubt radiates some shades of idealism. He had imaged a theoretical model without any frictions. This normative suggestion has been criticized a lot from the empiricists, which we will discuss latter. It is worth to be mentioned that, in Habermas's normative theory, the political discourses of public sphere are not only related to those informal ones in the media and public places. Inside the so-called political system, for example, in the legislative and judicial bodies, the formal negotiations and dialogues, seen by Habermas, are all related to public sphere. Indeed, they are all somehow considered as a part of public sphere according to him, because in modern countries (especially in Western countries), legislative and judicial processes have been massively open to the public. Habermas calls these standardized and programmed spaces within the

political system as the institutional public sphere. It, together with the ordinary and non-institutional public sphere, constitutes a whole process of deliberative politics.

According to Habermas's democratic ideas, citizens should entrust their representatives in the legislative body to participate in the formal democratic deliberation on one hand; on the other hand, they have to attend the informal democratic deliberations in the non-institutionalized public sphere by themselves. Between the two democratic deliberations, it has to build “a communicative channel which is unimpeded, without illegal interventions of administrative power and cannot be distorted by interest groups” (Tong, 2010: 350). Habermas (1996: 327) says, “The communication circulating in the public sphere is especially vulnerable to the selective pressure of social inertia; the influence thus generated, however, can be converted into political power only if it passes through the sluices of democratic procedure and penetrates the constitutionally organized political system in general.” Accordingly he argues that, “Such ‘influence’ is transformed into ‘power’ only by an interaction of the informal and diffuse communication flows of the public sphere at large with formally organized opinion – and will – formation processes first embodied in the parliamentary and the judiciary complex.” (Habermas 2000: 18)

5. The Proceduralist Paradigm of Law

By some occasions, Habermas's democratic views of legislation are also known as the *Proceduralist Paradigm of Law*. The term “Proceduralist” by which he uses to explain the discourse theory reflects how importantly the procedure serves in his theory. To introduce the new paradigm of law, Habermas (2000: 19) holds that it is an issue “from the hopeless competition between the two received legal

paradigms, the liberal and the welfare-state paradigm.” These two paradigms are considered to have emphasized too much on the moral contents.

Habermas's discourse theory of law and democracy (Proceduralist Paradigm of Law) does not provide many moral or normative premises like the Liberalism or the Welfare-state do. He argues that “the results arrived at in conformity with this procedure express per se the concurring will or rational consensus of all participants.” (Habermas, 1996: 93-94) His discourse theory has only two principles: the principle of universalization (U) and the principle of discourse (D). “The principle of universalization holds that moral decisions are valid only if all those affected can consent to them. All must recognize the consequences of the decision, and must prefer those to the consequences of any other decision.” (Habermas, 1990: 65; Edgar, 2006: 45); And “the principle of discourse claims that the agreement of all and thus the satisfaction of (U) must be achieved through practical discourse, which is to say through open and free debate, where agreement depends on the strength of better argument alone.” (Habermas 1990: 66; Edgar: 2006: 83-84) Obviously, his discourse theory does not involve too much substantial moral contents, and these contents could be determined only in specific historical situational communications and deliberations. The discourse theory includes mainly a procedural problem, that is to say, how to meet the normative requirements of validity through a procedural deliberation. In this light, the discourse theory of law and democracy could be defined as the Proceduralist Paradigm of Law.

The discourse theory of law and democracy does not offer a content orientation, but a kind of operation methods and a series of procedures. The practical deliberations must be able to offer themselves normative moral contents. This proceduralists' understanding of moral norms of Habermas got rid of some most substantial moral contents of liberalism or warfare-state, instead he stucked to the traditional moral universalism requirements of Kant. As Niklas Luhmann (1998) said when remarking Habermas's Discourse theory of law and democracy, “The

uncertainty of the future is the only real invariable of the discourse theory. All procedural measures serve to support these premises much in the same way as they do in court processes or election proceedings of political democracies. The decision has to be regarded as open until it has been made.”

What has to be explained here is that, “Discourse Theory does not offer normative contents in the deliberation process” does not mean “the Discourse Theory does not have any normative premises.” As the aforementioned introduction shows, Habermas set a set of premises for the rational discourse, for instance, the honesty and equality of participants. These premises themselves are normative contents. Comparing with the high standard of the normative promises of Republicanism, the honesty and equality of participants are maybe easier to achieve. Therefore, we could say that the normativity of Discourse Theory is somewhat thinner than the republicanism.¹⁰

In practice, Habermas attaches great importance to the procedure of legislation or judiciary, and believes that the legitimacy of the rule of law comes from democratic procedures. In the process of one social decision-making, the discourse deliberations must be treated coequally with the institutional decision-making procedures (e.g., voting procedures, legislative procedures and judicial procedures, etc.). The expected rational consensus depends on the institutionalization of Ideal Speech Situation. Once Habermas (2000: 17) said, “Legitimation depends on an appropriate legal institutionalization of those forms of rational discourse and fair bargaining that ground the presumption of the rational acceptability of outcomes.” That is to say, the communicative deliberative procedure, rather than the judgments, can produce the legitimate laws. Habermas thus had drawn the democratic paradigm from the Elite Democracy into a Proceduralist Democracy.

¹⁰ The critique that Habermas’s discourse ethic does contain substantive normative propositions, despite its strictly procedural aspirations, has been suggested by Benhabib (1990); Kelly (1990); Tuori (1989); Defflem (1996).

The moral debates need to be institutionalized and routinized through legal approaches. The legitimacy of the Rule of Law lies no longer only in the simple legality, but in the conclusions extracted from the moral debates, institutional constructions, and procedurally reflections. Thus, the Carl Schmidt's criticism on liberal democracy and Rule of Law, which holds that the modern Rule of Law is an oppressive force from legality to legitimacy, is solved. For further expositing Kant's jurisprudence, Habermas suggests that the moral principles could become the substantial law through the procedural principle. Meanwhile, proceduralist paradigm obligates the update space for laws, which means it is more open than either Liberalism or Welfare-state. According to Habermas's normative suggestion, the procedure can interconnect the value space with the public sphere, and integrate the natural law with positive law, facts with value, experiences with transcendentalities, so that the procedure is not only the mediation but also the institution, not only the law of freedom but also the law of force, not only the embodiment of justice but also the embodiment of the authority.

By the definition of the concept of procedure, Habermas (2000: 17) says, "There are three different kinds of procedures intertwined in the democratic process: first, the purely cognitive procedures of (various forms of) deliberations; secondly, decision-procedures that link decisions to preceding deliberations (in normal cases the majority rule); finally, legal procedures which specify and regulate in a binding manner the material, social and temporal aspects of opinion and will-formation process." These theoretical classifications have to be retested in different practical domains.

In the field of legislation, the proceduralist paradigm of law requires to institutionalize the mechanisms of public discussions. The formation of legal advices needs to be institutionalized because there are the mutual penetration relations between deliberative law-making and communicative power. Therefore, the institutionalization of deliberative procedures can guarantee the legitimacy of law. Habermas (1996: Chapter 4) argues that deliberative legislative process can

be divided into three aspects that are respectively solutions for three different issues: practical discourses, ethics-political discourses, and moral discourse, which are corresponded to the purposiveness of law, what is good, and what is justice. All of these can be achieved only when there were institutional guarantees.

In judicial field, Habermas proposes that the judicial reasonableness problem can be solved only in proceduralist legal discourses. That is to say, the process of judicial practice should be a deliberative process in accordance with the institutional procedures. In *Between Facts and Norms*, he employed some practical cases of German civil law procedures and criminal law procedures to explain this point. (Habermas, 2003: 287-290)

In the field of “Rule of Law”, Habermas suggests that institutional procedures should be the running form of administrative power, as well as the intermediary of transformation from communicative power to administrative power. People sovereignty principle is the core of the Rule of Law, and it had developed into the following sub-principles: the principle of comprehensive protection of individual rights, the principle that the administrative body has to respect the law and regulations and to accept the supervisions of judiciary and congress, and the principle of separation of state and society. These are the principles of Rule of Law, and they need to be re-understood in the frame of discourse theory. The classical separation of powers explained the running of power only with the functional differentiation of government, while we need to put the discourse principle into the theory of the separation of powers, which means the legitimacy of power implementation also needs to be institutionalized and programmed by the principle of discourse.

Apart from these arguments, Habermas also made further arguments on the neutrality of procedure. In his view, the neutrality of procedure can ensure the fairness and acceptability of results. In the last chapters of *Between Facts and Norms*, embarking from the proceduralist paradigm of law, he gives out some

constructive practical plans on the relations between parliament, courts, administrative organs, and new corporatism, and he emphasizes that his schemes are not utopian (Habermas, 1996: Chapter 9).

6. The Empirical Dimensions of Discourse Theory of Law and Democracy

As a normative ideal theory, Habermas's discourse theory of law and democracy is obviously very significant for re-building the legitimacy of the modern society. In Otfried Höffe's (2000: 609) words, "With the help of his discourse theory Habermas reconstructs the normative content of the liberal institutions of democratic constitutional states" However, although he aims to build a universalist and all-encompassing theory of justice, it does not mean that deliberation can solve all of the social political problems, or everything can be deliberated. According to Habermas, at least the following two issues can't be solved by discussions. The first is the objective problems, or what Habermas called, "pragmatic issues". Three kinds of issues would be involved in public discussions: the ethical, the moral, and the pragmatic. Habermas (1994) holds that, the pragmatic issues should be seen depending on the instrumental rationality and scientific methods. When he made comments on Klaus Gunther's views, he also came to the conclusion that the objective problems cannot be solved by discussion, and they have to be answered by the objective observations. (Horst, 2010: 68) On the contrary, the deliberated consensuses have to be examined by the objectivity. Secondly, the discourse theory also has its own moral bottom line. He once mentioned the Cloning Technique of human as an example to explain that cloning human will damage the morality of mutual recognitions which are the basis of our social attributes, so this issue is impossible to be discussed. (Horst 2010: 66) All of these indicate that the discourse theory of law and democracy is not a castle in

the air, it is somehow empirical oriented.

Moreover, although Habermas's discourse theory is derived from the linguistics to some extent, this does not mean that it refers to a theory of pure logical argumentation. Over the left, once he cited Stephen Toulmin's words to indicate his point of view: "The right way is that: do not require all demonstrations could meet the analytical standard, but think them should be sufficient and well-founded" (Horst, 2010: 61) That is to say, regarding the argument forms of discourse, Habermas prefers the substantive argumentations rather than the analytical or logical argumentations. As he had underlined, rational discourses must involve different types rooted in different kinds of reasons, like empirical reasons and ethical reasons, but not limited only to logical reasons. Furthermore, his discourse theory is closer to the daily life school of linguistic philosophy than the logical analytical linguistic school. In Habermas's own words, it has to "define the tenacious voice of communicative rationality in the daily practice itself." He stresses many times that the consensus from discourses must always be contrasted with experienced reality, so that the consensus can be updated in time. All above show that in the beginning of this theory was founded by Habermas, it was accompanied with a strong empirical concern and interest.

Different from the traditional German idealist philosophers, Habermas has been trying to transcend the binary opposition of Idealism/Materialism epistemologically and methodologically. In what he called post-metaphysics age, he proposes the epistemology and methodology of *Depth Hermeneutics* (Habermas, 1971) which was used by early Habermas in order to overcome the binary opposition between two paths: the philosophical hermeneutics and the social scientific empiricism. Habermas insists, adequate critique requires a thoroughgoing cooperation between philosophy and social science. (Bernstein, 1978)

This sort of analysis is also employed in the second chapter of *Between Facts and*

Norms to analyze the concept of *Justice* in political philosophy and the concept of *Law* in sociology, as well as the dilemmas of the two legal paradigms. Habermas (1996: Chapter 2) used the “the Sociological Disenchantment of the Law” and “The Return of Modern Natural Law and the ‘Impotence of the Ought’” to describe the difficulties these two opposite legal paradigms have encountered. He argues that, since the rise of modern social science, the attribute of law in traditional society as “natural justice” was gradually collapsing; but at the same time, the Positive Law, because of the lack of value orientations, was not as appealing as before. Habermas attempts to construct “his own theory as a synthesis which eliminates the weaknesses of two theoretical traditions and combines their strengths.” (Höffe: 609) Habermas (1996: 66) says, “Without the view of law as an empirical action system, philosophical concepts remain empty. However, insofar as the sociology of law insists on an objectivating view from the outside, remaining insensitive to the symbolic dimension whose meaning is only internally accessible, sociological perception falls into the opposite danger of remaining blind.” And “Only when sociological analyses of law combine external access with an internal reconstruction does it cease to be necessary for normative theory to seek contact with social reality in an unmediated way, through the political consciousness of a public of citizens.” (Habermas 1996: 65)

That is to say, for Habermas himself, a traditional German metaphysical perspective of law cannot fit his academic interest. From his early epistemology research until his building of the discourse theory of law and democracy, he treated the engagement between theory and practice as an important academic orientation. Habermas maintains that the discourse theory of law and democracy is not totally idealistic, but partially from the empirical observations. He says, “As I understand it, this question does not imply an opposition between the ideal and the real, for the normative content I initially set forth for reconstructive purposes is partially inscribed in the social facticity of observable political processes.” (Habermas, 1996: 287)

However, for how to define a rational discourse and how to discover the factors of communicative rationality in practice, Habermas did not give us some satisfied responses. He has not done any empirical studies as the sociologists had done. He thinks, at present, it is still unclear that “how this procedural concept, so freighted with idealizations, can link up with empirical investigations that conceive politics primarily as an arena of power processes.” (Habermas 1996: 287) But, still and all, we could find some inspirations in his theoretical construction for the empirical researches. The most important and inspired part, he distinguishes two discussion ways: *Arguing* and *Bargaining*. The arguing follows the criteria of validity, while the bargaining complies with the criteria of credibility. **Arguing represents a non-successful orientated, but a universal reasonable way of expression.** Therefore, the more arguing factors in a discourse, the more the discourse is deliberative. Habermas even employed a quotation of other scholar’s empirical study to illustrate it. He mentioned, “Elster undertakes an empirical analysis of the discussions conducted in the constitutional assemblies of Philadelphia (1776) and Paris (1789-1791). His analysis starts from the theoretically motivated distinction between ‘bargaining’ and ‘arguing,’ where argumentation includes, according to our terminology, not only justice arguments but also ethical-political arguments referring to the ‘general welfare’ of the nation.”(Habermas, 1996: 339) It is obvious that Habermas is not unsensitive to the practical performances of his normative suggestions.

Even so, Habermas's discourse theory has drawn a lot of criticisms from empirical fields. Nicholas Luhmann (1998), in his debates with Habermas, once pointed out that Habermas's theory does not belong to the domain of social science, because he had made too many normative buildings and he has spoken too much "ought to be". In Luhmann’s point of view, this is a work which a philosopher or a political scientist with normative orientations has to do, rather than a social scientist. Luhmann (1998) added, “For a sociologist it is noteworthy that most legal disagreements are decided not on questions of norm interpretation, but on factual and evidentiary questions.”

Michel Foucault was more straightforward on this issue: he pointed out that Habermas's theory fell into the trap of metaphysics, even if Habermas has always deemed it as his duty to make critics on metaphysics. Foucault criticized Habermasian idealist model of communicative action, and argued that in the daily practices of argumentation, there is no vacuum of power or the idealist dynamic balance of power, and the imbalance of power relations in reality is the fatal flaw of Habermas's communicative theory. Foucault (1982: 222) asserted that "a society without power-relations can only be an abstraction."

Facing these criticisms, Habermas somehow acknowledges the non-pureness of deliberation in daily life and the idealist color of his theory. Once he said, "the presupposition of an ideal speech situation is only necessary because convictions are formed and contested in a medium which is not 'pure' nor removed from the world of appearances in the manner of the platonic ideals." (Habermas, 1982: 30) Nevertheless, he is still stubbornly cling to his own normative directions and solutions.

At all events, discourse theory of law and democracy is a social/legal theory with such a practical purport apparently, so it would be a total loss if it was limited in theoretical analyses. However, the discourse theory of law and democracy, as a normative philosophical thought, especially the idealist concept – the Communicative Rationality, does it fit the practices of daily life? In what kind of situation could we claim that some discourse actions meet the standard of Communicative Rationality? To how much extent do they meet the standards? Can the extent be measured by social scientific empirical methods? In fact, after the discourse theory has been proposed by Habermas, it has been closely linked to the various legislative and judicial deliberations in the practice. In all over the world, by recent more than 20 years, there were numerous political scientists and social science scholars who were doing empirical researches on deliberative politics in different ways which were more or less making dialogues with

Habermas's theory. In the following part, in order to investigate the practical performance of discourse theory of law and democracy, I will introduce and analyze some influential empirical studies in two perspectives – the qualitative and the quantitative.

7. Qualitative Researches on the Discourse Theory of Law and Democracy

In social sciences, qualitative researches cannot accurately show the levels of the features, it can only describe the characteristics of some social phenomenon on an empirical level. In recent 20 years, in a worldwide, there were a lot of qualitative researches on the Discourse Theory, so that we can only list some representative ones here to explain the situations.

In 1996, a political scientist, Edward Lascher, proposed to set up some evaluation index according to the theory of Habermas to evaluate the quality of legislative deliberations. The evaluation index should conclude: “Whether arguments are framed in terms of some conception of the public good,” and “whether participants are able to critique each other’s arguments and respond to such criticism,” etc. He had also put forward some predictions or assumptions, for example, “deliberation increases the legitimacy of legislator’s decisions.” (Lascher, 1996) But, unfortunately his ideas were not applied to empirical studies. According to his own words, this is only a “preface” of the empirical researches on deliberation.

Among the empirical researches which support the Discourse Theory, the Deliberative Polling introduced by Professor James Fishkin of Stanford University is the most influential one. In the programmed designs of deliberative

democracy, the deliberative polling is also considered as the most artificially designed one. From 1997, as a political experiment, it has been tested in more than 20 countries and regions. To carry out this experiment, they firstly do some random samplings among related people and interview them, then select some representative citizens to participate. Each participant can get detailed materials on some particular legislative issues. Then, a well-trained host will lead a group discussion among these people. After reading and discussing the legislative issues, the organizers would also invite experts, congress members, or government officials to have dialogues with the participants on the issues, which enable the participants to have a better understanding and reflections on the bills. Usually, these discussion and dialogue processes would be live broadcasted through television and other media. In general, in order to examine the effects of deliberation, the organizers would also do some polls on the people involved in the deliberation before and after, as well as on some people without deliberations as the contrast groups. By the comparisons on the results of the polls, they can detect the role of communicative rationality in the deliberation.¹¹

As Habermas holds, the normal polls are usually the summations of individual citizens' non-reflected points of view, and such opinions are usually not reasonable. But the Deliberative Polling, using the method of contractive polls, shows exactly that the communicative rationality has played a role in it. Fishkin thinks that the political experiment of deliberative polling can well answer how to simultaneously achieve the equality and inclusivity of democracy. This political experiment has been done in the UK in the form of national deliberative opinion polling for more than five times, and it gained good responses. In other countries and regions (including China P. R.), it also has obtained good effects.¹² The biggest advantage of deliberative polling is that, as a more generalized and more

¹¹ For the materials about design of deliberative polling, see: Fishkin, James S. 1997, *The Voice of the People*, New Haven, CT: Yale University Press; Fishkin, James S. and Laslett, Peter (eds.) 2002, "Special Issue: Debating Deliberative Democracy," *Journal of Political Philosophy* 10: 125–229.

¹² The center for deliberative democracy of Stanford University, led by Professor James Fishkin, is making data summaries and statistics for the deliberative democracy experiments all over the world. On their website, it can easily found the relevant information and evaluations. See: <http://cdd.stanford.edu/>

public forum than many voluntary organizations, it created a new deliberative platform for the amateur citizens, who have neither professional knowledge nor prejudices on certain issues, to express public opinions. Deliberative Polling proves that these amateur citizens have a very mature and sophisticated thinking and action ability when discussing a complex problem. This result effectively attacked the opinions that general public is too unenlightened to have democracy. But there also exist some inevitable drawbacks: People attending the deliberation are selected with random sampling method, which means there are no conflicts of interests between them in real life. This is obviously far from the real situation. Moreover, these members were merely encouraged to deliberate face to face rather than be required to reach an obligated consensus. There is no pressure that the consensus must be achieved. In this environment, people are more likely to change their preferences and to accept the views of others. For the amateur citizens, it is easy to change their preferences in this kind of deliberation, but it is difficult to achieve in the real political life.

Another interesting double case study occurred in 2001. Tracy Sulkin and Adam F. Simon named their research “Habermas in the Lab”. They recruited a group of undergraduate students to participate in the famous *Ultimatum Game* experiment. Two participants formed a group and they could not meet each other throughout the experiment, and they were communicating through computers. Their task was to make a proposal of dispensing \$100. One person was responsible for a proposal, while the other was responsible for accepting or refusing the proposal scheme. If the proposal was accepted, they could finally make the distribution; if it was rejected, both of them could not get the money. They set three situations of deliberation: before the proposing, after the proposing but before the accepting, and totally prohibiting discussions from beginning to end. Each discussion was limited to 180 seconds, and was operated anonymously through the computer networks. The results showed that in the situation when discussion were held before proposing, the proposers were more generous to the receiver, and there was a greater chance that they reach consensus; but for the last two situations, the

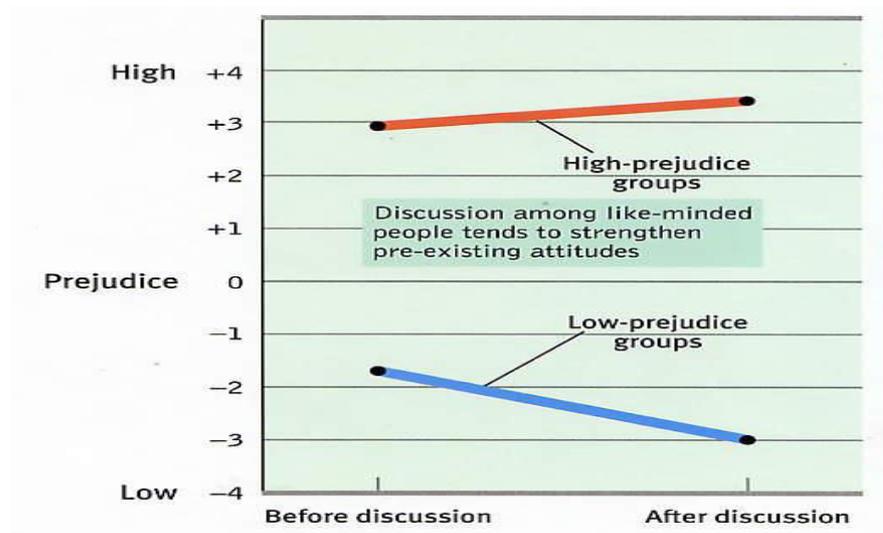
proposers were often less generous, and they usually could not reach the final distributions. Then they drew a conclusion that, “talk before an offer is made leads to fairer outcome.” (Sulkin & Simon, 2001) While their study was titled “Habermas in the lab”, someone criticized it as they regarded “Deliberation” too loosely as “public talks” but not in a Habermasian strict sense. Sulkin and Simon (2001: 815) admitted it, but they also argued that it is almost impossible to evaluate the Habermasian normative concept of deliberation on a precise method of social science.

Thomas Risse, a scholar in International Relations, had pushed the empirical researches of Discourse Theory into the domain of international politics. He studied the discussions between former Soviet Union leaders and Western leaders before and after the end of the Cold War on the topics of world order patterns after the Cold War, including the German unification and NATO enlargement, etc. Inspired by Habermas, Risse investigated the role of “arguing” expressions in these discussions, and defined that “Arguing implies that actors try to challenge the validity claims inherent in any causal or normative statement and to seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their actions. (...) Argumentative and deliberative behavior is as goal oriented as strategic interaction, but the goal is not to attain one’s fixed preference, but to seek a reasoned consensus.” According to Habermas’s suggestion, Risse thinks that more argumentative discourse is used, the higher its extent of deliberation is. The most illuminating aspect of Risse’s research is that he applied the method of *Discourse Analysis* to the empirical studies of Discourse Theory. He cited an example dialogue in the United States in 1990, between Bush and Gorbachev, and analysed that in this dialogue, the two sides were equal to each other, and used more of argumentative expressions (arguing) to exchange views with each other. He thus claimed “that we cannot explain the cooperative outcome of these negotiations without acknowledging that argumentative rather than instrumental rationality prevailed during crucial phases.”(Risse, 2000: 28) This research proved the

existence of the Habermasian ideal type of discourse at some degree.

However, some empirical researches gave out negative answers to deliberative democracy's effectiveness and to the existence of communicative rationality. In 2005, in Colorado, United States, a small experiment on deliberative democracy was conducted. The organizers divided 60 U.S. citizens into 10 groups, and required each group to discuss three of the most controversial political and social issues at that time.¹³ Organizers intentionally distributed people with close political interest and ideas into same groups, which made 5 groups belonged to the "liberal", while another 5 groups belonged to the "conservative". Through in-group discussion, they tracked the trends of idea-changing. The result was very simple and obvious: in almost every group, the members had adopted more extreme positions after talking with others. Although the small group consensus could be reached, big divisions had emerged between different groups, which means, "discussion helped to widen the rift between liberals and conservatives on all three issues. Before discussion, some liberal groups were, on some issues, fairly close to some conservative groups. The result of discussion was to divide them far more sharply." (Sunstein, 2008: 46) Such political experiments are often close to real public debates where people tend to communicate with the others who hold similar opinions in real life. There are also a lot of similar empirical researches which are all pointing to a well-known social psychological phenomenon: Group Polarization (as the picture below).

¹³ The issues included: whether to allow gay marriage; employers should take care of the weak employees or not; whether the U.S. should participate in international treaty for stopping global warming.



The “Group polarization” phenomenon proves that Habermas's Discourse Theory is somewhat incorrect in face of practical problems. A professor of legal philosophy, Cass R. Sunstein, who was the key organizer of these empirical researches, argues that two sources cause the failure of the deliberation: Informational Influences and Social Pressures. (Sunstein, 2008: 65) That means, on the one hand, the people who take part in the deliberation is very susceptible to the spoken contents before; On the other hand, many words in certain situations is spoken under some certain social pressures, “at least in societies that do not respect free speech” (Sunstein, 2008: 68) Overall, any deliberations in practice are not conducted in a vacuum. The empirical studies proved that well, Habermas’s normative discourse theory of law and democracy, especially the ideal speech situation he had suggested, is too idealistic to realize in practice. The power factors in practice are omnipresent like the air, driving and guiding people's discourse actions.

In order to explore the applicability of the Discourse Theory in a different cultural background, professor He Baogang introduced the deliberative democracy political experiments to China (P. R.). Since 2005, he has conducted a series of empirical researches on Wenling City of Zhejiang province, which was referred to the Fishkin’s “Deliberative polling” as well as the “Citizens Jury”, “Focus Group”,

etc. The deliberative case studies he had conducted include: “Democratic decision-making of construction funds using of Zeguo town of 2005”, “Democratic talkfest on budget of 2008 of Zeguo town”, “Rural deliberative democracy experiments in Bianyu village”, “Democratic talkfest of enterprise in Longbiao group”, “Talkfest between labor and capital about the labor contract law”, and so on, which are the most comprehensive and profound studies of deliberative democracy in Chinese background so far. According to his words, the purpose of these studies is to explore the effectiveness of deliberative democracy in an “unlikely place”. Through these studies, He thinks that, even in rural China where is considerably really distant from the Western political culture, in situation of being provided perfect procedural system, idealized deliberative democracy can be reached to a great extent (He Bao-gang, 2008). Meanwhile, because of the particularity of China's practical soil, he puts forward the concept of *Limited Deliberative Democracy* which means that the deliberative democracy must be combined with China's political practices, and could not be judged in a pure ideal standard; the advance of deliberative democracy in China must be regarded as a gradual process, and combined with grass-root democratic elections. Additionally, based on the normative definition of theorists and the political scientific research methods, he thinks that the deliberations which were actively dominated and controlled by Chinese authority power cannot be counted as “a true Deliberative Democracy”, and may be seen as the “Authoritarian Deliberation”.¹⁴

¹⁴ For the empirical studies of deliberative democracy conducted by He Baogang, see: He Baogang: *Deliberative Democracy: Theory, Methods and Practices* (Chinese version), China Social Science Press, 2008; Fishkin, James S, He. Baogang, Luskin, Robert C. and Siu, Alice. 2010. “Deliberative democracy in an unlikely place: deliberative polling in China” in *British journal of political science*, vol. 40, no. 2 (2010), pp. 435-448, Cambridge University Press, Cambridge, England; Baogang He, 2006, “Participatory and Deliberative Institutions in China”, in Ethan J. Leib and Baogang He (ed.), *The Search for Deliberative Democracy in China*, PALGRAVE MACMILLAN, New York, USA, pp.175-196; Baogang He and Mark E. Warren, 2011, “Authoritarian Deliberation: The Deliberative Turn in Chinese Political Development”, in *Perspective on Politics*, June 2011.

8. Quantitative Researches on the Discourse theory of law and democracy

Qualitative research can deepen the case studies, but it is with a main drawback that it is full of descriptive discourse but unable to give a more specific scope of the effectiveness. The general criticism on the qualitative research of Discourse Theory is that: these researches often fail to explain how to confirm and evaluate the occurrence of rationality, and often become a kind of case description (Graham, 2002: 126). Therefore, some researchers re-focused on the quantitative approach. But due to the idealism and normativity of Discourse Theory, the standards (such as the ideal speech situation) are very difficult to become specific index or indicators of quantitative research. So far, the relevant quantitative studies are held much less than qualitative researches.

DQI Approach

At the beginning of this century, four scholars, Jürg Steiner, André Bächtiger, Markus Spörndli and Marco R. Steenbergen (2004) had constituted an international team, and they had advanced the quantitative empirical research on Discourse Theory for several years. On the basis of predecessors' researches, their main contribution is that, in accordance with the ideas and guidelines of Habermas, they designed a set of discourse rationality evaluation index which were relatively stable and mature. They named it DQI (Discourse Quality Index). As a scale measurement of quantitative research, it has achieved good results in practices.

According to Habermas's Ideal Speech Situation, they set five indicators to evaluate deliberation. 1, Participation. That refers to a speaker's ability to participate freely in a deliberation. 2, Level of justification. For this indicator, they set up four grade standards (degrees). The situation that the presenter does not

give any reason accounts for the minimum (No justification); the situation that he gives at least two arguments accounts for the highest level (Sophisticated justification). 3, Content of justification. If the argument was just oriented by the interests of the individual or small groups, then it scores the lowest; On the contrary, if the argument was based on public interests, then it gets the highest points. 4, Respect. It is divided into three sub-indicators: respect for the groups, respect toward the demands of others and respect for the opposite views. Each sub indicator is carefully divided into different levels. For example, for the “respect for the opposite views”, completely ignoring the opposite points of view would get 0 points, and making a detailed assessment for the opposite views would get 3 points, while there are also two levels in the middle. 5, Constructive Politics. If in the end, participants still insist on their original opinions, the efficiency of deliberation is the minimum; if the speakers altered or revised their points of view, then the deliberation has the best effect. (Steiner, Bächtiger, Spörndli, and Steenbergen, 2004: 43-73)

With this index system, the researchers separate some parliamentary deliberative discourse into small speeches, then evaluate and code each of them according to the index system. Totaling all the achievements of coding of the speeches through statistics processing, they could conclude the degree of the whole deliberative discourse (for example, a full parliamentary dialogue), or what we say, the extent of communicative rationality. In order to enhance the stability of this index system, the researchers repeated the discussions and arguments in different occasions. They also selected two different groups of people, trained and not trained, as the evaluators and coders, then compared the evaluation scores from the two different groups on the same discourse. The results showed that, although there are differences, but they were still in the acceptable range. This shows that the index system, after repeated arguments, can to some extent eliminate the errors between different subjective people.¹⁵ What more valuable is that, different from other

¹⁵ For fully describing of the DQI method, see: Jürg Steiner, André Bächtiger, Markus Spörndli, Marco R. Steenbergen, 2004, *DELIBERATIVE POLITICS IN ACTION: Analyzing Parliamentary Discourse*, Cambridge

empirical researches, they also made a great deal of discussions and clarifications on the philosophical concepts before their empirical researches. But there are still some shortcomings, for example, they didn't put the "truthfulness" of dialogue which Habermas emphasizes many times into the evaluation index system, because they maintain that the "truthfulness", as a subjective conception, is very difficult to be objectified in empirical research. Moreover, the DQI method can currently only be applicable to the parliamentary deliberation whose discourse materials are easy to collect and select, but for the informal deliberations in the public sphere of daily life, it needs to be further tested and improved.

Lo Jin's Research

In Taiwan, part of the Chinese speaking world, Dr. Lo Jin (2010) had conducted a "Research on the BBS of Su-Hua Highway" which is one of the representative empirical researches on the deliberative democracy in the online forum in recent years. His research combined qualitative and quantitative approaches. The evaluation index of discourse of Lo's research is very comprehensive, meticulous and polyphyletic, not only covering the Habermas's requirements about ideal speech situation (including the requirement of "truthfulness"), but also involving other requirements of the deliberative democracy theories.

Lo designed eight grand indicators which included: Reciprocity, Reflexivity, Justification, Ideal role taking, Sincerity, Freedom from the interference of power, Inclusion and Discursive equality. Almost every grand indicator is divided into several sub indicators, and each sub indicator can be used for discourse analysis and coding by setting up different degrees of scale. For example, the grand indicator, "Justification", is divided into 3 sub indicators - "the source/foundation of justification", "the structure of justification" and "the content of justification". For the "the source/foundation of justification" part, he set 3 degrees – external validation, internal validation and allegation. For another example, in the

Reflexivity indicator, he set four degrees – “persuasion”, “progress”, “no reflexivity” and “radicalization”. On the basis of the meticulous divisions of indicators and degrees, Lo summed up the discursive deliberation as four types: “ideal deliberation”, “effective deliberation”, “normal dialogue” and “meaningless dialogue”. The former two belong to the “deliberative discourses”, while the last two belong to “non-deliberative discourses”. Each type consists of a one-to-one correspondence to the coding degree of the indicators.

By such a rich, strict and precise index system, Lo took a discourse analysis and statistical analysis on the online discussions of the “Su-Hua highway BBS” in one month, and found that the deliberative discourse accounts for 21.2%, while non-deliberative discourse accounts for 78.8% (Lo, 2010: 155). However this does not mean that the online forum deliberation is definitely on a low level. After comparing with the other related researches, Lo Jin (2010) stated in the conclusion that the online public discussion does not certainly lead to the “group polarization”; it can serve as the possible mechanism of government policy evaluation.

Lo’s research was more accurate and precise, but it also exposed some problems of quantitative method. Quantitative research can quantize some subjective standards, but it sometimes cannot give a full explanation on the quantized measures and standards. In order to adapt to the four different types of deliberation divided by him, Lo set four different degrees for every indicator. However, what are the reasons for this degree-setting? Why not 5 or 3 degrees? In addition, why does every indicator value the same? Does it mean that “the content of justification” play the same role as the “inclusion” in a deliberation? These are still the difficult questions for quantitative research to answer in the present.

9. Conclusion

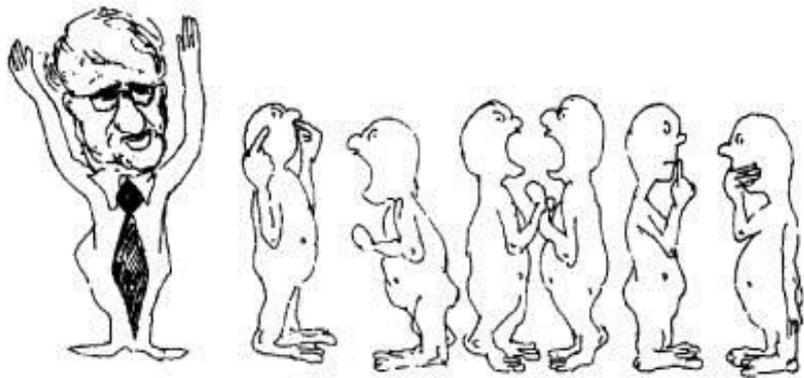
This Chapter had discussed the discourse theory of law and democracy of Habermas in two directions: theoretic and empirical, and had also shown the tension between theory and practice. On one hand, for Habermas's normative theoretical concepts, including communicative rationality, communication power, public sphere and the proceduralist paradigm of law etc., we need to compare them with other theories or practices on the basis of clarifying the concepts. Habermas, on the other hand, should be one of the contemporary Western scholars who think the most on the relationship between theory and practice. Rethinking the relations between theory and practice (Western theory and the practice of China) is also one of the important goals of this thesis.

The discourse theory of law and democracy is put forward basing on the criticism of traditional views of rationality. Although Habermas hopes to overcome the binary oppositional philosophy of "subject-object", his theory inevitably carries a certain color of metaphysics, due to the idealist nature of the methods, language and thoughts. The best way to overcome this defect may be the empirical studies of social sciences. As mentioned above, empirical researches either for or against the discourse theory of law and democracy had all given corresponding explanations on this normative theory from an experiential perspective, which shows that the significance of social science to philosophical theory is just as the meaning of engineering to natural science: philosophy puts forward the normative concept of rationality, and social science hopes to design some methods to prove or disprove the existence of rationality and to measure the extent of rationality. Social science provides an important methodological support for expounding, proving, challenging and improving the normative theories.

At the same time of affirming the positive effects of social science, we should also see the positive power of normative rationality itself. Just because of the

acknowledgement that human being has the ability of rational thinking, the Enlightenment of modernity can be sustained and the society can develop towards an ideal “goodness”. Habermas once said, “If I still have a little bit of utopia, only because I believe that democracy, freedom and justice, as well as the public debates on the best path to realize them, can solve the Gordian knot seem unable to solve in the world today. I’m not sure we will be successful, but because we don’t know, we just have to try it.” (Habermas & Carleheden, 2001: 22) Also he says, “Without the innovative potential of social movements operating in the meantime nothing will change, and we need the utopian ideals and energies that fuel them. But this does not have to imply, as in the case of Ernst Bloch, that theory itself has to take the place of utopias”¹⁶ How to realize the “utopia of rationality”, not only to prove or to disprove it? This may be a more comprehensive challenge for the social sciences.

¹⁶ Mikael Carleheden and Rene Gabriels, “An Interview with Habermas”.



Jürgen Habermas: My God! I have been expecting that the dialogue could go on with discourse of rationality

趙行情 Zhao Tingqing
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**Chapter 2. Communicative Rationality or
Power Discourse: Foucault's Challenge to
Habermas**

Introduction

Various schools of Western thinkers have interpreted the nature of our modern society differently. Max Weber was the representative publicist for the idea that the rationalization makes up the essential feature of modern society; while Nietzsche argued that the topic of modernity in the sense of Enlightenment does not exist at all. This debate discloses the inherent differences between different social-political philosophies. As the argument that has been continued persistently until today, two modern great thinkers at the respective ends of this debate are Habermas and Foucault (Jay, 1984: 509; Love, 1989). They have almost completely different interpretations on modern rationality, democracy and the concept of discourse. Habermas vindicating claims for modern rationality turns him into the most important defender and ameliorator of this school; Foucault is the most important critic of the so-called modern rationality. Habermas and Foucault's debate is not merely the debate between two thinkers with different theories and different world-views, is also seen as the debate between idealism and realism, and the debate between modernism and post-modernism. It is also considered to highlight an essential tension in Western modernity that is the "tension between the normative and the real." (Flyvbjerg, 1998a)

However, some similarities were still easy to be spotted. On the topic of modern societal criticism, they shared a lot of common cognitions, even with their opposite prescriptions. Habermas is relatively more optimistic by striving to find the answer within the modernity; Foucault was relatively pessimistic by believing that there is no other ways other than resistance.

By comprehending that Habermas and Foucault's social theories reflect the tensions between fundamentally different interpretations on modern society, it is necessary for scholars to treat the two as two contradicting theoretical goals in empirical researches. As mentioned earlier, Habermas had normatively put

forward the Discourse Theory of Law and Democracy. However, from theoretical questions he raised, the studies of this thesis don't have to be confined to a simple dialogue that is limited to the works of Habermas. Foucault's Discourse Theory should be put forward comparatively so that the academia people would have dialogues along with both in the theoretical and empirical researches in the texts after.

Among the existing researches on China's political and legal practices, Habermas and Foucault's theories are both theoretical frameworks with extremely high utilization rate, but people have seldom investigated the relationship between these two theories while doing researches in China. This chapter examines the theoretical comparisons in order to list the note-worthy tensions and combine both theories as further research questions.

We would also argue that, differently from the interpreters, such as Bent Flyvbjerg (1998a; 1998b), who believe that the tension between the two is the tension between the normative and the real, Foucault's negation of rationality and modernity is partly on a normative level, and his genealogical construction of power relations is also somewhat normative, which can be seen as the Negative Normativity.

In the first half of this chapter, the differences between Habermas and Foucault in three philosophical aspects: *Rationality*, *Methodology* and *Subject* would be illustrated. Only by finding out these differences, can we make the foundations to compare their social / legal theories. Then, in the second half of this chapter, the differentiations between their social theories would be shown, especially the differences about *Power*, *Discourse*, *Democracy* and *Law*, etc.

1. Diagnoses: about Rationality and Modern Society

As mentioned above, Habermas thinks that the flood of instrumental rationality in advanced capitalist societies caused the colonization of life world and the legitimation crisis. Habermas is still the advocator of modern rationality. Similar to Max Weber, he holds that the rationality is the most important element in the modern world; The rationality of discourse and action is always the theme of the philosophy. We can even say that, according to him the philosophy itself is from the rational reflections which are embodied in cognitions, speeches and behaviors. The fundamental problem of philosophy is about rationality. If there is something in common for all philosophical thoughts, that is from the usage of rational experiences to think about the uniformity of being or of the world. (Habermas, 1984)

Habermas argues that Hegel and Nietzsche represent the two perspectives of criticism on the tradition of modernity; Hegel is on behalf of the rational tradition, while Nietzsche represents the tradition of irrationality. The postmodern theory inherited Nietzsche's irrational tradition as their absolute negations on the modernity are obvious. In his view, reconstructing the theoretic tradition of modernity (rationality), on the basis of the belief that the critics of modernity are different from the critics of tradition, could rectify the way philosophers should do their researches on modernity (rationality). He says: "The criticisms of metaphysics in 20th century regarded rationality as a completely negative thing. (...) We have to consider the rationality as the subject of all discourses and actions, and as the fundamental principles and attitudes in the activities of production, life, communication and thinking. If there is no such fundamental principle and attitude, everything will descend into chaos, everything will not be able to get a reasonable explanation." (Zhang & Habermas, 2000) This statement indicates clearly his attitude different from the post-modernists. According to him, Michel Foucault is one of those distinctive figures of the post-modern irrational criticisms.

According to Habermas, modernity, as Max Weber emphasized, is derived on the basis of rationality. The existence and development of modernity is not the result of human being's choice, it is an objective process, so we can't shake it just through a decision. Rationality contributes to the progress and growth of its existence and development; in other words, the development of rationality has promoted the development of modernity. According to Habermas, now, the so-called legitimation crisis what we have seen is because of the overdevelopment of instrumental rationality. Through rebuilt and self-examination, the rationality hopefully would to be able to solve its own problems and find a better model of modernity. That is to say, starting from the thought of reconstruction of modernity, Habermas perseveres in the position of modernism, and believes that the rationality will solve the problems of itself. Although he had criticized the instrumental rationality, portraying it as a distorted rationality and the despotic rule social- life-wise. It doesn't automatically prove that the rationality can be all negated. On the contrary, only by searching the solutions within the rationality, can we correct the distorted situation of rationality.

In the reverse way, in Michel Foucault's view, the status of rationality has just soared in modern times. "Compared to the incessant dialogue of reason and madness during the Renaissance, classical internment had been a silencing (...) Confinement, prisons, dungeons, even tortures, engaged in a mute dialogue between reason and unreason — the dialogue of struggle. This dialogue itself was now disengaged; silence was absolute; there was no longer any common language between madness and reason." (Foucault, 1988b: 261-262) This shows that modern civilization is not a long narrative. It is generated from the rationality's repression over the madness. Its development is established upon the comprehensive controls to the "others". Foucault thought that the rationality was originated from the competitive struggles between people. He said: "Examining the history of reason, (...) the personal conflicts that slowly forged the weapons of reason" (Foucault, 1977a: 142)

According to Foucault, the function of rationality of modernity was to create and develop people's daily lives, but the results had backfired; it inversely made people not free. The development of instrumental rationality proved this point clearly. Foucault argues that the history of so-called modern civilization is just the history that the rationality conquered the irrationality. Originally, both rationality and irrationality constitute significant parts of human life, and irrationality unexpectedly colors the world. But, rationality's conquest and exclusion over irrationality had gradually eliminated such diversity and lessen the gap. So to say, the rationality dictatorship removed or even decimated the multifariousness of the modern society. Now the question is raised? Is diversity beneficial to the human society? From the social movements which reached their own peak in the 1960s, diversity and differences between different groups of people have been gradually accepted and embraced. Therefore, to resist the rationality by irrationality might be a good way to achieve the final goal of the diversely open world. What Foucault had used to resist the rationality was the "madness". Foucault pointed out that respecting the madness means to admit the "the bottom limit of human truth", so as to better understand the meanings of "human", "truth" and "rationality".

Obviously, Foucault wanted to jump out of the mundane theories of modernity which were always searching for the methods and solutions of rationality-related problems. He suggests that solutions for practical problems may lie in the external and opposite of rationality – the irrationality.

Generally speaking, Habermas' theories were based on the reconstruction of rationality, while Foucault was trying to think out of the pool of rationality. But speaking of the problems of rationality, at the same time Habermas and Foucault have both realized the crisis of modernity, and have both critiqued the instrumental rationality. On the topic of crisis of modernity, Foucault mainly promoted the deconstruction of the previous and ancestral theoretic foundation.

That would maybe enable scholars to pave the way to the new theory. Under the same condition, what Habermas encouraged was to rebuild the modernity of rationality, to accomplish the *Unfinished Project*, namely finding the solution inside the modernity and rationality. The Habermasian solution can be seen as a path of re-construction.

2. Methodologies: Debates on Genealogy

Methodologically the year of 1969 served as the turning point of Foucault's academic career which could be divided into two periods: the *Archaeology of Knowledge* and the *Genealogy*. In Foucault's early works, he defined his study methods as Archaeology of Knowledge which distinguished his historical researches from the general hermeneutics. This concept was constructed by the means of metaphor: as the archaeology is running on the ruins of the history, and a time list is unfolded in space, the archaeology of knowledge digs the deeper level of knowledge. It does not refer to the intellectual history, but the pre-intellectual history. The intellectual history started when the end of the knowledge of archaeology arrived. Foucault had clearly defined his Archaeology as a process of rewriting, rather the pursuing or confirming of truth of some significance. By Foucault's *Archaeology of Knowledge*, Dreyfus and Rabinow (1982) criticize that although Foucault's archaeology aims to liberate us from the transcendental narcissism, it is still wavering between the normativity and empirical descriptiveness. The archaeology of Foucault had neither limited itself in a modest empiricism nor maintained an abstraction in the sense of phenomenology.

After the 1970s, as Foucault became more aware of this problem, his research methodology was more focused and colligated to Nietzsche's genealogy in order to make a thorough deconstruction on the concept of modernity and rationality. As

Clare O'Farrell defined, "If archaeology addresses a level at which differences and similarities are determined, a level where things are simply organized to produce manageable forms of knowledge, the stakes are much higher for genealogy. Genealogy deals with precisely the same substrata of knowledge and culture, but Foucault now describes it as a level where the grounds of the true and the false come to be distinguished via mechanisms of power."¹⁷ From this period, Foucault's researches were thus focused on the analysis of power (relations) with genealogy.¹⁸

The concept of genealogy was originated by Nietzsche. It was fundamentally applied to explain the origin of moral prejudices. Foucault noticed that "Nietzsche sought to uncover, via the observation of localized and relational, rather than continuous, historical operations of power, the installation of 'false universals', interested ideologies that are made to pass as neutral and naturally occurring 'facts'." (Downing, 2008: 13) Therefore, with Nietzsche's genealogy, Foucault treated the specific history as scattered pictures of "pedigree chart". The way genealogy works is not to take history as a single process of continuous development, but to scatter the history, to dismount it and isolate it from the present, the past and the future, so as to make people aware of the uniqueness and alienation of history. Thus, through the process of historical deconstruction, Foucault discovered human being's characteristics of alienation and non-totality in the history, and found the "modern legitimacy" really questioning. Eventually he dug up the non-continuous and non-legitimate knowledge of history. Foucault (1977a) said: "Genealogy is gray, meticulous, and patiently documentary. It operates on a field of entangled and confused parchments, on documents that have been scratched over and recopied many times"¹⁹

¹⁷ Clare O'Farrell: Key concepts of Michel Foucault. See: <http://www.michel-foucault.com/concepts/>

¹⁸ This thesis focuses on the genealogy period of Foucault. For the detailed relations between Archaeology of Knowledge and Genealogy of Foucault, see: Green: 2004.

¹⁹ Michel Foucault, "Nietzsche, Genealogy, History," trans. Donald Bouchard and Sherry Simon, in *Language, Counter-Memory, Practise*, ed. Donald Bouchard (Ithaca, NY: Cornell University Press, 1977), pp.139-164; and, from "Truth and Power" interview by Alessandro Fontana and Pasquale Pasquino. trans. Colin Gordon. In *Power/Knowledge: Selected interviews and Other Writings 1972-77*, ed. Colin Gordon (New York: Pantheon Books, 1972), answer to final question, pp.131-133, in Lawrence E. Cahoon (ed):

Similar to Archaeology, Foucault's Genealogy is also an investigation approach to the origins. The major deviation of genealogy from archaeology is that what Foucault believed that the historical beginning is not the original universality of things but the disputes between different things. The central themes of genealogy are no longer the knowledge, but the power; are no longer the language, but the body; are no longer the thoughts, but the desires. To sum up, "Archaeology would investigate the rules of exclusion by which truth is created, while genealogy would trace how different systems of discourse replace one another." (Schmidt 1997: 154)

What commentaries Habermas had on Foucault's genealogy is quite compelling. In the *Philosophical Discourse of Modernity*, Habermas (1987d; 1987e) devoted two chapters to discuss Foucault's theories, especially focusing on the evaluation of Foucault's genealogy. As James Schmidt (1997: 149) has summarized, "Habermas sees Foucault's work as falling into two broad phases: his early studies mount an 'unmasking critique of the human sciences', while his later writings articulate a 'theory of power'." Habermas points out that every idea is generated in order to solve a particular problem. The proposition of genealogy reflects Foucault's dissatisfaction with the traditional humanities, especially the disciplines of history and hermeneutics. He thinks that Foucault's genealogy has created its own three paradigms to replace the tree paradigms of traditional humanities: the meaningless structure analysis replaced the interpretations of the meaning; the functions of the power replaced the claims of effectiveness of truth; the value neutrality replaced the value judgments. Habermas (1987c: 275) thus concludes: "the genealogy of knowledge is supposed, by contrast, to rise to true objectivity of knowledge."

Habermas believed that Foucault's genealogy was to substitute relativity with objectivity, and to substitute the artificial normativity with the objective

From Modernism to Postmodernism: An Anthology Expanded, Blackwell Publishers, 1996, pp. 360.

naturalism. The ultimate goal of these works was to present the original appearances of things. But he thinks that Foucault has never made a clear interpretation on the tension between the two (Liu Qing, 2006). According to Habermas's (1987: 275) words, "each is completely explicable from its own situation", that is the destination genealogy aimed for. Standing on such a position, Habermas points out that the non-autonomous temporality makes the starting point of genealogy still sunken into the hermeneutic swamp, and the related analyses of relativism can only be understood as the practical activities in a particular context. The original purpose of the historical studies of genealogy was to transcend the hermeneutic humanities, and to find the new objective knowledge, but it fell into the trap of "self-reference". Thus, inconsequently, genealogy's contradictions of "relativism" were found on the "objectivity" premise of it. Therefore, Foucault's genealogy, according to Habermas, functions as an "empirical-transcendental double".

Habermas (1987c: 286) also argues that Foucault's genealogy has written off the role of communication: "genealogical historiography deals with an object domain from which the theory of power has erased all traces of communicative actions entangled in life world contexts."

In our opinions, on the one hand, the genealogy of Foucault conducts empirical analyzes on the power technologies in order to examine the social effects of humanities; but on the other hand, it is also partly normative. It pays much attention on how the power relations produced knowledge. Indeed, as James Schmidt (1997: 150) argues, the genealogy "attempts to be both empirical analysis of power technologies (and thus part of functionalist social science) and an element of theory of constitution (and thus a transcendental account of how discourse about man is possible at all)." But from other perspective, genealogy of Foucault is neither purely descriptive (like history, it tells us how things were) nor purely normative (like philosophy, it tells us how things ought to be). Therefore, to understand how Foucault was different from Habermas on this issue, the most

important thing is to understand the whole academic system of Foucault and what is the purpose of his genealogy on earth.

If Foucault aimed to establish a kind of objective knowledge, Habermas's criticism was no doubt correct. But actually, Foucault had never word anything such as “the knowledge/discourse is fair, objective and impartial”. Of course he would not exclude his own work in this sense. From the beginning, Foucault had already set a criticism task for the genealogy. He held that the purpose of genealogy is to destroy the inevitability and to discover the contingency (Foucault, 1989: 208). Foucault (1996: 365) had well explained in “Nietzsche, Genealogy, History” that “Genealogy does not resemble the evolution of a species and does not map the destiny of a people. On the contrary, to follow the complex course of descent is to maintain passing events in their proper dispersion; it is to identify the accidents, the minute deviations - or conversely, the complete reversals - the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us; It is to discover that truth or being do not lie at the root of what we know and what we are, but the exteriority of accidents”

Neither the subject nor the rationality was formally or recognizably shaped, as Foucault believed. Their formation and development are generally periodic. Any understanding of them is related to certain context and limited to specific extent. In this case, the research method of Foucault, the genealogy, how does it purport to be objective? Habermas criticizes Foucault to be an entire objectivist. But on the contrary, Foucault was able to exploit problems by means of relativism. Habermas analyzes the theory in a hypothetical situation, and concludes that Foucault employed a meaningless structure analysis to replace the interpretations of the meaning, and so on. But in Foucault's hypothesis, he just amalgamated the knowledge/discourse into the social systems and practices, and revealed the mechanism of power from his studies. He had more emphasized the analyses and explanations on the historical fragments of discourse/knowledge. Foucault has

repeatedly claimed that the blood of argument is flowing under the truth. Here, the blood refers to an argumentation of the effectiveness of the truth. And to Foucault, the knowledge / discourse is produced by the power, is the product of power and it can be produced at anytime and anywhere. In what context does the value neutrality exist? And how can the value neutrality substitute the value judgment? In this light, Foucault is absolutely not the empiricist as Habermas thought, and it is maybe better to defined him as a relativist or a contextualist.

3. On Subject: Product of Power or Inter-subjectivity

Where Nietzsche proclaims the death of God, “Foucault announces at the end of *The Order of Things* the death of man, whereby that historical construction, the human being, is likened to a face drawn in the sand and about to be erased by the movement of the tide washing over it.” (Downing, 2008: 13) When the transcendental position of God was vacancy, whether the human beings are required to occupy this position? Foucault argued that human being has a special affinity with god, so that once god’s life is ended, people wouldn’t be alive. In fact, the *Subject*, which was established during the age of Enlightenment, has almost absorbed all the glories of God in the sense of ontology, and thus subject has become the new transcendental center and dominant power of the world. Foucault was extremely unsatisfied with this situation. According to him, the role as creator of one certain subject, and a variety of its alternatives must be deprived and thrown off, and dissected as one kind of complicated and variable function of discourse. He said “My objective has been to create a history of the different modes by which, in our culture, human beings are made subjects.” (Foucault 1983: 208) *The Orders of Things*, written by Foucault, was to criticize the mainstream Western ideologies - the *Anthropologism* from the past two centuries before this piece of work was written. In this light, Foucault is suspicious and hostile against

the idea of sovereignty and general ubiquitous subject, which function as foundations of the Western societal structure.

Foucault believes that there is a fundamental contradiction in the modern conception of *Human Being* (Subject): the mutual repulsion between the Transcendence and the Historical Limitation. The human nature in modern times cannot be equated to *Cogito*, because *Cogito* is always limited and temporary. There is another world out of *Cogito*, which is the *Unthought*. According to him, the problem of modernity is not how the experience generates the decision, but how people treat the “Unthought”. That is to say, “Unthought” is an indispensable “constitutive outside” out of *Cogito* and Being. As a result, human being cannot replace the transcendental position of almighty God in terms of the existence of Unthought. The works of Foucault had completely denied the Kantian transcendental subject. Foucault let us rethink the human being as subjects – whether as subject of knowledge, as legal subject, as political subject, as subject of sexuality, or as ethical subject. By Foucault’s inspiration, we would no longer set the human being as the supreme in ethical or legal fields, and we have to in turn re-think about the origins and constitutions of subjects (human beings).

In the eyes of Foucault, “human died” means the subject died; and the subject as the unique source and foundation of knowledge, freedom, language, and history is death. Subjects are constructed rather than transcendental, as Foucault acclaimed after dedicating much time and effort into the revelation of the truth. “During their history, human beings have never stopped constructing themselves, that is to say, continually moving their subjectivity, constituting themselves in an endless series and multiple of different subjectivities and who had never ended and never put us to face something that would be the human being.”²⁰ He believed that there is no so-called “transcendental Ego” in the world. Subject is actually constructed by power accumulated from hiding individual experiences in the process of

²⁰ Entretien de Michel Foucault, in *Microfisica del potere: interventi politici*, op. cit., repris in D.E., Vol. 3, texte no 192.

modernization. Considering body, behavior, discourse and desires as elements that comprise individuals is barely one of the primary consequences of power. He said: "In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires come to be identified and constituted as individuals." (Foucault, 1980a: 98) These indicate that Foucault suggested the decisive relation between Subject and Power. Once he concluded: "He [subject] who subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection." (Foucault, 1995: 203), and thus the subjectification and the objectification are inseparable processes.

Similar to Foucault, Habermas had also reviewed the concept of Subject in an epistemological sense, which he referred to as the "ecumenical human and his consciousness". In his view, the epistemology, which treats subjects as the core, concentrates on the fundamental questions: the divisions between human being as the subject, and the world as the object, as well as the possibility that the human being cognize the world. In other words, the binary opposition between Subject and Object serves as the critical feature of this philosophical approach. But there is no sufficient evidence to support this premise. Insofar as it can be ascertained, it is only a transcendental normative assumption, but not an established logical truth. Therefore, according to Habermas, the traditional concept of subject seemed to be quite suspicious in this case.

However, does Habermas also want to deny the existence of the Subject? The answer is of course no. By the contrary, he was opposed to all kinds of attempts to subvert and deconstruct the subject, especially against Foucault's entire negation of the existence of subject. In order to avoid these transcendental problems, during his construction, Habermas abandoned the transcendental approaches, and backed to the practical philosophical ways. He argues that the meaning of the finite prepositional word, "self", was distorted from the beginning with its characteristic

of pure subjectivity, in the process of growing individualism. So we must restore the word “self” with the sense of inter-subjectivity (Zhang Guo-feng & Habermas, 2001: 41). Somehow like a republican approach, Habermas argues that any subject could not exist independently; without association with others, no subject can have a significant life; Even a independent life of itself is impossible, no one can become a subject only belongs to himself. That is to say, for Habermas, Subject can be only explained as a product created by the socialization of human beings, it is formed and developed in the process of socialization. The “self” is embodied in the mutual connections with the “others”. Only with these connections, a single human can be a unique individual. The so-called self and subject are impossible without social collectivities. Thus, Habermas succeeded in turning the traditional philosophy of “subject – object” into the “subject – subject” model, that is, from *Subject* to *Inter-subjectivity* mode.

Overall, Foucault was committed to deconstruct the concept of Subject, while Habermas attempts to build a new concept of Subject which was transformed from transcendental level to practical level. But actually, Foucault did not completely abandon the concept of Subject. What he was against is just the modern normative assumption of Subject. This is also one of the bases of Foucault / Habermas debate. Foucault only criticized the “alienated concept” of Subject. He believed that the Subject should not be the “materialized” production of power construction, but should be a kind of active creator with the personal charm, namely “a subject of freedom”. In this term, Foucault’s criticisms of the modern conception of Subject might also be conducted in a normative approach. The differentiation between Habermas and Foucault on this issue reflects in different normative aims. Habermas attempts re-build the modern conception of Subject, which is to emphasize the inter-subjective dimension of it; while Foucault was aimed to re-find the ideal state of Subject which is assumed to exist in the pre-modern period.

4. On Power: Productive (Micro-) Power and Communicative Power

Nietzsche is the most influential reference of Foucault. Nietzsche argued that the desire of pursuing truth and knowledge, and the desire of pursuing power are inseparable. Under Nietzsche's influence, since the 70s, Foucault started to rethink the nature of power and its operating modes in terms of genealogical methodology and his deconstruction of modern Subject. Foucault (1994: 333) said: "For Nietzsche, it was not a matter of knowing what good and evil were in themselves, but of who was being designated, or rather who was speaking when one said Agathos to designate oneself and Deilos to designate others."

In other words, the key question for Foucault is that who grasps the power in their hands. Under the influence of Nietzsche, he refused to simply sum up with the conclusion that the nature of power was all given to the depression, and held the point that the power should be analyzed together with discourse. He distrusted the modern macro theories which treat the power as the exclusive functions of state and servant only applicable to class struggles. Foucault divided the power into two forms: the legal form and the form of war. The former treats the power as an entity which exists in the forms such as laws, institutions and prohibitions. The latter believes that the power is mutual, like a multiple-sided war, and the power relations are continuous, reciprocal and transformational. By *Power Relation*, Foucault treated it as "a mode of action upon other actions". In the legal mode, power has the features of negation and repression; while in the mode war, power is productive and creative. He believed: if we just take it linked with the law and the Constitution or the state and state apparatus when we look at the power, the power issue would be pauperized. Power is very different from the law and the state apparatus, and it is denser, and more complex and permeable than the latter ones. (Foucault, 1997: 161)

Foucault asserted that power is a productive process which is non-regulative, deductive and non-subjectivational. It constantly forms the individuals into the subjects corresponding with certain social norms. But there may be no subject for the power itself, which means power can be independent from any subjects, and operates by itself. The productivity of power (relations) in Foucault was defined by James D. Faubion (1998: xix) as: “power relations are integral to the modern social productive apparatus, and linked to active programs for the fabricated part of the collective substance of society itself.” So Power for him is simply the ability to create change in society or in the behaviour of individuals, be it positive or negative.

Power has in turn been reproductive through regulations and development which the productive forces cannot hinder, suppress or destroy. Power (relations) was seen as a fundamental mechanism to exemplify the operation and development system of society. He stressed that, because power is the decisive factor of social structure and social order, its changes would lead to social changes. In *Discipline and Punish*, Foucault argued that the nature of exploitation was not exposed to the public until the 19th century; and even until today the public has not empathized the nature of power to its full extent. These countless old sayings which portrayed the power effect as negative and troublesome should be rebutted or at least reviewed. In fact, power has the ability to create; it creates the reality; it creates the objects of many fields and the countless forms of truth. Individuals and the knowledge individuals may gain belong to this creation. That is to say, power is the basis of multiple relations, and power does not belong to any institutions, any organizations. It exists everywhere.

Concurrently, for Foucault, power is also microcosmic. Power situates in confusions, and exists in all kinds of relations by taking form of particle, especially in the daily operations and developments of human society. Foucault argued that power could be demonstrated on the micro level, and the groups of ordinary citizens could be powerful entities in society if they used their influence

as the greatest advantage. One instance he mentioned was that the capacity of students and workers to influence the French government in May 1968, through a range of strikes and street protests. Foucault's concept of micro power is different from the political power which is always from top to grass. The dictating and dominating power that inheres in the sovereignty and central government is not the proper form of power according to what Foucault talked about. These "power" are categorized as violence by him. Micro power and violence do not share common concept in Foucault.

Foucault used to make a long description to clarify the concept of the (micro-) power: "An analysis in terms of power must not assume that state sovereignty, the form of the law, or the over-all unity of a domination, is given at the outset; rather, these are only the terminal forms power takes. (...) Power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and that constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them; as the support which these force relations find in one another, thus forming a chain or a system, or, on the contrary, the disjunctions and contradictions that isolate them from each other; and, lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, in various social hegemonies."²¹ (Foucault, 2004: 92-93)

This quotation indicates that the most important feature of micro power is that it can be selectively exercised or accepted, while people who suffered from violence feel completely depressive and not selectable. Foucault inferred that the local ubiquitous micro power has destroyed the dominant grand power structure such as the governmental authorities. Comparing to total violence, the micro power owns another particular characteristic: it is productive. The knowledge, discourse, social

²¹ Quoted in Bob Jessop, "From Micro-Powers to Governmentality: Foucault's Work on Statehood, State Formation, Statecraft and State Power." http://eprints.lancs.ac.uk/506/1/-_E-2007a_Foucault-PG.pdf

organizations, and ideologies are all produced by this kind of power. In addition, the power also creates sexuality, body and truth, etc. We can say that “the micro power in a state of confusion” is omnipresent. Where there is power, the surrounding objects are produced by it.

The war is the best analyzer of power, and then, the war model can analyze all kinds of political practices. The notion of war can serve as the excellent tool bar of political analysis. That is to say, war and power are not only destructive, but also resistant and productive. Foucault further argues that it cannot be simply understood as the micro power relations (such as the power relations in families and schools) are simple embodiments and extensions of macro power relations (such as the power relations between states and between classes) in micro fields. Therefore, micro power is “relatively autonomic”.

Power relation, as the most important mechanism in modern society, is somehow represented in the prison system. In *Discipline and Punishment*, Foucault discussed the concept of “Panoramic openly visual prison” (the *Panopticon*) which Bentham had raised in the 19th century, and further extended it as a microcosm of modern society. The purpose of panopticon is to guarantee the operation of the power. This model could be applied to all institutions employed by people to achieve the expected discipline on others. This discipline-mechanism is “a functional mechanism that must improve the exercise of power by making it lighter, more rapid, more effective, a design of subtle coercion for a society to come.” (Foucault, 1995: 209) In modern capitalist societies, the barracks, hospitals, factories and schools etc., they all have the features this kind of prison has, more or less. This societal organizational form is pretty universal.

Here, we can easily discover some criticism on power in Foucault's work. But as he claimed, only the new productive power can break the existing power system, just as a well-known Chinese Marxism slogan: “where there are oppressions, there are resistances.”

In short, Foucault suggested that the war / power relation is the basic mechanism of modern society; simultaneously, power is not only destructive, but also productive and constructive. Comparing to Habermas, Foucault had never considered the rationality and logical problem of power. Habermas and Foucault hold similar opinion on the criticisms of power given the capitalist society background, but the power relation theories as fundamental mechanisms of Foucault are what Habermas opposed against. Foucault is concerned with giving a genealogical account of the diffusion of power, whereas Habermas is concerned with creating a normative political theory based on the recognition of the communicative capacities of rational human beings, which Foucault denies.

In Habermas's normative theoretical building, power would not be the source of social construction, and sometimes even the negative product and destructive element of modern rationality. Only the communicative rationality can cure the diseases of life world, can break the Cage that the instrumental rationality had created. Because in his theory of Communicative Rationality, there are always contents of consensus, solidarity, communication and coordination, etc., which are more important and more fundamental than power. Habermas aims to engage in a kind of practical rationality (communicative rationality) to replace the transcendental rationality. In Foucault's work, any difference is certain kind of war relation or power relation; while in Habermas's, differences can be eliminated and bridged by effective rational communications.

As mentioned in the preceding chapter, Habermas's ideal normative social theory thinks that the communicative rationality of life world is the only efficient prescription for the legitimacy crisis of modern society, as well as the only way to integrate the relation between legality and legitimacy. The achievement of communicative rationality depends on equal, sufficient and de-powerfulizational discourse communications between subjects (participants). In Habermas's ideal speech situation, power and rationality seem to be two incompatible things.

However, Habermas does not deny the existence of power. He is yearning for the discipline of power restricted under communicative rationality, which means it should be based on the communicative rationality to use the power correctly. If the power of communicative actions can be used appropriately, it can become an important origin of legitimacy of law, and then integrate the modern society. That is to say, Habermas's core idea on power relation argues that power must come from rationality, and the power generated from a rational communication is named Communicative Power.

Habermas's (1977: 3-4) words that "the fundamental phenomenon of power is not the instrumentalization of another's will, but the formation of a common will in communication directed toward reaching agreement.", can well indicate the nature of Communicative Power. And moreover, "a communicative power of this kind can develop only in un-deformed public spheres; it can issue only from structures of undamaged inter-subjectivity found in non-distorted communication" (Habermas, 1996: 148). Only the communicative power can be productive and creative. He says: "All political power derives from the communicative power of citizens." (Habermas, 1996: 170) Different from Foucault, Habermas thinks that only this kind of power can produce laws with legitimacy. And then, the legitimate law would be able to protect the private and public autonomy in the life world.

According to Habermas, communicative power should be produced in the public sphere of life world, and it is almost identical to the illocutionary force of language behavior. First of all, the production of communicative power should be acceptable. In the public sphere of ideal speech situation, the participants can speak up and conduct exchanges freely, have open dialogues and discussions to reach a consensus. This is a consensus in accordance with the democratic discourse principle, which means only when all the individuals, who are restrained by the consensus, are agree with the consensus on the basis of personal thinking and fully expressing, the consensus could be finally acceptable. Secondly,

the consensus would be enforced after it gets accepted. That is to say, the communicative power is enforced. Once it was formed in the public sphere and became an informal source of Discourse Democracy, it is enforced by the participants of communications, dialogues and discussions. Thirdly, communicative power also has the ability of self-correction. When consensus was found to have errors in the subsequent runnings, these errors can be corrected through subsequently formed communicative power due to the open and self-correcting public sphere. Finally, communicative power has the characteristic of uncertainty since it owns the above characteristics. Although its legitimacy is fairer, it could also be one of the weakest powers. The communicative power must be fixed in the form of institution, and mandatory force must be granted to communicative power. From the beginning, the law has put together the force and the communicative power which can produce the legitimate law (Rosenfeld & Arato, 1998: 236). This is also closely connected to Habermas' concept of Legal Proceduralism.

5. Discourse: the Embodiment of Power or the Carrier of Rationality

Both Foucault and Habermas are good at using the term, *Discourse*, to tab their own theories. Habermas's theory of law is called as the discourse theory of law and democracy, and his democracy thought is often known as the "Theory of Discourse Democracy", all because he placed the concept of discourse in a core position of his theories. Foucault's view of power is also often named "discourse theory of power", because he treated discourse as a phenomenon companied by power. But these two thinkers' interpretations on this term are different from the reflections of their respective work. Habermas tends to define discourse closely to "dialogue" or "discussion" which refers to the language communications between

different subjects; while to Foucault, discourse can be a speech action of single subject, it is more likely to be a set of knowledge or ideologies.

Foucault's discourse is a concept with a very broad extension. In *The Archaeology of Knowledge*, Foucault explicitly used the term, Discourse, to refer to the knowledge or view types he had described and analyzed in his earlier works. So the archaeology of knowledge would definitely become a kind of research method that investigates and analyzes the constitutions and evolutions of discourse. After that, in Foucault, knowledge and discourse, the two terms are almost indistinguishable. Generally speaking, Foucault's concept of discourse can be defined as “a group of statements belonging to the same system, which confirmed by us according to a certain standard.” In *The Archaeology of Knowledge*, he said that he has used discourse to refer to “the general domain of all statements, sometimes as an individualizable group of statements, and sometimes as a regulated practice that accounts for a number of statements.” (Foucault, 1972: 80) At other times, “he has used the term discourse to refer to ‘regulated practices that account for a number of statements’, that is the unwritten rules and structures which produce particular utterances and statements.” (Mills, 2003: 53)

According to Professor Xie Lizhong's (2009: 239) research, the group of statements known as discourse in Foucault, it at least has three characteristics: Firstly, it is constituted by the clauses or statements which are actually already spoken; Secondly, its structure is formed by a group of statements rather than a single one; Thirdly, it is even larger than one discipline of science on extension. After *The Archaeology of Knowledge*, the term was more and more broadly used by Foucault, and it was always accompanied with the concept of power to refer to “ways of constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and relations between them. Discourses are more than ways of thinking and producing meaning. They constitute the 'nature' of the body, unconscious and conscious mind and emotional life of the subjects they seek to govern.” (Weedon, 1987: 108)

In Foucault's theory, discourse and power is a pair of key concepts, these two are almost always tied together. To simplify the relations between the two, discourse is the consequence and carrier of the power, simultaneously the power is the informant of discourse. He said that "it is not possible for power to be exercised without knowledge (discourse), it is impossible for knowledge (discourse) not to engender power" (Foucault, 1980a: 52) According to him, all discourses can be shown to have the characters of hidden power and derive from the practices of power. Foucault believed that the power of discourse directly determines which people are allowed to speak up since the grant of this power is lineal to its consequences. Although there is no mandatory rule between the discourse power holders and the objects of discourse, as long as there are discourse conversations and communications, there is power. Power can be produced anywhere, even in all discourse relations.

Foucault held the point that power's production of discourse is embodied in the following aspects: 1, the discourses of humanities are intrinsically linked with power mechanisms, because the themes of these disciplines are at least partially constructed by authorities; 2, the dividing line between scientific and non-scientific is drawn reflexively and wholly by these scientific discourses; 3, the productions and proofs of discourse can only be achieved contingent on the intellectual groups as social power networks; 4, the social power inevitably takes part in the making of scientific decisions. In a words, how to make certain knowledge/discourse to be accepted by the general public? The answer is "As long as power supports it". Foucault (1997: 31) said, "In the humanities, the developments of all kinds of knowledge are closely connected with the implementation of the power." And for the natural sciences, he said, "the sciences are [also] institutionalized as power by the university systems, laboratories, scientific experiments, and other inhibiting facilities." (Foucault: 1997: 32)

In his important work, “The Discourse on Language”²², Foucault (1971) suggested that the important role of discourse is to shuffle people in society with anxiety and fear. This comes from the power factors behind the discourse. The anxiety against discourse led everyone aware of that it has to control the discourse and make the productions, circulations and distributions of discourse conducted in a specific order: the so-called order of discourse.

Why Foucault paid so much attention to the fact that discourse is the embodiment of power? The reason is probably that he was influenced by the *Linguistic Turn* of humanities in 20th century. After the *Linguistic Turn*, language/discourse had almost become the ontology of all humanities and social sciences. It represents all the ideologies and theories. It defines, segments, and even produces these ideologies and theories. Power theory serves as the core of Foucault’s thinking, so discourse serves as the appearance and carrier of power naturally. Foucault would like to use the Discourse Analysis method to reveal the power factors which this thesis would also employ later.

Habermas was also influenced deeply by the *Linguistic Turn*. Habermas's concept of discourse mainly refers to the phenomenon that people use language to communicate and dialog. When mentioning his own theory of Communicative Rationality, he says: “I was benefited from the inspirations of linguistics theory, (...) and I used analytical philosophy to interpret Humboldt. I intuited that mutual understanding is based on discourse communication. Along this way, we can understand the concept of communicative rationality.” (Habermas, 1997: 47) The modern pragmatics turn of Western philosophy made Habermas’s work a very soundly one. According to his pragmatics studies, the Subject is formed in the discourse interactions. Habermas’s normative concept of discourse involves understanding, communication, social division and cooperation concurrently. The

²² This lecture was delivered in French at the College de France on December 1970. The original French text has been published with the title “L'ordre du discours” (Paris, Gallimard, 1971). The English translation by Rupert Swyw was published in *Social Science Information*, April 1971, pp. 7-30. “The Discourse on Language” translation also appears as an appendix to *the Archaeology of Knowledge* trans. A. M. Sheridan Smith (New York: Pantheon, 1972), pp. 215–237

existence of discourse is not isolated: it is built between the communicative subjects. One subject should always see the discourses used by other subjects in the process of communications as the references. The subject can fully use the discourse as mediums, and believe that only in the communications, understandings, and dialogues of discourse, the reasons for the existence of oneself can be found, and the bad consequences which instrumental rationality had brought can be solved. Habermas argues that if the instrumental rationality requires people to follow some technical norms in life, then communicative rationality would advocate the communications which people conducted in the life world according to certain rules and through discourse. The communicative actions are firstly related to the discourse. Therefore, the communicative rationality serves as a kind of discourse rationality. Secondly the discourse, for Habermas, should be freed from power, which means that the communications are not conducted by force, and the harmonies are not forced neither, but these two can be reached through repeated discourse communications and interactions among qualified people.

More specifically, the role of discourse in Habermas's theory is not embodiment of power, but serves as the medium for communicative actions. Communications between subjects are implemented through discourse, so the inter-subjectivity and communicative rationality should be wrapped in discourses. As soon as the idea that discourse is a kind of dialogue between equal subjects is distributed over a considerable extent, rationality would be produced and embodied by discourse as Habermas argues.

Methodologically we could claim that, for Foucault, power relations can be found through discourse analysis; while according to Habermas's normative suggestions, the existence and extent of rationality is the target of discourse studies. Although the term "discourse" refers to different meanings for Foucault and Habermas, as a language phenomenon, it represents the omnipresent power in Foucault, while in the ideal theology of Habermas, it embodies the communicative rationality which

can heal the crisis of legitimacy of modern society. This springs the inspiration that the exploration of the existences of power or rationality with the method of **discourse analysis** might be useful. In fact, this is the method that would be used in the last empirical study part of this thesis. But in most cases of discourse analysis, the meaning of the term “discourse” is enlarged. It can loosely refer to many things, such as knowledge, ideas or groups of statements which Foucault had employed, the language communication which Habermas had pointed to, and even some simple discourse phenomenon, such as the single-side short sentences, exclamatory expressions and so on.

6. On Democracy and Law

On the basis of different diagnoses on modern society, different philosophies of subject, and different methodologies, Habermas and Foucault attained two diametric systems of social theory. The key word of Foucault’s thought is **power**; while for Habermas, it is **rationality**. But at the same time, they agreed upon regarding the existence of discourse as the carrier. They have polar interpretations on common concepts and mechanisms of modern society, such as the democracy and the law.

Democracy and law is another pair of key words in Habermas’s theory. The French version of his famous book, *Between Facts and Norms*, was simply translated as “Law and Democracy” (*Droit et Democratie*). Habermas made critics on the democracy of advanced capitalist society. He thinks that the spread of instrumental rationality led to the domination over the current life world, made the role of public sphere not able to work effectively, and the real public opinions cannot be formed. The real democracy, Habermas advocated, is that in the public sphere of ideal situation, citizens deliberate freely and equally, and the

deliberations form the communicative power on the basis of communicative rationality. Communicative power executes the legislation and other public functions through institutionalization. The laws formed by this way are the laws in accord with the democratic discourse principle, are the “truly” legitimate laws. He gives extra weight to the idea that the legitimacy of the modern law does not lie in the governmental power itself, even does not lie in the institutionalized law (positivist law) itself, but lies in the non-institutionalized and informal public discourses in public sphere. Only when general’s will, which is in accordance with democratic principles, becomes institutional state will (the law), it could eventually get implemented. Habermas's school has been discussed a lot. Only one point should be emphasized here is that in Habermas's theory, the ideal type of democracy and the ideal type of law are always together: the law is generated from the deliberative democracy; and the democracy is a kind of procedural democracy under the institutionalizations of law and standardizations of law.

But in Foucault's “reveals”, the law is not necessarily linked to democracy, as he held a critical attitude toward both the two in practical sense. In Foucault's view, law is closely linked to the term *Discipline* (Revel, 2002: 45). And *Power* is the logic behind discipline. Foucault firstly used his power theory to analyze the laws in pre-modern society. In the Middle Age, laws existed mainly around the kingship. The *Revival of Roman Law* was a typical event to this phenomenon. He thought that the Medieval laws were used mainly to solve three problems: the kingship, the power of king, and the borders of the power. And after the Middle Age, sovereignty issues continued to be the core content of law. This indicates that the main function of legal discourse and legal techniques is to realize the rule of power, and sophisticatedly blot out the facts of power domination.

Similarly, in modern society, law is in a form of discourse which is disguised as the Truth by using the notions of Right, Justice and so on. In the debates with some scholars, such as Chomsky, Foucault “is sometimes sharply critical of the languages of rights or justice as way to articulate the resistance and rejection of

actually existing forms of power.” (Gobdon, 1998: xxx). Foucault thought that it is merely a superficial phenomenon that people follow the discourse of truth. The fact is that people follow the power behind the truth. “Truth is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it.” (Foucault, 1980b: 133) He concluded that “We are subjected to the production of truth through power and we cannot exercise power except through the production of truth.” (Foucault, 1980a: 93) In this process, according to Foucault, the function of law is overpriced and overrated: all the meanings and purposes of law are billed as the pursuit of truth goes on. But because there is no standard answer to the legitimacy ruler of truth, the truth is only produced by power which makes it the only base on which law can run, and the discourse of law is just a representation of power. The reason for the production of truth discourse is that people need to apply the law, and the reason behind the application of law is that people need to implement power. As people in power having the law to pretend as a discourse of truth, the effects of power can be achieved, and make the conduction of disciplines and punishments on the objects reasonable.

Law, power, and truth, they are the three pillars of the disciplining society. (Foucault, 2001: 1) While analyzing the relationship between power and law, Foucault emphasized on the interactions between the two. He thought law and power are sometimes two opposite strengths. Traditional legal positivism regards law as the regulation system of power and believes that law regulates the running of power. But Foucault, from a realistic perspective, mooted that power can also be used as a form against the law, and the source is not a regulation system but the disciplining system. Foucault thus pulled the power away from the regulation system, and placed it in the public space of daily life. Unlike Habermas, Foucault thought the public space of daily life is a kind of power network. Power is not the result of law, but the source of law. At the same time, as an embodiment of power, law interacts with the other powers. Compared to other power embodiments, law and the state machines are the purest and the barest forms of power, but they

definitely do not represent the whole of power. The antennas of power touch far beyond the scope of the law.

On democracy, Foucault continued his critical and realistic thinking that the democracy in modern society is nothing more than the dictatorship of power of so-called rationality which is clothed in the truth. The so-called modern democracy is only the production of disciplinary power. He argued: “The juridical systems...have enabled sovereignty to be democratized through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratization of sovereignty was fundamentally determined by and grounded in mechanisms of disciplinary coercion.” (Foucault, 1980a: 105) Power needs to run through various mechanisms, and the democracy is just one of the games power plays.

However, in addition to the criticisms, Foucault also had built up some defenses and expectations on “True Democracy”. When he was asked the question “Is our society democratic?” He answered: “no, our society is not democratic at all!” (Du Xiao-zhen, 2003: 237) The “true democracy”, in his eyes, should be liberated from the autocratic power and discourse, and turn into a mechanism by which all the diverse independent individuals, whether rational or not, can realize his values, since Foucault thought that the power should come from the discourse of the marginal, meaning those outcaste groups that suffered from rationality oppression. “True democracy” is a kind of authentic social life which is non-discriminational, non-segregational, non-tyrannical-disciplinary and non-subjectivational, is also a pattern in which all meanings of life can be achieved. Here, as a so-called realist, Foucault rarely showed his idealist or normative face. In his later works, Foucault believed that the liberal democracy is still a promising social experiment, and regarded himself as one of those citizens who struggles for the realization of the “real human freedom” in a democratic society (Flyvbjerg, 1998). Foucault actively joined all kinds of social protests, especially the struggles and protests of all kinds of marginal people’s deserving freedom and rights. In this way, he

satirized and fought against the tyrannic power in real life, and battle for the ideal democracy he believes.

If we simply examine the critical stances on democracy in real life, there is almost no difference between Habermas and Foucault. They both claimed that the real democracy must realize the separation between state and society; the key point of democracy does not lie in the State but in the society, and the realization of democracy is to defend the society. The former employed an internal criticism perspective of legitimacy, while the latter used an external criticism perspective of genealogy. On the basis of criticism, they both have given their solutions. Habermas's solution is to rebuild it in the interior of the modern democracy; Foucault's plan is to destroy the false democracy from the outside. Habermas has been hailed as the “democracy fighters”, and Foucault was well known as “a democrat who is believed in Nietzsche's philosophy” (Flyvbjerg, 1998b).

7. Normativity and Reality in the Discourse Theories of Habermas and Foucault

The Habermas-Foucault debate is often mentioned by many titles, such as “the debate between the modernist and the post-modernist”, “the debate between rationality and irrationality”, “the debate between constructionism and deconstructionism”, “the philosophical debate between France and Germany in the 20th century”, “the debate between idealism and realism”, “the debate between critical theorist and post-structuralist” and so on. Habermas and Foucault didn't have many face-to-face dialogues. As they insisted their own views, they still granted each other some positive evaluations.

The mainstream explanation of the Western academia on the Habermas-Foucault

debate is that it was the tension between “ought to be” and “reality” (Flyvbjerg, 1998a). On one hand, the public deliberative legislative process through civil society, the positive role of communicative rationality, the ideal speech situation with the characteristics of equalization and de-powerfulization, and other normative theories, which Habermas had constructed, are generally regarded as somewhat idealism, and are the products of a kind of “utopia” which does not exist in the real world. But to some extent, this does not prevent them from being the goals of improving society and political construction. On the other hand, speaking of Foucault – especially in his earlier years - as a deconstructionist of modernity, what he had described is likely the most desperate side of modern society. The power (relation) mechanism, as the most fundamental and important mechanism, has eroded all aspects of social and political life, and thus the space of enlightenment rationality has been extruded to little by a variety of power operations. Therefore, Foucault's critiques of power are widely considered to be overly realistic, it let people unable to see any path for getting “out of the Cage” within modernity. Habermas's enthusiasm and insistence for the ideal and normativity, and Foucault's reveal of reality, the two constitute the opposing framework from one extreme to another extreme.

On some occasions, Foucault also thought himself as an empiricist. (Foucault, 1997: 32) He said: “Whenever I have tried to carry out a piece of theoretical work, it has been on the basis of my own experience, always in relation to processes I saw taking place around me. It is because I thought I could recognise in the things I saw, in the institutions with which I dealt, in my relations with others, cracks, silent shocks, malfunctioning... that I undertook a particular piece of work, a few fragments of autobiography.” (Foucault, cited in Eribon, 1991: 28–29), and he called his project as a “critical ontology of ourselves” which must “put itself to the test of reality.” (Foucault, 1984: 47) To do so, he emphasizes the war as the model of power and the interactivity of power. On the issues like how does power interact with each other and how it is produced, he thought these are impossible to be rationally analyzed by mind. Only in terms of the empirical researches, can

power (relations) be understood. Similarly, a social scientist, Peter Blau (1964; 1988), had done some detailed empirical analyses on the phenomenon of power which had penetrated in every corner of social life in his book, *Exchanges and Power in Social Life*. He concluded that if a person can meet the needs of service of others, and has nothing to do with any services dominated by others, then he has the power to them. Between superiors and subordinates, elders and young generations, friends, colleagues, there are always the power relations. There are still a lot of similar empirical researches which can support Foucault's theory.

However, Habermas had inherited the idealistic side of Western ideologies. No matter what the real practice is, he emphasizes the will of human can develop and change the world, and emphasizes more on the point that the human society is still stepping forward. And a procedural rule can be formed through rational communications. Then, according to the rule, reciprocating communications can bridge the tension between legality and legitimacy in modern society. Although it is ideal, it is still not impossible to take place. Sometimes Habermas (1984: 100-101) acknowledges that he had idealized the discourse of daily life: "Stability and absence of ambiguity are rather the exception in the communicative practice of everyday life. A more realistic picture is that drawn by ethnomethodologists – of a diffuse, fragile, continuously revised and only momentarily successful communication in which participants rely on problematic and unclarified presuppositions and feel their way from one occasional commonality to the next." However, still, "he leaves himself open to the charge of hyper-rationalism." (Love, 1989: 284)

Habermas acknowledges that his ideal condition of communication is difficult to fulfill in practice, and there are differentiations between different types of rationality according to the differentiations of value spheres. But still, he attempted to propose a normative paradigm of rationality, and he believed that there is something universal on the ground layer of human beings' thinking way. He argues, "The unity of rationality in the multiplicity of value spheres

rationalized according to their inner logics is secured precisely at the formal level of argumentative redemption of validity claims.” (Habermas, 1984: 249) This makes Habermas more tendencious to be a universalist. By contrary, Foucault rejects any type of foundationalism or universalism, and tried to replace them by situational ethics, i.e., by context and history. He distinguished himself from Habermas and the Kantian tradition by saying that he “is not seeking to make possible a metaphysics that has finally become a science.” (Foucault, 1984: 46) “Our sociality and history, according to Foucault, is the only foundation we have, the only solid ground under our feet. And this socio-historical foundation is fully adequate.” (Flyvbjerg, 1998a: 222) We thus could find a strongly tendency of contextualism in Foucault. The opposition between Habermas’s universalism and the contextualism of Foucault results in the different political suggestions of them: “Whereas Habermas emphasizes procedural macro politics, Foucault stresses substantive micro politics.” (Flyvbjerg, 1998a: 224)

Habermas criticizes that what Foucault's genealogy had found is not objective enough in the real world as Foucault argued, and the normative dimension is totally missing in Foucault’s theories. He argues that “only with the introduction of normative notions could he [Foucault] begin to tell us what is wrong with the modern power / knowledge regime and why we ought to oppose it.” (Habermas, 1986a: 7) Foucault (1982: 223) thought Habermas fell into the trap of metaphysics – “a society without power-relations can only be an abstraction” Habermas’s concept of Communicative Rationality, believed by Foucault, “is not necessarily ‘another paradigm.’”, and Habermas is also constrained by the disciplinary discourse of modernity (Love, 1989: 293). According to Foucault, the notion of *Discursive Truth* of Habermas is just part of a particular power / knowledge regime.

Not many people would question that Habermas’s social theory is normative. But for Foucault, is he an absolute empiricist? Habermas and Nancy Fraser hold that Foucault’s theory is just to criticize and to decentralize the existing theoretical

frameworks of modernity. Just like in the theories of Jacques Derrida, people cannot find any possibilities of new politics or foundations of new actions in Foucault. Therefore, it is necessary for Foucault to find some normative content as his starting points of criticisms. (Fraser, 1989: 33) On the other side, it seems like that in the late years of Foucault, he was aware of this point to some extent (Foucault, 2000: 293-294). Scholars believe that, there was an “ethical turn” from the volume 2 of *The History of Sexuality* (Love, 1989), in which, he began to study the “relation to me” (rapport à moi) and the process of the construction of subject (Foucault, 1992: 6). He had tried to explore the possibility to achieve the freedom through constant self-invention and self-cultivation (Foucault, 2000: 294). Unfortunately, Foucault had not done more constructions on the ethic aspect until the end of his life. Generally speaking, the main purpose of Foucault’s theory is to criticize and deconstruct the theories of modernity from the age of Kant. From this perspective, Foucault did not give any normative content indeed.

But the conception of normativity refers to been based on what is considered to be the normal or correct way of doing something on one hand; on the other hand, it means relating to an ideal standard or model which is opposite to the facts. Foucault had never built a social model through empirical studies, but he had pointed out that not everything is controlled by an inevitable law, which may also be seen as an ideal standard. As he had emphasized in “What is Enlightenment,” we should separate the conception of Enlightenment from the conception of Humanism. According to Foucault, Enlightenment means a continuous criticism on the historical circumstance we live upon, and the continuous self-transcendence. (Foucault, 1984: 43-45) In our point of view, the “continuous criticism” and “continuous resistance” are the ideal way that Foucault had suggested to the people. His theory thus might be defined as the **Negative Normativity** in this terms.

8. The Inherent Tension of Western Thoughts

Of course, if we take a look in terms of Critical Theories, the philosophical origins of Habermas and Foucault are almost the same: both of them are from the criticisms of modernity. In the book written by Axel Honneth, who is leading figure of the third generation of Frankfurt school, *the Critiques of Power*, he made comparisons between Habermas and Foucault's thoughts from the interior perspective of the Critical Theories. Foucault's power analysis and Habermas's composition of deliberative politics, in Honneth's (1993) point of view, are merely different development stages of the critical social theory. Foucault also recognized that the power and the rationality are two perspectives on one problem. In dealing with the criticisms on realistic society, both Rationality perspective and Power perspective are roads leading to Rome.

Once Foucault (1988a: 26) said: "Now, obviously, if I had been familiar with the Frankfurt School, if I had been aware of it at the time, I would not have said a number of stupid things that I did say and I would trying to pursue my own humble path – when, meanwhile, avenues had been opened up by the Frankfurt School. It is a strange case of non-penetration between two very similar types of thinking which is explained, perhaps, by that very similarity." By the other side, Habermas (1985: 81) also acknowledged the similarities between "the critique of instrumental reason and the analysis of formation of discourse of power." He thought that Foucault's diagnosis of modern society is greatly significant, he said "in the philosopher circle of my generation who diagnosed our age, Foucault is the most enduringly influential on the spirits of the age."²³ Even Habermas' most important English-language expositor (McCarthy, 1991b) has argued that Foucault is closer to Habermas on many fundamental issues than he was to any other significant intellectual grouping.

²³ See the back cover of the Chinese version of *Discipline and Punish* (《规训与惩罚》中文版封底。)

The two thinkers take two totally different paths while seeking the solution to heal the diseases of modernity. Habermas hopes to find solutions inside the modernity. He thought it should extend the connotation of rationality, to curb the excessive proliferation of instrumental rationality with communicative rationality. That's why Habermas has always referred it as "an unfinished modernity", and he was never afraid to be labeled as a Modernist. But Foucault is more desperate to the modernity. His despair is not a Weberian despair of the Cage of rationality, but from the suspicion of the modern rationality itself. In the spectrum of Western political thoughts, Foucault, as well as Derrida and others, is considered as the representatives of the Postmodernists, which means they are sceptics on the modernity and modern rationality. Habermas and Foucault seem going to opposite extremes and hold their own one-sidedness. Scholars believe that the theories of Habermas and Foucault cannot be combined in a harmonious whole (Love, 1987; Flyvbjerg: 1998a).

On the question why Habermas and Foucault had so different and opposing philosophies, some research analyzed from their personal life stories. However, if we expand our vision further to the big historical background of the development of Western thoughts, to investigate this "Power – Rationality" binary tension, we might get a deeper picture.

When Bent Flyvbjerg (1998a: 221) discussed the Habermas-Foucault debate as it stands for the tension of thoughts since ancient Europe, he said: "The reason may be that Plato was wrong. Perhaps the polarity relativism foundationalism is just another artificial dualism that makes it easy to think but hard to understand. Such dualisms simplify things conceptually but with little reference to actual phenomena." Flyvbjerg (1998a) seems to be in strong favor of Foucault, that is not very acceptable in the opinions of this thesis, but his deep insight that traced back to the origins of west civilization is very inspirational. The continental European thoughts and the Anglo-American thoughts today, they share the common sources in ancient Greece. That is to say, since ancient Greece period,

some of the characteristics of Western thoughts were fixed. Comparing to the Chinese traditional philosophy and other non-Western philosophies, the most important characteristic of Western philosophy that stands out is the dichotomy of thinking. Plato and Aristotle had made the world divided into two parts: On one hand, there is the transcendental subject (ontology) or the so-called “the world of truth”; and on the other hand, “there is the real world of daily life. (...) This clear division of the two worlds is the longstanding highlight of Western culture. However, it is not without any shortcomings, one of which is that the dimidiated philosophy became generally popular. (...) The dualism of theory/practice is its specific performance.” (Yu Ying-shi, 2003: 4) Until today, after the baptisms of long medieval thoughts and the rational Enlightenment of modern thoughts, the inherent characteristics of the Western thoughts still exert their influences. From one point of view, the “theory” (norm) as to search for the world of truth, it is only interested in the eternal regularities which are more from the meditation of static mindfulness, rather than the practice; The real world of daily life, however, is a different picture: it only believes in the things “can be seen and can be touched”, and there is the lack of fear against the power of human rationality in practical life.

Although influenced by the development of natural science since modern times, the various schools of Western modern thinkers have attempted to fill this gap between idealism and realism by various paths, such as the philosophy of language, which occupied a dominant position in academic world in the 20th century, has made very important contributions in this direction, this kind of binary way of thinking still exists significantly. It even can be seen as the source of the great schism of political thoughts for all over the world today, because the modernization of the world is dominated by the Western modernity. This tension is not only the tension between Hegel and Feuerbach, but also the tension between Habermas and Foucault. Habermas thought that Foucault had fragmented the theoretical construction of modernity into too much pieces, and deconstructed the building of modernity with some random empirical facts; Foucault argued that Habermas's thoughts had too much colors of metaphysics, although Habermas has

always claimed that his theory is a kind of modern rational philosophy in post-metaphysical era.

Scholars had revealed the tension between Habermas and Foucault many times, and raised the issue of combing the two different but equally important theoretical systems. As Flyvbjerg (1998a: 230) suggested, “in order to enable the public sphere to make a serious contribution to genuine participation, one would have to tie it back to precisely what it cannot accept in Harbermas’s interpretation: Foucault’s focus on conflict, power and partisanship.” But unfortunately, they have not come up with any satisfactory solutions. Therefore, in order to investigate this tension in a Chinese context, for us, it is very important to understand the inherent tension between Habermas and Foucault in terms of Western thoughts more deeply.



**Chapter 3. Confucian Rationality: Another
Normative Interpretation on Discourse
Theory**

Introduction

For the third chapter, we hope to conduct some generalizing discussions on Confucian Rationality, and use it as supplementary resources to make dialogues with Habermas's Communicative Rationality and Foucault's Power Relation theory. It would be the last part of theoretic explorations and buildings of this thesis.

1. An Overview of Confucian Rationality

Although the ancient Chinese society was usually generalized as an imperial authoritarian society of “absolutism” where “Power Relations” was the only mechanism to explain everything, it does not mean there was no Rationality of value to oversee or balance with the absolute power in ancient China. Chinese people, especially the people in traditional society, hold the concepts of rationality different from the modern Western ones. Some values are closely related to Confucianism, and serve as the most important part of value rationality of Chinese traditional views. Therefore the Confucian Rationality may be used as the third dimension apart from Habermas and Foucault's theories.

In Chinese history, especially in the pre-Qin (- 221 BC) period, there had been many schools of philosophical thoughts, which had more or less influenced the spiritual life of Chinese people for thousands of years. The most important schools of thoughts at that time were Confucianism, Taoism (Dao Jia, 道家), Mohism (Mo Jia, 墨家), and Legalism (Fa Jia, 法家). Confucianism was unexpectedly just one of them. After the Han dynasty (206 BC – 220 AD),

Confucianism became the orthodox official ideology. But it only served as the mainstream of value rationality of traditional Chinese thoughts. The instrumental rationality was never absent in Chinese ideologies. In the field of politics and law, the instrumental rationality is mainly embodied as the governance methods of Legalism, because Legalism was originated from the perspective of the rulers, treating people as the tools and state as the repressive apparatuses (Creel, 1953: 135). Therefore the mainstream political ideology of traditional China was embodied as “the mutual-complements of Confucianism and Legalism” (儒法互补). Guo Mo-ruo (郭沫若) (1979: 187) believes that this feature of Chinese political culture started since Han dynasty. Professor Zhao Ding-xin (2006a; 2006b) names the traditional Chinese political pattern “Confucius-Legal state” (Ru Fa Guojia, 儒法国家), and argues that it is generated from the frequent wars in East Zhou period (770 BC – 255 BC).

Even in the domain of official ethics, Confucianism has not always been the dominant one. When the rulers hoped to establish the social orders through force to gain some immediate effect, they would more likely to choose Legalism rather than the Rule of Virtue of Confucianism; when the rulers hoped to achieve social peace and stability through the rule of virtue, using Confucianism or cooperate with Confucianists would be preferred (T’ung, 2011). In general, in the Han dynasty and Song dynasty (960 - 1279), Confucianism, as the official ideology, occupied the most powerful situation. In the folk, the Confucian ethical ideas was penetrating and spreading gradually, especially after the Sui dynasty (581 - 619) which established the imperial examination system, the Confucian ethics had gained a paramount status in the folk. These show that, to some degree, the Confucianism is somewhat idealist and it did not always fit the realities. Confucianism itself is extremely complex and diverse, and it even includes the metaphysic aspects. The Confucian rationality in this thesis mainly refers to the thinking way and cognitive structures of traditional Chinese people, which were formatted under the influences of Confucianism.

Aristotle used to say that “The law is reason, free from passion” (*Politics*, Book III, 1287. a32).²⁴ This declaration not only put rationality and emotional factors into two opposite standings, but also concluded that the law is a system of rationality, and it has nothing to do with people's emotions. Aristotle’s thesis can be seen as an important source of Western legal culture. Max Weber (1978) also thinks that the law ought to be purely formalist rationalized, and to be integrated as a continuum by the legal logics, not to let the outside moral values to permeate in, otherwise the law would become “substantial and irrational” (Huang Philipe C. C., 2015). But in the traditional Chinese legal culture, the relation between rationality and emotion is another scene. First of all, the distinction between rationality and sensibility (emotion) in China is not absolute, and the positions of the two are not completely opposite to each other. To some extent, Chinese rationality contains emotional factors, which is partly due to the empiricism of Confucian thought and the particularity of Chinese language. Secondly, the traditional Chinese view of Justice involves many factors, which includes ethics, emotions and the *Heavenly Principle* (天理) etc., but being far from the chivalrous legal regulations in the sense of pure reason.

As mentioned in the first chapter, Habermas's Communicative Rationality is a collective concept which not only refers to any single concept of rationality in the Weberian sense, such as the formal rationality and value rationality and many others. The Communicative Action in Harbermasian sense can be driven by only one kind of rationality to reach a consensus, such as technical rationality, logical rationality, moral / ethical rationality, experienced rationality and so on. Confucian culture also attaches great importance to the deliberation and communication, but in the Confucian communicative actions, ethical rationality and experienced rationality would play a more important role, while the formal rationality and logical rationality would account for less. This is also the characteristics that need to be clarified in this chapter.

²⁴ In some versions, it is also translated as “The law is reason unaffected by desire”. For the full text of English-language translations of Πολιτικά (Politics), see wiki source: [http://en.wikisource.org/wiki/Politics_\(Aristotle\)](http://en.wikisource.org/wiki/Politics_(Aristotle))

Jin Guantao (金观涛) and Liu Qingfeng (刘青峰) (2011) had studied the characteristics of Chinese thought from the perspective of Intellectual History. They found that since the Wei dynasty and Jin dynasty (220 - 420), one obvious characteristic of the rationality view of Chinese people is to use the common sense from daily life and human natural sense to evaluate whether one action is valid or reasonable or not, rather than to use the “logic – rationality”. They call it the “rationality of common sense” (常识理性) or “empirical rationality” in Chinese culture. In Tang dynasty (618 - 907) and Song dynasty, Confucian scholars had been using this common sense rationality to interpret the Confucian classics. By the Cheng-Zhu school (Neo-Confucianism) period, this kind of phenomenon reached the peak, and it deeply influenced the Chinese customs of thinking and political legal culture.

Professor Li Ze-hou (李泽厚) used to generalize the Chinese culture as the “Practical Rationality” (实践理性). He concludes, “The tradition of Chinese practical rationality could prevent the development of speculative rationality, and also ruled out the proliferation of anti-rationalism. It constitutes a kind of emotion-thinking mode based on Confucianism, making the Chinese nation get a psychological structure of *Doctrine of the Mean* (Zhongyong) which is sober and full of tender feelings, that involves: no mania, no meditation / fantasy, valuing the understanding, neglecting the logic, preferring experiences, being good at history, to serve the real life and maintain the harmony and stability of the existing organic system, valuing the relations between human beings, against the risk and neglecting the innovation...” (Li Ze-hou, 1998) These Chinese thinking habits interpreted by Jin Guantao, Liu Qingfeng and Li Zehou would constitute the core content of this Chapter. We would like to conduct some deeper and more broadened discussions on the base of their researches.

In order to highlight the particularities, we will also do some comparisons with Habermas or Foucault's theories. This chapter will exhibit several sections to introduce and make a normative construction on the traditional Confucian views of rationality. All of these are done on the basis of predecessors' researches, so they are somehow descriptive rather than analytical. At the same time, while generalizing of Confucian rationality, it would also be concerned to the comparisons to instrumental rationality and communicative rationality. Similarly to the foregoing chapters, the construction of Confucian Rationality is also unfolded in discussions and critiques on a normative level.

2. The Potential and Definition of Confucian Rationality

According to Hegel's thoughts, the evaluation on the sense of rationality of China's traditional culture is somehow low. He thinks that the traditional Chinese people did not make any progress on the development of rationality in its long history comparing to the West, Chinese society has not achieved any "progress" in the Western sense, and there were just the constant cycles. Hegel (1991: 106) says: "This history, too is for the most part, really unhistorical, for it is only the repetition of the same majestic ruin... for through all this restless change no advance is made." That is clearly a hasty conclusion in terms of the position of a technical rationalist or an instrumental rationalist. Even so, this judgment is not completely correct.

However, many more recent scholars in the West, such as Karl Theodor Jaspers, had promoted traditional Chinese culture as to the equal status with Western civilization, and put forward the "the Axial Age" theory, which is obviously a point of view of pluralist rationality. This school holds that there was no difference between the rationality levels of Eastern or Western civilizations, only the performances are not the same. We believe that the concept of rationality is

somehow culturally relativist. Something is right or good in one value system, but it may not be right or good in another culture. This chapter is also written based on such a Plural Rationalism theory to examine the potential problem of Confucian rationality. Having this premise in mind, we think that Confucian rationality can be analyzed and compared to other types of rationality by modern academic researches.

For whether the traditional Confucianism is possible of being rationalized, Weber had given an unclear instruction. He thought that there were two standards (yardsticks) as judgments of whether a religion (Weber thought that Confucianism is also a kind of religion) has the potential to be rationalized, “One is the degree to which the religion has divested itself of magic; the other is the degree to which it has systematically unified the relation between God and the world and therewith its own ethical relationship to the world.” (Weber, 1951: 226; 2010: 309; 2004: 279) By the first standard, Confucianism undoubtedly has the characteristics of rationalization. It has a strong characteristic of anti-mysticism, and is very far from the witchcrafts. But when discussing the second standard - the oppositions between God and human being, Confucianism does not have the characteristic of rationalization in the Weberian sense. The God / human being opposition thinking is totally missing in Confucianism, in other words, human being does not serve as the tools of God in Confucianism. Weber (1951: 228; 2010: 311; 2004: 280-281) describes Chinese people as, “Like for truly Hellenic man all transcendental anchorage of ethics, all tension between the imperatives of a supra-mundane God and a creature world, all orientation toward a goal in the beyond, and all conception of radical evil were absent.” He thus concludes that Confucianism is one of the important reasons that Capitalism has not occurred in China. This may show that in his point of view, Confucianism was not as rationalized as the Western modern thoughts.

Habermas's cognitions on the potential of Chinese rationality are different from Weber's. He said, “Weber judges Confucianism and Taoism only from the

standpoint of ethical rationalization, he arrives at his famous assessment of the lower potential for rationalization in these worldviews (...) [But] thanks to Joseph Needham's pioneering investigations, however, it is now well known that the Chinese, from the first century B.C. to the fifteenth century A.D., were evidently more successful than the West in developing theoretical knowledge and using this knowledge for practical purpose....This suggests that the rationalization potential of these traditions might have been studied first of all from the standpoint of cognitive and not of ethical rationalization." (Habermas, 1987b: 209) Obviously, Habermas holds that the cognitive rationalization in China was more developed than the ethical rationalization. But he did not give further explanations. Habermas (1987b: 212) eventually sees Confucianism, together with Hindu, as the Eastern religion with lower potential of rationalization.²⁵ This point of view is just on the opposite of ours which would be explained in the following sections.

Generally speaking, both Weber and Habermas had noticed the secularity of Confucianism. They know it as a rational system of thinking in the secular life world where the God is always absent, although in their opinions the potential of rationalization of Confucianism is relatively low. Is the Confucian rationality a kind of value rationality or instrumental rationality? Is Confucian rationality transcendental or empirical? For answering these questions, it is very necessary to discuss the definition of rationalization of Confucianism in depth.

It is very difficult to define the Confucian Rationality, because its core concepts are difficult to be analytically defined by the Western modern academic terms, but only can be generally described. There is not an absolute God in Confucian culture. Confucianism is a kind of thought inherented in human hearts, and it expresses the understandings about life and emotion through an internal way. Upon this basis, there formed a kind of "universalist" ethic system of Ren (仁); and basing on the value system of Ren, there built a set of knowledge structures

²⁵ See the chart in Jurgen Habermas, *The Theory of Communicative Action, voll*, transl. by T. McCarthy, Beacon Press, 1987, p.212.

and hierarchical opinions of Li (礼). Ren and Li constitute the core content of Confucian Rationality.

The concept systems of “Ren” and “Li” could not be formed without the emotional experiences and accumulation from the empirical world. Professor Li Zehou summarized this process as “the Theory of Sedimentation” (Ji Dian Shuo, 积淀说) or “the Ontology of Emotion” (Qing Ben Ti, 情本体). But the *Emotion* (Qing, 情) here is also different from the concepts of *Passion* or *Feeling* in the Western sense. According to Li Zehou, Mou Zong-san (牟宗三), Xu Fuguan (徐复观) and other important modern Chinese thinkers, the Chinese (Confucian) “emotion” is abstracted from the animal instincts, and then it rose to a general and inner emotions among people. This kind of Emotions, in Li Zehou’s view, has been out of the original instinct feelings, and with a certain rational connotations. That is to say, firstly the Confucian rationality cannot be separated from the experienced feelings, it is not transcendental (for example, it is not given by the God), but it is not shown as the simply instinct “feelings” but a kind of sublimated and systematized orders of “Emotion – Value”. The Western political legal culture of rationalism, since Kant, has overall negated the value of Emotion which occupies the core position of the Confucian cognitive structure. Furthermore, Li Zehou named these Confucian rational social orders, that make emotions as the links and make “Ren” and “Li” as the core content, as the *Relationalism* (关系主义), different from liberalism, utilitarianism and communitarianism, and so on.²⁶

“Ren” and “Li” are from the emotional experiences of ancient Chinese people's daily life. They are from the life world rather than a transcendental world. The Confucian rationality is a kind of rationality sublimated from the emotional cognitions of outside world. At the same time, this kind of rationality is rooted in

²⁶ Li Zehou is one of most influential thinkers in China today. His theories of “the Ontology of Emotion” and “Relationalism” were involved in many works and dialogues, including his latest book, *A Response to Michael Sandel And Other Matters*.

one's heart deeply. It is not the external objective rationality in Weberian sense. It is a kind of subjective rationality, or some Chinese style inner value rationality. It is generally believed that "the traditional Chinese views of order set the 'Heartness' as the core, which is different from the other civilizations with the cores such as the 'Intellectuality' or 'Godship'" (Yu Xing-zhong, 2013: 97).

3. Confucian Rationality as the Ethic Rationalism

Weber (1964: 152) once pointed out that Confucianism is merely constituted by a series of political and ethical aphorisms and rules of action. It is not a system of knowledge like the Western theology or philosophy. He says: "Confucianism, we have seen was (in intent) a rational ethic which reduced tension with the world to an absolute minimum." (Weber, 1951: 227) Different from the Western civilizations, Confucian rationality is firstly a kind of broad ethical thought. Professor Yu Xing-zhong (2013: 97) argues that, "The orders of Western civilization had always been developing through the interactions between religion and law, and Ethics have to survive in the cracks between the two. In other words, due to maturely developed [instrumental] rationality and beliefs [to God], the glories of [human] emotion and relationship [between human beings] had relatively shaded." The Western Ethics has very few independent research objects or conceptual categories. It either borrowed the notions of "good" and "evil" from theology, or picked up the concepts of "right" and "duty" from the legal theories. Professor Hsieh Yu-wei (1977) also argues that most of the Western philosophers regard Ethics as science or pure theories instead of life actions. They usually separate their theoretical thoughts from their daily behaviors. And "this views and attitudes cannot be accepted by the traditional Chinese philosophers." (Hsieh, 1977: 169)

Since the birth of Chinese civilization, great philosophers like Confucius, Mencius and Han Feizi often raised problematics such as “How to build the social order?”; while the Western great philosophers like Hobbes usually asked questions in a way of “why social order is possible?” The former is a normative question while the latter is an intellectual question. Confucianism aims to regulate the actions of people and kings rather than to build a system of knowledge. For traditional Chinese people, the role of “God” or “Private Rights” is not that important. The ethics between God and private rights constitutes the main content of the life world, and it is also the value orientation of Chinese people. Perhaps this is the reason why Chinese traditional political culture served neither as the *Rule of God* nor the *Rule of Law*, but took more emphasis on *Rule of Virtue*. As Liang Shu-ming (梁漱溟) had described in his famous essay, *Essence of Chinese Culture*, different from the Western society, Chinese society is historically a culture with ethical life as the basis. Liang (2005, Chapter 5) argues, “The collectivity and individual are two separated entities in the West while the family is somewhat useless there. But the Chinese people developed in the middle, organizing the society by ethics in order to melt the two ends of individual and collectivity.”

The ethics of Confucian rationality were mainly reflected on the Confucian idea of “Ren”. “Ren” is a very complicated concept which has not been particularly, clearly or analytically defined in development of thousands of years. The closest English word to “Ren” is *Benevolence* or *Sympathy*. They are still not particularly accurate. According to the investigation of Professor Lin Yu-sheng (林毓生), the Chinese character “仁” (Ren) originally refers to the basic nature of human being, namely the manliness or manhood. Until the time of Confucius, Ren was gradually defined more normatively (Lin, 1974: 184). Confucianism believes that “Ren” is a kind of natural and internalized emotion about *Good* or *Kindness*. It describes and regulates the ethic relationships between people. It refers to “a kind of propensity to have a collective social political life” (Lai, 2008: 21). Ren is a kind of mental structure, but the Confucian interpretations of Ren are more

empirical. Confucianists used to define the concept of Ren by examples and sentences of judgment, for example, Confucius once said: “What has a person who is not Ren got to do with observing ritual propriety (Li)”²⁷. But for another time, he said: “Live life humbly, Do things devotedly, Treat people loyally [that is Ren].”²⁸

In the jurisprudence field, the ethic thoughts of Confucian rationality are embodied as that the law was regarded as the “Ethical Law” rather than the “Right-Law” or “Procedural Law”. Chinese Law was closely combined with the ethics (Huang Phillip C. C., 2015). The goal of law is to reflect the ethic values of “Ren”. The traditional Confucian politics was mainly embodied as Ethic Politics. It attaches great importance to the inner cultivation of personality, but does not attach importance to the political process; it pays more attention to the judgment of good or evil, but does not take the utilitarianism. Therefore the Confucian rational thinking way pays more attention to the ethic substances of law rather than the legal process or procedures. The statute laws promulgated by the state, which refer to the narrow definition of “law” in the Chinese sense, do not certainly represent the natural justice. Only when the laws are consistent with the ethical values behind them, they are worth to be valued and complied with. A very famous scholar in modern China, Yan Fu (严复, 1854 - 1921), translated Montesquieu’s famous work, *the Spirit of Law*, and he has emphasized in the translator’s preface that the Chinese concept of “Law” is quite different from the Western one. In the West, “ius” has the meaning of truth, while in China, the law is the embodiment of ethic. The ethics behind the law is the important ontology. Yan Fu (2010) said, “‘ius’ in Western languages can be translated into four Chinese words – ‘Reason’ (理), ‘Li’, ‘Law’ (法) and ‘System’ (制度). Scholars should inspect this phenomenon seriously.”²⁹

²⁷ In classical Chinese: “人而不仁，如礼何？”，*Analects* 3.3

²⁸ “居处恭，执事敬，与人忠”

²⁹ In classical Chinese: “西文法字，于中文有理、礼、法、制四者之异译，学者审之”，in the translator’s preface of the *Spirit of Law*, translated by Yan Fu. (严译《法意》卷一按语。)

The mainstream of the Western legal thoughts before Modernization was embodied as the “Divine Law - Natural Law”. And after the Modernization, it is represented as the “Right – Law”. By the rationality views corresponding to these legal paradigms, the former is the “Divine – Reason”, while the latter is the “Intellectuality – Rationality”. For the former, the ethic contents had been decided by God or religion doctrine, and the law would just follow these requirements, while people's Reason served as the thinking activities basing on these divine rules. Compared to the former, the latter went to another extreme. The “Intellectuality – Rationality” holds that the human rationality is the starting point of all thinking, and the private rights are the logical starting point of all ethic and legal contents. The Western modern legal thoughts, which orient the private rights as the starting point, have always been treating “the procedural justice safeguards the substantial justice” as the fundamental principle.

In these terms, Habermas’s Proceduralist Paradigm of Law can be classified as a legal thinking way of “Intellectuality - Rationality” in Western context, and even can be seen as a thinking way of “Super Intellectual Rationality”. The Habermasian legal proceduralism sees it as a premise, the individual rationality has a strong power, and most of the ethic normative contents are not innate but realized by people's rationality plus with communicative procedures. The productivity of procedure is seen as an important part in Habermas's theory. To sum up, there is a sharp contrast between the Chinese traditional rationality (as an ethical thinking way)’s despising over procedures, and the stressing of Habermas’s discourse theory of law and democracy.

4. Language and the Empiricism of Confucian Rationality

Almost all the comparative studies on Eastern/Western thoughts, when they come to the differences between Chinese civilization and Western civilizations, they usually first mention the differences between “Logos – Origin” and “Dao (道) – Origin”. (太初有逻各斯 vs 太初有道) (Liang, 2004; Li Ze-hou, 2011) The modern term *Logic* is derived from the concept of *Logos*. In ancient Greek, where the Western Civilization was born, *Logos* (λόγος) was originally derived from “legō” (λέγω), meaning “to count, tell, say, speak”.³⁰ It became a technical term in philosophy gradually. The Sophists used this term to mean discourse, and Aristotle applied the term to refer to “reasoned discourse” (Rahe, 1994: 21). Obviously, in the Western tradition, “Discourse” and “Logic” are two closely linked conceptions. This is also a very important source of Habermas’s Discourse Theory. But the concept of *Dao* in Chinese culture refers to an inherent law of the universe which does not only focus on logic or discourse.

When Kalberg (1980) sorted Max Weber's concept of rationality, he has listed four types of rationality: practical rationality, theoretical rationality, substantive rationality and formal rationality. The thinking way, which highlights the logic, is belonging to the theoretical rationality and formal rationality. Comparing to the traditional Chinese culture, “logic” is a thinking way which the Western people are better at. Weber also thought the formal rationality is merely the product as the Western capitalist societies had developed to a certain stage. Regarding the original cause of the differences between Western and Chinese thinking ways, it may have a lot to do with the languages.

In terms of modern linguistics, language is the carrier of the thinking of human beings, and language can, to a certain extent, determine the thinking way and cognitive structure of people. These are the main ideas of the *Linguistic Turn*. The founder of “General Linguistics”, Wilhelm von Humboldt (1988), in his masterpiece, *On Language: the Diversity of Human Language Construction and*

³⁰ Henry George Liddell and Robert Scott, “An Intermediate Greek–English Lexicon: *Logos*,” 1889.

Its Influence on the Mental Development of the Human Species, argues that the variety of different national languages represents the different worldviews and different cognitive structures. In his studies, Humboldt found that his general linguistics theory fails to explain the structure of Chinese language. He admitted that Chinese language is a very special case which means an “isolating language”. He said, “Among all known languages the most violent contrast obtains between Chinese and Sanscrit, since the former consigns all grammatical form of the language to the work of the mind, whereas the latter seeks to incorporate it, even to the finest shadings, in the sound.” (Humboldt, 1988: 230) But that does not mean Chinese culture is accordingly the most imperfect one. He added: “Chinese, on the contrary, has a high degree of excellence, and exerts a powerful, albeit one-sided, influence on the mental faculties.” (Humboldt, 1988: 230)

Humboldt, in his later years, devoted himself to Chinese language studies. As the Chinese character as a graphical writing, he finally concluded that, for those who were surprised with the fact that Chinese did not apply the alphabetic writing, they merely noticed that Chinese characters may bring inconvenience and confusion, but they more often ignored the fact that in China, the Chinese writing characters are actually part of the language. They are closely related to Chinese people's thinking way. The writing itself developed in China, to some extent, is a philosophical works.³¹ And “Chinese and Sanscrit represent two fixed extremes, unequal to each other in their aptness for mental development.” (Humboldt, 1984: 232) After Humboldt's groundbreaking research, the issues of the relation between Chinese characters (Chinese language) and the Chinese way of thinking, as well as the issues of the special worldviews influenced and formed by the particularity of Chinese language, once has become the hot issue among the Western intellectuals. The scholars after Humboldt, such as Endlicher, Steinthal and Wundt, etc., had all made in-depth studies on this issue.

³¹ “Lettre à Monsieur Abel-Rémusat, sur la nature des formes grammaticales en général, et sur la genie de la langue Chinoise en particulier” (1826)

The grammatical structures and lexical structures of Western languages are much more clear than Chinese. In linguistics, many Western languages, such as Latin and Old English, are defined as the “Fusional Language” or “Inflectional Language”, which means that the Languages have strict logical syntax rules such as the morphemes and declensions. But the Chinese, though lacking morphology or inflection, has its own syntax. In this sense, Chinese grammar is more often hidden than revealed. Humboldt (1988) thus thinks that, the logical grammar belongs to the Indo-European languages, and to a certain extent, the worldview that pays attention to the logic which results in this language structure, is also uniquely belonged to the Westerners.

Additionally, the Western language writings are alphabetic. Comparing to the Chinese characters which are derived from the pictographic characters, the Western writing characters are generally separated from the objective things which they refer to. The Western language writings themselves are a kind of metaphysical symbols, so people cannot imagine the specific things they refer to. The language, which always pursues logic, is already somewhat separated from the physical objective world. That is the source of Western thoughts from the perspective of language philosophy. And it also seems to be that the dichotomy thinking mode is also announced from this outset. Since ancient Greece, the knowledge was divided into two parts. One is the metaphysical world, and the other is the physical world. The two are quite distinct from each other. The language, on the one hand, is independent from the objective world with its own logic, and on the other hand, even can “split” the objective world. Ferdinand de Saussure (2001: 110) once argued: “Nothing is distinct, before the introduction of linguistic structure.” This indicates that, in terms of Western modern linguistics, everything was obscure before the language appears.

However, this kind of “obscureness” seems just to be one of the characteristics of the traditional Chinese thinking way and cognitive structure (Confucian Rationality). The reasons are also probably lying in the Chinese language and

writing characters. Chinese character is one of the only few “ideographic” characters in the world today. It comes from the hieroglyphics. Even as of today, Chinese has become a language that can indicate both meaning and pronunciation, but a lot of Chinese characters or character roots are still strongly pictographic. When people see some Chinese characters or character roots, they can also image the objective things that are related. For instance, “日” is on behalf of the sun; the character “一” represents “one”; and “上” means “up”; “下” refers to “down”, etc. It shows that even today, the Chinese language, as a language symbol system, has not completely separated from the objective world, and to some extent, it is still the representations of the objective world. On the other hand, even for the modern Chinese language, the “logic” of its grammatical structure is also relatively chaotic, and there are no strict inflections by temporal, gender, and number, and no conjugations and so on. Chinese writing character takes up very little space, because it is more three-dimensional than any alphabetic writing on one hand. On the other hand, Chinese has very few conjunctive words. Even the using of punctuations are popularized and standardized in modern China. “Pictography” and “lacking of strong logic” are the features that make Chinese language relatively different from the Western languages. That also led to the uniqueness of the traditional Chinese thinking way to some extent.

The uniqueness of Chinese thinking way (Confucian Rationality) led by language was embodied in the following two aspects. The first is that it has not separated the world into dichotomy completely: the spirit world and the objective world, and it is not good at thinking in dichotomy mode, but is accustomed to empirical thinking orientations. There are no divisions of the truth world and the practical world for traditional Chinese people, which is totally different from the Western rationalists like Kant and Habermas. As Weber (1951: 155; 1995: 204) thought, Confucianism had been freed from the Metaphysics to a great extent.

When French philosopher Derrida visited China, he once said that “China has no philosophy”, which actually meant that there was no metaphysics of Western

sense in China. The Chinese people are more accustomed to the concept of “one world” (such as the slogan of 2008 Beijing Olympic Game: “One World, One Dream”), and are more accustomed to summarize all principles from the experiences of practical world. As Weber (1951: 155; 1995: 205) had found, Chinese science was always purely empirical, and what the Confucianists care about are just the things of this life world and the past world. Confucian scholars (Shi) in traditional China were mainly selected from the history-officials (史官), and the discipline of history has occupied the core status in Chinese cultural history for thousands of years. When French Sinologist, Yves Chevrier (2010), discussed the relationship between Confucianism and history-experience, he says: “The Confucianism does not explain Chinese history: it is the history who explains the social and political uses of Confucianism in China.” That shows that the traditional Confucian thinking way and cognitive structure were mostly empirical oriented.

Mou Zong-san (牟宗三) (2007) compared the Chinese and Western thinking ways and cognitive structures in his very famous book, *the Features of Chinese Philosophy*: “They [Socrates, Plato, Aristotle and other Western great philosophers] treated human affairs by the way of treating the nature, taking an attitude of analyzing logically, doing some pure intellectual speculations. They regarded ‘beauty’ and ‘kindness’ as the objectives of pursuing the objective truth, thought them nothing to do with the real ethics.” Chinese culture has always emphasized the power of example, and tends to think of the ethics and values are embodied by some individuals or organizational units in order to let them become social standards, rather than to make the metaphysical moral concepts as social standards.³² The traditional Chinese people, including the East Asian people affected by the Chinese culture, had a very strong ancestor worship and experience/elder worship in their beliefs. The elders, teachers and experienced persons in the Chinese spoken society always had a higher ranking of power

³² This light is also very evident in another Chinese local religion: Taoism.

status. Even today, the Chinese governments are also passionate about the various competitions of “model unit”.

Secondly, as a nation accustomed to empirical thinking, the Chinese people’s logic thinking ability is relatively weak. They are good at inductive reasoning, but not good at deductive reasoning. For example, the *Analects of Confucius (Lun Yu)*, as a Confucian classic, is not an analytical philosophical book. It is composed of 499 discontinuous small paragraphs, and there was often some contradictions and repetitions in it. In comparisons, the modern Western thinking and cognitive ways are closer to a logic/deductive reasoning model. They pay more attention to the analysis. In the process of arguments of Western people, there less involved the personal feelings and backgrounds besides the argument objects. But in the process of Chinese reasoning of analogical type, there would be more personal emotions and argument backgrounds.

Although Habermas emphasizes that the communicative rationality he advocates is lying in the discourse behavior of People's daily life, rather than only from the rational logic discourse, he still made it as a normative precondition that everyone has the ability of analysis and thinking rationally. This ability of thinking rationally is also somewhat contextual. Or in other words, it is rooted in the context of “the language environment of Western people's daily life”. Habermas, on the one hand, is somehow against the Logic-centralism. But on the other hand, as it was mentioned earlier, in the Western tradition, Discourse has always been closely connected with Logic. Represented by Habermas, the deliberative democrats argue that the deliberations (discourses) should be conducted in a rational and logical situation. But apparently, this is merely a normative assumption. Habermas believes that people could improve their ability of rational thinking through learning, and this process is somewhat universal (Tong, 2009: 13). He defines it as a “Cautious Universalism” (Habermas, 1984: 155).

However, thus we can find an obvious distance between the empiricism of

Chinese thinking habit and cognitive structure defined by Chinese language, and the rationality ability which Habermas had suggested. We could not arbitrarily judge that the level of rational thinking of the Western people is higher than the Chinese people's, because they think with different types of rationality and they were learning in different languages and different cultural traditions. As Weber argued, empiricism made China far from other thinking ways, such as the mathematical logic way. He said: "In medieval China, experimentation was carried out systematically than was ever attempted by the Greeks, or even by the Europeans of the Middle Ages; however, so long as there was no change in the 'bureaucratic feudalism', mathematics, empirical observation of nature, and experiment could not be combined in such a way as to produce a wholly new approach." (Quoted in Habermas, 1984: 210) But Chinese people may be good at other approach of thinking.

5. Zhongyong: the key concept of Confucian Rationality

The term *Zhongyong* is originally the title of a Confucian classic book. The "way of Zhongyong" (中庸之道) is an action philosophy that Chinese people pursue. It is formed in the past thousands of years, but also the core part of Confucian rationality. As a status of relationship between human beings, Zhongyong is close to Aristotle's "the doctrine of the mean", but it also has its unique meanings. In the Confucian classic - *Shang Shu* (尚书), "Zhong" (中) means "the right" or "the appropriate". Confucius thought that Zhongyong is the supreme state of ethics, so that the ordinary people can't get it easily.³³ He stressed that any ethic practices should not be too extreme; Otherwise, it would be just hypocrisy or grandstanding, in turn, it would "damage the ethic" (乱德) and become the "destructor of ethic" (德之贼). Zhongyong in Confucian sense means refusing to be extreme but being

³³ "中庸之为德也,其至矣乎!民鲜久矣"(《论语·雍也》)

in a proper status, or refers to the action orientation for achieving such a state. The value of Zhongyong, as “the most appropriate state”, is no doubt a kind of rational worldview of China.

Zhongyong value is firstly different from the instrumental rationality. It doesn't pursue the maximization of utility or self-interests which are only from the angle of subjective actor. The principle of instrumental rationality believes that if something could be done, then people have to try their best to do it. But on the contrary, Rationality of Zhongyong is a kind of tempered mode which does not only think of itself, but also cares about others. Additionally, there is also the idea of “being considerate” and “being thoughtful” in Zhongyong value. There are a lot of folk proverbs in China, such as “allow for scopes” (留有余地), “Take a step backward, you will get a more broaden sea and sky” (退一步海阔天空), etc., which can well express the Zhongyong thoughts of Chinese people.

Zhongyong Rationality holds that there is a best “degree” (Du, 度) for everything, and anything extreme is wrong, as a Chinese famous saying goes “too much will leads to the opposite” (物极必反). Li Zehou (2011) thinks that the “degree” is the core of Chinese thoughts - the Zhongyong oriented men will consciously abandon the extreme actions in practices without regarding problems with dichotomy, and finding the most appropriate “degree”. There is a proverb in China called “Qia Ru Qi Fen”(恰如其分, “The cap fits”), which is quite often used to express things in the best state. Here, the word “fen” simply means “degree”. In English, the most similar word to express the Chinese meaning of “degree” is *Optimization*. As for how do the Zhongyong rationality actors control and hold the “degree”, according to Confucian ideas, this is not a metaphysical problem, it needs to continually revise the standards in the process of practice and according to the changes of the objectives. Here, we could also find the empirical orientation of Confucian rationality. Zhongyong rationality actors pursue the “temperance” rather than the extremalizations in everything.

Moreover, Confucianism has always stressed the concept of collectivity. Individuals are the individuals in the collectivity, while the collectivity is made up of individuals. By the Confucian ideal type, the relationship between the individuals and collectivity is not absolutely conflicting, but a state of harmony. Confucius thought that individuals and collectivity are symbiosis but not exclusive to each other,³⁴ so that the *Zhongyong* oriented actors should start from a holistic perspective to regard everything. Professor Zhang Desheng (Cheung Tak Sing) (2001) has explained the concept of holistic perspective in a sociological way: “The so-called holistic perspective made a holistic system including alters and egos of community, rather than only the social system of the actor himself, as the frame of reference.” By this point, it is different from the actors guided by instrumental rationality who always take the maximizing of his interests as the target and motivation. As a kind of holistic rationality view, *Zhongyong* is much closer to the Habermasian *Dialogue Mode* of communicative rationality, rather than the *Monologue Mode* of instrumental rationality. (Zhang De-sheng et al., 2001)

The view of *Zhongyong* rationality also contains the concept of harmony. In the book *Zhongyong*, Confucius said, “While there are no stirrings of pleasure, anger, sorrow, or joy, the mind may be said to be in the state of *Zhong* (Equilibrium). When those feelings have been stirred, and they act in their due degree, there ensues what may be called the state of *He* (和, Harmony). This *Zhong* is the great root from which grow all the human actings in the world, and this *He* is the universal path which they all should pursue. Let the states of *Zhong* and *He* exist in perfection, and a happy order will prevail throughout heaven and earth, and all things will be nourished and flourish.”³⁵ To interpret Confucius’s words, Professor King Yeo-chi (金耀基) once cited R. Bellah’s point of view that the

³⁴ 《论语》雍也第六，第三十章。

³⁵ “喜怒哀乐之未发，谓之中；发而皆中节，谓之和。中也者，天下之大本也；和也者，天下之达道也。致中和，天地位焉，万物育焉。”

core value system of Chinese people attaches much importance to the integrative value, and makes an adjusted balance as the ideal of Chinese society. King (2008: 2) thus argues it is a consensus among scholars that the Chinese culture values harmony and order heavily. Harmony is an ideal state that Confucianism quests. Oriented by the normative goal of social harmony, the Chinese view of deliberation is embodied as the one of local discussion that aims to establish consensus on specific political and legal issues that are consistent with broader collective understandings and values. In practice, it is reflected as the rejections of disputes. In the traditional Chinese legal culture, “anti-litigation” has always been one of the main characteristics.

The holistic characteristic of Zhongyong rationality makes people accustomed to a “comprehensive” perspective instead of perspectives of “analysis” or “opposites” in the process of dialogue and argumentation. Karyn L. Lai believes that a comprehensive approach is one of the main features of Confucian philosophy from the Han dynasty, and it is different from the Western philosophical method of analysis. She concludes: “This method of drawing insightful views from any number of different doctrines and integrating them into a viable theory continues to be a central feature of Chinese philosophy down to the present.... The syncretic approach is markedly different from analysis, which involves understanding the assumptions that lie behind particular theories, and the justification of basic concepts and ideas. While analysis seeks to distinguish and isolate basic components of an argument, the syncretic approach integrates ideas from doctrines that are discrete and perhaps even oppositional.” (Lai, 2008: 16)

6. Restricting Personal Desires and Sacrificing Individual Interests for Collective Interests.

It has always been an important issue that how to treat individual desires and

interests in Confucian thoughts. In the pre-Qin period, the three most important confucianists - Confucius, Mencius and Xuncius – had all expressed some normative opinions on this issue. Confucius was not totally against the human desires, he said: “Riches and honors are what men desire.”³⁶ He also thought that the riches of people are the symbol of a strong state.³⁷ He was opposed to indulge in the personal desires without any limitations, and stressed to follow the ethic norms such as benevolence (Ren), righteousness (Yi) and the ritual (Li). He argued: “To discipline yourself to act accordingly to the rites” (“克己复礼”), “to see profit and remember morality (idiom)” (“见利思义”), and “He takes when it is consistent with righteousness to do so, and so men do not get tired of his taking.” (“义然后取”) and so on, which all aimed to limit the individual desires within the social norms. Moreover, he said: “do not do to others what you would not like to be done to you.” (“己所不欲，勿施于人”)³⁸, which is to argue that the interests of others should be the limitation of one’s desires. According to Confucius, Ren, Li and Yi are the higher values,³⁹ to realize which, one could even sacrifice himself.⁴⁰

Like Confucius, Mencius was not against that people could have proper material pursuit, but also emphasized the noble value of spiritual life. He thought that if a person only eat and dress, that would not be meaningful,⁴¹ people's ethic pursuit of spiritual life is more precious than the wealth, the titles and even the life.⁴² Mencius had deeply argued this point in a very famous saying: “the principles of our nature, and the determinations of righteousness. The sages only apprehended before me that of which my mind approves along with other men. Therefore the principles of our nature and the determinations of righteousness are agreeable to

³⁶ “富与贵，是人之所欲也”。

³⁷ 《论语·子路》

³⁸ 《论语·颜渊》

³⁹ “不义而富且贵，于我如浮云”

⁴⁰ “志士仁人，无求生以害仁，有杀身以成仁。”

⁴¹ “饮食之人，人贱之矣，为其养小以失大也”，“饱食暖衣而无教，则近于禽兽。”

⁴² “鱼，我所欲也，熊掌，亦我所欲也，二者不可得兼，舍鱼而取熊掌者也；生，亦我所欲也，义，亦我所欲也，二者不可得兼，舍生而取义者也。”

my mind, just as the flesh of grass and grain-fed animals are agreeable to my mouth.”⁴³

Xuncius had explicitly discussed the relation between desire and power in his political philosophy. Once he stated: “Although you are the emperor, you cannot follow all your desires.”⁴⁴ He had put forward the principle- “Guiding the desire through rationality” (“以理导欲”), which means to limit the desire by the norms of Li and Yi.⁴⁵ These above indicate that, for the Confucianists in pre-Qin period, the desire of human being should be regulated by the social norms especially for those in power.

As mentioned earlier, after the pre-Qin period, the most prosperous ages of Confucianism was the Han dynasty and the Song dynasty. In the Han dynasty, Dong Zhongshu (董仲舒) once said: “Yi and interests are the two aspects of human being. Yi nourishes the heart of human, while interests nourish the body. The heart is more important than the body, so Yi is more important than interests.”⁴⁶

The Neo-Confucianism (程朱理学) in Song Dynasty can be literally translated as “The Learning of Rationality of Cheng (Yi) and Zhu (Xi)”, which indicates that Confucianism has defined itself as a series of rational thoughts since long time ago. One of the most important arguments of the Neo-Confucianism is that “feudal ethics and asceticism”(“存天理， 灭人欲”). It is more important for those in power. Zhu Xi had advised the Emperor Xiao of Song (1127-1194) to “let there be the rationalities but no lust”. According to the Confucianists of Song dynasty, the relation between Yi and interest was already connected to the relation between

⁴³ “口之于味也，目之于色也，耳之于声也，鼻之于臭也，四肢之于安逸也，性也，有命焉，君子不谓性也；仁之于父子也，义之于君臣也，礼之于宾主也，知之于贤者也，圣人之于天道也，命也，有性焉，君子不谓命也。”

⁴⁴ “虽为天子，欲不可尽”

⁴⁵ 礼义和利虽为“人之所两有”，但“一之于礼义，则两得之矣；一之于情性，则两丧之矣。”

⁴⁶ “天之生人也，使之生义与利；利以养其体，义以养其心。心不得义不能乐，体不得利不能安。义者心之养也，利者体之养也。体莫贵于心，故养莫重于义。”

the public and the private. Cheng Yi had argued: “Yi / Interests relations are nothing but the relations between public and private”⁴⁷; “the rationality is the most public in the world, and the interests are what the people want.” (“理者天下之至公，利者众人之所同欲。”)⁴⁸ In order to explain it, Professor Feng Youlan (冯友兰) (1983) had pointed out that the *Learning of Rationality in Song and Ming* was aimed to explain the relationships between subject and object, and the relationships between the public and the private through an approach of ethics. The Confucian limitation of personal desire in Song Dynasty is considered to be the most serious.

After the Song dynasty, the situation had been revised a bit, while some important Confucian thinkers had made influential interpretations on this topic. For instance, Wang Fuzhi (王夫之, 1619-1692) thought that the personal desires are not absolutely contradictory to the public interests.⁴⁹ Dai Zhen (戴震, 1724-1777) believed that the Confucianists in Song Dynasty were to “kill the human being by rationality.” (“以理杀人”). But he did not thoroughly deny the concept of Rationality. According to Dai Zhen, “Rationality” is a kind of inexorable and universal law,⁵⁰ and people would understand rationality and Yi after they apprehend the inexorable and universal law.⁵¹

Generally speaking, in the development of Confucianism during the thousands of years, there had never appeared a trend of thought like the Utilitarianism. A main clue line throughout the history is that: attaching great importance to the social and public interests, and to the values of rationality and spiritual life; requiring the people, especially those in power, to abstain their personal desires for public interests. This light, of course, is a kind of ideal standard. It shows the normative

⁴⁷ 程颐《语录》卷十七

⁴⁸ 《程氏易传》

⁴⁹ “私欲之中，天理所寓”，“人欲之大公，即天理之至正”。

⁵⁰ “举凡天地、人物、事为，求其必然不可易，理至明显也。”“理非他，盖其必然也。……尽乎人之理非他，人伦日用尽乎其必然而已矣。”

⁵¹ “圣人之学，使人明于必然”。

orientations of the Confucian ethics. As we have stated before, Habermas is opposed to the role of power relations in communications. He thinks that the power relations would damage the attainment of the communicative consensus. In his normative theoretic construction, the power relations should be eliminated in communication. But on the opposite side, Foucault had revealed the omnipresent power relations and the absolute domination of self-interested power over the human rationality. Foucault thinks that only through constant power struggles, can we truly achieve the democracy. Then, within the normative framework of Confucian rationality, we may see another picture: power relations are allowed to exist, but the power must be limited to the value, in particular, the power should not be selfish. The Confucian values demand people in power to limit their own desires and consider more about the interests of the collectivity (Jiang Yi-huah, 2007). This point will be more clearly explained in the following analysis of the concept of “Li”.

7. Li: the Power Relations and Structure of Power in Confucian Rationality

Compared with the intrinsic values of Zhongyong and Ren etc., Li (禮), in Confucianism, refers to a variety of external social ethics and action regulations. The regulations of Li are mostly on a practical level. In the perspective of jurisprudence, Li belongs to the category of Customary Law or Principles of Law. Ren is the intrinsic value of Confucianism, while Li is the external institutional performances of Ren (Tu, 1989). According to the Confucian ideas, the original state of human being is kind-hearted (人之初，性本善), and all the “Evil” elements are formed after birth. So it is necessary to regulate and manage human society through ethic enlightenments, in order to call upon the inner natural goodness of human. The laws, mainly embodied as criminal laws in ancient China,

played only a secondary role in the social rulings. Due to this, Confucianism is very different from the Legalism. In ancient China, Li, as the ethic regulations, was much more developed than the laws (Huang Phillip C. C., 2015).⁵²

Li was originated from the ritual behaviors of the very ancient Chinese people. After Li was spread to secular field gradually, it loosely refers to the polite and cultured ways of behaviors at that time (Dawson, 1981: 26). In the Western Zhou dynasty (1046–771 BCE), Li became more and more developed, and known as the “Li - Yue system” together with “Yue” (music, 乐). According to legends, the Li - Yue system was created by Zhou Gong (the duke of Zhou, 周公). The original functions of Li are mainly to classify people's identities and to regulate the society, and its eventual target is to form a complex and harmonious hierarchy for the society. Based on the hierarchy of Li, the role of Yue is mainly used to reconcile the social disputes and contradictions by employing “music”. *Li Ji* had defined it clearly: “Yue leads to the unity, while Li defines the differences.”⁵³

During the Spring and Autumn period (770 - 476 BC), Confucius, the founding father of Confucianism, faced the social chaos at that time, and he strongly advocated the restoration of the Li – Yue system of Western Zhou, and advocated “To subdue one 's self and return to Li” (克己复礼). He believed that only the restoration of Li – Yue system and the implementation of the politics of Ren could solve the societal problems at that time and regain a harmonious society. Confucius’s explanations of Li includes: “There is government, when the prince is prince, and the minister is minister; when the father is father, and the son is son. (That is li)”⁵⁴; “Beginning with Affection, and ending with Li”⁵⁵, etc. After the Confucianism had become the orthodoxy ideology in China, Li had consequently also become the leading societal behavior regulations. As ethic regulations of daily life, the core contents of Li include: “there are differences between up and

⁵² As for the Li – law relationship, there are a lot of researches on it, see: Xu, 1998.

⁵³ “乐统同，礼辨异。”《礼记》

⁵⁴ “君君，臣臣，父父，子子” *Confucian Analects*, Book XII: Yen Yüan, Chapter 11.

⁵⁵ “发乎情，止乎礼。”(《诗经》)

down” (上下有别), “there are orders between the seniors and the inferiors” (尊卑有序), and so on.

Li serves as the embodiments of the Confucian values, such as Ren and Zhongyong. The Confucian classic book - *Li Ji* (the Book of Rites, 礼记) - had once quoted Confucius's words: “Zhongyong is the foundation of Li.”⁵⁶; Xuncius (313 – 238 BC), another key figure of Confucianism, also once said, “what is Zhongyong? Li is on behalf of Zhongyong”⁵⁷ Li of Confucianism, as the generic term of social ethic regulations, is on behalf of the social values like Zhongyong and Ren. According to *Li Ji*, “Li is the reflections of all the reasons in the world.”⁵⁸ It is a kind of objective existence in the universe, or more clearly speaking, “Li is the reason or rationality, or some basic value can't be changed by the rationality of people.”⁵⁹ That indicates that, according to Confucianism, as social ethical regulations, Li is not the results of rational thinking but start point of rationality. This order is quite different from the modern Western normative relations between rationality and law, especially the rationalist tradition from Kant to Habermas. In terms of Jurisprudence, Li represents the thoughts of natural law in ancient China.

Li also serves as a kind of communicative principle. In the book, *Confucius: The Secular as Sacred*, Herbert Fingarette (2002: 15-16) holds that in Confucius's thoughts, “Li is formed by experiences in the situation when people think about how to communicate with others. People, in the process of communication, find themselves part of a great community, and fitting in the community, people understanding the values of their own.” In the records of Confucian classics, such as *Zuo Zhuan* (左传), *Guo Yu* (国语) and the *Analects of Confucius*, there are also many stories showing that people believe the communicative rules of Li, and

⁵⁶ “夫礼所以制中也”

⁵⁷ “何谓中？礼义是也。”

⁵⁸ “礼也者，合于天时，设于地财，顺于鬼神，合于人心，理万物者也。”

⁵⁹ “礼也者，理也；礼也者，理之不可易者也。”

these rules of Li represent the most profound truth of life, namely Zhongyong and Ren. Overall, in traditional Chinese society, communications usually followed the hierarchical rules of Li but not the promise of equality Habermas suggested.

What is important in the aforementioned narration is that Li serves as the regulations classifying people's identities and dividing the power statuses of people. As a famous sinologist, Benjamin Schwartz (1985: 68-69), has argued, the equality and democracy are the specialities of ancient Greek city-states (Polis), while Confucianists believed that the social order should be built on the base of hierarchy and authority. What the Confucianists care about is how the hierarchy and power relations can run harmoniously. Although in different historical periods the specific contents of Li changed, its functions of classifying the power levels had never changed. The spirit of Ren emphasizes the differences of emotional attributes,⁶⁰ so Li, as the external performance of Ren, would stipulate these identity differences. Li, according to one's position in a specific relationship, develops different standards to define the decent behaviors (Lai, 2008: 25). In the system of Li, the monarch-subject relationships, the father-son ranks, the power relations between elder and younger generations, and the power ranks between teachers and students, etc., are all very important and unchallenged power relations which were fixed by laws of Chinese ancient dynasties.

In this light, in the normative system of Li, the opportunities of equal participation of dialogues which Habermas had suggested are impossible to take place. Li pattern is much closer to the state of "power relations are omnipresent" as what Foucault had said. However, according to the Confucian normative thoughts, these hierarchical relationships are based on values of "Ren", "Yi" and "Zhongyong". That is to say, the rulers had the power, which is not because of their requirements of benefit maximization of instrumental rationality, but normatively because that they should act basing on Ren and holistic visions. Confucianism has a special order of "Ren – Yi". Ren is the requirement for those

⁶⁰ 《论语》，为政第二，第二十四章

in power, to ask them to care about others, especially the grass root classes, and to stand in a holistic perspective. While the most similar English word to Yi is “duty”, Yi is the requirement for the people who rank lower on power relations.⁶¹ As a famous Chinese saying goes, “if you are not Ren, so I cannot be Yi”, which means in traditional Chinese society, people's obligations are done based on how the rulers implement the policy of Ren. Therefore, the power relations represented by Li were stable and strong, but they are not unrestricted.

Li, as a kind of regulational system, was developed from family regulations to the national regulations. That is to say, Li was originally the action and behavior regulations founded on the base of family ethics and the communications among akin relationship clan members. It was originally embodied in various related regulations of patriarchal clan system, and these rules are very numerous and complex. Compared with the Western languages, Chinese language also contains a variety of complex and strict family and relative appellations, which can also prove that Li is well developed in “private sphere”. Due to the secularity and empiricism of Chinese culture, the applicable scope of the patriarchal clan system has gradually expanded. Thus Confucianists regard the society and country as an enlarged family, and then extend the ethical requirements of family to the whole society or country (Hsieh, 1977: 167-187). Accordingly, the Li system among family members had gradually expanded its popularity and influence on whole society along with the communicative actions and behaviors. The functions of Li were thus extended from maintaining the normal operations of family to maintaining the ordinary orders of society and country (Zhang Desheng et al., 2001).

This kind of political structure is still very obvious even in China today. In Chinese language, the literal meaning of the word “国家” (Guo Jia, country) is “family – state”, which is different from the “state” in Western political sense,

⁶¹ Scholars think that the term “Yi” refers not only to the duty, but also to the meaning of “to perform properly”, See: Hall and Ames (1997), Kim-Chong Chong (1998), Karyn Lai (2003; 2008)

also different from the “national state”, and even different from the “country”. The political phenomenon of “family - country isomorphism” is one of Chinese fundamental points. Traditional Chinese people understood the country as a magnified family (Liang, 2002: Chapter 1), hoping the holy king could be a loving father of the family-nation,⁶² while everyone firstly learned how to be Ren in the family. The local officials in ancient China were called “parental officials” (父母官). If an official performs very well, people would say that he is “loving the people as his sons” (Ai Min Ru Zi, 爱民如子). The teacher was called “Shi Fu” (师父, “Father-teacher”) in Chinese which means that he is both the teacher and the father, or was called as “Xian sheng” (先生), which refers to a person who is born before oneself and with more experiences. Even in the interpersonal communications in today's Chinese society, particularly in the rural society, people are accustomed to calling other older people with a family appellation, such as “uncle”, “aunt”, “elder brother”, “elder sister”, and so on.

To sum up, under the system of Li, experienced people and the elders are always in a position of higher power, and family ethic regulations are usually extended to the public political space. But normatively, those in power must be temperate with the use of power, and they are expected to love and care for the power objects basing on the blood relationship and Confucian values. As Derk Bodde (1962) has pointed out, according to the Confucian Li system, the whole society is an enlarged family where the members are not equal, but they maintain the same goals. He defined it as “a graded but harmonious organism” (Bodde, 1962: 47).

⁶² 《论语》泰伯第八，第六章

8. Shi (Scholar-Bureaucrats): The Carrier Class of Confucian Rationality

Weber also noticed another characteristic of Confucianism comparing to other cultural traditions - the creators, successors, disseminators, and maintainers of Confucianism are mainly the intellectuals in traditional society. He says: “Confucianism is a kind of hierarchical ethics which belongs to the official salaried class who were educated through a conventional and classical way with secular rationalism.” (Weber, 1999: 6) Because the class carriers are different, he thinks that the value pursuits of Eastern and Western traditional cultures must be inevitably different from each other. This point is just one of the most important characteristics of Chinese culture that Qian Mu (钱穆) (2005), Yu Yingshi (余英时) (2003) and other most famous scholars who study Chinese culture had pointed out, and also one of the reasons why the Confucian rationality is different from the concepts of Western rationalities.

As Weber described, Shi is the intellectuals supported by the authorities. This class was rising in the *Spring and Autumn* period. They were employed by those in power and in return they provided policy advices to the rulers. Confucius and his students are representatives of Shi class in that era (Hsu, 1965: 34-37). Numerous outstanding researches had found that Shi class played a very outstanding role in Chinese history and Chinese culture (Qian, 2005; Yu Ying-shi, 2003). They are the major founders and carriers of Confucian values. In the imperial traditional Chinese society, they were not only servants for the power, but also restricting force to the imperial power, because they carried the rationality of Confucian values. Some authoritative and mainstream historical studies have showed that, in traditional China, generally in a stable period of a dynasty, the emperor's role would be relatively unimportant, while the large intellectual-official group composed of Shi would be dominant in the daily political life of

state (Huang Ray, 1982; Qian, 2005; Yu Ying-shi, 2003). For example, in the period of *Wang Anshi* (王安石) *Political Reform* of Song Dynasty (960 - 1279), Wen Yanbo (文彦博), an important minister, once said a very famous speech to Emperor Shen Zong of Song (宋神宗, 1048-1085), “your majesty is ruling the world together with our Shi class, rather than with the ordinary people.” This sentence illustrates not only that the Shi class served as a checks and balances to imperial power, but also distinguishes this checks and balances role clearly from the public sphere which was entirely composed of ordinary people. In traditional China, even the legitimacy of the imperial power was to a certain extent dependent upon the cooperation of the Shi class. Since the Dong Zhongshu Reform in Han dynasty, Confucianism, as a mainstream ideology, has been always advocating an idea: the “sky” (天) is the supreme restrictive force over the imperial power, and the emperor is the son of the “sky”. Only the Shi of Confucianism can be “ethical enough for matching the sky” (以德配天) and know the willing of the “sky”, and in turn, to exercise the power together with the emperor (Qiu, 2012).

Confucianism requires the Shi class to possess both the ethic awareness and rational spirit. Shi have to follow the ethic demands of Li, as Weber (1951: 156; 1999: 206-207) described Shi as: “He is a man who is both inwardly and in relation to society harmonically attuned and poised in all social situations, be they high or low; he behaves accordingly and without compromising his dignity. Controlled ease and correct composure, grace and dignity in the sense of a ceremonially ordered court-salon characterize this man.” Shi class is somewhat similar to the Western intellectuals in modern times, and different from the philosophers who emphasized on the pursuit of rationality in ancient West society, and also different from the theologians who underlined the moral sacredness in Middle Ages (Yu Ying-shi, 2003: Preface). But the Western modern intellectuals are mostly outside of the political system, they mainly work at these relatively independent academic institutions; Some of Shi were outside of the system in

ancient China, such as the rural gentries and civilian Chu Shi (处士), Xiu Cai (秀才) (Wang Zi-jin, 2007), and there were also a large part of Shi in the political system who took part in the imperial examinations and were selected to become the members of the power system (He Huai-hong, 2011).

For both the official and the civilian Shi, most of them were supported by authorities, but it doesn't mean that Shi class was only serving the power. According to the idea of Confucianism, the ethic requirements of Shi were the most important of all. Confucius considered that the men who raises or leads a political reform should be a Jun Zi (君子, a man of noble character) who had received good education and have ethical wisdoms, and he has to be good enough to be a model (Lai, 2008: 18). Ren, Zhongyong, Li and other Confucian ethic thoughts were the main contents of the imperial examinations. A very famous poem verse of Fan Zhongyan (范仲淹) who was a model Shi in Song Dynasty, “Worry before the world and enjoy comfort after the world”⁶³ serves as the best description on the ethic responsibility of Shi class.

In traditional Chinese society, Shi scholars often gathered together to discuss and talk about the political and legal issues. Their meetings were considered, to some extent, by some scholars, as the political deliberative activities in public sphere (Qiu, 2012). This kind of public sphere was consisted of Shi, the main carrier of Confucian rationality, and determines the characteristics of political legal deliberations in traditional Chinese society.

⁶³ “先天下之忧而忧，后天下之乐而乐。” Quotation from “Essay On Yueyang Tower” (岳阳楼记) by Song writer Fan Zhongyan.

9. Conclusion: The Power / Rationality Disputes in a Confucian discourse context

The first chapter of this thesis has generally introduced Habermas's Discourse Theory of Law and Democracy. The emphases are the visions of rationality of proceduralist paradigm under the guidance of communicative rationality, and its empirical dimensions to demonstrate its normativity by quoting sociological researches. The second chapter has introduced Foucault's power relation theory as another dimension of discourse theory for dialoguing with Habermas, and it highlighted the tensions between the normativity of Communicative Rationality and the ubiquitous power relations in practice. The third chapter tries to explore the resources from traditional Chinese thoughts, culture and practices, and further enlarge the normative meaning of “rationality” and “power relation”, hoping it can improve the solutions on the contradictions between rationality and power, or at least offer another perspective for thinking.

The existing researches on the debate between Habermas and Foucault, either in Chinese speaking world or the Western world,⁶⁴ both focused on the distinctions between the two. For example, Habermas emphasizes the equality of participants in deliberative democracy and the role of *Arguing Discourse* in the process of consensus building; But Foucault observed the domination of power in discourses, thought that micro power is the most decisive factor rather than rationality, and the ideal equality is definitely impossible. This kind of distinctions is not wrong, but it is completely based on the Western dichotomy. If we do some studies on Foucault and Habermas in other perspectives, we would find that Foucault's forte is not lying in applying power theory to explain everything, but he finds the dominations of power in a seemingly equal and rational environment; The

⁶⁴ For recasting the Habermas-Foucault Debate in Western academic world, see: *Critique and Power: Foucault Habermas Debate* (Russell, Jesse; Cohn, Ronald; Book on Demand Ltd.), *Foucault Contra Habermas* (Ashenden, Samantha; Owen, David; Ashenden, S. Sage Publications Ltd); *Foucault-Habermas Debate* (Miller, Frederic P.; Vandome, Agnes F.; McBrewster, John)

valuable point of Habermas, on the other hand, is discovering the force of rationality even in a political practices fully filled and deconstructed by power. By investigating empirical studies, we also found that neither Habermas's view of rationality nor Foucault's power relation theory could explain the complex Chinese political and legal deliberations, not even explaining a single case. Therefore, another explanation framework must be introduced, even though it is also somewhat normative. The framework must include the Chinese rationalities, especially the Confucian Rationality. It is believed that we can use the Confucian rationality from the thoughts and practices of China to re-analyze the debate between Habermas and Foucault, as well as the tension between Communicative Rationality and Power relation theory.

As mentioned in the first and second chapter of this thesis, the biggest challenge that the view of communicative rationality of Habermas encountered is that, as Foucault has exposed, the power imbalance is ubiquitous in practices, and the ideal speech situation is difficult to achieve. How to let those in power give up the self-interested power and participate in the equal and rational deliberation? That is the most important **missing linkage** in theory of Habermas. Similar to Talcott Parsons's *Value Consensus Theory*, Confucianism emphasizes the obedience on one's own initiative to the social orders and norms. Basing on this point, Professor Zhang De-sheng (Tak Sing Cheung) and his research partners (2001) hold that the Zhongyong value of Confucian Rationality, "had just built a bridge between instrumental rationality and communicative rationality, and make the value conflicts solved in the rational communicative channels, because it starts from a holistic perspective and chases for temperance, containing the preparations and willingness of rational communication. (...) In the real society where the power relation is ubiquitous, those in power are willing to be self-restraint and pay attention to the interests of the whole, which is the key to solve the disputes peacefully."⁶⁵ This is a very noteworthy theoretical viewpoint. We also argue that,

⁶⁵ For how Confucian rationality can overcome the defects of instrumental rationality in a secular society, also see Tak Sing Cheung et al., 2006. "How Confucian Are Contemporary Chinese? Construction of an Ideal

in modern society where instrumental rationality overflows, the normative goal of communicative rationality is difficult to achieve, while Confucian rationality may put forward a new possibility to achieve the goal. Confucian rationality makes the efficiency view of instrumental rationality replaced by abstinence, giving considerations to both the actors themselves and the interests of the whole. It has kept the authority of experiences, but has weakened the self-interest orientation of power. Although it has the shortcomings of despising the procedures and logic, Confucian rationality is a unique thinking way of actions and communications which may somehow balance the tension between Habermas and Foucault.

Confucian rationality, as a value orientation and active standard of people, is somewhat dominant in Chinese spoken society for thousands of years. Even today, more than one hundred years after the abolition of the imperial examinations and the country has stepped into the development of modernization, the behaviors patterns and cognitive structure of Chinese people are still affected by the traditional Confucian Rationality. David L. Hall and Roger T. Ames (1997: 93-110) think that China, in many ways, is closer to the republicanism democratic ideals of John Dewey and Machael Sandel. They even think that Chinese traditional political culture, as a kind of democratic thought, can better answer the criticisms on advanced capitalism of Daniel Bell.⁶⁶ Although I do not agree with the view that generalizing Confucian culture simply as the republicanism in Western sense, I do think that it may be a useful dimension to talk with Habermas and Foucault. If we have to put some title with “ism” to define it, I prefer to use the “Relationalism” that Professor Li Ze-hou (2014) had suggested.

Confucian rationality is a unique thinking way of value rationality. In this Chinese normative light, the rationality serves no longer as the several directions defined

Type and Its Application to Three Chinese Communities.” *European Journal of East Asian Studies*, 5(2): 157-180.

⁶⁶ Daniel Bell thinks that the modern capitalism is too partial to the law when solving the contradictions between Morality and Law. David L. Hall and Roger T. Ames argue that, from the republican perspective, the Chinese Confucian values can redress it. See David L. Hall and Roger T. Ames (1997), *The Democracy of the Dead*. p.93-110.

by Weber or Habermas; the power relations are no longer only with contrarious and oppressive styles as revealed by Foucault. In the framework of Confucian rationality, the power imbalance can be somehow neutralized and dissolved by “Ren”, “Zhongyong” and other value views. Confucian rationality does not include a clear logical dichotomy as the Western ones emphasized, and not good at solving problems with a binary approach, but it pursues the “harmony between *YIN* and *YANG*” (阴阳调和)⁶⁷ and the dialectics. That is so-called as Chinese folk wisdom going, “you are among us and we are among you” or “There is something of each in the other”. As Derk Bodde (1962: 54) has explained, the basic mode of Chinese thought is to unify some things seemingly opposite to each other. There are a lot of binary systems in Chinese philosophy, however, these systems are usually mutual complementary but not opposed to each other. Professor Jiang Yihuah (2007) also argues that Confucianism aims to harmonize the political discussions through ethic requires, but not to conform the opinions in discussions. The Confucian-style political and legal discourses also explain that the differentiations between Foucault and Habermas are not an either/or debate; it is possible to be reconciled. It is different from the Western political philosophies’ arguments or political practices. There are many ways (or reasons) leading to the consensus (Tong, 2012), Foucault and Habermas's theories are just some of them, while Confucian rationality represents perhaps another integrated way.

We have to admit that the various characteristics of Confucian culture also exist in other cultures. Only the degrees are different in different cultures. And of course, Confucian rationality is not an ideal rationality model without any faults. Firstly, neglecting procedure and positive law, and overly relying on the emotions and family blood relationship, are all the harms done to the modern liberal system of Rule of Law. Secondly, Confucian rationality is a rational thinking way or cognitive structure from a relatively simple and traditional agricultural society, but the modern society has been much more complex one. As an ethical idealism without institutionalized protections, it is hard to play a positive enough role along

⁶⁷ In Eastern thoughts, *YIN* and *YANG* refer to the two extremes.

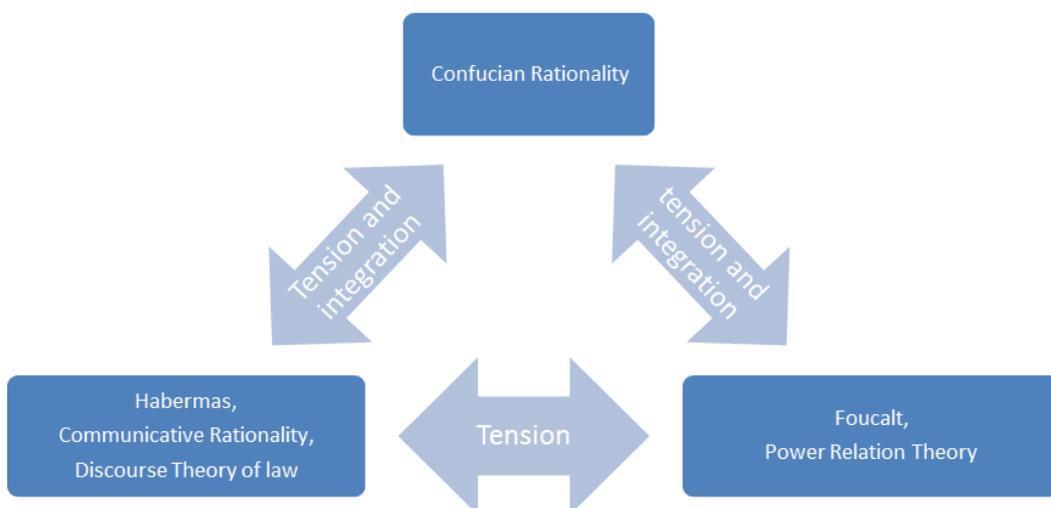
with all the rapid social changes. Thirdly, we should also notice that, similar to the Habermasian normative concept of Communicative Rationality, the Confucian rationality is also a kind of ideal theoretic type of rationality. In thousands years of history of traditional China, the idealized Confucian rationality was not always the dominant social ideology. As mentioned above, it tends to be dominant in a time of peace and order, the effects of Confucian rationality would be more obvious; but in the ages of social unrests, these ideal types of value would be impacted and the Confucian social orders would be damaged. Last but maybe the most important point, Confucianism regulates the human actions through an inner approach of the ethics in one's heart, but no relying on the external legal or religious regulations, which means that Confucianism is not as forceful as the Western social norms over the human actions (Tang Yi-jie, 1991). Although there is transcendence in Chinese (Confucian) culture, it may be kind of inner transcendence (Jin Guan-tao, 1990; Tang Yi-jie, 1991) rather than external transcendence. That generates a question: in modern times, can the social orders be regulated and kept only by the ethical force in one's heart?

Although Confucian rationality refers to some inherent thinking habits and characteristics of cognitive structure of Chinese people, it is not set in stone. Historically, Confucianism has many experiences of dialogue and integration with foreign ideas or ideologies.⁶⁸ This light also shows that Confucianism tends to face problems in a comprehensive and holistic way, rather than in an opposing perspective. So today, impacted by the Western political thoughts, Confucian rationality need also to be reflected constantly, and integrated with the others (such as the theories of Habermas and Foucault). In these terms, the Confucian rationality what we argued is different from the so-called "New Confucianism" of today, "Political Confucianism" or "Throughout Three Traditions" (通三统) and other schools or scholars have argued. They hope that the traditional Chinese political culture can be used in place of the modern Western liberalism (Jiang

⁶⁸ For instance, Chinese Buddhism is generated from the integration of Indian Buddhism and Chinese local cultures.

Qing, 2003; Gan, 2007). And mine is more similar to Habermas's, I hope to find answers within the modernity, hope we could find the points that Confucian rationality could make dialogues with the contemporary Western political philosophies and let Confucianism be a beneficial supplement for them.

So far, maybe we could draw some theoretical conclusions for the first three chapters. I argue that all three theoretical types are ideal and normative dimensions. Habermas has set an ideal model of discourse which relies too much on the abilities of rational thinking and rational expression of human being, because he is somehow influenced by the German idealist tradition of rationality from Kant. Foucault's theory is somewhat too post-modernist or post-structuralist since he was affected by Nietzsche and doubt on the modernity. Confucian Rationality is also somewhat too idealized and not very suitable to the modern society. Modern society (especially the Chinese society) is too complex to be observed or defined by only one theoretic framework. In terms of multiple modernity and plural rationalities, we have to rethink and reexamine the limitations of these three theories and the relations between them. When we put the three together, we would find not only the tensions but also the possibilities of mutual integration. I would like to see these three theoretical directions as following:



With this theoretical framework, people could observe and investigate the practical cases of public deliberation (especially the Chinese cases), and evaluate the positions and degree of the cases. Therefore, all these theories above - Habermas's theory of communicative rationality, Foucault's power relation theory and the characteristics of political/legal deliberations in traditional Chinese society, will be further discussed in following empirical studies.



**Chapter 4. “Public Sphere” and
Political/Legal Discussions in Traditional
Chinese Society Influenced by Confucian
Rationality**

Chapter 4. “Public Sphere” and Political/Legal Discussions in Traditional Chinese Society Influenced by Confucian Rationality

Introduction

In 1992, Professor Richard Madsen, a sociologist and sinologist, posted a paper at a conference relating to "Modern China". In this conference paper, "Public Sphere, Civil Society and Ethic Community", he argues that we have to redefine the Habermasian term of *Public Sphere*, as well as the related conception of *Civil Society*, in the Chinese Context. He holds that the Habermasian term of Public Sphere has showed some inadaptations while it was used to study a different culture, such as the Chinese culture. Specifically, Habermas had defined this term on a normative level: he assumes that the modern citizens had the ability more advanced than the past, which refers to "rational thinking and arguing". Scholars after Habermas continued to use this term to conduct their studies on China, but they ignored the special economic and political structures of the West where this theory was generated. According to Madsen, it is necessary to avoid this kind of Western Centrismistic views. He said: "we are still not very clear that, does the theory of public sphere of Habermas have to base on the principle of subject rationality and the individual priority to the society which are assumed by the Western culture? I personally believe that there may be the public sphere with a special Asian cultural paradigm." (Madsen, 2003: 229) As a result, Madsen suggests returning to the abstract meaning of this term of Habermas. That is to say, we should focus on the ethical and cultural dimensions of this term. It is believed that the study of this chapter is trying to follow Professor Madsen's steps.

Guided by Confucian rationality, the public sphere and political legal discussions in traditional Chinese society had shown some characteristics different from their Western counter parts. If judged by the modern Western standards of "democracy", especially the ideal standards of Habermas, they may not fit into the strict standard of "public sphere" or "true deliberation", but they do demonstrate some of the characteristics of traditional China. These features may still explain some phenomenas in China's public discussions today. This chapter will mainly yet

briefly describe the characteristics of public sphere and legal / political discussions in traditional China.

Different from the foregoing chapters, the demonstrations of this chapter would be more empirical. However, due to the difficulties faced while doing a such large historical investigation on the public sphere and political/legal discussions in traditional Chinese society, the presentation of this chapter could only be somehow generalized and problematically (characteristics) oriented, but not history-oriented, could only be integrated, but not very analytical. Or maybe we could say that the discussion of this chapter is somewhat genealogical.

1. "Public Sphere" in Traditional Chinese Society

For Habermas's public sphere theory, Thomas McCarthy has raised a question in the introduction of English edition of *Structural Transformation of Public Sphere*, "can the public sphere be effectively reconstituted under radically different socioeconomic, political and cultural conditions? In short, is democracy possible?" (McCarthy 1991a: xii) This question also aptly points to the Chinese traditional society.

So far, there have been a lot of studies on the "public sphere" of traditional China, especially on the history from 1840 to 1949. Most of them believe that there had been a "third space" which could balance the governmental power in traditional China and this third space is somehow similar to the Bourgeois public sphere Habermas has suggested. But on the other hand, they also emphasize on the uniqueness of Chinese public sphere. Among these researches, a famous paper of Professor Philip C. C. Huang (黄宗智) (1993: 216-240), "'Public Sphere'/'Civil Society' in China?: The Third Realm between State and Society", is one of the

most representative ones. Huang (1993: 216) believes that the binary opposition between state and society “is an ideal abstracted from early modern and modern Western experience that is inappropriate for China. We need to employ instead a binary conception, with a third space in between state and society, in which both participated.” These researches and judgments are the bases and hypothesis of this chapter. In the following part, it is hoped to investigate this kind of third place and the power relations in it on one hand. On the other hand, differently, it would also focus on the cultural and ethical dimensions of Chinese public sphere. That is to say, we would like to investigate the public sphere in traditional China by tracing back to the normative sense of Habermas’s definition.

As we have already mentioned before, in traditional China, the restricting force over the governmental power mainly came from the Shi class rather than the grassroots people. That is to say, in traditional China, there was a “third sphere” composed by Shi, and this sphere has an effective affect of checks and balances over the kingship. We could call it the “public sphere of Shi” or “Confucian public sphere”. Its functions as the checks and balances over power system are similar to the normative theory of Habermas, but its class limitation does not agree with the suggestion of Habermas. Moreover, I argue that, due to the influence of Confucian Rationality, the communicative activities in traditional Chinese public sphere had a very strong and unique ethical orientation.

1.1 In Ancient China

In the political practices of ancient China (before 1840), there were a lot of examples of “public sphere” of Shi, such as the Tai Xue (太学) since the Han dynasty, Guo Zi Jian (国子监) from the Sui dynasty, as well as the Dong Lin Academy (东林书院) of Song dynasty and Ming dynasty (1368 - 1644). Some of these agencies were governmentally established institutions for higher education

and researches, and also they served as the public spheres for Confucian Shi class to discuss political issues.

Since the Han dynasty, Tai Xue has become the official name of the higher academic institution established by the central government in the national capital, and Confucianism has become the orthodoxy knowledge of Tai Xue. Dong Zhongshu (董仲舒, 179–104 BC), who had promoted Confucianism as the official ideology of the Chinese imperial states, once proposed the “three strategies of sky and human” (天人三策) to Emperor Wu of Han (156 – 87 BC), which included “Hope that your majesty could establish Tai Xue, invite famous teachers, and keep the Shi all over the world”.⁶⁹ One of its purposes was to let the Confucian Shi have sufficient space to discuss political issues. The Number of Shi in Tai Xue was about ten thousand in late West Han Dynasty; in Eastern Han dynasty it once reached more than thirty thousand. On one hand, those in power would choose someone with talents in Tai Xue to be governmental bureaucrats; on the other hand, scholars of Tai Xue would expand their political influences through deliberative meetings and actions, and even fight with those in power.

According to the historical records, in the period of Emperor Ai (25 BC – 1 BC) of the Western Han dynasty, a famous scholar in Tai Xue – Wang Xian (王咸) had brought together more than one thousand scholars, in order to save a fair law enforcement officials – Bao Xuan (鲍宣). In late Eastern Han dynasty, scholars, represented by Chen Fan (陈蕃) and Li Ying (李膺), were object to the rule of the eunuchs, and they attained wide responses of other scholar-bureaucrats. The public opinions they formed through meetings and deliberations had played a great influence. Later, there were more than thirty thousand scholars of Tai Xue, headed by Jia Biao (贾彪) and Guo Tai (郭泰), who got together and talked about the current politics. It formed strong public opinions, which was known as the “Political Criticism by Scholars” (清议, Qing Yi), and “most of the officials of the

⁶⁹ “愿陛下兴太学，置明师，以养天下之士”。

court felt afraid of this force.”⁷⁰ These deliberations had prompted the social opinions to discuss political ethos, which had also promoted the struggle against eunuchs rule. Then, the students and scholars in Tai Xue also became the object of the eunuch’s punishments, which was referred to as a famous event of “Suppression of the Conspiratorial Cliques” (“党锢”). Many people related were imprisoned. Up to the first year of “Xi Ping” (C.E. 172, 熹平元年), more than one thousand scholars were arrested by the eunuchs. These events indicate the political function of public sphere of Tai Xue.

The Western Han dynasty set Tai Xue in the capital Chang 'An (长安) and another important city Luo Yang (洛阳); the Eastern Han dynasty and the Western Jin dynasty (266 - 316) set it at Luo Yang; and Eastern Jin (317 - 420) also set it in Jian Kang (建康). In addition, during the whole Jin dynasty, there was also a Guo Zi Xue (国子学) particularly for the descendents of Shi class. After the Northern and Southern dynasties (420 - 589), Sui dynasty (581–618) changed Tai Xue to Guo Zi Xue (国子学), but the functions were still the same. These institutions were not officially cancelled until the abolition of imperial examinations in 1905, in the very late Qing dynasty. Tai Xue, Guo Zi Jian were established by the governments, meanwhile the great mass fervor of private established schools driven by them had no loss and became the important carriers of public sphere of Shi in Chinese history.

Donglin Academy (东林书院) was the representative of these private schools. It was founded by Cheng Hao, a famous Confucian Shi of Northern Song dynasty (960 - 1127), and it was a very famous civil place in ancient China for the Shi class to get together and make public discussions on political issues. It was re-fixed in the Wan-li reign period (1573 - 1620) in the Ming Dynasty, and had influence throughout the country. In Ming dynasty, Donglin Academy had its own rituals of meeting and deliberation: a general assembly by every year, a small

⁷⁰ “自公卿以下莫不畏其贬议。”;“三公九卿皆折节下之，三府辟召常出其口”。

meeting by every month, and each meeting would last for three days. The participants were completely voluntary. In each meeting, there was a main speaker who was generally a respected Confucian scholar. By the Contents of discussions, in addition to the Confucian classics, there were also some contemporary political events. The rest of the participants could participate in the discussions by asking questions etc. Donglin Academy used to be one of the main centers of public opinions in ancient China for a long time.

In 1604 AD, a very famous scholar-bureaucrat, Gu Xiancheng (顾宪成) had been kicked out of the central government because of his contradictory opinion with the emperor. He was back to his hometown, together with Gao Panlong (高攀龙) and other scholar-bureaucrats, and re-created the Donglin Academy, which was aimed to let the intelligentsia to discuss politics and to publicize their political views. They advocated the value spirit of "Reading, Lecture and Patriotism" (读书、讲学、爱国). Gu Xiancheng wrote a very famous couplet: "In my ears are the sounds of wind, rain and reading. To my concern are the affairs of households, country and the mass."⁷¹, to express the tenet of Donglin Academy. This couplet explicitly shows the ethic spirit of the Confucian intellectuals at that time. For hundreds of years, this sentence, as well as the Fan Zhongyan's words in Song dynasty which we have mentioned earlier, has been one of the most important mottos for the Chinese intellectuals until today. Many scholar-bureaucrats within the political system were also very yearning to the Donglin Academy, so they came to participate in the meetings and discussions. The influence of Donglin Academy thus expanded into the political system of central power, and then affected the national politics. Later, the oppositions, especially the eunuchs, began to call them the "Donglin Party" with malicious intention. Donglin scholars, in the decades of late Ming dynasty, had always struggled with the eunuchs. That became one of the most important politics and culture / ideological struggles in China's history.

⁷¹ "风声雨声读书声声入耳，家事国事天下事事在心"

Overall, the “public sphere” in ancient China composed by Shi class was somewhat similar to the normative conception of Habermas. They both play a constraint role to the state power, and both have the functions of “democracy”. And, both of them set the rational consensus as the purposes of the discussions. But many differences did exist. First of all, the Bourgeois public sphere that Habermas has normatively suggested exists in the civil society but outside of the administrative system in most conditions. Shi public sphere in ancient China can be seen as a third place where both the governmental power and ordinary people can participate in. Secondly, in Habermas's theoretical construction, the equality between the participants is the most important premise. That means all the participants are required to be equal to each other, and any power imbalance is rejected. But in the ancient Chinese society, under the dominant thoughts of *Li* of Confucianism, even between the most grass-root intellectuals outside political system, the equality in the Western sense rarely existed. In the aforementioned descriptions, we could find that the respected people, especially the **Confucian teachers**, played a very important leading role in the Shi public sphere. Thirdly, the understandings on “rationality” of the two are not the same. Habermas attaches great importance to the Communicative Rationality; while the public sphere of ancient China was affected by the thinking way of Confucian rationality (Confucian values), so it paid more attention to the value issues such as Ren, Zhongyong, Yi and harmony, etc. rather than other rationality factors such as the logic.

1.2 In Modern China

The Chinese process of transition from the ancient to the modern is not very spanned like the West. From the Medieval Times to the Modern Times, the Western societies had gone along with a series of significant ideological changes, especially the changes from religious rules to the secularization. But Chinese

society has always been very secular, there was no such a change like from "with god" to "without god" in China. Chinese traditional thoughts and culture, although had experienced some social movements, such as the *New Culture Movement* and the *Cultural Revolution*, etc., has not been thoroughly gotten rid of, and still exerts influences. Different from the Secularization of the West, the modernization of Chinese thoughts is basically the process from stubbornly sticking to Chinese traditions to slowly accepting Western thoughts. Therefore, when we recognize that the traditional Chinese thinking way is still influencing the society today, we have to also note the process of China accepting Western thoughts and learning from the West since modern times. Since the Chinese modern times (1840 -)⁷², especially after the abolition of imperial examination system and the incoming flood of Western political ideas, the public sphere of traditional Chinese society was impacted strongly, but many characteristics still continue to alive. By synthesizing the factors above, we could find that the political public sphere of modern China is much more complicated than the ancient one. However, fortunately, some excellent historical/sociological studies can show us this complicated situation (e.g., Wakeman, 2003; Wang Di, 2006; Wang Di, 2010; Rankin, 2003; Rowe, 2003; Madsen, 2003; Chamberlain, 2003; Huang, 1993; Jin & Liu, 2005). These studies more or less make dialogues with Habermas's theory.

For example, Wang Di (2006; 2010) had studied the social space of Chengdu city from the late Qing dynasty to the Republic of China period (1912 - 1949), and presented the structural transformation of Chinese urban public sphere accompanied by the gradual disintegration of the traditional Chinese society and the rising of new business culture. He thinks that there was a public sphere similar to the concept Habermas has mentioned, as it is embodied within the "teahouses" and other public places. But this kind of public sphere also has its particularity, such as the guidance of the idea of Confucian "Li" and the important role of local

⁷² Generally speaking, the Chinese modern history starts from the first Opium War (1840-1842) when China started to communicate with the West all sidedly. In 1905, the millennial imperial examination system was abolished by the Qing Dynasty.

elites, etc.

Jin Guantao and Liu Qingfeng (2005: 175-205), using keywords carding method on important historical and political documents, find that in China's modern history, there existed a public sphere composed by the family (clan) representatives and local gentries (a kind of Shi). They named it the “Confucian public sphere”. Generally, the communicative activities of the representatives and local gentries still followed the value principles of Confucian Rationality, but some modern Western ideas and values, such as the liberty and human rights also began to infect their actions gradually. Jin and Liu (2005: 175) see this Confucian public sphere as a product of Confucian political culture in response to the West, and believe that “it was a particular type of public sphere different to the Habermasian model.”

The local gentries that Jin Guantao and Liu Qingfeng had referred to and the local elites that Wang Di had mentioned are all just the continuations of Shi class of ancient China. Fei Xiaotong (费孝通), a famous socio-anthropologist, had already meticulously studied this group of people in his works *Rural China* (《乡土中国》) (2006a) and *Chinese Gentries* (《中国绅士》) (2006b). Traditional Chinese society was largely sustained by the participations of these local elites with family (clan) background. They, together with the Shi scholars within the power system, belong to the Confucian intellectuals or social elite groups, and they formed a “third space” between individuals and imperial power. Fei Xiaotong believed that, since modern times, the public sphere of local elites was gradually weaken, but many of them turned their interests into other areas such as business, and continued to play their roles.

In his historical researches, Philip C. C. Huang (2003: 275) shows the existence of public sphere as a third space in modern China by using the case of Business Associations in late Qing dynasty and ROC period. These so-called new business associations were composed by business men. But these associations were

established by the proposition of the state policy in 1904 and they run under the governmental guidance. The emergence of these business associations shows the state confirmation on the business activities, since the Chinese dynasties were always object to the business activities for thousands of years. At the same time, it also shows that the business groups were gradually strengthened at that time. By the organizational framework of these business associations, the business men cooperated with the state power in a various fields, such as the public benefits, public security and mediation of disputes etc. Thus the institutional authority of the associations was built, and this authority made them become a relatively independent force from state and society.

Comprehensively speaking, by summarizing the “public sphere” in traditional China (before and after modern times), it can be generalized as a political legal public sphere composed by the Confucian intellectuals and local elites with clan consanguinity background and the action guidance of Confucian values. As a third space where both power and people can participate in and cooperate to each other, it is merely relatively independent from the state power and society. There were power imbalances between the participants, but they can still produce certain restrains and influences to the power of government. Under the influence of Confucian rationality, we would continually discuss what the characteristics of political and legal deliberations in this kind of public sphere are.

2. Political and Legal Discussions in “Public Sphere”

2.1 The Origins of Chinese Political / Legal Discussions

In ancient China, the origin of the traditions of political and legal discussions could be dated back to very early times. The oldest existing historical book *Shang Shu· Yao Dian* (《尚书·尧典》) records that Yao (a legendary monarch in very ancient China, about 2358 - 2258 BC) would often discuss with some nobles known as "Four Mountains" (四岳, four great persons) when he dealt with the political affairs on the matter of water controlling, the appointing of officials or the screening of heir (Chen Sheng-yong, 2006a: 84; 2006b: 161). A very famous chapter in *Guo Yu·Zhou Dian* (《国语·周典》) had expressed a point of view that "the power of public opinions is like the flood. You can't use the way of blocking it up to control. You should open up the channels of speech and make more people through different ways to participate in the discussions. This would make the policies and public opinions on the same track."⁷³ In 841 BC, the king Li of Zhou (周厉王) had been chased away by the *People Riots* (国人暴动). Duke Zhou (周公) and Duke Zhao (召公) were joint in power, which is called as the *Republic Governance* (共和之治). Their ruling way was that when they got into big problems, they would discuss with people from all walks of life. Therefore, certain research regards this event as the original source of political deliberation and republicanism of China (Chu, 2008).

Basing on the normative value of harmony of Confucianism, if the disputes can be solved through peaceful discussions, it would be the ideal state. The earliest story of political deliberation in Confucian classics was in *Zuo Zhuan* (《左传》). In the state of Zheng (郑) of *Spring and Autumn* period, there was a statesman whom Confucius greatly admired - Zi Chan (子产). He was the prime minister of Zheng. *Zuo Zhuan* (《左传》) records that "when Zi Chan came to the rest place in the countryside (School of township, 乡校), he heard a lot of people were talking about politics. Someone suggested Zi Chan to eradicate these places, but he

73 "防民之口，甚于防川。.....故天子听政，使公卿至于列士献诗，瞽献曲，史献书，师箴，瞽赋，蒙诵，百工谏，庶人传语，近臣尽规，亲戚补察，瞽、史教诲，耆、艾修之，而后王斟酌焉，是以事行而不悖。"（《召公谏厉王弭谤》）

rejected this proposal. He held that if he can come here at morning and evening every day to listen to people's talking about politics, it would be great benefits for his making of policy. If people thought it a right policy, he would actively implement it; if people thought it is wrong, he could correct it in time."⁷⁴ Zi Chan then had expansively promoted this form of political participation. After hearing this story, Confucius praised Zi Chan and thought this is the reflection of Ren of Confucianism.⁷⁵

These famous examples above can be seen as the beginning of Chinese deliberative politics. In sum, by the influence of Confucian rationality of value, the traditional Chinese political and legal discussions have the following characteristics.

2.2 Inequality (Power imbalance) between participants

As we have defined above, the public sphere in traditional China is a third space where both the state power and people can participate into and cooperate with each other, rather than the ideal type of bourgeois public sphere which were generated from the private sphere as Habermas had proposed. Therefore, the participants of Chinese public sphere would be much more multiplying and unequal with each other with power imbalance. Moreover, under the influence of the ethics of Confucian Li, the participants of traditional Chinese political / legal discussions in public sphere were difficult to get the equal opportunity of participating. The elder people, people with higher education or more leaning experience, people at higher generation, people with higher official positions, and people with outstanding contributions, etc., were always in a higher power ranking.

⁷⁴ “郑人游于乡校，以论执政。然明谓子产曰：“毁乡校，何如？”子产曰：“何为？夫人朝夕退而游焉，以议执政之善否。其所善者，吾则行之；其所恶者，吾则改之，是吾师也，若之何毁之？”

⁷⁵ “仲尼闻是语也，曰：以是观之，人谓子产不仁，吾不信也。”（《左传·襄公三十一年》）

The relations between the participants were seemed to be closer to what Foucault held: it was a kind of power relations rather than equal relations. For the vast majority of grass-root people, the chance of political participation didn't even exist. According to the normative suggestions of Habermas, participant inequality, or what we call power imbalance could lead to the failure of the political deliberation. However, as stated earlier, given the roles of Ren, Yi and Li values of Confucian rationality, traditional Chinese deliberation participants were not only standing on the position of instrumental thinking or utilitarianism, but also doing it through holistic and benevolence thoughts to participate in deliberation. That is to say, in terms of the Confucian normative requirements, they should play a role on the basis of Ren and Zhongyong, which will weaken the negative effects of power imbalance to the discussion to a certain extent.

We would like to name this form of discourse as a **“Teacher – Student Model”** of discourse. As we have stated, people with more experiences and knowledges were respected in Confucian cultures. Confucian teachers played a more important role in the political / legal discussions of Shi public sphere. Confucius said: “If three of us are walking together, at least one of the other two is good enough to be my teacher.”⁷⁶ In the areas influenced by Confucian culture, “Teacher” is a very reverent and respectful appellation for those with much knowledge and high ethical standards. Therefore, the “Teacher – Student Model” here refers to a Confucian normative model of discourse that even there are power imbalance between the participants, people with higher stands should communicate basing on Confucian values and benefit others.

In ancient China, the inequality of participation in political / legal deliberation, namely the principles of Li, was often protected by statute laws. From the Han dynasty, when laws began to be influenced by Confucianism, they were used to adjust relationships between fathers and sons, husbands and wives, and

⁷⁶ “三人行，必有我师。”

older/younger brothers to establish the dominant position of paternal and husbandly authority. Emperor Wu of the Jin dynasty (晋武帝) composed the *Taishi Law* (泰始律) which was the first thoroughly Confucianized legal code in China (Zhang Jin-fan, 2013: 144). Taishi Law took Li as its basis and strictly marked people's status. For instance, in the legal deliberation on the court, "determining punishments based on the status and kinship of people involved" was officially written in the code. Since the *Tang Code* (唐律) which was considered as the model of legal codes in empire China, activities that gravely injured familial ethics, such as being unfilial, unjust and inharmonious in the familial relations, causing familial conflicts with the elders, etc., were listed as the ten most serious crimes (十恶). "From the Song dynasty to Qing dynasty, many famous and influential clans composed their family rules and clan regulations to restrain their descendants. Because the requirements of these rules and regulations were consistent with national statutes, the government acknowledged their legitimacy, and this undoubtedly provided a further legal guarantee of the normative Confucian relationships and moral duties." (Zhang Jin-fan, 2013: 144)

2.3 Ethical indoctrination, temperance and holistic perspective in discussions

Under the influences of Confucian values, the traditional Chinese political and legal discussions also have the characteristics of ethical indoctrination, temperance and holistic. Confucianists believe that "ethics first and legal code second," (德主刑辅) and the laws must be based on ethical conventions. Chinese traditional laws were always combined closely with the ethics. This feature makes them far different from the formalist laws in the modern West as Weber had described (Huang Phillip C. C., 2015). Ethic indoctrination means that, on the basis of the existing inequality of participation, the main contents of political and legal discussions were all considered to be the ethical educations. They were implemented through educational helping and touching rather than the interest

balance, in order to reach consensus and to prevent disputes. Temperance principle and holistic perspective require that the participants of discussions could be able to treat problems with temperance rather than to pursue extremes or maximum of individual interests, and also see things from the perspective of whole community. In Confucian classics, Xuncius (荀子) had fully expressed this point, he thought that the enlightenment of Li can promote rational allocations of resources and make people temperance to satisfy their desires and needs (Nylan, 2001; Zhang Chao-yang, 2013: 50).

In middle and later periods of the Western Han dynasty, there emerged a dispute resolution mechanism named “Comity” (礼让, Li Rang) which was the typical example of the legal discussion of indoctrination type and temperance type in ancient China. The so-called “Comity” dispute resolution mechanism refers to that when the lawsuit happens, the judge would firstly make self-accusations, in order to educate and influence the litigants with comity, and to prompt their own introspections and mutual accommodations. And then through a series of measures, the ethical force of personal introspection would be expanded to the whole administrative area, which can let everybody be self-effacing to others and realize the regional harmony. “Biography of Han Yanshou”, a famous chapter of *Han Shu* (《汉书》), records two cases. Han Yanshou, the prefecture chief of Feng Yi County, once heard a case of two brothers fighting for goods. He thought it is an ethics-breaking case, and the primary reason is that he did not provide “his people” with good ethic educations. Then Han punished himself firstly, shut himself up and pondered over his mistakes. The two brothers, suddenly realized their mistakes, not only gave up the disputes, but also put themselves tied to ask for punishments from Han Yanshou. Another time, a government official lower than Han Yanshou had lied to him. Han did not punish him, but made deep self-accusation instead. Han thought it was his failure on education that he even failed to educate his surrounding staff well. The official was full of shame and finally committed suicide (Guo Jian, 2006: 208). Both cases may well explain the ethical indoctrination characteristics of legal discussions in ancient China. Perhaps, in a

modern Western normative discourse, that could not be defined as "true deliberation". However, it well indicated how Chinese traditional discussions can reach the consensus through ethical force on political / legal issues.

Moreover, the mechanism of comity can be promoted also because of the force of public opinions of the clans. An influential related research concludes that, "By the interventions of the clan members, the right and wrong can be identified, and the boundaries of their interests can be obtained. Finally, the harmonious relationship between individuals and their clans can be achieved through the Comity." (Zhang Chao-yang, 2013: 49) This shows that the demands of temperance and holistic are also involved. The influence of Comity type justice was lasting for thousands of years until the late Qing dynasty.

In modern China, these characteristics are still active in people's daily practices of legal / political discourses, which can be illustrated by two outstanding sociological researches in 1990s. From 1997 to 1998, Professor Zhang De-sheng and other scholars had conducted a questionnaire survey to test the role of Confucian concept of "Zhongyong" in the Chinese spoken world.⁷⁷ The final survey data shows, "contemporary Chinese people generally agree with the value orientation of Zhongyong", especially the value orientations of temperance and holistic. Almost the same time, Professors Isabelle Thireau and Hua Linshan had done some case studies on dispute resolutions in the countryside of Guangdong province, which can also better prove this point.⁷⁸ One of the typical cases in Thireau and Hua's studies occurred in 1996. A village was making the distributions of fish ponds by bidding contracting to the villagers. According to the past practical conventions of this village, family who did not win the bidding in the first round had the priority to outbid in the next round, so that each family could have at least one fish ponds. This village was a special case in the whole

⁷⁷ They selected 5 districts in Hong Kong, Taipei, Guangzhou, Tianjin, and Singapore to make these surveys. There were 14 questions in the questionnaire to test the degree of Zhongyong values of people. See: Zhang De-sheng et al., 2001: 43-44.

⁷⁸ Isabelle Thireau and Hua Linshan had collected 150 cases on civil disputes, but they didn't publish their studies. See: Zhang De-sheng et al., 2001: 44-45.

region, because other villages do not have enough fish ponds to go with this customary convention. Therefore, according to the situation of the whole area, the local government disproves this convention. Because of this, the local villagers chose a kind of informal habitual rule in practice, "the families who already have win the bidding would no longer outbid and gave chance to the family who did not have had. This is initiated by one family, and other families also followed suit, including some professional families who were capable for contracting multiple fishponds." (Zhang De-sheng et al., 2001: 44-45) Professor Zhang De-sheng cited this in his research and thinks this case can show that, the local villagers were unable to change the policy of the government, but in order to maintain the standards of their own 'rationality', they preferred to comply with self-temperance and sacrifice their interests. This kind of approach of sacrificing individual interests in order to maintain the harmonious could be seen as the typical Chinese communicative actions under the guidance of Confucian rationality.

2.4 Stressing on Harmony and Making Light of the Conflicts, Despising the Institutionalized Procedures and Using More Informal Mediations

In traditional Chinese Confucian thoughts and practices, being far away from the disputes and advocating harmony is a very good state. "Through the thousands of years of Chinese history, Chinese society has held harmony as the highest ideal in dispute resolution. When adjudicating disputes, ancient officials focused on avoiding lawsuits and settling arguments through mediation." (Feng, 2009: 3) Phillip C. C. Huang (2015) also argues that the large scale application of mediations indicates the Chinese feature of legal culture that stressing ethical substances and despising the procedures. It is unique from the Western legal culture of formalism which Weber has argued. It is the most highlighted feature of Chinese legal culture, and still plays a role today. Therefore, "Non Litigation"(无讼), "Weary of Litigation"(厌讼) and "dropping the lawsuit"(息讼) became the

most important principles and characteristics of Chinese traditional legal culture. When those in power inspected the accomplishments of a local magistrate, he would also see if there were less disputes, litigations and crimes in his area.

Confucius had once been a judge (called as "Si Kou" 司寇 at that time) of Lu state for a period of time, but he did not evaluate this job highly. He said, "For hearing the lawsuits, everyone can do that, but the more important point is how to eliminate the lawsuits."⁷⁹ The legal culture of Confucianism serves as the antithesis of institutionalized litigations at this light. The Confucian political and legal characteristics made formal institutionalized proceedings squeezed out. Until the Modern times of China, "Weary of Litigation" and "Dropping the lawsuits" are still the main views on institutionalized litigation in the folk society. And some of the non-institutionalized civil political deliberations and legal mediations on the basis of the Confucian values had become the main forms. (Huang Phillip C. C., 2015)

In Yuan dynasty (1271 - 1368), the government set up the "Agricultural Communities" (村社) across the country, and the chief or president of agricultural community should preside the mediations on civil disputes. In the early of Ming dynasty, the "Shen Ming Ting" (the pavilion for claim, 申明亭) were set up around the country and presided by the highly respected rural elders. Shen Ming Ting can mediate disputes, even to punish the tort-feasors. Ming dynasty limited that all the disputes without mediations in Shen Ming Ting should not be prosecuted as lawsuits. Ming dynasty had also promoted the mechanism of "Conventions" (mediators) which made mediations of civil disputes as their important responsibilities. In Ming and Qing dynasties, if the civil disputes were sued directly to the government without the clan's internal mediations, the government would generally refuse them. Even after the prosecution, the disputes about marriage, inheritance and so on, which were considered by Confucianism as

⁷⁹ "听讼，吾犹人也，必也使无讼乎？"(《论语·颜渊》)

the pure ethical issues of clan or family, would be sent back to the clan's internal "public deliberations" (公议) (Guo Jian, 2006: 211).

Phillip C. C. Huang's (2003: 270-271) legal-historical studies also provide a very good example on this point. He had collected 628 civil judicial cases in late Qing dynasty (1760 - 1911). Only 221 of them were judged by the formal courts, the most of the rest were solved by the interactions between the formal judicial system and the civil informal mediations. Huang argues that this approach is different not only from the formal institutionalized way, but also from the pure civil mediation. It is through a third space of half-institutionalized judiciary where both the state power and local people can make deliberations. At that time, most of the judicial cases were solved in this informal legal public sphere.

Until modern times, this kind of habits of solving civic disputes not through the way of institutionalized litigations but through mediations by the highly respected local gentries still existed in Chinese folk society inveterately. In Wang Di's researches, as mentioned above, there are some similar descriptions: "there was an unwritten rule in Chengdu City, the conflicts between citizens were not solved in the governments, but generally in the teahouses. The parties invited a highly respected man as a referee. The right and wrong could be known through the discussions." Because it took place in the teahouse, this way of mediation was also known as "Eating and talking the tea" (吃讲茶). "In fact, most of the conflicts and disputes were eliminated in this process." (Wang Di, 2010)

The characteristic that Chinese traditional legal cultural dislike institutionalized procedures strongly contrasts with Habermas's normative construction of Proceduralist Paradigm of Law.

2.5 The Private Values influenced Public Discussions

As mentioned before, the Confucian normative system of Li was generated from the daily norms of family life. Due to the empiricist behavior and action way of Chinese people, in traditional China, the social and political public ethical norms were the continuations and extensions of family ethical norms (Yang C. K., 1959). As David L. Hall and Roger T. Ames (1999: 96) have stated, these features were formed in an autonomous community without mandat, and then they were being extended to a more complex field of life. **Confucianist believes that the family was a microcosm of the state and the state was a magnification of the family.** Because of this, for the political and legal discourses in Confucian public sphere, the values of the private spaces (family and clan) had tremendous influence. But contrastively, in Habermas's Discourse Theory, public sphere is a third space different from the state bureaucracy and private spaces of individual, family and so on, and the values applicable in public sphere are different from the values in private spaces. However, due to the Confucian culture of "the same structure of family and country", Chinese people often confused public sphere with private spaces. Accordingly, since the Han dynasty, the mainstream of China's judicial ideology had always emphasized on the combination of "Heavenly Principles" (天理), "human feelings" (人情) and "state laws" (国法). That is to say, these values belonging to different areas have to be applied simultaneously in one political or legal discussion.

Confucianism particularly emphasizes on "the same structure of filial piety and loyalty" (忠孝同构), thinking that the loyalty to the country is derived from the filial piety to the parents. As Weber (1999: 207) had argued, in China, the filial piety is the original ethic. Before the imperial examination system was established, for whether a man can be an official or not, the most important standard was his performances in filial piety. This way of choosing officers are referred to as "recommending the filial persons" (举孝廉). The main principles of Li include

“three cardinal guides and the five constant virtues” (三纲五常),⁸⁰ and the three cardinal guides (ruler guides subject, father guides son and husband guides wife.) are very important value standards. Confucianism thinks that if these three are harmonious with each other, the world would be harmonious; if the three are conflicted to each other, then the world would be chaotic.⁸¹

In traditional Chinese society, for example, there was a very important principle of law – “tolerating and concealing between kinfolds” (亲亲得相隐匿), which means that if a person commits a crime, his relatives with a close kinship have to protect him. It is expressed in the *Analects of Confucius* as: “The Governor of SHE in conversation with Confucius said, ‘In our village there is someone called ‘True Person.’ When his father took a sheep on the sly, he reported him to the authorities.’ Confucius replied, ‘Those who are true in my village conduct themselves differently. A father covers for his son, a son covers for his father. And being true lies in this.’”⁸² Obviously, this principle is quite far from the universalism of modern formal law, but it is rooted deeply in Chinese political and legal culture. Even in today China's legislation, this principle has also caused a very big discussion between Chinese jurists and other intellectuals.

Today, the Chinese people are still pursuing the value orientation of “human feelings, Li and Yi” in social communicative activities, and this will lead their unique performances in the public discourse. Like another Chinese saying goes, “If someone can't sweep a house by himself, then he can't conquer the world” (一屋不扫何以扫天下), Chinese people tend to think that only the people with good personal ethics are likely to have good public morality and public performances. Chinese people are accustomed to require the discourse actors in public sphere by using the ethic norms of private spaces. If one's personal moral performances are

⁸⁰ The three cardinal guides (ruler guides subject, father guides son and husband guides wife) and the five constant virtues (benevolence, righteousness, propriety, wisdom and fidelity) as specified in Li.

⁸¹ “三者顺，天下治；三者逆，天下乱。”(《韩非子·忠孝第五十一》)

⁸² Trans. Ames and Rosemont Jr 1988a: 166-167

bad (for example, he had an affair), then his performance in the public discourse communications would not be very credible for the public. At the same time, in the political and legal discourses today, there still exists many phenomenon that "emotion is greater than reason, while reason is greater than the law" (情大于理, 理大于法).⁸³

Conclusion

To some extent, the concept of Public Sphere of Habermas is based on the concept of Communicative Rationality, although he had brought up the former much earlier time-wise. Accordingly, basing on the normative construction of the concept of Confucian Rationality, in this chapter, I attempted to briefly describe the characteristics of public sphere, political and legal discussions in traditional China. Focusing on ethical and cultural dimensions, I found that they are quite different from the normative suggestions of Habermas. Power factors, power imbalance, and power relations which Foucault had revealed are very obvious in these discourses and political communications. But, as I argued, due to the balance of ethical values of Confucian Rationality, political and legal discussions in traditional China can somehow reach a harmonious and rational consensus in an ideal situation. Maybe we could define this Confucian normative model of discourse as the "Teacher – Student Model". I still argue that the describing of this chapter is not a scientific historical demonstration. It prefers to be in the interpretive normative conditions. In the following chapter, I would like to explain the practical situations of these three normative dimensions (Habermas, Foucault and Confucian Rationality) in China today by using some empirical materials.

⁸³ For the relations between Emotion, Reason, and Law, see more in Fan Zhong-xin, 2011.

Chapter 4. "Public Sphere" and Political/Legal Discussions in Traditional Chinese Society Influenced by Confucian Rationality



Chapter 4. “Public Sphere” and Political/Legal Discussions in Traditional Chinese Society Influenced by Confucian Rationality

**Chapter 5. Rationality and Power in the New
Media Public Sphere of China**

Introduction

In the first three chapters, we have discussed Habermas's Discourse Theory of Law and Democracy and its empirical dimensions in terms of social science, the challenges Foucault's Power Relation Theory raised to Habermas's theory of Communicative Rationality, and the Confucian Rationality concept derived from the traditional Chinese society. These three constitute the core content of the theoretical carding, comparison and building of this thesis, and serve as the three normative dimensions of the next empirical studies. In chapter four, we have briefly described the public sphere and political / legal discussions under the influence of the Confucian rationality in traditional China, which was mainly to explain the normative conception of Confucian Rationality through an empirical way. For this chapter we would like to discuss some new situations in China today.

As stated earlier, Habermas's democratic theory of public sphere initially has a strong normative orientation. Although he has cited many historical facts in constructing this theory, it still received a lot of criticisms from perspective of social-history (e.g., Gestrich, 2006; Withington, 2007). Foucault had challenged Habermas's discourse theory from the perspective of so-called "realism", but Foucault's theoretical building went to another extreme: the absolute post-structuralism. Foucault broke the ideal type-building of rationality, and pointed out that the power relations and power imbalance are pervasive in practice, but no new theoretical solutions. The Confucian Rationality which we have discussed in the third chapter is still a kind of normative conception, and the Confucian model of discourse is still a normative model. As a kind of value rationality, Confucian rationality is built in order to balance the tension between communicative rationality and the power relations, but it is still not a kind of empirical construction in terms of social science. In the empirical studies, we would like to treat the three theoretic constructions - Habermas's Communicative Rationality, Foucault's Theory of Power Relations and the Confucian Rationality - all as

normative models, and investigate the practical performances of them. Perhaps the normative orientations are not very consistent to the reality, but it is still meaningful to present the two parts simultaneously.

Two models of public sphere and deliberation with Chinese characteristics in traditional China would also be discussed in this chapter. In Chapter four, many studies of public sphere in modern China have been discussed. Professor Philip C. C. Huang's model, which argues that the political public sphere of modern China was a third realm that both the governmental power and local people can participant in, is regarded as a general model of public sphere in modern China. In this Chapter, this model would be discussed again as a comparison or theoretical hypothesis for the new media public sphere of China today. At the same time, a deliberation model with Chinese characteristics, the "Teacher – Student Model of Discourse", was also mentioned in Chapter three and Chapter four. This model is used to explain the Chinese political/legal deliberations which were accompanied not only by the hierarchy and power imbalance but also by the rational discourses. These two models would be rethought in this chapter to investigate the hypothesis whether there are still some traditional factors in discourses of new media public sphere today.

Generally speaking, comparing with the traditional China, Chinese society today is much closer to a "Modern Society". The traditional factors and force exist in the society as well, but they become much weaker. What we could see more in today's Chinese society are the games between Rationality and Power Relations. In this chapter, I will analyze the political and legal discourses in China's Internet public sphere by focusing on the following issues: (1) the rising of new media public sphere in China, (2) the power relations and power interactions in the new media public sphere, (3) the rationality factors, power actors, and traditional factors in the online deliberative discourses. Firstly I will attempt to discuss the role of the new media public sphere in the political and legal domain of China, which is different from the normative model of Habermas and even different from

the practices in Western world. And then, apart from the macro descriptions and text reviews, the latter part will illustrate this problem by analyzing a highly publicized judicial case in recent years.

1. The Rise of Web 2.0 and a New Public Sphere in China

In Western academia, the development of Internet new media has been generally believed to bring a revival of Habermasian public sphere (Hilmer, 2010). However, the high expectation that comes along is the idea that "Electronic Democracy" did not achieve the ideal situation in the practices of the West. Some empirical researches had indicated that in the web 2.0 era, public discussions in cyberspace do not conform to the ideal of Habermas – the sincere dialogues, rational arguments and the consensus of mutual understanding were not achieved. On the contrary, some emotional expressions fill up the various kinds of online social networks (Shulman, 2006). The participation of Chinese citizens in new media age was also highly expected because it was suggested to make up for the shortage of institutionalized channels of citizen participation (Tai, 2006). Even the emergence of the communication through mobile phone SMS was considered, according to Kevin Latham (2007b: 295-314), to be a new expected possibility of Habermasian public sphere in an unlike background. In China, the democratic participation in new media age will encounter a very different situation from the Western practices - the strict regulations from state power (Zhao Yuezhi, 2008). So this section will also start analysis on the interactions between power system and Chinese new media public sphere.

After 1949, the development of China's political public sphere has been very slow. In the first three decades, due to the lack of guarantee of basic civil rights, the public participation and public discussions in various political movements cannot

be regarded as the activities of political public sphere. At that time, the anonymous "people" under the power manipulation was actually a tool in the political power struggles. In this period, the space of social organizations was reduced radically, while the scale of state organs expanded exponentially (Huang, Phillip C. C, 2003: 277). In Habermas's words, this process may be seen as the "Refeudalization" of the bourgeois public sphere.

In the 20 years between the *Reform and Open policy* and the age of Internet, the Chinese government has been implementing some effective controls on the media, mainly including the access limitations and censorship mechanisms. In this case, the public discussions at that time cannot be completely defined as activities of political public sphere. There were still undeniable distance between the traditional media and the real public opinions. This situation has changed to some extent since the advent of Web 2.0.⁸⁴ With the emergence of internet blogs and other online communities such as Weibo, the ways information spreads have profoundly changed – no longer is information dispensed from a single source point. But under these conditions, public opinion may be created through a bottom-up way. The "true public opinion" possibly emerges when everyone becomes the origin of information (O'Reilly: 2007).

In China, the past 20 years witnessed a great explosion of internet media. China has the largest number of Internet users in the world. According to a report of the China Internet Network Information Center (CNNIC), by the end of June 2013, the number of Internet users in China has reached 591 million, with around 464 million people who also have access to the web via mobiles (CNNIC 2013). Out of China's various social media platforms, Weibo has been at the forefront of this expansion of users and, unsurprisingly, it also exerts the greatest influence. Since 2010, the number of Weibo users in China has increased from only 63.11 million to 195 million by June 2011, and by June 2013, the number has sky-rocketed to

⁸⁴ Not only China, the whole world is changed by the information technological revolution of web 2.0. See Tim O'Reilly, "What is Web 2.0? Design Patterns and Business Models for the Next Generation of software," In *COMMUNICATIONS & STRATEGIES*, No. 65, 1st Quarter 2007, pp. 17-37.

330 million (People's Daily Overseas Edition December 1, 2011). According to CNNIC statistics, the active users account for 56.0% in 2013. In China today, these figures change rapidly, and correlate largely with important events that occur in the country. For instance, the number of Weibo users jumped four-fold during 2011. Sina's official statistics (CNNIC, 2012) showed that the fastest growth of the number of users dates back to the “Wenzhou EMU Incident” of July 2011 (i.e., a serious railway accident costing 40 lives and 192 injuries): the user-base grew by almost 20 percent in about half a month (The Telegraph, 2014). Similarly, according to AN Ti's study (2012), there emerged about 1 billion critical tweets in Sina Weibo in 5 days after the “Wenzhou EMU Incident”. Information above shows that Weibo and other new media, today, serve the main forums for the discussion and exchanges of information on popular and controversial social and political issues in China.

One should also note that China's Weibo is considerably different from a Western social media platform such as Twitter. Firstly, the brevity of the Chinese language allows individuals to use only a third of the space required for Western languages to express the same meaning (An, 2012). Secondly, Weibo allows users to publish more than 140 characters. In other words, Weibo can function both as a conventional blog and as a microblog like twitter. Thirdly, twitter can only display 5 comments and “50+” (which means “more than 50” but not precise) forwarded messages whereas such limits do not exist on Weibo. Additionally, since April 2013, Weibo further implemented a feature that displays the number of visitors (views) to a publisher's individual tweets. Popular tweets are viewed hundreds of millions times and have hundreds of thousands of forwarded messages and comments, which could confirm the cohesion and conformation of online discourses. Finally and also the most importantly, the Chinese government prohibits browsing almost all the foreign mainstream social media websites through the Great Firewall technology such as *Twitter*, *Facebook*, *Youtube*, etc. China's Weibo remains as one of the few platforms for Chinese netizens. These important characteristics grant it a crucial and irreplaceable role in China's

political public sphere today. For instance, China's top 20 opinion leaders all registered and serve as active figures on Weibo rather than individual blogs, and each of them has at least a few million followers (Zhao Ding-xin, 2012).

The aforementioned information illustrates a fact that in today's China, the network platform based on web 2.0 technology has become the important carrier of political public sphere. Due to the technical characteristics different from the traditional media's, these new media is more direct, more authentic and faster in collecting, expressing and spreading the public opinions. The new political public sphere, which has these platforms as the main carriers, covers a quite high proportion of the Chinese people.

At least during the 4 years from 2010 to 2013, along with the occurrences and developments of various public events, the vitality of Weibo public sphere was continuously strengthening, which made Weibo an important force in the Chinese political life. This phenomenon has gained utmost attention, and many related academic researches came out.⁸⁵ For example, professor Zhao Ding-xin (2012) holds that Weibo played a very important role in China's political democratization today, but the public discourse that takes place on Weibo is more or less unquestioning and irrational, which leads to the problem of unrest populism. Yang K. C. (2013) also thinks that Weibo is the most important political public sphere in China today, and is regarded as one of the most threatening arenas by the government. Similarly, Ya-wen Lei (2011) argues that the development of China's internet, especially the SNS sites, has accelerated the democratization of China. Some well-known Chinese scholars and media persons had also expressed their views of Weibo's influence on Chinese society, such as An Ti (2012), Li Kai-fu (2012), Yang Lan (2011) and Du Zi-jian (2011), believing that it is one of the most important forces that may transform the Chinese society. The mainstream media

⁸⁵ In China, there are very few journal articles focusing on the online public discussion because the government doesn't support them and even prohibit such researches, while foreign researches are rarely deep because of language and information problems. That is why many references of this chapter are from some speeches, newspaper articles, etc.

in the Western world has also noticed it and frequently bring up the influences of Weibo space in China.⁸⁶

Apart from what has already been mentioned, it should be emphasized that two specific features of Weibo have effected on Chinese politics. Firstly, there has not been any discernable and effective political public sphere historically since the founding of the People's Republic of China. But Weibo, because of its particularity of expression form, could play the role adaptively. Under the condition where almost all traditional media are firmly under control by a centralized state power, Weibo, at that time, enables the Chinese grassroots to find a channel of "free" expression. And such contribution to Chinese political discourse in those past few years has been pivotal. So theoretically, the new media in China today should play a more democratic role than in the West. Secondly, the CCP itself, recognizing the indispensable position that Weibo held in Chinese politics, had tried to relocate its position for their own interest. By the end of June 2013, various Chinese governmental sections have established around 79000 official accounts on Sina Weibo (Sina Governmental Weibo Report for the First Half Year of 2013). The governmental sections employ specialized staff for aggregating volumes of data and information that occur on Weibo every day.⁸⁷ At the same time, the amount of state authorities that communicate with the public on Weibo has been increasing. For example, information and progress on natural disasters, "the trails of Bo Xilai", and other nationally attention-worthy news have all been broadcasted live on Weibo.

Since late 2013, the Chinese government has gradually been adopted to the

⁸⁶ *Le Monde*, a Franch paper, has reported the influences of Weibo on Chinese politics and society with a title of "Weibo versus Shibada, la dynamique chinoise" (Weibo versus 18th Conference of CCP, the Chinese dynamic, *Le monde*, September 12th, 2012). There is a blog channel at *lemonde.fr* to report the news on Weibo every day (<http://weibo.blog.lemonde.fr>). Some media, such as the *Washington Post*, often report news of Weibo space, see: http://articles.washingtonpost.com/2013-01-03/world/36211710_1_sina-weibo-chinese-internet-users-internet-crackdown.

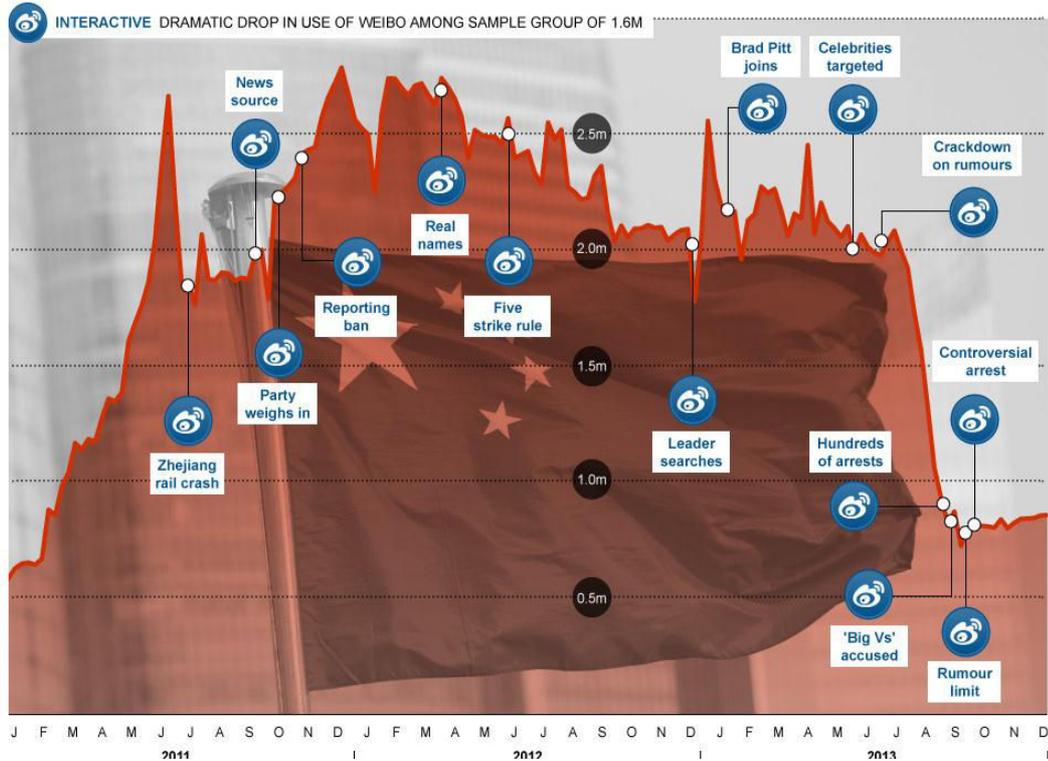
⁸⁷ These people are the so-called "fifty cent party" or "water army" in China. Their official name is "internet security officer" or "internet police". See: Rongbin. Han. 2013. "Adaptive Persuasion in Cyberspace: The 'Fifty Cents Army' in China." Conference paper for Annual Meeting of America Political Science Association. Chicago, IL, August 29th, September 1st, 2013.

phenomenon of broad citizen participation in new media public sphere, and continually enhanced full control on Weibo space through different approaches. Also because of some internal reasons of the Weibo public sphere, its role in the political life in China has tended to be gradually weakened after the late 2013. There emerged a phenomenon which is similar to the structural transformation of bourgeois public sphere Habermas had once described, namely the *Refeudalization of Public Sphere*. According to the research of a team of the Telegraph, since the August 2013, China power system has posted some effective policies, such as the “Crackdown on Rumours” and “Accusing the big Vs”, which has successfully led a dramatic drop in activity on the online phenomenon of Sina Weibo. As their clear graph (as below) shows, we could even find not only the very specific tendency of the activity of Sina Weibo from 2011 to 2013 but also the relation between this tendency and the public events or governmental policies.⁸⁸

⁸⁸ Malcolm Moore, Joel Gunter and Mark Oliver, (2014) “China kills off discussion on Weibo after internet crackdown,” *The Telegraph*: <http://www.telegraph.co.uk/news/worldnews/asia/china/10608245/China-kills-off-discussion-on-Weibo-after-internet-crackdown.html?fb>. Access time: 27/10/2014.

China kills off discussion on Weibo after internet crackdown

Exclusive: An aggressive crackdown on Sina Weibo has seen numbers of postings on the Twitter-like microblogging site plummet according to research commissioned by the Telegraph



(Picture from the Telegraph)

However, it is still very difficult to judge whether this decline phenomenon is a temporary one or lasting one so far. Wherever it goes, although the Weibo space as new political public sphere declined, other similar new media platform of public sphere, such as the “Friends Circle” of Wechat (A smart phone application which has 438 million active users by August 14, 2014⁸⁹), would rise and maybe replace it. The materials of this chapter was collected by the end of 2013, the case we want to analyze took place in the period when Weibo public sphere is the most active, therefore we still hope to present the positive interaction between Weibo public sphere and power system.

⁸⁹ “The number of users of Wechat has boosted very much” See: http://finance.ifeng.com/a/20140815/12929169_0.shtml

2. The Power Interventions on New Media Public Sphere

In the recent decade, the leaderships of CCP have become more and more rigorous with the Internet public sphere and have strengthened the monitoring and controlling gradually. Symptomatic event of this was that on February 27 2014, the *Central Leading Group for Network Security and Information* was formally established. Chinese President Xi Jin-ping personally serves as the team leader, and other two top leaders of CCP, Li Ke-qiang and Liu Yun-shan, serve as the deputy leaders.

The interventions of state power on the new media public sphere can be generally divided into four approaches: legal means, technical means, administrative means and the media company's own censorship required by the state power. Among all four of them, the company's own censorship is combined more closely to the technical intervention of state power; the administrative measures are more flexible than the others; Legal means is a kind of “abstract methods” which mainly provides rules and regulations for other interventional means. But in some specific cases, some power technologies can conduct specific interventions in a way that are disguised as a legal means (legal discourse) in terms of Foucault's theory. Power relations and power factors are hoped to be presented by the following descriptions, and most of these materials are from the participant observation studies and interviews.

2.1 Legal Means

The term “legal” here should be understood loosely since it refers to all the abstract regulations effective across the country, involving not only the legislations of the National People's Congress and its standing committee but also the administrative regulations and department regulations promulgated by central government and its compositional departments. Although in accordance with the

Constitution, Chinese citizens do have the right of "freedom of speech" (Article 35), actually there is no law with higher status, which refers to the laws promulgated by the National People's Congress and its standing committee, to set and regulate this citizen right. According to our incomplete statistics, nowadays, the effective regulations which regulate and adjust the public speeches in Internet are mostly administrative regulations issued by the central government or the departmental regulations issued by the ministries. That is to say, they can also be identified as the administrative means, and they are only a kind of special abstract administrative actions - the administrative legislations. In addition to these administrative legislations, some regulations issued by the organizations of the Chinese Communist Party (such as the central propaganda department and the general office of the central committee of the CCP) also have a certain legal effectiveness in practice. Moreover, the related judicial interpretations of the Supreme Court and the Supreme Procuratorate can be also seen as the legal means of state power to control and regulate the new media public sphere.

According to my statistics, from 1994 to 2013, 46 administrative legislations and other regulatory documents were issued to regulate Internet public expressions, such as *Interim Regulations of the People's Republic of China International Networking of Computer Information Management* (the central government, 1996), *the Management Measures of the International Networking Inward and Outward Channels of the Computer Information Network* (Ministry of posts and telecommunications, 1996), *the Management Measures of the International Networking Safety and Protection of the Computer Information Network* (the Ministry of public security, 1997), *the Supreme People's Court's Legal Explanation of the Concrete Application of the Cases about Disturbing the Management Order of Telecommunications Market* (the judicial committee of the Supreme People's Court, 2000), *the Management Measures of Internet Information Services* (the central government, 2000), and so on. In addition, after the rise of Weibo as online public sphere, some government sectors of the Beijing city - the News Office, the Administration of Public Security, the

Communications Authority and the Network Information Office - jointly issued the *Management Regulations on Beijing Microblogging Development* in December 2011. Since all of the most important microblogging companies in China are registered in Beijing, this regulation also has a national effect to a certain degree, and it was the first regulation specifically on the Weibo space. All the aforementioned regulations, without any exception, emphasizes the absolute authority of the government departments in the supervision and management of the Internet public sphere, and have rarely mentioned the citizen rights of participation in the online discussions and how to get relief when encountering the torts of the power system. They were formulated by the departments of state power, and they simultaneously provide the basis for the state power to control and regulate the Internet public sphere.

In September 2013, the Supreme Court and the Supreme Procuratorate had jointly promulgated a very influential judicial interpretation which stipulates that: “when one defamation information is actually clicked and browsed by more than five thousand times, or it is forwarded by more than five hundred times, it should be deemed as the ‘serious’ defamation”, which means that it fits the threshold of the *Libel Crime* of China. In fact, it is very easy for many hot posts on Weibo to be forwarded by thousands of times, and the power of judging the authenticity of information is in the hands of the state power system, so this judicial explanation was widely viewed as an important measure of power system to depress the Weibo public opinions. This explanation is strictly executed in practice, and it leads an effective depressing effect combining with other measures. According to Telegraph (2013) research above, the sharply decline of the Weibo public sphere at the end of 2013 was linked closely to the role of these legal measures.

2.2 Technical Means and the Self-censorship of the Microblogging

Companies

The technical approaches, which the Chinese government used to monitor the Internet public sphere, are mainly embodied in the applications of the Great Firewall (GFW) which was founded in 1998. The GFW refers to a grand software and hardware system monitoring and filtering the web content. It is constituted by the computer servers, routers and other equipment, as well as the related software applications (Li Yong-gang, 2009). It can monitor online communications, and interfere or block the transmission contents which do not conform to the requirements of the Chinese authorities. China's Internet censorship is even unventilated. The domestic websites which contain "inappropriate" contents would be affected over the governmental imposition on its content. The domestic websites would have to do self-censorship, self-regulation, and even to be shut down due to the "inappropriate content". Therefore, the main function of GFW is to analyze and filter the information communications across the frontiers. Within the GFW technical framework, Chinese government sections and the SNS websites usually employ some monitoring software. According to the reports of an independent Chinese media (PaoPao.com, 2014), these softwares have functions such as "key words setting", "tracing the origins of information" and "remanding of sensitive events", etc.⁹⁰ Some outstanding researches had pointed that the Chinese GFW can be regarded as a kind of comprehensive monitoring system of *Panopticon* which Foucault had developed from Bentham (Crandall & Zinn & Byrd & Barr & East, 2007).

Meanwhile, as required by the government, almost all of the Chinese SNS sites conduct very strict self-censorships. The government will inspect these SNS space aperiodically and warn or punish those websites who were not positive at self-checking. The scale of technological controls on the discourses of online public

⁹⁰ "Explanation of Chinese public opinion monitoring software", see: <https://a248.e.akamai.net/f/1/1/1/dci.download.akamai.com/35985/159415/1/p/?u=node/154>

sphere depends on the strength of each website self-censorship, and also depends on the political and policy environment changing during different periods. For example, the "renren.com", a SNS site which is one of the most popular ones in China, is generally seen as being somehow loosely regulated than other sites. Another famous SNS platform, douban.com, had always been considered looser in the past. But after an official criticism by "there is a lot of pornographic information in it", Douban.com turned unusually harsh over the political sensitive discourse. It would even check every speech before publishing it, and only approved information can become publicly visible. Another example, when the "two great meetings" (the National People's Congress and the Chinese People's Political Consultative Conference) are held every spring, or during the important conferences of the Communist Party of China, and before or during some important national events (such as the Beijing Olympic Games, the Xinjiang "7.5" incident, the anniversary of the founding of the Party and the National Day, etc.), these sites would automatically strengthen the technical regulations and controls.

The microblogging websites' self-censorship can be probably divided into the following several ways: first, when some sensitive and unexpected social events happen, they will often directly delete the tweets regarding these events and manage the user's IP addresses which are from related area, such as limiting the users from that area to post pictures, and so on. Second, when some important events (such as the conventions of the CCP) have to last for several days, they would do some technical processing on the microblogging websites, such as delaying the issuing time of the tweets and expanding the sensitive words thesaurus, etc. They would also use the "false forwarding" technology which would make the users mistakenly think that their tweets have already been forwarded, but actually only a small number of followers can see them. Third, for some influential and sensitive Weibo users, there would be some dedicated staff focusing on them and deleting their sensitive tweets timely, or even banning their accounts temporarily or permanently when necessary. For the ordinary users, the microblogging sites would remove and control their tweets through sensitive

words searching function. Fourth, the websites may occasionally block some certain functions of some or all of the users. For example, it is forbidden to make reviews on some government Weibo accounts, and some of the sensitive users' tweets are prohibited to be forwarded. At the end of April 2012, Sina Weibo was punished for "bad regulations". Sina Company had ceased the function of "message leaving" for three days. The Microblogging sites themselves, of course, are also constantly developing new technologies for monitoring.



(Censorship controllings when posting a sensitive tweet on Sina Weibo)

2.3 Administrative Means and Other Means

Compared to the legal means and the technical means, administrative means are more flexible, diverse and widespread. It refers to all the intervention activities with which the departments of state power monitor and control the Internet space directly and particularly.

A typical administrative mean is that the governmental departments directly participate in the discussions as the actors of public sphere. This way means that the state power, in fact, has realized the importance of Internet political public sphere, and hopes to release information, and to collect or to guide the public

opinions through the way like other participants'. The participation of these power subjects in the public discussions had unchoked the communicative channels with the public opinions, and simultaneously it also plays the role of the supervision and control of public opinions. In the political propaganda discourse, the government prefers to highlight the former function and dilute the latter one.⁹¹ One of the former top leaders of the CCP and the director of "Spiritual Civilization" office, Li Changchun has once openly encouraged the government institutions to have Weibo accounts. He asked them to "be good pioneers marching from traditional mainstream media into the new media" and to "improve the ability of leading the public opinions" (Li, Chang-chun, 2012).

In practice, the state organs often make specific requirements on Internet companies on some specific issues, such as banning some Weibo users' accounts permanently or temporarily, filtering some sensitive words involved in particular topics according to their specific requirements, talk to the users and ask them to discipline their activities in cyberspace, and so on. The most extreme cases of administrative supervision existed in Chongqing during the Bo Xilai period. Because of making criticisms on some governmental policies and leaders, several online public sphere activists were punished to the most serious administrative penalties – the Rehabilitation through Labor. After the depriving of Bo Xilai's position in Chongqing, these extreme monitoring cases were known to the public through media reports (CCTV, 2012).

Since the second half of 2013, controlling the key public figures (the big Vs) of microblogging public sphere has become the most important administrative monitoring measure, and it has achieved some effective results. Here are two typical examples that occurred in August 2013 – "the detention of Weibo big V Xue Manzi for whoring" and the "Weibo celebrity Qin Huohuo was arrested for disinformation". These Internet celebrities (Xue Manzi has more than 20 million followers) were truly involved in these related crimes or illegal acts, but after their

⁹¹ *Sina Government Affairs Weibo Report of the Third Quarter of 2012*: <http://vdisk.weibo.com/s/gOVlr>

affairs were publicized by the state media, the traditional media controlled by the power system (Such as the CCTV) paid extraordinary attention and effort into the reports (CCTV, 2013). This also reflects the fact that administrative power system does some specific interventions on the new media public sphere in some cases. The foregoing Telegraph (2014) research also proved that these events have a close and positive relation with the rapid decline of Weibo space activity from late 2013.

Apart from the foregoing direct administrative means, power system would also supervise the Internet public sphere by employing indirect means, such as using the power of the industry associations and the party organizations, etc. This approach can be seen as the transformational process from macro power to micro power in a Foucauldian sense. The *Internet Industry Association of China*, for example, is qualified as an independent legal person under the guidance of the Ministry of Industry and Information. This association runs in the legal form of industry autonomy. However simultaneously, its leader positions are held by the related government officials. This indicates that it also supervises and controls the member units (the Internet companies) on behalf of the state power. The communist party organs also exist in the Internet Industry Association. In the so-called Chinese Internet Capital – Beijing where the Internet companies are very concentrated, the CCP branch committee of the Internet Industry Association was officially enlarged into the CCP committee of the Internet Industry Association in the Capital at November 5, 2012.⁹² These facts indicate that the power had strengthened the monitoring and controls over the Internet public sphere through some indirect associations.

Employing the “Water Army” is another important and indirect but sophisticated way. The “Water army” refers to people who post massive and repetitive information and opinions to intentionally guide the public opinions on BBS,

⁹² “The party committee of the Capital Internet Association was set up” See: http://www.baom.com.cn/2012-11/06/content_8791.htm [Accessed 10 September 2012].

Weibo or other internet spaces according to the requirement of the employers. Some Internet public relations companies will reserve a large number of water army in order to guide the public opinions in time of need. The water army hired by the official agencies is called as the Internet Commentators. They usually act as the ordinary Internet users and post the content supporting the government. Government authority did not deny the existence of the Internet commentators and confirmed their positive role of guiding the online public opinions in some public documents (Han, 2013). There is another similar occupation known as the "Internet public opinions analyst". China's state-run official news agency, the Xinhua news agency, has described the career as: "providing the public opinions monitoring reports for decision makers of the party and government organs, Banks, other financial institutions and other large enterprises; providing emergency disposals and consulting solutions on the focusing events of public opinion."⁹³ The Chinese Ministry of Industry and Information plans to train 100000 professionals in the field of Internet public opinion each year in order to fill the inadequacy of 1.2 million qualified Internet public opinions analysts. At the same time, the Ministry of population and social security had officially announced that the government would grant qualification certificate to this new profession at the end of 2013. (Wu, 2014) Of course, the water army and public opinion analysts serve not only for the governmental agencies. There are a large number of Internet public relation companies who can interfere with the public opinions of the new media public sphere in various ways according to the needs of different employers.

2.4 Staged Conclusion

We have described the several aspects of how the power interfere the Internet public sphere. Firstly, from the perspective of Foucauldian discourse analysis, this

⁹³ Wu, Mao, 2014.9.18 "Demystifying the Internet public opinions analyst", Report of PaoPao.com, See: <https://a248.e.akamai.net/f/1/1/1/dci.download.akamai.com/35985/159415/1/p/?u=article/153> [Accessed 01 October 2014].

power intervention was always accomplished by constructing the discourse systems which are disguised as the truth. The most obvious example is the legal discourse. By constantly formulating and promulgating laws and regulations, etc., those in power have created a binary oppositional discourse structure of the “legal” and the “illegal”. As Foucault’s (1988b; 2009) analysis on the births of psychiatry and clinical medicine, people always distinguish between the “normal” and the “abnormal”, the “health” and the “disease”, etc., and in the process of building such a set of knowledge/discourse system, the operation of the power plays the most important role.

Secondly, directly controlling the expressions in the public sphere, blocking and restricting the channels of discourse communication of people, and forbidding or controlling particular speakers, these actions are perfect examples for the idea of power disciplines on discourse. Under these power interventions and controlling, the expressions in the public sphere are insufficient. This phenomenon generates many defects, such as insufficient analyses and arguments, false information taking, lack of coherence of logics, difficulties to form the completely rational discourse, and so on, which are all criticized and opposed by the Habermasian idealized Discourse Theory of Law and Democracy. Those fragmental, emotional and anti-intellectualized discourse expressions are somehow the results of power interventions. Government power and capital power, etc. control and guide the public opinions by hiring and buying off the participants. For example, the existence of the commercialized public relation companies has fully illustrates this point. The Internet public relations companies, water army and Internet public opinion analysts have become the media through which power influences the public sphere.

Thirdly, the power operations in these processes are not completely visible. In some cases, these power interventions and controlling are not generated from some specific decisions, and even without the subjects. In this Internet public sphere, every participant is not only the object but also the subject of power.

Everyone is controlled by the invisible power.

Fourthly, the government power system participates in the discussions of public sphere directly, and that destructs the premise of equality of the Habermasian normative model of rational discourse. In practice, these participants of power often play the role of “punch bag” in Weibo space. However, due to the visible power imbalance and differences between them and the other participants, which indicate their authority and the hierarchy in discussions, the ideal equal deliberation order is thus destroyed. In terms of Habermasian normative model, it would make the communicative rationality difficult to achieve. In fact, these “official Weibo accounts” rarely equally participate in discussions. What they mainly do are “releasing the 'authoritative' information” and “giving the discourse of the real facts”.

3. The Public Discourses under Power Control

3.1 The Explorations of the Space of Rationality and Communicative Power

Under such a tight power monitoring, the individual citizens can still get the opportunity to access to the public discussions on political and legal issues. In fact, in the seemingly circumstance where power regulations are ubiquitous, the rational expressions of citizens can still play a limited role. This situation, to some extent, can echo professor He Baogang’s judgment which treats the Chinese rural political practices of deliberation as a kind of limited deliberative democracy.

First of all, the control of state power is somewhat selective, but not pervasive. Because there were no high ranking laws to set and regulate citizen's right of speech, so for whether something can be discussed, it completely depends on the

different time periods and different operators. In general, the power's tolerance range of speech is that as long as it doesn't seriously threaten the operation of power, which means there wouldn't be "serious incidents or political movements" caused by the speech. But it is still a very vague standard which is wholly dependent on the specific practical operator's understanding of power's intention and their own experiences. For example, the case which would be used in the following studies – the Wu Ying case – can be fully and openly discussed on Weibo public sphere because it is not covered by senior political power operations;⁹⁴ But for the another similar case at near time, the Li Zhuang case is strictly restricted to be discussed in the public sphere at early time since it is involved in the political problems of Chongqing and Bo Xilai. Another example is the event of "Shaanxi Watch Brother Yang Da-cai" in September 2012 which is very much discussed on Sina Weibo. In this public event, the official who was suspected of corruption was not at a high power ranking, and the social influence of this event is not very large, so Sina Weibo did not limit the related discussions, and even gained the public attentions by supporting some certain expert Weibo users in the discussion.⁹⁵

Secondly, the managements are somewhat hysteretic. Among all the aforementioned various monitoring managements, apart from the direct banning of accounts with "inappropriate behaviors" or limited access of some functions, most of them can not completely block the sensitive discussions. That is to say, after a user post a tweet, regardless of how its content is sensitive, as long as it has effectively avoided the sensitive words, it can still be seen by the followers in a limited time and has the potential to be reproduced. Once a tweet has been deleted, those who had seen it could repost it again in a certain time. During the time period from the posting to the deletion, it could let more people to see it again. Therefore, "reviewing after posting" makes the visibility of microblog

⁹⁴ Comparatively, according to the author's interviews, at that time, many traditional media, such as the newspapers, have received the notification that Yao case cannot be "overly" reported.

⁹⁵ A weibo user, Hua Zong (花总), had admitted later that he was supported by Sina to promote these related discussions.

information much higher than the counterpart of traditional media. The Weibo censorship is not as easy as it is to the traditional media. The continually changing lexicon of sensitive words and long tweets which are made into the image format, etc. had all technologically increased the difficulty of reviewing. That is also one of the characteristics of web 2.0 media.

Finally, the netizens' expressions are somewhat concealed. The Chinese language, as a diverse language, provides a perfect premise for the netizens to evade sensitive words. In practice, people often use homophones, that are extremely abundant in Chinese, to avoid these sensitive words, and simultaneously to make the others understand it. For examples, the "river crab" ("He Xie" means harmony), "alpaca" ("Cao Ni Ma" represents the "mother fucker"), "the empire" ("Tian Chao" means China), etc., they have already become part of the daily language of netizens. Replacing the sensitive words by the initials of Chinese Pinyin and technically processing some sensitive words are all very common approaches for avoiding censorship. In some events, people will quickly invent some specific words to express. For example, in the discussions around Li Zhuang case, netizens used the "Wang Li-juan" (a common women name like Janet Wang) to replace "Mr. Wang Li-jun", used "Hu Shi Zhang" (means the "head nurse" literally) instead of "Fu Shi Zhang" (means the "deputy mayor") and so on.

In fact, as a new channel for political participations and civil rights expressions, the role of Weibo was very obvious. From May to July 2011, I had interviewed 14 very active actors in Weibo public sphere on the topic of new media's democratic role. I found that they all attached great importance to the role of Weibo, and regarded it as the most important battlefield of public opinions. One of the interviewees, who had rich experiences in traditional media, has said some very representative words: "Even if my tweet was deleted, there may be very many fans have seen or forwarded it. Only by constantly releasing fresh information, can we let the followers full of constant attention; as long as you put forward substantial information, you would win more and more attention. Under China's

special conditions, power produced by Internet onlookers is even much stronger than the traditional media.”⁹⁶ After the emergence of the new media such as Weibo, almost every public event can witness the role of the netizen participation in public sphere.

The information above indicates that, even under such heavy power control, the public participants in the new media age can still open up a new space for the discussions through discourse expressional strategy. The domination of power over rationality is not absolutely embracive, and the communicative power, to some extent, can find its effective space in a non-ideal speech situation. This mechanism can be reflected in the following case studies.

3.2 The Formation of the Irrational Discourses

On the opposite side, of course, the negative effects of power influence on the new media public sphere are obvious. One of the most important negative effects is the “group polarization” phenomenon which we have previously mentioned, as well as the appearances of the irrational and emotional expressions. Some recent researches also illustrate this point well. In a sociological quantitative research among Chinese internet users, Angela Xiao Wu argues that, due to the Chinese governmental power control and other measures, there emerged a rapid process of overall polarization among Chinese internet users, and “the overarching ideological division of the Chinese Internet is split between nationalism and cultural liberalism.” (Wu, 2014) That suggests that, similar to Sunstein’s research, in a non-ideal discourse environment interfered by power, especially in a non-democratic society (Sunstein, 2008: 65), the communicative consensus of ideal type is often difficult to achieve; Group polarization is a very common phenomenon whether for a brief specific discussion, or for a long-term wide-ranging deliberation (Wu’s research spans 4 years).

⁹⁶ Interviews with Mr. Y. at 25th April 2013 in Shanghai.

There are also some researches suggesting that these phenomenons of group polarization and irrational discourses are caused by the Internet companys' technology sets (Lu, 2014). One reason is the self-censorship mechanisms of Internet companies; the other reason is that, basing on considerations of the maximization of their own interests, the Internet companies would conduct some invisible power interventions over the online discussions through technical means. First, with the technical functions like the "mutual following", "canceling following", "blocking someone completely", "shutting down the comments", etc., the encapsulation of the opinion group circles is strengthening. Accompanied with that the size of these circles is growing, the moderate views were squeezed into the *Silence Spirals*. Due to the *Group Polarization*, the freedom of speech thus lost its deliberative dimensions (Sunstein, 2001).

Secondly, given the excessive use of the "big data" technology, the e-commercial companies control the preferences of consumers, thus deprive the netizen's rights of choice. Thirdly, in order to get more attention, the BBSs indulge the spread of the slanderous and false information, acquiesce in the infringement acts such as the "Internet mass hunting". They also cooperate with the Internet public relation companies to make profits through "deleting the articles" and "assisting the hypes" and other ways (Hu, 2011). There are also some other paths or performances such as: The search engine companies set up the ranks through bidding; the resource sharing sites always infringe the intellectual property rights; gambling and violence are very common among the online games, etc.

These means have seriously alienated the reflective function of the Internet public sphere, which confirms Lawrence Lessig's (2006; 2009: 43) famous argument - the nature of the Internet is not determined by the will of God, but is only determined by its technic framework design which may be multifarious. Through these operations of micro power, the irrational behaviors have been generated.

There is no doubt that as one form of the mass media, the new media represented by Weibo still retains many features of mass media. W. Lance Bennett (2011) once pointed out that the contents of mass media were always in the tendencies of personalization, dramatization, fragmentation and authority-centralization because the market power and the administrative power may seep into the mass media. These features make the deliberative democracy on whatever platforms difficult to obtain sufficient and correct information, and might cause the alienation of the Habermasian normative discourse theory of law and democracy. Moreover, these phenomena, especially the operations of the Internet companies, can well prove Foucault's opinion that the power of discourse is micro and everywhere.

3.3 Staged Conclusion

The analyses above have illustrated the role of new media public sphere in Chinese political life today from two aspects - positive and negative. In fact, these two aspects were still analyzed within Habermas and Foucault's normative claims. On one hand, under the strict power monitoring, public deliberation can still find the opportunity space. The communicative consensus formed through deliberation of participants can generate a democratic force to balance the power of the government and to influence the operation of the political system and legal system. That is extremely significant for China, as a place with short of democratic channels.

On the other hand, similar to the public discussions in traditional media and other platforms, due to the influence of the pervasive power factors, public discussions in the new media also presents some characteristics such as “group polarization”, “emotionality”, “fragmentation” and so on. The power factors comes not only from the macro power of government authority, but also from the various micro powers generated by the market, the technology, the hierarchy of participants and the imbalance of possession of information.

Additionally, to echo Professor Huang's model of public sphere in modern China, we could also find that, in new media public sphere of China today, both the state power and ordinary citizens are involved. But differently from that model, other forces apart from the former two, such as the commercial factors and the Internet Companies' technological settings, also play an active role in the new media public sphere.

4. The Power Interaction between Public Sphere, State Power System and Legal/Judicial System

Linking to the topics of Discourse Theory of Law and Democracy, what we want to analysis and explain here is that: what are the impacts of this double-sided new media public sphere over the specific political and legal operations. In other words, what kind of interactive relationship between democracy and law it can present.

4.1 Judicial System with Chinese Characteristics

In order to answer the questions above, firstly we have to make a brief introduction to the unique relation between China's judicial system and power system. China's judicial system is unique comparing to the Western ones, in that it is referred to in the official discourse as "A socialist judicial system with Chinese characteristics" (Wang Sheng-jun, 2011). In practice, it simply means that the organs of the CCP exert a more or less direct leadership over the courts. The CCP's unite tasked with leading the judiciary is called "the Political and Legal Committee of the CCP" which is established at from a central to a local level of the Party organizations. Within this power hierarchy, the Chief Justice of the Court is just a member in the committee and has significantly fewer power, as well as operates under the direct leadership of the secretary and the deputy

secretaries of the Political and Legal Committee. While the power of the Political and Legal Committee is not clearly defined by the current Constitution and laws, in practice, it is responsible for instructing all affairs concerning to justice and social security. Therefore, for the most important judicial cases, the courts are under the direct guidance of the Political and Legal Committees (Zhou, 2012).⁹⁷

Another organization that shares the capacity of affecting and restraining a judge's independence is the court's Judicial Committee. According to Chinese law, the Judicial Committee is the highest judicial organization in a court, composed of the Chief Justice of the court, the Vice-President, members of party committee, the presidents of the Tribunals, and senior judges. It does not directly hear cases from courts. In reality, however, the Judicial Committee is the leading agency of a court, subject to the superior leadership of the Political and Legal Committee and entitled to weigh in on important and difficult cases.

Ordinary cases are usually processed independently by the court and the presiding judge in strict adherence to laws and regulations. But when faced with cases with great social and political significance or impact, - that is, the highly publicized cases - the judges will be somehow deprived of the autonomy of their jurisdiction by their superiors. In our interviews, we found that, in most cases, when encountering some influential cases, the judges would tend to ask for instructions from their leaders. And usually for some very important cases, it was very common that the leaders make some informal instructions directly to the courts or judges.⁹⁸ The judges and the courts maintain a façade of independence, while these authorities would have already determined the outcome of these cases. Folk wisdom in China is well adapted to the realities of the judicial system, as the saying goes: "The big cases are dependent on politics; those in the middle on social impacts; and small ones on the laws."

⁹⁷ Detailed studies about the institution of Chinese politics and law committee can be seen at Yongkun. Zhou. 2012. "The History and Evolution of Politics and Law Committee." *Yan Huang Chun Qiu* No.9: 7-14.

⁹⁸ Interviews with Judge Li, Judge Gui, Judge Sun and Judge Shen, at 17 April 2013 and 25 April 2013, in Shanghai and Beijing. Also see: Liu, Sida. 2011. *The Logic of Fragmentation: An Ecological Analysis of the Chinese Legal Services Market*. Shanghai: Shanghai Joint Publishing Co. (In Chinese: 《割据的逻辑》)

Many reasons account for the existence of this extremely distinguishable and Chinese-like judicial system. On one hand, it is a representation of the Party-state political system that the CCP has established in the judicial arena. The tradition that the CCP organizations can guide the trails of the important cases has been kept until now since 1949 apart from the period of Culture Revolution (Zhou, 2010). Although it was changed to some extent around the 13th Conference of the CCP in the 1980s (He Wei, 2011), it was continued after the “4th June Event”, and it was very obviously applied during the Zhou Yongkang’s administration of the central Committee of Politics and Law (2007-2012).⁹⁹ On the other hand, it is related to the thousand-year old political and legal traditions of Imperial China. Executive and judicial powers have intertwined since the Qin Dynasty (221 – 207, BC) whereby executive and judicial authorities overlapped each other. In imperial China, the image of a “Good Bureaucrat” was two folded in the hearts of people: being the honest and benevolent (benefit seeking for the people), and good at settling lawsuits.

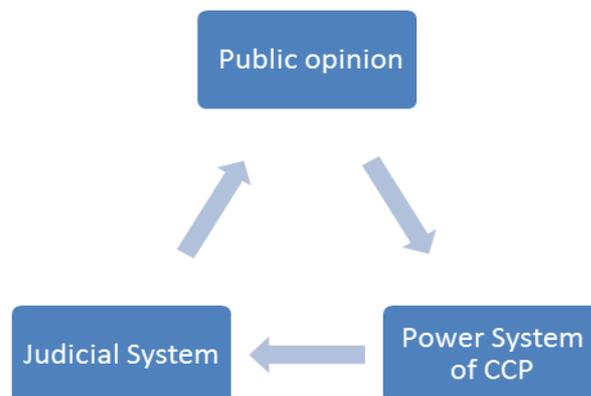
4.2 The Interaction between Public Sphere, State Power System and Legal/Judicial System

These particularities of China's judicial system lead the particularity of way how citizen participation in China's judicial practices today. In China, the interaction between public opinions and the judiciary began in the late 1990s. Two famous cases in 1997 – the Chu Shijian case and the Zhang Jinzhu case – marked the monuments as how the public opinion, as an important power to check and balance the judiciary, began to have its influence. However, this democratic influence seems to be accompanied by emotions, blindness and mistrust of the state power system from the very start. In the Chu Shijian case, the public opinion let a serious criminal obtain a very great commutation of sentence because people

⁹⁹ See: “How many cases were controlled during Zhou Yong-kang’s period”(“周永康主管政法十年“遥控”过多少次法槌”), <http://blog.ifeng.com/article/33829647.html?touping>

generally think that “his contribution to the country is too big”;¹⁰⁰ But in the case of Zhang Jinzhu, because of the anger of people which was incited by the media, a light criminal was eventually punished by extraordinary death penalty.¹⁰¹

After the two symbolic cases, a series of highly publicized cases have taken place in China, such as, the Yang Jia case, Ma Jiajue case, Xu Ting case, Deng Yujiao case, Zhou Zhenglong case, Li Gang case, Sun Zhigang case, Li Changkui case, until today's Yao Jiabin case, Li Zhuang case, Wu Ying case and Xia Junfeng case, and so on. In these cases, the public opinions from public sphere had largely influenced all of the final verdicts (Lindblom, 1980; Zhao Yuezhi, 1998; 2008; Wang Yan, 2004; Liebman, 2005). In a paper focusing on Chinese media-judiciary relations in 2005, Benjamin Liebman (2005) has argued, if the public wants to influence the court outcomes, in most cases, it has to firstly influence the party leaderships. What I want suggest is that in the era of new media, nothing changes for this situation. In fact, a particular interactive pattern has emerged between the judicial system, public opinion, and the power system of the CCP.



While this framework is at times unilateral and relatively fragile, it describes an

¹⁰⁰ For Details on Chu Shi-jian case, see: Seth Faison (1998), "China's Paragon of Corruption; Meet Mr. Chu, a Hero to Some, an Embezzler to Others" In *The New York Times*, <http://www.nytimes.com/1998/03/06/business/china-s-paragon-of-corruption-meet-mr-chu-a-hero-to-some-an-embezzler-to-others.html>. Accessed at 02. 09. 2014.

¹⁰¹ Zhang Jinzhu Case is extremely controversial and symbolic in the fields of justice and mass communication in China. Detail studies on this case see: Yi, Ding (1998). "the Ins and Outs of Zhang Jinzhu Case". *Journalism Lovers*, NO.2, pp. 34-37, and Chang, Pengxiang (2010). "Public Opinion Absorbed by Trail." In Guo, Weihua (ed) *Network public opinion and Court trial*. Beijing: Law Press, pp. 48-52.

important feature of Chinese politics: informal democratic discussions in the public sphere influence legal outcomes indirectly.

For such an interactive structure, we still need to evaluate it from two aspects. The first aspect is the positive role of the new media public sphere pushing for the democratization of Chinese political and legal operations today. Needless to say, in the Chinese society today, where the democratic channels were short for a long time, the emergence of the new media represented by Weibo provides a rare opportunity for the deliberative democracy of public sphere. The power of rationality of citizen communication is released to a certain extent. In terms of Habermasian normative model, the new media public sphere should play a positive role in constructing social consensus and building the legitimacy of politics, law-making and judiciary. The second one is a realist aspect. By various kinds of power intervention, the alienated new media public sphere produces some negative impacts that may cause the formation of the power of irrational public opinions, then torn the social consensus emotionally, and finally damage the legitimacy of the law.

As some researches had pointed out, there emerged a phenomenon of "passive lawmaking by pressures" in China today, which means that the legal decisions excessively depend on the media information (Wu Yuan-yuan, 2010). In this case, whether the legitimacy of the law can be reached depends on the quality of the political and legal discussions of the public sphere. It would be the ideal type of deliberative politics, or a complete power struggle, or the coexistence and integration of the both to a certain extent? Are there other elements besides power and argument rationality factors can play a role in the discourses? These can be further analyzed by specific case studies.

5. A Case Study

During 2011-2013, when Weibo public sphere was the most active, there appeared a lot of topics of public discussions. Almost every one of them may serve as a good example for the functioning of the general situation of China's new media public sphere. I would like to introduce a trial of financial fraud case in order to explain the general study above. Methodologically, I mainly focus on the discourses around this case, that is to say, to explain the power relations and rational or irrational factors by using discourse analysis.

5.1 A briefing of the Wu Ying Case

Wu Ying was a female entrepreneur in Zhejiang Province. In March 2007 she was arrested on charge of illegally collecting money from the public. After more than two years of investigations and hearings, on December 2009 the Middle Court of Jinhua City sentenced Wu Ying to death on conviction of financial fraud, and deprived her of lifelong political rights, and confiscated all her personal property. In January 2010 Wu Ying appealed with the justification that the purpose of borrowing money was for her company rather than for the squander of herself. On January 18, 2012 the Higher Court rejected Wu Ying's appeal and maintained the death sentence. While the first phase of the trial already attracted widespread public attentions, during the second phase it became one of the hottest topics in the online public sphere. Due to the intense pressure of public opinions, during the National People's Congress in March 2012, Prime Minister Wen Jia-bao also made remarks on the case. Accordingly, the appeal of Wu Ying's death penalty was rejected by the Supreme People's Court later. The Supreme Court stated that Wu Ying should be punished by law, but since she has truthfully confessed the crimes as well as her bribery of some officials, she should be sentenced to death with a postponement of her execution. On May 21, 2012, Zhejiang Provincial Higher People's Court re-heard Wu Ying case, convicting her of financial fraud

and sentenced her to a death penalty with a two-year suspension, which means that after two years, if she commits no more crimes, she would receive a life sentence. The final outcome of the case was not in any way different from the suggestion of the review by the Supreme Court. Eventually, Wu Ying was sent to jail.

5.2 Public Discourses on the Case

The Wu Ying case lasted more than five years. After her first trial, the case triggered widespread concerns and attentions among the public, especially among active members on Weibo. The attention of public opinion reached its peak after the second phase of her trial that basically reestablished the same verdict from the first trial. From the end of January to early February 2012, Wu Ying case was one of the most discussed topics on Weibo. Every single day witnessed tens of thousands or even hundreds of thousands of messages regarding the case. Until May 22, 2012, there were in total 372 million tweets discussing Wu Ying case on Sina Weibo, and this figure did not include messages that were deemed “extreme” and deleted by the authorities.¹⁰² Many tweets received a lot of comments and forwards. When the final judgment was handed down on the 21st of May, there were nearly 15 million tweets regarding the final decision in a day. In the public discussions surrounding Wu Ying’s trial, some “Big V”, including scholars, writers, media persons, lawyers, etc., became the most leading participants.

¹⁰² Statistical data from the “Micro Data” function of Sina.



(The trend analysis of the hot word “Wu Ying” in Sina Weibo space by Sina *Micro Index* from 15/05/2012 to 13/11/2012)

Next, I will briefly describe the public discussions, and analyze the typical discourses in it in order to show two things: the interaction mechanism between public discussions and the state power system, and to discover both the rational and irrational factors in the discourses. An anonymity user created a Weibo account under the title “A compilation of public opinions on the Wu Ying case”. He updated and forwarded the latest and the most influential Weibo views and opinions on the case every day, and provided a platform for public discussion. I selected some of the most influential tweets in it in order to do some discourse analyses.



(The Weibo account of “A compilation of public opinions on the Wu Ying case”

His profile picture is a cartoon depicting a weak man who is struggling to hold up an official stamp, the symbol of power. It implied the message of restricting the abuse of power through the pressure of online public opinions, no matter how feeble netizens think they are.)

Short Tweets

In the beginning, discussions were considerably centered on the issue of guilt and the death penalty as (un)just in regards to the discussed offense. For instance: Qin Hui, a well-known scholar from Tsinghua University, who in general supports for removing death penalty from the Wu Ying case, expressed his views in concise and rational language: “even if Wu Ying was guilty, she should not be sentenced to death for committing such crime. Though it may not be the time to abolish all death penalties, the principles of ‘being cautious with handing down the death sentence’ and ‘reducing the number of death sentences’ should be materialized first in such cases.” His views and the way he expressed them were highly appreciated by the online readers, and the tweet received many forwards on Sina Weibo.

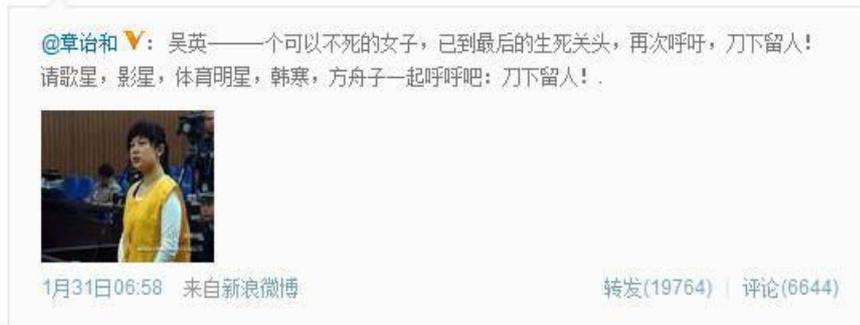
During the period of the second trial, the public online discussions became more

emotionally charged. While most of them strived to make rational analysis on the case, there were also some sentimental threads of discourses, even coming from some legal professionals. During the 2012 Chinese New Year a lawyer was trying to mobilize the public opinion to action. He openly called users of Weibo to “make comments” on the Supreme Court’s website, and to “Save Wu Ying”. He made a detailed description of how to help Wu Ying through the online “opinion communication mailbox” of the Supreme People's Court. He wrote: “Wu Ying's head can fall to the ground at any time... Lawyer Li Changqing will appreciate you very much for giving your sounds... Save Wu Ying!” His discourse was filled with emotions and without any justifications but this tweet was transmitted for nearly 8,000 times within a few days.



(The tweet of Li Changqing)

On January 31, during the Supreme Court review, a famous writer – Zhang Yihe issued a tweet calling on online celebrities to stand up for Wu Ying. The tweet was entitled: "Save Wu Ying from the guillotine!" She wrote: "Wu Ying, a woman who shouldn't be killed, is meeting the final moment of life judgment. I am openly calling again: keep the women alive from the guillotine! Please! Pop stars, movie stars, sports stars... let's call together: Keep the women alive from guillotine!" This tweet attracted nearly 20,000 forwards and more than six thousand and six hundred comments.



(The tweet of Zhang Yihe)

Both Zhang Yihe and Li Changqing's tweets were very typical emotional calls in public discussions on the Wu Ying case. They just gave calls without any justifications. Zhang Yihe, as a "liberal" female writer, often plays the role of an emotional appellee among public intellectuals in China. This was also obvious in the Wu Ying case. Her tweet utilized emotional language in an effort to arouse people's sympathy and attention.

People engaged in the discussion included Wu Ying's family member, as well as netizens and public figures who were moved by her story, which also showed the importance of Weibo. To attract more public attention, Wu Ying's father opened an account on Sina Weibo. By registering himself with his real name as opposed to an alias, he was designated a "V" user, which means "verified". He used a photo of Wu Ying crying in the court as his profile picture. He introduced himself as "I am Wu Ying's father. Wu Ying was sentenced to death by the second instance". In total, by the end of 2012, he posted less than 80 tweets, but gained more than 65000 followers.



(The Weibo account of Wu Ying's father)

Long Tweets

The few examples above are indicative of the types of public discussions that occurred on Weibo. This kind of short tweets can be read very fast and spread widely, but hard to make a deeply deliberation and justification, because of the limitation of space. For deepening the public deliberation on this issue, the long tweets, analytical articles and seminars are indispensable. Actually, at the same time of short tweet (within 140 Chinese Characters) discussions, many longer tweets about Wu Ying case also continued to appear and transmitted widely by Weibo. Some of them, written by legal professionals, had analyzed Wu Ying case in detail; others written by news reporters, university professors and other public intellectuals were mainly about the social and political impact of the case. These articles were in dialogue with each other, and contributed to the in-depth discussions, and were not limited to some simple appeals on Weibo.

For instance, Lang Xianping, a famous economist from Hong Kong, offered a conspiracy theory. He believed that the local police was the wire-puller in the trial. He wrote: "They [YF: the local police] want to give people an impression that Wu Ying is a liar. But in fact, the 'liar' can be seized more than 100 pieces of real estate and 30 sport cars by the Dong Yang police? A province higher people's court can only conduct a 'legal judgment', rather than a 'fact judgment'. The facts

of the case rest on the Dong Yang police. The police cannot wait to auction off the assets before the court judgment! A car of 16 million RMB was sold for only 3.9 million; A 50 million RMB hotel was only sold for only 4.5 million! This proves that the Dong Yang police was the wire-puller behind the black interest chain (...)" Through this speech, we could find that Lang Xianping had made a proper justification, although his point of view was only an assumption. For example, he gave two corresponding evidences for one judgment, which shows a higher level of arguing by some standards of deliberative discourse analysis. Before this tweet was deleted, it had already attracted nearly 19,000 forwards and six thousand comments.



(Lang Xian-ping's long tweet)

The content of the traditional media was also re-discussed spread widely in Weibo space. For example, an article by He Bing, a law professor from the China University of Politics and Law, proposing the establishment of a citizen Jury system for death sentences was quoted by microbloggers and forwarded on Sina Weibo thirty-thousand times. It was possibly due to his statement: “the death penalty also exists in foreign countries, but the courts there are rarely subject to such great pressure like our own courts, because citizen participation in judicial trials can effectively reduce pressure on the judges.” Professor He analyzed in his article why cases like Wu Ying case can get such a huge wave of public attention in China. According to his analyses, the main reason is that the judicial democratic mechanism is imperfect, and the judiciary is easy to be controlled by

power systems.

Offline Discussions

The climax of the public discussions around Wu Ying case happened on February 6th and 7th 2012 when two unofficial conferences on the case were convened. The Public Policy Research Center at China University of Politics and Law hosted a conference entitled “On the Rights and Wrongs and the Fate of Wu Ying, On the Civil Financial Environment of China”. Among the 19 participants of the seminar, there were Wu Ying's father and her lawyers, six professors of law, seven lawyers, two economists, a journalist, a famous novelist and a businessman from Zhejiang province. Before the conference, almost all the speakers had expressed their points of view through Weibo and each of them garnered numerous followers. The four- hour conference was broadcasted live on Sina Weibo, and attracted hundreds of thousands of Weibo users to participate in the discussion.



The conference followed a strict procedure. First, the father and lawyer of Wu Ying presented the case, then each participant spoke in turn; the host controlled the time and procedure. After the first round, they posed questions and debated on issues where their opinions diverged. Finally, the participants briefly summarized

their own points of view. The whole event went relatively smoothly. On a number of legal and financial details, there were still some small differences. But at the end, a basic consensus was reached that Wu Ying should not be put to death. The conference was originated from the discussions in Weibo space, and there were also instant interactions between the offline conference and the Weibo online discussions. However, unlike the typical online discussions, this conference followed certain procedures. There were also certain limitations to the participants - most of them were legal scholars and respected public intellectuals. Their discourses were relatively more rational and deeper than the short tweets of Weibo. They reached some important rational consensus, (such as the criminal circumstances of Wu Ying were not worth a death penalty, China's financial system should be reformed, etc.), but not just some simple emotional appeals.

Moreover, another important point should be noted here. By analyzing the whole discourses in the conference (they are too many to be presented here), I find that some respected scholar's speeches played an important role in the formation of consensus. For example, Professor Tang Yi-jie and Professor Yue Dai-yun, two very famous scholars in Chinese thoughts and both of them are more than 80 years old, were not present there, but they asked their student to communicate their views on this judicial case. They think that more public opinions should be referenced in this case, and it has to use the death penalty deliberately. In the subsequent discourses, their points of view were referenced many times by other participants.¹⁰³

So far, it is possible to draw some preliminary conclusions from the descriptions above relevant to the discourses in Weibo space in general and to the offline discourses. Leaders of the public discussions were mainly legal professionals and intellectuals. Their discourses were relatively objective and rational, which is

¹⁰³ The author had heard the whole sound recording of this conference. But it is too long to be presented and analyzed here due to the space limitation. For the complete record of this conference, see: <http://blog.ifeng.com/article/16249519.html>; And for the online discussions around this conference, see: <http://club.kdnet.net/dispbbs.asp?boardid=25&id=8097213> [Accessed 12/12/2012]

good for the public to recognize the facts of the case and reach a consensus. However, because one's life hinged on the outcome of the case, and maybe the corruption issues of government were involved, many netizens chose to express their anger in an emotional way. All in all, both rational analysis and emotional appeals formed the mainstream discourses in the public discussions of the Wu Ying case. Moreover, we could also find some traditional factors in the discussions of new media public sphere. For instance, the "Teacher-Student Model" is somehow reflected in the discussions, that is to say, the professional persons and elder scholars are still more respected in the discourses.

5.3 The Influence of the Weibo public discussions

As people lively discussed Wu Ying Case in the cyberspace, in February 2012 China's official media, the Xinhua News Agency, firstly reported the Wu Ying case, as well as the extensive discussions it had caused. The News Agency interviewed numerous jurists, sociologists, economists and entrepreneurs who had expressed their views on Weibo space, and analyzed the phenomenon whereby the court has handed down a sentence which differed greatly from the expectations of the public. The deeper reason of the dissatisfaction of the public opinion, as expressed by the report quoting the words of these experts, was that "China's financial system has been monopolized, and unofficial financing is very difficult; executing Wu Ying in light of these larger systemic problems will not at all solve the problem." This news report could be seen as the first official response from the power system. It was then widely disseminated through Weibo, and the opinions expressed online became cautiously optimistic to the final outcome of the trial. (VOA, 2012)

The large-scale public discussions had aroused the attention of the CCP authorities. Therefore during the Chinese National People's Congress in March 2012, Premier Wen Jia-bao expressed his views on a single court case for the first time. He said: "I have noticed that there has been much public attention paid to

the Wu Ying case. On this matter, I want to make the following points. First, a thorough study must be conducted concerning the legal aspects of private lending and the principles that should be observed in handling this matter so that there will be clearly defined legal safeguards for private lending. Second, the Wu Ying case must be handled on the basis of real facts and in accordance with the laws (...). Third, the case shows that the development of private finance is not in line with the requirements of social and economic development in China." (Wen, 2012) Wen's discourse indicates that the highest authority of the Communist Party was paying attention to the public opinion expressed online. Additionally, he made some clear guidance to the judicial system on how to handle the case. From a certain perspective, what Wen said was also a part of the public discourses. It proves that the informal participatory democracy in public sphere had forced the power system to respond and make concessions. The discourse of Wen was also a rational response to the public.

The subsequent development of the case has strictly followed the remarks of Wen. It is noteworthy that on May 21st, at the time of final judgment in the Wu Ying's case, the Zhejiang Provincial High Court very rarely held a press conference in response to the concerns of the public. The spokesman of the High Court answered four questions of the official media - Xinhua News Agency. Almost all of these were related to the topics discussed online by netizens. For two of these questions, the reporter began with a phrase by saying: "Some netizens pointed out that (...)" It is evident that during the entire trial, the opinions of internet users played a very important role, and the court hoped to ease the pressures coming from the online public sphere so that it can satisfy the superior authorities.

Wu Ying was imprisoned just one day after the final judgment. Different from the lively discussions online, the judiciary hoped to deal with the case quietly so that people could forget it as soon as possible. They refused all media interviews, except the official media of the central authorities, and even imposed a tough restriction on meetings between Wu Ying and her family because Wu Ying's

father had a Weibo account. Only the CCP's power organs over the court, Zhejiang Provincial Political and Legal Committee, can impose this restriction. According to the report of *ChinaTimes* (*Huaxia Shibao*) (2012), all meetings between Wu Ying and her family must gain the prior agreement of the provincial Political and Legal Committee, since this case was deemed special and sensitive – and because “Wu Ying’s father has a Weibo account.”

5.4 Further Analyses on the Public Discourses around Wu Ying Case and Other Judicial Cases

The democratic role of the new media public sphere

Wen's response, the press conference of Zhejiang High Court after the final instance, and the performance of the Zhejiang Province Politics and Law Committee in dealing with this matter, show clearly that public discussions really had impacted the operations of the power system and that in turn the power system affected the judicial decision. In the new media era, this interaction framework is strengthened. Weibo space already, to some extent, had the elements of forms and foundations of discourse democracy that have been confirmed by several studies. The analysis of the Wu Ying case only confirms this point.

In today's China, it's very difficult to look for an effective mechanism of civic participation. Scholars have done some political experiments of deliberation in China, for example the experiments of He Bao-gang at Wen Ling (He Bao-gang, 2008; Fishkin & He & Luskin & Siu, 2010) and Yuan Tian-peng's experiments at Nan Tang (Kou and Yuan, 2012). But these experiments, under-severe political control of the government, could not really play an important role on the national level (Richard, 2009). Professor He Bao-gang's research also shows that, in reality, these partly government-leading deliberations are mainly used to maintain social stability (He & Warren, 2011). The emergence of new media, such as Weibo and

Wechat, is a very good opportunity for the development of legitimate participatory and deliberative democracy. Numerous facts have proven its effectiveness even with some political constraints. Comparing to the standardized form of deliberative democracy in the Western countries, it seems very informal and maybe not be the “true deliberation”, but some cases have proven that it does work in China. Thus this informal public deliberation is somehow close to the normative democratic role of Habermasian public sphere.

Yet, this informal public deliberation also has grave disadvantages. It lacks the necessary procedures and rules, which would, as Habermas argued, make it difficult to reach a rational consensus. By this case, we must be alert to the populist tendencies of online public discussions. Perhaps, just as Habermas had pointed out, establishing the standardized procedures of deliberative democracy, and continuing to improve them, is the only path to produce a high quality of democracy.

Macro and micro power relations of the public discourses

In Foucault’s power relation theory, power is not only something that the state institutions possess and use oppressively against individuals and groups, but also an invisible factor underlying in any type of relation between any member of the society. We define the former as the macro power relations and the latter as the micro power relations, although Foucault devoted himself mainly into the construction of the latter.

On the macro level, although Wu Ying case is just an ordinary criminal case without serious political sensitiveness, the state power still pays much attention on it. Some related discourses in Weibo space were often censored and deleted, for example, Lang Xianping’s long tweet was deleted within a few hours. State power also controls the extreme participants in other ways. In September 2014, Wu Ying’s father was accused of suspected prostitution, but in the end he was not

arrested. On the other hand, the public opinions formed through informal online/offline discussions can be regarded as another macro power – the democratic communicative power – to balance the state power. These macro power relations were proven again by Wu Ying case.

The micro power relations are not easy to be seen, but we could still find some factors in the discussions of Wu Ying case. Firstly, if we treat all the discourses around the case as a macro deliberation, which involves not only the discussions in Weibo space, we would find that the relations between participants are absolutely not equal. There were the head of the central government, the courts, the police, the legal professionals and the ordinary netizens. Even in the discussions in Weibo space, the public opinions were guided by the discourses of the elites, especially the legal professionals and famous intellectuals. Most ordinary netizens participated in these discussions only by forwarding hot tweets and other means. These are the power relations between participants. Secondly, there were also power factors in the discourses of participants. The powerful discourses refer to those emotional speeches and speeches with violent factors, rather than the speeches of rational arguing. In fact, as the discourse analyses had shown before, the Weibo public sphere was occupied by a variety of powerful discourses in many times when discussing the Wu Ying case. Although public discussions on the case finally reached a consensus, it may merely account for that a majority of participants held similar points of view. In the Weibo discussions, the irrational, emotional discourses often prevail, because this kind of discourse is likely to get more positive responses. These two aspects above can well explain Foucault's interpretation that discourse power is everywhere in reality.

But as we have presented, in most cases, the rational factors and power factors coexist in discourses. In order to reach a normative rational consensus, we have to set some institutions and procedures of deliberation to squeeze out the power factors as far as possible.

The Influence of the Traditional Chinese Factors (Confucian Rationality) in Discourses

First of all, in the discussions around the case, we could find that the ethical values somehow constitute an important part of arguments and justifications. Even the legal professionals were willing to put forward some ethical appeals, such as the lawyer Li Chang-qing's influential tweet. Wu Ying's father made a lot of ethical statements, especially on some private ethics, in Weibo space and during the offline conference. This phenomenon is more evident in discussions around other cases. For example, by a similar judicial case in the same period – the Yao Jiaxin case,¹⁰⁴ most of the public discourses around the case are argued in an ethical way rather than focusing on the legal issues (Wu Qiong, 2012). This indicates a characteristic of traditional Chinese legal culture that the ethical values are much more important than the technique or procedural issues of law (Huang Phillip C. C., 2015). Accordingly, the discussions look down on the institutional judicial procedures (Chapter 4). In Wu Ying case, the court had changed some of the judicial procedures according to the requirement of leadership and the social emotions. In Yao Jiaxin case, the court even conducted some questionnaire surveys on the audiences without any legal bases.¹⁰⁵

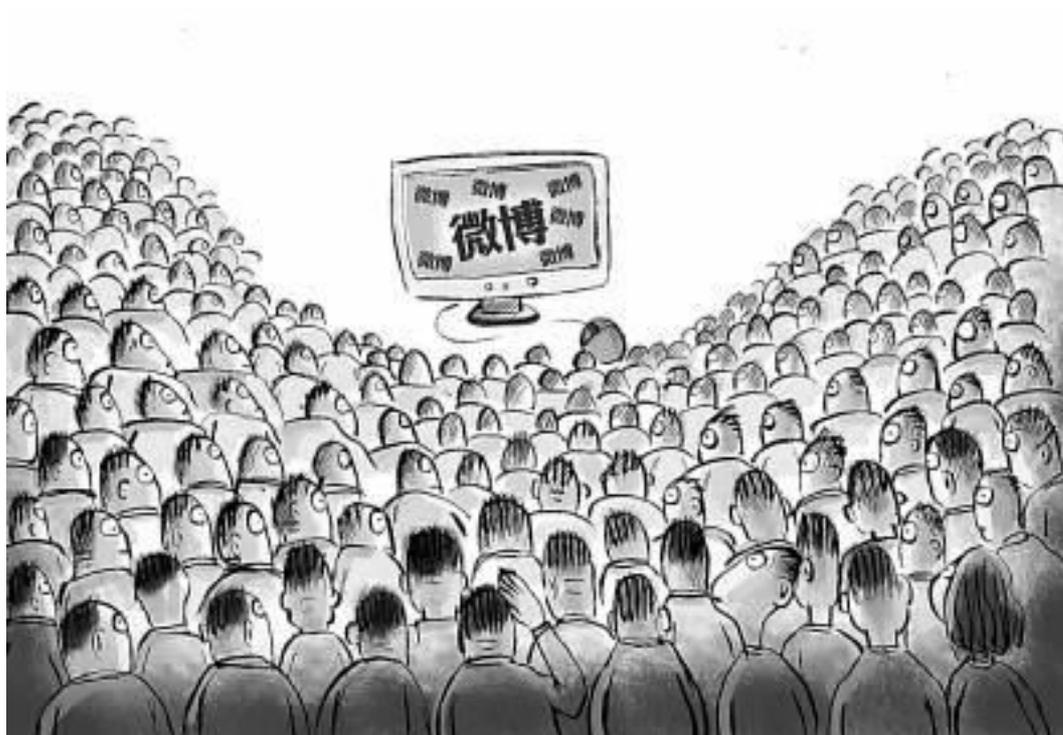
Those in power, who participated in the discussions, also showed some aspects of benevolence (Ren). Wen Jiabao's remark proves this point well. Throughout Chinese history, rulers had always been very cautious with the death penalty, even if it was caused for the purpose of maintaining their ruling orders. They even invented some judicial systems of “benevolent governance” such as the “Being Beheaded in the Fall” (秋后问斩). The Review System of Death Penalty today is basically the continuation of the traditional judicial system of China. It attributed

¹⁰⁴ Yao Jiaxin case refers to an intentional homicide triggered by a traffic accident on October 20, 2010. Yao Jiaxin, a 21-year-old student from Xi'an, Shaanxi Province, hit a restaurant waitress, Zhang Miao, and stabbed her to death when he saw her memorizing his license plate number. Yao was put on trial on March 23, 2011 and was sentenced to death on June 7, 2011. This case brought much public attention because of Yao's family background and whether the death penalty should be abolished.

¹⁰⁵ “Yao's case is in trust crisis, the lawyer question the impartiality of the questionnaires”, *Qilu Evening News*, April 18, 2011” (“药家鑫案陷信任危局 律师质疑问卷调查公正性”, 齐鲁晚报, 2011年4月18日) See: http://www.ce.cn/xwzx/shgj/gdxw/201104/18/t20110418_22370381.shtml

the final decision about the death penalty to the central, that is to say, the supreme rulers could determine whether the death penalty could be executed according to public opinions. In the Wu Ying case, under the pressure of the public opinions, the supreme rulers eventually decided not to deprive the life of Wu Ying, which with the signal of Wen's speech. This illustrates, to some extent, the ethic value's balance role to the power in the process of discussion.

Finally, we also find that the "Teacher-Student Model" of discourse of traditional China still plays a role in the new media public discussions today. Respected people, especially those with professional experiences and more knowledge and elder in ages, have more influence and power in the discussions. In the public discourses surrounding Wu Ying case, it was very obvious that these people played a leading role not only in online informal discussions but also in the offline conferences. But for these leading figures in public discussions, of course, they should act in a holistic way.



General Conclusion

The Tension Problems

In the Introduction, we talked about this thesis mainly investigates and what it explains would be a series of *Tension* problems about discourse theories. We would look at the problems from two perspectives: the tension between Universality and Particularity, and the tension between normative theories and the social practices. These two perspectives are mutually complementary to each other. In order to doing so, we drew upon some theoretic and empirical studies in different disciplines to suggest that these tension problems are very pivotal for discourse theories, meanwhile, it is also very important to gain a comprehensive understanding of these tension problems in order to establish deliberative democratic institutions in China.

The first Chapter discussed the tensions between Habermas's normative discourse theory of law and democracy, and the social facts. This is a topic that get brought up frequently in academia, but it was approached differently by philosophers and by social scientists. We recommend a comprehensive interdisciplinary perspective to look at this problem. On the one hand, normative philosophical theory is divorced from the social reality, and it is always believed to be overly idealistic. On the other hand, social scientific approaches provide an important methodological support for expounding, proving, challenging and improving the normative philosophical theories. At the time when we affirm the positive effects of social sciences, we should also see the positive power of normative theories and normative concepts of rationality. Normative theories could set up the ideal types as the aims of socio-political practices. This may be the most significant light of Habermas's theory.

Chapter 2 had analyzed the tensions between two normative discourse theories: Habermas's discourse theory of law and democracy, and Foucault's discourse theory of power relations. Foucault's genealogical approach is seen neither purely normative nor descriptive. I prefer to define it with a kind of *negative normativity*.

The two theories represent the two dimensions of Western discourse theories. At the one end, there is the normative proposition of communicative rationality; and at the other end, there is the thorough deconstructions on the concepts of subject rationality, truth, modernity, and ideal discourse situation. We also argue that the differentiations between the two indicate an inherent problem of Western thoughts: the dualist model of thinking and cognitive structure.

The third chapter tried to search for the historical resources in traditional Chinese political cultures, and to put forward another normative interpretation on discourse theory, namely the discourse theory of Confucian rationality, in order to balance the tensions between the foregoing two kinds of normative discourse theories. Basing on the pluralist understanding of different cultures, different cognitive structures and thinking modes, We think an ideal type of Confucian rationality (a kind of normative value rationality) can be used as a bridge between these two opposite discourse theories. Firstly, the Confucian rationality admits that there are power imbalances in every discourse. At the same time, the Confucian rationality also attempts to employ some values, such as *Ren*, *harmony*, *Zhongyong*, *Yi*, and *Li*, requiring those in power to make deliberations from a more holistic perspective.

Another meaningful topic was also discussed throughout the Introduction, Chapter 1, Chapter 2, and Chapter 3. That is the relation between Habermas's theories, and the Western emphasis on logos and Metaphysics. It argues that although Habermas used to criticize the Western emphasis on logos and Metaphysics, given the close linkages between logos, metaphysics and discourse in Western cultural context, his discourse theory could not be implemented completely without the influences of Logocentrism and Metaphysics. Therefore Habermas's discourse theory of law and democracy is also a kind of local knowledge which is rooted in the Western political traditions. Under this justification, the Confucian normative construction of rationality thus could be seen as another dimension of discourse theories.

The fourth chapter explained the normative theory proposed in the third chapter, and hoped to be able to re-examine and redefine the concepts of "Public Sphere" and "Deliberative Politics" in the context of traditional China through empirical descriptions on the "Public Sphere" and political/legal discussions in traditional Chinese society. The contents of this chapter are empirical, but they are also highly summarized and integrated basing on a lot of existing historical researches. For the public sphere in traditional Chinese society, we argue that it was a third space where both power and people can participate in and cooperate with each other, it was merely relatively independent from the state power and society, but simultaneously, it was mainly composed by the Confucian intellectuals and local elites with clan consanguinity background and the action guidance of Confucian values. For the political and legal discussions in traditional China, we argue that they were characterized by the following issues: (1) Inequality (Power imbalance) between participants; (2) Ethical indoctrination, temperance and holistic perspective in discussions; (3) Stressing on Harmony and Making Light of the Conflicts, Despising the Institutionalized Procedures and Using More Informal Mediations; (4) The Private Values influenced Public Discussions. Moreover, a kind of *Teacher - Student Model of Discourse* could be regarded as the Model of political / legal discussions in traditional Chinese society.

Finally, the fifth chapter focused on the descriptions of the political and legal discussions in China's new media public sphere today. It is not only an empirical response to all previous normative theories, but also an investigation on the tensions between the normative theories and the experiences. The studies of this chapter were divided into macroscopic descriptions and case analysis. Today, the Chinese practices of discourses in the new media public sphere reflect the synthesis of aforementioned three kinds of normative theories. Among the online discussions, we could not only spot the role of communicative rationality which Habermas argues, but also find the macro and micro power relations that Foucault has claimed, and see the influences of traditional Confucian rationality. It is also

found that the normative theories and social practices do not fit well with each other. This chapter also responded to many of the aforementioned existing researches, such as the concepts of “limited deliberative democracy” or “authoritarian deliberation” of Professor He Bao-gang, the concept of “a Third Realm” of Professor Philip C. C. Huang, and the “Teacher - Student Model of Discourse” etc.

Comprehensively, only a preliminary conclusion could be drawn here regarding to the tension problems from these two perspectives. Firstly, for the universality / particularity problems of discourse theories, we argue that, because of the different cognitive structures and different thinking modes rooted in specific cultures, there should be different normative paradigms of discourse democracy in corresponding cultural contexts. Although Habermas's discourse theory of law and democracy is only a normative ideal type, it can still be questioned on its universality. On the normative level, a deliberative democracy with Chinese characteristics may be accessible. We argue for the pluralist normative discourse theories, which is based on Weber's argument of multivariate rationalities of value. Each kind of normative discourse theory has its own cultural context, meanwhile, each can criticize, refer to and learn from others.

Regarding the tensions between the ideal types and social realities, in my opinion, it will always exist. But this tension can not prove that normative theories are wrong, or the political realities are totally negative. Normativity and reality are two sides of the sam coin. They depend upon each other. Normative discourse theories are the guidance for the practices of deliberative democracy, which can, in its turn, verify, supplement, improve and challenge the normative discourse theories.

The Practical Intent of this Thesis

Apart from the demonstrating of the plural dimensions of discourse theories, another practical intent of this thesis is to exploit an approach leading to discourse democracy that would combine elements of both Chinese and modern, consistent both with the fundamental predilections of Chinese civilization and with the practical needs of a modern China.

As it has been argued in Chapter 4 and Chapter 5, traditional Chinese political culture still plays a role in Chinese public deliberations today. A still living specific culture could provide individuals with specific substantive values, which can affect the degree to which individuals have the knowledge they need to contribute effectively to a political or legal deliberation. A culture is also likely to impact deliberation by shaping the ways individuals communicate with one another. These may have an important impact on the normative resources a discussion group may employ in attempting to resolve disagreements and coming to the consensus. Culture thus importantly defines the institutional settings of deliberations. Therefore, we argue that a self-proclaimed universalist model of discourse democracy, such as Habermas's discourse theory of law and democracy, should be revised in a specific cultural context, especially in China.

It is widely believed that an integrated approach should be taken, since every normative model of discourse democracy has its own limitations. And the institutional designs of deliberation in China should also be considered in this way. China today is a very complex and huge society. China's political modernization needs to be exposed to the Western modern political thoughts, as well as the Western advanced democratic forms. But it is important to remember that their applications must be conditioned by an awareness of the Chinese emphasis on the values.

My hope is that some of the arguments here are useful for people not only to understand the theoretic issues deeper, but also to think more comprehensively when designing the political institutions. We hope this kind of concern we have

raised can help guide the researchers and political / legal practitioners who devotes themselves to this significant field.

The Limitations of this Research

At the beginning, I had proposed a very ambitious research project, hoping it can discuss the theories of discourse democracy in detail from both normative and empirical aspects. However, after beginning the research, I found this “big project” is almost impossible to be completely implemented. Given the limitations of personal ability and research time, this thesis has many disadvantages on both theoretic researches and empirical explanations.

For the theoretical researches part, because of the overly broad reference scope and the limitations of personal ability, it failed to involve all the important materials in these fields. Textual studies serve as the most important research methods, and the lack of this part is hoped to be made up in the next modifications.

There might be more problems in the empirical researches. Firstly, the secondary data still takes up a large part of this study, and some key arguments can be only supported by second-hand materials. Secondly, the empirical parts mainly focus on the general descriptions, and pay less attention to the empirical details. But even so, it cannot present the whole picture of the empirical facts. A lot of empirical materials we had collected have not been applied to the thesis. The last but maybe the biggest drawback is the methodology of empirical researches. Some more advanced social scientific research methods, such as the quantitative approaches of discourse analysis which were mentioned in chapter one, have not been applied. All in all, these shortcomings are hoped to be corrected in the future.

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