Conflict Management

Dispute Resolution and Technology: Revisiting the Justification of Conflict Management

Riikka Koulu

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2016

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Helsinki, June 30, 2016,
Riikka Koulu

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PART I: THEORETICAL IMPLICATIONS OF DISPUTE RESOLUTION AND TECHNOLOGY

1 Introduction

1.1 THE FUTURE OF DISPUTE RESOLUTION?

Isaac Asimov, a professor of biochemistry at Boston University, who is best known for his works in science fiction, described the meaning of technological change in 1978 as follows:

> It is change, continuing change, inevitable change, that is the dominant factor in society today. No sensible decision can be made any longer without taking into account not only the world as it is, but the world as it will be ... This, in turn, means that our statesmen, our businessmen, our everyman must take on a science fictional way of thinking.[1]

Asimov's position aptly describes the challenge of understanding technology. Grasping the meaning of change, especially the meaning of technological change within an established, long-lasting, and authoritative field of law, requires a leap of faith. In order to see beyond the devastating threats of technology painted by the technophobes and the infinite possibilities preached by the technophiles, we need to engage in an act of fiction while simultaneously holding on to the promise of scientific knowledge. This is no simple task as the combination of science and fiction often goes against our view of law as a grave and solemn function taken over by an army of grave and solemn lawyers residing in gloomy courthouses that reek of authority. However, technology might just be the last push to change all that, which is the reason why a quick glance at the inner science fiction geek is needed once in a while.

In this study, I examine how technology might change the most quintessential of legal practices, dispute resolution. I claim that the implementation of technology in dispute resolution creates a discrepancy in the ways in which we have justified the establishment, function, and appearances of dispute resolution. In pursuing an understanding of technology in dispute resolution, we enter a world of many questions and few answers.[2]

1. Isaac Asimov, *Asimov on Science Fiction* (Doubleday 1981) 19.
2. It should be noted that some legal issues related to technology have received considerable attention, especially those related to intellectual property, Internet governance and data

16 In the first part of this study I focus on the theoretical implications of applying modern technology to dispute resolution. I show how the use of ICT creates new possibilities for privatisation of enforcement and how this development, in turn, is significant in justifying dispute resolution. In the second part I examine different narratives for justifying dispute resolution and evaluate whether these narratives could also explain private enforcement.

Questions on the implications of technology tend to voice both our hopes and fears. Are we soon to face computer judges driven by artificial intelligence? Would such an AI even be willing to undertake such menial tasks? Is human error removed from dispute resolution by automated procedures? Will law, in its fundamental form of granting justice to disputing parties, become a phenomenon which is detached from its inventors? Are we finally reaching an era of true access to justice? Or is the hype surrounding technology within dispute resolution only a fad? Are these new courtroom gadgets really necessary? What happens to justice if disputes are resolved without any human interaction? By emphasising technology, are we about to face the gruesome triviality of document cameras and case management software, reading too much into these aspirations that should be regarded simply as instruction manuals? Are automated systems simply the latest chapter in modernising courtrooms or are we talking about a fundamental change in law? And, if we are indeed facing a fundamental change, what will it be and how should we address it?

Some questions can be and have already been answered. However, much remains to be seen, and there is still a lack of comprehensive analyses of the intersections between dispute resolution and technology. The role of scientific examination is first and foremost to formulate necessary questions instead of simply providing answers to preset questions that reflect the threat and promise of technology.

Therefore, the purpose of this study is threefold. Firstly, I examine the interfaces between dispute resolution and technology and claim that these intersections give rise to a new emerging subfield of *dispute resolution and technology*.[3] This new field includes components of several fields of law as

protection. Another issue is that the pace of technological innovation often exceeds that of legislation creating new challenges for the legal system. Frank Fechner, *Medienrecht* (12th edn, Mohr Siebeck 2011) 346; Greg Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 71–73.

3. When referring to the emerging subfield, I italicise the term *dispute resolution and technology* to avoid confusion with the separate concepts of dispute resolution and technology. In the latter (non-italicised) meaning both terms are self-contained.

well as interdisciplinary elements from computer science and social sciences.

Secondly, these interfaces have resulted in new applications of technology both in the courtroom and outside of it. Within the courtroom, technology has been annexed to existing court practices from e-filing and obtaining evidence by electronic means to case management. Out of the courts, private conflict management has gained more ground by implementing automated procedures to resolve e-commerce disputes in online dispute resolution (ODR). This two-pronged development raises the issue about the relationship between public and private dispute resolution. The issue becomes more pronounced when the use of force in the form of enforcement is applied. Private forms of enforcement contest the state monopoly on violence, which could in turn generate a justificatory crisis. Technology further intensifies this age-old discrepancy, and it becomes visible especially in the resolution and enforcement of cross-border conflicts. An analysis of this development forms the bulk of this study.

Thirdly, this juncture of private and public dispute resolution is further escalated as technology sets the stage for re-evaluating the future of dispute resolution. Such a re-evaluation goes beyond a descriptive analysis and asks how we could justify both private and public forms of dispute resolution on same grounds. Predicting the future of dispute resolution is a venture into science fiction. However, the questions that precede such predictions are quite concrete. A lot can be said on the basis of current developments of dispute resolution technology, and this paves the way for fiction and innovation.

Next, I will briefly describe the three interfaces of dispute resolution and technology. After that I proceed to depicting concrete examples of how technology changes different aspects of dispute resolution.

1.2 THREE INTERFACES OF DISPUTE RESOLUTION AND TECHNOLOGY

Dispute resolution intersects with technology at three connecting points: when technology is used in the court proceedings, when technology is used by private providers of dispute resolution, and in disputes about technology. Although these three categories are not necessarily completely separate or clearly defined, they are seldom discussed together. To provide the reader

with an overview, I briefly describe these three intersections that form the context of this study.

Courtroom Technology

The first interface between dispute resolution and technology takes place within the courts and is sometimes referred to as courtroom technology. Bringing technology to the courts includes videoconferencing technology, case management systems, service of documents through e-mails, access to legal information through electronic means, automated document generation, and e-archiving, to name but a few. Most of these applications of dispute resolution and technology depend on legislative approval before implementation. These technological applications preserve their close connection with the nation-state, as they are publicly funded and incorporated into the court system.[4] The role of technology is mainly auxiliary in courtroom technology, as it is used to facilitate the adjudicative procedure, although exceptions do exist.

From the legislators' perspective, technology might provide a variety of effective measures to combat the shortcomings of national court systems, such as inefficiency, time and costs.[5] Implementing technology might seem especially tempting as one-time investments and relatively low maintenance costs may permanently reduce labour costs.[6]

4. Fredric I Lederer, 'Wired, What We Have Learned About Courtroom Technology' (2010) 24 ABA Criminal Justice 18; Fredric I Lederer, 'Technology-Augmented Courtrooms -- Progress Amid a Few Complications, or the Problematic Interrelationship Between Court and Counsel' (2005) 60 NYU Annual Survey of American Law 675; Fredric I Lederer, 'The Courtroom 21 Project: Creating the Courtroom of the Twenty-First Century' (2004) 43 ABA Judges' Journal 39; Karim Benyekhlef, Emmanuelle Amar and Valentin Callipel, 'ICT-Driven Strategies for Reforming Access to Justice Mechanisms in Developing Countries' (2015) 6 The World Bank Legal Review 325; For a general overview of implementing technology to the law of evidence see David Wotherspoon and Alex Cameron, *Electronic Evidence and E-Discovery* (Lexis Nexis Canada 2010); Vincent Gautrais, *Preuve Technologique* (Lexis Nexis 2014); On the ramifications of technology to courts and judicial ethics, see Karen Eltis, *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Irwin Law 2012).

5. In Finland, bringing technology to courtrooms has been considered to "increase the attractiveness of public courts as a venue for conflict management". See the statement of the Ministry of Justice's committee for the development of the court system 'Tuomioistuinlaitoksen kehittämiskomitean mietintö' (Ministry of Justice of Finland 2003) OMKM 2003:3 203–206 <http://urn.fi/URN:ISBN:952-466-132-2> accessed 27 June 2016. Technology has also been considered to have a positive impact on legal fees and handling times. It should be noted that practical experiences from the US are not directly comparable with the presumed results of the Finnish or Nordic procedural system because of the differences in legal culture.

6. However, the Nordic discussion has adopted a cautious stance towards adopting new technology, as courtroom technology might hinder the quality of litigation. See e.g., Jyrki Virolainen,

It should be noted that issues related to technology-enhanced trials are extensively regulated and abide to national procedural rules. As it is, the public court system looks towards procedural jurisprudence to tackle technology-related issues of interpretation, and jurisprudence may deliver some insight by applying the methodology of legal dogmatics. Much of these interpretative problems can be answered by *ex analogia* interpretation of the existing provisions. For example, privacy of e-mail correspondence could be compared with traditional letters by way of analogy. Another example of analogy is comparing presence via videoconference to actual presence in the courtroom.

Also, the intersection of courtroom technology is often designed to serve the needs of national courts and the legal system of a specific country. Thus, the applications of courtroom technology are not necessarily targeted to the needs of disputants outside the national borders engaged in cross-border disputes. However, some cross-border instruments do exist. For example, the EU's Evidence Regulation encourages the use of videoconference when evidence is obtained from another Member State.[7]

Online Dispute Resolution

The second interface between dispute resolution and technology consists of private conflict management augmented by technology, often addressed as online dispute resolution. ODR has been considered an answer to the demand for efficient redress mechanisms for online disputes that would otherwise be left outside the courts due to the low value of the claim or the difficulties of cross-border situations.[8] Thus, ODR is designed for low intensity

'Periaatteet rosessioikeudessa' in Dan Frände (ed), *Prosessioikeus* (4th edn, WSOYPro 2012) 181; Laura Ervo, *Oikeudenmukainen Oikeudenkäynti* (WSOY 2005) 153; Eva Smith, 'Mundtlighed Ved Domstol I Danmark' in Eric Bylander and Per Henrik Lindholm (eds), *Muntlighet vid domstol i Norden. Ett rättsvetenskaplig, rättspsykologisk och rättsetnologisk studie av presentationsformernas betydelse vid domstol i Norden.* (Iustus Förlag 2005) 72–74.

7. The Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters 2001; For an overview on the application of the Regulation, see Vesna Rijavec, Tomaž Keresteš and Tjaša Ivanc (eds), *Dimensions of Evidence in European Civil Procedure* (Kluwer Law International 2016) Also other cross-border procedural instruments have made the necessary changes to accommodate courtroom technology. E.g., the Hague Conference on Private International Law has examined the possibilities of videoconferencing for obtaining evidence. See L'obtention des preuves par liason video en vertu de la convention preuves de la Haye/ The Taking of Evidence by Video-Link under the Hague Evidence Convention, Preliminary Document No 6 of December 2008 for the attention of the Special Commission of February 2009 on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions.

8. For an overview on these challenges including jurisdiction and choice of law, see Dan Jerker

20 disputes[9] which arise from e-commerce or other online transaction and are resolved through the help of technology, often in completely automated procedures and according to terms of user agreement.[10] Hence, the emergence of ODR is closely linked with the prolific rise of a new dispute category, i.e. Internet disputes.

ODR was first introduced and recognised as a dispute resolution model in the beginning of the 2000s.[11] Although there is no uniform definition, ODR is seen as private dispute resolution based on the consent of the parties in the same manner as alternative dispute resolution (ADR) models.[12] Because of this close relation to ADR and its criticism of the existing courtroom practices, ODR is often examined as part of ADR doctrine. Although originally meant

Svantesson, *Private International Law and the Internet* (Kluwer Law International 2007) 1–10.

9. In literature, e-commerce disputes have usually been described as low value, high volume. On ambiguity of this terminology, see Karim Benyekhlef and Nicolas Vermeys, ''Low-Value, High-Volume' Disputes: Defining the Indefinable' <http://www.slaw.ca/2014/01/29/low-value-high-volume-disputes-defining-the-indefinable> accessed 4 January 2016; However, this characterization is very much entwined with e-commerce and may overlook other applications of dispute resolution and technology. The Laboratory of Cyberjustice of University of Montreal uses the terminology of low intensity disputes to describe the characteristics of disputes that would be suitable for ODR. This terminology has the advantage of expressing the relatively low and simple interests of the parties without labelling them simply as e-commerce disputes. See e.g., Karim Benyekhlef, Valentin Callipel and Emmanuelle Amar, 'La Médiation En Ligne Pour Les Conflits de Basse Intensité' (2015) 135 Gazette du Palais 17. In the following, I adopt this terminology of Benyekhlef et al. to emphasise my view that the intensity of the dispute rather than its qualification is decisive to its applicability for ODR.

10. For fictional ODR samples in the literature see Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 26–28; Arno R Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010) 91–145.

11. The first articles on ODR were published by Ethan Katsh as early as 1996. See Ethan M Katsh, 'Dispute Resolution in Cyberspace' (1996) 28 Connecticut Law Review 953; Ethan M Katsh, 'The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace' (1996); Katsh and Rifkin published the first monograph on ODR in 2001 focusing on analysing the role of technology as the fourth party of dispute resolution proceedings. Ethan M Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey Bass 2001).

12. Rule, for example, points out that the main difference between ADR and ODR lies in the role of technology, which gives the neutral third party greater control of the process. See Colin Rule, *Online Dispute Resolution for Business. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass 2002) 45; Vilalta considers that ODR has its connection points to ADR but it is also a unique phenomenon. Aura Esther Vilalta, 'ODR and E-Commerce' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012) 115; Hörnle sees ODR as an out-of-court resolution in the spirit of ADR. See Hörnle (n 10) 75; On defining ODR see also Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 53; Although technology-augmented litigation and ODR are often conceptually separated, lately some authors have suggested a joint approach. See Lodder and Zeleznikow (n 10) 170.

only for online disputes, the scope of ODR has later expanded to include also disputes that have risen in the offline context.[13] ODR can be provided by several different intermediaries, such as e-commerce platforms, private ODR providers, credit card companies, or private actors performing public functions, as is the case with ICANN.[14]

It follows from ODR's nature as private dispute resolution that its development has not been burdened by slow legislative procedures and evaluations of pros and cons to the same extent as innovations of courtroom technology; neither is ODR bound to due process criteria like the courts, which raises questions about the quality of such services. The role of technology in ODR is often more pronounced than in courtroom technology, especially in completely automated procedures.

However, regulatory efforts are slowly coming to grips with ODR. Transnational intergovernmental organisations have set up two significant projects in order to regulate ODR and to assure its quality. In the EU, the ODR Regulation and ADR Directive established a union-wide ODR platform with automated translation services.[15] The Directive obligates the Member States to provide high quality ADR services but leaves the choice of methods to national discretion. The Regulation establishes a platform through which individual disputes are directed to applicable national ADR entities. The Commission's ODR platform was launched in January 2016. The EU's framework is focused on non-binding ODR. Also, the United Nations Commission on International Trade Law (UNCITRAL) has attempted to draft uniform procedural

13. This would mean that online tools would be applied to all suitable disputes regardless of their origin. Thus, the context of the dispute would not define its resolution. See Ethan Katsh and Leah Wing, 'Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future' (2006) 38 University of Toledo Law Review 19, 27.
14. ICANN (Internet Registry for Assigned Names and Numbers) is responsible for the distribution of unique Internet Protocol (IP) address spaces which are an essential part of the structure and functioning of the Internet. ICANN has established its own dispute resolution model called Uniform Dispute Resolution Policy (UDRP) in co-operation with World Intellectual Property Organization (WIPO). ICANN gives a binding decision in domain name disputes which is also directly enforced by ICANN. Because in the end, ICANN is a private organisation entrusted with responsibilities of public interest, it has been criticised for its lack of adequate accountability mechanisms. See Rudolf W Rijgersberg, *The State of Interdependence: Globalization, Internet and Constitutional Governance* (TMC Asser Press 2010) 69–, 217.
15. Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) 2013; Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) 2013.

rules for both binding and non-binding ODR. However, after a relative standstill in 2015 the working group has produced a non-binding document of technical notes on ODR. The document will most probably be finalised and adopted by UNCITRAL's commission in June 2016.[16]

Interestingly enough, ODR has never actually lived up to the expectations regarding its popularity.[17] A single triumph has been named and referenced over and over again, namely eBay, which solves sixty million e-commerce cases per year through its Resolution Center.[18] However, even eBay redesigned its ODR service as a money-back guarantee at some point in December 2014 or January 2015. ODR faces some difficulties, as it has been unable to meet the high expectations placed on it in the 1990s and early 2000s.[19] Many ODR providers have turned towards the public sector in the hopes of investments, and it remains to be seen how the legislative work of the EU

16. The objective of UNCITRAL's working group III has changed since it started working on ODR in 2010. One of the stumbling blocks has been the fundamental difference between different jurisdictions regarding the acceptance of binding pre-dispute arbitral clauses in consumer cases and the differences of opinion whether such arbitration can provide sufficient consumer protection. In July 2015, the Commission further specified the working group's mandate to focus on the "elements of an ODR process, on which elements the Working Group had previously found consensus". The commission decided that the working group will be continued until summer 2016, after which it will be terminated regardless of the outcome. See 'Report of Working Group III (Online Dispute Resolution) on the Work of Its Thirty-Second Session (Vienna, 30 November-4 December 2015)' (UNCITRAL, Working Group III 2015) A/CN.9/862 § 5. I discuss UNCITRAL's work in more detail in section 6.2.2. The final document of the working group took the form of non-binding technical notes and their exact meaning remains to be seen after their adoption. For the technical notes, see 'Online Dispute Resolution for Cross-Border Electronic Commerce Transactions. Technical Notes on Online Dispute Resolution' (UNCITRAL, Working Group III 2016) A/CN.9/888 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/021/29/PDF/V1602129.pdf?OpenElement> accessed 30 May 2016.

17. Tania Sourdin and Chinthaka Liyanage, 'The Promise and Reality of Online Dispute Resolution in Australia' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012) 471–472; Arthur Pearlstein, Bryan Hanson and Noam Ebner, 'ODR in North America' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012); Pearlstein et al.'s and Pblet and Ross's empirical findings on the status of ODR in North America and Europe shed light on the current situation. See also Marta Poblet and Graham Ross, 'ODR in Europe' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012).

18. E.g. Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), 'Introduction', *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012) 2.

19. E.g., Benyekhlef and Vermeys state that 'true ODR … is having trouble to say the least'. See Karim Benyekhlef and Nicolas Vermeys, 'The End of ODR' <http://www.slaw.ca/2015/10/01/the-end-of-odr/> accessed 1 August 2016.

and UNCITRAL will affect the dispute resolution environment. Nonetheless, despite disappointments and new promises, the emergence of ODR signifies a change in our understanding of dispute resolution – the scale of which is still unknown.

Technology Disputes

In addition to courtroom technology and ODR, a third interface between technology and dispute resolution can be recognised, namely disputes over technology. Some technology-specific procedural rules exist for resolution of disputes on technology. In this category, the technology aspect is interconnected with the material legal rules applicable to the subject in dispute, e.g. conflicts of patent law and utility model rights. In addition to these, disputes arising from contracts on the delivery of software systems are also typical technology disputes.

Special procedural rules have been developed for the resolution of technology disputes. For example, the EU has enacted a directive on the enforcement of intellectual property rights. The directive includes rules for intermediaries such as Internet service providers, precautionary measures and injunctions.[20] Although such procedural rules are interesting, this third intersection is more focused on taking into consideration the specific needs of these disputes than on the changing forms of dispute resolution. In other words, this interface is more distanced from the core of the emerging field of *dispute resolution and technology*, and examining it together with courtroom technology and ODR would not bring any significant additional value but might lead to fragmentation of analysis instead.

Hence, I focus on the first two interfaces of courtroom technology and ODR and exclude the third interface of technology disputes from the scope of this study.

After establishing this overall context, I proceed to concrete examples of technology within dispute resolution. These examples shed light on the first two interfaces of courtroom technology and ODR. I concretise the interfaces by depicting examples of enforcement and how technology impacts this fundamental phase of dispute resolution. Through these examples I make way for the overarching research question of this study, i.e. how technology changes the justification of dispute resolution.

20. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

1.3 TECHNOLOGY AND ENFORCEMENT

The implementation of technology in dispute resolution has taken different routes in the public and private sectors, answering to the different needs of their respective environments. However, both the private and public schemes of dispute resolution share the overarching need to provide a mechanism for executing the decisions rendered in the resolution procedure. Often enough voluntary compliance may frustrate the need for any further enforcement. But regardless of this, the functioning of markets presupposes a functioning model of governance complete with a mechanism for coercion, either private or public.[21] In addition to this general level, the need for enforcement becomes tangible when the threat of coercion does not produce compliance on its own.[22]

The relevance of enforcement for dispute resolution cannot be reduced to its practical importance. On a different note, we could also claim that law is inherently a repressive order exercised through the threat of violence, which transforms the enforcement necessary for upholding the authority of law. This violence of law is more difficult to hide in enforcement, which adds a certain depth to its examination. Before discussing this further, an overview of enforcement and its alternatives is needed.

In this section, I describe seven examples of encouraging – and even forcing – compliance in private and public models of dispute resolution. By these examples, I elaborate the problematic nature of enforcement and how new forms of forcing compliance overlap, co-operate and challenge the old ones. Some of these new enforcement mechanisms enabled by technology disturb the earlier balance between private and public governance.

This introduction, in turn, breaks new ground concerning the justificatory crisis rising from the continuous contestations of the state's monopoly on violence, which will be discussed in the next section. At this point it suffices to state that the privatisation of enforcement contradicts the state's monopoly to use coercion, leading to a crisis of traditional justificatory narratives.

21. Avinash K Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Princeton University Press 2004) 1–4.

22. As Cortés points out, 'consumer protection in e-commerce is meaningless unless effective enforcement mechanisms are provided.' Cortés (n 12) 35.

Dispute Resolution and Enforcement through Public Courts

The first example describes how an unpaid debt can be enforced through the public courts.

Helsinki-based artist Violetta has bought a used hi-fi amplifier from Bob's company Sound Waves, which is located in Berlin, Germany. However, after receiving the item Violetta has refused to pay the agreed price of 1,000 €. According to Violetta, there is a scratch on the amplifier that she was not aware of at the time of purchase. As they are unable to reach a settlement among themselves, Bob files a claim on behalf of his company at the district court in Helsinki. The court assesses that the relatively small scratch does not affect the price and in its enforceable judgment, obligates Violetta to make a full payment plus interest to Bob. As Violetta refuses to comply, Bob contacts the Finnish enforcement authorities that collect the debt from Violetta's salary and transfer the whole sum to Bob.

In this simple example Bob relies on the public court system to enforce his legal position. The procedure has two elements: the adjudicative process that ends when the judgment is rendered, and the additional debt recovery procedure. As both phases take place within the same public system, the transition from adjudication to enforcement is straightforward. Also, both parties may trust the court to follow the due process criteria set in the national legislation.

The downside is that in the worst-case scenario Bob might have to wait for years to finally receive the payment, and depending on Violetta's contestation, the adjudicative process might be expensive due to court fees and legal costs of using an attorney. In addition, Bob has taken the matter to a foreign court at Violetta's place of residence, which adds to the complexity of the matter on Bob's side. In reality, these obstacles might cause Bob to re-evaluate his situation or even decide not to pursue the matter anymore.[23] On the other hand, the well-functioning interface between the adjudication and the enforcement might increase the desirability of the public courts. Further, the implementation of technology in different stages of

23. The complexity, cost and time of cross-border court proceedings might prevent especially consumers from pursuing their rights, which has been acknowledged by the EU. These difficulties of public redress mechanisms are partly the reason behind the EU's regulatory project on ODR. The objective is to provide more efficient means for redress through non-binding ADR and the ODR platform. See 'Executive Summary of the Impact Assessment on Directive on Consumer ADR and Regulation on Consumer ODR' (European Commission 2011) SEC (2011) 1409 final 1; see also Immaculada Barral-Viñals, 'Consumer Trust and Business Benefits with ODR' in Colin Adamson (ed), *Online Dispute Resolution: An International Business Approach to Solving Consumer Complaints* (Author House 2015).

26 adjudication and debt recovery might reduce the overall expenses of money and time.

Arbitration and Enforcement through Public Courts

The experience with Violetta still fresh in his mind, Bob agrees to install a complete sound system to club owner Jacqueline's newest club The Peekaboo in Barcelona. A price of 100,000 € is agreed upon and on Jacqueline's insistence an arbitration clause is included in the contract between her and Bob's companies. There is, however, a problem with the installation and the sound system does not match the technical specifications agreed upon in the contract. Bob refuses to compensate the fault and Jacqueline takes the matter to an arbitration procedure according to the arbitration clause. After a relatively quick procedure, the arbitral tribunal decides in favour of Jacqueline and obligates Bob to pay her the compensation of 30,000 €.

When Bob refuses to pay, Jacqueline contacts the district court in Berlin where Bob's company is still located. She asks the court to enforce the arbitral award in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The German court recognises the award in a summary process and after this, Jacqueline has the award enforced through the public enforcement authorities.

In this example, the dispute resolution is provided by private arbitration tribunal and the enforcement by the public system. This follows from the rationale of the New York convention that entrusts the enforcement of private dispute resolution to the contracting states in accordance with the rules set out in the convention instrument. By choosing arbitration over public courts, Jacqueline saves time, although the costs of arbitration might exceed the legal costs in courts. The convention provides a well-functioning interface to the public enforcement mechanism that limits the time and expense of the recognition procedure.[24] Also, the due process criteria of the

24. The success of the New York convention has also been emphasised within the EU. Because of this success and worries from stakeholders, provisions regarding arbitration were not included in the recast Brussels I Regulation that governs the circulation of court judgments within the Member States. See preamble (12) of the Regulation (EU) No 1215/2012 on the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) 2012. However, it is possible that the decision is set aside in the recognition procedure. The New York Convention stipulates the reasons based on which the Contracting States may refuse the recognition of an award. On due process as a ground for denying recognition, see e.g., Matti Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd edn, Oxford University Press 2010) 1.

arbitration procedure are evaluated by the public court before access to public enforcement is granted, meaning that the final say about the use of force still resides within the public sphere. This means that the parties may place their trust simultaneously in the expertise of the arbitration tribunal and the quality of the recognition procedure and debt recovery of public authorities.

Nonetheless, full-scale arbitration is often too expensive to provide a solution for low intensity disputes often characterised by their low value.[25]

Coaxing Compliance Online without Enforcement

Montrealer Matthieu browses around an e-commerce site in the hopes of finding a modular synthesizer for the right price. He finds Bob's company Sound Waves and is about to place an order before noticing that the products are shipped from Germany. He decides to go through user reviews about other buyers' experiences with Bob. Seeing that Bob has several reviews complaining about damage to the products during delivery, Matthieu decides to buy the synthesizer from another seller.

There is no element of dispute resolution or enforcement in this example. Instead, this scenario portrays an important aspect of e-commerce that has developed at least partly due to the lack of sufficient mechanisms for redress. As trustworthy redress mechanisms might not be available, consumers' trust in the reliability of e-commerce is upheld by other means of directing behaviour. Here, the e-commerce site adopts the perspective of conflict prevention as it rewards appropriate behaviour by publishing positive reviews and sanctions unwished behaviour by negative reviews and other possible means, e.g. banning unwanted users from the site.[26]

25. This is not necessarily the case, however, regarding online arbitration which could lower the expenses while maintaining the interface with public enforcement. The question whether ODR could be enforced as online arbitration is still unanswered. This discussion has been going on in UNCITRAL's working group III. For an overview, see 'Report of Working Group III (Online Dispute Resolution) on the Work of Its Thirtieth Session (Vienna, 20-24 October 2014)' (UNCITRAL, Working Group III 2014) A/CN.9&827 § 33–37, 47–52. The issue of enforcing ODR decisions as arbitral awards is not a simple one. If the decision is made for ODR as arbitration, potentially several providers would rename their services without making other changes, e.g. without incorporating the due process criteria stipulated by the New York Convention. This could increase the caseload at public courts and lead to awards being set aside on procedural grounds. Further, enforcing ODR as arbitration does not remove the issue of court costs which might still prove to be too high for low intensity disputes.

26. A different issue is the users' possibilities of contesting such sanction mechanisms. For a short introduction to an ODR mechanism intended for disputes on fraudulent user reviews, see e.g. Katherine G Newcomer, 'Online Dispute Resolution Decision Making – A NetNeutrals

28 Although this conflict prevention does not address the needs of an already escalated dispute, such functionalities encourage desired behaviour in the future. Also, if there is an ODR service incorporated into the site, a user's non-compliance with the ODR decisions can be listed publicly to encourage future compliance and transparency. However, user review systems can also be used fraudulently.

Dispute Resolution and Enforcement through Chargebacks

Dutch consumer Pierre orders a sequencer online from Bob's company and makes the payment of 400 € with his credit card. However, the product never arrives and Pierre is not able to discuss a settlement with Bob. Pierre then contacts the credit card company that has issued his card and asks them to reverse the payment due to non-delivery. The credit card company trusts Pierre's description and issues a chargeback that reimburses Pierre's payment.

In this example dispute resolution and enforcement are organised by a private third party, the credit card company. The system is funded by payments made by the sellers to the credit card company and the payment sum varies from seller to seller depending on how often they have been involved in chargeback procedures. Thus, in addition to providing a redress mechanism, chargebacks enable steering the future behaviour of sellers.

However, chargeback procedures only enable the reversal of the payment made but they lack any compensation for damage. Further, their scope of application is limited to specific situations, and consumers are not necessarily aware of the existence of chargeback procedures.[27] The latter issue, however, could be improved by raising consumers' awareness. Should the credit card

Practitioner's View' in Colin Adamson (ed), *Online Dispute Resolution: An International Business Approach to Solving Consumer Complaints* (Author House 2015).

27. The legal basis for requesting a chargeback can be found in EU directives or in the operational rules of credit card companies. Directives authorise the request for chargeback in cases where the transaction was not authorised by the consumer, the trader does not respect the consumers' rights, or in the case of bankruptcy. See Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC 2007; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC 2008. Operational rules provided by MasterCard and Visa enable chargebacks in cases of non-delivery and non-conformity. See 'Chargeback in the EU/EEA. A Solution to Get Your Money Back When a Trader Does Not Respect Your Consumer Rights' (The European Consumer Centre's Network ECC-Net (undated)) <http://ec.europa.eu/consumers/ecc/docs/chargeback_report_en.pdf> (accessed 25 November 2015).

company refuse the chargeback, the consumer needs to turn to out-of-court redress services dealing with financial services.[28]

ODR and Private Enforcement on e-Commerce Platforms

The German sound system expert Bob orders some wires for his home-built modular synthesizer online from an US-based company, Oscillating Vibes. The wires, although functioning, are not to Bob's liking for they are pink and not black as he supposed them to be based on a listing photo. When no settlement is reached between Bob and Oscillating Vibes and the company refuses to refund, Bob decides to settle the issue through the ODR service of the e-commerce site. After photos provided by Bob are compared to the listing photos, the e-commerce site decides to refund the cost of the wires and the shipping fees to Bob. Based on the user agreement, Oscillating Vibes is obligated to reimburse the amount to the e-commerce site and, if necessary, the sum is then automatically deducted from the company's account on the site.

In this example, dispute resolution and enforcement are both provided by the e-commerce site. Both the resolution procedure and the enforcement phase are conducted online with the help of technology at the same e-commerce platform where the disputed transaction took place. This ensures efficient and quick redress at a low cost. However, this option requires the combination of an e-commerce site and a payment platform, which means that such private schemes are feasible mostly to market leaders, such as eBay and PayPal. The mandate to draw funds from the seller's bank account is based on the user agreement. However, there is no certainty or public control as to whether the private provider follows the minimum criteria of due process or not.

Dispute Resolution and Direct Enforcement of ICANN

The Spanish club owner Jacqueline has recently gained some fame with her old band Black Vixens from Outer Space. A booking agency contacted Jacqueline and complained about not finding the band's home page although it had remained the same blackvixensfromouterspace.com for several years. Apparently Jacqueline had forgotten to renew the registration of the domain name. After this Jacqueline discovered that the domain name had already

28. There are instruments that can aid a consumer to take a chargeback dispute to an ADR scheme. For example, FIN-NET is a network of financial dispute resolution schemes that directs consumers to the correct authorities. See 'FIN-NET Financial Dispute Resolution Network' <http://ec.europa.eu/finance/fin-net/index_en.htm> accessed 11 January 2016.

been claimed by a dealer who then wanted to sell it back to the band for a profit.

Now Jacqueline wants to regain the ownership of the band's domain name and contacts ICANN (Internet Corporation for Assigned Names and Numbers) that governs the global domain name system. ICANN redirects Jacqueline's claim to an approved dispute resolution service provider who applies ICANN's specific policy for resolving domain name disputes, UDRP (Uniform Dispute Resolution Policy). As the decision is rendered in favour of Jacqueline's claim, ICANN executes the decision by registering the domain name to the domain name system.

In this example, the dispute resolution of a domain name dispute is entrusted to private providers and the decision is enforced by ICANN. No separate public enforcement is needed. Although the UDRP rules do not prevent parties from taking the dispute to court, it is unclear whether and how often court proceedings are initiated after the specialised process. Also, ICANN has been criticised for the lack of due process as well as for the non-existing monitoring of the private corporation's functions.[29]

G) Enforcement through Self-Executing Smart Contracts

The Finnish artist of our first example Violetta has composed a particularly interesting piece of experimental drone music. Alex from the UK is a music enthusiast and wants to buy Violetta's new piece for her electronic music collection. They agree to conclude the transaction by using a new technology, a platform for smart contracts built on the infrastructure of cryptocurrencies.[30] Alex drafts the contract programme and transfers money to it. The smart contract will automatically transfer the money to Violetta once the piece is downloaded to Alex's computer. The contract verifies that the download has taken place and completes the transaction without any further action from the parties.

In this example, there is no dispute resolution or enforcement as such,

29. Monika Zalnieriute and Thomas Schneider, 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values' (Council of Europe 2014) DGI (2014) 12 <http://www.coe.int/t/informationsociety/icann-and-human-rights.asp> (accessed 25 November 2015). See also Rijgersberg (n 14) 69–, 215; Elizabeth G Thornburg, 'Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process' (2002) 6 Computer Law Review and Technology Journal 89.

30. I discuss the example of using cryptocurrencies for self-enforcement later in section 9.2. See also Riikka Koulu, 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement' (2016) 13 SCRIPTed 40.

let alone a dispute. Neither does this scenario direct future behaviour of the parties or participants as was the case with example C), coaxing compliance through user reviews. However, there is an element of conflict prevention here, as the automated contract instrument does not enable withholding funds or other fraudulent behaviour. The example depicts a method of completing contracts that self-execute contractual obligations without relying on the parties to trust each other in order to do business. Trust is allocated to the technological infrastructure, not to the authority of the courts, the expertise of the arbitration tribunal or ICANN, nor to the binding or non-binding sanction mechanisms of e-commerce intermediaries. Although the challenges and potential of self-executing contracts deserve more thorough examination later on, at this point it suffices to draw attention to the private nature of this application of conflict prevention.

New Chapter in Private Governance?

As these seven examples depict, enforcement and its alternatives have become a multi-faceted phenomenon. Traditional models of enforcement through courts and arbitration proceedings co-exist with contractual models such as chargebacks and direct enforcement of e-commerce platforms. Distinctions between the original contract, contractual obligations, the resolution of a dispute rising from the transaction, and the enforcement of the decision reached in the dispute resolution are no longer definitive. The boundaries between dispute resolution and conflict prevention are dissolving. Also the demarcation between contractual arrangements and dispute resolution is becoming more ambiguous.

Chargebacks, private enforcement of e-commerce sites, direct enforcement of ICANN, and self-executing smart contracts all bypass the nation-state's monopoly on violence, as private or internal mechanisms of forcing compliance are sufficient by themselves and do not require an interface to public enforcement. At the same time, however, these models of enforcement challenge the state's traditional monopoly on violence. From this perspective, it is not relevant whether the expansion of private regimes to enforcement is a part of a deliberate neo liberal agenda,[31] or simply an organically evolved solution for situations where public governance models have not yet been able to provide enforcement measures.

31. For example, Lister et al. acknowledge the neo liberal agenda behind the promotion of ICTs both by state and corporate actors. Martin Lister and others, *New Media: A Critical Introduction* (2nd edn, Routledge 2009) 11.

32 Of course, private governance has existed before the emergence of the Internet. For instance, American legal scholar Lisa Bernstein has examined private regimes that predate the current technological development. She discusses examples of private ordering within the diamond and cotton industries which have both created their own systems of private law complete with institutions for dispute resolution and enforcement. Both of these industries rely on their own reputation-based private legal systems that are considered superior to the public legal system by the members of the industries.[32]

Countless other examples of past private regimes can be found in the medieval *lex mercatoria* with its market courts,[33] in the European trade companies exercising sovereign power in the colonies,[34] and in the Sicilian mafia,[35] among others. This is to say that the phenomenon of private governance is not new either within the legal system or outside of it.[36] Noted private enforcement has much in common with older models of private governance, as all of them answer to the need of governance in situations where public governance does not exist or otherwise does not act.

32. Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 Journal of Legal Studies 115; Lisa Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions' (2001) 99 Michigan Law Review 1724; for case studies of private governance from the perspective of economics, see Edward Peter Stringham, *Private Governance: Creating Order in Economic and Social Life* (Oxford University Press 2015); Dixit (n 21) 25–29; on the relationship between public policy and private governance, see Catherine E Rudder, 'Private Governance as Public Policy: A Paradigm Shift' (2008) 70 The Journal of Politics 899.

33. However, it is unclear how autonomous the medieval private regime actually was. See Gralf-Peter Calliess, 'Lex Mercatoria' ZenTra Working Paper in Transnational Studies No. 52 / 2015 <ssrn.com/abstract=2597583> accessed 20 August 2015.

34. For example, The Dutch East India Company was granted sovereign rule over Indonesia. See e.g., Wieze van Elderen, 'The Dutch East India Company' <http://european-heritage.org/netherlands/alkmaar/dutch-east-india-company> accessed 25 November 2015.

35. Diego Gambetta, *The Sicilian Mafia: The Business of Private Protection* (Harvard University Press 1993).

36. The emergence of private governance within the legal system, although not necessarily called governance, has received much attention in legal literature. The discussion is linked with the emergence of alternative dispute resolution, the decline of civil cases in the courts known as the vanishing trial phenomenon, and the apprehension about renewal of case law without precedents. These phenomena are discussed in the following chapters. For an overview on privatisation of justice, see e.g., Fabien Gélinas and others, *Foundations of Civil Justice: Toward a Value-Based Framework for Reform.* (Springer International Publishing 2015) 81–104; Tracy Walters McCormack, 'Privatizing the Justice System' (2006) 25 Review of Litigation 735; Trevor CW Farrow, 'Public Justice, Private Dispute Resolution and Democracy' in Ronalda Murphy and Patric A Molinari (eds), *Doing Justice: Dispute Resolution in the Courts and Beyond = Règlement des conflits: la justice n'appartient-elle qu'aux tribunaux? 2007* (Canadian Institute for the Administration of Justice/ Institut canadien d'administration de la justice 2007); for an overview on private governance from the perspective of economics, see Stringham (n 32).

However, there are differences between these old and new instances of private governance. Firstly, new models of private governance are no longer limited to offshore colonies or foreigners but are expanding to the core areas of sovereignty, to the nation-state's territorial jurisdiction, and to the monopoly on violence within its own borders. In other words, private enforcement is bringing new players to a field that previously has belonged mostly to public institutions. For low intensity disputes that do not pass the threshold of costs and time to access public courts, private ordering and enforcement is becoming the mainstream, if not the only, option. Also, private enforcement, as it employs use of coercion, goes beyond the earlier models of private alternative dispute resolution that rely on state enforcement when necessary. Thus, private forms of governance formulate policies for online transactions that are cross-border and global by definition, not limited to certain industries, and bypass the state's monopoly on violence.

Secondly, the mode of operation of this new private enforcement is more inclusive than earlier spheres of private governance. Private dispute resolution and enforcement is not limited to close-knit communities or self-regulating sector-specific industries that operate based on reputational sanctions. Earlier models of self-governance have emerged within relatively small homogeneous communities where sanctions effectively mean exclusion from the community and information about fraudulent behaviour flows efficiently within the network. But the private enforcement of e-commerce sites or the domain name system do not function in such small communities based on trust. They are not limited to professional practitioners within certain industries but encompass consumers and businesses that earlier had no entrance point to cross-border commerce. Further, it could be argued that the freedom of choice within these new private regimes is limited; participants can mostly choose whether to participate or not but have often restricted or non-existent possibilities to negotiate the terms of participation.[37]

Instead, e-commerce communities are not clearly defined or stable, the sanction mechanisms steer participants' trust to the intermediaries and not to the community,[38] and the distribution of information is at the discretion

37. It is possible to argue that this is also the case within reputation-based industry regimes. However, technology-enabled private regimes are potentially significantly more inclusive and extensive than small professional communities, though participants also shape the social norms and best practices in the latter.

38. Some applications of private enforcement go further than others. For example, the rationale behind cryptocurrencies was to form trustless public networks where transactions do not rely on the past or future behaviour of the parties or the authority of central banks or other

34 of intermediaries. In short, private enforcement is changing our understanding of who is entitled to use force, against whom, on which grounds, and how this coercion is monitored and justified.

1.4 TOWARDS A CRISIS OF JUSTIFICATORY NARRATIVES

The examples of the previous section depict how the use of force is no longer restricted to the public court system but is instead increasingly becoming a part of private dispute resolution. This development both empowers disputants and transfers responsibility for dispute resolution outside the public court system. Whereas arbitration still relies on the public system to enforce arbitral awards, other solutions are adopted to serve the needs of private dispute resolution and enforcement online. The development of technology has enabled new forms of private enforcement, and this use of force is seldom visible.

This development brings about a crisis of justifying law in a nation-state. By this I mean that the new irritant of technology has brought new phenomena such as private enforcement to the legal system, and the traditional justificatory narratives do not explain these phenomena in a sufficient manner. The result of this is that the narratives are losing part of their credibility and adaptability. In this meaning the crisis has a negative connotation. The justificatory crisis refers to uncertainty about how private enforcement should be conceptualised, which then causes disruptions in the legal system's normal functions. If the legal system does not find a way to react to the private use of coercion, the law's renewal comes under threat. However, a crisis should not be reduced only to its negative aspects. Instead, a crisis may also bring forward necessary changes and development that might have a positive impact.[39]

intermediaries. I discuss the architecture of cryptocurrencies in more detail in section 9.2.

39. The etymology of crisis comes from the Greek word *krisis*, which can be literally translated as 'judgment', 'result of a trial', 'selection'. See 'crisis (n.)' 'Online Etymology Dictionary' <http://www.etymonline.com/index.php?term=crisis> accessed 12 January 2015. Communication theorists Seeger, Sellnow and Ulmer define organisational crises as follows: 'specific, unexpected, and nonroutine events or series of events that [create] high levels of uncertainty and threat or perceived threat to an organization's high-priority goals'. Matthew W Seeger, Timothy L Sellnow and Robert R Ulmer, 'Communication, Organization, and Crisis' in Michael E Roloff (ed), *Communication Yearbook 21* (Routledge 1998) 233. Within the same context of crisis communication, Venette attaches an element of change into the definition: 'Thus, crisis is a process of transformation where the old system can no longer be maintained'. See Steven James Venette, 'Risk Communication in a High Reliability Organization: APHIS PPQ's Inclusion of Risk in Decision Making' (North Dakota State University 2003) 43. These definitions reflect the uncertainty

Hence, the claim I make on the emergence of justificatory crisis is descriptive by nature. Instead of claiming that we should change the existing justificatory narratives because of new technology, I understand the narratives to be changing as a result of new technology. However, there is a prescriptive element: it is necessary for the future coherence of the legal system that the disruption is resolved, the irritant neutralised, and the justification of coercion restored.

Although this tension between private and public conflict management has existed for quite some time – later on, I will present this tension as inherent to and even necessary for procedural argumentation – the emergence of technology has escalated this tension into a discrepancy. Technology has transformative power, and if left unaddressed, the implementation of technology in dispute resolution could have serious implications, as the invisible use of force would not be predictable for the legal system.

The changes in enforcement brought on by technology call for a reaction within the legal system. The legal community should take a decisive stance whether private use of coercion is acceptable or not and whether it should be regulated in more detail or not. If the transformation of enforcement is not acknowledged and private enforcement is not absorbed into the legal system, the justificatory crisis deepens. In order to answer this challenge imposed by private enforcement, we first need to understand how public coercion is rendered acceptable, in other words how it is justified, and then evaluate whether the same applies to private coercion. The starting point is that law shows itself as violence in enforcement and this violence needs to be justified. The overarching research question of this study is: *how does implementing technology to dispute resolution challenge the justification of law as a legitimised mode of violence?*

Before answering such an abstract research question it is necessary to examine 1) how we should understand technology in the context of dispute resolution, and 2) how technology changes our perception of dispute resolution. Answers to the first of these preliminary questions are sought from Marshall McLuhan's technological determinism, which highlights the disruptiveness of technology, and Raymond Williams's social construction of technology, which places emphasis on the social element of using

and element of change inherent in crises, although they deal with a different context than the legal system. Hence, they provide a sufficient starting point for the research question in hand. I return to the description of the justificatory crisis and deal with it in more detail in chapter 4.

 technology. In addition to these, I discuss the agency of technology in the spirit of Friedrich Kittler's work on media theory.

The second preliminary question is answered by discussing the converging models of dispute resolution. In this discussion, I suggest abandoning the doctrinal distinction between courtroom technology and ODR. Implementing technology brings public and private dispute resolution closer to each other in many aspects, even to the point of convergence. Thus, it dilutes the doctrinal borders between different ideologies of dispute resolution. In other words, technology adopted in both public and private forms of dispute resolution and democratisation of coercion are, in a way, crossing the gap between adjudication and ADR. Courtroom technology and ODR have a connection point in technology, unlike their predecessors. The emerging field of *dispute resolution and technology* is still in its pre-paradigmatic phase, trying to create general principles and legal conceptualisations which would give it a distinct identity as a legal field. I hope that this study partly contributes to this objective. After setting the stage with these two preliminary observations, I proceed to evaluate the issue of justification.

Justification of coercion is not straightforward. To address the issue, it is necessary to recognise the argumentation that is used within the legal system to justify different forms of dispute resolution and enforcement, and after these structures of argumentation have been rendered visible, compare them to the challenge of technology and that of private enforcement. I presuppose that private dispute resolution and enforcement needs to be justified based on the same criteria as public use of force due to the before-mentioned growing convergence caused by technology.

I approach the issue of justification by recognising three narratives that are employed to justify the use of force in dispute resolution – sovereignty, private autonomy and access to justice. These justificatory explanations are not exclusionary but instead overlap and are interconnected in several ways. In addition, the preferred justificatory model has varied in different times, societies and circumstances. It follows from this that the picture I am painting is a freeze-frame of workings of justification, a theoretical simplification aimed at bringing the justificatory narratives out in the open instead of hiding them behind the façade of doctrinal differences and legal dogmatics. These narratives illustrate that introducing technology into dispute resolution influences the ways in which law functions and the ways in

which the law sets its own boundaries. Technology has implications for the fundamental justification of state intervention in private conflicts as well as for the argumentative role granted to private autonomy and to access to justice.

The first justificatory narrative uses the concept of *sovereignty* to explain state interests in dispute resolution and how justification is created, reinterpreted and grounded in the changing environment of dispute resolution. As a source of justification, sovereignty renders a decision enforceable when it is reached in a public trial. This first narrative interconnects with larger social and legal changes often described through legal pluralism and increasing legal regulation.[40] In traditional procedural doctrine, state intervention is executed through adopting a state monopoly on dispute resolution as a theoretical starting point. Thus, sovereignty plays a significant role as a justificatory principle in this narrative. However, sovereignty, formulated as the state monopoly on conflict management, brings the political ideal and agenda of the modern nation-state into dispute resolution.[41]

The second narrative explores how *consent* is seen as a source of justification in procedural law. Although sovereignty has been the main justification basis for the state monopoly of dispute resolution since the formation of the modern nation-state through the Peace Treaty of Westphalia in 1648, state monopoly accepts and gives protection to the parties' agreement in litigation. Agreement, i.e. reciprocal consent, became prominent as a justificatory model after ADR ideology was introduced in the 1970s. An example of consent as the source of justification can be found in arbitral clauses that transfer jurisdiction from public courts to private arbitration tribunals. This emphasis on mutual agreement as a source of justification has partly challenged the old tradition of founding legitimacy on sovereignty. Current forms of private governance further challenge the state's monopoly on dispute resolution, and question the role of sovereignty as a source of justification. Still, the consent of the parties as a justificatory narrative conveys the rationality of contractual freedom and classic liberalism to dispute resolution.

40. On pluralism e.g., John Griffiths, 'What Is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1; Surya Prakash Sinha, 'Legal Polycentricity' in Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth 1995) 31–; Günther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 Cardozo Law Review 1443.
41. Similarly, on the conceptual dominance of the nation-state within the legal system, see Günther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Günther Teubner (ed), *Global Law Without a State* (Dartmouth 1997).

The third narrative, *access to justice,* draws its justificatory force from the quality of the resolution procedure rather than the external authority of the state or the parties concerned. As a source of justification, it would imply that a violation of due process renders the procedure unjust, inexistent and empty. Or contrastingly, a high level of due process in the resolution process renders the decision enforceable. Such justificatory conceptualisations would also be compatible with the joint approach of viewing both state litigation and ODR simultaneously. As a justificatory narrative, access to justice is ethical communication about dispute resolution. In this sense, the concept demarcates what is considered to be due process and what is not. It draws its justificatory strength from the morality of the communication alongside of the authority of institutions like the European Court of Human Rights (ECtHR), which is established by sovereign states. As a source of justification, access to justice transforms the question of justification into the content of a single resolution procedure. On a general level, we would be left empty-handed with a bare reference to human rights whose content can only be decided *in casu*. If this is our best answer to the question of justification, what does it tell us about law?

Based on this examination, I propose the following: the existing justificatory narratives as they are do not provide an answer for justifying private enforcement. Hence, it is necessary to evaluate whether these narratives could be adapted to this task by reinterpretation. The hypothesis of this study follows from this: *the justificatory narratives used to demarcate the legally accepted use of force do not automatically apply to new, emerging forms of dispute resolution and enforcement enabled by technology, and a re-evaluation is called for in order to overcome the potential justificatory crisis.*

1.5 EXISTING RESEARCH AND THE SCOPE OF THIS STUDY

The objective of this study connects with several existing discussions on procedural law, legal theory and social understanding of technology, while the space available here means they cannot be discussed as extensively as they deserve. Some notes, however, are in order. In this section, I briefly describe the existing research on courtroom technology, ODR and private regimes, after which I position this study within the existing discussion.

Bringing technology into dispute resolution is a new phenomenon, which partly explains why the existing body of work is still relatively scarce and fragmented. Also, the existing research follows the doctrinal distinction between courtroom technology and ODR.

Two focal research projects focusing on courtroom technology can be mentioned. Several interesting studies on courtroom technology has been conducted by Professor Fredric Lederer, who also founded The Center for Legal and Court Technology.[42] The Cyberjustice Laboratory at the University of Montreal examines cyberjustice in general and the implementation of technology in courts in particular. The Laboratory also develops its own ODR platform called PARLe.[43] In addition to these, Dory Reiling's comprehensive doctoral dissertation in 2009 has shed light on the many ways in which IT technology may assist future judicial reforms.[44]

In addition to specialised research institutes and groups, concrete applications of courtroom technology are discussed in documents produced for national court reforms.[45] However, legislative projects and national studies tend to cater to the specific needs of national legal systems and seldom address the more abstract issues of privatisation of dispute resolution or issues of justification. Some technology-related topics such as videoconferencing technology are extensively discussed both in the literature and in practice,[46]

42. See e.g., Fredric I Lederer, 'The Road to the Virtual Courtroom? A Consideration of Today's – and Tomorrow's – High-Technology Courtrooms' (2009) 50 South Carolina Law Review 799; Lederer, 'Wired, What We Have Learned About Courtroom Technology' (n 4); Lederer, 'The Courtroom 21 Project: Creating the Courtroom of the Twenty-First Century' (n 4); Lederer, 'Technology-Augmented Courtrooms: Progress Amid a Few Complications, or the Problematic Interrelationship Between Court and Counsel' (n 4).

43. PARLe for 'Platform to Assist in the Resolution of Litigation electronically'/ '*Plateforme d'Aide au Règlement des Litiges en ligne*'. For scientific articles, see e.g., Benyekhlef, Amar and Callipel (n 4); Nicolas Vermeys, 'Fostering Trust and Confidence in Electronic Commerce: Will the EU-Canada Comprehensive Economic and Trade Agreement Really Effect Change?' (2015) 20 Lex Electronica 63; Karim Benyekhlef and Nicolas Vermeys, 'ODR and the Courts,' *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012); François Senécal and Karim Benyekhlef, 'Groundwork for Assessing the Legal Risks of Cyberjustice' (2010) 7 Canadian Journal of Law and Technology 41. In addition to scientific publications, the Cyberjustice Laboratory produces studies for the needs of the courts, working papers and maintains an online library on current publications concerning cyberjustice. See 'Cyberjustice Laboratory' <http://www.cyberjustice.ca/en> accessed 14 January 2016.

44. Dory Reiling, *Technology for Justice: How Information Technology Can Support Judicial Reform* (Leiden University Press 2009).

45. See e.g., the report of the Finnish Ministry of Justice concerning the pilot project of videoconferencing, 'Videoneuvottelupilotoinnin loppuraportti' (Ministry of Justice 2006) OMTH 2006:31.

46. For European studies, see e.g., Sabine Braun and Judith L Taylor (eds), *Videoconference*

40 although procedural law research on litigation has not addressed technological issues at large.

ODR has received much scholarly attention as well. Most of the early work on ODR originated in the US, where the concept was first established.[47] Early monographs on ODR focused mainly on defining ODR and its uses, adopting a role of advocacy.[48] The majority of research on ODR is published in journal articles, and there is no established common framework.[49] This combination of publishing strategy and lack of established framework has led to a strong emphasis on case examples and to the adoption of a practical approach.

However, some more comprehensive studies have emerged. The monograph of Kaufmann-Kohler and Schultz in 2004 and the compilation of articles edited by Abdel Wahab, Katsh and Rainey in 2012 have contributed to a more elaborate research agenda for ODR.[50] In addition to these, doctoral dissertations on ODR should be mentioned as valuable contributions to the body of research. In her 2009 monograph based on her dissertation, Julia Hörnle examines online arbitration for resolving Internet disputes. She ar-

and Remote Interpreting in Criminal Proceedings (Intersentia 2012); Ulf Andreas Nissen, *Die Online-Videokonferenz Im Zivilprozess* (Peter Lang GmbH 2004); for Canadian and US approaches see e.g. Amy Salyzyn, 'A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario' (2012) 50 Osgoode Hall Law Journal 429; Lorne Sossin and Zimra Yetnikoff, 'I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources' (2007) 25 Windsor Yearbook of Access to Justice 247; Meredith Rossner, David Tait and Jane Goodman-Delahunty, 'Students vs. Jurors: Responding to Enhanced Video Technology' (2014) 3 Laws 618; Anne Bowen Poulin, 'Criminial Justice and Videoconferencing Technology: The Remote Defendant' (2004) 78 Tulane Law Review 1089; Michael D Roth, 'Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth' (2000) 48 UCLA Law Review 187; Matthew J Tokson, 'Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?' (2007) 74 The University of Chicago Law Review 1581; for an Australian perspective, see Anne Wallace, '"Virtual Justice in the Bush": The Use of Court Technology in Remote and Regional Australia' (2008) 19 Journal of Law, Information, and Science 1; for a Finnish perspective, see Riikka Koulu, *Videoneuvottelu rajat ylittävässä oikeudenkäynnissä: sähköisen oikeudenkäynnin Nousu.* (University of Helsinki Conflict Management Institute 2010).

47. See e.g., Melissa Conley Tyler, '115 and Counting: The State of ODR in 2004', *Proceedings of the Third Annual Forum on Online Dispute Resolution* (2004) 3.

48. See e.g, Katsh and Rifkin (n 11); Rule (n 12).

49. The need for a more comprehensive theory formation is acknowledged within the field by Wing and Rainey. See Leah Wing and Daniel Rainey, 'Online Dispute Resolution and the Development of Theory' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012) 25.

50. Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004); Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012).

gues for a proportionate model of due process, in which public due process safeguards would be integrated into private dispute resolution procedures. To this end, she suggests that pre-trial arbitration clauses would be accepted also in consumer disputes but the finality of online arbitration would be balanced by imposing more far-reaching due process standards. Hörnle proposes detailed due process standards for online arbitration along with recommendations for their implementation.[51]

In 2010, Pablo Cortés published a monograph based on his 2008 dissertation. Cortés focuses on consumer disputes arising from e-commerce and discusses online mediation, online arbitration and online small claims processes in the EU context. He provides a detailed proposal for a European legal framework for consumer ODR. This framework should consist of regulation, increasing consumer awareness through accreditation and uniform trustmarks, enabling mandatory ODR clauses and establishing procedural legal standards.[52]

In the Nordic countries, ODR has been discussed in Susan Schiavetta's unpublished dissertation at the University of Oslo in 2008,[53] and Tapio Puurunen's dissertation at the University of Helsinki in 2005.[54]

Regardless of the growing body of research, enforcement in general and private enforcement in particular have mostly remained peripheral. Cortés touches upon self-enforcement mechanisms of ODR providers and lists the lack of enforcement as one of the possible impediments to the development of ODR. Also, he states that the public enforcement system should complement self-enforcement mechanisms.[55] Thornburg points out that ICANN has found a solution to the enforcement issue but this solution cannot be adopted in other forms of ODR.[56] Kaufmann-Kohler and Schultz, on the other hand, make a distinction between indirect and direct self-enforcement. In their definition, indirect self-enforcement refers to trustmarks, reputation

51. Hörnle (n 10) 217–219.
52. Cortés (n 12) 191–206.
53. Susan Schiavetta, 'Electronic Alternative Dispute Resolution - Increasing Access to Justice Via Procedural Protections' (University of Oslo 2008); See also Susan Schiavetta, 'The Relationship Between E-ADR and Article 6 of the European Convention of Human Rights Pursuant to the Case Law of the European Court of Human Rights' (2004) 2004 Journal of Information, Law & Technology <https://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/schiavetta/> accessed 13 January 2016.
54. Tapio Puurunen, 'Dispute Resolution in International Electronic Commerce' (University of Helsinki 2005).
55. Cortés (n 12) 82, 204.
56. Thornburg (n 29) 106.

42 systems, exclusion from the marketplace and other modes of directing behaviour, whereas direct self-enforcement includes escrows, chargebacks, insurance mechanisms and 'judgment funds' established by ODR providers or third parties.[57] They consider self-enforcement to be the best option for ODR decisions in case voluntary compliance is not an option.[58] Despite these concise remarks, there is no comprehensive examination of enforcement within the field of *dispute resolution and technology*.

Compared to the relative scarcity of research on dispute resolution and technology, justification has been, in one way or another, the object of study of most legal scholars. In the end, the very question of law's self-description is a question of justification and legitimacy. The emergence of private regimes has been discussed in legal theory by the German legal scholars Teubner and Fischer-Lescano,[59] and Calliess,[60] among others. I examine this discussion in more detail in section 4.1.1. Further research on private governance can be found in several fields of law as well as in economics, political science and social sciences. These discussions, although illuminating and relevant, provide limited support to the specific research objective of this study to examine technology in dispute resolution from a legal and theoretical standpoint.

There is a lack of theoretical research in procedural law on the implementation of technology in dispute resolution, which this study strives to fill. At this point, we lack the grammar to address volatile subjects such as justification within the framework of dispute resolution and technology. Moreover, finding a theoretically solid grammar is necessary for the development of concrete applications. Although theoretically oriented, this work circulates around a very concrete question, namely how to bring effective redress for cross-border, low intensity disputes.

As a part of the Canadian research initiative Towards Cyberjustice, Gélinas et al. suggest a new value-based framework for future research and reforms

57. Kaufmann-Kohler and Schultz (n 50) 223–233.
58. ibid 168.
59. Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen. Zur Fragmentierung Des Globalen Rechts* (Suhrkamp Verlag 2006); Gunther Teubner and Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999.
60. Gralf-Peter Calliess, 'Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law' (2002) 23 Zeitschrift für Rechtssoziologie 185; Gralf-Peter Calliess, 'Online Dispute Resolution: Consumer Redress in a Global Market Place' (2006) 7 German Law Journal 647; Gralf-Peter Calliess, Jörg Freiling and Moritz Renner, 'Law, the State, and Private Ordering: Evolutionary Explanations of Institutional Change' (2008) 9 German Law Journal 397; Gralf-Peter Calliess and Moritz Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22 Ratio Juris 260.

of civil justice. Through a critical review of the existing literature on civil justice, they substantiate that focusing simply on increasing efficiency leaves important questions of values unaddressed. According to Gélinas et al., "efficiency for the sake of freeing up resources should be instrumental to other ends, which need to be researched and identified, rather than an end in and of itself".[61] By addressing justification, this study contributes to the research agenda of identifying a value-based framework for future research and reforms.

It is especially fruitful to evaluate the implementation of technology in dispute resolution within the field of procedural law as the implementation affects the whole *modus operandi* of procedural law instead of just its research object. The objective of procedural law is to examine procedures, in other words, the structures that set frames in which the law functions. As such, these procedural structures become transparent only when material law is applied through them. When technology is implemented in these structures, it does not only affect the *result* of dispute resolution procedures, as would be the case if technology were implemented only in the material norms. Also, the consequences of implementing technology in the structures are not limited to application of singular procedural rules as would be the case if technology were simple enough to allow *ex analogia* interpretation. Instead, technology impacts *the way* in which these structures frame the space for material norms to function in.

In comparison, in other branches of law the implementation of modern information technology often influences the subject matter. For example, inheritance law doctrine might examine electronic estate, such as accounts in social media, e-mails or intangible objects. Labour law might discuss employees' use of ICT and employers' right to supervise or restrict such use. Criminal law doctrine might focus on cybercrime and developing means for effective cross-border criminal punishment. It could be claimed that these examples are more easily solved through analogy than structural changes. Then again, certain areas of immaterial property rights face similar issues as procedural law as technology changes the inner logic of legal doctrine, e.g. as the Internet creates the need to reassess traditional copyright law.[62] Based on this, certain branches of law, namely procedural law and copyright law, could be just the first milestones of many future collisions between law and

61. Gélinas and others (n 36) 105.

62. Lawrence Lessig, *Code Version 2.0* (Basic Books 2006) 169–199 <http://codev2.cc/download+remix/> accessed 15 January 2016.

technology. Thus, solutions developed under these legal doctrines might also have an impact in other fields of law.

The strength of this study lies within the combination of theory and substance. However, this combination also poses a challenge for the study. By applying the method of theoretically oriented reflexive jurisprudence to procedural law, it is not possible or even desirable to provide the reader with an extensive understanding of legal theory. This study focuses on a topic that cannot be pinpointed to a specific field and for this reason the examination necessarily balances at a crossroads. In order to grasp the phenomenon of justifying private enforcement, I focus on a relatively high level of abstraction. This choice excludes a systematic examination of national procedural systems as well as multilateral conventions from the scope of this study. I refer to national legislation and case law, and to convention-based normative regimes only when it is necessary for the objective of examining the justificatory narratives on a general level. This generalised approach precedes more detailed analyses of technology in dispute resolution.

Although the question of justification of *dispute resolution and technology* is closely connected with other governance issues, Internet governance and other rules of virtual worlds are excluded from the scope of this study.[63] The focus adopted here is that of dispute resolution and enforcement.[64]

In terms of procedural law, my examination is focused on civil and commercial cases, in which parties are given more extensive contractual freedom.[65] Thus, cases where the parties can only find redress through the public court system (e.g. family cases and criminal cases) are left outside the scope of this study.

As an abstract examination of justification, this study participates in a theoretical discussion that is global by definition. To serve this purpose, which transcends the differences between jurisdictions, references to Finnish legislation, case law, and legal doctrine are kept to the minimum. However, as I have received my legal education in Finnish law, the Finnish national system

63. For regulating cyberspace and sovereignty, see e.g. Lastowka (n 2) 226; Lessig (n 62) 27.
64. It should, however, be noted that the problematic issue of governance of virtual worlds and the need to find other means of governance than national legal systems and multilateral conventions originate from the same emergence of technology and online activity than the challenge of justifying technology in dispute resolution. Technological change creates new unique challenges for most normative systems where it is applied.
65. In the Finnish context this means that only dispositive civil cases are examined and non-contentious cases that are initiated according to chapter 8 of the Finnish Code of Judicial Procedure (4/1734) are excluded from the scope of this study.

forms the point of entrance of this study. In any case, the examples described earlier show how private dispute resolution and enforcement are detached from traditional markers of territorial jurisdiction.

In terms of legal theory, this research is applied theoretical research. The objective is not to provide an all-encompassing theoretical approach to dispute resolution and technology, but instead to sketch one option for connecting the needs of a substantive field of law with the answers that can be adopted from legal theory. Like its subject, this study also falls into the interface between theory and practice, substance and abstraction.

1.6 RESEARCH STRUCTURE

This study consists of three main parts.

In the first part, I depict the implications how technology changes procedural law. After this Introduction, in chapter 2, I discuss the theoretical framework through which I aim at making the narratives of justification visible. I adopt systems theory, developed by German lawyer and sociologist Niklas Luhmann, as my main theoretical influence. Through systems theory I explain how the legal system functions in society and in cooperation with the systems of economics and politics. This theoretical introduction is necessary for understanding how technology enters the legal system. Moreover, systems theory enables the examination of how justification is created, renewed, reinterpreted and harnessed within the legal system.

Chapters 3 and 4 discuss the definition of technology in relation to dispute resolution and how meaning is linked to technological advances. The definition and scope of the technological shift in dispute resolution connects both with our understanding of technology and with doctrinal paradigms of procedural law. The two separate doctrines of procedural law research, i.e. research on courtrooms and civil procedure on the first hand, and research on ADR on the other, will be addressed in relation to technology. I connect this doctrinal separation to dispute resolution and technology, and I demonstrate that there is a need for a joint approach to all dispute resolution theory. The need to discard such a dogmatised doctrinal divide becomes even more apparent when examining courtroom technology and online dispute resolution, i.e. dispute resolution and technology.

The second part of the study examines justification and justificatory nar-

ratives. In chapter 5, I embark on a mission for justification by examining how the implementation of technology enables us to deconstruct methods of justification within procedural law. In the following chapters, I discuss three separate narratives of justification.

In chapter 6, I examine the implicit agenda of the modern nation-state which, embedded in the structure of procedural law doctrine, upholds the distinction between litigation and ADR. I establish that sovereignty interpreted through the state monopoly on dispute resolution is the argumentative starting point in procedural law doctrine. As such, the modern state agenda is further emphasised by continuous renewal of the tension between litigation and ADR. I claim that this premise renders the theory of procedural law ineffective for answering the new interpretative issues arising from dispute resolution and technology. Next, I will examine whether the reinterpretation of sovereignty as interdependence could provide procedural law doctrine with the necessary tools for further theory development. Finally, chapter 6 concludes that state sovereignty has lost its justificatory force, and thus we need to resolve the doctrinal void by building a new justification for dispute resolution methods on other grounds than sovereignty.

Chapter 7 discusses consent as a justificatory structure, which employs a similar authoritative constitution as sovereignty. Based on the principle of freedom of contract, consent as a justificatory narrative connects the legal system with the system of economics and reflects the ideology of the markets. In dispute resolution, accentuating the importance of consent reflects the ideology of ADR. As a source of justification, consent turns the focus to the meeting of the minds between the parties instead of reaching out to the state. As in previous chapter, I first examine the origins of consent as a source of justification and localise its use in dispute resolution. Later, I proceed to discuss its shortcomings in answering the challenge of technology. The justificatory force of consent is embedded in its interpretative flexibility: as consent imposes no other demands for validity, it justifies all that has been consented upon or nothing. In other words, consent as justification ignores the power relations between the parties and provides little safeguards for balancing inequality through due process.

In chapter 8, access to justice is evaluated as a source of justification. This justificatory narrative, however, shows another picture of law, as it does not have the same constitutive function as the two other structures depicted in

this work. Instead, access to justice draws its justificatory power from the moral dimension of its demands. These demands can be found for example in procedural principles such as *audiatur altera pars* or equality of arms. Without the support from constitutive authorities like ECtHR, access to justice can only provide an understanding of moral communication but no universal solutions to moral dilemmas.

Chapters 9 and 10 form *the third part* of this study and expand on the lessons learned from the justificatory narratives. Chapter 9 asks what becomes of *dispute resolution and technology* beyond this sphere of justification by discussing the interaction of justificatory narratives and self-executing smart contracts. Finally, in the last chapter I sum up the main findings of this study.

2 Theoretical Framework

In the Introduction, I discussed seven examples of private enforcement or their alternatives, and established that use of force, which both private and public enforcement constitutes, needs to be justified. The question asked in the first part of this study is how does implementing technology to dispute resolution change the ways in which we traditionally see justified enforcement. In order to answer this question it is necessary to first establish the theoretical framework through which I approach the issue.

This chapter begins with a description of law as violence. This is necessary to establish the context of enforcement, as enforcement straightforwardly reveals the inherent violence of the legal system. After this, I situate my research question within the framework of Niklas Luhmann's systems theory and examine the role of critique for the renewal of the legal system. To this end, I briefly introduce the main tools provided by systems theory, namely the functional differentiation of society, autopoiesis, operational closure and cognitive openness. Following this, I discuss Luhmann's systems theory against critical systems theory and Jacques Derrida's deconstruction. These two theories provide supplementary insight into systems theory and enable one to test its blind spots.

This chapter concludes with an elaboration of the methodological choices and sources of law applied in this study. Thus, the theoretical framework established in this chapter provides an understanding of the legal system, which is necessary for evaluating the role of technology in chapter 3.

2.1 LAW AS COERCION

2.1.1 MISSION STATEMENT

As discussed in the Introduction, the use of force needs to be justified but justifying private enforcement is no simple task. The evaluation of potential sources of justification for private enforcement touches on wide-ranging debates on law's boundaries, the essence of justice and the paradox of bringing justice within positive law. In short, finding justification for private enforcement connects procedural law with legal theory. These theoretical discussions are relevant to dispute resolution, which takes place within those

boundaries. Nevertheless, procedural law is the starting point for my observations.

To this end, the objective of this study is to provide research of procedural law with an understanding of how the adopted theoretical argumentation structures create, renew and reinterpret justification of dispute resolution. Further, the objective is to demonstrate how these structures become particularly visible in relation to dispute resolution and technology and private enforcement.

Justification is an elusive structure for procedural law: it is rarely discussed in itself and can only be deduced by close readings of procedural texts. It appears as hidden assumptions and values that are considered to be self-evident.[66] Creating justification in dispute resolution is full of unsaid truths, controversies and tensions. It is connected with the fundamental question of how law renews itself and what are its limits, what law is without the nation-state and what role is left to fundamental rights. A huge task is adopted by an apparently simple concept, which furthermore remains largely disguised.

However, this construct is all-encompassing and ever-present. Justificatory structures, which I discuss in detail in the second part of this study, are often used as naturalised arguments for or against reforms. I demonstrate this with an example of arguing for and against binding ODR based on two justificatory narratives, private autonomy and sovereignty. Binding ODR for e-commerce disputes can be considered a prerequisite for respecting the will of the parties and the importance of contractual relations. Thus, removing hindrances from binding ODR would be necessary in order to take these values seriously. In other words, preventing such ODR would signify a violation of freedom of contract. On the other hand, infringement of sovereignty could make a plausible argument against binding ODR procedures if they prevent the parties from later access to court. According to this rationality, respect for democracy and territorial integrity of nation-states forbids allocation of territorial jurisdiction to ODR providers without a specific delegation from state power.

As this example shows, justificatory narratives can be employed on a concrete level of legislative decision-making. However, my quest for justification takes place on a more abstract level of law's coherence in general, and procedural law's coherence as a distinct doctrine in particular. Such a high level of abstraction is needed for two reasons. Firstly, only abstract examination

66. See chapters 6 and 7.

50 provides an entrance point to discussing justification. Secondly, a high level of abstraction enables insight into technology without losing sight of law's boundaries. In order to embark on this voyage to unknown lands of law's self-understanding, some tools are required. In this chapter, I establish my ontological understanding of law as violence and describe the fundamental elements of systems theory, which I later employ to explore the justificatory narratives and their reaction to the challenge of technology.

As stated, justificatory structures can be engaged in different ways and, depending on the circumstances, they might provide very divergent implementation provisions. But, as they mostly remain dormant, accessing them calls for deconstructive analysis. However, by deconstruction, I do not refer to French philosopher Jacques Derrida's work on deconstruction itself. Instead, I approach deconstruction of law's methods of justification from the perspective of Niklas Luhmann's systems theory. Such a deconstructive analysis of how sources of justification are employed within procedural law needs a reconstructive element to answer the question how these sources of justification respond to the challenge of technology. As German legal scholar Günther Teubner, who has extensively used the systems theory approach in his work, puts it, law's paradoxes can enable this move from deconstruction to reconstruction.[67] One of these paradoxes, law as legitimised violence, sets the tone for examining private enforcement.

2.1.2 LAW AND LANGUAGE AS VIOLENCE

Justificatory structures and engaging their rationalities in discourses of dispute resolution are ways of adopting power and using it to advocate different means. Power used in this way becomes inseparable from language and reveals the nature of law as a system of coercion. In other words, we can reveal law's inherent violence only through close reading of its language.

By definition, law as a practice of violence does not deem itself to be unjust. Instead, use of force filtered through the legal system often claims the exact opposite: inherent violence is legitimised in the process. Regardless of this *prima facie* justification, law's nature as violence has not gone unnoticed on the theoretical level.[68] Language choices, however, disguise inherent violence

67. "Creative use of paradox is the message that moves autopoiesis [i.e. law's self-creation] beyond deconstructive analysis into reconstructive practice." See Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (n 40) 1444.

68. Teubner, for example, evaluates the starting points of both Derrida and Luhmann. As he

on a practical level. They draw the line between justified use of coercion and arbitrary violence. That is to say, the words we choose simultaneously include and exclude, and they are by no means neutral or objective. Bearing this in mind, deconstructing the language which creates and renews the justification of dispute resolution might turn into a highly subjective and futile task.

The starting point I adopt here is that the social context defines how meaning is added to an expression. Language is an elemental point of the process where meaning is constructed and therefore, defining the context is an act of coercion in itself.[69] In other words, I acknowledge the subjectivity of the analysis conducted in this study and that by discussing justification, I take part in the same coercive practice that law by definition is.

The issue of justifying the use of force in dispute resolution can be formulated as an application of the fundamental question of legal theory: how is the boundary between acceptable and unacceptable use of coercion established? One of the most influential formulations of the relationship between law and violence derives from German cultural critic Walter Benjamin's essay *Zur Kritik der Gewalt*. Benjamin's essay provides an accessible entrance point to the discussion on the dilemma of justifying law as violence.

Benjamin aims to evaluate the relationship between law and (state) violence by different juxtapositions and argues against the dogma that the ends would justify the use of violence as the means. According to Benjamin, if the relation between the objective and the means is presupposed as justified, then it is only possible to criticise the application of violence but not the use of violence in itself on a fundamental level. Benjamin differentiates between law-creating (*rechtsetzende*) violence, e.g. war that aims at overthrowing the

points out, both theorists depart from the fundamental paradox of law, which is violence. See Gunther Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (2001) 18 Theory, Culture and Society 29, 31.

69. Similar to Finnish legal scholar Martti Koskenniemi in relation to international law, my objective is to reveal the deeper meaning construction of procedural law, embedded both in theory, doctrine and schools of thought. These are all interpreted as individual speech-acts, Saussurean paroles that in their turn reveal the meaning-constructed language, langue, of law. Koskenniemi applies a method similar to post-structural linguistics to depict what can be said within the law's grammar, how meaning is attached to legal concepts, how difference is created within legal definitions, how paroles form the langue, how the meaning (signified, *signifié*) is added to the expression (signifier, *signifiant)*. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press 2005) 6–9; Also legal scholar Christodoulidis employs Saussure's terminology: where justification of general norms would be 'langue', application of these norms in adjudication would be 'parole'. See also Emilios Christodoulidis, 'The Objection That Cannot Be Heard: Communication and Legitimacy in the Courtroom' in Antony Duff and others (eds), *The Trial on Trial Volume 1: Truth and Due Process* (Hart Publishing 2004) 194.

historically acknowledged laws of borders, and law-preserving (*rechsterhaltende*) violence, e.g. conscription.[70] However, the distinction is deconstructed through temporality: a peace treaty ending the war strives to create a new historically acknowledged legal state, securing 'equal' rights to both parties, albeit ambiguously. Benjamin mentions the death penalty and police violence as other examples of institutionalised violence. These examples reveal that law uses violence to create new laws, not as a means to an end but as an end itself.[71] According to Benjamin, justice is beyond the law's grasp and this impossibility to find justice in its violent practice makes it inevitable to destroy law in principle.[72]

Niklas Luhmann shares Benjamin's conclusion that it is impossible to ground legal order on the concept of justice. However, unlike Benjamin, Luhmann rejects the concept of violence from law's operations. Instead, Luhmann reserves for violence the role of deparadoxification. This means that the observation of law as violence is unfolded and concealed by new distinctions or references to universal truths in order to enable its continuous operations regardless of the paradox.[73] This is done by setting the paradox momentarily aside: the paradox is not solved or permanently removed; it is simply hidden from sight.[74] By doing so, Luhmann's systems theory dilutes

70. Walter Benjamin, 'Zur Kritik der Gewalt' in Rolf Tiedemann and Hermann Scweppenhäuser (eds), *Walter Benjamin Gesammelte Schriften Band II.1* (Suhrkamp Verlag 1991) 179.
71. ibid 189.
72. "Weit entfernt, eine reinere Sphäre zu eröffnen, zeigt die mythische Manifestation der unmittelbaren Gewalt sich im tiefsten mit aller Rechtsgewalt identisch und macht die Ahnung von deren Problematik zur Gewißheit von der Verderblichkeit ihrer geschichtlichen Funktion, deren Vernichtung damit zur Aufgabe wird." See ibid 199.
73. Teubner summarises de-paradoxification as follows: "De-paradoxification means to invent new distinctions which do not deny the paradox but displace it temporarily and, thus, relieve it of its paralysing power." Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (n 68) 36. For a general introduction to Luhmann's conceptualisation of paradoxes, see also Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (1st edn, Palgrave Macmillan UK 2003) 22. See also Niklas Luhmann, 'The Paradoxy of Observing Systems' (1995) 31 Cultural Critique 37.
74. The paradox of law relates to its coding, as making the distinction between legal and illegal always includes both sides of the code. Luhmann describes this as follows: "The development that in fact became possible [functional differentiation of the legal system through adoption of its own code], namely the delopment of this distinction, can be described, logically and with hindsight, as an unfolding of the tautology or dissolution of the paradox of law. In shortened form we shall call this the de-tautologization or de-paradoxification of law. One could almost say that the following steps occur. That which has been created as law has always been there; that which has been defined as such and has been distinguished from something else, is amplified and emphatically transformed into the tautology 'legal is legal'. This tautology is turned into a paradox by introducing a negation 'legal is illegal'; in the social system this means above all that both legal and illegal exist in an unavoidable conjuction: the legal status for one party

the elements of violence and coercion.[75] The aspect of violence still remains, although disguised. The paradox of law as violence is there, yet deparadoxified.[76] More concretely, the paradox of violence may be unfolded by making a distinction between acceptable/unacceptable use of force, or between state/vigilante coercion, or reasonable/unreasonable measures, and so on.

This position of deparadoxifying law as violence is valuable. Hiding the paradoxical nature of law explains why enforcement does not appear to us, the participants in a legal system, as violence but as a legal practice instead. The element of coercion is there, as it is necessary for the legal system, but simultaneously our attention is directed elsewhere. By observing enforcement as justified coercion, the element of violence does not interrupt the operations of the legal system.

This mechanism of deparadoxification connects closely with my research question. New forms of private coercion bring into question the established methods of playing down the element of violence in enforcement. In other words, this privatisation of coercion challenges the distinctions that have at least earlier succeeded in unfolding the paradox. This means that the justificatory crisis I described in the previous chapter can also be perceived as the disintegration of the methods of deparadoxification.

Although justifying privatised use of coercion is focal to this study, the legal system cannot be reduced to a system of violence. This stance follows Luhmann's understanding of law's ontology. Luhmann understands the law's operations as continuous communications, continuous differentiations, where each communication includes several selections instead of just the one of utterance.

For Luhmann, the legal system is only secondarily a system of coercion but primarily it is a system for facilitating expectations. Upholding normative expectations is the function of the legal system in systems theory, as manag-

is the illegal status for the other party, while both are members of the same community. This form is turned into the form of a contradiction by a further negation: legal is not illegal; in order for the party who is right or wrong to rely on/ must rely on this status, there must also be a temporal and social perspective. The finding that someone who is in a legal position is at the same time in an illegal position is a logically prohibited contradiction. This contradiction is ultimately excluded by setting conditions and only now can the tautology be unfolded, and the paradox dissolved." See Niklas Luhmann, *Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004) 175–176.

75. Petra Gehring, 'Benjamins Kritik und Luhmanns Beobachtung: Perspektiven einer Zeittheorie der Gewalt' (1999) 5 Soziale Systeme 339, 345.

76. “”Whenever violence is involved, the paradox of legal coding shows up – but in a form which is immediately unfolded within the legal system through setting conditions which make the paradox invisible." Luhmann, *Law as a Social System* (n 74) 265.

ing them provides congruence and stability. This means that normative expectations cannot be left open in conflicts but instead an institutionalised third party must decide which expectations are supported and which are not.[77] Violence is a necessary part of this function. Luhmann states that the decisions on supported expectations have to secure at least an assumption of consensus, if not an actual consensus, in order to provide for the continuing operations of the legal system. Physical violence, which Luhmann admits to be an inherent part of law, is a means to this end. Within the legal system, normative motivations of violence do not relate to its factual consequences, i.e. the concrete possibility of assault, but instead to its symbolic meaning on a more abstract level: through its generalisation, violence becomes a symbol for future possibilities. As physical violence is present in all social interaction due to our physicality, law loses itself as law if physical violence is cast out, and no normative expectations can then be uphold. Law's evolution is of necessity also the history of the domestication of violence.[78]

However, Luhmann does acknowledge that this close connection between law and violence introduces some problems. According to Luhmann, "[p]hysical violence has the peculiarity of high structural independence as a power basis", meaning that in comparison to other motivations such as gratitude and appreciation of rank it is more autonomous and not susceptible to time, context, or object. However, physical violence is indifferent to expectations, to structural continuity. Because of this, violence may be used for different ends, for revolution or for supporting the existing dominant order. Here, for Luhmann, is its role in securing change and evolution.[79]

This means that no pre-set moral criteria follow from law's constitution in violence. Instead, acknowledgement of law as violence is the starting point for evaluating the justification of privatised coercion. In addition, this acknowledgement functions as a reminder of law's paradoxical nature.

77. This position comes close to the Nordic debate on the functions of procedural law. In this discussion the objective of procedural law is seen to be behavioural steering, conflict management, or material truth. All the suggested functions, however, are ultimately considered to serve the stability of society. See also section 4.3.5.
78. Niklas Luhmann, *A Sociological Theory of Law* (Martin Albrow ed, Elizabeth King-Utz and Martin Albrow trs, 2nd edn, Routledge 2014) 84–86.
79. ibid 87.

2.2 LAW'S NORMATIVITY AND INTERACTION

2.2.1 LAW'S AUTOPOIESIS AND CODE

The question of law's inherent violence is a formulation of its ontological foundation: what is at the bottom of law, on which grounds are its foundations built? Is there a normative foundation which separates the acceptable, recognisable force of law from coercion by force? How is such a distinction made in the legal system? In this section, I first position Luhmann's theory within jurisprudence and then describe how law reproduces itself in a continuous flow of operations, forming a cycle of self-production that is central to systems theory.[80]

After the positivisation of law, the issue of law's foundation has been addressed by Kelsen's *Grundnorm*, by Hart's rule of recognition, by Tuori's critical positivist theory of law's levels, and by countless others. The main doctrinal categorisation takes place between natural law theories, which consider law inherent to human nature and attainable by reason, and positivist theories that perceive law as a human construct. In addition to these, a third, intermediary position can be distinguished: realist argumentation about law.[81] The realist argument does not presuppose the need for adding metaphysics or transcendence to law but also considers the positivity of law more as a question of societal decision-making, concentrating on the empirical reflections of the legal order.[82]

Systems theory takes us in another direction. In systems theory, the legal system consists of its own operations and is created by continuous communicative acts. For Luhmann, the legal system includes "all social communication

80. Luhmann has discussed systems theory in relation to other theories of jurisprudence in his book Law as a Social System. See Luhmann, *Law as a Social System* (n 74) 53–75.
81. This three-tier categorization is derived from German philosopher Petra Gehring. See Gehring (n 75) 340.
82. On natural law theories and the short-comings of the theories of Kelsen and Hart, see e.g. Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002) 7–27; Petra Gehring offers an interpretation of Luhmann's opinion towards this debate of foundations to be 'gödelisiert', Gödelized. By this reference to the theoretical mathematician Kurt Gödel and his incompleteness theorem (true statements about natural numbers exist, although they cannot be proved by mathematic axioms), the legal discussion is hit spot on, its perpetual-motion machine revealed. See Gehring (n 75) 340; Then again, Gödel's incompleteness theorem specifically handles formal consistent systems which include a theory of natural numbers and thus its applicability to law depends on whether the legal system could be considered to be a formal system in Gödel's meaning. For example, Franzen considers that law does not fulfil the requirements for formality within the meaning of formal logic and hence application of Gödel's theorem is irrelevant to law. See Torkel Franzén, 'The Popular Impact of Gödel's Incompleteness Theorem' (2006) 53 Notices of the American Mathematical Society 440, 441.

that is formulated with reference to law".[83] Law's positiveness is not sufficient for Luhmann, as its inherent distinction between the law and morals does not lead to anything more than a paradox of simultaneously holding on to the distinction and being unable to reconcile it.[84] This claim reflects Luhmann's position to earlier theories, which is more often than not highly critical, and the essential characteristics of his own theory, the importance of connectivity for the future reproduction of a system.[85]

Luhmann's theory has a social constructivist slant. He adopts the starting point that social systems do exist but makes the reservation that this premise has no ontological bearing as such but instead is a product of observation, a specific operation within systems theory. His theory reflects an understanding of a world which is socially constructed through communication.[86] However, Luhmann's ontological position is somewhat ambivalent. His stated mission in *Social Systems* is to analyse real systems in the existing world. By committing himself to systems theory, Luhmann adopts the ontological starting point that there is a reality and systems exist in the real world. However, Luhmann also argues that such a reality is unattainable to an observer, and thus everything that is communicated about reality is socially constructed.[87] The key element of systems theory is the distinction between systems and their environment, which is achieved by their internal operations. Internal operations of a system define the boundary between the system and its envi-

83. Niklas Luhmann, *The Differentiation of Society* (Stephen Holmes and Charles Larmore trs, Columbia University Press 1982) 122.

84. Luhmann, *Law as a Social System* (n 74) 76–77; Luhmann does not actually disagree with legal positivism on the basis of its problem of legitimacy or its relation to natural law, as has been done by others, but instead on the basis of its lack of theoretical connectivity within the science system. "Rather, the essential problem is that the concept of positivity is theoretically inadequate. It may be appropriate when applied in the context of reflexive theories of the legal system; however, when applied in a scientific context it lacks connection to other theoretical concepts." ibid 76; See also Luhmann, *The Differentiation of Society* (n 83) 90–121.

85. Luhmann's theory draws heavily on the work of his teacher, American sociologist Talcott Parsons, who presented the theory of social action. However, Luhmann expands on Parsons's systemic conceptualisation and downplays the emphasis given to value commitments in Parsons's theory. For Luhmann's discussion on Parsons, see e.g. Luhmann, *The Differentiation of Society* (n 83) 47–65; Niklas Luhmann, *Social Systems* (John Bedmarz, Jr. and Dirk Baecker trs, Stanford University Press 1995) 103–136.

86. As Teubner formulates it, "Under constructivist social epistemology, the reality perceptions of law cannot be matched to a somehow corresponding social reality 'out there'. Rather, it is law as an autonomous epistemic subject that constructs a social reality of its own." Günther Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 Law & Society Review 727, 730.

87. This means that by making the distinction system/environment, a system also creates the environment in which it operates. See King and Thornhill (n 73) 21.

ronment, and no external operations can directly enter the system. Luhmann himself refers to this as "operative constructivism".[88]

In the Preface to *Social Systems*, his major contribution to sociological systems theory, Luhmann states that "this is not an easy book", which depicts accurately the complexity of his theory.[89] Luhmann's goal is to develop a polycentric and polycontextural theory for an acentric world, a theory that would be able to increase relevant concepts and their relations for a better understanding of society.[90] Luhmann's theory aims for universality and, like other supertheories, presents guiding differences to steer information processing.[91] Universality and the complexity of Luhmann's research agenda explain the high level of abstraction of systems theory.

To understand systems theory, it is crucial to perceive it as a method of making further and further distinctions in social systems. These distinctions are necessary in order to allow more extensive complexity for the system. Unlike other systems, like psychic and biological systems, social systems make these distinctions through communication. Continuous distinctions are necessary in complex modern societies, and social systems have historically evolved to manage this increasing complexity through functional differentiation. By delegating complexity through functional differentiations, the system is able to add to the overall complexity within itself. Social systems differentiate themselves first and foremost from their environment but also from other social systems, which they recognise in their environment. For Luhmann, this distinction between a system and its environment is the decisive building block of social order. Thus, the most constitutive claim of systems theory can be narrowed down to the simple fact that systems exist. As the overall complexity increases, social subsystems, such as the legal system, the political system, or the system of economics, start to emerge.

This method of achieving higher complexity by increasing the number of further differentiations leads to the most central concepts for understanding Luhmann's conception of society: the distinction between the system and the environment, and the system as self-referential.[92] The claim on self-referentiality of systems translates into two abilities attributed to them: systems "have the ability to establish relations with themselves and to differentiate these

88. Luhmann, *Law as a Social System* (n 74) 79.
89. Luhmann, *Social Systems* (n 85) xxxvii.
90. ibid xlix–li.
91. ibid 4.
92. ibid 6–8.

relations from relations with their environment".[93] Social systems are function systems which operate through these two central concepts of differentiation and the system's autonomous self-production called *autopoiesis*. This results in the merging of the system's operation and its existence: without differentiation from its environment, there is no system, and without autopoiesis, the system has no boundaries in relation to the environment. Autopoiesis creates the boundaries that define the system's identity. For Luhmann, the system itself, not the observer of the system, defines its boundaries and identity.

In relation to my research objective, the concept of autopoiesis is useful as it explains how the legal system can only be produced by itself. The legal system is produced through a specialised form of communication about law, by legal grammar. In the second part of this study, I examine justificatory narratives, which I define as external references that the legal system adopts to its internal operations. It translates these external references into its own language in order to make them function within the legal system as sources of justification. In order to accomplish this, it is essential to establish the legal system's autonomy, and to understand how these boundaries are upheld.

In addition to functional differentiation, another focal concept of systems theory is the system's self-production. This means that the system produces, reproduces and maintains the operations that continuously produce the fundamental difference between the system and its environment. This self-production is called autopoiesis. Luhmann defines autopoiesis as the system's self-production where the system's operations produce its own elements through its internal operations. Luhmann derives the terminology from cell biologists Humberto Maturana and Francisco Varela, who developed the term from Greek (*auto* = self, *poiesis* = production) in order to refer to the cell's self-maintaining chemistry. According to Maturana and Varela, the term expresses the essential features of living organisms, namely autonomy and self-referentiality.[94]

Luhmann's systems theory transfers the original concept of *autopoiesis* to social sciences and to law in particular. This means that the legal system produces the fundamental distinction between itself and its environment

93. ibid 13.

94. The term is derived from an essay on Don Quixote, where Alonso Quixano decides on the path of arms (praxis=action) instead of the path of letters (poiesis=creation). Autopoiesis, an invented word referring specifically to the autonomy of organisms, was chosen for its lack of history. See Humberto R. Maturana and Francesco J. Varela, *Autopoiesis and Cognition: The Realization of the Living* (D. Reidel Publishing Company 1980) xvii.

through its own operations, simultaneously establishing the system and its boundaries. In other words, law's identity as a social system is created through networking operations. The system's self-observation has a fundamental role in this continuous cycle as self-observation both presumes and simultaneously produces identity.[95] Hence, the law's limits are defined by continuous operations and their self-observation, which uphold the system/environment distinction.[96] Every communicative operation in the system is linked to earlier operations and makes a distinction between what belongs to the legal system and what does not.

Everything inside a system, including its boundaries, is included in self-production.[97] However, the environment is not itself a system, although a system can recognise other systems in its environment.[98] Boundaries between the system and its environment are intensified by putting them under pressure, which produces preservation of the boundary performance. Requirements for boundaries vary depending on whether the system makes a distinction only between itself and its environment or whether it needs to recognise other systems (and their environments) in its environment.[99]

Code

This self-production is enabled by adopting a system-specific code. The adoption of the code gives the system its unique identity by deciding which operations belong to the system and which do not. The code stipulates the functional differentiation. In other words, the system's functional differentiation that both establishes a specialised differentiated system and upholds

95. In Finnish jurisprudence, Jussi Syrjänen has applied systems theory to examine the foundations of legal decision-making. He describes the role of self-observation in a similar manner in his dissertation, which also includes a summary in German. See Jussi Syrjänen, *Oikeudellisen ratkaisun perusteista* (Suomalainen lakimiesyhdistys 2008) 248.

96. It should be noted that by establishing its boundaries the system establishes both itself and its environment. By defining what belongs to it (what the system is) and what does not belong to it (what is outside) the boundary establishes both sides of the distinction. For an accesible definition, see Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart Publishing 2006) 24–25.

97. Luhmann, *Social Systems* (n 85) 10.

98. "The systems in a system's environment are oriented to their own environments. No system can completely determine the system/environment relations of another system, save by destroying them." ibid 18.

99. According to Luhmann, the simplest example of boundaries is national boundaries between sovereign states which treat their environment as another system, in other words a nation-state's borders are understood in relation to borders of another nation. However, as economy, politics and science detach themselves from national borders, boundaries have to be understood more extensively. ibid 30–31.

 its boundaries is achieved by symbolically generalised communication mediums, which differ in each system. The use of this generalised medium, in other words the application of the binary code for making distinctions, is the method applied for deciding what belongs within the system and what does not.[100] The code is always a distinction between binary oppositions, and the functional differentiation is achieved through its application. Depending on which system-specific code is applied, operations are 'coded' as belonging to a system or outside of it. For example, money (*Geld*) is the medium for the economic system, and the code of economics paying/not paying defines which operations belong to the economic system. The legal system, in turn, operates through the medium of law (*Recht*), and the application of its code legal/illegal prescribes operations belonging either to the legal system or outside of it. Similarly, power (*Macht*) is the medium of the political system, which applies the code power/opposition. The science system operates based on the medium of truth (*Wahrheit*). According to Luhmann, the medium itself cannot be deciphered cognitively but only the form that follows from it. In other words, the code itself provides only a form for making distinctions but does not produce information. The code cannot be applied to itself.[101]

This study is closely connected with the legal system. This, however, does not mean that the other social systems Luhmann identifies would not be relevant. Instead, I focus on evaluating justification through systems theory particularly because of its descriptive force in explaining how the legal system interacts with other societal subsystems.

The code distinguishes which operations belong to the system and which do not. However, the code does not suffice to decide which side of the code, the legal or the illegal, is applied to an operation. For this purpose, there are programmes within the system that regulate the application of the code.[102] These programmes stipulate which side of the code is applied. For example, in the legal system programmes such as legislation or case law direct which party is right, in whose favour a case is decided, and which argument is considered legal and granted legal protection. The code generates the programmes but simultaneously their relationship is circular as codes are only

100. "Codes and programmes can be observed only as communication. Codes enable us to distinguish between belonging to the system and not belonging to the system, while programmes, which attribute the values legal/illegal, are the objects of judgments of valid/invalid." Luhmann, *Law as a Social System* (n 74) 209.
101. Applying the code to itself would unfold another paradox. ibid 191–210.
102. ibid 209.

efficient through the distinction coding/programming. Programming balances out the harshness of the code.[103] It should be noted that programmes are fundamentally structures created by connecting the communicative operations of the legal system.

We have now established the starting points of systems theory: functional differentiation and the system's self-production, which are both established through system-specific coding. However, mere self-referral as a means of providing continuing processes for maintaining the system is not enough, as this circular referential loop would only create a tautology. Instead, Luhmann breaks the self-referential circle by opening the system's information gathering to its environment. Adapting meaning from its environment enriches the system's autopoiesis although the control of environmental boundaries remains within the system. A system is an interaction between openness and closure. The system regulates how it reacts to impulses from its environment and by controlling these impulses the system controls itself.[104]

By adopting systems theory as the theoretical starting point for this study, we establish law as an autonomous subsystem of society, a system that defines its own boundaries through its operations. This approach provides us with an observation point from which it is possible to approach law's need for justification from within the legal system. Simultaneously, we are able to observe and recognise other subsystems in society and their input into the legal system.

In the next section, I describe how a system's autonomy is produced by connecting individual communications to each other in order to create operational closure. This operational closure protects the system's autopoiesis from operations external to it. Without closure, a system would lose its control over what belongs to it. However, closure itself is not sufficient to provide means for a system's further development, and thus it is balanced by cognitive openness. These building blocks are necessary for the discussion in the following chapters on how technology enters the legal system, and how justification is built within the legal system.

103. ibid 192–193.
104. Luhmann, *Social Systems* (n 85) 466–468, 475.

2.2.2 CONNECTIVITY, CLOSURE AND OPENNESS

Connected Selections

In addition to the system/environment difference, systems differentiate between elements and relations, and their connectivity within the system. Elements and their relations are the building blocks of all systems, not simply those of social systems. Social systems, in turn, are composed of communicative acts, where each individual act is linked with earlier and future communication. Elements do not interlock with all the other elements, but instead they connect selectively, making a distinction within the system's code.[105] These selective connections, or conversely connected selections, establish the system.

Luhmann states that elements and relations are prerequisites for each other and neither can exist without the other. Decomposing systems to elements and relations enables us to differentiate systems and subsystems and to understand the claim that increasing differentiation also increases the complexity that the system can cope with. Elements cannot be dissolved, and the system changes by reorganising the interrelations between the elements. This connectivity between the elements is crucial to system formation. Through connections the system emerges as a system, without connectivity it ceases to exist.[106]

However, Luhmann does not oversimplify systems as consisting only of random relations between elements. Instead, in his view, a system regulates the connections that are possible between the elements. This regulation of

105. See Niklas Luhmann, *Die Gesellschaft der Gesellschaft I* (Suhrkamp 1997) 196.

106. Luhmann sees the increase of complexity as a necessary evolutionary step for modern social systems such as societies. Complexity is defined through the connectivity of the system's elements: "we will call an interconnected collection of elements 'complex' when, because of immanent constraints in the elements' connective capacity, it is no longer possible at any moment to connect every element with every other element." Complexity can be coped with as "determinately structured complexity" whereas the incomprehensible complexity of trying to connect everything with everything renders the system inoperable. See Luhmann, *Social Systems* (n 85) 20–24. It is noteworthy that the possible selections are limited within the system through conditioning. In Luhmann's theory, conditioning is connected with the relationship between *alter* and *ego* in communication. If communication is to take place, first the ego needs to acknowledge itself and its environment. Second, the ego needs to direct the communication at something, at the alter, i.e. the ego needs to acknowledge the alter as separate and capable of observing the ego. This is called double contingency, ibid 113. It should be noted that Luhmann adopts the term *double contingency* from Talcott Parsons, whose influences are visible in several parts of Luhmann's systems theory. Luhmann does discuss in detail in which areas he differs from Parsons's opinions. See Raf Vanderstraeten, 'Parsons, Luhmann and the Theorem of Double Contingency' 2 Journal of Classical Sociology 77.

relations is called conditioning and it acts as the constraints in the system.[107]

Connectivity between elements and mechanisms that regulate further selections are prerequisites for a system as otherwise the system would lead to entropy.[108] Structures are formed in systems to provide necessary connectivity between elements and to enable expectations of behaviour.[109] A system emerges by establishing its boundaries by self-organisation,[110] "order from noise" in Heinz von Förster's terms.[111] A system must develop mechanisms for regulating its inadequacies in order to adapt to complexity. Selections where differentiations are established and communicated form the system. For Luhmann, selections are subjectless events.[112]

107. Luhmann, *Social Systems* (n 85) 23.

108. "For an observer, a system is entropic if information about one element does not permit inferences about others. The system is entropic for itself if in the process of self-production, thus in the replacement of elements that have passed away, any possible successive element is equally probable. In other words, in entropy connectivity is not straitened and time is not won by the fact that not everything comes into consideration." See ibid 49.

109. ibid 32–36. Luhmann separates a system's structures from its processes by time and change. As structures can be changed, they are reversible, but processes are singular events which as such are irreversible. ibid 44.

110. Luhmann describes the emergence of systems with the help of the concept of adaptation. Instead of the simple system/environment relationship, where the system adapts to its environment and the environment enables the development of systems, Luhmann sees a transition from the paradigm of system/environment to that of self-reference. See Luhmann, *Social Systems* (n 85) 31.

111. The American scientist Heinz von Förster connected physics and philosophy in his contributions to second-order cybernetics, which emphasises the autonomy and self-referentiality of complex systems. The "order from noise" principle formulated by Förster describes, how openness is produced by closure in complex systems. On connections between Luhmann, von Förster and Maturana and Varela, see e.g. Søren Brier, 'From Second-Order Cybernetics to Cybersemiotics: A Semiotic Re-Entry into the Second-Order Cybernetics of Heinz von Foerster' (1996) 13 Systems Research 229; Bruce Clarke and Mark BN Hansen, 'Neocybernetic Emergence: Returning the Posthuman' (2009) 16 Cybernetics and Human Knowing 83.

112. For Luhmann, 'the' subject, which has been adopted extensively in Western philosophy as the starting point of all observation into social interaction, is a harmful concept. 'The' subject distorts observation from the meaning construction within interaction systems and excludes certain aspects by resorting to human consciousness as the defining location of all inquiries. According to Luhmann, this results in concentrating on factual dimensions and overlooking the temporality and sociality of social systems. Luhmann, *Social Systems* (n 85) 71–74. Luhmann's opposition against subjectivism has received criticism as he places humans outside the society *per se*, reduces them to autonomous psychic systems and places themin the environment of social systems. As stated by Mavrofides, among others, the criticism does not quite hit its mark. Luhmann does include individuals (and even subjects) in his system, although he does not accept 'the' subject in his mission statement. Thomas Mavrofides, 'From Humans to Persons: Niklas Luhmann's Posthumanism' (2010) <http://www.academia.edu/434382/From_Humans_to_Persons_Niklas_Luhmanns_Posthumanism> accessed 25 January 2016. For Luhmann, the humanist criticism against his theory misses the point as the concept of a person is produced by communication and has no possibility of explaining action by itself. Luhmann, *Law as a*

64 *Operative Closure*

The functionally differentiated legal system adopts its identity by using a system-specific code. As it is, any societal subsystem can reform itself as a legal system by adopting the binary code but other subsystems are not capable of offering content to the legal system as only the use of legal code produces legal communication.[113] This operative closure provides for law's autonomy, law's limits and its normativity. This means that the system, and only it, is the actor behind its autopoiesis and is responsible for providing the operative closure by its own network of legal operations. In other words, no operation can leave the system nor enter from the outside because of operative closure. Also, operative closure limits the possible selections as operations can primarily be linked only with operations within the system.[114]

Operative closure, in its turn, is reached by different means in different systems, depending on their distinct functions and codes. In the legal system, the function is to maintain expectations regardless of disappointments and thus to provide for a sort of coherence.[115] This function dictates that operative closure for the legal system is normative. However, the function *per se* is not sufficient to procure law's boundaries. The function dictates that law's communications (which are the fundamental element of each social system) concern what should happen next, ought instead of is, *sollen* instead of *sein*. Communication of and in the legal system maintains these expectations of future events regardless of the fact that sometimes the instructions do not take place and that sometimes disappointments are inevitable. Expectations are simply normative communications about the future.[116]

Social System (n 74) 84.

113. As Luhmann puts it, "Es gibt kein Input von rechtlicher Kommunikatin in das Rechtssystem, weil es überhaupt keine rechtliche Kommunikation ausserhalb des Rechtssystems gibt. … Und es ist eine Konsequenz der These, dass nur das Rechtsystem selbst seine Schliessung bewirken, seine Operationen reproduzieren, seine Grenzen definieren kann, und dass keine andere Instanz in der Gesellschaft gibt, die sagen könnte: Dies ist Recht und dies ist Unrecht." Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp Verlag 1995) 69. See also, Luhmann, *Law as a Social System* (n 74) 100.

114. However, law's operations could be understood to be selective instead of closed or operationally closed, as Syrjänen suggests. According to Syrjänen, this would more aptly present the way in which legal operations form networks for two reasons: first, in complex social systems the number of connections is almost infinite and connecting to all internal and/or external social operations is not possible, and second, it is not necessary for an operation to connect to all the earlier operations but instead the operation might decide to select different connections rather than the earlier operations. Syrjänen (n 95) 253.

115. This internal coherence, which is necessary for law's function, is also the prescriptive element I discussed in section 1.4.

116. But this function of 'ought' is not unique to law and is not sufficient to separate it from

Cognitive Openness and Structural Couplings

Operative closure is balanced through cognitive openness.[117] This means that the system is open towards its environment and to other systems in its environment, although certain limits are imposed. The legal system cannot include impulses from its environment or from other subsystems directly as these are coded differently and the legal system only recognises elements which follow its own coding. However, information can be transferred from one system to another. Operative closure and cognitive openness go hand in hand with the premise of autopoietic law. The complexity of a system's environment is decreased as law responds only to those elements of the environment it considers relevant – a selection reached through application of the code. It should be noted that not all comments about the code make a communication an operation of the legal system. Luhmann exemplifies this by pointing out that law teachers or journalists can make personal comments about law instead of formal commentaries as the previous comments belong within the education or media system.[118]

By applying the code in order to preserve operative closure together with cognitive openness, the legal system can register facts from its environment as legally relevant and include external impulses in its operations. The distinction of operational closure and cognitive openness takes place solely within the system.[119]

other systems which employ the same function, namely the systems of religion or morals. Luhmann, *Law as a Social System* (n 74) 9. But, this function is achieved by the application of the code where communications allocate the distinction between legal/illegal. It should be pointed out that the definition of the code is in the distinction it makes. The code is a method of making a distinction and the 'legal' side of the code is defined only in reference to the 'illegal,' the one does not exist without the other. If expectations cease to be normative, law's function is not fulfilled and thus the system's boundaries no longer maintain the system/environment difference. Uncertainty inherent in the possibility of disappointments is absorbed by stabilisation instead of regulating behaviour. Luhmann, *Social Systems* (n 85) 110.

117. "self-reference and external reference need to cooperate in the form of normative closure and cognitive opening, based on normative closure. The system can leave learning to chance, that is, to external stimuli for which there is no provision in the system, if it has the capacity to practice changes as changes of valid law and to weave them into the recursive network of the interdependent interpretations of norms." Luhmann, *Law as a Social System* (n 74) 109–110. It should be noted that the operative closure becomes a normative closure in the legal system due to its function of upholding expectations regardless of disappointments.

118. ibid 103. This point comes close to Tuori's distinction between the narrow and public legal communities, legal practices in *sensu largo* and in *sensu stricto*, where a lawyer's speech acts might be addressed either to the narrow community as normative claims or to the public audience as personal opinions. Tuori (n 82) 132.

119. Luhmann, *Law as a Social System* (n 74) 112.

66 The concepts of operative closure and cognitive openness benefit the chosen perspective of this study. As all the justificatory narratives I suggest include some type of reference outside the legal system, understanding the role of narratives within the legal system is complicated. The legal system needs to hold on to its boundaries in order to remain a legal system instead of turning into a system of morality or economics. At the same time, the legal system needs to be able to include information from outside its operations. These concepts of systems theory enable us to uphold law's autonomy while concurrently assessing how these influences are incorporated into the legal system.

Informative openness is enabled by two distinct mechanisms: interpenetration which enables the system to borrow computational resources from another system but has connective value only within the system,[120] and structural couplings between different social systems, where an element has connective value within both systems although in accordance with each system's binary code. Also, interpenetration can be seen as a specific type of structural coupling which results from a joint evolution of two different systems.

Law opens itself to its environment through structural couplings (*strukturelle Kopplung*), which simultaneously facilitate relaying impulses from outside the legal system into it and limit the content of such impulses. Structural couplings are a way of understanding how different societal subsystems affect each other. By structural couplings between systems, operations abide by the coding of several systems simultaneously. In other words, the operation belongs to two systems at the same time. For example, a contract and property are couplings between law and commerce; constitution is a coupling between law and politics.[121] Thus, a contract or property can be evaluated in accordance with law's binary code of legal/illegal and recognised by the legal system as belonging to it as its own operation. Simultaneously, a contract abides to the code of paying/not-paying of the economic system and is recognised within its symbolically generalised meaning medium, i.e. money.[122] Comparatively, a constitution applies the binary code of the po-

120. Luhmann, *Social Systems* (n 85) 210–254.

121. Luhmann, *Law as a Social System* (n 74) 381–422.

122. Luhmann describes this as follows: "[Structural coupling] is based on a synchronicity of the system with operations that the system attributes to the environment, for instance, with the possibility of fulfilling a legal obligation by making a payment or symbolizing political dissent or consensus by passing a law. However, operative couplings between the system and the environment brought about by such identifications are possible only for the duration of the event. They do not last and they depend on a certain ambiguity in their identification. The identity of

litical system, which is power/opposition functioning through the medium of power, in addition to the code of the legal system.

Interpenetration, in turn, has meaning only within a system, as the observed system utilises the elements of another system. According to Luhmann, interpenetration is only possible between systems that have evolved together and have thus developed interfaces. In his 1997 monograph *Die Gesellschaft der Gesellschaft*, Luhmann gives two examples of interpenetration. First, nerve cells that belong to the biological system are able to share information with the brain, which also forms the psychic system of a person.[123] Second, the connection between the psychic systems, which operate through consciousness, and communication-oriented social systems is interpenetration: without consciousness there would be no communication, without communication there would be no further development of consciousness.[124] Interpenetration is also possible between two social systems. For example, the external motives and interests of legislation often influence norm interpretation in legal decision-making. However, these motives are internally filtered before their inclusion – e.g. if a legislative act results from political manoeuvring, its origins are not usually discussed in a legal decision applying the act.[125]

These structural links enable a higher level of complexity and, at the same time, reproduce law as an autonomous system that is consistently interconnected with other systems, highlighting its simultaneous independence and dependence. Irritation from the legal system's environment caters to its immune system, which is necessary for its survival. Through structural couplings between social systems and systems of consciousness, the legal system remains immune to disappointments of expectations.[126]

For the purposes of this study, the concepts of structural couplings and interpenetration explain how the legal system is able to include external rationalities in its operations. These methods benefit the analysis of how the autonomous legal system creates narratives to function as sources of justification, and how technology is starting to penetrate the legal system.

What is then the relationship between structural couplings and autopoie-

such individual events is, in fact, in the recursive network of the individual system. The economic aspect of payment, which relates to the reuse of money, is quite different from the legal aspect, which relates to the change in the legal situation induced by the payment." ibid 380.

123. Luhmann, *Die Gesellschaft der Gesellschaft I* (n 105) 108.
124. ibid.
125. Luhmann, *Law as a Social System* (n 74) 115–116.
126. ibid 384.

sis? How does self-production relate to irritations from the system's environment? It is clear that structural couplings are a necessity for the evolution of a system and also for autopoiesis as they help to immunise the system boundaries and contribute new facts. As it is, both autopoiesis and structural couplings between systems are operative couplings. Operative couplings refer simply to connections between operations. As autopoiesis refers to couplings between operations within a system, a structural coupling connects an operation from one system with an operation of the other system.[127] I shall return to this discussion in chapter 5.

2.2.3 STRUCTURES WITHIN THE LEGAL SYSTEM

Why systems theory, why not something else, something less abstract for a better fit with the concreteness of technology? The upside of Luhmann's theory is that it provides a possibility to examine structures formulated by legal operations in the course of time. Also, systems theory provides a comprehensible solution to the problem of upholding law's normativity. This task becomes increasingly difficult in relation to dispute resolution and technology as bridging the gap between two distinct systems of law on the one hand and technology on the other entails a danger of losing one's way. Such an excursion is necessary as the legal system has to have an understanding of technology and it cannot provide this understanding itself. However, systems theory grants easy access to law's normativity at all times as the system's self-production creates normativity, and circularly also requires it for future operations. The legal system turns social practices into legal practices by using the binary coding of legal/illegal for social practices.[128]

One point should be clarified in relation to structures in systems theory. The focus of the theory is in communication, and communicative operation may form temporally oriented structures in the course of time. Although these structures can be examined with the framework of systems theory, the emphasis remains in communicative operations, which are the basic elements of system formation. Structures like statutes, norms and legal texts have been of interest to legal theory earlier, which is apparent in the positivist theories of Kelsen and Hart. However, Luhmann's theory does not shrink down to an examination of permanent legal structures and institutions but makes connections beyond this, so to speak. Although structures are neces-

127. ibid 381.
128. Teubner, 'Global Bukowina: Legal Pluralism in the World Society' (n 41) 13.

sary for law's operations, they do not define law's identity.[129] In the end, there is no material difference between structures and operations, as structures too are formulated by continuous operations, which have been temporalised.[130]

Luhmann highlights the importance of time in relation to the legal system. Forgetting has historically been an important method for adaptation and evolution. Structures exist only when they connect communicative events, and expectations are real only when they are communicated. Expectations may not be reutilised and forgetting them is a simple way of procuring change. However, the evolution of texts and the use of the written form have created a necessity for new methods of adaptability as texts bring memory in their wake and render forgetting much more difficult. The legal profession was developed for the purpose of handling texts and accepting norm changes. Such structures within the legal system replace the function of forgetting as a means of adaptability.[131] However, legal practice always operates with the understanding that "law has always been there because it could not otherwise entertain the notion of distinguishing itself as legal practice".[132]

As stated before, some answers are hidden by certain theoretical choices, whereas some are revealed. Here, the choice is made for the structure instead of operations. The limits and interfaces between systems provide a pressure point of legitimation, which can be reached by engaging systems theory as a tool for deconstructing the justification of dispute resolution. Thus, by making a choice for this particular theory, it is possible to reach an understanding of law and technology in a different way than through subjectivism – and this theoretical choice, in turn, enables more detailed analysis of justifying dispute resolution through external references. The justification can be perceived as long-lasting structures within the legal system that have emerged in the course of time through continuous repetition and renewal.

2.2.4 TESTING SYSTEMS THEORY AGAINST DECONSTRUCTION

In the previous sections I described the focal concepts of systems theory and its application to law. As discussed, parts of systems theory, i.e. autopoiesis, closure and openness, structural couplings, interpenetration, and structures within systems, strongly influence my perception of law's ontology. In short,

129. Luhmann, *Law as a Social System* (n 74) 78.
130. ibid 84.
131. ibid 82–83.
132. ibid 91.

systems theory provides a useful starting point for this examination in which different agendas of economic gain, political power, morality and justice intersect. The self-production of systems directs our attention to relations between different rationalities and provides useful tools for assessing them.

However, systems theory leaves little room for grand ideals of justice. Within the framework of systems theory, the demand for justice in general, or specified as the call for access to justice within dispute resolution, meets with a surprising opposition – de-paradoxification.

Günther Teubner evaluates the similarities between Luhmann's de-paradoxification and the French philosopher Jacques Derrida's deconstruction,[133] as he sees both of these theories to grasp the irrational nature of law, its paradoxes, violence and arbitrariness.[134] Derrida depicts how law is troubled by its fundamental paradoxes, which render it without decisive force. In turn, Luhmann explains how the law can function despite such paradoxes by deceiving even its self-understanding. Juxtaposing Luhmann's perception of justice as law's contingency formula with Derrida's deconstruction, we may test systems theory's capabilities in explaining the role of justice. In other words, Derrida's deconstruction provides an alternative viewpoint to law as violence, a stance that reveals the elusiveness of justice as the legal system's unresolved dilemma.

The common denominator between these two modern radical theories of Jacques Derrida and Niklas Luhmann concerns law's paradoxical nature. As Teubner puts it, they both make a claim for "taking the normative requirements of justice even more seriously" by revealing law's irrationality.[135] As Derrida assumes law to be "without rules, without reason or rationality",[136] Luhmann considers law to be a system for upholding expectations despite disappointment. Law depicts itself through continuously making distinctions between itself and its environment. As Derrida rushes headfirst into the dark worlds of understanding law's paradox, Luhmann aims at a de-paradoxification through distinctions that set the paradox aside for a while to decrease

133. The term deconstruction ows its existence to Jacques Derrida who is considered as " leaving behind a legacy of himself as the 'originator' of deconstruction". Antonio Calcagno, 'Foucault and Derrida: The Question of Empowering and Disempowering the Author' (2009) 32 Human Studies 33, 35.

134. Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (n 68).

135. ibid 31.

136. Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 Cardozo Law Review 919, 965.

its paralysing power. Teubner considers the objective of reconciling law's paradox to be the common starting point for Derrida's deconstruction and Luhmann's autopoiesis, although the scholars depart in different and partly contrasting directions based on their interests and theoretical frameworks.[137] Whereas Luhmann seeks a method for rendering law's paradox ineffective, Derrida aims at exposing the paradoxes and reaching the transcendence of social institutions through this re-paradoxification.

In his article *Force of Law*, Derrida focuses on a deconstructionist approach to justice and observes "slippages" between the categories of law (*droit*) and justice on the linguistic level.[138] He asks how we could distinguish between the (inherently violent) force of law and unjust use of violence, and how the former is legitimated.[139] Derrida reinterprets Walter Benjamin's definitions of law-creating and law-preserving violence by making a distinction between mystical violence. On the one hand, mystical violence creates the foundation of a positivist state and law by use of brute force. On the other, divine violence creates destructive yet life-preserving justice without violence. From this reading, Derrida derives the ultimate paradox of law where positivity and justice cannot be distinguished from another, and no criteria can be placed for making such a distinction. This creates an infinite *non liquet* for law, exposing law's ultimate failure. Derrida states that:

> The structure I am describing here is a structure in which law (*droit*) is essentially deconstructible, whether because it is founded, constructed on interpretable and transformable textual strata (and that is the history of law (*droit*), its possible and necessary transformation, sometimes its amelioration), or because its ultimate foundation is by definition unfounded. The fact that law is deconstructible is not bad news … But the paradox that I'd like to submit for discussion is the following: it is this deconstructible structure of law (*droit*), or if you prefer of justice as *droit*, that also insures the possibility of deconstruction. Justice in itself, if such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exists. Deconstruction is justice.[140]

137. Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (n 68) 33.
138. Derrida (n 136) 923.
139. ibid 927.
140. ibid 943–945.

Teubner evaluates Luhmann's mechanisms of de-paradoxification, namely self-production of autonomic systems (*autopoiesis)*, polycontexturality and second-order cybernetics against Derrida's deconstruction, as these methods render social systems unthreatened by paradoxes which deconstruction reveals. The paradox of alterity, "paralysing self-contradictions", remain in social systems but are deemed to be harmless as the paradox is made invisible by autopoiesis. Autopoiesis interconnects two self-referential systems which reconstruct each other interdependently, salvaging the relation between alter and ego, and delegates the paradox of alterity as a foundational issue of communication. In Teubner's terms, "deconstruction remains hostage to the original paradoxes of alterity" where deconstruction is dependent on historical and social conditions and becomes harmless when historicised.[141]

However, to keep deconstructive moves dormant, the system has to change constantly, to engage in a constant circle of renewal, making new differentiations, variations and immunisation. Only when the system's ability stops is the foundational paradox revealed.[142] And, according to Teubner, this everlasting obsession of change, of evolution, is the actual object of deconstruction, the place where deconstruction and autopoiesis meet, "the birth of autopoiesis from the spirit of deconstruction".[143]

Unlike Luhmann's de-paradoxification, Derrida's deconstruction is directed towards society, to the sphere of the political, by asking whether deconstruction enables justice.[144] Derrida considers that deconstruction can be aimed at law as law is "constructed on interpretable and transformable textual strata". Instead, justice is seen as un-deconstructable as it goes beyond law. Thus, deconstruction takes place in the distinction between deconstructible law and un-deconstructable justice.[145]

From the perspective of systems theory, justice plays another role. For Luhmann, justice is law's programme of programmes, its contingency formula that operates like the conception of god in the religious system, or the principle of scarcity in the economic system. This means that Luhmann provides no values or criteria for deciding what is justice, no maxims or ethical codes. Justice is an internal process of the legal system, the system's self-observation

141. Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (n 68) 37.
142. ibid 39.
143. ibid.
144. Derrida (n 136) 921.
145. ibid 943–945.

that aims to provide “adequate complexity of consistent decision-making”.[146] This “adequate complexity” goes beyond the formal consistency of the legal system and responds reflexively to external demands from its environment.[147] However, justice is closed within the legal system by operative closure, rendering justice as law’s necessary but impossible self-transcendence. This apparent paradox can still be overcome. Justice surpasses the limits of operative closure through re-entry, meaning that the legal system is able to create an enacted environment by handling extra-legal communication. Through this construction it is possible to ask whether legal decisions provide justice for these enacted environments as well.

In Teubner’s analysis, Derrida’s deconstruction and Luhmann’s justice as a contingency formula both explain why there is no value to be added to the ideal of justice. In this perspective, the theories are parallel to each other. Luhmann’s mechanisms of de-paradoxification are able to deconstruct deconstruction; they are able to immunise social systems against the power of deconstruction.[148] However, Derrida’s deconstruction is able to address a blind spot in systems theory: the separation of consciousness and communication, which forces justice into the role of law’s internal formula. Derrida sees justice as transcendence, which is in continuous opposition to positive law, and invokes calls for political action. Luhmann’s systems theory is unable to address this issue as the demands of continuous operations leave room only for hiding the paradox of justice.[149]

Christoph Menke also examines the combination of deconstruction and systems theory. According to Menke, the theories share an understanding of modern law in including the other in its self-reflection. From this the paradoxical foundation of law is revealed. However, Menke considers that the theories differ in accordance with the nature of law’s self-

146. Luhmann, *Law as a Social System* (n 74) 214–219; Teubner formulates this as follows: “Justice’s intention is not to maximize doctrinal consistency but to respond sensitively to extremely divergent external demands and to strive at the same time for high consistency. Justice as contingency formula is not justice immanent to the law but a justice that transcends the law. Internal consistency plus responsiveness to ecological demands – this is the double requirement of juridical justice.” Günther Teubner, ‘Self-Subversive Justice: Contingency or Transcendence Formula of Law?’ (2009) 72 The Modern Law Review 1, 9–10.

147. As Teubner puts it, “justice redirects law’s attention to the problematic question of its adequacy to the outside world”. Teubner, ‘Self-Subversive Justice: Contingency or Transcendence Formula of Law?’ (n 146) 10.

148. Teubner, ‘Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann’ (n 68) 39.

149. Günther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 Law & Society Review 239, 40–43.

reflection: systems theory focuses on the self-constitution of the system where the law becomes a form, whereas deconstruction aspires to dissolve the relation of paradox and form, which for the latter is above all a political process.[150]

Luhmann's systems theory, however, upholds the functional differentiation between the societal subsystems of politics and law. This strong distinction between law and politics explains why Luhmann's foremost critic, German sociologist Jürgen Habermas considers systems theory to be "the mortal enemy of democracy". By a rather technical application of the code, political elements of the legal system are trivialised. As Thomas McCarthy formulates it, systems theory then "promotes a depoliticization of the public sphere by defining practical questions from the start as technical questions".[151] However, counterarguments have also been voiced. For example, Fischer-Lescano claims that it is possible to reveal the political elements deconstructively by implementing elements of critical theory to systems theory.[152]

Comparing systems theory with Derrida's deconstruction gives particular insight into the research agenda I have adopted in this study. Chosen theoretical tools open some worlds and close others. Viewed from the perspective of deconstruction, justifying private enforcement and technology in dispute resolution would lead to revealing the paradoxes and politicised reality of the legal system. Derrida's deconstruction functions as the mirror of de-paradoxification, as a constant reminder of the fragile illusion that is justice. Written from this perspective, my attention would have been directed towards the political nature of discourses on justice and the participation in these discursive practices that create social reality.

Hence, applying Luhmann's systems theory as the theoretical framework of this study comes with certain reservations. It could be claimed that taking these reservations, i.e. systems theory's lack of political awareness and the focus on de-paradoxification instead of revealing the paradoxes, seriously

150. Christoph Menke, 'Subjektive Rechte: Zur Paradoxie der Form' (2008) 29 Zeitschrift für Rechtssoziologie 81.

151. Thomas McCarthy, 'Complexity and Democracy: Or the Sediments of Systems Theory' in Axel Honneth and Hans Joas (eds), Jeremy Gaines and Doris L Jones (trs), *Communicative Action: Essays on Jürgen Habermas's The Theory of Communicative Action* (MIT Press 1991) 133–134; See also Kenneth C Bausch, 'The Habermas/Luhmann Debate and Subsequent Habermasian Perspectives on Systems Theory' (1997) 14 Systems Research and Behavioral Science 315, 326.

152. "[Critical systems theory] reveals the contingencies and the political controversies about these interconnections [in communication], by reading the theory against its grain with deconstructive elements." Andreas Fischer-Lescano, 'Critical Systems Theory' (2012) 38 Philosophy and Social Criticism 3, 4.

means taking a step closer to Günther Teubner's reflexive law. According to Teubner's conceptualisation, law is moving from formal law to substantive law and then onwards to reflexive law, which imposes procedural and constitutive limitations to legal development. This means that reflexive law does not provide any specific material values or criteria for desired outcomes.[153]

For the purposes of this study, I apply the basic concepts of Luhmann's systems theory, i.e. autopoiesis, closure/openness and structural couplings, as my theoretical starting point, and complement them with elements of reflexive law and critical approaches to systems theory, which are discussed in the following section. It should be noted, however, that combining reflexive elements to systems theory goes against Luhmann's perception of law as he considered reflexive approaches to be too far-reaching in their search for a synthesis of critical-emancipatory approaches, responsive dogmatics and sociological analysis.[154] Regardless of Luhmann's critical view, adopting the fundamental concepts of systems theory does not mean that theory would have to be applied in its entirety without conceptual supplements.[155]

2.3 INTERNAL CRITIQUE AND METHODS

2.3.1 THE ROLE OF INTERNAL CRITIQUE

Thus far I have established the theoretical tools which I will employ in evaluating the relationship between the legal system and technology and in examining how the justification of dispute resolution changes through technology. Before proceeding to these analyses, a few more remarks are required about

153. On reflexive law, see Teubner, 'Substantive and Reflexive Elements in Modern Law' (n 149). For an analysis of reflexive law within private transnational regimes, see Calliess, 'Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law' (n 60). Hydén also discusses reflexive elements within the Scandinavian context. See Håkan Hydén, 'Towards a Theory of Law and Societal Development' (2014) 60 Scandinavian Studies in Law 443.

154. "Überdies ist die Vorstellung des Programms belastet durch die Absicht, damit eine Synthese von Theorien der 'kritisch-emanzipativen' Richtung mit Vorstellung uber 'responsive Dogmatik' und mit soziologischen Analysen des 'Rechtsystems' herbeizuführen. Infolgedessen mag jeder Anhänger einer dieser Richtungen unter 'reflexivem Recht' ungefähr das verstehen, was er selbst immer schon gemeint hatte." Niklas Luhmann, 'Einige Probleme Mit "Reflexivem Recht"' (1985) 6 Zeitschrift für Rechtssoziologie 1, 2. On Teubner's reflexive law see Teubner, 'Substantive and Reflexive Elements in Modern Law' (n 149).

155. In fact, Luhmann applies Thomas Kuhn's concept of scientific revolutions without bringing Kuhn's context to the application: "A rough orientation will suffice to define what we have so far called a 'paradigm change'. We need not concern ourselves with finding out what Kuhn had in mind when he introduced the concept of paradigm. That is a pointless task today." Luhmann, *Social Systems* (n 85) 4.

the objective of this study. In the last sections of this chapter, I discuss critical systems theory and the role of internal critique with the objective of locating this study in these current discussions.

Critical systems theory provides a safety valve for systems theory, as it focuses on revealing instead of hiding law's foundational paradoxes. As the developer of this approach to systems theory, Andreas Fischer-Lescano puts it: a critical system "regards real contradictions as the societal engine". Thus, by making paradoxes visible, instead of rendering them invisible, the theory aims towards the demystification of these paradoxes and an immanent critique internal to law.[156]

Immanent critique, in turn, describes how this study relates to law's renewal. I do not aspire to provide fundamental criticism to the legal system or to the ways in which law reacts to technology through justification, nor do I present concrete policy recommendations. By revealing how different sources of justification can be employed for arguments about technology, I strive to describe technology's multifaceted impact on law.

Through critical systems theory, Fischer-Lescano aims to answer Habermas's criticism that perceives systems theory simply as a descriptive apparatus, the "Hochform of technocratic consciousness, the 'apology' of the status quo, meant to preserve the latter".[157] Critical systems theory combines the critical theory of the Frankfurt School with systems theory by distinguishing five commonalities in both their ontologies:

1. the thinking in societal-systemic, institutional concepts, which transcend simple relations of reciprocity by dint of their complexity:
2. the assumption that society is based on fundamental paradoxes, antagonisms, antinomies:
3. the strategy to conceptualize *justice* as a contingent and transcendental formula:
4. the form of immanent (and not morality-based, external) *critique* as an attitude of transcendence:
5. the aim of societal (and not only political) *emancipation* in an "association of free individuals" (Marx).[158]

156. Fischer-Lescano (n 152) 8.
157. See e.g., McCarthy (n 151) 133–134; Fischer-Lescano (n 152) 3.
158. Fischer-Lescano (n 152) 4.

According to Fischer-Lescano, critical systems theory focuses on the indeterminacy of law and brings forward the "political in law as the contradictory moment of law". From law's simultaneous openness and closure, justice arises as a two-fold contingent and transcendent formula of law. First, the formula provides the legal system with an internal formula for its operations, which produces normative implications within the system. Second, transcendence formula goes beyond law, and criticises the universality of theories and the expansionism of law's rationality, thus connecting transcendence with law's immanence.[159]

Critical systems theory is sensitive to political controversies within social orders. Fischer-Lescano recognises two types of critique enabled by critical systems theory that are relevant to law. These are value critique and critique of statism. Through value critique, the theory is able to perceive how social conflicts are hidden behind the façades of values and principles and thus rendered unrecognisable. In turn, a critique of statism allows the theory to recognise other usurpers of societal autonomy than politics.[160]

Both of these forms of critique provide supplementary perspectives to systems theory. However, the politically-oriented critique of statism is especially useful for the objective of this study, namely the examination of the privatisation of dispute resolution through technology. As Fischer-Lescano puts it, critical systems theory provides methods for understanding societal struggles from an internal perspective without losing sight of law's normativity.[161] By tuning systems theory towards a more sensitive understanding of political struggles, critical systems theory is able to answer Habermas's critique. In other words, attention is redirected towards the paradoxes that without the critical stance would be hidden in order to preserve operational continuity. However, this perspective calls for fine-tuning rather than abandoning my chosen approach of systems theory. Regardless of this, the entrance point of observation remains the same, i.e. an internal normative critique of the legal system.

According to Tuori, immanent critique aims at introducing an "intersubjectively acceptable substantive criteria" for the validity of law. As Tuori points out, fundamental criticism contesting the whole coercive nature of law and its legitimacy e.g. on Marxist or on anarchist grounds is possible only from outside the field of law and thus, fundamentalism forms the limits for

159. ibid 11.
160. ibid 13.
161. ibid.

internal critique. Immanent criticism holds on to normativity of law, judging law's borders and validity based on its own promise of what law is and should be.[162] This perception of immanent critique comes close to Luhmann's internal observation. According to Luhmann, external observers perceive law differently and internal observation is more limited in what it may say about law. These limits provide stability and security for the system at the same time as they limit what can be observed internally.[163] In terms of Fischer-Lescano and Tuori, I strive for an immanent normative critique of law, which is to be separated from such fundamental criticism that aims at the abolition of the regime of law.

Hence, this study in its critical endeavours simultaneously adds to law's legitimacy in its totality, renewing its normativity and strengthening its stance as a societal practice. Discussion on how justificatory structures are engaged in relation to *dispute resolution and technology* emphasises the significance of justifying law, and law's need to perceive itself as coherent. As Finnish legal scholar Thomas Wilhelmsson states, "microcriticism can lead to macrolegitimation".[164]

However, are law's boundaries as strictly separated from other societal subsystems as Luhmann's theory suggests? Within science and technology studies, Professor Sheila Jasanoff suggests that technology and science and social practices such as law co-produce themselves. According to Jasanoff, "knowledge and its material embodiments are at once products of social work and constitutive of forms of social life; society cannot function without knowledge any more than knowledge can exist without appropriate social supports".[165] Similar to this, Friedrich Kittler, a German media theorist known for the dystopian overtones of his writings, perceives that media technology defines human interaction, to the point that "what remains of people is what media can store and communicate".[166] German legal historian Cornelia Vis-

162. Although Tuori particularly points out that normative criticism is also not limited to an internal approach and fundamental autonomous criticism is normative as well. See Tuori (n 82) 29–30.

163. Luhmann, *Law as a Social System* (n 74) 105. "Valuation is left to the observer, and as an aspect of a system's self-observation it is possible only within the context of this self-referential processing of information." See Luhmann, *Social Systems* (n 85) 323.

164. Thomas Wilhelmsson, *Critical Studies in Private Law: A Treatise on Need-Rational Principles in Modern Law.* (Kluwer Academic Publishers 1992) 49.

165. Sheila Jasanoff, 'The Idiom of Co-Production', *States of Knowledge: The Co-Production of Science and Social Order* (Routledge 2004) 3.

166. Friedrich A Kittler, *Gramophone, Film, Typewriter* (Geoffrey Winthrop-Young and Michael Wutz trs, Stanford University Press 1999) xl.

mann, in turn, emphasizes the impact of a written form, of files (*Akten*), in shaping legal practices throughout history.[167]

It seems that media theorists focus on the interactive elements between law and technology, which then become entwined. This mediatheoretical stance does not necessarily contest the existence of strict boundaries between different social subsystems required by systems theory. Forms of media do affect the internal functioning of the subsystems both by providing new irritants for the subsystems to manage and by providing a reflection of the overall system that is applied internally in the subsystems.[168] Another train of thought that should be sought within the framework of systems theory is the possibility of system boundaries becoming fuzzy, which could result from the decreasing ability of subsystems to make continuous distinctions as the overall complexity of society and the use of ICT technology increases. In other words, do the changes in communication media affect the consitution of system boundaries. Unfortunately, this issue cannot be discussed in this context further.

This leads us to the following. As an ontological starting point, I consider law to be socially constructed. Law is renewed, upheld, and created through communicative acts that attach meaning to the use of language. Similar to law, reality and our knowledge are also built in a social context, and we can only observe them as such. We should be content solely with trying to understand how subjective 'truth' is built in social interaction, how the socially-mo-

167. Cornelia Vismann, *Files: Law and Media Technology* (Geoffrey Winthrop-Young tr, Stanford University Press 2008) 12.

168. Professor Geoffrey Winthrop-Young evaluates whether it would be feasible to combine Kittler's views on media and technology with Luhmann's systems theory. According to his view, there is not enough common ground to form a basis for such hybrid theory regardless of some communalities between their starting points. "Such similarities notwithstanding, it is difficult not to conclude that the attempts to manufacture this grand theory must founder on the incompatible views of media and communication. Kittlerian media science decrees that where letters were, there subjects shall be, and where subjects were, there encoded programs will be. Systems theory responds that the connections between letters and also those between letters and programs depend on observers reacting to and catalyzing further exchange of letters and programs. In a fully digital environment, media science argues, to talk of communication only makes sense if one starts at the beginning, with the input standardization imposed by digital machines, while systems theorists respond that as a social event communication only makes sense if observed in terms of its observer-based effective output, which presupposes specific distinctions within the very structure of communication." Winthrop-Young's analysis has many merits. However, his analysis does not take into consideration the potential of structural couplings that may relay information between different systems much in the same way as Jasanoff's co-production. See Geoffrey Winthrop-Young, 'Silicon Sociology, Or, Two Kings on Hegel's Throne? Kittler, Luhmann, and the Posthuman Merger of German Media Theory' (2000) 13 The Yale Journal of Criticism 391, 417.

tivated meaning of law is created, and which structures preserve it. What criteria should we set for our knowledge about law and what kind of knowledge should we accept as hegemonic? Which means of justification have become dominant? In the words of Italian Enlightenment philosopher, Giambattista Vico, truth itself is made.[169] Jurisprudence, while simultaneously renewing and reinterpreting the object of its study, is also a scientific practice. Hence, I adopt Tuori's statement about the dual-nationality of legal science as both legal and scientific practice.[170]

2.3.2 METHODS AND SOURCES

The overarching research question of this study is *how does implementing technology to dispute resolution challenge the justification of law as a legitimised mode of violence?* As established in this chapter, I employ systems theory as my framework for the examination of justificatory narratives. This has implications both on the ontology and methodology of this study. Ontologically, I perceive the observations we make of reality to be socially constructed. Understanding social interaction as functionally differentiated societal subsystems enables the observation of the legal system's connections with other systems without losing sight of law's normativity.

Methodologically, this framework orients my observation towards legal theory. However, this theoretically oriented perspective is supplemented through the subject matter of conflict management. In other words, this study participates in the doctrinal discussion of procedural law but approaches its subject from the somewhat unconventional angle of applied legal theory.

Hence, I do not use legal dogmatics for systemising and organising information provided by the operations of the legal system. I do, however, discuss the content of existing legislation, case law and doctrine regarding *dispute resolution and technology* when necessary for the research question, but this examination is not the central part of my argument. Instead, I primarily focus on identifying and examining the justificatory narratives that are used both to justify certain forms of dispute resolution and to argue for or against

169. Vico's statement cited by Glaserfeld is as follows: "As God's truth is what God comes to know as he creates and assembles it, so human truth is what man comes to know as he builds it shaping it by his actions. Therefore science (*scientia*) is the knowledge (*cognitio*) of origins, of the ways and the manner how things are made." Glaserfeld considers Vico's quote to be an early expression of constructivism. See Ernst von Glasersfeld, 'An Introduction to Radical Constructivism' in P Watlawick (ed), *The Invented Reality* (Norton 1984).
170. Tuori (n 82) 283–322.

the best models of managing conflicts. These narratives are historically created and contextualised but they also transcend their original contexts. For example, sovereignty as a justificatory narrative is still employed as a source of justification regardless of its origins in the 16th and 17th centuries, as I discuss later on in chapter 6.

This means that the examination of these timeless and context-transcending elements of dispute resolution becomes the centre of attention. Such analysis resembles Norwegian sociologist Vilhelm Aubert's studies of legal anthropology on the historical development of conflict management in different tribal communities and the commonalities between these practices. For example, Aubert identifies the inclusion of the external third party to resolution processes as a decisive element which transforms the dyad of conflicting parties into a triad.[171]

My analysis is also directed towards the history of different mentalities concerning dispute resolution. However, such approach observation moves out of necessity on an abstract level. There are three reasons for this. First, these mentalities are typically unwritten, silent expectations that may be considered rather self-evident. This means that data produced by legal operations, cases, legislation, etc., rarely provides an entrance point for abstract observation as such. In other words, no answer to the research question as such can be found in the data produced by legal operations. Second, my generalised research objective directs my examination to the legal macroanalysis of society. To put it more concretely, an abstract research question needs to be answered on the same level as the question is asked. Third, legal operations have not yet had the time to produce much data addressing issues of technology as connections between dispute resolution and technology are only starting to emerge.[172] In addition, many disputes resolved in private forms of technologically augmented dispute resolution are not public by default, unlike court judgments. This means that legal dogmatic and certain sociological approaches to my research subject,

171. Vilhelm Aubert, 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution' (1963) 7 The Journal of Conflict Resolution 26, 26. See also Vilhelm Aubert, *Rettens sosiale funksjon* (Universitetsforlaget 1976) 180–186.

172. This is especially evident while discussing ODR where legal norms are just emerging. Thomas Schultz has described the Internet as a "field of evolving normativity". See Thomas Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' (2008) 10 Yale Journal of Law and Technology 151, 163. Lastowka puts an emphasis on the fast growing pace of regulation online, where many current legal instruments did not exist twenty years ago. He also refers to criticism that the Internet is evolving faster than it can be regulated. See Lastowka (n 2) 73.

 dispute resolution and technology, are not yet established enough to provide a sound methodology.

Instead of legal dogmatics or the sociology of law, my examination takes place on the level of the self-understanding of procedural law, in the structures of doctrine formation. I identify justificatory narratives by observing how this self-understanding changes as a response to the challenge of technology. Instead of evaluating these changes directly, I evaluate how doctrinal self-understanding is capable of reacting to these changes, which tools are engaged to systematise technology, and how different rationalities from other subsystems direct these reactions. This means that there is a deconstructive element in my analysis although I do not use deconstruction as a methodological tool. Instead, I employ influences from systems theory, from the critical and political stance of critical systems theory, social constructivism and the sociology of technology to examine how justificatory narratives can be engaged for systemising multifaceted social reality.

It should be noted that the emphasis of this work is not on its methodological uniqueness. However, it is important to entwine the theoretical framework and methodology soundly together. The methodological challenge of this study relates to its interdisciplinary approach, which I adopt to understand the use of technology in communication. Systems theory provides a functional interface for examining technology, as it recognises the functionally differentiated rationalities within each societal subsystem.

This enables us to find an understanding of technology from the approaches of science and technology studies. Finding an understanding of technology means asking questions about what technology is and how it relates to the legal system. Is there a common language between these two, or does technology merely enter the legal system as detached singular facts or internal programs?

Defining technology for the needs of the legal system necessarily participates in social meaning construction. American physicist and philosopher of science Thomas Kuhn claims that the emergence of technology has often played a significant part in creating new sciences.[173] Kuhn's initiative towards

173. According to Kuhn, "Because the crafts are one readily accessible source of facts that could not have been casually discovered, technology has often played a vital role in the emergence of new sciences". Thomas S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1964) 15–16. Similarly, Resnik considers technology alongside market incentives and legal profession to be "also important parts of the story of the changing forms of civil dispute resolution". Judith Resnik, 'Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication' (1995) 10 Ohio State Journal on Dispute Resolution 211, 215.

epistemological change of scientific practices has also paved the way for the sociology of scientific knowledge, which examines science as a social activity where political, cultural and economic fluctuations may create points of convergence or ambiguity. This in turn has strongly influenced science and technology studies in the 1980s.[174]

This interdisciplinary aspiration of understanding technology beyond its reflections in the legal system is enabled by two steps within the framework of systems theory. First, legal science has dual citizenship as it simultaneously belongs to the legal system operating with the coding legal/illegal and to the science system, which operates through the symbolically generalised medium of truth (*Wahrheit*).[175] Secondly, systems theory itself enables interdisciplinary influences, as operations can be shared by several systems through structural couplings. This means that we can examine an understanding of technology within the sociology of technology, detect how these claims relate to the rationality of the scientific system and analyse how these facts become relevant for the legal system. In examining *dispute resolution and technology*, we place ourselves at the point of convergence between law, science and technology.

It follows from the above-mentioned objectives and realities of the research scope that I do not apply any fixed hierarchical doctrine of sources. Moreover, sources of law have changed and are significantly changing as the result of global law, which has rendered sources doctrines problematic at the very least, or even in need of reinterpretation. Teubner has attempted such a reinterpretation, and he sees the sources doctrine as the result of "self-organized processes of 'structural coupling' of law with ongoing globalized processes of a highly specialized and technical nature".[176] Teubner's sources doctrine refers to global private regimes with their own specialised norm production. Although these regimes are not hard law regimes, they are still specifically legal regimes. In the absence of hard law, soft law adopts a significant role in these regimes. Thomas Schultz discusses the same issue from

174. See Klaus Taschwer, 'Science as System vs. Science as Practice: Luhmann's Sociology of Science and Recent Approaches in Science and Technology Studies – a Fragmentary Confrontation' (1996) 35 Social Science Information 215, 215.
175. It should be noted that Luhmann considers truth a symbolic medium of communication. This means that truth is neither a characteristic of objects, of sentences or of cognition but a method of organising the system's communication autopoetically. It follows from this that the medium of truth can neither be attributed with rationality or be seen as a source of knowledge. Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Suhrkamp Verlag 1992) 173.
176. Teubner, 'Global Bukowina: Legal Pluralism in the World Society' (n 41) 5.

84 a different perspective: he focuses on the processes through which social structures transform into private legal systems. According to his analysis, the ICANN and ODR platform of the e-commerce site eBay establish themselves as autonomous non-state legal systems by creating structures imitating those of state litigation. [177]

These conceptualisations demonstrate that ways in which private social practices turn into legal regimes are particularly interesting at the convergence point of private and public, namely in dispute resolution that is changing as a result of technology. Emphasising the role of such practices instead of sources doctrine directs observation towards identifying these new regimes as belonging to the legal system despite their unconventional origins. In other words, we ask how these regimes are seen to be legally relevant. [178]

This brings us back to Luhmann's systems theory. According to Luhmann, sources doctrine has been utilised as a means of excluding doubt from the legal system. However, other instruments take over this function, which basically comes down to providing legitimacy. Luhmann considers de-paradoxification to be among these instruments.[179]

For Luhmann, all self-description of the legal system is based on paradoxes. Foundational paradoxes result from the self-observation of the system that always participates in the system's operations. Without downplaying this tautology, the foundational paradox would lead to paralysation of the system's operations and autopoiesis would stop. Through de-paradoxification, i.e. by introducing new distinctions, the system is able to pretend that its operations are not based on self-observation.[180] Michael King and Chris Thornhill exemplify de-paradoxification within the legal system through distinctions between reasonableness/unreasonableness and constitutional/un-

177. See e.g., Schultz (n 172) 156,163. Similarly, Calliess and Renner refer to private ordering which translates into a global governance instrument as it takes over the function of safeguarding normative expectations. Calliess and Renner (n 60).

178. This follows Luhmann's position on sources doctrine: "The unalterable fact that legitimacy is based on legal fiction confirms that a concept of validity, which is free from norms and which can then be conditioned, is more appropriate for dealing with the discrepancy between the complexity of the system and the actual decisions it achieves. Seen from the perspective of a history of theories, this concept of validity as a symbol of the unity of law replaces that of the sources of law and thus replaces the starting point for all 'positivist' theories." Luhmann, *Law as a Social System* (n 74) 123–124.

179. ibid 125.

180. "Deparadoxification means to invent new distinctions which do not deny the paradox but dispalce it temporarily and thus relieve it of its paralysing power." Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (n 68) 32.

constitutional that may be substituted for the problem whether the law may be justified by universal morality or by natural law.[181]

The chase between de-paradoxification and deconstruction is a continuous one where the object of deconstruction changes constantly through autopoiesis and only when its everlasting self-production stops does deconstruction hit its mark. Teubner formulates it thus:

> Only when deconstructive moves affect the validity of legislative, judicial or contractual decisions, something which recently appeared as a consequence of the globalisation crisis of law, the hectic search for new bases of normative validity begins.[182]

According to Teubner, contradictions and paradoxes in law remain dormant, or ineffective, as they rise within legal self-observation of doctrines, concepts or principles. They do not have an effect on legal operations such as judicial precedents, legislative decisions or contracts, as these form an autonomous network of institutionalised structures loosely connected with the self-observation. Deconstruction is possible but remains ineffective unless it touches upon the validity of these legal operations. Teubner raises globalisation as an example of a crisis which addresses legal operations and begins the "hectic search for new bases". The constant race for evolution, for change, for reconstruction, renewal and new selections are crucial for the existence of the system. If the system cannot renew itself through its autopoiesis, its immune system deteriorates and in the end it ceases to exist. Teubner considers self-contradictions, anomalies and paradoxes to be essential for self-renewal Thus, it is not structures but this unquestioning, voracious need for change that is the object of deconstructive attention.

Moreover, we can consider the implementation of technology in dispute resolution to be the necessary evil that has the function of accelerating law's renewal. Instead of crisis, the new irritant is reworded as a possibility. Instead of hiding the paradox, we may embrace its disruptive force.

It follows from this that the mechanisms of de-paradoxification, including justificatory narratives, take on a decisive functional role in this study. In the spirit of critical systems theory, the examination of de-paradoxifying elements of the justificatory narratives becomes a critical project in which the

181. King and Thornhill (n 73) 22.

182. Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (n 68) 39.

focus is on revealing the paradoxes instead of hiding them.

This approach opens the narratives to value critique and critique of statism, which results from critical systems theory's sensitivity to political controversies. Critical close reading of de-paradoxifying mechanisms replaces sources doctrine as a methodological tool in this study. This interpretation of justificatory narratives exposes their function of de-paradoxification and thus enables critical evaluation of how they adapt to the challenge of technology.

2.4 CONCLUSIONS

In this chapter I have laid out the theoretical framework which I employ in order to answer how the implementation of technology in dispute resolution challenges the justification of law as a legitimised mode of violence.

The chapter began with a description of law as violence, a fact which is often hidden from sight in everyday discussions on the nature of law. As the emphasis of this treatise is on private enforcement, law's inherent nature as violence is vital and needs to be brought out into the open. Understanding dispute resolution as a part of law's violent nature sets the tone for understanding justification. Instead of disguising violence the debate I take on is to define who has the right to define which modes of violence are accepted as legitimate and which are not. This discussion on justifying coercive interventions can be located at the core of the legal system, and needs to be evaluated from the system's perspective. To this end, I engage the theoretical apparatus of Niklas Luhmann's systems theory to set the stage for assessing how justification of dispute resolution is built through justificatory narratives.

Like Luhmann, I understand the legal system to be a separate social subsystem in the overall society which has been created through continuous communications that all contribute to establishing law as a functionally differentiated part of society by renewing the distinction between law and non-law. This means that the legal system constitutes itself by itself through self-reference (autopoiesis), where all the system's communications apply the system-specific code. Thus the legal system is operatively closed, in the sense that only the system's operations can apply their own coding, yet it remains informatively open to external influences through structural couplings of operations shared by several systems at the same time in accordance to each

system's unique coding. This combination of openness and closure, which reflects the often paradoxical nature of Luhmann's theory, has explanatory power, as it provides a relatively simple model of evaluating law's interaction with other subsystems such as the political system and the system of economics without losing sight of law's uniqueness as a (legally) normative practice. Through the lens provided by systems theory, justificatory narratives used to justify coercion in dispute resolution appear as temporalised structures created through continuous applications of law's coding.

However, Luhmann's theory has been aptly criticised for not reserving a sufficient role for justice. By testing systems theory against Jacques Derrida's deconstruction, justice reveals itself to be the ultimate paradox of the legal system. This paradox is hidden as long as the system's continous operations are able to keep the paradox hidden but if the system's ability to make continuous distinctions decreases, the paradox is revealed yet again. In addition to this problematic quality of justice, systems theory's lack of insight into existing power relations requires us to complement the main system-theoretical tools with critical systems theory's awareness of politics. Another shortcoming of Luhmann's theory, if it indeed can be called as such, is absence of theorisations on the role of media. To provide this insight, it is necessary to look towards media theory, and to ask what is the role that media technology adopts in law's self-renewal – a question that is taken up in the following chapter.

3 Understanding Technology in Dispute Resolution

In the previous chapter, I established the theoretical framework of this study. The study belongs to the tradition of systems theory but detaches from this starting point because of the objective of finding justification of dispute resolution through critical reconstruction. I perceive the legal system as a simultaneously operationally closed (the legal system alone decides what belongs to it) and cognitively open (outside information may enter under certain restrictions placed by the legal system) system. Structural couplings may emerge between different systems when the systems share an operation (the operation applies codes of both systems). This background is important for the objective of this chapter: examining how technology enters the legal system.

Bringing technology into dispute resolution has many implications on justifying both state and private intervention to private conflicts. Because my research question is how justification changes due to technology, it is necessary to define what technology means in this context. This means taking technology's disruptive power seriously. Surprisingly enough, the discussion on technology in dispute resolution is often centered around introducing individual applications and projects instead of more comprehensive analysis of technology's impact on legal communication.

In this chapter, I explore how technology should be conceptualised for the needs of dispute resolution and procedural theory formation. This examination is two-fold. First, I evaluate technology on the abstract level of social systems, and second, I provide concrete examples of how technology is implemented to dispute resolution processes.

The chapter starts with a working definition of technology, which includes technological artefacts as well as social practices that stem from the use of modern information and communication technologies (ICT). There are two further issues that follow the chosen conceptualisation of technology and which demonstrate why the definition of technology carries ideological choices. First, whether technological artefacts themselves direct how they are used, which would signify a determinist approach to technology, or whether the artefacts and their use affect each other reciprocally as is claimed within social constructivist approach to technology. Second, to which extent new

ICTs possess disruptive power, i.e. whether there is a societal change caused by technology and, if yes, how substantive such change might be. In this chapter I suggest that ICTs have changed social interaction extensively, and this change could be interpreted as the emergence of a new social system, the use of ICT.

3.1 DEFINING TECHNOLOGY

3.1.1 DEFINITION DEFICIT

The most obvious choice for defining technology in connection with dispute resolution would be to examine the policy documents that promote its use. Surprisingly enough, definitions of technology are hard to find both in policy documents and in jurisprudence, although use of technology often is at the centre of access to justice reforms. This definition deficit is most likely the result of a more functional orientation where the emphasis is placed rather on the tasks entrusted to technology than to its formal definition.

For example, ODR Regulation of the EU does not include a definition of ODR or even mention technology. Instead, more instrumental approach is adopted in the recitals of the Regulation, which perceive ODR as a means to improve consumer confidence in the online single market. The lack of efficient electronic means for dispute resolution is recognised in recital (8), and the Regulation tries to amend the situation by introducing the EU-wide ODR platform. Recitals 18 and 19 define the content of the platform. The platform "should take the form of an interactive website offering a single point of entry to consumers and traders seeking to resolve disputes out-of-court which have arisen from online transactions".

In addition to this, the platform should provide information on out-of court resolution arising from online sales and services and means for submitting claims in all official languages. The platform is also intended to transmit the complaints to competent ADR entities and to provide case management tools for these entities. In addition to these, the recitals pay attention to data protection and it should be made accessible through a specific EU portal. These functionalities are described in further detail in article 5 of the Regulation, which also stipulates that the platform should be user-friendly.

90 In short, the Regulation describes the specific functionalities and desired objectives of the platform but nothing is stated about the role of technology or how it should be implemented. Naturally, such examinations cannot be considered mandatory for legislative instruments and they could also bring additional complications for streamlining. The chosen approach accentuates the principle of technological neutrality. However, the role of technology, what it means in the context of the regulation, and its implications on human interaction in dispute resolution processes are not discussed in the impact assessment accompanying the regulation either.[183]

Similar functionalist approach has been adopted in other policy documents. For example, UNCITRAL's working group on ODR has discussed definitions of ODR and technology and agreed that any definition should be inclusive enough not to exclude further developments of technology in the future. The working group has acknowledged also the importance of preserving the principle of technological neutrality.[184]

In the UK, the Civil Justice Council is responsible for overseeing and coordinating the modernisation of the civil justice system. To provide background information for policy setting, the Council's ODR Advisory Group gave its report in February 2015. The report includes examples of ODR, detailed recommendations, and suggestions for ODR piloting. The most interesting part of the report, however, is its discussion on the future of ODR. The report recognises four areas in which future technological development will further revolutionise dispute resolution: 1) systems to help analyse legal problems, 2) systems to assist in negotiations, 3) systems to assist in decision-making, and 4) systems that make decisions. According to the report, advancement of artificial intelligence, big data, affective computing, crowd sourcing, machine learning, what-if analysis, and virtual meeting rooms will all contribute to the future development of ODR. This being said, the report concludes that the role of legal AI will be to function as "intelligent agents for judges" in the 2020s although the advisory group does not anticipate AI systems replacing human judges.[185]

183. 'Impact Assessment on Directive on Consumer ADR and Regulation on Consumer ODR' (European Commission 2011) SEC (2011) 1408 final.
184. 'Report of Working Group III (Online Dispute Resolution) on the Work of Its Twenty-Second Session (Vienna, 13-17 December 2010)' (UNCITRAL, Working Group III 2011) A/CN.9/716 8.
185. Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low Value Civil Claims' (Civil Justice Council 2015) 24–25 <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/odr-report-february-2015/> accessed 16 February 2016.

These examples depict that policy documents or legislation provide no definition of technology that would be useful as a starting point.

In literature, descriptions of ODR technology have often become descriptions of pilot projects or overall advantages of ODR. These descriptions are often linked with Ethan Katsh and Janet Rifkin's analogy of technology as the fourth party of the resolution process, in which its tasks and role vary depending on the context.[186] Colin Rule has followed Katsh's definition. Furthermore, Rule has recognised computer technology's role in early ADR as a tool for "number crunching", i.e. for calculating value of the claim, from which technology has expanded to be used for case analysis and later on for information and communication purposes.[187] According to Rule, the main difference between ADR and ODR is the use of technology for communication, which enables a variety of different options from asynchronous e-mails and threaded discussions to synchronous communication such as chatting, instant messaging, or video conferencing.[188] Arno R. Lodder and John Zeleznikow, in turn, analyse different types of ODR software on the basis of the fourth party analogy and discuss the convergence of the third and fourth party when the software decides the case.[189]

Cortés considers the main difference between ADR and ODR to be the lack of face-to-face (F2F) communication in the latter. Although this creates some challenges, distance and lack of physical interaction may sometimes benefit the resolution procedure, and the development of ICT makes new substitutes of F2F communication more accessible. According to Cortés, new online tools will change ODR accordingly. However, Cortés accentuates the role of technology, especially in the absence of a physical meeting place.[190]

Kaufmann-Kohler and Schultz discuss the means of electronic communications in ODR. According to their analysis, two existing views depart from the question of ODR's uniqueness. One of these views maintains that ODR is

186. 'The fourth party does not except in a few well-defined instances such as blind-bidding, replace the third party. But it can be considered to displace the third party in the sense that new skills, knowledge and strategies may be needed by the third party. It may not be coequal in influence to the third party neutral, but it can be an ally, collaborator, and partner.' Katsh and Rifkin (n 11) 93 I discuss Katsh's analogy in further detail in section 3.2.2.

187. Rule (n 12) 23–34.

188. ibid 44–48.

189. Lodder and Zeleznikow (n 10) 79–85.

190. 'In offline settings, arguably, the features of the place where parties meet are not important, but when parties meet online the role of cyberspace is of paramount importance, because the fourth party shapes the ay expertise is delivered and the way communications take place. In online negotiation and online mediation the use of the software (fourth party) helps the parties in reaching an agreement by taking on part of the role of the third party.' Cortés (n 12) 83–85.

only online ADR and should replicate F2F communication as closely as possible, whereas the other solution emphasises the new opportunities provided by technology and consider ODR as a *sui generis* type of dispute resolution.[191]

Hörnle describes the different technologies used in online mediation and arbitration,[192] and examines the "transformative power of technology" based on Katsh and Rifkin's analogy. She recognises six characteristics of this transformative power: 1) overcoming spatial and temporal distances through communication technologies, 2) empowering communication through visual aids and access to legal sources, 3) saving human labour cost through artificial intelligence, such as automated translation software, negotiation systems, and online forms, 4) psychological effect of technology i.e. both the negative and positive consequences of the lack of F2F communication, 5) overcoming the jurisdictional problems of cross-border disputes through the extra-judicial nature of ODR, and 6) faster information processing enabled by technology.[193] Similarly to Hörnle, professor Richard Susskind has identified ODR as one of the "disruptive technologies" that fundamentally challenge the existing *status quo*.[194]

Hence, it seems that the revolutionary force of technology has been acknowledged in the ODR literature. However, the specifics of this technological dynamic are seldom elaborated further. Most descriptions depart from the analogy of technology as the fourth party of the proceedings. In these descriptions, technology used for ODR appears as supplementary, as a tool designed for the decision maker who is the neutral third party. The emphasis on the transformative power of technology on the one hand and the role of technology as a set of new skills and tools on the other have different implications.

We should ask whether the transformative qualities of new ICT could be reduced to lack of F2F communication or whether these technologies fundamentally challenge the routines of dispute resolution processes. In other words, the question that needs to be asked is what changes in dispute resolution when the interface between human and computer is added to the ritualistic structures of conflict management. In order to understand dispute resolution we need to reflect upon our tools, which are by no means

191. Kaufmann-Kohler and Schultz (n 50) 60.
192. Hörnle (n 10) 74–86.
193. ibid 86–89.
194. Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press 2010) 99, 217–225.

irrelevant.[195]

Answering this question to any satisfactory end would require both theoretical examination and in-depth analysis of empirical data on communicative practices in resolution processes. As this cannot be done in the scope of this study, we have to seek answers from other sources in order to examine how meaning is attached to the concept of technology. This is to say, our understanding of technology inevitably reflects certain ideological choices that influence the assumptions we draw from the conceptualisation. Understanding that these ideological elements are relevant to arguments regarding the use of technology is a necessary step towards revealing the justificatory narratives. To this end, I first discuss a working definition of technology and then proceed to examining the differences between determinist and constructivist approaches to technology in the following sections.

3.1.2 WORKING DEFINITION AND TWO APPROACHES TO TECHNOLOGY

The term technology is derived from an ancient Greek word meaning craftsmanship or art (*tékhne*) and from the word study (-*logia*, originally *légo*, "I speak"), meaning the s̄tudy of craftsmanship. Nowadays the term refers̄ to knowledge of techniques, practices, and devises that can be used for the purposes of information sharing and communication without exact knowledge of their operational specifics. This means that the use of fire, the invention of the wheel, and the development of agriculture, which lead to the Neolithic Revolution,[196] are all technologies in the original meaning of the word. However, when we talk about technology in dispute resolution, these are not the technologies we are referring to. Instead, the focus is shifted to information and communication technologies (ICTs) in general and to the popularisation of the Internet in particular, which transform conflict communication. In

195. The German media theorist Cornelia Vismann points this out in relation to files, which have for centuries formed the foundation of legal practices. The form of files provides participate in truth-making and in a way provide legitimacy for legal practices based on their validity. 'Legal studies lack any reflection on their tools. Of course, lawyers consult files to recapitulate past events. But they are of no interest in themselves, and they certainly do not turn into objects of scientific investigation. Files are the basis for legal work. Their validity resides in their truth value and their everyday operations.' See Vismann (n 167) 11.

196. The transition from foraging to agriculture signified unprecedented demographic growth and revolutionized human societies. See Jean-Pierre Bocquet-Appel, 'When the World's Population Took Off: The Springborad of the Neolithic Demographic Transition' (2011) 333 Science 560.

this meaning, (information and communication) technology is portrayed as "new".[197] In other words, we are interested in the social and communicative elements that these new ICTs bring to our comprehension of technology. To put it concretely, *dispute resolution and technology* does not refer to courtroom lamps or type writers but looks more towards such technologies as videoconferencing, online platforms, complex case management systems, and ultimately legal artificial intelligence, which I discuss later on in this chapter in closer detail. Physically, these technologies include both hardware and software applications.

As the exact function and relevance of ICT within dispute resolution depends strongly on the context, general definitions of technology might prove out to be poorly compatible with the needs of a more context-oriented approach. Bearing this in mind, the meaning we attribute to technology should rather be over-inclusive than under-inclusive. In addition, it is necessary to consider that, in the end, the meaning of technology is created through social interaction.

A starting point for an extensive definition could be found from the scientific policy setting, as computer scientists David Messerschmitt and Clemens Szypenski have done in their book *Software Ecosystem*. By acknowledging the multifaceted economic, legal, and social elements that all influence software development, they suggest that we should understand the software industry as a network of organisations interacting through the exchange of information, resources and artefacts.[198] Messerschmitt and Szypenski start their examination of information technology with the comprehensive definition provided by the American policy-setting organisation National Research Council. The National Research Council has defined technology in its 2002 report on technological literacy as follows:

> In its broadest sense, technology is the process by which humans modify nature to meet their needs and wants. However, most people think technology only in terms of its artefacts: computers and software, aircraft, pesticides, water-treatment plants, birth-control pills, and

197. For a critical overview of 'newness' of new media see Lister and others (n 31) 9–104.

198. David G Messerschmitt and Clemens Szyperski, *Software Ecosystem: Understanding an Indispensable Technology and Industry* (MIT Press 2003) 361–363; for classification of software ecosystems, see Slinger Jansen and Michael A Cusumano, 'Defining Software Ecosystems: A Survey of Software Platforms and Business Network Governance' in Slinger Jansen, Sjaak Brinkkemper and Michael A Cusumano (eds), *Software Ecosystems. Analyzing and Managing Business Networks in the Software Industry* (Edward Elgar Publishing 2013).

> microwave ovens, to name a few. But technology is more than its tangible products. An equally important aspect of technology is the knowledge and processes necessary to create and operate those products, such as engineering know-how and design, manufacturing expertise, various technical skills, and so on. Technology also includes the entire infrastructure necessary for the design, manufacture, operation, and repair of technological artefacts, from corporate headquarters and engineering schools to manufacturing plants and maintenance facilities.[199]

Messerschmitt and Szypenski further problematize technology by emphasising processing, storage, and communication of information as the main functions of modern IT.[200] Following this focus on information further, Spanish sociologist Manuel Castells recognises that there exists a power struggle over control of information between the state and other actors such as corporations, NGOs etc.[201]

Knowledge is often considered to be power, which statement entwines access to information with having authority. This relationship between information and authority is very much present in discussions on the changes caused by the adoption of IT technology, which has revolutionized accessing information online. As a mechanism of institutionalised power, law's function is deeply connected with controlling and managing information, which in turn calls attention to the changing forms of holding and storing information. German legal historian and media theorist Cornelia Vismann examines the historical relationship between archived legal files and legal practices, which she considers to mutually constitute one another. Deriving several historical examples from the Roman Empire to formation of Prussia as sovereign state and to excavation of the destroyed Stasi files of 1990s, Vismann deduces that record-keeping and handling of files shape the formation of legal proce-

199. Committee on Technological Literacy; National Academy of Engineering; National Research Council, *Technically Speaking: Why All Americans Should Know More about Technology* (Greg Pearson and Thomas Young eds, National Academies Press 2002) 2–3.
200. Messerschmitt and Szyperski (n 198) 14.
201. Manuel Castells, *The Power of Identity. The Information Age: Economy, Society, and Culture Volume II* (2nd edn, Wiley-Blackwell 2010) 319–320. Similarly, Lister et al. state that 'This apparent enthusiasm for the 'latest thing' is rarely if ever ideologically neutral. The celebration and incessant promotion of new media and ICTs in both state and corporate sectors cannot be dissociated from the globalising neo-liberal forms of production and distribution which have been characteristic of the past twenty years.' Lister and others (n 31) 11.

dures and the focal conceptualisations of truth, state, and subject.[202] The files themselves have changed in the course of time; from being the tools of legal administration to being administered by legal regulation on privacy, according to Vismann's genealogy. This means that the changes of form in recordkeeping from the old paper files to computer icons constitute a change from material media to handling of data (instead of files) - a change that enables us to question how the battle over control of information is mutating.

As the work of Castells and Vismann depict, defining technology is not simply a neutral issue of including both existing and future advances of the industry to the definition. Instead, already its conceptualisation participates in ideological struggles over control of information. I will exemplify this with describing two approaches adopted within media theory that perceive the relationship between human users and technology drastically differently from one another. Fragments of these approaches can also be found in the ODR literature.

Within media theory, the two main approaches to technology are technological determinism of the Canadian philosopher Marshal McLuhan and social shaping of technology presented by the Welsh academic Raymond Williams. It should be noted, however, that both McLuhan's and Williams's major contributions to media studies took place before the emergence of the World Wide Web in early 1990s. Nevertheless, their theoretisations are still relevant to media studies. The main difference between these two theorists concerns the extent to which they consider media technology to have the capability of transforming society and culture. Whereas it follows from McLuhan's analysis that technology enables fundamental change, the Williamsite approach considers technology as reflections and interpretations of already existing social stratification, wealth distribution, and power balances. A point of interest is that the scope of Susskind's disruptive technology or Hörnle's transformative power both reconnect with this issue, i.e. the extent of technological change.[203]

McLuhan's technological determinism considers technological artefacts as "extensions of man", where the form of technology itself has more fundamental influence on human behaviour than the message that is related through technology.[204] It follows from this "extension thesis" as it is called by

202. Vismann (n 167) xii–xiii.

203. See Susskind (n 194) 217–225; Hörnle (n 10) 74–86.

204. McLuhan calls attention to the forms of technology through his assertation of the medium as the message: 'Societies have always been shaped more by the nature of the media by which

Lister et al.[205] that McLuhan does not make a distinction between the terms of 'media' and 'technology'; both are extensions of our senses, tools in our hands. In a famous example McLuhan depicts how a simple technology of light bulb has transformed the society by creating a new environment, i.e. the use of night-time for activities, although the bulb itself is empty of content, it is merely the medium. Similarly, he claims that the impact of television on society does not depend on the content of television shows: the influence is identical regardless of whether the shows are children's shows or illustrated violence.[206]

The strong suit of technological determinism is that it brings the disruptive element of ICTs to the front by considering the emergence of new media as a fundamental change in society. Also, McLuhan's environmental thesis of technology's naturalising impact accentuates the need to go beyond the content of a medium in order to understand its implications on human culture.[207] Shortcomings of technological determinism boil down to its lack of sociological sensitivity. McLuhan's position is not interested in a sociological analysis of power relations, wealth, and social norms present in technology. Hence, Williams's critique hits a spot as he brings attention to the reductionist overtone in McLuhan's theory in which the complicated social history of media is brought down simply to its effects.[208]

McLuhan's theory has its proponents also within *dispute resolution and technology*. For example, Katsh and Rifkin have referred to McLuhan's theory as the framework for understanding how technology changes interaction and communication in conflict management.[209]

men communicate than by the content of the communication.' Marshall McLuhan, Quentin Fiore and Jerome Agel, *The Medium Is the Massage. An Inventory of Effects* (Gingko Press 1967) 8.

205. Martin Lister and others, *New Media: A Critical Introduction* (2nd edn, Routledge 2009) 89.

206. Marshall McLuhan, *Understanding Media. The Extensions of Man* (McGraw-Hill 1964) 18–20.

207. As McLuhan has formulated it in 1969, 'The new media are not bridges between man and nature; they are nature.' Eric McLuhan and Frank Zingrone (eds), *Essential McLuhan* (Basic Books 1995) 274; see also Lister and others (n 205) 89–94.

208. 'It is an apparently sophisticated technological determinism which has the significant effect of indicating a social and cultural determinism: a determinism, that is to say, which ratifies the society and culture we now have, and especially its most powerful internal directions. For if the medium -- whether print or television -- is the cause, all other causes, all that men [sic] ordinarily see as history, are at once reduced to effects. Similarly, what are elsewhere seen as effects, and as such subject to social, cultural, psychological and moral questioning, are excluded as irrelevant by comparison with the direct physiological and therefore "psychic" effects of the media as such.' Raymond Williams, *Television: Technology and Cultural Form* (Schocken Books 1975) 127.

209. Ethan M Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in*

98 The social shaping of technology promoted by Williams insists on human agency instead of technological determination. Contrary to McLuhan, Williams calls attention to the social and ideological practices that he considers relevant to the impact of new technology. Instead of advocating for a fundamental change, he downplays the disruptive nature of modern technology and sees existing hegemonic ideologies, social classes, and social norms more decisive for the reception and use of media than any specific form of technology.[210] By asking why and how a certain technology is achieved, Williams is able to establish a more nuanced approach than McLuhan. Instead of perceiving technology simply as artefacts, Williams includes the knowledge and skills needed to use technology to his definition.

Thus, Williams's constructivist approach enables more context-based analysis of technology's impact and is more sensitive to ideological elements behind its acceptance. At the same time, however, technology becomes an extension of already existing social practices and has little disruptive value beyond this scope. In other words, Williamsite interpretation of technology would not consider the emergence of ICTs as a radical societal change like McLuhan's determinism.

Further Williamsite approaches can be found in the ODR literature. For example, the claim that ODR is simply online ADR with new and improved tools is a Williamsite interpretation of technology where the existing practices of ADR have more impact on the new method of dispute resolution than the implementation of technology.[211]

Due to its more sociologically comprehensive approach, Williams's theory has become the mainstream of media and communication theory.[212] Still, McLuhan's more generalised and provocative remarks have their value as his theory accentuates the radical change brought on by new media. Later on, the multidisciplinary field of science and technology studies (STS) has

Cyberspace (Jossey Bass 2001) 21–22.

210. As Lister et al. formulate Williams' position: 'The extent to which the technoloy can have tranformative "effects" is more or less in relation to other pre-existing patterns of wealth and power'. Lister and others (n 205) 87.

211. Kaufmann-Kohler and Schultz distinguish two main views, where the first one sees ODR as online ADR and the other approach emphasizes uniqueness of ODR. See Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004) 60.

212. Lister and others (n 205) 78–79. For an application of Williams's approach see e.g., Donald MacKenzie and Judy Wajcman, 'Introductory Essay' in Donald MacKenzie and Judy Wajcman (eds), *The Social Shaping of Technology*, vol 2 (Open University Press 1999). In a Williamsite spirit, MacKenzie and Wajcman point out that there are no single nominators which affect technological change, but instead, the social relations are more complex.

adopted an understanding of technology, which combines William's constructivist approach to culture with certain elements of McLuhan's theory. In this tradition, French philosopher Bruno Latour combines elements of both approaches in his actor network theory, which allows agency to physical objects as parts of networks of humans and objects.[213] In any case, McLuhan's and Williams's work on theorizing media has paved the way for later developments of media theory and still provide a point of reference for these discussions.

The German media theorist Friedrich Kittler, for example, expands on McLuhan's determinism by stating that "media determine our situation"[214] but contests the notion of media as extensions of man by highlighting the autonomy in technology. Instead of McLuhan's extensions of man, Kittler playfully turns McLuhan's extension thesis upside down and perceives humans as extensions of technology, where machines have required the skill to connect and manage information without any reference to human consciousness.[215] In one of his interviews Kittler negates the importance of the internet in promoting human interaction: "The development of the internet has more to do with human beings becoming a reflection of their technologies ... after all, it is we who adapt to the machine. The machine does not adapt to us."[216] Kittler's autonomy of technology, which acknowledges fully the disruptiveness of technology, stands in clear juxtaposition to McLuhan's determinism, and provides yet another, feasible tool for understanding the role of technology in dispute resolution. This tool contributes to our comprehension of the various ways in which the use of media affects human interaction and emphasises the growing importance of information. German legal historian and media theorist Cornelia Vismann takes this idea to its logical conclusion

213. See Bruno Latour, *Science in Action* (Open University Press 1987).
214. Friedrich A Kittler, *Gramophone, Film, Typewriter* (Geoffrey Winthrop-Young and Michael Wutz trs, Stanford University Press 1999) xxxix.
215. 'From Kittler's point of view (informed, no doubt, by Heidegger's take on technology) the notion of media as means, no matter how formative, still reserves a central position for humans. Against this instrumentalist anthropocentrism he posits media as 'anthropological aprioris': humans are appendages of media technologies rather than beneficiaries of their storage and communication potential. Subsequently, McLuhan's vision of a tech- nologically mediated global community as an all-encompassing electronic noosphere is replaced with the vista of machines that can connect and operate without any detour into human consciousness because, just like humans before them, they have learned to read and write on their own.' Geoffrey Winthrop-Young, 'Silicon Sociology, Or, Two Kings on Hegel's Throne? Kittler, Luhmann, and the Posthuman Merger of German Media Theory' (2000) 13 The Yale Journal of Criticism 391, 394–395.
216. See e.g. Stuart Jeffries, 'Friedrich Kittler Obituary' *The Guardian* (21 October 2011) <https://www.theguardian.com/books/2011/oct/21/friedrich-kittler> accessed 9 June 2016.

by describing how the form of a medium, in her case the concept of storing information to files (*Akten*), shape our understanding of legal processes, and ultimately defines subjecthood, both as the audience of media and as data subjects.[217]

To conclude, the approaches of McLuhan and Williams are both present in discussions about technology in dispute resolution. The differences between these approaches highlight different aspects of technology. Surprisingly enough, the more recent conceptualisations of autonomy of technology presented by Kittler and Vismann are absent from the debates on dispute resolution technology, although they might provide some new, useful perspectives. In order to examine technology in dispute resolution, we should be aware of our understanding of technology and the theoretical implications that follow such an understanding.

3.1.3 HOW SHOULD WE PERCEIVE TECHNOLOGY?

Out of necessity, any definition of technology includes elements of both deterministic and constructivist approaches. This is true also for my approach, which emphasises the radical changes brought on through the implementation of ICTs. In this perspective, I follow the reasoning of Marshall McLuhan. ICTs are not simply extensions of existing social practices but instead their use brings new social elements to communication.

217. 'Ever since the publication of records could create a public, that is, ever since the historian August Ludwig von Schlözer (1735-1809) called for an end to state secrecy (and followed up on his demands by founding a journal dedicated exclusively to publishing records), files have been the medium instrumentally involved in the differentiation processes that pit state against society and administration against citizenry. The state compiles records, society demands their disclosure. Alongside these struggles over access to files, society arises as a discursive unit, a political force antagonistic to the state. Whereas nineteenth-century debates had centered on free access to archived records, the twentieth century expanded the demands to include the right to inspect current and active files. But a society that wishes to be informed about matters of government is poised to trespass on one of the last arcane domains of the state: the state secret. No longer protected by physical barriers, chests, and keys, it has become virtual and exists solely on the basis of a declarative act that something is "secret" or "top secret". This classification, however, remains hidden from the public. Secret services by definition work with secret records, hence constitutional oversight is only possible in part. The state secret, therefore, belongs to the state "taboo-protected phantoms"; uncontrolled, it flits about and arouses suspicion. As a result, elaborating a legal framework that guarantees the right to inspect one's files becomes a touchstone for a functioning democratic rule of law.' Cornelia Vismann, *Files: Law and Media Technology* (Geoffrey Winthrop-Young tr, Stanford University Press 2008) 147; This notion of the form of files creating discursive practices such as data subjects comes close to Luhmann's notion of roles created through communication. See Niklas Luhmann, *Social Systems* (John Bedmarz, Jr. and Dirk Baecker trs, Stanford University Press 1995) 313–317.

As McLuhan points out, these characteristics of technology create a new environment of sorts.

However, evolution of technology, or the development of ICTs to be more precise, cannot be reduced to the effects of the media. Williams's social shaping of technology has several merits and its perspective to social elements of technology is indispensable to evaluating technology in dispute resolution. Still, the technology we refer to when discussing dispute resolution can neither be reduced to reflections of existing ideologies and social practices.

This can be illustrated by an example of two STS scholars Trevor Pinch and Wiebe Bijker, who examine technology with an approach they call social construction of technology and criticise the narrow perspective of economic innovation analysis. According to Pinch and Bijker, innovation studies have failed in its examination of technology as the approach focuses on economic analysis of successful technological innovations and dismisses the technology itself. This approach depicts technology as a linear process and is not useful for the constructivist definition of technology. History of technology, on the other hand, does not provide necessary insight for an overall theory of technology as it focuses on technology as the explanation, not as the object in need of an explanation. To concretise their view, Pinch and Bijker refer to the success of plastics in the beginning of the 20th century. In historical analyses of technology depicts this evolution has been seen to begin with the invention of Bakelite process in 1909 and leading up to the modern wide use of plastics. However, it is pointed out that the industry was, in fact, unsuccessful until the aftermath of the Second World War when the war industry dumped its oversupply to the market to be used by the plastics industry as a cheap resource. Pinch and Bijker argue that it is unclear whether the plastics industry would have recovered from its demise without the use of these resources, an event that resulted from the socio-political context of the era.[218]

As Pinch and Bijker's example depicts, the acceptance of technology in dispute resolution does not depend simply on the qualities of suggested technical applications but instead it takes place under complicated societal conditions that may be almost impossible to predict beforehand.

The constructivist approach detaches the examination from the technical artefact to its social implications. This, in turn, makes visible the dif-

218. Trevor J Pinch and Wiebe E Bijker, 'The Social Construction of Facts and Artifacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other' in Wiebe E Bijker, Thomas P Hughes and Trevor J Pinch (eds), *The Social Construction of Technological Systems. New Directions in the Sciology and History of Technology* (MIT Press 1987) 24–25.

ferent structures and discourses which shape the success of technology. Combined with the disruptive elements of new ICTs, this brings us closer to understanding how new technical applications of conflict management question existing practices and the methods justifying these practices, and consequently bring forward a justificatory crisis. Although the scope of this crisis takes different forms in the courts and in private dispute resolution, the disruptiveness of ICT affects both of these spheres.

Still, highlighting the disruptiveness of technology in dispute resolution does not exclude the social element embedded in technology. Instead the disruptiveness and social shaping of technology often become entwined, as Cornelia Vismann's example of legal files influencing the architechture of computer systems demonstrates.[219]

In other words, constructivist approach in the spirit of Williams together with elements from McLuhan's determinism expand our possibilities of examining technology in dispute resolution. By detaching from the technical artefact, we can discuss how knowledge on technology is created through communication, making the discussion understandable from the perspective of social systems. Kittler's emphasis on the autonomy of technology, in turn, describes how handling of information, regardless of human intervention, becomes a focal point in the digitization of media.[220] Instead of focusing on the disruptive elements of technology or de-

219. ' Faced with electronic facilities of communication, the bureaucratic principle of filing things - which was first explicitly spelled out during the emergence of another fleeting communications technology, the telephone - is once again emphasized. Auto-protocol features save data from complete decontextualization and immaterialization, thus retaining the filing principle, even in the digital domain. But the history of files is not only apparent when it comes to data processing or the one-to-one graphic rendition of the old world of files and paper. In highly unmetaphorical fashion, files and their techniques organize the very architecture of digital machines. As processors, they have become part of the hardware of the transmission, computing, and storage machine called a computer; they ensure access to all internal operations by controlling both instructions and data, as well as their addresses. A central processing unit, whose register controls all that goes on within a computer, retrieves the old universal function fulfilled by files in the days of the Staufer emperor Frederick II. The history of files therefore also contains a prehistory of the computer. Not because old filing principles are consciously transferred to the new medium but because administrative techniques of bygone centuries are inscribed as stacks, files, compiler, or registers in a digital hardware that remains unaware of its historical dimension. And with this media-archaeological reference to files, it finally becomes possible to determine where their power resides today.' Vismann (n 217) 164.

220. 'The general digitization of channels and information erases the differences among individual media. Sound and image, voice and text are reduced to surface effects, known to consumers as interface. Sense and the senses turn into eyewash. Their media-produced glamor will survive for an interim as a by-product of strategic programs. Inside the computers themselves

bating about the uniqueness of ODR, we can engage in a more extensive socio-cultural contextualisation without losing sight of the technological change. This widening of perspective is necessary for understanding how justification is built within the legal system in relation to other societal subsystems.

3.1.4 COULD THE USE OF ICT BE A SYSTEM?

As stated, social construction of technology stresses the importance of social context in the examination of technology. New ICTs both change the human interaction through their deterministic qualities but simultaneously their use reflects the existing social practices. This standpoint provides crucial information for evaluating the reasons for acceptance or rejection of technological innovations. But as technology enters the social sphere, or rather as the two are inseparable, what is the role of technology in social systems? How do we reconcile the disruptive nature of technology with the theoretical framework of systems theory?

Luhmann's relative briefness on matters related to media vacate a space for further elaborations on the role of technology within systems theory. However, in his book *The Reality of Mass Media* Luhmann considers the system of mass media as its own social system that operates based on the code information/non-information. For Luhmann, media provides the means for creating a portrait of reality that other social systems can then tap into without losing their internal stability; media adopts the role of memory, in a manner of speaking. However, Luhmann sees mass media as a one-sided relationship between sender and the receiver, where there is no real interaction between the sender and receiver.[221] This is problematic as this conceptualisation does not offer an adequate description in the case of ICT technology, which is pronouncedly different than previous forms of mass media due to its reciprocality. Although Luhmann downplays the importance of technology by perceiving ICTs as "invisible machines", he admits that any societal theory needs to accommodate further technological development

everything becomes a number: quantity without image, sound, or voice. And once optical fiber networks turn formerly distinct data flows into a standardized series of digitized numbers, any medium can be translated into any other. With numbers, everything goes. Modulation, transformation, synchronization; delay, storage, transposition; scrambling, scanning, mapping a total media link on a digital base will erase the very concept of medium. Instead of wiring people and technologies, absolute knowledge will run as an endless loop.' Kittler (n 214) 1–2.

221. Niklas Luhmann, *The Reality of Mass Media* (Polity Press 2000) 2.

 and take note of its impact on society; for Luhmann, the concept of structural couplings is a tool for this end.[222]

As I focus on the converging and disruptive nature of use of ICT technology, Luhmann's theoretisations on mass media as such do not cater for the needs of this study. In the previous sections I have described the disruptive and social nature of technology, which conceptualisation is further elaborated by Kittler's emphasis on information and autonomy of technology. Although media theorist Geoffrey Winthrop-Young claims that combining Luhmann's and Kittler's theories on media fails due their ontological differences as the theories talk past each other,[223] I argue that the place of indeterminacy in Luhmann's theory vacates a place that more elaborated theoretisations on technology are able to occupy.

The question remains: how do we reconcile systems theory with a comprehensive and feasible concept of use of technology that takes into consideration both the disruptive power and social meaning of communicative practices? How can we adopt Kittler's idea of autonomy of media within the framework of systems theory in relation to dispute resolution? Could technology be considered its own autopoietic system as German sustainability researcher André Reichel has suggested? At least Kittler's notion on the autonomy of technology could support this interpretation and also the importance given by Vismann to the form of legal files in defining legal practices and subjecthood would underpin it.

Reichel applies Luhmann's systems theory to what he considers as the core of technology, the technological artefact itself, which connects with its

222. 'There are already computers in use whose operations are not accessible to neither consciousness nor communication, neither simultaneously nor reconstructively. Although they are manufactured and programmed machines, such computers function nontransparently for consciousness and communication–but which by way of structural coupling nevertheless influence consciousness and communication; their operations nevertheless affect consciousness and communication through structural couplings. Strictly speaking, they are invisible machines. If we ask whether computers are machines that work analogously to consciousness and can replace or even outdo consciousness systems, we are putting the problem wrongly and probably playing it down. Nor is it relevant whether the internal operations of the computer can be understood as communications. We must presumably leave aside all analogies of this sort and ask instead what consequences it would have if computers could establish a quite independent structural coupling between a reality they were able construct and consciousness or communicative systems. This question deserves greater attention; it is impossible to judge at present what consequences it would have for the further evolution of the societal system. At any rate, any theory of society should reserve an indeterminacy position for the issue, and the structural coupling concept offers such a possibility.' Niklas Luhmann, *Theory of Society. Volume I* (Rhodes Barrett tr, Stanford University Press 2012) 66.
223. Winthrop-Young (n 215).

physical and social environment and with the human user.[224] He considers three options of fitting his understanding of technology to the framework of systems theory. His first option is that technology could be considered as an autopoietic system of society with its own specialised communication medium and its own code, similarly to the systems of economy, politics and law. The code would be work/fail within the medium of operativeness and autonomous self-production would enable development of its own organisations and structures. The second option would be to interpret technology as a part of other function systems, which according to his application would mean that technology would provide assistance to other subsystems and steer communication but would not be able to create long-lasting structures within these subsystems. According to Reichel, both of these options fail to actualise the full potential of technology as they both still link technology to social systems and individuals. Thus, Reichel's third option would ascend technology to its potential by considering it as an autopoietic system in its own right but not as a social system. Such an autopoietic system would be distinct from society and humans. This would depict technology as non-physical and non-living reproduction, as 'technological' instead of social.[225]

Reichel raises an interesting point that would explain why bringing ICTs to dispute resolution has proven out to be such a complicated matter. Simply put, this difficulty would result from the system-specific coding that cannot be understood as such in any other system. Perceiving technology as an autopoietic system would provide a theoretically comprehensible viewpoint for our examination. If technology cannot be seen as an autopoietic system, another option of theorising technology within systems theory could be to perceive it as a programme within social systems. The first option, portraying the use of ICTs as an emerging new system would roughly follow the deterministic elements of our definition of technology. In the spirit of McLuhan, such interpretation would emphasise the disruptive power brought on by these new technological applications. The other option, downplaying the *sui generis* nature of ICTs by considering technology simply as an internal programme of different subsystems would follow a more Williamsite train of thought.

However, Reichel's position has several shortcomings. First, neither the physical production, nor the meaning production of technology is separate

224. André Reichel, 'Technology as a System. Towards an Autopoietic Theory of Technology' (2011) 5 International Journal of Innovation and Sustainable Development 105, 106.
225. ibid 110.

from human interaction and social contextualisation. Society affects how technology is produced but simultaneously technology has implications on the social practices in which it is employed. Reichel's proposition would consider technology apparently as a system alongside biological systems like biological organisms and psychic systems of consciousness, so that technology would connect with psychic systems of consciousness and social systems through language. However, already the use of communication as a foundational element constitutes a social system. Hence, Reichel's proposition can be countered with a Williamsite approach, which would lean more towards technology as a social system or a programme within social systems. Another shortcoming is that Reichel's approach distances technology from human action. In this respect, Reichel's proposition might renew the dualist dichotomy of human/technology, which is present in both neo-luddite and transhumanist approaches.[226] The difficulty is that, by subscribing the dichotomy, the concept disregards the embedded impact of social context within technology, turns it into an 'other'.

According to Reichel, the technological system does not function on the basis of communication. Whereas psychic systems and social systems both operate through meaning and can interpenetrate each other, technology operates through information.[227] Although Reichel considers that technology is not a social system but instead *another type of* autopoietic systems, he still connects technology to social systems and psychic systems through the use of language, through communication.[228] However, only social systems operate through communication.[229] Reichel does not explain how a technological

226. Deriving its name from the British 19th century textile workers who opposed the industrial revolution, Neo-Luddism refers to ideological opposition towards new technologies and perception of harmful consequences of technologization to society. Critical examination of technology's impact on the society and on the legal system carry similar undertones of opposition. See e.g., Molly Warner Lien, 'Technocentrism and the Soul of the Common Law Lawyer' (1998) 48 American University Law Review 85, 87. Lien admits the risk of Luddite echoes in her comprehensive article on the radical changes in the methods, way of thinking, and culture of decision-making, which technology will bring in its wake. In turn, transhumanism refers to an ideological movement that advocates modern technology in the hopes of surpassing human limitations with sophisticated new tchnologies. Transhumanist discourse is gaining ground in health care law and bioethics. See e.g., Lisa C Ikemoto, 'Race to Health: Racialised Discourses in a Transhuman World' (2005) 9 DePaul Journal of Health Care Law 1101. In their attitudes towards technology both extremes see technology as *the other,* either as the alien intruder to who threatens to overthrow the established labour practices or the potential of emerging technologies for transcending the human condition.

227. Reichel (n 224) 111.

228. ibid 112.

229. See Niklas Luhmann, *Die Gesellschaft der Gesellschaft I* (Suhrkamp 1997) 81 Psychic sys-

system could connect with psychic and social systems but assumes such connections in any case.

Luhmann has not taken a stance in relation to technology but instead leaves the question open. He considers the possibility of artificial intelligence reaching the double contingency where communication is enabled by alter's understanding of itself in ego's environment and vice versa. For Luhmann the question is whether computers can actually operate similarly to consciousness, whether double contingency can exist on both sides of communication if the other party is a computer.[230] According to Luhmann, it is clear that communication through computers does exist and that this communication differs to some extent from other communication within social systems. Through global information networks, information and communication detach from their authors, a development which began already through introduction of print media but is now exponential, and which leads to an acentric world society.[231] This idea of world society created by mass media and information technology comes close to Teubner and Fischer-Lescano's concept of private regimes, leading to the introduction of sector-specific *lex digitalis*.

Still, the question remains how ICTs could be perceived within the framework of systems theory. It is clear that technology somehow connects with the communicative processes of the society. Technology, both the physical artefacts and the technological infrastructure of software, are created in interaction with social systems and psychic systems. Thus, it is a social system or belongs to social systems or shares similar connections with social systems as social systems do with psychic systems. But does technology simply relay communication of other social systems or can it be evaluated as communication in its own right? Does the prerequisite of communication, mutual recognition of the origin of communication and its recipient, i.e. double contingency, occur? Is the use of ICT a system oriented by meaning, like both social and psychic systems? If yes, does it also connect with these two through language?

And to what extent does technology produce its own operations, make the distinction between system and environment? In other words, is technology a *sui generis* social subsystem, a system that is not a social system, or a programme shared by several social systems? If technological operations are networked to one another in a continuous web, which then produces the dis-

tems operate through the form of consciousness and biological systems through life.

230. ibid 304–309.

231. ibid 170.

tinction system/environment, then use of ICTs could perhaps be considered an emerging new social system. However, such interpretation would require us to identify the code candidate of the system and its generalised medium.

3.1.5 USE OF ICT IS A SOCIAL SYSTEM

Echoes of McLuhan's determinism would suggest that use of ICTs constitutes a radical change, where a new system is emergent. This follows also from Reichel's analysis. However, the Williamsite social shaping of technology, and particularly the role that ICTs play in dispute resolution, emphasise the social elements in the use of technology. Hence, Reichel's interpretation of technology as an autopoietic (but not social) system can be called to question in the spirit sociological critique. The argument of technology as its own type of autopoietic system is not convincing, as it does not solve the issue of technology's connection with psychic and social systems. Hence, either we focus on the social element of using ICTs to justify our claim that ICT is an emerging system, or we conclude that use of ICTs is a programme within social systems.

By emphasising the disruptive elements of these communicative practices, we focus our gaze upon the change that is taking place in societal operations and overall communication due to use of ICTs. These effects are not limited within any single subsystem such as system of politics, law, or economics. The strongest argument for the emerging system and against the use of ICT as an internal programme follows from this wide-spreadedness across different subsystems and from the plethora of diverse interpretative issues arising from ICTs. In other words, the use of ICT has brought on changes of methods, discourses, and practices within a wide variety of different fields, and it has created the need to react in several scientific, political, legal, and economic ways to new and complicated phenomena.

It is noteworthy that the use of technology has also had consequences on society and its social practices historically. For example, the development, commercialisation and success of the printing press lead to the Printing Revolution in the 15th and 16th centuries, which had wide-ranging consequences for circulation of information, journalism, and democratisation of knowledge. In short, use of technology has had social implications before the introduction of ICT in the 20th century. However, the development of new media has further intensified the social dimension, which roots can be found in the

earlier forms of technology. This, in turn, has led to the ever-increasing complexity of communication through ICT and gradual functional differentiation.

Based on this interpretation of technology's disruptive potential, I claim that use of ICT constitutes a new social system. This social system operates through communication and produces itself through the continuous autopoiesis of these communicative operations. However, technology does not come down to mere communication nor does it consist solely of technical artefacts. Instead, the hardware and the software are both present, the artefacts inseparable from the communication taking place on the software level. The social element is embedded in there, inseparable from the artefacts and software communication. From the perspective of systems theory, it would be feasible to consider technology as a combination of both social systems and physical artefacts.

This said, I make an important restriction to my claim on technology as a social system operating through communication.

Physical artefacts and the social element of technology cannot be examined as a single unity. The broad definition of technology leads to a situation where the social context and the chosen individual technology might mean a variety of different things. Universally, no claim can be made that technology always operates through or contributes to communication or *vice versa*. However, it is evident that the implementation of information and communication technology, i.e. ICT, which is pronouncedly digital in nature, has changed social interaction and carries a socially oriented meaning. This change in social interaction is of a fundamental nature. The rupture is not related to the technological artefacts *per se*, although the development of artefacts has enabled the social change. The use of technology, when it relates to communication, is without doubt social. In short, use of ICT is social by nature. Still, the technological artefacts themselves do not operate under the same preconditions. Hence, we need to make a distinction between the technological artefact and its communicative use.

The relationship between the physical artefacts and the element of communication within technology is somewhat unclear. This lack of clarity speaks volumes, it tells something. One way of reconciling this difference between the physical and the social is to understand technology through Bruno Latour's actor-network theory, which has gained popularity in science

110 and technology studies.[232] Actor-network theory considers physical objects as parts of social networks and attributes agency to both human and non-human actors. Such a position is problematic in relation to dispute resolution, as agency presupposes autonomous conscious decisions and a certain volume of personhood.[233] In addition to actor-network theory, what other theoretical hypotheses would explain this obscurity of physical artefacts and social meaning?

The relative fluidity of the social nature of technology could be explained by the newness of ICT. If we distinguish physical artefacts from these social intentions and contexts of meaning creation, we notice that the use of ICT takes the form of a social system, whereas the physical artefacts and non-communicative technology remain outside this social context. This simultaneous cohesion into a social system and divide between social and technological elements is still under way, which suggests that we are talking about an emergent social system. The emerging social system can be found in the communicative social interactions, where the context of using ICT creates meaning and this use relays communication as a communicative act. I will call this emergent social nature related to technological communication the system of the use of ICT, in lack of a better word, to separate it from the non-communicative aspects of technology.

Based on this, the use of ICT is an emerging social system which is functionally differentiating from other subsystems to form its own distinctive autopoiesis through communication. This way of understanding ICT explains why the earlier forms of technology have not caused a similarly extensive crisis within society.[234] It simultaneously places this study and the consequences of dispute resolution technology within the context of new media.

232. Lister and others (n 205) 98, 337–339.
233. I return to this closer in section 3.2.2. At this point it suffices to say that legal artificial intelligence may well change our understanding of agency in the near future but granting agency to non-human actors and objects is problematic in the context of dispute resolution. In addition to possible fallicies connected with allocation of consciousness outside of psychic systems, agency connects with difficult legal questions such as liability and authorship.
234. Of course, we can argue that the Industrial Revolution in the 19th century or the introduction of Gutenberg's printable press both changed the society rapidly and caused extensive need for reinterpretation. However, I claim that the effects of these means of production where not as fundamental as the emergence of ICT in the 20th century. Both of these events resulted from new technology, but this technology concentrated on very specific fields of production and was not social in the same meaning as ICT. It is true that Gutenberg's movable press resulted in changes of copyright legislation, but these changes took several centuries to take place, as Tapper depicts. See Colin Tapper, 'Genius and Janus: Information Technology and Law' (1985) 11 Monash University Law Review 75.

Also, this interpretation enables us to address the communicative element of technology without resorting to descriptions of pilot projects or policy objectives. The emergent nature of this new social system illustrates why the use of ICTs also calls for reactions within the legal system. The social system enters the legal system through structural couplings and is used in the operations within the boundaries of law. At the same time, the physical elements of technology, the non-communicative side, may enter the legal system as simple brute facts of a legal case (e.g. in contractual disputes over delivery of technology). However, these facts do not function as communication as such. The technological side is left the role of a bystander in the legal system, but the social side of technology accumulates a more pronounced role as another functionally differentiated social system that can interact with the legal system through structural couplings or interpenetration.

I have now established that use of ICT is a social system and operates through communication. It shares a structural coupling through its orientation to meaning with psychic systems, which in turn operate through meaning-oriented consciousness. But what is the symbolically generalised medium of this social side of the technological system? What is its code, which allocates inclusion and exclusion and maintains the system's boundaries? What is the function of the system?

Reichel suggests that the technological system (which he does not consider to be a social system) operates through the code of work/fail.[235] Continuing in a similar vein, the medium of use of ICT could be located in functionality, operability, or even elegance of the solution.[236]. Examining the Internet or the social construction of technology, no clear-cut answer is to be found as to the content of code. This ambiguity might be the flipside of the system's emergent nature: the code and the medium might still be under construction, if the system's cohesion has not led to a sufficiently powerful way of establishing system boundaries. In fact, the difficulty of finding the code can be read as a sign of the emergence. Also, this could explain why the distinction between the social system of the use of ICT and the non-social technology is not always lucid.

However, when focusing on the content and the context of the radical change brought on by ICT, we notice that the communicative and informative procedures are at its core. In a way, this is almost self-evident, as both words

235. Reichel (n 224) 109.

236. Elegance of the code infrastructure might be a considered as the key element in the system's functionality, as elegance could make it more adaptable to its environment.

are included in the acronym. When considering the different elements of ICT, the World Wide Web and the transfer of data packets through the Internet, technical artefacts such as hardware, online platforms and programming languages, we notice that both communication and information are entwined with their functioning. One might even claim that these two functions of communication and information lose their distinctiveness in this context. On this basis, I suggest that the use of ICT is an emerging social subsystem of society that operates through the generalised meaning medium of information.

Modern ICT has revolutionised the transmission of data, of information, in different formats. Its code reflects this disruptive element that is leading to the system's functional differentiation from other subsystems. Hence, its use of its medium, its code would take the form of data transmission - its code making the distinction between transmission and non-transmission of information. In a way, this identification of the code comes to the same conclusion as Luhmann's definition of the code of the mass media system as information/non-information.[237]

In the end, what does a theory of *dispute resolution and technology* gain from depicting technology as a social system and socially constructed? In short this approach enables us to evaluate technology more accurately without mystifying it. Also, understanding the framework of technology makes theoretical analysis possible, enabling us to describe what is happening.

For example, understanding the possibilities of the Internet infrastructure is useful to jurisprudence in two ways. First, it enables us to see how technology facilitates private ordering in a way unseen ever before.[238] Second, it enables us to understand how the technological choices made and the Internet architecture frame the legal operational environment, i.e. whether and how we can extend coercion to private cross-border service providers of dispute resolution. This links to the continuing discussion whether the Internet infrastructure should be governed by regulation established by territorial states or should Internet form its own jurisdiction.[239]

237. Luhmann, *The Reality of Mass Media* (n 221) 15–.

238. See e.g., Thomas Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' (2008) 10 Yale Journal of Law and Technology 151.

239. This discussion was begun by Johnson and Post in 1996 who argue that cyberspace does not abide to earlier legislative authorities and legal framework cannot be created through sovereign nation states. Instead, cyberspace is its own jurisdictional place and accordingly the behavioural rules should be created internally. See David R Johnston and David Post, 'Law And Borders: The Rise of Law in Cyberspace' (1996) 48 Stanford Law Review 1367.

3.2 TECHNOLOGY IN DISPUTE RESOLUTION

I understand modern ICT as socially shaped new media that also shapes our views on communication. The next logical step is to combine understanding of law and understanding of technology. How is the social shaping of technology translated into the language of law? What can be gained from such an excursion to social construction of technology? How does it become relevant for the legal system?

By adopting a more comprehensive understanding of the role of technology in dispute resolution we are able to overpass some common stumbling blocks of earlier theory formation. By taking technology at face value we cease to mystify its importance and are able to adopt a position between technophilia and technophobia. We can strip the multifaceted question of technological change in law to its bare bones, divide it into more manageable bits without having to struggle first with the ultimate question whether we are for or against, whether we consider the implementation of technology in dispute resolution as a way forward or as a step back.

In this section I proceed to evaluate the role of technology in dispute resolution. In order to do this, it is necessary to expand on the summary description of dispute resolution technology discussed in chapter 1. I further exemplify the importance of comprehensive definition of dispute resolution technology by taking up the discussion of technology as the 4th party in ODR.

3.2.1 WHAT IS DISPUTE RESOLUTION TECHNOLOGY?

Before going further, a glance to the diverse world of ODR is needed. In this section I describe different applications of technology within dispute resolution, both on a general level and through examples of some pilot projects. It should be noted that the field is changing rapidly and new ways to employ technology emerge continuously. Also, the development of dispute resolution technology is not linear or progressing similarly in different countries.[240] Instead, different court practices and needs of the stakeholders call for different solutions and, on the other hand, innovative and creative system design does not necessarily abide to different work methods and cultures.

240. See Karim Benyekhlef, Emmanuelle Amar and Valentin Callipel, 'ICT-Driven Strategies for Reforming Access to Justice Mechanisms in Developing Countries' (2015) 6 The World Bank Legal Review 325.

114 Technology may be implemented to all stages of dispute resolution. Claims can be filed and the resolution procedure initiated electronically (e-filing), the communication between the parties and the neutral third and court clerks can be done via e-mail or platform messaging (e-communication). The provider of dispute resolution, i.e. the court, tribunal, or ODR provider, may manage the life cycle of a single case file with the help of technological system or follow the workflow (case management). Also the court dates and deadlines can be scheduled and followed automatically (e-scheduling). A hearing can be organised via videoconferencing instead of physical presence. The decision may be rendered with the aid of automated document generation systems. The case file may be transferred directly from the court to parties, their legal counsel and other authorities, and archived electronically (e-filing and e-archiving).

In addition to these more court-oriented applications, technology may be used in automated bidding systems or in facilitated negotiation. For example, if parties agree on liability but disagree on the damages, an agreement may be found through blind bidding systems, where both parties enter the amount of damages they would accept. The bids would be invisible to the other party but the system would generate an agreement if the bids enter the acceptable range, e.g. within a ten per cent from each other. The algorithm may be designed to reward the party who moves toward a compromise more rapidly in order to avoid a stalemate.[241]

Of course, computer algorithms can be taken advantage of in other cases than mere calculation of money. As John Zeleznikow and Emilia Bellucci discuss, automated systems can be developed for deciding allocation of marital assets in divorce cases.[242]

Another aspect of dispute resolution technology is the possibility of interfaces across traditional boundaries. For instance an e-filing system or ODR platform may share an interface with an identity verification mechanism, e.g. electronic identity cards or the use of e-banking codes. Also, an interface to a payment mechanism can be incorporated to the user interface of a case management system or an ODR platform. For example, after a decision is ren-

241. On blind bidding systems see e.g., Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 64–66. On artificial intelligence and bidding systems see David Allen Larson, ‘Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator’ (2010) 25 Ohio State Journal on Dispute Resolution 105, 106, 160.,

242. John Zeleznikow and Emilia Bellucci, ‘Family_Winner: Integrating Game Theory and Heuristics to Provide Negotiation Support’ in Danièle Bourcier (ed), *Legal Knowledge and Information Systems. JURIX2003 The Sixteenth Annual Conference* (IOS Press 2003).

dered, the voluntary payment could be done via link to the payment mechanism, which would directly verify that the decision has been followed and further enforcement would therefore be unnecessary. A similar system could be implemented before the conflict escalates to the phase where a decision needs to be given. In an e-commerce dispute the parties may come to an agreement during the process and have the payment concluded and verified by the receiving party simultaneously. Traffic violations and other misdemeanours that have resulted in police-ordered tickets could be paid or contested through a user portal that connects with a case management system and online payment mechanism. Similar interfaces to legal aid offices could facilitate party in applying for subsidised legal counsel, or interactive e-filing forms could remove the need to use legal counsel for simple petitions such as divorce or registration of documents. This is to say, there is already a multitude of automated legal tasks.

Another aspect of dispute resolution technology links with information. Several countries are providing access to public online portals containing the up-to-date legislation and case law. Although such applications are not necessarily the typical example of technology within dispute resolution, they do increase access to justice by providing channels for accessing information that has traditionally been in the hands of lawyers. Another possibility of increasing access to information is the somewhat controversial issue of using social media or the Internet for informing the public about recent cases in courts or tribunals. On the one hand, such a practice could increase the transparency of dispute resolution. On the other, it should be asked whether this would endanger the privacy of parties on a different level than the more traditional press releases.

It becomes evident that technology has many concrete applications in dispute resolution. Not all solutions are necessarily adopted simultaneously and there is overlap between different categories. However, this categorisation depicts the diversity of the field. Next, I will describe representative examples of different projects that aim at improving access to justice by implementing technology in dispute resolution. To further accentuate the multifaceted underlying interests, these projects portray both public and private applications as well as commercial and penal solutions.

There are several interesting projects that aim at merging dispute resolution with technology and new applications are emerging constantly. To give

a general overview of the field and its variety, some of these projects are described briefly in the following.

Public courts provide a significant venue for implementing technology. Several jurisdictions are in the process of introducing wide-ranging technological applications that cover the whole span of a case. The Rechtswijzer project strives for improving access to justice and self-efficacy of individuals facing conflicts. The project has adopted an end-user-centered approach and its perspective is to help individuals.

The Rechtswijzer site provides a wide selection of different tools for conflict resolution. These functionalities include information and diagnosis tools for the conflict, maintenance and pension calculators, step-by-step plans for conflict resolution, negotiation and communication tools, interfaces to neutral thirds, e-scheduling, decisions, and aftercare. In also includes an interface to a payment system and e-identification standards. The website is developed to be scalable for different jurisdictions and different case types. At first it was launched for divorce cases and consumer cases in the Netherlands in the end of 2014 with the intention of expanding it British Columbia in Canada and England in the beginning of 2015. Later on in 2015, landlord-tenant and employment modules were added to the Dutch interface.[243] The aim of the project was to provide self-reliance by giving the parties more control and information on their conflict.

Visitors to the website begin by choosing their conflict type. After this, the website poses a set of questions on the case. In divorce cases the questions relate to the number of children, social networks and employment status of the parties, existence of prenuptial or cohabitation agreements, reflections on the possible consequences of the divorce, and the partner's desire to co-operate. In consumer cases the questions relate to the existence of an insurance for legal expenses and they aim at cost-efficiency analysis.[244]

The first empirical studies on Rechtswijzer show that the users generally evaluated their experience with the website to be positive, the average grade being 7.51 on the scale of 1-10 for divorce cases and 7.29 for consumer cases.[245] In divorce cases most visitors considered the information provided on the website to be trustworthy. Also, visitors visited the website several

243. 'Rechtwijzer 2.0: Technology That Puts Justice in Your Hands' <http://www.hiil.org/project/rechtwijzer> accessed 28 June 2016.

244. Esmée A Bickel, Marian A van Dijk and Ellen Giebels, *Online Legal Advice and Conflict Support: A Dutch Experience* (Department of Psychology of Conflict, Risk & Safety, University of Twente 2015) 5.

245. ibid 22, 37.

times and were willing to recommend it to others. The users considered that their self-efficacy had increased when using the website. [246] Interestingly enough, the users of Rechtswijzer reported more additional concerns related to financial issues than the control group in the study.[247] The study underlines the importance of access to information, as most visitors in divorce cases stated a need for problem-focused help instead of emotional or social help.[248] The results received in consumer cases were parallel to the results in divorce cases.[249]

Like the Rechtswijzer project, also the Finnish AIPA initiative applies a user-centered design. However, the latter is aimed more towards the courts and court personnel than individuals facing the conflicts. Still, the Finnish project will integrate an interface to individuals.

The objective of the Finnish initiative of the Ministry of Justice called AIPA is to improve the existing court practices and to replace the currently used anachronistic software. To this end, the system design and development has adopted a more court-oriented approach than the Dutch Rechtswijzer. The basis of the project is to create an interactive case management system for all public courts from district court level to the Supreme Court. Thus, the platform will include precautionary cases and fines, criminal procedure, civil cases, and petitions. The case management functionality includes automated deadline administration, e-filing, e-scheduling, automated document generation, automated recording of testimonies, direct transfer of case files between officials, automated updates to criminal records and online archiving. In addition to these, interfaces to legal aid offices, to enforcement officials and to legal information portals are provided. In addition to the court personnel, the end-users will be prosecutors, lawyers and citizens.[250]

As the scope of AIPA shows, technology may be implemented also to misdemeanours and criminal procedure. The AIPA project has an interface to the police authority, which enables electric transfer of police investigation reports to prosecutors, to the parties involved, and to their lawyers in addition to courts. Also, the payment interface is of interest to the penal system.

246. ibid 23–26.
247. ibid 28.
248. ibid 37.
249. ibid 52–53.
250. For more information regarding the AIPA project, see the public memorandum (in Finnish), Ministry of Justice, 'Muistio Aineistopankkihanke' (2012) OM 15/31/2010 <http://www.oikeusministerio.fi/material/attachments/om/valmisteilla/kehittamishankkeet/NMmokEaIp/AIPA_JulkinenTavoitetila_2012_11_23.pdf>.

118 It is being discussed in several Canadian provinces whether traffic tickets should be handled through a technological platform, which would enable making payments or contesting the tickets online.[251] Similar e-services for online payments are available also elsewhere.

Nonetheless, these different perspectives - access to justice for individuals or efficiency of court practice – are reflected in the infrastructure and in the development of the systems. It is likely that the completed systems will have largely diverged functionalities. This demonstrates that although both projects are publicly funded and operated, their outcomes may serve different user groups.

In addition to public initiatives, there are several interesting pilot projects. For example, ICANN's dispute resolution procedure emerged from the need to solve the disputes arising from the new global infrastructure of the domain name system. Pilot projects might have other motivations as well. For example, the Cyberjustice Laboratory of Université de Montréal promotes an open-source pilot program PARLe, which is an online platform for negotiation and mediation of low-intensity disputes.[252] The platform is a part of the Laboratory's more general objective of promoting new procedural models and facilitating access to justice.

ICANN's role in implementing technology in dispute resolution is an important one. In ICANN's practice the technology is related both to the dispute subject as well as its enforcement stage, as well as to the dispute resolution process. ICANN's role as a private corporation managing public tasks is problematic but it also links it closer to the public applications than private ones.

As stated before, ICANN is responsible for distribution and maintenance of the global domain name system. ICANN has established its Uniform Dispute Resolution Policy (UDRP) in co-operation with the World Intellectual Property Organisation (WIPO) to resolve domain name disputes. Such a dispute may rise when a complaint is filed that someone has registered a domain name in bad faith that is confusingly similar than the complainant's

251. Jane Bailey, 'Working Paper on Digitization of Court Processes in Canada' (Laboratoire de Cyberjustice, Université de Montréal 2012) <http://www.cyberjustice.ca/wordpress/wp-content/uploads/webuploads/WP002_CanadaDigitizationOfCourtProcesses20121023.pdf/> accessed 24 March 2015; see also 'Let's Try Settling Traffic Ticket Disputes Online instead of in Court: Editorial' *The Star* (Toronto, Ontario, 9 March 2015) <http://www.thestar.com/opinion/editorials/2015/03/09/lets-try-settling-traffic-ticket-disputes-online-instead-of-in-court-editorial.html> accessed 24 March 2015.
252. 'ODR: PARLe' <http://www.cyberjustice.ca/en/projets/odr-plateforme-daide-au-reglement-en-ligne-de-litiges/> accessed 28 June 2016.

own trademark (a practise also known as cybersquatting in the U.S.). The UDRP provides for a mandatory administrative proceeding in domain name disputes. ICANN also upholds a list of approved providers of the UDRP dispute resolution. At the time of writing, these are Asian Domain Name Centre, National Arbitration Forum, WIPO, The Czech Arbitration Court Arbitration Center for Internet Disputes, and Arab Center for Domain Name Dispute Resolution.[253] The registrar does not intervene with the work of the administrative panel and the UDRP resolution process does not prevent the parties from accessing a court of jurisdiction later on. However, if the panel's decision is rendered and no documentation about initiation of court proceedings is shown within 10 days, ICANN will implement the decision to the domain name system.[254]

Public and semi-public applications of technology are becoming more and more common. However, as stated earlier, ODR has developed to answer the requirements of online market place. eBay is the often-quoted success story of ODR. eBay is an online market place where the sellers list items on sale and buyers may bid the items and thus enter into a binding agreement for sale of goods with the seller. As conflicts may rise when the payment is not done or the buyer does not receive an item, eBay has included an ODR process to its website. In addition to ODR, the platform includes the possibility of private enforcement conducted by eBay. However, the coercive nature of dispute resolution and private enforcement has been downplayed by collectively referring to these as the Money-Back Guarantee. This will be discussed in more detail in section 4.1.4.

In addition to ODR platforms merged with market places, there are several independent applications of commercial ODR. One well-known example of commercial ODR that is not linked with a market place is Modria. Modria provides a private ODR service including dispute diagnosis, negotiation tools, mediation phase, and arbitration phase. Although Modria promises seamless integration to existing structures when designing unique ODR applications, it does not itself incorporate a mechanism for private enforcement. However, an escrow mechanism was previously available in Modria's Service Vault.[255]

253. 'List of Approved Dispute Resolution Service Providers' <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en?routing_type=path/> accessed 28 June 2016.
254. 'Uniform Domain Name Dispute Resolution Policy' 4.k <https://www.icann.org/resources/pages/policy-2012-02-25-en?routing_type=path/> accessed 28 June 2016.
255. 'MODRIA - The Service Vault - Online Dispute Resolution' (24 July 2012) <https://www.youtube.com/watch?v=qQExT7krWkw/> accessed 24 March 2015.

120 Different functionalities of dispute resolution technology can also be divided to two distinct categories based on the role of technology and the time of their adoption. In this taxonomy, the first-generation of dispute resolution technology refers to such uses of technology as e-filing, case management systems, videoconferencing, automated document generation, case diagnosis and negotiation tools and online access to legal information. In this meaning the first-generation of dispute resolution technology has been developed since the early 1990s and is widely used in different legal practices. Most of the examples described above belong to this first-generation. The second-generation of dispute resolution technology goes beyond these relatively straightforward uses of technology.

By the second-generation of dispute resolution technology I refer to applications such as legal artificial intelligence, blockchains, big data, machine learning, and automated decision-making. This second-generation technology is starting to gain momentum and, although some applications are already on the market, its possibilities are just starting to be discovered.

An example of already existing legal artificial intelligence can be found in Lawyer Ross, which is a program based on IBM's cognitive computer known as Watson. The software is an interactive tool for legal research; Ross understands language, provides hypotheses based on legal questions, generates argumentation and conclusions based on case law, and monitors new judgments that might affect the case in question. In addition, it learns through experience and thus develops in its tasks.[256] Another second-generation application is the blockchain architechture of cryptocurrencies, which provides tools for decentralized trustless transactions in general and for self-executing smart contracts in particular, potentially removing the need to place trust in any intermediaries be it an e-commerce site, credit card company, escrow service, or the public courts.[257]

It should be noted that the taxonomy I present here differs from the one presented in the UK in the final report of the Online Dispute Resolution Advisory Group, which considers the use of video technology to be representative of the second-generation and legal artificial intelligence as the third-generation.[258] However, video technology comes close to other first-generation ap-

256. 'Ross - Your Brand New Super Intelligent Attorney' <http://www.rossintelligence.com/> accessed 14 June 2016.

257. See e.g., Riikka Koulu, 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement' (2016) 13 SCRIPTed 40; Pietro Ortolani, 'Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin' [2015] Oxford Journal of Legal Studies 1.

258. Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low Value

plications of technology, which can be defined by their use of ICT to replace or enhance already existing legal practices. In contrast to these functionalities, the second-generation applications assign a more autonomous role to technology, giving rise to completely automated procedures and new legal practices.

In any case, it becomes evident that the field of dispute resolution and technology includes diverse array of different applications and projects. Although ODR originally developed for the private e-commerce, at this point the most interesting solutions are taking place within the public sphere. As stated earlier, ODR has never become the success story it was expected to be. This is further demonstrated by eBay rewording its ODR service as a contractual Money-Back Guarantee and by Modria directing its business towards system development for public authorities.

It can be claimed that public sphere has a solid brand as a trustworthy provider of dispute resolution services. Although the public sphere has adopted technological applications later on, new initiatives such as Rechtswijzer seem to go further than private ODR. This development underlines the relationship between dispute resolution and trust. It brings to foreground that dispute resolution is a means for allocating trust between the parties in conflict and a method of fulfilling expectations in the legal system.

3.2.2 PROBLEMS OF THE 4TH PARTY ANALOGY

After discussing these pilot projects and other examples of ICTs in dispute resolution, it is necessary to come back to the seminal concept of ODR literature that perceives technology's role as the 4th party. As Katsh and Rifkin describe, the analogy derives from a McLuhannite approach to technology.[259] As the discussion in section 3.1 illustrates, Williamsite focus on social dimension of technology provides a critical counterpoint for evaluating determinist approaches. For example, Williams criticises McLuhan's determinism as he considers the determinist claim that the medium is the message as a reification of essential social practices.[260]

As Katsh and Rifkin's understanding of technology derives from a McLuhanite stance, its window of vulnerability can be located with Williamsite

Civil Claims' (Civil Justice Council 2015) 24–25 <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/odr-report-february-2015/> accessed 16 February 2016.

259. Katsh and Rifkin (n 209) 21–22.

260. Lister and others (n 205) 88–89.

criticism that calls attention to the neglected social dimension of technological determinism. Such critique reveals how determinist approaches to technology attain a universalist nature and how universalist arguments about technology may lead to inadvertently attributing agency to technology.

Because dispute resolution is after all a communicative process, technology affects the ways in which people build their trust in dispute resolution procedures but at the same time people create the meaning attached to technology in these contexts. However, the language of technology is employed to both defend and to oppose changes in dispute resolution.

For example it can be claimed that automated procedures create mistrust among participants. Interlocking the use of technology with the necessity of trust (upholding expectation regardless of disappointments) is a self-evident step when we consider *dispute resolution and technology*. However, revealing this relation does not provide us with any clear-cut answers whether technology enhances or dents this trust. Technology is socially constructed and no answers can be found to questions posed as universal abstracts. Any answer depends on the context and can be given only *in casu*. Still, a lot of work has been put to finding such universal constants. This ends in detailed – one could even claim casuistic – descriptions of situations where a yes or no is achieved through oversimplification. Such unconditional absolutes reflect the preceding decision whether we consider technology good or bad.

To put it more concretely, we can see the impossibility of universals in the debate whether automated resolution procedures are more or less just than their non-technological counterparts. On the one hand, we can claim that it is a good thing to minimise the possibility of human error; naturally automated procedures would be more objective. On the other hand, we may claim that human action is necessary for a just decision, as automated procedures may not otherwise take into account human feelings. This line of thought presupposes that disputants consider evoking the judge's feelings of empathy or anger to be useful for their case and as such, automated procedures do not provide for the same strategic behaviour as physical litigation. There are several faults in such deductions. First, such positions presuppose certain idea of individuals and of human interaction. Either disputants are considered as equal and rational economic actors whose dispute is best resolved without human input or we emphasise the need for emotions in dispute resolution.

To take this further, the first option might even lead to downplaying the need for protecting a weaker party. The second option pictures the resolution as an interpretation of positive law through subjective emotions, which in turn leads to the danger of arbitrariness. Law loses its normativity and fails in its function of upholding expectations regardless of disappointment if resolution of disputes depends on strong subjectivity. Both stances ignore the complexity of dispute resolution and presuppose technology as an invariable constant.

Such universal claims presume that technology has a significant role in the reality of dispute resolution. Some consider technology to restrain the procedure from achieving its natural goals whereas others consider technology to transform the procedure closer to achieving its true nature. Such opinions mystify technology. Simultaneously, these claims explain why the theory of dispute resolution has been caught up in long debates about technology's nature without reaching any sustainable conclusions.

By such stances, the technology of dispute resolution is reified into subjectivity, and, consequently an action and active role are allocated to technology instead of the parties. Through attaching agency to technology, the resolution process is alienated from the actual social relations between the parties. In other words, agency is taken from the participants and granted to technology. Upholding the dichotomy between nature and technology and attributing characteristics to this distinction fetishizes technology, and diverts attention from social relationships present in dispute resolution. This means that the technological commodity becomes decisive for the whole social interaction. This leads to a mystified understanding of technology, which then gives rise to universal claims about the consequences of its implementation.

Similar criticism has also been voiced before. American academic Lawrence Lessig emphasises that technology should not be dogmatised. Lessig argues that technology can be remade and thus, its functioning can be changed by rewriting its code. This aspect is often disregarded by the rhetoric of cyberspace emphasising technology's innate regulation-averse nature.[261]

This thing-ification of technology and objectification of persons is present in the ODR literature, although this has most likely never been a

261. 'the unregulability of the Internet was a product of design: that the failure to identify who someone is, what they're doing, and where they're from meant that it would be particularly difficult to enforce rules upon individuals using the network.' Lawrence Lessig, *Code Version 2.0* (Basic Books 2006) 59 <http://codev2.cc/download+remix/> accessed 15 January 2016.

124 conscious intention. Objectification comes about in the famous idea of technology as the 4th party, originally introduced by Katsh and Rifkin in 2001. The summation is a word play of the procedural law doctrine, where the disputants are seen as the first and second parties and the judge as the neutral third party – terminology that is commonly used both in litigation and arbitration. According to Katsh and Rifkin, technology as the fourth party would be working with and assisting the third party.[262] The original context of the fourth party relates to resolution of online disputes where the dispute results from an online action between geographically distanced parties.

This summation has definitely redeeming qualities as it makes room for implementing technology into dispute resolution. Rhetorically, the term encompasses coexistence: technology assists and aids the third party instead of displacing it. It is inherently embedded in the conceptualisation that the ultimate decision still lies with the third party. Also, the concept has great deal of descriptive value: the term fourth party explains instantly that technology becomes a fundamental part of the dispute resolution process, which separates ODR from offline processes – as was the original intention.[263] In addition, the term has become established and is commonly used in the ODR literature, which facilitates discussion.

However, the fourth party status grants technology a subject position and does not provide sufficient tools for de-mystifying technology; instead it holds on to the mystique of technology. Technology becomes a participant in the resolution process, linguistically equivalent to other participants, but unable to meet the expectations of such agency. Technology's role is highlighted rather than downplayed but regardless of this, the concept is lacking. Technology is unable to deliver, as it cannot fulfil the expectations that come with this agency. Thus, we are left with a procedure, which has several participant roles, but one of these is vacated, in a manner of speaking. If technology assumes the role of the fourth party, particularly in situations where there is only technology-augmented interaction between the geographically distant parties, the social relations are alienated, social interaction is reduced to the physical commodity. The abstract concept of technology is made into a concrete party in the procedure and this results in a fallacy.

However, the embedded social element is decisive to dispute resolution technology. Also, the concrete physical artefact, the software code, is an in-

262. Katsh and Rifkin (n 209) 15–16.
263. ibid 16.

tangible object. Physical elements or the lack of them have no relevance to reification.

Lodder and Zeleznikow have taken the wordplay even further by adding a fifth party to the equation, namely the provider of technology, the service provider.[264] Also, the programmer behind the code could be included into the party analogy, as well as the Internet service provider. However, further theoretical development towards Latour's actor network theory could provide a solution for maintaining the analogy but overcoming the critique of social shaping of technology. In this spirit, agency would be created in a network of human and non-human actors and thus, there would be enough room to discuss the social actions created by such networks without attributing agency to the dispute resolution technology itself.

It seems that the fourth party analogy falls short in describing the function of technology especially in relation to the first-generation of dispute resolution technology. Agency and the given subject position distort the role of technology in applications such as e-filing, case management, video technology, and online access to legal information. However, it is unclear whether agency in the meaning of the fourth party analogy could be granted to applications of second-generation dispute resolution technology. After all, second-generation applications possess a higher degree of autonomy than the first-generation of dispute resolution technology. However, there is a difference between autonomy and agency. Unlike autonomy, agency suggests the ability to interact in social structures. Even if second-generation of dispute resolution technology gives the impression of being "smart", of being able to create social responses, this portrayal of interaction does not stem from the technology itself. Granting agency to technological infrastructure, to computer programmes such as smart contracts or to machine learning applications such as Lawyer Ross, disregards the underlying human intention that is always present in programming. If the technology itself is seen as a subject, this limits our means of focusing on the existing ideologies, values and reflections of power relations that are embedded behind the lines of code.

In addition to this, the analogy raises the question, in which instances the role of technology is significant enough to earn an active role in the dispute

264. Arno R Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010) 79; see also, Aura Esther Vilalta, 'ODR and E-Commerce' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012) 114.

126 resolution procedure. In addition, it is unclear whether the use of technology is sufficiently detached from the actions of the parties to justify its role as the fourth party. In any case, the analogy disguises the differences between first and second-generation applications.

In short, the analogy comes burdened with certain embedded ambiguity and the need to make further, often problematic distinctions between different uses of technology. Based on this it seems that the theory of technology as the fourth or fifth party is not sufficient in itself. Technology is not a party to the resolution procedure but a structure, which facilitates the process. Although the metaphor of the fourth or fifth party is appealing for its elegance, it is an oversimplification that hides the effect technology has on dispute resolution on a deeper level. Instead of using the analogy, a more context-oriented approach is advisable, as this enables focusing on the specific functionalities of dispute resolution technology in given circumstances and creates a more nuanced picture with added explanatory power.

3.3 PRINCIPLE OF TECHNOLOGICAL NEUTRALITY

As stated earlier, dispute resolution should take technology seriously but not exaggerate its importance. Technology entwines with communication, which takes place within the resolution process. In other words, technology affects the procedure into which it is applied but its role is not necessarily decisive. The danger is that without a comprehensive impression of technology, its benefits, e.g. flexibility, are easily lost. In courtroom technology this means that new technologies should not simply be implemented to old regimes designed for old, often anachronistic tools but instead attention should be paid to the overall coherence of the court system and to the due process principles. Bringing technology to dispute resolution should not concentrate solely on the existing technological solutions but encompass also future innovations.[265]

In order to create space for such a comprehensive evaluation of technol-

265. Although in a different context of regulating criminal procedure, Solove makes a similar notion: “In fact, many judicial misunderstandings stem from courts trying to fit new technologies into old statutory regimes built around old technologies. The problem with the statutes is that, when they try to track existing technology too closely, they become too rule-like and lose the flexibility of a standard. Basic principles get lost or forgotten in the shuffle for technologies.” See Daniel J Solove, ‘Panel VI: The Coexistance of Privacy and Security: Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference’ (2005) 74 Fordham Law Review 747, 773.

ogy, the theory of *dispute resolution and technology* should adopt the principle of technological neutrality as a starting point.

With technological neutrality, I refer to three different elements. First, in relation to dispute resolution technology, technological solutions that are used for similar purposes should be regulated similarly. In other words, legislative action should concentrate on the function and objective of technological solutions instead of the characteristics of technological infrastructure.[266] This is necessary also due to the fast pace of technological development, which sometimes renders earlier solutions obsolete before regulative projects have even reacted to them. Further, legislative reforms, especially those related to courtroom technology, should not commit to one single solution, as this might delay adopting the best available solutions as they emerge. Second, consumers and companies should be at the liberty of choosing the most suitable technological solutions. This is another side of the regulatory neutrality. In dispute resolution this translates into posing similar minimum standards for different platform providers without such standards affecting which technological solution the platform chooses.

Third, we should address technology itself in a neutral way. This means that technology should not be understood as good or bad in itself. [267] Instead, technology can be used for contradictory ends, and these ends cannot be predicted based on the technology. It is the context, which defines whether the ramifications of technology provide improvements or challenges to access to justice.[268] However, as Rajab Ali points out, the concept of technological neutrality is always vague as regulating specific uses usually presupposes specific technology or otherwise leads to unspecific application.[269]

266. Technological neutrality has become the mainstream for European IT law around 2000 and is rarely questioned any more. See e.g., Rajab Ali, 'Technological Neutrality' (2009) 14 Lex Electronica 1. For one of the prominent examples of considering technology dangerous see Neil Postman, *Technopoly: The Surrender of Culture to Technology* (Alfred A Knopf Inc 1992).
267. For detailed account of attributing good or bad to technology see e.g., Ali (n 266).
268. A simple example is that of electronic communication with the courts. Although the possibility to use e-mail and videoconference in court proceedings might increase access to court in remote areas and lower the court costs, it might simultaneously exclude certain groups, e.g. those who lack the skills to use these means. Also Gélinas et al. emphasize that access to justice should not be reduced to making procedures as cheap or efficient as possible. Also the ways in which judicial reforms marginalize diversity should be taken into account. See Fabien Gélinas and others, *Foundations of Civil Justice: Toward a Value-Based Framework for Reform.* (Springer International Publishing 2015) 60.
269. Ali (n 266) 7.

128 Principle of technological neutrality has been defined in the European regulatory Framework Directive for electronic communications of 2002 (revised in 2009) as follows:

> The requirement for Member States to ensure that national regulatory authorities take the utmost account of the desirability of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology, does not preclude the taking of proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency.

The recital 18 of the Directive emphasises that technological neutrality consists of removing preferences and discrimination in order to address the digitalisation and convergence of different technologies as stated by Ulrich Kamecke and Torsten Körber. In addition, the concept is directed towards the States that need to abide to neutrality in further regulatory processes to ensure the functioning of the single market. According to Kamecke and Körber, European policy on electronic communication was traditionally based on specific technologies and the necessary move to the principle of technological neutrality changed the existing *status quo*.[270]

Kamecke and Körber clarify that the principle of technological neutrality is useful for policy setting if some common misunderstandings are avoided. They argue that the principle does not affect the standards for defining relevant markets. Technological neutrality is neither achieved by simple rewording of market recommendation but instead demands more extensive analysis of the entry barriers. Although otherwise claimed, the principle is not itself pro-regulation. This is emphasised by the wording of the definition in the Directive. The principle is provided for in the process of legislation but sufficient neutrality cannot be guaranteed simply by the means of regulation. Neither does technological neutrality impose identical regulation for competing services nor call for regulating previously unregulated services. Instead Kamecke and Körber state that the principle is oriented to self-regulation of the markets and aims at facilitating entry.[271]

270. Ulrich Kamecke and Torsten Körber, 'Technological Neutrality in the EC Regulatory Framework for Electronic Communications: A Good Principle Widely Misunderstood' [2008] European Competition Law Review 330, 330.
271. ibid 332–335.

Ali distinguishes four "rationales" that should be address to comply with the need for technological neutrality: 1) non-discrimination, which means that regulation should not prefer a specific technology but remain indiscriminate by employing a neutral terminology, e.g. 'electronic communications network which conveys signals' instead of addressing specifically 'cable' or 'wireless' networks, 2) sustainability, which means that regulation should not be sensitive to technological development, 3) efficiency, meaning that legislation should not be simply responsive to changes in the market but be also flexible to accommodate the needs of consumers, and 4) consumer certainty, which refers to the governmental responsibility to provide certain minimum services to consumers with low costs as universal services.[272]

Based on these accounts, technological neutrality refers to a non-discriminatory legislative method, which aims at facilitating entry into the markets. As Kamecke and Körber state, the principle itself does not imply any distortion but instead encourages self-regulation. As Ali demonstrates, different values are embedded in the principle, which is often vaguely formulated on an abstract level. Also Luhmann has taken a stance for technological neutrality. According to Luhmann, technology is neutral in relation to communication. Technical machines and communication through the network of the system are distinct from one another.[273]

In contrast to such stances for neutrality, Neil Postman considers technology as inherently biased. According to Postman, technological change always has its advantages paired up by disadvantages and these are not distributed equally between different groups in society.[274] It should be noted that Postman's position reflects deterministic approach to technology. As

272. Ali (n 266) 11–12.For example, it has been considered whether access to Internet would qualify as universal service. See e.g. Council of Europe/ Parliamentary Assembly/ Committee on Culture, Science, Education and Media, 'Council of Europe Draft Resolution for the Motion on the Right to Internet Access' (4 March 2014) section 3 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20535&lang=en> accessed 28 June 2016.

273. Luhmann, *Die Gesellschaft der Gesellschaft I* (n 229) 302.

274. See David Postman, 'Five Things We Need to Know About Technological Change, Talk Delivered in Denver Colorado March 28, 1998' (Denver, Colorado, 28 March 1998) <http://www.cs.ucdavis.edu/~rogaway/classes/188/materials/postman.pdf> accessed 2 May 2015. As a highly critical media theorist Postman underlines that there is always a philosophy embedded in technology and that it affects the ways how people perceive technology. Postman admits that his image of technology originates from media theorist Marshall McLuhan's theory coined by the famous phrase "the medium is the message". Postman has been quoted in ODR literature by Katsh, see Ethan Katsh, 'ODR: A Look at History - Few Thoughts About the Present and Some Speculation About the Future' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012) 19.

stated before, such approach often results in oversimplifications. The danger of oversimplification is present in Postman's argument as well. A point of interest is that we can contrast this position with technology-religious view, which considers technology as a cure-all, and both of these arguments lead to the same pitfall of oversimplification.

Instead, technological neutrality should be considered along the social construction of technology. It is the context that defines the meaning and specific requirements for regulatory action. It is evident that theory of *dispute resolution and technology* has to be context-specific and to adopt the principle of technological neutrality at the same time.

3.4 CONCLUSIONS

To understand how the implementation of technology in dispute resolution challenges the justification of law as a legitimised mode of violence it is necessary to define what we mean when we speak about technology. This challenging task of defining dispute resolution technology has been taken on in this chapter. I began my examination of technology from the lack of an exact definition, which seems to be characteristic to most discussions on dispute resolution and technology. Specific functionalities and technologies are mentioned in legislative and policy documents and ODR literature has focused on perceiving technology as the fourth party to ODR processes, but the role of technology has gained surprisingly little attention otherwise.

I approached the issue through the works of two major media theorists, Marshall McLuhan whose technological determinism, often coined by the slogan "the medium is the message", sees technology as disruptive and Raymond Williams's social shaping of technology that understands technology as reflecting already existing social practices, such as social stratification. Both of these contributions that predate the invention of the World Wide Web in the early 1990s, the disruptiveness of technology, as well as the reflections of existing social practices, are present in the use of modern ICT in dispute resolution. However, further theoretisations on digitalisation, such as Friedrich Kittler's focus on the autonomy of technology as well as the growing importance of information, provide more in-depth analysis of the changes also taking place within the legal system due to the prolific rise in the use of

ICT. Combining these different approaches to technology provides a more comprehensive image of the role of technology, of its multifaceted effects that need to be evaluated in order to examine the justificatory challenge its implementation to dispute resolution imposes. I reconcile these theoretical insights on the role of technology with my theoretical framework of systems theory by perceiving the use of ICT as a new emerging social system.

In the second section of this chapter I moved from the abstract level of media studies to concrete applications of technology in dispute resolution. First I described different applications of technology in dispute resolution and then introduced a taxonomy of two different generations of dispute resolution technology to provide a more context-based framework for future discussions. In this taxonomy the first-generation of dispute resolution technology refers to those uses of technology, which have already become established within legal practice: e-filing and electronic case management, videoconferencing and electronic communication tools, document generation and online sources of legal information. The role of technology in first-generation applications is mainly supportive and their disruptiveness is relatively low in comparison with new, emerging second-generation applications such as machine learning, legal artificial intelligence, big data and blockchain architechture.

This taxonomy helps to elaborate how technology is used in different ways in different applications. This also brings into question whether the much-used analogy of technology as the fourth party of ODR is sufficient to explain these different functionalities of technology. Taken literally, the fourth party analogy attributes agency and subjecthood to technology. This stance is problematic especially in relation to first-generation applications of technology, although discussions of agency might become relevant in relation to second-generation applications. In any case, using the analogy hides the embedded human action behind the technology, concealed in the lines of code, and at the same time it leads to mystifying the technology itself. As the fourth party analogy is not sufficient to describe the complex tasks attributed to different applications of technology, I suggested a more context-oriented approach and emphasised the importance of the principle of technological neutrality. Focusing on the specific functionalities of technology, which in my study would be that of private enforcement, provides a more elaborate foundation for evaluating the implications of technology to the justification of dispute resolution.

4 Emerging Crisis

In the previous chapter, I examined different approaches to technology both in communication theory and from the perspective of systems theory. I concluded by describing the use of ICT as a new emergent social system, which has no historical predecessors but is rooted in early social uses of technological development, e.g. the printing press or the television. As technological change takes place within society, the ways in which we talk about technology impact the social reality and therefore influence both the future development and acceptance of technology. Hence, I adopted a position of technological neutrality to emphasise the importance of the social context in which ICTs are used.

In this chapter, I elaborate how the emerging system of use of ICT creates a rupture within the legal system. The emergence of use of ICT as a social system changes society and the need to cope with this change reflects also to the legal system in several ways, one of which is the increasing globalisation. This development brings forth the need to address the question of justification anew, from the perspective of how technology changes the existing justificatory narratives. This need for re-evaluation becomes particularly visible in enforcement. In order to lay groundwork for this inspection, it is necessary to overcome doctrinal differences between court-based public litigation and ADR.

First, I discuss how technology creates ruptures in law and how the legal system has tried to address these ruptures. After this, I assess the importance of enforcement to the issue of justification and discuss why private enforcement cannot be understood simply as a contractual matter. Following this, I consider the convergence of litigation and ADR as the legal system's method for reacting to technological irritants.

4.1 REFLECTIONS OF RUPTURE IN DISPUTE RESOLUTION

4.1.1 EMERGENCE OF PRIVATE REGIMES

In the previous chapter, we established that a new social system of the use of ICT is emerging. The disruptive power of new technology relates first and

foremost to the changes in information and communication management. Whereas ICT has enabled the efficient transmission of information regardless of national borders, the operations of the legal system are still closely connected with the nation state. This difference is closely linked with the privatisation of dispute resolution, as contractual regimes are able to bypass the limitations of state-bound law. Hence, this issue is at the core of both ODR and private enforcement. In this section I briefly describe the existing theoretisations of private regimes in order to shed further light on this tension.

Thomas Schultz applies Luhmann's theory to Internet regimes and discusses the emergence of autonomous legal systems, which do not swear allegiance to the nation-state, at least not all the way. According to Schultz, a legal system never reaches autopoiesis but instead is still open to its social environment.[275] Schultz claims that social normative systems can transform into legal normative systems by acquiring autonomous jurisdictional powers of prescription, adjudication, and enforcement, which enable formal legal institutions to recognise it. After constituting his theoretical foundation, Schultz moves on to evaluate two Internet regimes, ICANN and eBay's Resolution Center, by their prescriptive, adjudicative, and enforcement institutions. He founds that both of these examples constitute an autonomous private legal system by passing the test set out by legal positivist approach. He concludes that the requirements for passing as a legal system set out by legal positivism, i.e. comprehensiveness, territorial exclusion, and supremacy, are misplaced as the emergence of these private legal systems reveals. According to Schultz, public legal systems are still considered the epitome of legal systems because modern legal theory is still closely attached to the concept of political sovereignty.

A point of interest in Schultz's theory is that autonomous legal systems can emerge on their own and this development is leading to different actors placing separate normative orders on the Internet. Schultz's theory seems to adequately contest the legal positivist approach to private legal systems emerging online, as he highlights legal pluralism instead of legal monism.

275. See Schultz (n 238) 166. Schultz starts from Eugen Ehrlich's sociology of law. It should be noted that while discussing the emergence of the legal system from social normativity, Schultz emphasises the emergence of secondary norms, the delegation of power to certain people, and replacement of informal institutions with formal ones. His point of origin is not that of systems theory but instead H. L. A. Hart's legal positivism and the rule of recognition. However, Schultz points out that once a social system has evolved into a legal system "it cannot be more or less a legal system than another legal system", i.e. in his opinion the legality of a system is not scalable – an argument that closely resembles Luhmann's concept of law's code of legal/illegal.

134 However, Schultz gives little guidance for evaluating the relationship between these private legal regimes and public regimes.

Teubner and Calliess have both examined similar processes where private legal systems emerge.[276] Similarly to the underlying issues of Schultz, Teubner has shown in his analysis of global transnational law how the controversy related to lex mercatoria's legal nature depicts the conceptual dominance of the nation-state in legal theory. Teubner claims that lex mercatoria, as a privately emerged legal system of norms, challenges the close connection between law and the state by enabling such a formation of private legal orders without state intervention. In addition to this ultimate challenge of the state's prescriptive power, lex mercatoria, by becoming *de facto* transnational, also ascends the regional scope of the nation-state and the traditional method of formulating cross-border rules by international politics.[277] However, Teubner does not accept Schultz's point of origin – H. L. A. Hart's rule of recognition – as a prerequisite for constituting a system as legal.[278] According to Teubner, lex mercatoria locates itself in the periphery of law. Thus, it finds its dynamic stability by other means than creating a centre, which is typically a practice of national legislation. However, it should be noted that such differences in comparison with national legal systems are not necessarily defects; they are simply differences. Stability is provided by the softness of the regulation.[279]

This leads to another significant opening regarding private regimes: Fischer-Lescano's and Teubner's work on private global regimes. The globalisation of societal functions such as commerce, technology, security etc. has led to the development of sector-specific self-regulation, which form their own rationality.

276. Teubner has also approached the themes of a nation-state and transnational law from the viewpoint of new types of corporate actors formulated as networks. Teubner describes such systems as 'hybrid law'. See Günther Teubner, 'Hybrid Laws: Constitutionalizing Private Governance Networks' in Robert Kagan, Martin Krygier and Kenneth Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Berkeley Public Policy Press 2002) 312. Teubner claims that organisational theory has been unable to form a workable understanding of private hybrid networks ,which are obscuring the limits of formal institutions. Instead of describing these hybrid networks as contacts or highlighting communal norms embedded in transactions, Teubner introduces a clear distinction between networks and hybrids, concluding with the demand for private law to develop constitutional rules for a new private regime beyond contract and association.

277. See Günther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Günther Teubner (ed), *Global Law Without a State* (Dartmouth 1997) 7.

278. "Recognition is not constitutive of the existence of a legal order". See: ibid

279. Teubner, 'Global Bukowina: Legal Pluralism in the World Society' (n 277) 16.

Based on this, I claim that systems theory provides a framework for understanding why integrating technology into dispute resolution in cross-border civil cases is so problematic. Teubner states that technology is a global system, whereas law is interlinked with the political system of the nation-state. These new self-producing subsystems of society compete with the politics of nation-states in the formulation of a global autonomous society.[280] In other words, whereas commerce and technology are global systems, law is not. It follows from this tension that conflicts arising from a global subsystem of technology or commerce should be resolved through a local system, which fails in its task due to the inherent contradiction.

Following Teubner's train of thought it becomes apparent that bringing technology into dispute resolution causes discrepancies which are the result of law being perceived as excessively connected to the nation-state. This tension between different systems that are not able to communicate directly with each other is the result of the legal system's normativity – e.g. its binary code, which requires a structural coupling with the system of technology in order to be informationally open to its input. Sketching the issue of ODR, enforcement and the need to improve access to justice through a systems theory approach reveals the structure of transnational law and explains why it has failed to provide an effective theory for ODR. A systems theory approach directs our research interests to this problem of the interfaces between systems – namely to the issue of the justification of dispute resolution models in cross-border situations.

American law professor Elizabeth Thornburg discusses the privatisation of Internet dispute resolution. Through the examination of four instances of privatisation, i.e. ICANN, notice-and-take-down of web sites, digital rights management, and mandatory B2C arbitration, she points out that privatisation does not automatically hamper the rights of either party. However, she finds that privatised systems do transfer procedural advantage to one party and "circumvent meaningful due process protections that are implicit in a court of law".[281]

It does not follow from here that law is a harmonious system. Instead, there are different tensions embedded in law as a system, and these tensions transform into conflicts and disputes on the content of law. These tensions offer the participants of the legal field the possibility of resistance. Foremost,

280. ibid 5.
281. Elizabeth G Thornburg, 'Going Private: Technology, Due Process, and Internet Dispute Resolution' (2000) 34 University of California Davis Law Review 151, 187.

it is a question of perspective, whether we emphasise the rationality of law as a regime of practices, or alternatively the agonistic politics of law. Also, as becomes evident in particular within the UNCITRAL framework (discussed later in chapter 6), the battle for the hegemony of interpretation is an essential element of law's operation. Enabling, safeguarding, and reinterpreting these embedded tensions of the legal sphere are a central part of law's operation, of the ways in which autopoiesis is achieved.

4.1.2 WHY ENFORCEMENT MATTERS IN DISPUTE RESOLUTION

The emergence of ICT is creating several ruptures within the legal system as it strives to react to these new interpretative challenges. A similar challenge to the materialisation of private regimes can be found in dispute resolution. The disruptive element of the use of ICT is also changing the last phase of resolution processes, enforcement, as it enables the development of private enforcement. Why, then, is enforcement of importance to conflict management or to our examination of the justificatory crisis?

The Oxford Dictionary defines enforcement as "the act of compelling observance of or compliance with a law, rule, or obligation".[282] This definition sheds light on the most interesting element of enforcement, i.e. to compelling compliance. In laymen's terms enforcement may refer both to law enforcement and to enforcing judgments or rights. From the internal perspective of the legal system, enforcement may present itself simply as the technical implementation of a decision, where the resolution process carries more weight than the after-treatment. As the possibility of coercion is an instrumental part of the legal system, enforcement is well established in the doctrine – to the point where its exact definition is seldom discussed or problematized. In its recommendation on enforcement, the Committee of Ministers of the Council of Europe sums up the general definition of enforcement as follows:

> 'Enforcement' means the putting into effect of judicial decisions, and also other judicial or non-judicial enforceable titles in compliance with the law which compels the defendant to do, to refrain from doing or to pay what has been adjudged;[283]

282. 'Oxford Dictionary: Enforcement' <http://www.oxforddictionaries.com/definition/english/enforcement> accessed 4 March 2016.
283. Recommendation of the Committee of Ministers to member states on enforcement 2003 I.a.

In this study I refer to enforcement in this general meaning of legitimized obtaining of funds based on an existing legal decision. In other words, this examination targets the core area of enforcement. However, the examples described in the Introduction depict that different alternatives to enforcement further complicate the image of legitimized coercion. Focusing on this functional similarity of objectives, I consider social sanctions and contractual models of forcing compliance in connection with enforcement provided by the monopoly on violence of the nation-state. It follows from this that the social pressure of tribal communities, which Norwegian sociologist Vilhelm Aubert has studied,[284] is also a method of forcing compliance and thus, it can be seen as an alternative to enforcement.

Law's inherent violence cannot be hidden when decisions are put into action by force. As it is, enforcement reveals something relevant about law already on a linguistic level. Derrida also has made this connection: As he points out, the English idiom of "enforcing the law" and its relation to "enforceability" do not hide the use of force in applying law unlike the French equivalent of "appliquer la loi". Derrida states that

> The word 'enforceability' reminds us that there is no such thing as law (droit) that doesn't imply *in itself, a priori, in the analytic structure of its concept,* the possibility of being 'enforced', applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth.[285]

This means that, in enforcement, law cannot hide its unsavoury violent roots. Enforcement reveals us something about law: law ceases to be law if the coercive element is removed. As the paradox cannot be downplayed, we face the abyss of its deconstructive power. Violence has to be justified but simultaneously it cannot be justified. To this gap we fit justificatory structures and hope that they function as mechanisms of de-paradoxication.

284. Vilhelm Aubert, 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution' (1963) 7 The Journal of Conflict Resolution 26; Vilhelm Aubert, *Rettens Sosiale Funksjon* (Universitetsforlaget 1976) 180–186.
285. Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 Cardozo Law Review 919, 925–927. Another example of Derrida's is the German word "Gewalt" which translates both to "violence" and to "authorised power".

138 Enforcement is relevant for finding the justification of dispute resolution for two reasons. First, enforcement is a vital part of *legal* decision-making. This does not undermine the ADR emphasis on voluntary compliance with the decision, as ADR ideology accentuates the need to meet the actual needs of the parties, which then render enforcement irrelevant. However, the effects and significance of a decision depend on its actualisation by force in the end. If the debtor does not pay the debt voluntarily, the creditor is entitled to get the money she has lent. She may realise her right by resorting to the institutionalised violence of the state machine as a last resort. If a consumer bought a vinyl player from the corner shop but the player did not work as promised, she is entitled to call off the deal, return the player, and have her money returned. She may engage the district court and enforcement office if needed. If a person has paid a monthly bill twice by mistake, she is entitled to have the extra payment compensated and may turn to dispute resolution and enforcement to reach this outcome.

It is the 'if' in making voluntary payments that underlines the necessity of enforcement. There is no dispute resolution without the possibility of actualising the outcome. Different jurisdictions have different rules for who and which cases are entitled to access enforcement. However, the coercion, the violence, the consequences of non-compliance are shared by most as they are a constitutive element of law. Law is use of force, as becomes apparent in enforcement. Dispute resolution is law, law is use of force and use of force has to be justified.

Second, the same discussion gains significance in relation to the online environment. Online, if the buyer does not receive the office chair she purchased on an e-commerce market place but a kitchen chair instead, she should have an access to redress. She should have the possibility to cancel the transaction, get her money back and return the unwanted kitchen chair. If the state mechanism is not available, the question arises, what alternative systems would be applicable. This leads to the emergence of ODR, private enforcement, and its alternatives such as escrows,[286] chargebacks, and reputation systems. As will be discussed in chapter 4, these mechanisms cannot be considered simply as contractual issues because they deal with the other side of dispute resolution, they deal with the violence of the legal system. A point of interest is that the rhetoric does not start off from the claim that there should not be use of coercion in these situations. Instead, the question is,

286. Escrow services refer to online payment intermediaries that deposit a buyer's payment until the bought item is delivered and accepted. See e.g., Cortés (n 241) 60.

whose coercion and by which means? Another layer is added but the paradox itself does not disappear.

There are two phases in all dispute resolution processes that are of interest from the perspective of actualising rights. These are the threshold to enter into a dispute resolution process in the first place and the threshold to access enforcement after the dispute resolution process is concluded. As stated before, litigation struggles more pronouncedly with the first threshold. As litigation costs have continued to soar, litigation is no longer a real option for low-value disputes. Then again, litigation provides an easy access to the state enforcement mechanism, as the national decisions are recognised by enforcement officials directly and foreign decisions either directly or after a routine *exequatur* procedure.[287]

For decisions rendered in the private sphere, the situation has been exactly the opposite. Traditionally, ADR procedures have promoted easy access to conflict resolution. This access is usually guaranteed by the relatively low fees and the light structure of the process and by focusing on party interests instead of black-letter law. However, ADR decisions struggle with accessing enforcement in those cases where the decision is not followed on a voluntary basis. Up until now, ADR decisions have sought enforcement through the state's enforcement mechanism, which meant that they were subordinated to an *ex ante* control of due process before being granted access. This interaction between the private and the public takes place at the enforcement stage. However, it is specifically this stage where private enforcement comes to the front and shuffles the deck completely.

4.1.3 PRIVATE ENFORCEMENT MECHANISMS

As discussed, the point of interest for justification is enforcement. Enforcement shows law's inherent violence as it is, brings the paradox out into the open. In enforcing decisions, law shows itself as coercion, as use of force, as power. The grounding paradox of law cannot be de-paradoxified in relation to enforcement, it can only be temporarily hidden from sight. The bare use

287. In the EU, the recast Brussels I Regulation (1215/2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides for the abolition of exequatur procedures for decisions from other Member States. See recital 2) of the Regulation. However, exequatur still exist within the framework of cross-border procedural law, e.g. the model has been adopted in the Hague Convention of 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

of force has to be justified but simultaneously it is not possible to justify it in any satisfactory manner.

In the following chapters, I argue that private enforcement mechanisms of ODR providers have brought on a crisis for sovereignty, which in turn leads to the need for law to redefine itself. If and when a private entity assumes the task of enforcing legal decisions, the state's monopoly on violence is bypassed. There is no control whether a decision reached in ADR meets the demands of due process before accessing the state's enforcement mechanism. There is no delegation of power between the public courts and ADR procedures as was the case when access to enforcement was governed through summary *exequatur* processes. The internal private enforcement mechanism is established by on the user agreement of the ODR provider, usually in connection to e-commerce market place.

In the next section, I describe the private enforcement mechanism of eBay as it is governed by the user agreement all participants of the market place have to accept before engaging in the sale of goods. In the ODR literature, eBay has often been used as the example of ODR's promise, of the unprecedented success and breakthrough that ODR brings in its wake. Such statements are not exaggeration *per se*, as eBay solves 60,000,000 cases annually.[288] Before discussing eBay's mechanism, it is necessary to briefly explain why private enforcement mechanisms are interesting for procedural law and which alternatives to state enforcement have been suggested.

It should be noted that enforcement is always a question of exception. Most decisions reached both in litigation and ADR procedures are carried out voluntarily and there is no need for enforcement through coercion. From this perspective, enforcement is already a glitch in the system, a glitch that is further emphasised in private enforcement mechanisms. However, the possibility of enforcement is vital for e-commerce and for preserving the trust towards the digital market as stated by the EU's digital agenda.[289] The importance of enforcement is not diminished by its exceptionality.

One might ask why private enforcement is of interest to procedural law, as from another perspective it could be addressed simply as a matter of acceptable terms of standard contracts. This is a counterargument against per-

288. Katsh, 'ODR: A Look at History - Few Thoughts About the Present and Some Speculation About the Future' (n 274) 2.
289. 'A Digital Single Market Stategy for Europe' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2015) COM (2015) 192 final 4.

ceiving private enforcement as a question of procedure, as is done in this study, instead of considering it as a contractual law issue. The argument has its merits. It is obvious that the material norms of the place of residence of the corporation stipulate which terms are acceptable in standard contracts between the corporation and its customers. If the corporation providing ODR follows the material norms set in the legislation, why would there be anything problematic if a customer decides to bind herself to the standard contract and simultaneously surrender certain rights to the ODR provider? As such cases are contentious cases and not e.g. family cases, and the customer has in any case the right to choose how to resolve a conflict, she has the freedom of contract to decide on ODR. *Pacta sunt servanda*, and if a consumer accepts the valid standard agreement presented to her in a click'n'wrap before completing the signup, then she is bound to her contractual responsibilities.[290] She can always make the choice not to use the market place or its ODR add-on.

And in the end, it *would* be very effective to bypass the thresholds of cross-border civil litigation and enforcement by granting the same rights to the e-commerce platform, who then resolves any possible disputes by giving decision and enforcing it without any intermediaries. Moreover, customers would also have the right to take the case to court if they wish, as private ODR is just an alternative to traditional litigation and state enforcement. Simply put, they have the right but they do not need to or want to do so in practise. This follows the logic that the fact that ODR cases are not taken into court shows that customers are content with the alternative. However, these arguments that private enforcement is simply a question of standard contractual terms and voluntary choice are not plausible. Private enforcement is nevertheless use of force, even if we call it by another name, and use of force has to be justified in the legal system. Also, there is no actual choice for a customer if and when the litigation threshold is too high as it often is in cross-border, low intensity cases.[291] This stance does not contest that there is a question of contract law

290. Whether click'n'wrap agreements bind a consumer is a somewhat controversial question. According to Davis, courts have adopted a stance where the click of a consent is considered as presumed assent regardless of the consumer's actual agreement with the terms, as considering such contracts invalid would have severe effects on e-commerce. See Nathan J Davis, 'Presumed Assent: The Judicial Acceptance of Clickwrap' (2007) 22 Berkeley Technology Law Journal 577, 598.

291. Similarly, Ponte highlights that there is a need for cross-border enforceability of ODR, as cross-border enforcement in a national court is not an option and even if it was, it is unlikely, that a national court would recognise an ODR decision that does not comply with established legal standards. See Lucille M Ponte, 'Throwing Bad Money after Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper' (2001) 3 Tulane

entwined within ODR. Private autonomy and the freedom of contract are very much a part of ODR, as will be discussed in the following chapters.

Instead of claiming that private enforcement is one or the other, it is more reasonable to state that both perspectives, contractual freedom and procedural rights, can be employed but they produce different types of information. Arguments about the importance of material norms, *pacta sunt servanda*, or the freedom of contract cannot be countered but they reveal another side of the reality of e-commerce. From this perspective, the protection of the weaker party is guaranteed by the material norms of national legislation on sale of goods. From the perspective of procedural law, protection of a weaker party calls for procedural safeguards, which cannot be sufficiently provided for in material norms. If a standard contract includes norms on the method of resolving disputes related to the activities arising from the contract, then there is always an element of procedure. Along the element of procedure, come the requirements for access to justice. If there is a private enforcement mechanism, there is use of force, which traditionally has belonged to the nation-state. If the nation-state is bypassed, we need to ask who caters for access to justice.

The contractual perspective might claim that corporate responsibility is a sufficient tool for providing procedural protection. Access to justice can be guaranteed by the horizontal effect of human rights, which requires corporations to assume a role in protecting the effective realisation of human rights alongside the states and individuals. The contractual lawyer has an interesting point here, which however is not convincing to the procedural researcher. The argument comes down to the liberalist argument that individual action on protecting one's own interests is profitable to the larger community. The claim presupposes that the freely operating markets benefit the society in its entirety, and following this line of thought, the ODR industry standards would take care of access to justice without the need for state intervention outside the material norms. The argument employs the metaphor of Adam Smith's invisible hand, but it is not a sufficient safeguard from the procedural perspective. As private enforcement is a matter of technological infrastructure but also holds a function of procedural law, material norms do not hold the answer for extending state control beyond its territorial scope to the inherently global Internet. However, there is the option of considering the contractual arrangements of private enforcement as insurance models,

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which interpretation could easily be applied also to chargebacks. However, the perspective adopted in this study focuses on conflict management as a procedural issue, and thus this discussion is beyond our scope.

4.1.4 ALTERNATIVES TO ENFORCEMENT

Several options for enforcement have been discussed in the ODR literature. One option to enforce ODR decisions is to consider them as arbitral awards, which can be then enforced through the New York convention of 1958. However, it is still undecided whether the convention would apply to online arbitral awards. Regardless, enforcement as arbitral awards would not bypass state control, as recognition and enforcement of the award would still be sought from the national authority and executed by the national enforcement mechanisms.[292] This means that enforcing ODR decision as arbitral awards would not constitute private enforcement. However, there might be other problems in interpreting ODR as arbitration as the discussion in UNCITRAL's working group on ODR on the acceptance of pre-dispute arbitral clauses in consumer cases shows.[293] It suffices to point out that the New York convention has been intended for addressing commercial cases that are of high value and low volume, which differ significantly from the small claims associated with e-commerce. This affects the structure of recognition under the convention. Court fees for recognising an award in an *exequatur* procedure in the country of enforcement is not a significant threshold for multi-million awards, but the typical e-commerce dispute does not exceed the value of few hundred euros. It might well be that ODR as arbitration would not provide effective enforcement even if ODR was accepted into the scope of NY convention.

Also chargebacks have been proposed as another functional equivalent of enforcement especially for B2C transactions in the US. In chargebacks it is the credit card company that assumes the responsibility for allocating

292. According to article 5 of the convention, recognition may be refused if it is shown that the arbitration agreement was invalid, if a party was not given a proper notice of the appointment of the arbitrator, the arbitrated matter is outside the scope of the arbitration agreement, the composition of the arbitral tribunal was not in accordance with the agreement or with the law of the country of arbitration proceedings, the arbitral award is not yet inter partes binding, or if the subject matter cannot be arbitrated according to the law of the country of enforcement, or if recognition would be against public policy. The convention is available at: <http://www.newyorkconvention.org/texts/> accessed 11 March 2015.

293. See section 6.2.2.

144 money after a decision is reached. The credit card company forcibly reverses the payment done and returns the money to the buyer after establishing that the seller did not follow through with her contractual responsibilities.[294] The system is funded through the chargeback fees that businesses engaging in the sale of goods have to pay in order to accept payments done through the payment method. The amount of these fees depends on the track record of the business and the amount increases if the business has reoccurring chargebacks on its transactions.

Chargebacks are an enticing solution for disputes arising from e-commerce, especially for the typical cross-border, low intensity disputes concerning the sale of goods. As Ichiro Kobayashi states, such disputes are difficult to predict and to enforce, which has resulted in unique business models in comparison to the more traditional sale of goods. It follows from this that 'cost engineering' is at the heart of e-commerce business models. According to Kobayashi, in B2C relations the target is to lower the *ex post* enforcement costs.[295] Based on this, it is evident that chargeback models comply well with the logic of the market, with the rationality of e-commerce, as they subsidise the costs in dispute situations and affects future seller performance. However, it is still unclear whether the scope of chargebacks could be expanded beyond their current use.

Also different types of reputation systems have been suggested to address both the need for compliance with the rules of the market place and the need for increasing customer trust in the market. Feedback systems are one such option, and they are included in most e-commerce market platforms. After the transaction is concluded, both parties, the seller and the buyer, have the possibility to leave positive or negative feedback. The idea is that sellers with the best user ratings will have more transactions in the future and sellers with bad reviews are either forced to improve their behaviour or discontinue their activities. There are several difficulties with feedback systems, but first and foremost their effectiveness may be questioned as negative feedback does not necessarily describe what has actually been the problem between parties. It is stated that negative feedback can be left out of spite or positive feedback

294. It should be noted that a chargeback process can also be independent from the ODR decision. For example, PayPal may make a decision on the behalf of the parties but this does not prevent the parties from engaging in a chargeback dispute with the credit card company. See Amy J Schmitz, ''Drive-Thru' Arbitration in the Digital Age: Empowering Consumers Through Binding ODR' 62 Baylor Law Review 178, 217.

295. Ichiro Kobayashi, 'Private Contracting and Business Models of Electronic Commerce' (2005) 13 University of Miami Business Law Review 161, 215.

can be manipulated.[296] However, the main issue with feedback systems is that they do not provide redress for individual cases but instead they try to affect the future behaviour at the market place.

Another form of reputation systems tries to provide a trust mark for those market places who have a functioning ODR system that follows certain criteria of access to justice. Ponte suggests that these trust marks could be granted by a transnational authority, which would be established by the cooperation of governmental institutions. The trust mark would include an enforcement function as well as provide a minimum criteria for due process. Trust marks would be granted to businesses that follow the rules of such an international convention. Non-compliance with an ODR decision would lead to a temporary or permanent loss of the trust mark.[297] However, there are several difficulties with creating a system of trust marks. If the intention is to create a transnational system similar to the New York convention for arbitral awards, governmental action is needed. Up until now, the success of engaging different states for developing ODR standards has been low. Also, the issue is related to the Internet governance on a more general level. Ponte suggests that a non-complying merchant would be banned from e-commerce altogether – a task that is not an actual option when taken into consideration the disharmonious infrastructure of the Internet. Regardless, trust marks have a similar inherent problem as feedback systems: they regulate future behaviour but without establishing the convention for enforcement, they do little for the singular case.

However, technology enables also more exhaustive means of forcing compliance than reputational systems, namely direct self-enforcement. eBay's enforcement mechanism is enabled by its easy access to a payment mechanism but also other applications do exist, as I have pointed out already in the Introduction. ICANN enforces arbitral awards given in domain name disputes through its authority over the domain name system, whereas blockchain applications of cryptocurrencies give rise to self-enforcing programmable smart contracts, where the contract executes contractual obligations automatically, e.g. allocates money, once the contractual terms are fulfilled. All these models of private enforcement have far-reaching consequences to

296. On reputation systems see Louis Del Duca, Colin Rule and Zbynek Loebl, 'Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)' (2012) 1 Penn State Journal of Law and International Affairs iv, 64.
297. Ponte (n 291) 88–89.

the legal system, as they provide new means of coercion that do not rely on the state's monopoly on violence.

The difficulty with chargebacks, trust marks, and feedback systems is that they do not speak in terms of law. Instead they follow the rationality of the market place. In terms of systems theory, these operations are recognised through the coding of the economic system, paying/not-paying, but they do not abide to the coding of the legal system. Chargebacks come down to a reversal of an earlier transaction and provide redress for an individual dispute. However, chargebacks seldom extend to the question of damages. Also trust marks and feedbacks are communication of the economic system. Their decisive force for the legal field does not convince the procedural researcher, although there is value in these additional courses of action. This lack of credibility can be explained by the coding. The participant of the legal system does not recognise the redress mechanisms that employ the coding of the economic system.

Although chargebacks, trust marks, and feedback systems communicate about law, as alternatives to enforcement, the legal system does not recognise them as valid, as belonging to itself. The paradox of law, the coercion it hides, does not exist in these alternatives in a way that the legal system would recognise it. They communicate about law but they do not produce law. They might enter the legal system as facts (the fact that a payment was reversed through chargeback has meaning for a later legal procedure) but they are not independent operations within the system. The feedback system or multilateral trust marks may facilitate commerce and increase trust and even create better business practices, but in the end, they are not the functional equivalent of engaging law's coercion. They abide to a different rationality than the inherent violence of law. Chargebacks come close, as the reversal of payment does indeed return money to the buyer. But depending on the content of the chargeback, these systems either hold a similar problematic as private enforcement, i.e. the issue of making a normative decision and enforcing it without the preceding control of due process, or they are reduced into payment mechanisms with additional fees for certain types of behaviour.

Unlike the other alternatives, both options of enforcing ODR decisions as arbitral awards and private enforcement mechanisms are interesting for the legal system. These models employ the familiar code through which the legal system recognises them as belonging to its sphere. Although both op-

tions are relatively new phenomena, mostly unregulated, the legal system recognises the element that makes these operations communications about law. These models are communication about law but also produce legally interesting communication. They are about upholding expectations, regardless of what the legal system decides to do with them. In other words, these are legal phenomena and it does not matter whether we come to the conclusion that ODR is arbitration or that it is not or whether private enforcement is allowed or not. Even if the programs within the legal system decide that the side of 'illegal' will be applied to these, they are relevant communication about law. They are irritants, impulses, mutineers that demand action from the legal system. Using Luhmann's language, such irritants are vital for the future development of the legal system, as they bring new elements to its autopoiesis. The legal system faces two options. Either it is able to cope with the irritation and improve its immune system by addressing such demands, or it ceases to exist.[298]

Excursion 1: The Case of eBay's User Agreement

I stated earlier that private enforcement is something that the legal system has to address. In this section, I will briefly describe the reality of eBay's internal enforcement mechanism, which is established by its user agreement. Before commencing commerce on the market place, both sellers and buyers have to accept the user agreement and abide to the rules governing private enforcement. A point of interest is that eBay's Resolution Center no longer goes by that name but instead it is rebranded as Money Back Guarantee. Most probably the terminology is changed in order to increase buyers' trust in the market place. However, the content of the Money Back Guarantee is the same as the earlier internal enforcement mechanism.

It should be noted that eBay is not simply a market place with an add-on Resolution Center/ Money Back Guarantee for buyer protection. In addition to providing e-commerce platform for sellers and buyers, eBay also has access to the world's largest Internet payment company, PayPal, which has been eBay's subsidiary since 2002.[299] The combination of an access to the

298. Niklas Luhmann, *Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004) 171.

299. However, in 2014 eBay has announced plans to detach Paypal from eBay into an independent company in 2015. See Deepa Seetharaman and Supantha Mukherjee, 'EBay Follows Icahn's Advice, Plans PayPal Spinoff in 2015' (30 September 2014) <http://www.reuters.com/article/us-ebay-divestiture-idUSKCN0HP13D20140930> accessed 12 March 2015.

148 payment method and internal dispute resolution procedure is necessary for producing an effective private enforcement mechanism.

The user agreement of May 19, 2016 also gives eBay.com the right to request PayPal to restrict seller's access to funds on her PayPal account "based on certain factors, including, but not limited to, selling history, seller performance, returns, riskiness of the listing category, transaction value, or the filing of an eBay Money Back Guarantee case".[300] According to the user agreement, eBay's right to recommend restrictions is necessary to protect the e-commerce site from the risk of liability for the seller's actions. Based on eBay.com's request, PayPal may decide to restrict the user's funds according to PayPal policies. This restriction policy of PayPal has been criticised for its arbitrariness and controversial nature.[301]

According to the latest eBay.com user agreement, both sellers and buyers accept that eBay renders a final decision on the Money Back Guarantee.[302] Based on its policy, eBay decides whether a buyer needs to be reimbursed after receiving an item that does not meet the description provided in the seller's listing. If the buyer does not reach a settlement directly with the seller, eBay will refund the payment to the buyer. However, the user agreement authorises eBay to remove the paid reimbursement from the seller's PayPal account or charge the amount from the seller's other payment method. In addition to the reimbursement, the user agreement enables eBay to bill the seller's account for return shipping if eBay has provided the shipping label for the buyer.

It is worth noticing that the objective behind the Money Back Guarantee is to increase buyer satisfaction and trust in the e-commerce platform. For this purpose, the buyer is reimbursed directly by eBay if deemed necessary, and then later on eBay collects the returned payment from the seller in addition to the shipping costs. The private enforcement mechanism is directed against the seller. However, the seller may be credited byeBay in cases where

300. 'eBay User Agreement' (19 May 2016) section 'Holds' <http://pages.ebay.com/help/policies/user-agreement.html> accessed 15 June 2016.
301. See e.g. Council of Europe/ Parliamentary Assembly/ Committee on Culture, Science, Education and Media (n 272) section 6.6.
See also Andrés Guadamuz González, 'PayPal: The Legal Status of C2C Payment Systems' (2004) 20 Computer Law & Security Review 293; Andrés Guadamuz González, 'eBay Law: The Legal Implications of the C2C Eletronic Commerce Model' (2003) 19 Computer Law & Security Review 468.
302. 'eBay User Agreement' (n 300) section 'eBay Money Back Guarantee'.

the buyer does not make a payment even after the seller has resolved the case through the Resolution Center.[303]

The contractual relationship is stipulated in the user agreement, which grants eBay access to the seller's PayPal account. The terms described above enable enforcing the final decision on the transaction between the seller and the buyer that eBay renders through its Resolution Center. It is noteworthy that the user agreement itself does not mention the Resolution Center or the ODR add-on, but only states that eBay has the right to render the final decision on the Money Back Guarantee.

The final decision is made in eBay's Resolution Center through an automated ODR procedure. This means that the possible claims that can be initiated at the ODR phase are limited to the typical issues related to e-commerce; the buyer did not receive the item or received an item that does not match the description, the seller did not receive the payment or needs to cancel the transaction. In addition to these, some other issues may be resolved through the Resolution Center.

Considering the above, private enforcement mechanism of eBay and PayPal is undeniably an economic mechanism created for protecting consumer trust in the e-commerce market place. It abides to the rationality of the markets in a similar manner as advertisements or user reviews. This is further emphasised by the casual wording of the ODR procedure, which downplays the element of coercion embedded in the mechanism. However, this is not the sole function of the Resolution Center and Money Back Guarantee.

As it allows the use of force, the Money Back Guarantee abides to the logic of the legal system. If a final decision against the seller is rendered in the Resolution Center, then eBay may demand the transfer of money from the seller's PayPal account. Here, eBay both renders the final decision and also *de facto* deducts the money, on the basis of the user agreement. Instead of underlining this as enforcement, which this would be hazardous from the perspective of the separation of powers, this is rephrased as an allocation of liability, a contractual matter between the seller and eBay, who had to reimburse the buyer through the Money Back Guarantee. However, this claim is not credible as the function of procedural law is inevitably included in the decision of allocating responsibility. If we consider ODR and private enforcement simply as a matter of contractual law, we face the danger of getting lost in a legal no-man's-land, where the sole option of redress is to look into the

303. 'Requesting a Final Value Fee Credit' <http://pages.ebay.com/help/sell/credits.html/> accessed 15 June 2016.

150 material legislation of ODR provider's place of domicile. The redress from material legislation is often illusionary despite the claim that its existence makes ODR just one option among different models of dispute resolution.

However, private enforcement mechanisms seem to employ the rationality of the market place at the same time as they deal with a legal issue. It is not clear from the legal side how we should interpret such a phenomenon. At this point, it is evident that there is something strange about such use of coercion within e-commerce. A discrepancy is revealed and this reflects the underlying rationality behind law, bringing the paradox of violence back into our sight.

As stated above, there are two separate questions here. The first one is whether private enforcement, dressed in contractual terms, is an operation of law. I claim that there is a legal element, which makes them of interest to the legal system. In other words, they are relevant to law. However, this is a separate question from the issue whether we should consider them acceptable (employ the side 'legal' instead of 'illegal') and how the legal system should address them. The latter question is more far-reaching. However, this study is more interested in the first one: how does this phenomenon affect the legal system, how does the law cope with the emergence of a new irritant, what does this tell us about law? What will be revealed by such a glitch in the system? And, should we address private enforcement in a similar way as public enforcement through the state courts, or is it a phenomenon of ADR? Is such a separation even possible anymore?

4.2 RUPTURES IN THE DOCTRINE: DISINTEGRATING DISTINCTION BETWEEN LITIGATION AND ADR

4.2.1 LINGUAL ANTAGONISM

Dispute resolution as a whole strives for a swift, fair, and final solution of conflicts that are coded as 'legal.'[304] Different resolution models do this by

304. This study focuses on legal conflicts and particularly their resolution, although recognising at the same time that there are also other perspectives and forms of resolution to conflicts, such as religious, sociological etc. What makes a conflict 'legal' is an important question for research of dispute resolution. Unfortunately, it is not possible to discuss issues related to legal ear-marking in this context. As a generalisation, it is possible to differentiate a legal dispute from a non-legal conflict by claiming that the legal nature is embedded as inactive in the conflict. Through escalation into a legal question, the conflict emerges as a dispute. Trakman fears that

very different means. While state-governed and institutional dispute resolution is organised through permanent courts, different models of alternative dispute resolution can be organised more flexibly, on a case-by-case basis or through private or public organisations.

These different models of resolving conflicts, state-run litigation and ADR, are often seen as opposite and rivalling systems.[305] Actually, ADR is already on the level of terminology conceptualised as contradictory; the 'alternative' in ADR can be understood only in relation to the traditional form of dispute resolution, i.e. litigation. This dogma of contrasting positions is further emphasised by legal scholars identifying themselves as belonging to the one or the other discipline.[306] However, this 'separation paradigm' can be challenged by focusing on the common goal and other joint functions common to all forms of legal dispute resolution. Although all dispute resolution shares a common ground, this need for a joint approach is further solidified in *dispute resolution and technology*. I claim that the divide between the two discourses is no longer necessary but, in fact, prevents research of dispute resolution from examining the justification of use of force comprehensively. Implementing technology into dispute resolution creates novel situations and issues arising from this do not abide to the separation paradigm.

It should be noticed that similarities and differences between litigation and ADR procedures are constructed through the use of language. As Kaijus Ervasti notes, paradigms of traditional procedural law and ADR are usually depicted as contrasting opposites in legal discussion through choosing exclusively the other as a starting point and emphasising the advantages of the

applying the justice system's narrow definitions of 'legal' "circumscribe the social dimensions of family, business, and political conflict". See Leon E Trakman, 'Approriate Conflict Management' (2001) 2001 Wisconsin Law Review 919, 919.

305. This presumed juxtaposition between litigation and ADR is apparent in the terms selected to describe their interrelationship. For example, Main sees these two as 'rival' (Thomas O Main, 'ADR: The New Equity' (2005) 74 University of Cincinnati Law Review 329, 329.), while to Edwards, ADR means 'substitutes' for litigation (Harry T Edwards, 'Commentary. Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 Harvard Law Review 668, 669.). The prima facie rivalry is widely recognised in Finnish jurisprudence as well. See e.g., Laura Ervo, *Oikeudenmukainen Oikeudenkäynti* (WSOY 2005) 28–29. See also, Riikka Koulu, 'Domstolsrättegångar och alternativ tvistelösning – innebär användning av nutida teknologi I tvistelösning en upplösning av separata paradigm?' (2013) 2013 Retfaerd: Nordisk juridisk tidskrift 60.

306. Although, in recent discussion it has been questioned whether the existance of such divide is rather a thing of the past than the actual state of affairs. While Koulu's critique is well versed, the change of research field does not instantly affect the public image constructed on doctrinal dissent and renewing this divide – which Koulu point out as well. See Risto Koulu, 'Eurooppalaistuuko vai kansainvälistyykö prosessioikeuden tutkimus?' [2012] Defensor Legis 482, 489.

chosen model through simplification and generalisation.[307] It is essential to emphasise the role of rhetoric in constructing the divide. ADR's revolutionary origins were cut out for quick criticism of the prevailing system of litigation, but then again, litigation's disapproving apprehension towards ADR's ability to give protection to the weaker party further renewed the separation.

In the American literature, Kathy Douglas has examined the role of language in procedural law education. Using discourse analysis of sorts, Douglas separates six discourses all preserving and encouraging different attitudes towards ADR: doctrinalism (legal doctrine focusing on black letter law, disregard of ADR), vocationalism (emphasis on professional identity, values ADR as a part of legal practice), corporatism (focus on efficiency and marketability of legal education, often result in decline of socio-legal studies as not marketable), liberalism (oriented on individual freedom, ambivalent attitudes), pedagogicalism (orientation on deeper learning, values ADR as it focuses experimental learning), and radicalism (critical legal studies challenging law as rational, high regard for ADR).[308] Douglas' analysis proves to be especially enlightening as it shows how the values of speakers affect the construction of the argument for or against either one of the dispute resolution models. Evaluating the discursive aspects might also reveal the chosen ideological connections behind paradigms. As Leon Trakman depicts, ADR can be seen as based more on liberal values, emphasising individual liberties and autonomy rather than communitarian perspective of social interests.[309]

In addition to being anachronistic, maintaining the separation paradigm can also divert our focus from questions relevant to all dispute resolution. Separating litigation and ADR is often explained by using such juxtapositions as state-governed/privately organised,[310] public/confidential,[311] public-service/customer-service,[312] unenforceable compromise/enforceable external verdict,[313] rights/interests, formal/flexible etc. All of these aspects could be

307. Kaijus Ervasti, *Käräjäoikeuksien sovintomenettely: empiirinen tutkimus sovinnon edistämisestä riitaprosessissa* (Oikeuspoliittinen tutkimuslaitos 2004) 166–167.
308. Kathy Douglas, 'Shaping the Future: The Discourses of ADR and Legal Education' (2008) 8 Queensland University of Technology Law and Justice Journal 118, 128–.
309. Trakman (n 304) 921.
310. ibid 919.
311. Tapio Puurunen, 'Dispute Resolution in International Electronic Commerce' (University of Helsinki 2005) 245.
312. Caroline Harris Crowne, 'The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice' (2001) 76 New York University Law Review 1768, 1769.
313. Edward Brunet, 'Questioning the Quality of Alternative Dispute Resolution' (1987) 62 Tulane Law Review 1, 15.

discussed in detail, and it could be evaluated to what extents the differences *de facto* exist. However, it is noteworthy that the embedded normative nature of the escalating conflict is recognised also in the ADR literature, although the focusing on interests instead of rights enables consideration of non-legal elements as well. Nevertheless, this is an important starting point for creating a joint approach covering both litigation and ADR. Both forms of dispute resolution focus on conflicts that, when escalated, are reinterpreted as legal. Moreover, both models have adopted the premise of normativity, at least.[314]

4.2.2 DIFFERENCES BETWEEN LITIGATION AND ADR

What comes to the characteristics of the model, litigation is often described through the adversarial principle, labelling the adjudicative procedure as a disharmonious and argumentative instead of communicative. Driven by the objective of discovering the material truth in the dispute and applying the material law, the litigation system has been depicted as formal, rigid and unable to react with situational sensitivity.[315] Further, the distinction of facts and norms is derived from this objective, a separation that also affects the scope of party autonomy.[316]

We should ask what interests the traditional litigation paradigm aims at serving, what kind of knowledge from conflicts we can construct through its theory, to what extent the theory's problem-solving abilities contribute to dispute resolution. Traditional procedural research has seen its assignment to be facilitating the judicial system and the decision-making process by interpretation and systematisation of procedural norms. Likely, the litigation paradigm has succeeded in its task at least moderately, although it can be challenged to which extent some of its contributions, like the mathematical theories on evidential value have, in fact, been adopted by the courts.

In jurisprudence, ADR is differentiated from litigation doctrine through earmarking it as a new paradigm, alternative and substitute to litigation, creating

314. In this general direction and on due process in privatized dispute resolution, see e.g., Paul R Verkuil, 'Privatizing Due Process' (2005) 57 Administrative Law Review 963, 993.

315. Judith Resnik, 'Many Doors -- Closing Doors -- Alternative Dispute Resolution and Adjudication' (1995) 10 Ohio State Journal on Dispute Resolution 211, 257.

316. The division of power between the judge and the parties can be traced back to Aristotle who stated that the parties' task is to present, what has happened, but the judge evaluates whether it is of importance or just. See Aristotle, *The Art of Rhetoric* (Penguin Classics 1991) ch.1, v. 354a. On the parties' autonomy to decide on evidence in Finnish law, see e.g., Jyrki Virolainen, *Lainkäyttö* (Lakimiesliiton kustannus 1995) 267–277.

154 the need for the traditional dispute resolution to make adjustments.[317] As Gélinas et al. describe, public dispute resolution is still seen as the proper course of action to which ADR methods are the alternative.[318]

Originally, ADR emerged as a third wave of the access to justice movement demanding procedural fairness to be increased by removing procedural obstacles from access to justice.[319] Later on, ADR has become established as an institutionalised,[320] co-existing system alongside litigation and, to a growing extent, integrated with it.[321] It is noteworthy that ADR models have the tendency to form permanent, institutionalised structures for the resolution of disputes, although at first, this could be seen going against the ideology of ADR.

In legal debates, ADR is often depicted to include less involvement from lawyers, resulting in cheaper, more flexible, and more friendly resolution procedure.[322] ADR's advantages are seen to be the result of its differences from litigation paradigm.[323] The theoretical framework of ADR is often multidisciplinary. ADR avoids substantive law and focuses on providing a functional procedural frame for the parties in which they can resolve the conflict through compromise. The conciliatory atmosphere is further emphasised by the informal nature of the procedure and the lack of compulsion. According to the ADR paradigm, future disputes between the parties are prevented as the dispute is resolved by compromise.[324] It is often claimed that the procedure's orientation towards compromise also leads to a more extensive commitment of the parties to the resolution and thus remedies the lack of enforceability of ADR decisions.[325]

317. Crowne (n 312) 1779. On definition of 'alternative' as alternative to litigation, see e.g., Lodder and Zeleznikow (n 264) 4.
318. Gélinas et al. provide a fruitful overview of the discussion for and against ADR. See Gélinas and others (n 268) 81–104.
319. See e.g., Ervasti, *Käräjäoikeuksien sovintomenettely: empiirinen tutkimus sovinnon edistämisestä riitaprosessissa* (n 307) 27–30.
320. See e.g., Sharon Press, 'Institutionalization: Savior or Saboteur of Mediation?' (1997) 24 Florida State University Law Review 903; Douglas Yarn, 'The Death of ADR: A Cautionary Tale of Isomorphism through Institutionalization' (2004) 108 Penn State Law Review 929.
321. Resnik (n 315) 261–265.
322. Judith Resnik explores claimed differences between litigation and ADR and concludes that both forms are moving closer to each other. According to her, as a result of this melt-down, the focus of procedural research is shifting from adjudication to resolution. See ibid 246,261–.
323. See e.g., Crowne (n 312) 1769; Trakman (n 304) 928. Trakman notes that implementing ADR into litigation and applying litigation's justice construct to it might cause the loss of these advantages.
324. See e.g., Brunet (n 313) 11–14, 26.
325. On enforceability see e.g., Puurunen (n 311) 250–251.

Despite its avoidance of substantive law, ADR is seen taking place "in the shadow of the law", according to the famous metaphor of Robert Mnookin and Lewis Kornhauser.[326] This metaphor describes how ADR solutions often simulate the assumed results of litigation. According to Lodder and Zeleznikow, this shadow of the law nature of ADR creates common criteria of fairness and justice for litigation and ADR.[327] Then again, it can be questioned to what extent the threat of later examination by the judicial system actually affects the parties' conduct.

The basis of jurisdiction is one clear distinctive feature between litigation and ADR. When state-governed adjudication must base its jurisdiction on a positive norm, ADR procedures derive their legitimacy from the voluntary entrance and commitment of parties. Especially in cross-border dispute resolution, often rising from Internet activity, ADR's solution to base its legitimacy on optional acceptance given by the parties dismisses the problematic issue of deciding on jurisdiction. This means that the disputants' commitment to the chosen model of dispute resolution is constructed differently: when ADR emphasises consent, litigation starts from the coercive force of legal jurisdiction. These differences in establishing jurisdiction affect the operational logic, and the ultimate justification, of the dispute resolution model. While litigation has to justify the use of force by claiming fairness, ADR finds justification from party autonomy.

When the same question of interests is placed to the ADR paradigm, we notice that the strength of the ADR approach is that it produces information on conflicts and their causes, which is not necessary legal information by definition. For example, Douglas points out that impact of emotion in negotiations and in disputes is often disregarded by the typical mind-set of adversarial lawyers, while in ADR the importance of emotional connections is emphasised.[328] This type of information sheds light on the root causes of conflicts. As we notice, the knowledge interests of these paradigms differ and both paradigms provide information for distinct purposes. Still, in this perspective, these interests are differentiable and do not overlap: litigation paradigm does not succeed in providing information that would be valued in the ADR paradigm, and vice versa. A key issue here is what kind of infor-

326. Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution' (1979) 88 Yale Law Journal 950.
327. See Lodder and Zeleznikow (n 264) 165–170. Based on this, the authors discuss the possibility of adopting a joint approach.
328. See Douglas (n 308) 127.

156 mation we need and for what purposes. At this point it suffices to state that litigation and ADR have their distinct identities. But what happens to these identities when technology is implemented in dispute resolutin?

4.2.3 CONVERGING MODELS OF DISPUTE RESOLUTION AND TECHNOLOGY

In the previous section I referred to the distinction made in the procedural law research between adjudication. This division is reconstructed and reinterpreted constantly by individuals participating in the conversation on dispute resolution. However, the distinction becomes unnecessary when focusing on the use of force. Similar stances have been adopted in jurisprudence. Victoria Crawford sees that the unique nature of the Internet brings ADR forward from the shadow of the law, enabling efficient solution to the problem of jurisdiction that the litigation paradigm battles with, and thus, it brings ODR to the mainstream of dispute resolution.[329] Lodder and Zeleznikow acknowledge that ODR does not have to be an alternative to litigation, because same technological methods could be adopted in litigation as well.[330] In turn, Dan Jerker Svantesson emphasises the importance of effective ODR schemes for a healthy and fair Internet.[331]

The same distinction between litigation and ADR is adopted also in discussion on technology and dispute resolution, reworded as a difference between courtroom technology and ODR.[332] Upholding the difference between ODR and courtroom technology most likely results from the ease of positioning research under existing separate doctrines. Whereas ODR research has advocated for the increasing importance of technology, the development of courtroom technology has mostly focused on implementing new technolo-

329. Victoria C Crawford, 'Proposal to Use Alternative Dispute Resolution as a Foundation to Build an Independent Global Cyberlaw Jurisdiction Using Business to Consumer Transactions as a Model, A Note' (2002) 25 Hastings International and Comparative Law Review 383, 383.
330. Lodder and Zeleznikow (n 264) 170.
331. Svantesson argues that Internet needs easy-access and well-functioning ODR schemes. See Dan Jerker Svantesson, *Private International Law and the Internet* (Kluwer Law International 2007) 47. According to Katsh, new technologies, by "opening new technologies can lean ... to a reassessment of goals, priorities, assumptions and expectations". See Ethan Katsh, 'ODR and Government in Mobile World' in Marta Poblet (ed), *Mobile Technologies for Conflict Management. Online Dispute Resolution, Governance, Participation* (Springer International Publishing 2011) 82.
332. See Pompeu Casanovas and Giovanni Sartor, 'Foreword: What LGTS Intends to Be' in Giovanni Sartor and others (eds), *Approaches to Legal Ontologies. Theories, Domains, Methodologies* (Springer International Publishing 2011).

gies to existing practices without considering the more general implications. Karen Eltis aptly describes the situation of courtroom technology as follows:

> And yet, notwithstanding its growing relevance, the question of technology's ramifications for the courts more generally and for judges has thus far evaded scholarly inquiry almost entirely, leaving courts (for the most part) with little choice but to attempt to fit new technologies into outdated regimes and practices, devised for outdated tools.[333]

Like Eltis' notion suggests, the preservation of the doctrinal distinction in debates about technology may hamper in-depth analysis of its potential for both forms of dispute resolution and hide the converge points from sight.

Both courtroom technology and ODR face similar needs for new legal concepts and the need to understand technology, in order to provide for access to justice. However, courtroom technology is a concept associated with adjudication, trying to map out the field of technology issues in the courtroom, while online dispute resolution is seen as an extension of ADR. A point of interest in the American debate is that researchers of dispute resolution focus either on studying ODR or on virtual courtrooms but seldom concentrate on both although there are many common nominators between the two contexts. Typically, the grounds for choosing an exclusive research angle are seldom discussed, and the other form of technology-enhanced dispute resolution is usually left unmentioned.[334] Still, in reality these concepts seem to be overlapping.

Although the adoption of this separation to *dispute resolution and technology* would *prima facie* seem artificial, it results from the research tradition. In addition to doctrinal issues, it can be claimed that the distinction between technology-enhanced trial and ODR lies with the different mechanisms of change engaged by private and public dispute resolution. While technology reforms in adjudication have to undergo the lengthy process of legal policy

333. Karen Eltis, *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Irwin Law 2012) 1.

334. For example, Fredric I. Lederer, professor and director of experimental Courtroom 21 Project discussing implementation of technology in dispute resolution, concentrates on courtroom technology. At the same time, another East coast law professor Ethan Katsh examines exclusively ODR. Both of them have published several renowned articles and books on their chosen subjects and both are interested in connections between dispute resolution and modern technology. See Fredric I Lederer, 'Technology-Augmented Courtrooms -- Progress Amid a Few Complications, or the Problematic Interrelationship Between Court and Counsel' (2005) 60 NYU Annual Survey of American Law 675; Katsh and Rifkin (n 209).

making, ODR is not bound to such advance control. This lack of policymaking implicates that the pace of change in ODR is significantly faster than in litigation and innovations can be introduced to ODR procedures as soon as promising new technologies emerge, while public litigation has to wait for legislative acts enabling its implementation. However, this apparent freedom from advance control can in some cases be superficial as ODR is being institutionalised. The relative easiness of implementing new technology to ODR, in contrast with the lengthier processes of implementing courtroom technology, signifies that we can perceive ODR as a type of experimental laboratory for the new dispute resolution technologies. This, at least to some extent, explains why discussions on technology in dispute resolution have focused mainly on ODR procedures instead of adjudication procedures.[335]

The separate treatment of courtroom technology and ODR could be explained through differences in norm-creation. This difference, although significant in itself, has little bearing for the role of technology. One could even claim that the argument of norm-creation provides little support for maintaining the separation. In other words, reducing the difference between courtroom technology and ODR to differences in norm-creation does not provide convincing grounds for maintaining the separation in discussions on dispute resolution tehcnology. Another focal point for abandoning the separation of litigation and ADR is that both methods set equality, fairness, and justice as their objectives.[336] While both models fulfil similar societal functions, and accepting ADR as a parallel model calls for evaluating some sort of minimum level of due process, ADR and litigation are tied together conceptually through their normative element.

American law professor Richard Reuben argues for a unitary theory of dispute resolution by depicting how ADR schemes are often promoted by state action and thus some constitutional due process standards apply. Instead of focusing on ADR as privatisation of dispute resolution, Reuben promotes a conceptual expansion of public civil justice.[337]

In the ODR literature, some writers have adopted the distinction between private and public dispute resolution, while others advocate for a wider definition. Hörnle acknowledges the traditional dichotomy between public and

335. See Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 47; Lodder and Zeleznikow (n 264) 12.
336. For ADR, see Edwards (n 305).
337. Richard C Reuben, 'Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice' (2000) 47 UCLA Law Review 949.

private dispute resolution systems, which are conceptually separated from one another.[338] She suggests a proportionate model to overcome the divide between private and public dispute resolution, as all dispute resolution has a public function in the end. According to her view, due process standards should apply to all dispute resolution but the content of applicable standards differs depending on the dispute and the parties.[339] Lodder and Zeleznikow consider the adoption of a joint approach, including both courtroom technology and private ADR-based ODR, to be useful for future dispute resolution.[340] As argued by Nicolas Vermeys and Karim Benyekhlef in addition to Cortés, the next logical step in implementing technology is court-annexed ODR.[341]

Based on this examination, the use of ICT is gaining ground both in courtrooms and in private ADR. Because of the institutionalisation of ADR methods and the disruptive power of ICT, the doctrinal distinction between litigation and ADR is becoming more difficult to uphold and to defend. Hence, I suggest a unitary theory for the interface of dispute resolution and the use of ICT.

Dispute Resolution and the Use of ICT

Both courtroom technology and ODR share the common objective of providing conflict management to parties. These parties may be consumers and businesses, individuals, corporations, public agencies, citizens etc. Also, this objective can be understood to be normative as the 'legal' filter is applied to conflicts once a claim is filed. In this section I claim that these two interfaces share common ground to an extent where separating them based on source of funding (public or private) or limited scope (territorial jurisdiction or sector/ marketplace specific) is no longer sensible.

Traditionally, the relationship between public and private dispute resolution has been understood as cooperation, where the parties have the right to resolve their case however they prefer but state control is exercised if the

338. According to Hörnle, due process only obliges the public sphere related to the state, while the private individual sphere's operational environment is not limited by such preconditions. Hörnle sees that due process should apply to internet disputes as well and, therefore, such disputes should not be directed solely to the private sphere. See Hörnle (n 335) 215. It appears that Hörnle does not contest the dichotomy of public and private in relation to internet disputes *per se*; but instead, operates within the framework of distinction.

339. ibid 217.

340. Lodder and Zeleznikow (n 264) 170.

341. Karim Benyekhlef and Nicolas Vermeys, 'ODR and the Courts', *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012) 295; Cortés (n 241) 223.

result of such process has to be enforced through the state's enforcement mechanism. This means that, in the end, also ADR decisions are subjected to same demands of due process and access to justice as court judgements. However, the relationship between courtroom technology and ODR does not follow the same logic, as private enforcement mechanisms bypass the state control. Thus, it becomes necessary to ask to which extent access to justice should be applied to ODR procedures. Here, I suggest that similar possibilities to access to justice should be provided to disputants regardless of the form in which the dispute is settled. It follows from this claim that we should detach from separate examination of courtroom technology and ODR and focus on a common framework of *dispute resolution and technology*.

As stated before, there are publicly funded applications of ODR. As this is the case, why cannot we just use the term ODR to describe both public and private resolution of disputes through technology? As long as we employ the ADR-derivative concept of ODR, we will not be able to overcome the embedded doctrinal choices.

Given that ODR differs from ADR due to technology's decisive role in the resolution procedure, integrating technology in to official court procedures affects the functioning of litigation similarly. The common denominator of technology renders the distinction between litigation and ODR useless and, in order to stress the revolutionary impact of technology, we should instead adopt the terminology of *dispute resolution and technology*.[342] ODR as a term has a strong doctrinal history due to its roots and, therefore, adopting the new terminology of *dispute resolution and technology* for such a joint approach is dialectically a more sound solution.

It should be noted that by no means should we exaggerate the significance of technology to the point of fetishizing it. However, we should neither downplay its effects on dispute resolution. Technology is the common nominator between technology-enhanced trial and ODR. When these phenomena are discussed separately from each other, only in connection with their traditional equivalents of courtrooms and protective measures, the role of technology diminishes. I claim this causes a false perception that technology's impact on procedural law is minor at best. Placing focus on technology instead reveals a picture where questioning the old ideals of physical presence and assumptions on the reliability of sensory observation becomes possible.

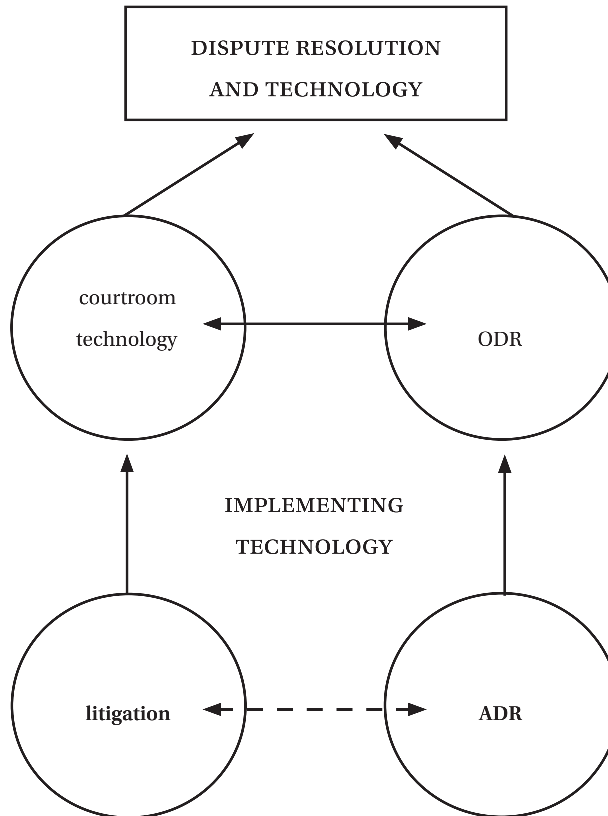
342. For more in-depth discussion see e.g., Koulu, 'Domstolsrättegångar Och Alternativ Tvistelösning – Innebär Användning Av Nutida Teknologi I Tvistelösning En Upplösning Av Separata Paradigm?' (n 305).

The delicate balance between reification of technology and taking technology seriously is hard to maintain. Also the danger of imposing universal invariables is looming, as immanent critique cannot detach from the practice it simultaneously observes and reinforces. However, there is a difference between claiming that implementing technology in dispute resolution always causes X to happen and claiming that technology might in some cases cause X to happen. In this study, I aim to understand the embedded social element of technology and its case-sensitivity by making exclusively the latter.

In this vein, I argue that it is necessary to understand the potential of technology if we are serious about taking technology seriously. For example, technology has the potential to provide low-cost dispute resolution methods in both litigation and in ODR regardless of funding. This means that the dichotomy between expensive litigation and cheap ADR is not necessarily accurate anymore. Thus, the litigation threshold caused by legal fees is lowered by the introduction of technology. Then again, accessing the necessary technology in ODR might prove out to be difficult for non-digital natives and thus be biased towards those who are adept in using technology. This might create a new threshold for both private and public ODR models, although ADR has usually been considered to be relatively free of threshold issues. The point is that public and private applications of dispute resolution technology share a close connection, a closer than has traditionally existed between ADR and litigation. In order to de-mystify technology, we need to scale down the role we grant to technology in dispute resolution. However, we should not belittle its significance either. Therefore, a conceptual change to common terminology of *dispute resolution and technology* is needed.

This claim can be illustrated through the following graph:

162 *Graph 1/ Impact of Technological Change to Dispute Resolution*



The research agenda for this joint approach of *dispute resolution and technology* is clear. First, the possibilities and challenges created by technology should be defined. Second, a comprehensive analysis is needed in order to evaluate how due process principles frame the implementation of technology and to which point these principles need to be re-evaluated to create room for technology. System design of legal technology should depart from this re-evaluation, taking into consideration the specific context to which the technology is applied.[343] Third, the social ramifications of technology should be continuously monitored and the chosen solutions remodelled based on this monitoring when necessary. The study of *dispute resolution and technology* has both a socio-legal and a technological dimension that interconnect, which is also the premise of the Cyberjustice Laboratory's projects.[344]

343. This follows Karen Eltis' mission statement regarding technology in the courts. See Eltis (n 333) 2.
344. See e.g., Benyekhlef, Amar and Callipel (n 240) 328.

4.2.4 PARADIGM SHIFT IN THE DOCTRINE?

The American philosopher of science Kuhn has pointed out in his controversial book *The Structure of Scientific Revolutions* that doctrinal change creates a divide between normal and revolutionary science where the doctrines are not necessarily able to understand each other. It should be asked whether this applies to paradigms of procedural law. First, does the litigation paradigm understand the possibilities offered by the ADR paradigm? As the two paradigms have co-existed for several decades, the revolutionary nature of ADR has been reconciled into normal science and different mechanisms have been developed for the interface between the systems, e.g. the ex post control of ADR decisions before granting access to enforcement.

It is evident that the two streams of dispute resolution differ significantly in what is considered a preferable resolution outcome and in their methods of obtaining such outcome. The paradigms could be seen as competing and at least partly incommensurable with their different perceptions of conflict reality.

Despite their differences, the paradigms are merging as ADR is more and more often included in public courts and as it becomes institutionalised within the private sphere. Also the language is changing. The terminology of 'alternative' is no longer decisive but instead we focus on the engaged method of conciliation, mediation, and facilitated negotiation. These methods are no longer the sole privilege of the private sphere but have also been adopted into public courts. This answers the first question but leads us to a second one. Does the division of labour between litigation and ADR adapt to the suggested model that we should discard the separation between these doctrines?

In my opinion, there are no doctrinal limitations to this. A discussion between the old doctrine and such new openings is possible, although the different positions do not necessarily understand each other completely. Also, no peremptory understanding should be a prerequisite for the discussion and reconciliation of different paradigms and similarly, objective scientific consensus is not the criteria for evaluating the necessity of a doctrinal shift. However, such a shift is not easy to accomplish. The research question defines whether it is possible in the first place to examine the public and private dispute resolution simultaneously. In this study, I have adopted a joint approach in order to address the issue of justification in the context of *dispute*

resolution and technology. The theoretical aspiration translates into an inclusive understanding of dispute resolution. Unlike legal dogmatic approach, such perspective can include internally disharmonious definition of dispute resolution, as the knowledge constructing interests lie on a higher level of abstraction. In other words, joint approach is portrayed as unproblematic as I focus on justification. However, more practically oriented research question would not necessarily be able to incorporate the joint approach without having to address the ontological differences.

Regrettably, the procedural law doctrine in Finland has neither discussed the theoretical implications of dispute resolution nor usually included the subject as belonging to its turf. This surprising *status quo* could be considered to be the result of the function of procedural law, which has traditionally been considered to share closer connections with the legal practice than many other legal disciplines. The knowledge constructing interests of procedural law research have long been to facilitate court practice, although this has been changing since the beginning of the 2000s. In Finland, the body of work on modern civil procedure can be divided roughly into two parts. Both traditions live on and coexist and they can be found in the current doctrine. Understandably, there are works that do not correlate with this division. However, making this distinction has been widely discussed and accepted in Finnish procedural jurisprudence – even to the extent where it could be claimed to be fundamental for the self-image of procedural law.

Firstly, procedural law research has engaged in legal dogmatics in order to produce functional recommendations and interpretations for the court practice. Especially after the reformation of the Code of Judicial Procedure in 1993, there has been a pronounced practical need for such research and practice has steered jurisprudence towards such knowledge-constructing interests.[345]

345. See for example the doctoral dissertations of Walamies on civil jurisdiction, Juhani Walamies, *Tuomioistuimen yleistoimivalta siviiliprosessissa: tutkimus tuomioistuimen kansainvälisestä toimivallasta prosessinedellytyksenä ja ulkomaisen tuomion tunnustamisen edellytyksenä* (Suomalainen lakimiesyhdistys 1982). Lappalainen on damages in criminal procedure, Juha Lappalainen, *Vahingonkorvausvaatimuksesta rikosjutussa: prosessioikeudellinen tutkimus* (Suomalainen lakimiesyhdistys 1986). Hormia on absence of a party in civil procedure, Lauri Hormia, *Asianosaisen poissaolosta siviiliprosessissa: tutkimus yksipuolisesta eli kontumasiaalimenettelystä erityisesti ns. dispositiivisia riita-asioita silmällä pitäen* (Suomalainen lakimiesyhdistys 1988). Jonkka on prosecution threshold, Jaakko Jonkka, *Syytekynnys: tutkimus syytteen nostamiseen vaadittavan näytön arvioinnista* (Suomalainen lakimiesyhdistys 1991). Laukkanen on the judge's role, Sakari Laukkanen, *Tuomarin rooli: prosessioikeudellinen tutkimus tuomarin roolista dispositiivisen riita-asian valmistelussa silmällä pitäen riidan kohteen selvittämistä* (Suomalainen lakimiesyhdistys 1995)., Leppänen on preliminary hearing, Tatu Leppänen, *Riita-asian valmistelu todistusaineiston osalta: prosessioikeudellinen tutkimus* (Suomalainen

As a result, the needs of the courts are underlined in this research tradition, and the perspective of the courts becomes dominant at the expense of the party perspective. Secondly, a transition to more interdisciplinary procedural law research began around 2004 when the court-based mediation was enabled by legislation and jurisprudence started to delve into ADR.[346] Instead of focusing on the needs of the court and judges, the new approach provided criticism in the tradition of ADR and brought the party perspective into the spotlight. The new tradition adopted influences outside the traditional point of reference in Scandinavia and opened also towards other disciplines.

As Ervasti observes, Finnish research on procedural law has been mostly practically oriented and researchers have chosen legal dogmatics as their methodological approach.[347] Then again, Risto Koulu criticises Ervasti's opinion by claiming that the change of procedural law doctrine has already taken place and that Ervasti's critique has outlived its usefulness in the current research context.[348] However, although the focus of Finnish procedural law has shifted to include ADR alongside litigation, these models are seldom examined in the same studies.

It can also be claimed that ADR has, through institutionalisation and co-operation with the adjudicative legal system, lost its revolutionary power and become, in fact, a part of a joint approach to dispute resolution. Judith

lakimiesyhdistys 1998). Pölönen (2003) on witnesses in criminal procedure, Pasi Pölönen, *Henkilötodistelu rikosprosessissa* (Suomalainen lakimiesyhdistys 2003). Huovila on principles to specify grounds for a decision, Mika Huovila, *Periaatteet ja perustelut: tutkimus käräjäoikeuden tuomion faktaperusteluista prosessuaalisten periaatteiden valossa arvioituna* (Suomalainen lakimiesyhdistys 2003). Vuorenpää on the prosecutor's responsibilities, Mikko Vuorenpää, *Syyttäjän tehtävät: erityisesti silmällä pitäen rikoslain yleisestävää vaikutusta* (Suomalainen lakimiesyhdistys 2007). Saranpää on evaluating evidence, Timo Saranpää, *Näyttöenemmyysperiaate riita-asiassa* (Suomalainen lakimiesyhdistys 2010). Vaitoja on the burden of claims and judge's questions in civil procedure, Jari Vaitoja, *Väittämistaakka, tuomarin kyselyvelvollisuus ja pakottavaan yksityisoikeudelliseen sääntelyyn perustuvien vaatimusten tutkiminen siviiliprosessissa* (Suomalainen lakimiesyhdistys 2014).

346. See e.g. Ervasti's doctoral dissertation of 2004 on mediation in the district courts, Ervasti, *Käräjäoikeuksien sovintomenettely: empiirinen tutkimus sovinnon edistämisestä riitaprosessissa* (n 307). Also, Risto Koulu's monograph on mediation in commercial disputes, Risto Koulu, *Kaupallisten riitojen sovittelu* (University of Helsinki Conflict Management Institute 2006). See also the doctoral dissertation of Ervo in 2005 on fair trial, where she applies a discursive methodology, Ervo (n 305). In 2005 The Conflict Management Institute of University of Helsinki was established, which focuses on alternative dispute resolution and conflict management in both public and private spheres.

347. Kaijus Ervasti, 'Tuomioistuimet ja oikeuslaitos tutkimuksen kohteena: lähestymistavan valinta' in Heidi Lindfors (ed), *Tuomioistuintutkimus muuttuvassa maailmassa* (University of Helsinki Conflict Management Institute 2007) 11–12.

348. Koulu, 'Eurooppalaistuuko Vai Kansainvälistyykö Prosessioikeuden Tutkimus?' (n 306) 489.

166 Resnik contemplates on this, using words such as 'blurring of forms', 'melding', 'collapse', ending up with a claim that a transformation of both dispute resolution forms has taken place.[349]

From the Nordic viewpoint, abandoning the separation paradigm might prove out to be effortless because of the close connection between litigation and ADR. In Nordic countries, many aspects typically connected with ADR in the Anglo-Saxon discussion are implemented directly to the litigation system. On the other hand, Ervasti states that many forms of ADR are in close connection with the official dispute resolution system also in the US.[350] Similarly, Susskind describes that ADR has become a mainstream tool in England already in the 1990s.[351] Implementation of ADR into the litigation takes often the form of voluntary or necessary pretrial mediation or the judge's obligation to advance a conciliatory solution between the parties. Still, in legal research the separation paradigm remains mainly unquestioned – although strong state initiative in implementing ADR to litigation would suggest joint approach as a natural starting point.

On this score, one can claim that the strict separation between litigation and ADR is, in the Finnish context unlike in the Anglo-American legal culture, more connected to the values of individual researchers and their chosen areas of interest, than to the reality of dispute resolution in a small legal culture. Although often emphasised in legal literature,[352] strict separation of litigation and ADR is not conceivable when examining the Finnish court-annexed mediation or conciliatory process management conducted by the judges. It is plain to see that Sternlight's and Douglas' conclusions that discourses employed in legal education shape and reconstruct lawyers' attitudes towards ADR, is relevant also outside the US context. This means that, due to the regenerating nature of research and legal education, it is most likely a question of time when the change to a joint approach is adopted for good.

349. Resnik (n 315) 214, 262–.

350. Ervasti, *Käräjäoikeuksien sovintomenettely: empiirinen tutkimus sovinnon edistämisestä riitaprosessissa* (n 307) 109.

351. Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press 2010) 186.

352. Erkki Havansi, 'Riidanratkaisun vaihtoehtoinen skaala "Pähkinänkuoressa"' in Heidi Lindfors (ed), *Vaihtoehtoista riidanratkaisua vai vaihtoehtoista konfliktinratkaisua?* (University of Helsinki Conflict Management Institute 2005).

4.2.5 ETERNAL QUESTIONS OF FUNCTIONS AND TRUTHS

Despite this doctrinal distinction, one might claim that procedural law research has rarely addressed theoretical questions on ontology or epistemology. Two main discussions in the tradition of legal dogmatics include the debate on the function of dispute resolution and the debate on how the objective of material (and/or procedural) truth can be reconciled with due process ideals.

I claim that the fixation on these two debates, which have been going on for several decades, has attributed to the self-understanding of ontology of procedural law. The doctrine has focused on the material truth as the endgame of procedure and has had to reconcile this objective with the limitations of subjectivity, i.e. it has been necessary to lower the standard to procedural truth as finding the objective material truth is an impossible task. In addition, the objective of material truth is mellowed down by setting it in juxtaposition with the principle of due process.[353]

The debate on functions of dispute resolution in Finnish jurisprudence has traditionally been of little impact,[354] due to the relative shallowness that is typical to the discussion. It should be noted that this discussion has mostly been conducted within the paradigm of litigation. This means that connecting the issue of objectives with the question of justification, and framing the examination to include all forms of dispute resolution, might result in more fruitful conclusions. However, the ontological premise of the functions debate should be acknowledged, as this is not necessarily compatible with the constructivist approach or with the systems theory.

The discussion on material truth and the function of dispute resolution places dispute resolution at the centre of social activity and adopts a scientific empiric criteria for evaluation. By adopting material or procedural truth as its objective, dispute resolution becomes a process for verify-

353. However, Huovila points out that both principles of due process and material truth are not necessarily contradictory but they might reveal different sides of the same objective instead. See Huovila (n 345) 168–169.

354. By ‘functions debate’ I refer to the debate undergone in Nordic procedural law for the most of 20th century, whether conflict management, behavioural modification, realisation of material truth, or administration of legal protection is, in fact, should be considered the ultimate objective of procedural system. For a summary of this debate see e.g., Koulu, *Videoneuvottelu rajat ylittävässä oikeudenkäynnissä: sähköisen oikeudenkäynnin nousu.* (n 46) 119–122. As Leppänen notes, the debate on functions of dispute resolution is inconvenienced by its unscientific character. See Leppänen (n 345) 39–40. Similar conclusions on multiple functions of dispute resolution systems have been made by Teubner. See Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ (n 277) 13.

ing objective reality, a task that cannot be achieved. This ideal is originally derived from Jeremy Bentham's law of evidence, which was later adopted in several procedural models following the Enlightenment.[355] Bentham's practically oriented theory on procedure was based on utilitarianism and includes traces of British empiricism. According to Bentham, the ideal procedure would be based on reason; as such procedure would be "natural" and organic. The evidence would be collected by the judge herself and the evaluation would be based on perception instead of internal conviction. The perception of a rational man as the defining concept in collecting evidence portrays the procedure as examination of facts that results in inductive reasoning.

However, such an all-encompassing belief in the scientific method as a means of accessing objective reality does not create a functional model for understanding dispute resolution, as is stated in the ADR doctrine. Dispute resolution is more diverse than the premise of fact-finding might lead us to believe. Instead of placing truth as the objective of dispute resolution, we should focus on the needs of the parties, how the conflict is resolved in a due process, which ensures that expectations of both parties are provided for. This stance distances us from the ever-lasting debate on objectives and functions.

A point of interest is that systems theory does not consider dispute resolution to be law's function like the Nordic procedural law does. Instead, dispute resolution is an example of law's performance. This results from the role of law's function of maintaining expectations also in the case of disappointment. Function, which alongside the application of the code upholds the system/environment difference.

As it is, dispute resolution is not a decisive element of legal operations, as there are all kinds of regulatory structures that guide human behaviour, starting from social expectations. For example, behaviour is instructed by the unspoken expectation that one lines up in a queue at a bus stop in Montréal but not necessarily in Helsinki or by different aisle designs of supermarkets. These cognitive expectations differ from the normative expectations that can be enforced through the performance of law, through dispute resolution.[356] However, there are other forms of conflict management and non-legal conflicts might

355. Jeremy Bentham, *A Treatise on Judicial Evidence* (Baldwin, Cradock and Joy 1825) 7, 18, 301; Kevät Nousiainen, *Prosessin herruus: länsimaisen oikeudenkäytön 'modernille' ominaisten piirteiden tarkastelua ja alueellista vertailua* (Suomalainen lakimiesyhdistys 1993) 235–240; Riikka Koulu, 'Virtuaaliläsnäoloa istuntosalissa - oikeudenkäynnin tulevaisuus vai teknologiauskoisten utopia?' [2011] Defensor Legis 73.

356. Luhmann, *Law as a Social System* (n 74) 16.

emerge if one skips the line in Montréal. The difference between such non-legal conflicts and legal dispute resolution lies in law's normativity. As stated earlier, law's function of managing expectations comes with the possibility of disappointment, the inherent uncertainty within the system. This uncertainty in the legal system is absorbed by stabilisation of expectations, not by regulation of behaviour.[357]

This leads to the following. I approach dispute resolution as a method for protecting normative expectations. This normativity is law's normativity, the application of the code legal/illegal. Dispute resolution is a legal operation, which upholds the code. Its objective is linked with the expectations of the parties instead of regulating future behaviour (which still might be a side-effect). The objective is not reached by considering dispute resolution as a fact-finding mission nor by emphasising it simply as a venue for concretising the fair trial principle.

It should be noted that the theory of *dispute resolution and technology* should be a normative theory, although it does not need to perceive material law as the objective of dispute resolution. The requirement of normativity derives from the function of law. While disputes could be solved using material standards other than law (contesting the "in the shadow of the law"), different dispute resolution methods still play normative roles regardless of content criteria and, as such, normativity cannot be discarded. In general, the non-legal nature of ADR is a fiction, at least from the perspective of the legal system.[358]

4.3 REACTING THROUGH JUSTIFICATION

Gélinas et al. discuss the role of judicial ritual and architecture in legitimising dispute resolution. Through historically oriented analysis they describe how the visible symbols of justice, i.e. the courthouses, have transformed

357. Luhmann, *Social Systems* (n 85) 110.
358. Traditionally, ADR has been seen as an alternative method for resolving conflicts, which has the potential of providing a genuine resolution between the parties since ADR methods do not focus on material rights and obligations, but, instead, place emphasis on communication and the parties' needs. Thus, ADR literature stresses these characteristics of "non-legal" dispute resolution in order to separate ADR from litigation. For example, Trakman fears that applying the justice system's narrow definitions of 'legal' "*circumscribe the social dimensions of family, business, and political conflict*". See Trakman (n 304) 919. However, ADR carries out similar functions to providing societal stability by resolving conflicts and, as such, belongs to the subsystem of law. Thus, it cannot resign the coding of the legal system.

 from early outdoor gatherings to secular cathedrals and symbols of power. The authority of justice is reflected through these outward symbols:

> Throughout time, societies have invented and reinvented social practices, including rituals based on the understanding that the power of rituals derives from the State, society, ancestors, God, or other external sources. For example, it is the authority of the State and the constitution that makes people rise as the judge enters the courtroom. People do so not because they feel like it or because they particularly respect one individual judge, but rather because they recognize the authority bestowed on the figure of the judge. Judicial rituals may thus be subject to change because their normative force is viewed as a function of external, cultural considerations, rather than based on factors internal to or inherent in the form a particular ritual itself.[359]

As the demand for efficiency of judicial proceedings gains ground, Gélinas et al. draw attention to the possible repercussions to legitimacy. They suggest that efficiency could diminish the role of judicial rituals and judicial architecture, which traditionally have contributed to public confidence in civil justice.[360] However, the foundation of legitimacy is not straightforward. In contrast to public dispute resolution, arbitration proceedings usually have less emphasis on ritual and focus more on active participation of the parties. Thus, the active participation, the feeling of being heard, which the seminal studies of Lind and Tyler have proven central to the perceived fairness of judicial redress,[361] compensates for the lack of ritual and thus restores legitimacy. Based on the example of arbitration, Gélinas et al. suggest that legitimacy of judicial institution could be found on partly contrasting grounds, the ritual and the participation of the parties.[362]

At this point, it is possible to sketch an outline of the justificatory crisis. The introduction of a new emergent social system of technology, which refers to the use of ICT as a communicative operation (instead of technology as combination of physical artefacts and social elements), constitutes a point of crisis. This new social system is located in the society, in the environment

359. Gélinas and others (n 268) 16.
360. ibid 34.
361. Allan E Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988) 215.
362. Gélinas and others (n 268) 34.

of other functionally differentiated, established social systems like the legal, political and economic systems. The social technological system has impact on these other subsystems. Programmes emerge from the new system and function as irritants in other systems. The political system talks about surveillance and technology in relation to power, like is apparent from the NSA discussions of 2015.[363] The economic system addresses the possibilities of monetising technological innovation.[364] Even the question of finding passion through online dating is an example of how an existing social system, in this case the love system, converses with irritants from the social system of theuse of ICT.[365]

The emergence of the social system of the use of technology has led to a rupture, which affects most if not all subsystems of society. Technological innovation causes reflections in society, the need to adapt.[366] If a social system is not able to react and immunise itself against the new irritant, it faces the danger of stagnant autopoiesis and losing the system/environment difference, which constitutes its existence. In other words, the social systems affected by the use of ICT need to adapt in order to defend their identity.

In order to overcome the challenge, the subsystems need to include themes, programmes, and operations, which deal with the irritation. However, adaptation takes time. Different systems have different ways of engaging their immune systems, which may result in differences in reaction times. The legal system, characterised by its slow pace of change in order to preserve its objective of safeguarding expectations, does not adapt quickly. The economic system, however, might be more prone to improve overall efficiency

363. E.g., Edward Snowden, 'NSA Surveillance Is about Power, Not "Safety" An Open Letter to the People of Brazil' (17 December 2013) <http://www.commondreams.org/views/2013/12/17/nsa-surveillance-about-power-not-safety/> accessed 16 June 2015.
364. E.g., Henry Chesbrough, Wim Vanhaverbeke and Joel West (eds), *Open Innovation: Researching a New Paradigm* (Oxford University Press 2006).
365. E.g., Aaron Ben-Ze'ev, *Love Online. Emotions on the Internet* (Cambridge University Press 2004).
366. Luhmann discusses the relationship between changes of public opinion and the legal system. For example, the influence of civil rights movement in the US or the development of consumer protection both refleft, how the legal system adapts to the overall society. This adaptation is further accelerated by the use of new mass media. "Under the current conditions of mass print media and TC such changes of orientation happen much faster than in a time when adjustment of law to the conditions of a capitalist economy was involved. Therefore the oscillations of legal change can be more erratic and more quickly prone to a review which, in turn, makes the causal relation between change of opinion and legal change appear more plausible. Without doubt this situation can be descrived as a causal relation." See Luhmann, *Law as a Social System* (n 74) 119.

by reacting promptly to new possibilities. Still, the affected systems aim to answer the societal rupture in their own way. If left to its own devices, the rupture caused by technology creates a significant risk to the overall coherence of the society, which then threatens the stability of the society. The affected systems do not have an option, but instead they need to defend themselves. In other words, they need to be immunised, changed and adapted in order to preserve their distinct identity, to uphold their system/environment difference.

Hence, also the legal system receives an aftershock and needs to respond to the irritants from the social system of the use of technology. As the operations of law, communication about the application of the code, has changed, this reflects also to the legal science. Legal science participates both in the legal system and the science system simultaneously but the changes in the object of its study, e.g. the communication about its code, translate into the demand of finding answers on the theory level. The irritants enter the legal system in different ways, but in procedural law this has lead to the emergence of ODR and private enforcement. In the research of procedural law, this technological rupture has led us to the issue of justifying dispute resolution.

Justification is a logical reaction to the new irritant. Law, as much as other social systems, has to tell itself a narrative of its existence in order to validate its operations, to find the roots of its rationality. In the legal system, this story connects with the question of justice, with law's transcendence, and the issue of legitimacy and justification. Justification is the form that the origin myth and the need for validation take on in the legal system. By longing for justification, the legal system reacts to the irritant and tries to accommodate the new influences within its own rationality. Needless to say, the legal system (like other systems) has to react to the crisis of technology in a way that is in accordance with its internal rationality. This is the connection point where justification emerges as the legal system's method of reacting to the change. This is the context, where law's quest for justification starts. This is the crisis and the challenge that the legal system needs to face and answer.

This chapter concludes the first part of this study. In this part I have tried to outline how we should understand technology, its implications and consequences to the legal system, and where we should try to find answers to the change brought on by implementing socially relevant technology law. In the second part of this study, I introduce three different justificatory structures

that have been established in both the operations of the legal system and in the legal science. I will start this quest for justification by first discussing justification in general and its function in the legal system in chapter 5. After establishing justification as a reciprocal link between the legal system and other systems, I will examine individual sources of justification, namely sovereignty, contract and access to justice, more closely in chapters 6-8. These latter chapters are structured in a similar way in order to make their comparison easier. First, I will discuss the philosophical background of each justificatory construction. Second, I will locate it to the context of dispute resolution and demonstrate how dispute resolution is understood in relation to the said source of justification. Third, I will interpret the constructions in relation to the technological rupture and enquire after their abilities to react to the crisis.

4.4 CONCLUSIONS

In this chapter I have described in further detail the emergence of a justificatory crisis that results from the new means of coercion enabled by technology. The chapter has two separate parts, which both address the ruptures caused by technology.

In the first part I described private regimes and the changes that are taking place in enforcement. This discussion sheds light on the overall theoretical discussion on privatisation of law and the possibilities of stateless justice. Following this debate, I portray private enforcement as a novel phenomenon that has been mostly overlooked in theoretical discussions but has legal relevance, especially in the context of dispute resolution. However, these earlier theorisations on globalisation and private regimes are useful, as they provide the context for analysing the changing justification of coercion. Private regimes and globalisation question the role of the state and privatisation of coercion is simply the newest, albeit a significant, chapter in this development. Private enforcement breaks into the core of the state's monopoly on violence and hence it cannot be set aside simply by categorising it as an issue of contractual terms.

Different means of forcing compliance have been developed in private e-commerce to overcome the lack of easy access to the state's enforcement mechanism that decisions of public courts have automatically. Reputation systems such as user reviews have developed alongside more intrusive

means of private enforcement, such as those of ICANN and direct enforcement of e-commerce market leaders. In addition to these, self-execution of blockchain-based smart contracts might provide a method of enforcement that does not require access to a payment mechanism as is the case with eBay's Money Back Guarantee. Still, it is uncertain whether smart contracts will actually generate democratisation of private coercion. In any case, these examples of private enforcement demonstrate that the traditional understanding of enforcement as a question of accessing the state's monopoly on violence is changing radically.

In the second part I evaluated the doctrinal distinction between alternative dispute resolution and public adjudication, and made the claim that technology makes this categorisation at least partly obsolete. As private enforcement intrudes on the state's monopoly on violence, the difference between private ordering and public adjudication can no longer be reduced to the enforceability of the decisions. Different models of ADR and litigation are already converging; ADR is becoming more institutionalised and rule-bound at the same time as public courts are increasingly adopting ADR methods into existing court procedures or as separate court-annexed procedures.

The introduction of technology on both sides of the table, so to speak, is further escalating this convergence. This convergence raises the question whether we should forgo the traditional doctrinal distinction, at least in relation to legal technology, and adopt the terminology of dispute resolution technology instead of renewing the distinction by using the terms ODR and courtroom technology. Adopting a joint approach to debates about technology in dispute resolution has the advantage of refocusing our attention on the ways of legitimising judicial rituals and providing procedural justice irrespective of the name of the dispute resolution model in question.

PART II: THREE QUESTS FOR JUSTIFICATION: SOVEREIGNTY, CONTRACT AND ACCESS TO JUSTICE

5 Heading towards Justification

In the previous chapters, I described how a crisis is resulting from the disruptive element of the use of ICT in dispute resolution and this, in turn, calls attention on justification.

In this chapter, I examine what role does justification play for the legal system. This discussion applies the theoretical framework developed in chapter 2 and, considering the disruptive power of the emerging system of use of ICT; I argue that a justificatory crisis is starting to appear. On a theoretical level, this rupture follows from the lack of sufficient de-paradoxification that would hide law's violence.

I advance this claim in two ways. First, I follow the discussion of the previous chapter on private enforcement. I depict how the current doctrine of procedural law understands the relationship between private and public dispute resolution, which I call the traditional ideal model. The division of labour between courts and private ADR providers presents itself in use forcing compliance, where the state controls the access to enforcement through its courts. After demonstrating the lack of state control on private enforcement, the examination moves to the abstract level of justifying use of coercion. Here, I consider three options of understanding the function of justification for the legal system: justification as law's programme of programmes, justification as law's autopoiesis, and justification as structural couplings.

I conclude by suggesting that justification is internal to the legal system but, in seeking justification for dispute resolution, law reaches outwards beyond its boundaries. Justificatory narratives are structures of the legal system formed by law's continuous operations that reflect the information acquired through structural couplings with other subsystems of society. By examining justification as structural couplings, we can understand why the use of ICT in dispute resolution has brought on a justificatory crisis.

5.1 THE BREAKING POINT OF CONSENSUS

5.1.1 TRADITIONAL IDEAL MODEL AND CROSS-BORDER DISPUTES

In the previous chapter, I described why enforcement becomes a decisive juncture for examining the use of ICT in dispute resolution. The principles for organising acceptable use of coercion bring the foundational paradox of law as violence closer to the surface. Hence, they provide a starting point for evaluating the justificatory crisis.

In this section, I discuss enforcement from the perspective of division of labour between public courts and private providers of dispute resolution services. Traditionally, the courts have constituted the only official access point to the state's monopoly on violence and going through the courts has been the primary method of accessing enforcement. Surprisingly, this state of affairs has not changed significantly after the introduction of ADR in the 1980's. Instead, ADR methods have been incorporated to the traditional model of understanding the state as the gatekeeper of enforcement, creating an intricate co-operation system between the private and the public dispute resolution mechanisms.

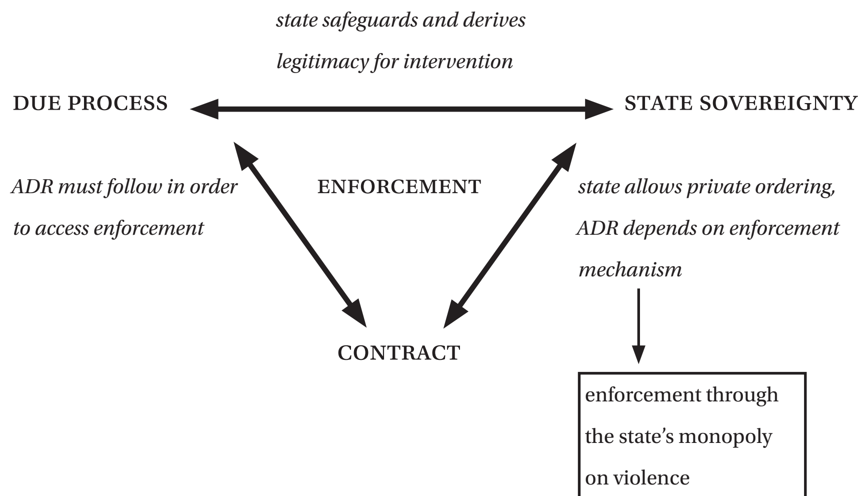
The emergence of the nation-state in the aftermath of the Thirty Years' War was also a milestone for dispute resolution in national courts. The peace of Westphalia in 1648 introduced the respect of national boundaries and the principle of non-interference in domestic affairs. However, from the perspective of dispute resolution, its most significant provision was that of territorial jurisdiction. Territorial jurisdiction formulates the basis of international procedural law even today and promotes the state agenda in dispute resolution. A monopoly on violence is the most visible signifier of the state's jurisdiction.

Later on, the 1980's brought in its wake the ADR movement and the justification of dispute resolution had to be revisited. Instead of territorial jurisdiction, ADR derived its foundation from the agreement of the parties, in other words from the principle of contractual freedom. The differences were reconciled by accepting the coexistence of both litigation and ADR. This reconciliation preserved the state's primary role, at least in theory. The coexistence meant that from the perspective of the state, ADR was tolerated as delegation of power, its role ancillary to help overcome the caseload of the public courts. However, the key element of the territorial jurisdiction still remained in the sole domain of the courts. The decisions of public courts have

direct access to enforcement but ADR decisions are not granted a similar easy access. Instead they are subordinated to an examination by the public courts before accessing enforcement. As no other mechanism of enforcement existed, ADR procedures still needed to resort to the state's enforcement mechanism, which subjugated it to *ex ante* state control before granting such access to its monopoly on violence.

The changes in the state's role after the reconciliation can be illustrated by the following graph:

Graph 2/ Traditional ideal model



The argumentative structure of this interplay is interesting. The sovereign state accepts contractual ADR by neutral thirds if and when the state control is enabled before such decisions utilise the state monopoly on violence. In order to enable enforcement at a later stage, ADR applications have to follow certain due process requirements. In addition to the political agenda of a nation-state to expand its power, the state control on due process is defended by references to the state's responsibility towards its citizens. By this manoeuvre, the modern nation-state has been able to avoid the potential crisis that the emergence of ADR movement could have signified. Through highlighting the relation between the nation-state and protection of individuals on the one hand and the possibility of coexistence between litigation and ADR on the other, a potential re-evaluation was averted. In other words, the emergence of

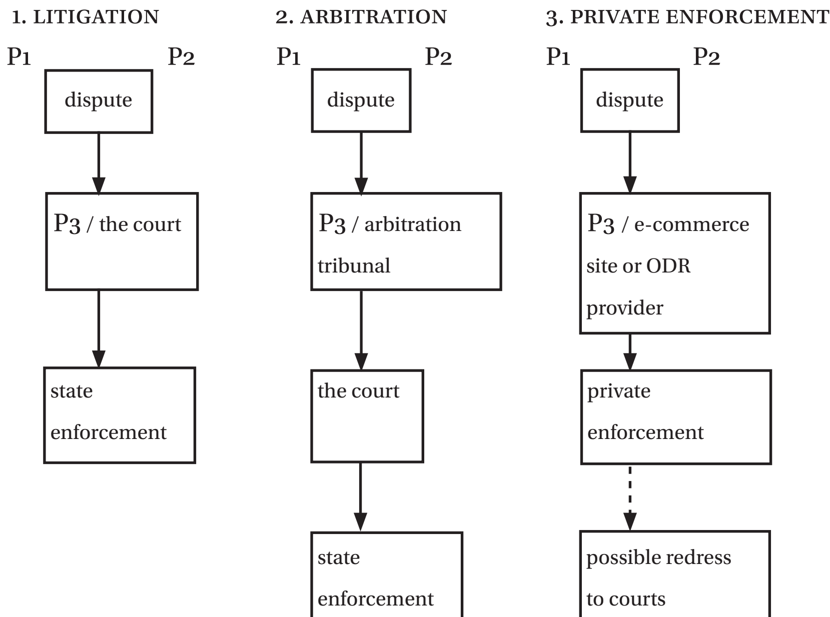
180 ADR in 1980's was an irritant to the legal system but law's operations immunised the system and incorporated the phenomenon to its communication.

Nonetheless, the traditional model depicts how justification may be theorised within the current doctrine of procedural law. The question is whether dispute resolution is able to apply similar justificatory argumentation to private enforcement or not. In private enforcement, the interplay between state sovereignty and private providers of dispute resolution services changes.

This change takes place in the state control to which ADR decisions are subjected before access to enforcement is granted. Private enforcement removes this phase of seeking recognition in the public courts. In a way, this means that the decision rendered in private dispute resolution procedure has a similar direct access to enforcement as decisions of public courts have to public enforcement.

This can be illustrated with the following graph, where the dispute between parties (P1 and P2) is resolved by a neutral third party (P3) and then enforced:

Graph 3/ Changes in enforcement



Of course, some disputes that undergo a private resolution process may be taken to the public courts later on. This option may be limited in some situations, for example when there is an arbitral clause. In any case, the actual possibilities of taking a dispute to public courts may be close to non-existent in many low intensity cases.

When decisions are put into action through private enforcement, there is no case-by-case state control of due process before enforcement. Such recognition procedures are needless when decisions can effectively be enforced without the state's enforcement mechanism. Instead, the ODR decision may be enforced without resorting to state's monopoly on violence if the ODR provider has its own integrated mechanism for forcing compliance. Simultaneously, the state's monopoly on coercion comes under threat as the question arises whether there still *is* a state monopoly on violence.

It should be noted that the shortcomings of the traditional ideal model present themselves primarily in the context of cross-border cases. This does not mean, however, that the traditional model is unproblematic on the national level as private enforcement bypasses state control on enforcement also in domestic cases.

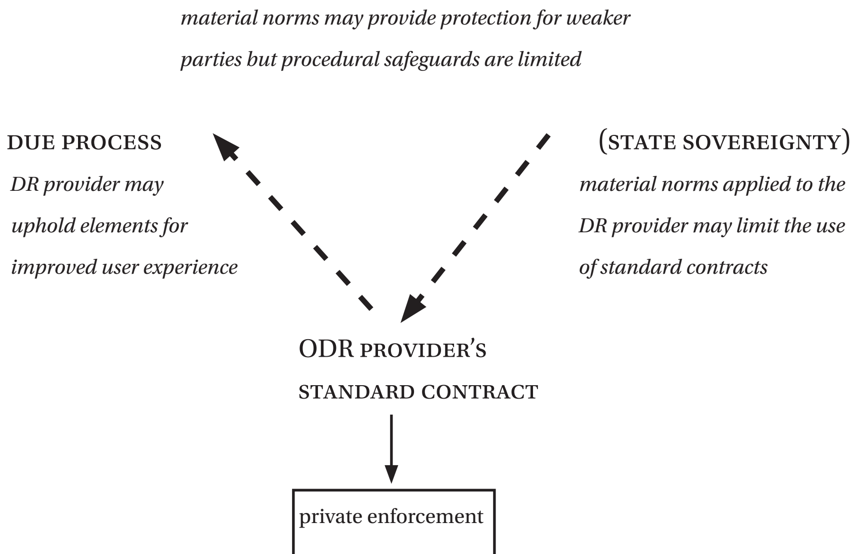
However, the picture is not so dark for the political agenda of the state as this would lead us to believe. At least at this point, most ODR providers that have the means to create a private enforcement mechanism are situated within the territorial jurisdiction of some state or another. That is to say, they are legal entities that have to follow the material norms of their place of domicile. However, the protection provided through material norms on a general level does not measure up with the *in casu* protection provided by state control. The state control is *ex post* in the meaning that it evaluates the quality of the procedure where the decision is rendered. In other words, the control is exerted after the dispute is resolved. Simultaneously, this state control is *ex ante* in the meaning that it precedes accessing the enforcement. As discussed in chapter 3, the argument for contractualisation of dispute resolution is not plausible.

In addition, the ODR provider does not need to follow the minimum due process standards simply for the purpose of accessing enforcement. This does not mean that there are no other motivations for making the ODR process fair. The use of a platform may depend on how well its resolution proce-

dure is organised. As there is competition on the market, a badly functioning redress mechanism might drive sellers and buyers to other platforms. This connects with independent reputational systems and soft law instruments for corporate responsibility. However, the state's role is different in private enforcement than in the traditional model regardless of these market-based reasons for introducing due process.

The change in the state's role may be demonstrated with the following graph:

Graph 4/ Cross-border private enforcement model



The graph depicts how the role of the state changes in relation to private enforcement. The nation-state loses the possibility to extend its influence to the coercion used to force compliance with private decisions. In short, the traditional model fails to apply to private enforcement. This means that the mechanisms used for reconciling the discrepancy between territorial jurisdiction and ADR movement cannot be employed for reconciling private enforcement with state control.

As the rationality behind private enforcement does not correspond to same logic as the traditional model, it is clear that law faces a new irritant. The method used to immunise the challenge of ADR, i.e. expanding the tra-

ditional model towards co-operation, cannot be employed to downplay the rupture brought on by private enforcement. However, immunisation is needed because without overcoming the challenge, law's paradox starts to unravel. In other words, private enforcement, especially when combined with the low entrance threshold typical of ODR, challenges the monopoly on violence of state courts. There is coercion that needs to be justified, and this needs to be solved through other means than the reinterpretation of the traditional ideal model. However, if the justificatory crisis is resolved satisfactorily, ODR could create a similar improvement in law's immune system as ADR did.

To phrase it differently: dispute resolution and use of ICT, especially when the implementation of ICT to dispute resolution gives rise to private enforcement, is a mutineer in the lines of law, whereas justification is the morale of the troops. If the morale cannot be kept up by immunisation, the disorder might spread and in the worst case scenario the unit would not function anymore. It is unlikely that law would cease to exist if the unclear justificatory status of private enforcement is not reconciled. Nonetheless, without immunisation the lack of justification might affect law's function and coherence of its operations. In short, law faces a discrepancy that has to be addressed.

One could contest the claim about emerging discrepancy by pointing out that ODR has been extensively supported by state agenda and by public policy setting. According to this the train of thought, the state support of ODR shows that the traditional ideal model still applies and how the supremacy of the state prevails. According to this position, the state exerts its own agenda over ODR and claims it for its own. Thus, ODR would be simply an extension of state power, a delegation of jurisdiction. This idea of delegation will be discussed in further detail in chapter 6. However, it is crucial to note here that private enforcement does not fit this view, as the preservation of the traditional ideal model would require the *in casu* control of procedural safeguards before accessing enforcement.

5.1.2 Multifaceted Implications of Privatisation

We have established that the traditional ideal model, which reflects the current doctrine of procedural law, is challenged by private enforcement. How-

ever, the implications of privatisation of justice cannot be reduced simply to private enforcement. Instead, private enforcement is only one, although perhaps the most pronounced, implication of the gradual decline of the traditional model.

Also other characteristics of privatisation contribute to the justificatory challenge: the lack of public precedents and the increase of cases that are left outside the public courts for various reasons. These phenomena are not new and they have been addressed already in the wake of ADR. In this section, I briefly discuss these issues in order to elaborate the complexity of the justificatory crisis and to demonstrate how private enforcement is just the newest chapter in the story of privatisation. In other words, implementation of ICT into dispute resolution also escalates other existing discrepancies. This multiformity of the justificatory crisis means that a simple revision of the traditional model is not in itself sufficient to overcome the justificatory crisis.

Firstly, the lack of precedents is relevant to the justification of dispute resolution. Private dispute resolution models produce decisions, which do not provide for judicial precedents in the same way as decisions of state courts. This is a question of law's continuous self-renewal as well as an issue of societal values. How do we provide for equal treatment before the law if procedures and their outcomes are not public and do not contribute to law's renewal? Is this lack of precedents a reason to restrict private resolution methods or is this deficiency remediable?

As private dispute resolution often takes place outside the courts, the highest national court instances are seldom able to guide these processes through precedents. However, precedents may be given when decisions reached in private dispute resolution enter the courts for accessing enforcement. Still, non-adjudicative processes such as mediation do not necessarily strive for enforceable decisions but focus on settling the disputes amicably.

However, several arguments contest the claim that private dispute resolution does not produce precedents.[367] In the arbitration community, the case law of arbitral tribunals has been considered to be its own field of procedural law and earlier decisions are referenced in future cases in the same way as if they were precedents.[368] The argument against private dispute resolution's

367. The lack of precedents has received much critical attention in the debate on privatisation of dispute resolution. For an early seminal article on this critique, see Owen Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 1073.For a recent re-evaluation of Fiss' argument, see Michael Moffit, 'Three Things to Be Against ("Settlement" Not Included)' (2009) 78 Fordham Law Review 1203.

368. Kaufmann-Kohler discusses the practice of referring to earlier cases in arbitration prac-

lack of precedents would be the claim that precedents do not need to exist within the court-based judicial system in order to be effective and to induce *autopoiesis*. This argument that precedents are not the only way to achieve autopoiesis is also present in the famous formulation of Mnookin and Kornhauser who recognised that private resolution takes place "in the shadow of the law", mimicking the legal decisions to the detail.[369] The structure of this second argument differs from the first one, as it claims that private dispute resolution is the shadow of the public system, its *alter* without its own content.

The example of growing institutionalisation of arbitration suggests that judicial precedents as such are not vital for law's continued *autopoiesis*, because continuous communication can also be achieved by other means. This means that the public precedents are not necessarily vital to law's existence if replacing techniques are available. However, the issue has other implications. For example, the discussion on transparency and other values of democratic society, law's function of upholding expectations and the efficiency of policy setting such as consumer protection are related to public precedents. The lack of public precedents has deconstructive relevance, as already the debate on vanishing trials depicts,[370] but this issue does not connect with law's existence or upholding the system/environment boundary. This explains why the emergence of ADR in 1980's did not create the need for complete re-evaluation but could be reconciled through the traditional ideal model.[371] This does not denote that values attributed to public precedents have an important role for law's function. Also, the question still remains,

tice, although no official doctrine of precedents exists. She considers the concept of "arbitral precedent" necessary for rule of law in the future. See Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture' (2007) 23 Arbitration International 357. Kurkela and Turunen examine the established due process standards in arbitration and suggest that this common core of arbitration could be called *lex proceduralia*. See Matti Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd edn, Oxford University Press 2010) 201–206.

369. Mnookin and Kornhauser (n 326).

370. On the debate on vanishing trials, see Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 Journal of Empirical Legal Studies 459; Marc Galanter, 'A World without Trials?' [2006] Journal of Dispute Resolution 7; Stephan Landsman, 'So What? Possible Implications of the Vanishing Trial Phenomenon' [2004] Journal of Empirical Legal Studies 973.

371. It could be claimed that the question of precedents is a question of law's self-renewal. According to Luhmann, structures provide constraint and internal guidance for the system's autopoiesis. See Luhmann, *Social Systems* (n 85) 282–283. When examining the relationship between court precedents and the traditional ideal model, we notice that the structures within the legal system have changed. However, the change in structures should not be understood as synonymous to lack of structures, which would lead to disruption of guidance for autopoiesis.

whether the increase of non-public ODR decisions poses the problem anew and requires further thought.

Secondly, technological change creates a mass of cases, which are an ill fit for the legal system that operates primarily with the concept of nation-state-based jurisdiction. For example, the low intensity cases that typically arise from e-commerce are often left outside the litigation threshold for several reasons. One such reason is the risk of legal expenses, as the legal expenses likely exceed the value of the dispute. When these disputes take place in the cross-border context, the complexity of litigation increases. Already deciding the court of jurisdiction becomes challenging and easily time-consuming and hence taking the disputes to public courts might not be a *de facto* option. We could even argue that this new category of disputes poses a challenge for the national legal systems.

However, Pollicino and Bassini have claimed that the issues of cross-border Internet cases are only a question of localization. Cross-border cases arising from Internet have been tried and decided in state courts up until now, although sometimes several courts have announced jurisdiction over the same matter, but the emergence of geo-localization tools enable deciphering territorial location of the dispute and thus remove the earlier challenges for territorial jurisdiction.[372] This argument has its merits, but tools for geo-localization are not sufficient to solve the challenge for territorial jurisdiction. Also Pollicino and Bassini contend to a case-by-case approach. Cross-border low intensity cases create discrepancies in the application of territorial jurisdiction, as multiple courts can claim jurisdiction simultaneously or individual cases may as well be left without a court of jurisdiction. The emergence of these case types may threaten the function of upholding expectations, as it is unclear, where the dispute should be resolved.

The challenges of privatisation through technology actualise in law's function of upholding expectations but in addition, they extend further to the structures of law, to the idea of state sovereignty as the source of dispute resolution. The traditional ideal model does not provide a solution for deciding the court of jurisdiction nor does it provide an access to court for low intensity cases arising from Internet. The traditional model only applies, when a decision is enforced through the state's monopoly. The difficulty here is that the content of due process depends on the decision on jurisdiction: two po-

372. Oreste Pollicino and Marco Bassini, 'The Law of the Internet between Globalisation and Localisation' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) 361.

sitions of the triangle, sovereignty (which state?) and due process (whose standards?) depend on which state claims the jurisdiction if any.

Thirdly, private enforcement mechanisms make enforcement of contractual decisions a matter of technological infrastructure and contractual relationship, bypassing the authoritative violence provided by the state. As stated, private enforcement contests the monopoly of violence granted to the nation-state.

The disruptive element of private enforcement can be downplayed by considering it as a contractual issue. Enforcement, regardless of its conductor, derives justification for the use of coercion from the decision itself. Private enforcement could be considered sanctioned by the existence of a decision, just by the mere form of the decision, the fact that there *is* a decision that will be enforcement, as opposed to mere use of violence without a form. However, this argument falls short, as it would mean describing private enforcement as a *sui generis* forum agreement. This interpretation, however, would lead to a plethora of follow-up problems.

Private enforcement has deconstructive meaning within the legal sphere. This significance cannot be downplayed by the traditional ideal model, as shown before. Also Pollicino and Bassini admit that enforcement is a problem for transnational law due to the structural limits.[373] Hence, private enforcement challenges the concept of state sovereignty in a similar way as disintegration of territorial jurisdiction, which is to be expected as the two phenomena are closely connected.

In the end, the issue behind all these new interpretative challenges of dispute resolution is that of regulation. Should we provide regulatory framework for ODR or for private enforcement or should we ban them? If we want to restrict their use or bring them back to the family fold of regulation, how would we institute such a regulatory regime?

This step takes us out of the frying pan into the fire. By asking about regulating private enforcement we are on dangerous ground, as the question of bringing due process to private dispute resolution suddenly becomes a question of legitimacy of any dispute resolution. We are no longer asking, what makes a good technology-enhanced dispute resolution procedure but instead, we end up seeking the source of due process, the foundation of dispute resolution. However, we cannot avoid this question, as the source and authority of due process needs to be established before asking what are the

373. ibid.

 criteria. Instead, we face the issue of what is justification and can these implications of privatisation be justified within the legal system or not.

5.2 WHAT IS JUSTIFICATION FOR THE LEGAL SYSTEM?

5.2.1 THREE OPTIONS OF INTERPRETATION

The challenges imposed by privatisation of justice in general and accelerated by the implementation of ICT do not comply with the doctrinal understanding of co-operation between the courts and providers of private dispute resolution services. It seems that the development of private enforcement has the potential to further escalate the existing tensions between private and public governance. In other words, private enforcement has meaning for justifying dispute resolution. What, then, is justification for the legal system?

I have discussed earlier that justification is produced by the operations of the legal system, which form long-lasting structures through continuous repetition and renewal. Hence, I consider justification as internal to the legal system.[374] Because justification is formed slowly in the course of time, we are looking at established networked operations.

This directs the focus of our examination towards different structures within the legal system. Should justification, the fundamental basis for coercion, be understood as law's programme, which guides the application of the code legal/illegal? As law's programme, justification would govern the allocation of the code by defining the grounds and bases for operations. For example, Luhmann describes legislation or the doctrine of precedents as programming. Without programming the application of the code could not be determined.[375] In other words, justification as a programme would demarcate the boundary between the legal system and its environment.

Another option similar to considering justification as law's programme would be to interpret it as law's autopoiesis. Is the rationality behind dispute resolution a question of self-production? This choice would mean considering justification as an internal continuous process of the legal system for its self-production. The self-production may include irritations from outside the

374. This follows Luhmann's understanding, who considers the issue on a higher level of abstraction. According to Luhmann, "Questions of final justification can only be answered within the self-referential theories of self-referential systems". See Luhmann, *Social Systems* (n 85) 485.
375. On programmes and programming, see Luhmann, *Law as a Social System* (n 74) 118.

legal system to its own operations. Nevertheless, openness through autopoiesis has connective value solely within the legal system; it fortifies the system/environment difference as the constitutional element of law. As autopoiesis, justification would, then, be left the role of internal reference. However, there would be no external effects of justification, which would reflect to other societal subsystems. Still, justification as autopoiesis could include external information to the legal system.

Both interpretations, justification as a programme and as autopoiesis, locate justification within the legal system. Other interpretative options, however, would emphasise law's interaction with its environment. If justification is produced by law's structural couplings with other systems, the operations that renew justification within the legal system have also meaning within the coupled systems.

There is a fourth possible interpretation of justification's role in the legal system. Justification might also be understood as the result of interpenetration, where two co-evolved systems are able to borrow one another's computing power. However, Luhmann exemplifies interpenetration with the connection between social systems of communication and the psychic system of consciousness, which are linked through the use of language.[376] Interpenetration is a special type of structural couplings but requires the dependent coexistence of the interpenetrating systems.[377] This means that the interpenetrating systems are formed by convergent evolution. However, this option of considering justification as interpenetration is not possible, as the legal system has not co-evolved with any other social subsystem after its functional differentiation. Therefore I discard this option of interpretation.

It is noteworthy that ultimately all of these different forms of interaction contribute to the autopoiesis of the legal system. These possible interpretations vary to some extent depending on the role they play for the legal system and to the overall society. Whereas justification as law's programme or as autopoiesis directs our gaze inwards to the legal system, justification as interpenetration or as structural couplings would emphasise the input to law's operations from outside the legal system. In short,

376. Baraldi et al. formulate this elegantly: "Ohne Teilnahme von Bewussstseinsystemen gibt es keine Kommunikation, und ohne Teilnahme an Kommunikation gibt es keine Entwicklung des Bewusstseins". Claudio Baraldi, Giancarlo Corsi and Elena Esposito, *Glossar Zu Niklas Luhmanns Theorie Sozialer Systeme* (Suhrkamp Verlag 1997) 86.
377. ibid 85–88.

190 there are only slight differences in emphasis depending on the chosen interpretation.

5.2.2 Justification as Law's Programme?

If justification were a question of law's programme, what would this mean? To understand the role of programmes, we have to return to the coding of the legal system. The legal system separates itself from its environment by the application of the coding legal/illegal, which produces its normativity and identity. In turn, law's internal programmes decide how legal operations deal with situations. In other words, the programme decides which side of the code is applied. For example, programming decides whether a situation falls within civil law or criminal law.[378] The code is harsh in its uncompromising absoluteness: the code does not allow the system to react to its environment. However, reaction is imperative for autopoiesis and thus, the code produces structures for deciding how the code is allocated rightly or wrongly. Programmes balance the harshness of the code.[379]

The legal system does not operate in a vacuum but instead is connected with the surrounding society. The code is specific for the legal system and cannot be applied by other systems. However, law needs to correspond with the society, it needs to be integrated. The code is insufficient for this task of integration. Instead, the level of programming balances the code and reconnects the legal system with the society. In this, the programming level adopts the role earlier attributed to natural law in pre-modern societies according to Luhmann. Before social contract theories and the Age of Enlightenment, references to nature were a way to bring external truisms into the legal system. For example, social stratification was included into the rules of positive law but grounded on the human nature and natural necessity.[380] Similarly, law's programmes convey elements into the legal system, creating an 'enacted' environment within, where the system may reconnect with society without losing its self-referential closure.[381]

Luhmann makes a distinction between purpose-specific and conditional programmes. Law's programmes are always conditional: they set out the

378. As Luhmann states, this example is a simplification. See Luhmann, *Law as a Social System* (n 74) 189.
379. ibid 190–193.
380. ibid 193.
381. Günther Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' (2009) 72 The Modern Law Review 1, 11.

conditions on which the allocation of legal or illegal depends on.[382] For example, the form of logical syllogism follows conditional programming. Legal decisions are formulated through the syllogism where the application of a general rule (such as "the plaintiff carries burden of proof and suffers the consequences of not fulfilling it") to singular past facts ("X did not met the burden of proof") provide the conclusion ("X should suffer the consequences, i.e. the case is not decided in her favour"). However, syllogistic argumentation often comes with fallacies, as setting the general and singular premises is complicated. However, the form of syllogism and the legal system's infatuation with it depict how conditional programmes operate. The conditional programme enables legal decisions to be dressed into the form of syllogism; the form, in turn, provides the appearance of legitimacy.[383]

It should be noted that conditional programmes look mainly at past events, facts that have actualised. This is connected with the legal system's objective of maintaining expectations, as the legal system aims at stabilising them. Resolution of conflicts comes down to making a decision on which side of the code is applied in a single case, where the expectations of parties derive from general premises and the application is directed at past events. Luhmann makes the point that sometimes judges adopt a different role. For example, the best interest of the child in custody cases does not simply look at past behaviour but also makes an assumption of future events. Also, a judge might adopt a therapeutic role in cases concerning juvenile delinquents or in debt restructuring cases or in situations of transformative justice. These situations go beyond past events and look at future facts instead. Strictly speaking, such purpose-specific programmes in law are no longer operations within the legal system but outside of it. As Luhmann states, "such programmes would run into the same problem that the future gives no satisfactory answers to the question whether something is legal or illegal right now".[384]

Here, Luhmann makes an interesting remark, which has meaning for doctrinal debate between litigation and ADR. ADR decisions often exceed the limits of traditional litigation, which measures compensation for damages in money and bypasses the potential importance of an apology as irrelevant. Mediation and conciliation instead focus on more multi-faceted and individually tailored solutions. If interpreted like Luhmann does, such resolutions would not necessarily be legal operations but would

382. Luhmann, *Law as a Social System* (n 74) 196–201.
383. ibid 195.
384. ibid 201.

belong outside the legal system as extra-legal. In this, Luhmann's position seems to be coherent. Such procedures have elements that point into the direction of the legal system and its code but also include elements from other systems.

Similarly, several systems meet in ODR, it is the connection point between law (resolution of legal dispute concerning the question on contractual obligations), economics (the context of market place and payment for goods), politics (power to enforce), and technology (automated dispute resolution platform and its operability). In this context, justification of dispute resolution no longer deals simply within the law but has implications outside of it as well.

It would seem that Luhmann supposes justification to be a question of law's programmes. Conditional programmes direct which side of the code is applied and provide a formal legitimacy for the choice.

This leads us to following. Within the legal system, justification may have implications that resemble the law's programmes but justification is not limited to this. The issue of justification of dispute resolution needs to be answered within the legal system, as dispute resolution is pronouncedly a legal operation. Still, the answer to the justificatory crisis within law also has implications for other social systems that come together when ICT is implemented to dispute resolution. Although justification is internal to the legal system, operations that provide justification internally must also be able to abide to these other rationalities. Simply put, justification as law's programme does not provide a sufficient explanation for the use of ICT in dispute resolution.

5.2.3 JUSTIFICATION AS AUTOPOIESIS?

We have discarded the possibility of considering justification as law's programme, as this would render justification of dispute resolution simply as an internal method of attributing the code to operations and this would provide an insufficient image for understanding dispute resolution and technology. Next, the logical step would be to ask, what is the significance of justification for the self-production of the legal system? Could justification be a question of autopoiesis?

Considering justification's role in the legal system as autopoiesis follows

closely the previous option of justification as law's programme. In fact, these two interpretative options both place justification within the legal system. In other words, interpretation of justification as programme means that justification is produced by the autopoiesis of the legal system. The difference between justification as law's programme and justification as autopoiesis is its exact location within the legal system. The option of justification as programme grants it the role of directing the application of the code, where as the interpretation of justification as autopoiesis would place it more generally within the legal system's operational closure. As autopoiesis, justification would be produced as a by-product of the code's application, through law's internal operations.

This being said, both interpretations provide a perspective into the implications that justification has *within* the legal system. These implications cannot be ignored; justifying use of coercion is without doubt an operation within the legal system. However, the question is, whether justification is limited to these internal implications or not.

Legal theorist Emilios Christodoulidis touches upon this interpretation of justification as autopoiesis in his article on sedition.[385] He examines the fundamentalist critique of the Red Brigade members during their trial in the 1970s, in which the revolutionaries contested the court's power to rule. Instead of pleading guilty or not guilty to the charges, the defendant contested the meaning of the words and use of official language, which in turn met with frustration and demands for a straight answer from the prosecutor and the judge. The activists referred to the court as a form of class justice, violence of the fascist state machine towards people. As Christodoulidis states, such a discursive act remained unintelligible for the legal system, as much as the language of the courtroom did not make sense to the discourse of revolutionary action.

Christodoulidis examines how the exclusion of sedition is justified within the legal system. He suggests that such silencing acts can only be justified through the inclusion of the silenced in the norm-creation through democratic process. Christodoulidis argues that sedition "marks the threshold beyond which law cannot accept speech as political". This means that after this point the legal system is no longer able to mark the speech act as political speech and it is excluded from the self-reference. According to Christo-

385. Emilios Christodoulidis, 'The Objection That Cannot Be Heard: Communication and Legitimacy in the Courtroom' in Antony Duff and others (eds), *The Trial on Trial Volume 1: Truth and Due Process* (Hart Publishing 2004).

doulidis, external sources of justification, such as authority, bring uncertainty in their wake.[386] Christodoulidis' argument maintains that justification is created internally through the legal system's self-production. What the legal system does not include in its autopoiesis, remains outside, like the objection that cannot be heard.[387]

Christodoulidis' examination of justifying silencing acts is convincing. However, the context in which he makes his claim differs significantly from the one at hand. Private enforcement, ODR, or implementation of ICT to dispute resolution do not stand for fundamental critique of the legal system as is the case with Christodoulidis' sedition. However, his argument about the uncertainty that the external references entail carries weight also in this context. Whether the argument holds true in this context, needs to be discussed further in connection with individual justificatory narratives. At this point it suffices to point out that also Christodoulidis' inclusion in the norm-creation could be understood through the legal system's connection with the political system in legislation.

As interpretations of justification as law's programme and as autopoiesis depict, justification is a question of the legal system. However, implementing the use of ICT to dispute resolution raises the question, whether justification of these new procedures are limited to the legal system.

Another option is to admit that the rationalities of other social subsystems come together in these new forms of dispute resolution. This would explain, how the discrepancies between public and private dispute resolution have not escalated into a conflict before the implementation of ICT. Private enforcement abides to the rationalities of several systems simultaneously and it cannot be reduced simply to its implications within the legal system. Law's rationality comes with constraints that do not explain the mandate of private enforcement, which separates itself from the state. Simply put, the legal system does understand the crisis yet needs to react to it. Alone, the legal system does not have sufficient data for this task.

386. "If the symmetry between addressor and addressee of norms is not assumed at some level, the imposition of a norm on a citizen who isn't its addressor needs to seek an external justification and this externality instantly imports a certain arbitrariness into the political context, a question-begging premise. This applies to most kinds of arguments that are called upon to provide such external justifications, whether natural law arguments, arguments from authority, or whatever. … I want simply to warn that 'external' reasons for silencing statements (rather than democratic/ consensual ones) are only binding to those who find them convincing and thus carry uncertain justificatory weight …" See ibid 188.
387. ibid 198.

Either law needs to reach beyond its own limits and include external references to its own operations (after coding them) to provide fuel for its self-production or it needs to answer the call for transcendence by engaging in amore long-lasting link with other systems. Autopoiesis and structural couplings are both operational couplings in a sense that they link operations to each other. Whereas autopoiesis links operations within the system, structural couplings link operations between different systems.

Dispute resolution and technology certainly link operations within the legal system, but this does not seem to explain why law cannot provide us a convincing understanding of private enforcement. There is something else in addition to law taking place in this equation. As the numerous examples of globalised world society and emergence of private regimes depict, the close connection between the legal system and the political system of the nation-state has proven to be problematic. ODR can be understood as a private sector-specific regime, but it is also a part of the legal system.

In order to explain the complicated relationship between law, the state and private regimes and to expand the demand for access to justice to this sphere, we need to go further than law's internal operations. Hence, considering justification simply as law's autopoiesis does not provide convincing arguments in the context of *dispute resolution and technology*.

5.2.4 JUSTIFICATION AS STRUCTURAL COUPLINGS?

In the previous sections I argued that justification is created through internal operations of the legal system but these operations also have implications outside the legal system. Considering justification as law's programme or as its autopoiesis we are unable to explain these external rationalities present in justificatory narratives.

We have also established that the implementation of ICT to dispute resolution has meaning within several different fields, which have their own distinct rationalities. We have identified these systems as those of law, politics, economics and use of ICT. This means that implementing the use of ICT to dispute resolution creates an operational environment (not in the Luhmannian meaning) to which several systems participate. For the legal system, private dispute resolution as it is enabled by the use of ICT is a method for resolving a conflict on contractual expectations, on legal rights based on

these obligations. For the economics, the code of payment/non-payment is allocated by the decision and following enforcement. For the political system, it is a question of power that culminates in using force, particularly in enforcement. In other words, the political system is interested in preserving its monopoly on violence. For the system of the use of ICT, private dispute resolution and enforcement is an issue of transmitting information. Simply put, dispute resolution and the use of ICT abides to the rationalities of several social systems simultaneously.

This plurality of systems reflects on justification. The challenge of private enforcement becomes particularly pronounced. The challenge it presents to the legal system reveals that the traditional model has been that of the nation-state. We notice that the language of law, without reference to the state, is not simply unable to address the challenge but unable to comprehend it as well.

Instead of asking how do we establish due process requirements for private dispute resolution, we come to ask, how do we bring due process to private ordering without reference to the state. This question may very well be a deadlock. As stated, ODR has never fulfilled its potential by turning into a mainstream solution to online disputes. The unpopularity of ODR has many reasons but lack of trust is one that has been acknowledged in the literature. To overcome this, state-issued trust marks are suggested.[388] Also, ODR applications are more and more often linked with the public court system, as completely private applications have mostly failed notwithstanding market place integrated models such as eBay. One reason for this failure and sudden turn back towards the public system might be the shortcomings of a legal order functioning without reference to the state. Because private enforcement shatters the link between law and politics, we are suddenly looking the structure of the legal system directly in the eye. Whether we will find a way forward is unclear. It is a question of understanding the source of justification within the legal system but at the same time being conscious of the connection to the state as a traditional foundation for it.

It follows from this that the justification of dispute resolution and technology becomes an entangled matter. It should be noted that justification and demand for due process are claims to the legal system. However, the legal system does not seem able to answer these questions without external ref-

388. On trustmarks see Cortés (n 241) 60–66.

erence. It is suggested here that law's quest for finding justification could be explained through structural couplings.

Law creates justification for dispute resolution by enabling its operations to link with operations of other systems. Through this reference the legal system is able to hold on to its identity created through distinction system/environment and at the same time borrow the rationality of the other system for producing its self-transcendence. In other words, the legal system goes beyond law and still remains within its boundaries concurrently.

This interpretation is not as far-fetched as one could assume. Structural couplings between systems are a specific type of operational couplings that also include the operational coupling known as autopoiesis. The difference between autopoiesis and structural coupling is in the effect that an operation has outside its primary system. If justification was primarily an internal operation of autopoiesis, then it could have an external reference, but its effects would be limited within the legal system. Justification as structural coupling would have effects in all systems that are linked to it, but these operations would be interpreted differently in all systems through the application of the system code. Thus, the effects would be different and incommensurable between the systems.

Justification is something that the legal system understands conceptually. The justification we talk about in relation to *dispute resolution and technology* is most definitely something specifically legal, although other systems might have their own concept functionally similar to justification. With private enforcement, the legal system faces an operation that belongs to it but contains also elements that it cannot understand. Justification remains within law but draws strength from other systems to comprehend dispute resolution and the use of ICT.

This means that justification is produced internally within the legal system by operations that also belong to other subsystems. Although the other side of the coupling partakes in the autopoiesis of these other systems, justification remains within the legal system. In other words, the structural couplings are reciprocal by definition. The concrete application of a structural coupling is that an operation can be interpreted simultaneously by two different social systems in accordance to each system's own unique code. All social systems need to themselves a narrative of their rationality, an origin myth or a reason for their existence, they need to set state and renew the

reason why the system/environment difference was established in the first place. These narratives are not the exclusive right of the legal system. In the legal system this narrative takes the form of justification. In other systems the narrative dresses up differently. However, the narrative must always abide to the rationality of the system itself.

From the perspective of the legal system, justification is a result of the operation of the structural coupling. For the other system at the other end of the coupling, the narrative does not necessarily result from the coupling itself. Still, the structural coupling is reciprocal. The operation through which the legal system uses structural couplings as sources of justification are interpreted by the referenced systems in accordance with their own code, as operations belonging inside them. The operation that produces a source of justification for the legal system is not necessarily the source of the narrative to the other. In any case the operation has effects on both systems and as a by-product the legal system creates justification at the same time. Law's justification is not left solely inside the legal system but is translated through the structural coupling to the language of the other system. The "receiving" system does not need to understand the shared operation as justification, or even as an origin narrative, but in order for there to be a coupling, it needs to understand the operation as relevant inside itself.

By describing justification as the result of structural couplings I expand the concept of structural couplings. As methods of creating justification within the legal system, operations shared through structural couplings serve a central role for the legal system. This conceptualization is more abstract than Luhmann's impression of structural couplings. Luhmann, in fact, describes structural couplings briefly and mostly in concrete terms and examples. Here, I am referring to a different level of structural couplings than a simple contract, which can be read by the legal and economic systems both. Here, the structural coupling is given more strength. I am referring to structural couplings in the sense of shared values and abstract conceptualizations. This can be exemplified by sovereignty and contract, which both I will discuss closer in the following chapters. Luhmann uses a constitution created in the democratic legislative process as an example of structural coupling between the political system and the legal system. When discussing sovereignty as a structural coupling between these same systems, I do not refer to the legislative act

or the document, but instead I speak about the concept of sovereignty, the value, the abstraction. Similarly, I speak of contract as a structural coupling but instead of the concrete simple legal/economic act of selling or buying, I am referring to the principle of private autonomy, the abstraction.

This said the reciprocity of the structural coupling takes place on this level of values, constitutive principles and fundamental conceptualizations. When the legal system seeks justification from the political system, the principle of sovereignty is understood by both systems, although through their own codes. The political system acknowledges the importance of the principle through its language of power and sovereignty becomes a question of maximizing political power, the state agenda. Similarly, the economic system understands the meaning of private autonomy, of contractuality and consent, as a question of establishing markets and maximizing resource-allocation efficiency. For the legal system, private autonomy and the importance of consent play different roles in different contexts, but it is also a source of justification in the context of dispute resolution. In other words, the principles form long-lasting connection points between the systems but their exact meaning depends on the perspective, the context, time and place. However, the most seminal element of reciprocity remains.

5.3 TESTING JUSTIFICATION

5.3.1 JUSTIFICATORY NARRATIVES

In the previous chapter, it was argued that a joint approach of both litigation and private dispute resolution is needed in order to examine how justification is created for dispute resolution and technology. Earlier in this chapter, we have established that justification should be understood as a structural coupling, which turns our attention to other systems that take part in dispute resolution and technology. In the following chapters, a reconstruction of three different justificatory couplings is undertaken.

It should be made clear that several subsystems collide in applications of dispute resolution and the use of ICT. This collision and its unique characteristics are the reason why the de-paradoxification fails and the paradox of law is revealed. It also explains why justification needs to be consid-

ered as operations of the legal system that are shared with other systems through structural couplings. In private enforcement, we face the question of upholding legal expectations, its connection to the legal system, and its identity as a legal operation. But also the economic system takes part in private enforcement, as the economic system is the sphere where the phenomenon first emerged and private enforcement connects with the coding of the economic system at the same time. This is even more pronounced when we look at the example of eBay and how easily the Resolution Center can be renamed as Money Back Guarantee without changing the specifics of the mechanism. From the economic system's perspective, private enforcement is a question of paying and allocating the payment. For the legal system, private enforcement is about deciding a position of a legal right and actualising the position through coercion. Technological infrastructure has a significant role in private enforcement and hence the latter connects with the system of use of ICT.

The justificatory structures include sovereignty, consent, and access to justice, and each of them has made numerous performances in the field of procedural law. As structures within the legal system, these narratives are formed through the course of time by the continuous self-production of law's operations. This means that justification is produced internally in the legal system. Still, the operations that form justificatory narratives are shared operations between several subsystems of society. This interpretation explains the complexity of justification, as the structures reflect the rationalities of interconnected systems.

Such justificatory structures are a freeze-frame that depicts the mechanism of justifying use of force within enforcement. In legal practice, they seldom make appearance in such pure form as in theoretical examination but instead are often entwined with each other or just presupposed. As often is the case with principles that are used for justification, they are rarely voiced. For the sake of argument, they are depicted here as distinct and separate categories.

It has already been hinted that the legal system has traditionally shared a close connection with the nation-state, particularly in relation to enforcement. Also, this relation has become increasingly difficult to maintain as private regimes are emerging as the result of globalisation accelerated by technology. However, this emergence of private regimes and sector-specific

tools for dealing within such frameworks do not excuse us from addressing the issue of justification. Justification is an issue for modern law. Nevertheless, the task of finding it is not a simple one. In similar vein, Luhmann points out that difficulties in finding justification result from excessive differentiations in situations where the need for interdependencies is not met.[389]

In the following, justification is referred to as justificatory structures, which emphasises both the historical sedimentation and the temporal stability of structural couplings as a source for justification. Historical sedimentation in this sense refers to the empirical and historical process where different foundations have become the foundational values and fundamental principles of law's structure. They tell us something axiomatic about modern law, and not simply about modern procedural law as similar structures can be found in other sub-disciplines of jurisprudence.

Temporal stability means that justification is renewed and reinterpreted time and time again through the structural couplings. Through time operations that belong to several systems have been repeated to the extent that they have created structures which have a more long-lasting nature than individual operations would. In order to provide a source of justification for the legal system, a single un-repeated event (operation that forms a non-recurring structural coupling between two systems) is not enough. Instead, repeated operations that have become stabilised as structures provide the necessary reflexivity and stability for the needs of the legal system.

Before embarking on a journey to understand these justificatory structures, certain disclaimers are needed. First, justification is seldom perceivable "in pure form". This means that different justificatory structures may be engaged simultaneously and in association to each other. For example, state litigation may be justified both by reference to state sovereignty and by agreement of the parties. Second, as the different applications of dispute resolution are converging, they start to adopt characteristics that have been considered to belong solely to other models earlier. For example, there are contractual elements in litigation, e.g. the judge's responsibility to strive for amicable solution or the possibility of court-annexed mediation. Also, in arbitration there may be a mandatory preliminary mediation before the full-scale arbitral proceedings. This is to say, several sources of justification may be used at the same time and also different models of dispute

389. According to Luhmann, another example of this is "the much-decried erosion of traditional societies' cultural heritage". See Luhmann, *Social Systems* (n 85) 92.

resolution are becoming more and more mixtures of both litigation and ADR elements.

For the sake of the argument and in order to hold on to the disruptive element *dispute resolution and technology* provide, this study examines justificatory structures from a theoretical perspective. Consequently, the study mostly bypasses the confusion and convergence of both sources of justification and distinct elements of different dispute resolution models, such as early neutral evaluation, mediation, arbitration, court-annexed mediation, litigation in family matters, mediation in criminal matters, and cross-border civil litigation.

This simplification of justification is similar to Luhmann's perception of observing communication. As communication is continuous, observation of an individual communicative element requires its simplification. This means that we can only perceive and conceptualise communication as asymmetrical (who communicates what to whom), if we freeze-frame them as actions. Such asymmetry is necessary for the system's self-description as only then it is possible to steer its self-production and connect the system's elements with consequences. Through this process of turning symmetry of communication into asymmetrical, an individual communication becomes simplified and more easily comprehensible. This freeze-frame of asymmetrical action is the final element of the system.[390]

This necessary simplification has implications on the research agenda of this study. Like all communication within the legal system, also establishing justification is a multifaceted continuous operation. In order to function as a source of justification, the legal system's operations need to reproduce justification continuously. As we cannot access the continuous flow of communication, we are limited to observation of actions. In other words, we may only observe justification through such an oversimplification.

5.3.2 THE QUEST FOR JUSTIFICATION

Before proceeding onwards, one question remains. How do we recognise the justificatory structures that are of interest to the task of finding justification for dispute resolution and technology? It would be feasible to turn towards the systems that come together in ODR, i.e. economics, politics, and technology. However, do these correspond with the sources of justification that

390. ibid 165.

have been employed in the discourse of procedural law?

The close association with the legal system and the system of politics of the nation-state provides us a self-evident starting point for the quest for justification. Binding the legal system to the state machine is the historical foundation of state litigation. It has formulated the basis of international, convention-oriented procedural law,[391] which has been unable to meet the needs of cross-border dispute resolution online. Sovereignty has resulted in the concept of territorial jurisdiction, which makes the issue of justification within a nation-state a simple one but causes difficulties in the cross-border context, where dispute resolution is no longer as easily located and founds other grounds for its jurisdiction.

Luhmann considers the constitution as a perfect example of the structural coupling between the systems of law and politics, where the political system recognizes the operation through its coding of power/opposition and the legal system through its own.[392] In dispute resolution the justificatory narrative corresponds with primacy of the state-governed litigation. However, sovereignty does not seems to be able to cater to a wider spectre of dispute resolution models, as its rationality is so much that of the political system. By using sovereignty as justification we cannot explain private enforcement, although ADR schemes have mostly found a way of peaceful coexistence with litigation. This structural coupling between law and politics has taken up forms also in other areas of law than dispute resolution. Here, I refer to this coupling as sovereignty.

The justificatory structure has formed between the system of politics and the legal system with the state-governed litigation as its flagship. However, sovereignty does not seems to be able to cater to a wider spectre of dispute resolution models, as its rationality is so much that of the political system. By using sovereignty as justification, we cannot explain private enforcement, although ADR schemes have mostly found a way of peaceful coexistence with litigation. This structural coupling between law and politics has taken up forms also in other areas of law than dispute resolution. Luhmann considers the constitution as a perfect example of the structural coupling between these two, a situation where the political system recognises the opera-

391. This truism is often so self-evident that it is not necessary to express it in words; however, it is still presumed template for formulating co-operation instruments. Such acknowledgement of territorial jurisdiction can be found, for example, in the preamble and general provisions of Brussels I Regulation (44/2001).
392. Luhmann, *Law as a Social System* (n 74) 389.

tion through its coding of power/opposition and the legal system through its own.[393] Here, I refer to this coupling as sovereignty.

The emergence of ADR in the 1980's has provided procedural law a new structure for finding justification in private autonomy. In ADR, the source of jurisdiction is the parties' contract, such as arbitral clause in their sale of goods contract. The meeting of the minds to agree upon something, the logic of agreement, of contract, puts emphasis on the consent of legally competent, rational individual who takes her best interests into calculation before entering into a contract. This rationality follows that of the commerce, the system of economics. Here, the systems of law and economics both understand the structural coupling between them, the contract, through their own codes.

Also, the discourse of human rights has begun to take more and more part in the doctrine of procedural law claiming that the fairness of the procedure justifies itself. This third justificatory structure seems to be of a newer origin and is not yet totally formed. It can be located starting around the 2000's, when the European renaissance of human rights took up the form of Charter of Fundamental Rights of the European Union and the fast increasing body of case law of the ECtHR. Human rights discourse seems to reflect another type of rationality than the constitutive structures of sovereignty and contract. This discourse is very much unlike the claim that dispute resolution is okay as long as it is backed up by the sovereign state or the claim that dispute resolution is okay as long as the parties have agreed on it. Instead of naming an authoritative source, this structure seems to calling for a more qualitative definition. Could a reference be made to the system of ethics? Or if not ethics, where, then?

These three sources of justification can be found in procedural law. In the following chapters, I discuss them in more detail and evaluate whether they could help in understanding private enforcement. Before this, one more observation is needed. It seems like the system of technology has misplaced itself in this discussion. Although it is one of the systems interacting in *dispute resolution and technology*, it cannot be seen among justificatory structures that have been employed in dispute resolution. What does this reveal to us? Should we forget the technological system at this point, as it does not seem to have a connection with the justification of dispute resolution? In the end, is justification left for these three sources of sovereignty, contract and human rights? Or could it be that technology is such a new player on the field that

393. ibid.

we have not even begun to ask what would its place be in law's justification? I will return to this later on.

5.4 CONCLUSIONS

In this chapter I have examined the role of justification within the legal system and how technology has given rise to new means of private enforcement that in turn give rise to a justificatory crisis. Since the prolific rise of ADR procedures, dispute resolution has been provided by both the private and the public sector, with the exception of accessing enforcement that has up until now remained synonymous with the state's enforcement mechanism. The traditional ideal model depicted in section 5.1 shows how this interplay has been organised (and justified): the state allows private ordering and grants access to its own enforcement monopoly to those private decisions that follow a certain due process criteria.

However, private enforcement bypasses this state control as it is not dependent on the state's enforcement mechanism and therefore there is no need to subject the decisions to recognition procedures, where this control would then be exercised. As recognition of arbitral awards in accordance with the NY Convention demonstrate, this state control on due process is not exhaustive but is often summary instead. However, without such last resort state control the private use of coercion is regulated only through material norms and not through procedural norms. This means that the traditional ideal model no longer provides an explanation for the co-operation between public and private dispute resolution and needs to be revised. In addition to the disintegration of the traditional ideal model, the lack of public precedents in private ordering and the increase of cases left outside the public justice system both contribute to the justificatory crisis.

The justificatory crisis created by escalating privatisation of coercion needs to be identified and examined in further detail. In order to accomplish this, the necessary first step is to understand how justification is created within the legal system. The theoretical framework of amended systems theory I described in chapter 2 provides three different options for the role of justification: justification could be one of law's internal programmes like legislation or the doctrine of precedents; a part of law's self-production; or it could adopt the form of structural couplings between the law and other

societal subsystems. However, justification as the law's programme would mean seeing justification as purely internal to the legal system and thus would oversimplify the meaning it has outside the legal system. Justification as autopoiesis would still locate justification simply as the application of the law's coding, but would enable the entry of external facts to the law's operation. Still, perceiving justification as structural couplings would mean that these operations of law are shared by other subsystems as well, although from the legal system's perspective they are still internal operations.

This interpretation explains why the justification of dispute resolution is often sought from the rationality of the political system and why some alternatives to enforcement, e.g. reputation systems and chargebacks, follow the rationality of the economic system. This means that several systems collide in dispute resolution and justification needs to be sought from the structural couplings formed between these systems: the justificatory narratives of sovereignty, consent and access to justice.

6 Sovereignty and State Agenda

In the preceding chapter I argued that justification is an internal operation of the legal system that is produced through structural couplings with other societal subsystems.

In this chapter, we examine how justification is created by a link between the systems of law and politics. First, it is discussed what sovereignty means for dispute resolution and what is its foundation. In dispute resolution, sovereignty translates into state monopoly, where the state has the exclusive right – and an obligation – to resolve private conflicts. This monopoly is a legal fiction that has been derived from the social contract theories of Hobbes and Locke and translated into a defining concept of procedural law. I claim that sovereignty as it is most commonly understood is unable to respond to the needs of justifying cross-border dispute resolution and technology. Second, I evaluate whether reinterpretation of sovereignty could provide an answer to the justificatory crisis brought on by dispute resolution and technology.[394] Finally, I ask what will be the role of sovereign States in dispute resolution and technology.

6.1 FINDING SOVEREIGNTY

6.1.1 WHOSE CONFLICTS ARE THEY ANYHOW?

Kahlil Gibran, the famous Lebanese-American poet, describes the strange relationship between parents and children in his collection of poetry essays The Prophet in 1923 as follows:

> Your children are not your children.
> They are the sons and daughters of Life's longing for itself.
> They come through you but not from you.
> And though they are with you yet they belong not to you.

394. This chapter is loosely based on a previously published article. See Riikka Koulu, 'Disintegration of the State Monopoly on Dispute Resolution: How Should We Perceive State Sovereignty in the ODR Era?' (2014) 1 International Journal of Online Dispute Resolution 125.

The poem reflects, how there is a divide between generations, how the parents cannot force their own ideas or thoughts on their children, as their children belong to the world of tomorrow, where parents cannot follow. The poem uses the vocabulary of belonging, of owning, and argues against this misconception of 'ownership', the idea that children belong to their parents. Children enter this world through their parents but instead of being a reproduction of their parents, they are something else. It seems like the relationship between parents and children is not reciprocal. Children affect the lives of their parents in a fundamental way but, in the end, the children disengage themselves from their parents and become incommensurable and even incomprehensible to their parents. Gibran's words about children and their parents describe a situation similar to that of the ownership of conflicts.

To whom do conflicts belong? They emergence between people, both natural and legal, grow into disputes and are then resolved either with the help of a judge or some other neutral third. It is evident that they do not belong to the disputing parties themselves, as vigilantism is often criminalized.[395] The parties have no other options to reach their legal rights than to agree between themselves or turn to a third party. By criminalizing vigilantism, the power over the conflict is transferred from the parties to the neutral third, which can be private or public provider of resolution services. Still, the conflict does not belong to the third party either, as her authority depends on the initiation of the procedure, which can be done solely by one or more of the parties. Legal decisions have effects on a wider level than just in the parties' lives, although theirs are often the prominent effects.[396] Decisions may form a body of case law or become binding precedents that provide further grounded legal expectations to others. Private disputes benefit the broader public. Does this mean that conflicts belong to us all? Or to the state as the representative of the public?

395. See e.g. The Finnish Criminal Code, chapter 17, section 9, which defines vigilantism as an offence against public order, which also include such crimes as participating in criminal organizations, rioting, illegal immigration and territorial violations. "A person who in order to protect or enforce his or her rights undertakes measures that are unlawful without resorting to the authorities shall be sentenced, unless a more severe penalty for the act is laid down elsewhere in the law, for unlawful self-help to a fine or to imprisonment for at most six months." [unofficial translation by the Ministry of Justice, available at: https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf/ accessed 23 April 2015]

396. As Gélinas et al. point out, "... civil procedure has developed in response to historical dependencies. For instance, the allocation of power between the court and parties to a suit appears to be grounded in tradition rather than in a logical principle of necessity or the pursuit of specific, well-defined goals." They accentuate that the lack of empirical data on these court practices poses issues for court reforms. See Gélinas and others (n 268) 40.

It becomes evident that there are several claims to the ownership of conflicts and, more importantly, conflicts and their resolution are important. However, like children in Gibran's poem, conflicts have a tendency to elude ownership. Several positions can be argued here. The parties involved care a great deal about the resolution of their conflict, but also the state, and even the markets want to have a say.

We can argue in favour of increasing party autonomy so that disputing parties have the sole right to decide how their conflicts are resolved, in private or publicly, according to the law or according to other criteria, with the use of force or with amicable solution. Still, such a solution has been seen to lead to vigilantism and blood revenges, which then threaten societal stability.

In order to preserve peace and order in social relations, we could make the claim that conflicts disengage themselves from the parties. They become something separate from their origin, they come about through the parties but not from the parties. Conflicts become a social practice. They are something that needs to be solved by an outsider so that we can separate power and law from each other. Conflicts would then become a public matter with a pronounced social relevance. They would carry a social function and belong to the society as a whole, which would highlight their importance in creating legal precedents and in providing continuity for future expectations and interaction. The state has a significant role in maintaining social order and stability, so we could claim that both the state and the entire society have a say in conflicts.

However, in lieu of social development and functional differentiation of the society, dispute resolution has also become a market. Dispute resolution services are more and more often provided by private entities, which adopt the role of the neutral third. As the freedom to engage in commercial activity is a fundamental right provided for in several human rights conventions,[397] the claim that conflicts belong simply to the state is difficult to maintain in an absolute manner. So, the addressees of conflicts include the parties, the neutral third, the operators of the economic markets, as well as the state and the wider public.

So, who has, or should have, a say in how conflicts are resolved? And most importantly, whose say is the one that carries the most weight? The answer to

397. For example, see the Finnish Constitution, section 18 on right to work and right to engage in commercial activity of his or for her choice. The right is guaranteed also by article 15 of The Charter of Fundamental Rights of the European Union and article 6 of The International Covenant on Economic, Social and Cultural Rights, among others.

the question of whose word we trust has implications to justification. Different perspectives correspond with different interests and values and choosing a perspective affects the role we grant to the parties and to the state to define what dispute resolution should be.

Depending on which direction we turn to, whether we accentuate the significance of the parties' perspective and their need to find a quick resolution or whether we give more weight to the interests of the public, affects the way we perceive justification. It is precisely this conception of the public function of disputes that is employed to promote state action in dispute resolution. *Vice versa*, we may contest the state's role by emphasizing the perspectives of markets (and the interests of private providers of resolution). Also, the party perspective would lead to a claim that the provider of dispute resolution does not matter as long as the parties are content with the solution.

These positions influence which source of justification we consider decisive. Still, the justificatory narratives often entwine and are present simultaneously. We would miss a point if we deny that all these interests of parties, markets, the state and the public are relevant to dispute resolution at the same and justification is born through all these. Still, we would make an oversimplification if we hold on to the idea that some group would have a *prima nocte* sort of principal right to the ownership of conflicts.

We can claim that all conflict management, through either private or public dispute resolution models, performs a public function by preventing conflicts from escalating and thus protecting peace and order in society.[398] As Hörnle states, even arbitration, which is often particularly identified as being confidential and private,[399] is not entirely private; in fact, it fulfils a public function similar to that of litigation. According to her well-argued position, it is because arbitration serves the public interest that its legal rules are binding and arbitral awards are given access to public enforcement.[400] The same statement on the interaction between private and public dispute resolution has been made even earlier. The claim that private and public dispute resolution models are distinct can be questioned by referring to Mnookin and Kornhauser's assertion that private dispute resolution is by no means

398. Discussion on the social functions of dispute resolution is a classic in Scandinavian procedural law, although it is sometimes criticized for its unscientific character. On functions of litigation in the Finnish context see Kaijus Ervasti, 'Lainkäytön funktiot' (2002) 100 Lakimies 47. On criticism see e.g., Leppänen (n 345) 37–40.

399. Then again, Kurkela and Turunen argue that arbitration is not entirely private, the same argument Hörnle later repeats. See Kurkela and Turunen (n 368) 201.

400. Hörnle (n 335) 70.

oblivious to litigation; instead, it can be seen as "bargaining in the shadow of the law", where the law also creates the context for out-of-court private settlements.[401] Then again, this view can be criticised by claiming that, in the end, such an influence from litigation on private dispute resolution is hard to measure and might, in fact, be non-existent.

To understand how justification is created through interaction between the law and the state, we need to bear in mind the social function of conflicts. Traditionally, we accentuate the significance of this social function.[402] In the doctrine of procedural law, this emphasis has meant linking dispute resolution with the nation-state. This is done by granting the state the sole right to regulate, how conflicts are resolved, in order to cater to this social function. To this end, the role of sovereign power is reworded as the state monopoly of dispute resolution.

6.1.2 THE CONCEPT OF SOVEREIGNTY

The concept of sovereignty is difficult to define, as the concept is loaded with history and philosophical debate.[403] As Mutanen points out, it is impossible to give a comprehensive study of the philosophical work on sovereignty or even a general overview, due to the vast attention it has received in literature.[404] According to the Encyclopaedia Britannica, sovereignty is "the ultimate overseer, or authority, in the decision-making process of the state and in the maintenance of order … [and] is closely related to the difficult concepts

401. The figure of speech is much used in ADR literature. Mnookin and Kornhauser (n 326). However, it is unclear to which extent the legal framework actually influence settlements. See Moffit (n 367) 1207. Moffit refers to empirical studies on how neighbourhood disputes between farmers and ranches and fraud cases are settled, i.e. in these cases there are seldom references to legal merits or legal entitlements. On shadow of the law in ODR e.g., Arno R. Lodder and J. Zeleznikow, 'Enhanced dispute resolution through the use of information technology' (Cambridge University Press cop. 2010), p. 11.

402. This social function portrays an image of a legal dispute as more multifaceted phenomenon than a simple prisoner's dilemma or a strife between neighbours. By emphasizing the public elements and the inherent complexity of ownership of disputes, we are able to avoid the oversimplification of regarding disputes as conflicts between two equal rational actors. Owen Fiss' critique of privatization of justice departs from similar viewpoint. See Fiss (n 367) 1076.

403. For the origins of the word and its relation to social change see Stéphane Beaulac, 'The Social Power of Bodin's "Sovereignty" and International Law' (2003) 4 Melbourne Journal of International Law 1, 2.

404. Anu Mutanen, *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain Other EU Member States* (Anu Mutanen & Hansaprint 2015) 7–8.

212 of state and government and of independence and democracy".[405] Since the 18th century constitutional theory has mostly considered sovereignty and state power to be entwined, as both of them boil down to the monopoly on violence.[406] In the context of this study it is not possible or even worthwhile to describe in detail the changes that have taken place in the concept of sovereignty or in the surrounding society, its subsystems of law, politics or economics, since the 18th century.

After the French and American revolutions in the 18th century, sovereignty has sometimes been considered to flow from the people in the tradition of popular sovereignty. Whereas this perception can nowadays be interpreted in accordance with the principle of democracy, back in the 18th century sovereignty was linked with absolutism. As is often the case with such idealized principles, sovereignty can be dressed up to serve multiple and even contrasting objectives.[407] This fluidity and ambiguity of the concept might very well be the reason why sovereignty and the nation-state have proven out to be such a long lasting fundamental concepts in constitutional and international law, as Mutanen suggests.[408]

The concept of sovereignty, as it is a link between the legal and the political, engages in the discourses of power and violence, the concept itself being the product of these discursive practices, like Foucault demonstrates.[409] Although a comprehensive study of sovereignty is beyond the scope of this study, a short description of the concept's philosophical roots is needed.

405. Encyclopaedia Britannica, 'Sovereignty' <http://www.britannica.com/EBchecked/topic/557065/sovereignty/> accessed 26 May 2015. The word is derived from vulgar Latin 'superanus' meaning 'above' through the French word 'souveraineté'.
406. Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002) 22.
407. "Sovereignty, it should be clear, sometimes subsumes – and conceals – important values. It is used to express the essential quality of a State, the basic entity, abstract but real, of the international political systems. It is used to describe the autonomy of States and the need for State consent to make law and build institutions. Sovereignty is used to justify and define 'privacy' of States, their political independence and territorial integrity' their right and the rights of their peoples to be let alone and to go their own way. However, sovereignty has also spun a mythology of State grandeur and aggrandizement that misconceives the concept and clouds what is authentic and worth in it – a mythology that is often empty and sometimes destructive of human values." See Louis Henkin, 'The Mythology of Sovereignty' in Ronald St John MacDonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff Publishers 1994) 351.
408. Mutanen (n 404) 387. Similarly, Castells makes observations of the persistence of nation-states in the globalised modern world. See Manuel Castells, *The Power of Identity. The Information Age: Economy, Society, and Culture Volume II* (2nd edn, Wiley-Blackwell 2010) xxx.
409. Michel Foucault, *The History of Sexuality Volume 1: An Introduction* (Robert Hurley tr, Pantheon Books 1978) 90–93.

6.1.3 DECONSTRUCTING THE ORIGINS OF STATE MONOPOLY

The concept of sovereignty was formally introduced by French political philosopher Jean Bodin in his *Les Six livres de la République* in 1576. To Bodin, sovereignty was "an absolute and perpetual power of the republic",[410] to include all legislative powers indivisibly. However, Bodin's sovereignty referred to the highest unified power, the top of the pyramid of authority, as has been pointed out by professor Stéphane Beaulac. The concept was originally meant for describing the necessity of the king's central authority, i.e. in internal matters within a nation. Later on, the perspective of externality was added to the concept, as Beaulac describes.[411] Concurrently with the addition of external effects the concept has expanded beyond the borders of sovereign states to a different context of law of the nations.

Bodin's sovereignty played a role in the power transfer from feudal lords to the king, to a more centralized system of governance that signified the transformation from feudalism to early nationalism.[412] After Bodin's preliminary theorisation, the principle of sovereignty became attached to the concept of the state in the aftermath of Westphalian Peace Treaty that ended the thirty years' war. The Westphalian concept of sovereignty was pronouncedly the origin of the territorial state, through which secular rulers reasserted dominion over their own territory. Hence, the birth of the territorial state took place in the shadow of the power struggle between secular and canonical leaders, the juxtaposition between the territorial rulers and the authority of the Pope.[413]

Most importantly, the concept created borders and alongside them territorial jurisdiction, which is still a focal concept of procedural law. The objective of the Westphalian model was to establish a system of international law for coordination of territorial solving conflicts between sovereign states. However, such system did not emerge afterwards, although the Westphalian model of sovereign territorial states still remained as the model of international cooperation for European states.[414]

410. "La souveraineté est la puissance absolue et perpetuelle d'une Republique." Jean Bodin, *Les Six Livres de La République* (Gérard Mairet ed, Librairie générale française 1993) 74.
411. Beaulac (n 403) 25–27.
412. Mutanen (n 404) 29.
413. Dietmar Willoweit, *Deutsche Verfassungsgeschichte. Vom Frankenreich Bis Zur Wiedervereinigung Deutschlands* (5th edn, Verlag C H Beck 2005) 177–193.
414. Douglas Howland and Luise White, 'Introduction: Sovereignty and the Study of States', *The State of Sovereignty. Territories, Laws, Populations* (Indiana University Press 2009) 3.

214 In the 17th century the concept of sovereignty was evaluated through social contract theories. In social contract theories, the sovereign authority of the state is created by the consent of individuals who, by surrendering their freedom such as it exists in the natural state, gain the protection of a sovereign. The concepts of the state of nature, which precedes the creation of the sovereign power, and of social contract, which is the instrument for the transfer of power, are essential to social contract theories. Two of the most influential works on formation of a sovereign state through a social contract are Thomas Hobbes' *Leviathan* (1651), which is often described advocating absolutism for the sovereign ruler, and John Locke's *Two Treatises of Government* (1689), which places limits to the sovereign's power.

The question that divides Hobbes' and Locke's theories is whether or not limitations apply to the sovereign's power. However, both Locke and Hobbes consider that penal authority and the monopoly on dispute resolution are surrendered to the Sovereign by the social contract.

Absolutist Sovereign of Hobbes

Hobbes's state of nature is defined as "war of all against all", where an individual has, in theory, unrestricted freedom. In practice this freedom is limited by the continuous threat of attack from other individuals. There are no misdemeanours or obligations, which would be penalized, as there is no penal authority in Hobbes' state of nature. He defines punishment only in relation to the Sovereign, following the social contract that establishes such authority:

> A Punishment, is an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience.[415]

415. Thomas Hobbes, *Leviathan. Or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill* (Ian Shapiro ed, Yale University Press 2010) 186-187 (ch. 28) Hobbes continues by investigating, case by case, situations that fall outside the definition of punishment, such as evil inflicted as revenge or by a judge who is lacking the sovereign's authority. Thus, Hobbes defines punishment as legal, in the sense that it presupposes authority and an established legal order. This legal definition of punishment is compatible with Nagel's reading of Hobbes, emphasizing that Hobbes's concept of individual's obligation was not moral but based on self-preservation. See Thomas Nagel. 'Hobbes's Concept of Obligation' (1959) 68(1) The Philosophical Review , 74, 82-83.

According to Kingsbury and Straumann, "there is nothing, no possible violation that could trigger a right to punish" in Hobbes' state of nature.[416] Hobbes considered the surrender of individual autonomy in exchange for peace as absolute; only the right to self-preservation is left within the individual's autonomy. After establishing sovereignty by acquisition or institution,[417] the Sovereign has the right of judicature in all legal and factual cases.[418]

According to Stanlick's reading of Hobbes, the Sovereign has a duty to maintain its sovereignty, and undermining that sovereignty by surrendering part of its power to another sovereign, i.e. by creating an international legal system between sovereign states with binding legal norms, would mean the Sovereign acting against its fundamental objectives and the principle of self-preservation.[419]

Tarlton goes even further, by claiming that the maintenance of the sovereign political order depends on the efficacy of the Sovereign's control mechanisms, i.e. how effectively the Sovereign can prevent individuals from attacking each other.[420] Furthermore, Kingsbury and Straumann describe the Sovereign's duty to protect its people as a dual function, operating both within the state and outside its territory in relation to other Sovereigns: on the one hand the Sovereign resolves internal conflicts and on the other hand guarantees protection against external attack.[421] Thus, interpretations of Hobbes

416. Benedict Kingsbury and Benjamin Straumann 'The State of Nature and Commercial Sociability in Early Modern International Legal Thought' (2010) 31 Grotiana , 33.

417. According to Tarlton's reading, what Hobbes meant by acquisition was the fear of the would-be sovereign, while institution refers to the fear of others. Tarlton criticizes later scholars for disregarding some central themes in Hobbes's theory, such as the creation and maintenance of a stable political system. According to Tarlton, For Hobbes it is essential to examine what constitutes a recognizable process for creating the Commonwealth in order to understand the legitimacy of that order. See: Charles D. Tarlton. 'The Creation and Maintenance of Government: a Neglected Dimension of Hobbe's Leviathan' (1978) 26(3) Political Studies pp. 307-327, p. 316-322, 308.

418. Thomas Hobbes, *Leviathan. Or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill* (Ian Shapiro ed, Yale University Press 2010) 109 (ch. 18)

419. Nancy A Stanlick, 'A Hobbesian View of International Sovereignty' (2006) 37 Journal of Social Philosophy 552, 558–561.

420. Tarlton, 'The Creation and Maintenance of Government: A Neglected Dimension of Hobbe's Leviathan' 307, 321, 417. Tarlton bases his reading on a quotation in Leviathan: "To resist the Sword of Common-wealth, in defence of another man, guilty, or innocent, no man hath Liberty; because such Liberty, takes away from the Sovereign, the means of Protecting us: and is therefore destructive of the very essence of Government". See Thomas Hobbes, *Leviathan. Or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill* (Ian Shapiro ed, Yale University Press 2010) 132 (ch. 21).

421. Benedict Kingsbury and Benjamin Straumann, 'The State of Nature and Commercial Sociability in Early Modern International Legal Thought' (2010) 31 Grotiana 22, 43.

suggest that providing efficient dispute resolution is a part of the sovereign's responsibility, transforming the question of sovereign's rights into an issue of duties.

The Lockean Safety Valve of 'Objective'

While Hobbes can be viewed as advocating an absolutist monarchy, Locke's social contract theory is commonly seen as promoting majority democracy.[422] In Locke's natural state, penal authority belongs to all individuals, who act as both judges and enforcers in offences against themselves; however, their obvious bias causes them to act on emotion and revenge instead of from fairness and objectivity.[423] For Locke, natural laws do exist in the state of nature; nevertheless, they are poorly enforced because all individuals possess the right of enforcement. Consequently, sovereign power is given to the communal majority by consent,[424] in order to preserve the individual's right to property and to act for the good of the society.[425]

In Locke's theory that power surrendered to the sovereign is absolute yet limited to the objective for which it was constituted, for the good of the public. Due to these restrictions on the scope of its prerogative, we may ask whether Locke conceptualizes the scope of sovereign power in a different way than Hobbes. Still, Hobbes and Locke both define sovereignty through the objectives of the social contract: the Sovereign's existence is based on its capability to protect and maintain peace.

Concerning the relations between states, Locke examines the possibility of global commonwealth that arises from the international state of nature. In this natural state, every country's freedom is limited by the freedom of others.

422. See e.g., Francis Edward Devine, 'Absolute Democracy or Indefeasible Right: Hobbes Versus Locke' (1975) 37 Journal of Politics 736, 740. Devine emphasizes, in the same manner as Leo Strauss in his Natural Right and History, that Locke's theory is in fact based on the concept of Hobbes with some alterations.
423. "*Secondly,* In the State of Nature there wants *a known and indifferent Judge,* with Authority to determine all differences according to the stablished Law. For every one in that state being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases, as well as negligence, and unconcernedness, to make them too remiss, in other Mens." See John Locke, *Two Treatises of Government* (Peter Laslett ed, student edition, Cambridge University Press 1988) 351.
424. ibid. Then again, Moots and Forster argue that Locke did not base the social contract on consent but on "deeper philosophical foundation". Glen Moots and Greg Forster, 'Salus Populi Suprema Lex: John Locke Versus Contemporary Democratic Theory' (2010) 39 Perspectives on Political Science 35, 40.
425. Locke (n 423) 357–361.

According to Cox, Locke's global state of nature "leaves little room for choice as to whether a government will or will not engage in the general competition for power and advantage".[426] In the state of nature a state's foreign policy aims at maximising military and economic power in relation to other states, resulting in a rat race for domination. This leads to the incentive for establishing a global commonwealth. Regardless of this incentive, creation of a global commonwealth might fail due to the lack of common cultural and national background. However, as Cox points out, Locke's political philosophy does not actually include a theory of international relations, although it is evident that he did not advocate a global world-state.[427]

Sovereignty and Globalisation

From the basis of work conducted by Locke and Rousseau, the absolutist perception of sovereignty subsequently translated into popular sovereignty in the 18th century. This idea of popular sovereignty saw the people as the source of sovereign power. This interpretation was later on incorporated into the revolutionary constitutions of America and France in the end of 18th century.[428]

Although social contract theories have developed under completely different social conditions, their remnants are present in our current understanding of the relationship between society, law, governance and the consent of the governed. These roots can be found, for example, in the focal role of the principle of democracy, which has its roots in popular sovereignty. This consent of the governed, which interestingly is also the basis of contractual relationships, is central to democratic justification of rule creation, to jurisdiction, where 'we' speak the law to us.[429]

Several scholars have discussed the future of sovereignty in a globalised world, where European integration and globalisation of markets and communication have created competing authorities alongside the traditional supremacy of the nation-state. Castells has analysed the changes of nation-states brought on by globalisation in general and the emergence of new technology in particular. As crime, financial markets and technology are increasingly detaching from the nation-state, sovereignty is increasingly shared by

426. Richard Howard Cox, *Locke on War and Peace* (Clarendon Press 1960) 178.
427. Cox (n 426).
428. Mutanen (n 404) 34.
429. One of the seminal formulations of the democratic justification is Habermas' theory on the Rechtsstaat. For a comprehensive analysis, see Tuori (n 406) 77–117.

218 multiple stakeholders in addition to the state. According to Castells, we are witnessing "the systemic erosion of their [nation-states'] power in exchange for their durability".[430] Instead of the demise of the nation-state, Castells suggest the emergence of a network state, where the states will become nodes in a network of power. Instead of upholding Bodin's absolutist concept of sovereignty, Castells claims that parts of sovereignty are escaping beyond the state and the states become more and more interdependent on each other and other players of the power network.[431]

Mutanen examines the role and interpretation of sovereignty in the context of European integration and the EU and asks what has changed regarding state sovereignty as the Member states have transferred some of their sovereign power to the EU. Her comparative analysis of how sovereignty is interpreted and perceived in different EU Member States depicts that the changes brought on by integration are acknowledged in national constitutional understandings. The paradoxical nature of combining the theory of sovereignty with current constitutional practice raises the question on the scope of the concept's flexibility. Mutanen considers that the concept of sovereignty is still relevant in constitutional law and by reinterpretation the theory can be accommodated to modern constitutional pluralism, which she advocates as the solution.[432]

As is evident, the concept of sovereignty has faced several societal changes and a lot of criticism. Nevertheless, both the nation-state and the theory of sovereignty have proven out to be persistent concepts. Despite fundamental and rigorous criticism, both concepts still act as a starting point for theorizations on power relations in the globalised world. Mutanen considers this endurance of the debate on sovereignty as a sign that the concept itself has not lost its significance. According to Mutanen, this persistence can at least partly be explained by the ambiguity and contextual nature of the concept itself, as interpretative flexibility enables its adaptability to changing societal environment.[433]

The question I am asking departs from here. Is the interpretative flexibility of sovereignty adaptable enough to fit the concept of sovereignty with the changed environment of dispute resolution? Is there an interpretation of sovereignty that would uphold its position as a source of justification for

430. Castells (n 408) 330–331.
431. ibid 357.
432. Mutanen (n 404) 389–390.
433. ibid 50,386.

dispute resolution? If we change the context from European integration to global dispute resolution and technology, what are the role of the state and the scope of its sovereign power?

6.2 SOVEREIGNTY IN DISPUTE RESOLUTION

6.2.1 SOVEREIGNTY AS STATE MONOPOLY OF DISPUTE RESOLUTION

We have achieved a point, where the question of ownership of conflicts collides with the question of justification, the latter of which is raised once again by the consequences of implementing technology to dispute resolution. The social element of conflicts has directed the doctrine towards state sovereignty as the constitutive principle, where justification is derived from. After this, I demonstrated, how the concept of sovereignty has emerged, been interpreted and changed interpretations during the centuries after the Westphalian Treaty. Next, the question of sovereignty needs to be reframed in the context of dispute resolution and technology and as a source of justification, before discussing whether the flexibility of the principle of sovereignty enables us to reinterpret it to accommodate the needs for justification in the era of dispute resolution and technology.

This leads us to question, what does state sovereignty mean in dispute resolution? As state politics rarely take a stance in individual resolution processes, the close link between law and the state is realized through legislation and state-governed court systems. Direct references to state sovereignty are rarely made but instead the principle is filtered through the doctrine as the state monopoly on dispute resolution. In order to examine state sovereignty as a source of justification, as a structural coupling between the legal system and the political system, we need to define this state monopoly, how it has reacted to the new irritant that challenges it, and where does it draw its power.

The changes in the position of the state are linked with the emergence of diverse phenomena such as globalisation, private enforcement, the introduction of technology and emergence of the Internet. Still, the objective of this study is not to adopt a stance for or against sovereignty as such, but to describe how sovereignty is employed as a source of justification. There is an extensive collection of studies devoted to the analysis of sovereignty in the

information era but the approach here is that of dispute resolution. Thus, the discussion is limited to serve this purpose, although several other theories would deserve a proper analysis based on their merits.

At this point it suffices to describe sovereignty as the supremacy of a single authority over a specific territorial area. This supremacy, however, is under constant attack as a result of the globalisation of markets, finance, politics, and technology. In the language of politics, sovereignty is a question of power and influence, the increasing interdependency between different states on a global playground.[434] In the legal system the principle of sovereignty is coded with the language of legal/illegal, with a transcendental drive for justifying the use of force. In sovereignty, the political and legal systems overlap. This means that the operation is shared by the coding of both systems. In the political system sovereignty follow the language of politics, i.e. the generalized medium of power that makes the distinction between power/opposition. Sovereignty is a structure formed by these shared operations and given the form of constitution. The structural coupling of constitution also explains why the legal system lumps together the concept of sovereignty, the importance of the nation-state and the mandate of the public courts in dispute resolution. Traditionally, these three phenomena have been closely connected, although this does not necessarily apply any longer from the perspective of the political system.

Luhmann identifies the structural coupling between the political system and the legal systems as the constitution of a state, which transforms to both languages of power and law.[435] The legal system inadvertently simplifies the language of power, because the nuances of the discourse of power are not relevant to the legal side of the structural coupling. The political power to legislate is read as a source of legislation by the legal system. Naturally, the power of legislation is not the only source for law but it still preserves a primary position from the system's perspective. It could be asked, whether the legal system is able to understand the language of (political) power only if it is combined with legislative power, as this provides fuel for the system's application of the code, for its autopoiesis.

The legal system is very closely connected with the territorial area of a nation-state. This also explains why legal systems have difficulties in adapting

434. Sovereignty as an issue of power and influence is a useful tool for assessing the impact of social changes to the construction of the nation-state, as Castells demonstrates. See Castells (n 408) 303.
435. Luhmann, *Law as a Social System* (n 74) 389.

to legal issues raised within the globalised sub-systems of economy, politics, technology or private regimes. The emergence of private regimes does not contest the connection between law and the nation-state but more precisely the regimes both reveal the existence of this connection and challenge its usefulness. The question remains whether it is possible for law to understand sovereign power without a connection to the state, or, to understand power in terms of interdependence. If yes, how is the language of power translated to the language of law? Through new structural couplings, through redefining sovereignty, or through casting it aside and finding something else? If no, is the legal system doomed to the same fate as the nation-state, to an existence under the growing restraints from globalised systems, which limit its scope of power? If the legal system cannot detach from its connection with the nation-state, how will it uphold expectations (regardless of disappointment) in a globalised society?

These are the fundamental questions related to sovereignty as the source of justification of dispute resolution. At the end of the chapter I will provide some preliminary answers to these. Before that, it is necessary to understand the concrete ways in which sovereignty affects the operations of the legal system and to find the fundamental function behind adopting this principle as a constitutive justificatory concept. These concrete examples of sovereignty in dispute resolution relate to territorial jurisdiction as the basis of international procedural law and to the state's monopoly on violence, from which the state's monopoly on dispute resolution is derived. Against these concrete courses of action the irritant nature of technology becomes apparent once again.

The concept of territorial jurisdiction, which is ultimately based on sovereignty, is a fundamental concept of procedural law. Based on this principle, the state has almost unlimited power on its own soil but the effects of a state's legal system are very limited on the soil of another state. Although this conceptualization preserves the interests of a sovereign state, it also creates obstacles for the functioning of law at times when two or more state legal systems are overlapping. In order to promote commerce and interaction, effective solutions for co-operation are necessary. However, it follows from sovereignty that a state can expand its effects outside its own territory only with the consent of the state in whose territory the effect takes place. By giving consent to procedural acts of foreign states, a state expands its own sov-

222 ereignty beyond its territory. This happens reciprocally. The trade-off insists on allowing similar acts of another state on the territory of the first state.[436]

International procedural law has followed this principle of sovereignty, as granting effect to foreign judgments is most often created by international multilateral conventions.[437] Such conventions have been drafted for all stages of litigation, from recognition of foreign documents and service of documents to taking of evidence, legal aid for aliens and civil procedure.[438]

This connects with Hobbesian state of nature and the question what is the state of nature between sovereign states. For Hobbes the state of nature between different sovereign states translates into a vacuum of coherent power, a normative no-mans-land, where the power of no single sovereign reaches in. The internal aspect of sovereignty, namely the responsibility to provide effective dispute resolution for its citizens, has been up until now sufficiently provided for by local territorial methods and by such relatively insignificant consent-based methods as *lex mercatoria* for cross-border situations.[439] However, in the ODR era individual citizens increasingly access this external normative space through e-commerce and by other cross-border communi-

436. On international legal co-operation and territorial jurisdiction, see e.g., Ulf Andreas Nissen, *Die Online-Videokonferenz Im Zivilprozess* (Peter Lang GmbH 2004) 124. In the Finnish context, Risto Koulu describes this combination of co-operation and territorial jurisdiction as the inherent double standard of international procedural law, which refers to a state's aspiration to expand its own jurisdiction as widely as possible while at the same time maintaining a mistrust of foreign process acts.See Risto Koulu, *Kansainvälinen prosessioikeus pääpiirteittäin* (WSOY 2003) 2. However, Koulu states that the development of both the ECHR and EU has brought about a change of attitudes in international procedural law and isolationism is no longer a possibility in international co-operation.

437. This principle is evident in the decision of the European Court of Justice on the interpretation of the Evidence Regulation (1206/2001). See *Lippens and others v Kortekaas and others* [2012] ECJ C-170/11 § 29. Issues arising from cross-border dispute resolution usually connect with the jurisdiction of the court, choice of law and enforcement. These three issues are of often depicted as private international law (or conflict of laws). On private international law in general and in relation to Internet issues in particular, see Svantesson (n 331) 5–10.

438. See e.g. the work of Hague conference on private international law, which includes the Apostille convention (1961) with 108 signatories, Service convention (1965) with 68 signatories, Access to Justice convention (1980) with 27 signatories, and Civil Procedure convention (1954) with 49 signatories. However, the conventinos on choice of court from 1958 and 1965 never entered into force and neither did ther 2005 convention on choice of court agreements. The Enforcement of Jugments convention (1971) is in force but has only 5 contracting states, which is to say it lacks wider applicability. See Hague Conference on Private International Law, 'Status Chart' <https://www.hcch.net/en/instruments/status-charts> accessed 28 June 2016.

439. However, the significance of lex mercatoria as a global regulatory regime has been questioned. On comparative studies between corporate social responsibility (CSR), ICANN's UDRP procedure and lex mercatoria, see Gralf-Peter Calliess and Moritz Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22 Ratio Juris 260, 260.

cation actions, which all of a sudden change the sovereign's responsibilities. In order to carry out its internal responsibility and to provide for upholding its internal sovereignty in relation to its citizens, the Sovereign should be able to extend its power to the external but this would infringe the sovereignty of other states. Without effective co-operation, the Sovereigns all fail in their internal duties as individuals' actions would not be tied with the nation-state, but dispute resolution for disputes arising from these actions is.

As is apparent, there are several links between the Hobbesian Sovereign and the way in which State sovereignty is interpreted in cross-border procedural law. Both perceive sovereignty as binary concept, including the external and the internal aspect. External sovereignty protects the sovereign from intervention of other sovereigns and simultaneously limits the sovereign's actions towards other sovereigns. In the external relation the state's scope of power is limited to inaction.

However, no such instruments of procedural law have been created to answer the new type of disputes arising online. Instead, ODR schemes are promoted by private operators and, increasingly, it is also receiving public support, e.g. from the EU and the UNCITRAL. Although there has been public and legislative support for ODR and the issue has existed for 20 years, the conventional (!) mechanism has not been applied to battle the difficulties of online disputes.[440]

Internet disputes are a particularly difficult type of dispute, as they are typically based on an online low-value transaction between geographically distant parties, who are previously unknown to each other. It could be claimed that ODR has the potential to replace state litigation as the mainstream. However, increasing state interest in regulating online disputes could very well lead to convergence of state litigation and ODR, which could be the solution for the justificatory crisis caused by private enforcement.

Before asking what the state's role in future dispute resolution and technology will be, we need to understand the connection between state-gov-

440. However, the traditional convention-oriented solution for regulating Internet disputes can be seen at some instances. For example, UNCITRAL's work, although unsuccessful, is a step to this direction, as is the EU's ODR regulation. Also, ICANN's function as Internet Assigned Numbers Authority could be construed to include elements of state-based jurisdiction, as its jurisdiction is based on agreements with US Department of Commerce and Internet Engineering Task Force. Still, ICANN's position as a private corporation responsible for public function can and has been criticized. See e.g., Rudolf W Rijgersberg, *The State of Interdependence: Globalization, Internet and Constitutional Governance* (TMC Asser Press 2010) 69–, 215.

erned litigation and justification. The legal system has historically derived justification for its functioning from the state machine, from the system of politics.

This justification has two forms in dispute resolution. First, the link between law and politics forms the basis of territorial jurisdiction. This is the foundation of internal co-operation that takes place in multilateral conventions. Second, the state agenda in the legal system is upheld by the concept of state monopoly on dispute resolution. This is the other side of territorial jurisdiction as well as an embodiment of the state's monopoly on violence. As territorial jurisdiction is directed externally against other states to avoid interventions from them, state monopoly on dispute resolution reflects on its own citizens. State monopoly means that the state governs access to enforcement and grants it solely to decisions validated by the state courts. In this, state monopoly on dispute resolution is simply another aspect of its monopoly on violence. In order to maintain its power basis of exclusionary right to violence,[441] the state provides and has to provide, in its turn, effective means of dispute resolution.

Both the external and internal aspects are connected to the state's responsibility to provide protection as its ultimate *raison d'être*. The external state monopoly protects citizens against the arbitrariness of foreign legislation and self-serving jurisdictions, while the internal monopoly prevents vigilantism. In order to maintain its monopoly on violence, the state must perform its task of providing legal protection effectively – namely, it must provide effective dispute resolution models for its citizens' disputes. A failure to provide such DR models could lead to a loss of stability and coherence in dispute resolution. This is because outlawing vigilantism would no longer be effective and it would become unclear which disputes would be granted access to dispute resolution and according to which standards they would be resolved.

It should be noted that the monopoly is not a historical event, nor does it reflect the reality of dispute resolution. Instead, the monopoly is a conceptual and doctrinal practice through which we preserve the connection between

441. According to Weber, "[a] compulsory political organization with continuous operations will be called a State insofar as its administrative staff successfully upholds the claims to the monopoly of the legitimate use of physical force in the enforcement of its orders…" See Max Weber, *Economy and Society: An Outline of Interpretive Sociology. Volume 2* (Guenther Roth and Claus Wittich eds, University of California Press 1978) 54. Rijgersberg uses Weber's definition of a modern state as a theoretical framework in his examination of the changing nature of constitutional governance in the era of globalisation. See Rijgersberg (n 440) 16–17.

law and politics. However, this relationship is experiencing some technical difficulties, so to say.

These two forms of sovereignty in dispute resolution have led to a point where the state is unable to resolve the issue of ODR efficiently. This follows from the reality of online activity, which is often small-scale sale of goods often across borders. The cross-border, high-volume and low-value elements of e-commerce have rendered the threshold of cross-border litigation too high to cross for most consumers. This is the result of territorial jurisdiction and the state monopoly, which still form the foundation of procedural law doctrine. The geographical pointers of national borders are difficult to draw online. Because Internet disputes cannot be localized to any state's territorial jurisdictions, no state monopoly may exist and if one state claims jurisdiction, it violates other's right of jurisdiction out of necessity.

So, if the state monopoly is a conceptual practice but does not correspond with historical conflict reality, why would it have stopped working at this point? Has there always been resolution of conflicts in the shadow of the state? And if yes, why would ODR make any difference? To answer these questions, state monopoly has to be understood as a given explanation of organizing dispute resolution through the state.

It should be emphasized that I do not claim private dispute resolution to be the deal-breaker of sovereignty. Historically, private ordering has existed all through the creation of the nation-state, despite the nation-state. Although the centralized modern state expanded its power through the introduction of a state monopoly on conflict resolution, examples of informal community-based methods of conflict management, settlement talks and mock courts functioning outside the public dispute resolution system with or without acknowledgement from the central power can be found in most modern states. Sometimes such informal conflict management models have also been encouraged by the Sovereign.[442]

Private dispute resolution is nothing new in itself, but two other developments have rendered the traditional state-based model of enforcement dysfunctional. First, the amount of cases left outside the sphere of litigation has increased significantly as a result of Internet activity. Second, the

442. For example, a legislative proposal for establishing informal settlement courts in Finland was drafted at the request of the Russian Tsar. Although no such courts were ultimately introduced, the operational principles behind the proposal greatly resembled the ideals of ADR. See Nousiainen (n 355) 438–439.

implementation of technology has changed the content of legal operations, as the *ex ante* state control before enforcement can be bypassed through private enforcement. As a result, it is not simply a change from offline to online worlds of dispute resolution, or the increase of caseload, or the failure of regulating ODR, or the implementation of technological innovation but the combination of several such factors that challenge the state monopoly as a doctrinal explanation of dispute reality.

6.2.2 WHERE CAN WE FIND SOVEREIGNTY IN DISPUTE RESOLUTION?

We have established that the principle of sovereignty (and its application, the state monopoly of dispute resolution) is a fundamental concept of international co-operation in procedural law. However, such principles can rarely be found in the case law of international conventions. This does not mean that their existence is under question, but instead by their nature as self-evident truths. Still, the traces of sovereignty can be found in preambles, convention articles on the scope and in reservations made to such conventions as well as in some forms of case law.

In this section I try to find these traces by using the Finnish national legislation as an example. National legislation is pronouncedly bound to the territorial borders of the state. It could be claimed that hence it is not a representative example for establishing the claim of sovereignty as a source of justification. This argument is not without merits, as the scope of this study is cross-border civil disputes and the claim I make is about private enforcement constituting a disintegration of sovereignty in justifying dispute resolution. However, these are precisely the reasons why an example of national legislation is needed.

Firstly, it depicts how the self-understanding of procedural doctrine still departs from the nation-state, both in concrete and abstract ways. Concretely, the national acts stipulate the conditions under which the national courts have jurisdiction, i.e. can exercise their power as a mandate of the state's monopoly on violence. Abstractly, this source of authorization also shapes the understanding of the relationship between the courts and the state. This understanding is not necessarily a conscious one; it may well be that it is an innate and unquestioned assumption that dis-

pute resolution should be organized by the state by the exact provisions of constitutional law.

Secondly, reference to national legislation still explains the framework in which the courts function. Similar frameworks exist in most jurisdictions, although they may have differences due to legislative tactic or legal culture. However, there are not a lot of possibilities for variation of the main theme, as national rules tend to accomplish the relatively simple task of granting the mandate to national courts. This is further illustrated by the simplicity of national rules. Although there are evident differences in both constitutional law and procedural codes between different states, an example of a national system speaks farther than the territorial borders that limit its application.

Thirdly, national legislation is more and more often complemented by multinational legal instruments. For example, when EU legislation is applicable, it takes precedence and national legislation is applied only secondarily. Similarly, the case law of the ECtHR is followed closely, and the member states of the Council of Europe mostly comply with the court's decisions. Hence, it is likely that the role of national legislation in procedural law is changing as a result of such co-operation and these instruments contribute to shared European conceptualizations of fair trial and efficient methods of cross-border dispute resolution. Still, it should be noted that procedural law is not a forerunner in the Europeanization or internationalization of law. The principle of lex fori, which means that regardless of the applicable material law a court always applies its own procedural rules, is widely recognized and applied. Also, the EU instruments of procedural law have a limited scope and do not extend to all sectors and cases. Hence, the search for sovereignty in dispute resolution would be defective, if national instruments would be ignored.

After this, I will raise two examples of UNCITRAL's work. The first is the 1958 convention negotiated through UNCITRAL, which has 155 parties to it, established case law, and is widely recognized and respected.[443] The second example tells a different story. Since 2010, UNCITRAL's Working Group III has focused on drafting uniform procedural rules for ODR, with very little progress.

443. UNCITRAL, 'Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 28 June 2016.

National Legislation

In Finland, the separation of powers between the legislative body and judiciary is provided for in the Constitution of Finland (731/1999). The section is located just after the section on democracy and rule of law, which accentuates that the powers of the State are vested in the people represented by the parliament, and establishes that the exercise of public powers must be based on law. The section is followed by a section on the territory of Finland. According to section 3:

> (1) The legislative powers are exercised by the Parliament, which shall also decide on State finances. (2) The governmental powers are exercised by the President of the Republic and the Government, the members of which shall have the confidence of the Parliament. (3) The judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances.[444]

The section 3 of the Constitution of Finland is the highest order provision in the national legislation regarding the delegation of power between different branches of government. In addition to this provision on principles of organization, the basic right to a fair trial is provided for in section 21, titled "Protection under the law":

> (1) Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice. (2) Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.

This division between the organization of the judiciary and the right to a fair trial is not out of the ordinary. Neither one of the quoted provisions is surprising, nor do they reveal some hidden meanings on a closer inspection. What makes their examination worthwhile is in plain sight: judicial powers

444. unofficial translation of Ministry of Justice, available at: <https://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf/> accessed 26 June 2015.

are a part of the function of government. Section 3 gives the mandate to judicial powers to courts that are established by law. In addition, the highest instances are named, one for the general courts and one for the administrative courts. The power to resolve conflicts is granted to the judiciary by the power of the constitution. The constitution itself derives legitimacy from the democratic legislative order, which has enacted its reform based on the mandate given by the previous constitutional instrument.[445] Hence, it is the democratic legislative procedure that grants the jurisdiction to the courts and creates the instance order between lower and higher courts. The function of the judiciary, the power to resolve disputes, is derived from the link between the legal system and the political system, from the constitution that can be understood by the languages of both systems.

In addition to the mandate of section 3, the constitution guarantees a certain quality of dispute resolution. According to section 21, everyone has the right to access to court. This access can be provided by some "other authority" than the courts, and a review can be conducted by an "independent organ for administration of justice". The right to appeal is a part of a fair trial. The dispute should be resolved "appropriately and without undue delay". Other aspects of access to justice, such as the publicity of proceedings, the right to be heard, the right to appeal, and the principles of fair trial are further elaborated elsewhere in legislation. In Finland, these detailed provisions are incorporated to the code of civil procedure.

Read together, these two sections of the constitution give a clear image what dispute resolution should be on the territory of Finland. It is a societal function, part of the government alongside executive and legislative branches. It is administered by courts of law that are established by national law and follow national law while they execute their duties. Such duties can be delegated to other authorities but the constitutional basic rights still apply. Similar structure can be found for administrative matters. Private entities of dispute resolution do exist, but they often derive their mandate from sector-specific legislation, as is the case with The Consumer Disputes Board.[446] No dispute resolution market as such exists in Finland at the time of writing, and ADR

445. This idea of deriving legitimacy from the process of legislation is the same advocated by the famous Austrian legal positivist Hans Kelsen. Kelsen's positivist theory of law leads to the problem of Grundnorm, the fictional basic norm that predates all other constitutions, a problem that is in juxtaposition with the positivist approach. On Kelsen's opinion on sovereignty, see Mutanen (n 404) 45; Tuori (n 406) 18–21.

446. On Consumer Disputes Board, see Klaus Viitanen, *Lautakuntamenettely kuluttajariitojen ratkaisukeinona.* (Suomalainen lakimiesyhdistys 2003) 185–.

has been established and advocated by different projects of public actors.[447] This partly explains why the image of dispute resolution is focused on courts and the public mandate given by the constitution.

The New York Convention

The Convention on the Recognition and Enforcement of Foreign Awards, best known as the New York Convention, was concluded on June 10 1958. With 155 signatories, the Convention is a well functioning and often applied multilateral instrument for facilitating the movement of arbitral awards across borders. Its significance is widely acknowledged and taken into consideration when creating other cross-border instruments.[448] The Convention forms its own global framework for arbitration, but its application is closely entwined with national courts. This connection between the cross-border instrument and its application through state courts is interesting, as it depicts an example of regulating private dispute resolution by entwining it with the State's monopoly on violence.

For example, article 1 of The New York Convention on enforcement of arbitral awards states that:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

As article 1 demonstrates, the convention instrument makes a distinction between domestic and foreign arbitral awards. Domestic awards are enforced in accordance with the national legislation but enforcement of foreign awards requires the multilateral instrument between the State where the award is given and the State where it will be enforced. A point of interest is that the reference to nation-states is already incorporated to the definitions of 'domestic' and 'foreign'. Accordingly, states are the actors behind the creation

447. For example, mediation of child cases has been introduced and advocated by the courts in Finland. See Sanna Koulu, *Lapsen huolto- ja tapaamissopimukset: oikeuden rakenteet ja sopivat perheet* (Lakimiesliiton kustannus 2014) 171–.
448. See e.g., recital 12) of the Brussels I Regulation (1215/2012) according to which the New York Convention takes precedence over the Regulation.

of convention instruments and carry the responsibilities that follow from these instruments. This status is based on their sovereign power to agree on limitations to their territorial jurisdiction by granting legal effects to foreign awards and to simultaneously expand the effects of their domestic awards across their borders.

According to article 3 of the NY Convention:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Articles 1 and 3 illustrate that the enforcement of arbitral awards within the framework of NY Convention requires cooperation between the convention and national systems. The authority that recognizes the award as enforceable is the national court of jurisdiction in the state where enforcement is sought. The uniform interpretation of both the Convention and its interface with various national legal systems is facilitated by collecting relevant case law of its application.

The NY Convention was meant to be a relatively simple and straightforward document for improving cross-border enforcement of arbitral awards. The reason behind this was to facilitate its implementation to different jurisdictions and application of its provisions within contracting States. The simplest method to improve enforcement was to use the existing infrastructure of courts within the contracting states.[449]

Thus, the parties of the Convention are the nation-states that have exercised their sovereign power by opting in to the multilateral enforcement mechanism of arbitral awards. The instrument is put into practice through the court system in each of the contracting states. The individual court of the country of enforcement makes the decision between recognizing the award

449. See e.g., Fali S Nariman, 'The Convention's Contribution to the Globalization of International Commercial Arbitration', *Enforcing Arbitration Awards under the New York Convention* (United Nations 1999) <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf> accessed 12 August 2015.

and refusing to recognize it on the exclusive grounds provided for in article 5 of the Convention. Violation of public policy of the country of enforcement constitutes grounds for a refusal, entwining these grounds with the fundamental principles of national legislations.

By these two examples, the infrastructure of both national and multilateral procedural law becomes clear. The national courts derive their exclusive jurisdiction from the constitution, from the link between law and politics. The multilateral instruments, which are needed to cross over the barriers of territorial jurisdiction, are similarly grounded in conventions between sovereign nation-states and applied through their court systems. This interaction is seen as one of the reasons behind the success of the NY Convention.

This close link between jurisdiction and sovereignty - that can be found both in national constitutions as well as in the framework of the NY Convention, describes the traditional self-understanding of procedural law. Such a conceptualization of justification as interaction between law and politics has its advantages, as access to enforcement is granted only after judicial review in the court, and thus provides safeguards for due process. Based on this simple solution of employing state courts for enforcing private dispute resolution, the NY Convention is easily implemented, thus enabling its vast acceptance.

Apparently using the link between law and the state as a source of justification has created long-lasting, viable instruments for cross-border transactions. In the words of Fali S. Nariman, who examines the 50th anniversary of NY Convention, the "genetic heritage" of State sovereignty still holds fast and the success of the Convention is the result of taking this into consideration.[450] But is the link to the state still a feasible option for finding justification for dispute resolution and technology? Could the logic of the NY Convention be applied to ODR as well?

Uniform Procedural Rules for ODR

An effort has been undertaken in this direction, to create a cross-border instrument for ODR. In addition to facilitating international arbitration, UNCITRAL has focused on drafting uniform procedural rules for ODR since 2010. The focus of working group III is on cross-border electronic commerce transactions, where there is no existing cross-border regulation and no consistent self-regulation of auction sites or merchants. As UNCITRAL's objective is to further the unification of international trade law and serve the needs of

450. ibid 13.

international commerce under the mandate of the UN's General Assembly, there arises an urgent need to provide unified rules of due process for the low-value, high-volume disputes of e-commerce. ODR was embraced as a solution to these disputes, which could not be dealt with using traditional resolution mechanisms.

In contrast to the success of the NY Convention, UNCITRAL's work on ODR has left much to be desired, as little progress has been made.

From the beginning in 2010, the working group's efforts encompassed both business to business (B2B) as well as business to consumer (B2C) disputes. Already at the beginning of the whole ambitious unification project it became clear that the key issue at hand consisted of the policy differences between countries which accept pre-dispute consumer arbitration and countries which do not.[451] However, it was agreed that arbitration is a necessary part of ODR, although cases should primarily be settled without an arbitration phase.

The acceptance or rejection of pre-dispute binding arbitration in B2C cases reflects the reality of the online market. In the USA, in which market leaders of e-commerce such as eBay and Amazon.com are located, consumer arbitration is accepted and chargebacks are often used as enforcement alternative. In contrast, national legislations in EU Member States do not generally allow pre-dispute consumer arbitration. However, EU has established its own regulatory framework for ODR, the functioning of which remains to be seen after the implementation phase.

Later on, an attempt was made to reconcile these differences of opinion by establishing a two-track system, where two different sets of rules would be developed to address the different needs regarding enforceability.

The two-track system was introduced in November 2012. This system resolved the tension between pro- and contra-arbitration positions by separating non-binding and binding ODR rules into two different tracks.[452] The binding arbitration track would be applicable to business-to-business (B2B) disputes, and to B2C disputes in jurisdictions where binding pre-dispute arbitration was accepted. Thus, in track I the parties would have agreed at the time of purchase that any dispute would be resolved in an ODR procedure

451. 'Report of Working Group III (Online Dispute Resolution) on the Work of Its Twenty-Second Session (Vienna, 13-17 December 2010)' (UNCITRAL, Working Group III 2011) A/CN.9/716 § 30.
452. 'Report of Working Group III (Online Dispute Resolution) on the Work of Its Twenty-Seventh Session (New York, 20-24 May 2013)' (UNCITRAL, Working Group III 2013) A/CN.9/769 § 15.

which would end in a binding arbitration award. The award, in turn, could perhaps be enforced through the NY Convention, although this is still somewhat unclear. Only one click would be needed, the click which simultaneously completes the purchase and agrees to the binding arbitration clause. In track II, binding arbitration would still be possible, but only if the consumer accepts it after the dispute has arisen. So, both tracks would start off with facilitated negotiation, but the difference would be that there is a second click for parties in contra-arbitration jurisdictions: a click to opt-in for binding arbitration after they have failed to reach an amicable solution earlier.

However, the two-track system had its own flaws, such as the difficulty of determining which track a dispute belongs to and what would be the point of reference for determining whether a certain B2C dispute is within a non-arbitration jurisdiction. As is often the case in private international law, the question of allocating jurisdiction has many solutions: jurisdiction can be determined based on nationality, by place of residence, by place of purchase or by other criteria, all of which options have further not-so-simple definitions. Determining jurisdiction becomes even more difficult in relation to e-commerce, as foreign e-commerce platforms are easily accessed from several countries, purchases can be done while visiting a different country, and network traffic can be rerouted. Also, the basic issue with holding on to the two-track system is “the annex question”: who would create and maintain the list of countries by track so that ODR providers could determine which set of rules would be applicable to them?

Due to these inherent problems of maintaining a two-track system, the model was set aside in October 2014. The decision was made after several delegations had pointed out that arbitration would not provide sufficient consumer protection and that simplified arbitration rules would undermine traditional arbitration procedure. Several delegations stated that non-binding rules would be able to accommodate all jurisdictions and the practical influence of ODR arbitration would be low, and awards’ enforceability would remain without effect because enforcing arbitral awards would be too expensive and time-consuming for low-value disputes.[453]

It follows from this that the work seemed to have come to a standstill. In February 2015 the discussion turned to the question of whether the work should be discontinued due to the lack of progress. This discussion stems directly from the problematic related to the basic model, i.e. whether pre-

453. ibid § 33–35.

dispute arbitration clause is binding on the consumer or whether arbitration is only allowed after the consumer gives her consent during the dispute. On the one hand, there were many who considered the fundamental chasm too wide to overcome, but on the other hand, there are others who thought the need for a compromise, even a weak one, more urgent than the alternative of *laissez-être*.

In July 2015, UNCITRAL's Commission has further specified the working group's mandate to focus on the "elements of an ODR process, on which elements the Working Group had previously found consensus". At the same time the commission decided that the working group will be continued for one year until summer 2016, after which it will be terminated regardless of the outcome.[454]

In March 2016, the working group drafted the final document, which took the form of non-binding technical notes on ODR. According to the final document, the purpose of the descriptive Technical Notes "is to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings".[455] The notes reflect due process values such as impartiality, fairness, and transparency but as a non-binding instrument the document's impact is somewhat unclear. Regardless of this unclarity, the document is bound to reflect UNCITRAL's encouragement for the increasing use of ODR.

As UNCITRAL's work on ODR will be terminated after the likely adoption of the technical notes, UNCITRAL member states are left to their own devices to address the problematic procedural issues of cross-border e-commerce and regulation of ODR. This will most likely prove harder for developing economies, while it will have less impact on the established ODR Regime of the EU and the commonly used chargeback models of the USA. The concrete meaning of the technical notes depends on their implementation by the major players.

The outcome of the working group falls short of the high expectations placed in its work. Understandably the consensus-based technical notes do not take a stand on the question of one-or-two clicks, which issue sub-

454. 'Report of Working Group III (Online Dispute Resolution) on the Work of Its Thirty-Second Session (Vienna, 30 November-4 December 2015)' (UNCITRAL, Working Group III 2015) A/CN.9/862 § 5.

455. 'Online Dispute Resolution for Cross-Border Electronic Commerce Transactions. Technical Notes on Online Dispute Resolution' (UNCITRAL, Working Group III 2016) A/CN.9/888 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/021/29/PDF/V1602129.pdf?OpenElement> accessed 30 May 2016.

stansiated the differences of opinion regarding the finality of ODR decisions. The lack of consensus on finality has not been resolved at the cross-border level and if later on another attempt for regulating ODR through international conventions is sought the issue remains to be solved at that time.

Thus, UNCITRAL's work on ODR tells us something. As the continuous efforts of the working group during the last six years has provided only technical notes of uncertain usability, the probability of developing a global ODR regime seems highly unlikely. However, the work still gives valuable insight to the issues that stand between the aspiration and the realisation of such a regime. In addition, the outcome emphasises yet again the support of policy makers to ODR.

As the example of UNCITRAL's work on ODR depicts, it is unlikely that a sovereignty-based framework can be established for ODR at least for the time being. There are many reasons for this. Firstly, the dispute resolution market has changed significantly since the NY Convention was drafted. The typical ODR case is not a high-value business dispute, for which international commercial arbitration and enforcement through state courts are the preferred resolution models. E-commerce disputes can involve consumers and consumer protection needs to be taken into consideration. At the same time, the cases are low-intensity, probably low-value, and high volume cases, which do not exceed the litigation threshold in the first place.

Enforcing the outcomes of such disputes through state courts would not remove the reason why these cases were not litigated in potentially time-consuming and expensive cross-border civil procedures. Instead of decreasing or removing the litigation threshold, enforcement of ODR through state courts would just shift the threshold from the access to court perspective into the enforcement phase. In order to function similarly to foreign arbitral awards, access to enforcement through state courts requires that the thresholds of time and expense be lowered. However, making the court system more efficient without lowering due process standards, especially in a time of economic recession, is no small feat.

Secondly, the typical e-commerce cases delve deeper into the sphere of domestic legislation than commercial arbitration, as consumer protection regulation varies significantly between different States and jurisdictions.

This does not mean that public courts are not a suitable place to incor-

porate ODR. Instead, I emphasize that private ODR cannot be thought of as low-value private arbitration and enforced accordingly through a summary exequatur procedure. We cannot solve the interpretative challenge of ODR simply by making an analogy to arbitration and by developing specialized multilateral instruments on this basis. Also, the national character of consumer protection legislation means that neither can we leave private ODR simply as it is without regulation, due process and enforcement, as ODR may easily be the only available redress mechanism. Thirdly, the role and consequences of private enforcement mechanisms has not been discussed at all in this context. It is unclear, whether and how private cross-border enforcement could be regulated, but it is becoming increasingly obvious that the existing way of understanding enforcement and traditional instruments does not provide the answer.

Hence, we arrive at another dead end. Attempts to create multilateral regulatory instruments have been fruitless up until now, as sovereign states have not found a compromise. It is unclear how such instruments would come about, and to which extent they would be implemented even if an acceptable compromise would be found. National or regional regulation is a plausible option but too limited in scope to solve the difficulties arising from cross-border transactions, as it is limited to the state's territory. Leaving ODR unregulated would mean that only national material norms of e-commerce sites would provide safeguards to individuals in ODR procedures and by this we would overlook the procedural element of their dispute resolution function. By this, we would have to admit that regulating this new and significant field of dispute resolution is too difficult. This dead end reveals something vital. The traditional way of understanding dispute resolution through sovereignty is unable to answer the challenge imposed by ODR and private enforcement mechanisms.

6.2.3 WHAT IS WRONG WITH SOVEREIGNTY?

The concept of sovereignty is a risky business. The concept has proven out to be especially long living, inclusive to the point of losing its descriptive force and subject to continuing reinterpretations. The principle has received its share of criticism but still forms the basis of our understanding on law and society.

238 The question that needs to be asked is, to which extent we can understand different types of enforcement, of use of force, through the concept of sovereignty. Sovereignty functions as the coupling between law and politics of a nation-state, meaning that it is the basis of understanding litigation. Hence, it justifies the way in which enforcement is conducted through the State's monopoly on violence. Also, voluntary compliance with a decision, i.e. when the losing party makes a voluntary payment, bypasses the use of force entirely. Voluntary compliance does not engage the monopoly on violence, and therefore it is partly left outside the logic of enforcement. This also means that compliance with a decision is not coercion and therefore it does not challenge the State's enforcement monopoly. Instead voluntary compliance is seen as belonging to the individual's freedom of contract, the sphere belonging beyond the State's interests as long as there is no foul play included. Therefore, sovereignty as a source of justifying dispute resolution does not explain the coercive element in forcing voluntary compliance and neither is there a need for such an explanation. Voluntary compliance is qualified under freedom of contract and hence it poses no challenge or threat.

However, other models of enforcement do not necessarily fall as easily to the logic of sovereignty. Still, can the problem be solved inside the logic of sovereignty by similar means, as is the case with voluntary compliance? Chargebacks provided by credit card companies, direct enforcement through ICANN, internal private enforcement of e-commerce sites such as eBay and other enforcement mechanisms may also be qualified as belonging to the sphere of private autonomy as they are basically contractual relations or networks of such relations. However, they differ significantly from voluntary compliance, as the use of force is engaged. Ignoring these alternative ways of enforcement by contractual qualification is not a credible solution, because they tap into use of force and use of force needs to be justified from the perspective of the legal system.

At present, the nation-states have been unable to reach a consensus on controlling ODR. This inability to establish new multilateral convention does not yet constitute the failure of sovereignty as a source of justification. Instead, the question is, what would sovereignty as a source of justification mean if the nation-states are unable to extent their control to cross-border private dispute resolution. Without actual possibilities of providing sufficient re-

dress, sovereignty starts losing its impact – and this in turn would diminish its justificatory power.

This opens up another set of questions, namely, whether private autonomy is a more credible source of justification than sovereignty, which I discuss in the next chapter. However, the feasibility of sovereignty as a source of justification for dispute resolution depends on the concept's possibilities to perceive and categorize use of force other than that wielded by state courts. Thus, the question is, can sovereignty as a source of justification provide us with other means of understanding the challenge these models entail instead of just qualifying them as a part of private autonomy? How flexible is the concept of sovereignty?

As stated above, the origins of sovereignty can be located in the writings of Bodin in the 16th century, later on discovered in the concept of Westphalian sovereignty, further elaborated by social contract theories, distinctions between internal and external, de facto and de jure etc were made to contextualize the concept's content. Originally, sovereignty referred to the person of the sovereign ruler - a context very different from its current day use. Later on the concept of sovereignty was transferred on from the sovereign king to the people, to the consent of the governed, but did not receive international consequences in a similar way as the earlier absolutist sovereignty. Thus, Henkin argues, sovereignty as a fundamental normative axiom of international law should no longer be perceived as such.[456]

Others have voiced similar opinions on various different grounds from empiria to philosophy. Koskenniemi divides such criticism into three categories. Sociological critique accentuates that no State can actually exist as autonomously as the theory of sovereignty would suggest. According to moral criticism, the concept of sovereignty caters the State's egoism, which is the ground reason for several political cataclysms in the previous century. According to the logic-systemic criticism, sovereignty can have no independent meaning without referring back to the fundamental question of the relationship between constitutional and international law.[457]

In Finnish legal theory, both Tuori and Syrjänen suggest the disintegration of state sovereignty. They both argue that sovereignty as the interpretative framework of law is old-fashioned and has outlived its usefulness. Syrjänen claims that considering societal peace as the product of state sovereignty

456. Henkin (n 407) 353.

457. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press 2005) 235–236.

leads us astray, for in late modern society there is no sovereign power that is not restricted by international or national limitations, such as human rights. Syrjänen suggests that instead of perceiving law and justice in a *state* context, we should review it in accordance with Niklas Luhmann's system theory, as a part of social systems and their interaction, as *society's* law.[458]

From a systems theory perspective, the inability of procedural law to effectively resolve cross-border civil disputes is a result of the close connection between the law and the nation-state. While the subsystems of commerce and technology are global in nature and give rise to disputes, discrepancies between systems follow.[459] In other words, legal rules are established by national legislative processes and governed by national courts giving *in casu* content to these norms, the conflict environment that the national law tries to reduce to a normative code is global, and thus cannot be simplified to such a code. However, in an information-based society, there is a need to develop cross-border legal instruments for addressing such disputes, and this can be reached only by overcoming the restrictions embedded in the concept of state sovereignty. Regardless, state sovereignty might hinder access to dispute resolution, but it also retains the task of providing due process by safeguarding access to enforcement. [460]

The discussion on private enforcement depicts that the sovereign nation-state is losing some of its power due to the disruptive power of technology. Still, these changes in the role of the state are by no means straightforward, as Castells points out.[461] The implications of this change on dispute resolution are evident in the justificatory crisis of dispute resolution and technology. The state monopoly seems to be poorly compatible with e-commerce disputes and private enforcement seems to pass over the state's monopoly on

458. Jussi Syrjänen, *Oikeudellisen ratkaisun perusteista* (Suomalainen lakimiesyhdistys 2008) 43.

459. See Teubner, 'Global Bukowina: Legal Pluralism in the World Society' (n 277) 3.

460. It is another question whether ODR procedures might provide more effective relief than litigation and in which cases would this apply. However, such examination is not possible in this scope.

461. "What the power of technology does is to extraordinarily amplify the rends rooted in social structure and institutions: oppressive societies may be more so with the new surveillance tools, while democratic, participatory societies may enhance their openness and representativeness by further distributing political power with the power of technology. Thus, the direct impact of new information technologies on power and the state is an empirical matter, on which the record is mixed. But, a deeper, more fundamental trend is at work, actually undermining the nation-state's power: the increasing diffusion of both surveillance capacity and the potential for violence outside the institutions of the state and beyond the borders of the nation." See Castells (n 408) 341.

violence as well. However, the territorial nation-state has proven out to be a long-lasting phenomenon in the history and it is still very much the primary provider of power and administration.[462] No other norm project has been able to establish itself as strongly as the nation-state, although the potential for this is increasing. In other words, due to the globalisation of economy, the nation-state has lost some of its power but not its influence.

Seems like we cannot rid ourselves of sovereignty, although its role as a source of justification for dispute resolution and technology can be challenged on solid grounds. As stated at the beginning of this chapter, conflicts involve the diverse interests of the parties, the public, the market operators, and the state. If we dismiss the sovereign state as the primary source of justification, what will its role be? Could we still emphasize the role of the state, but simply try to reinterpret its content? Would such an exercise provide a way of understanding alternative means of enforcement, and enable maintaining the concept of sovereignty as the source of justification?

The possibility of reinterpreting sovereignty is desirable, as it would save us the trouble of finding other sources of justification. For example, we could test, whether understanding sovereignty as delegation would function, or whether sovereignty as interdependence of States would provide a solution. There are several options for reinterpretation of sovereignty.

The first option of reinterpretation is to consider private enforcement as a delegation of power. Seeing private enforcement as a delegation of power from the Sovereign to the e-commerce sites would be a theoretically solid description and would comply with Hobbesian sovereignty. This model has been applied to understand the relationship between state litigation and ADR while simultaneously holding on to the constitutive starting point of sovereignty. Then again, such description is not entirely accurate, as private enforcement owes more to inaction of sovereign States than to pro-active and conscious transfer of powers. Also, Hobbes' theory is an ill fit with the reality of globalised world, as it makes a close connection between the person of the Sovereign and the territory of the State without focusing extensively on the relationship between different States on a global scale. Regarding alternative enforcement mechanisms, it is unclear to which extent their emergence could be read as a delegation of state power and how much they owe their existence to creativity in bypassing the litigation threshold.

462. ibid xxx.

242 The second option for reinterpretation is to perceive sovereignty as interdependence between States. Rijgersberg suggests a model for interpreting sovereignty in the context of globalised legal environment, in which sovereignty and constitutional obligations are considered as interdependence of interconnected states and private operators would provide the organizational architecture for this by participating via Internet. For Rijgersberg, the state maintains the responsibility for providing public security, ensuring welfare and protecting property rights. Rijgersberg's claim that, from the perspective of globalisation, constitutional responsibilities can be interpreted as interdependency provides us with a useful insight. Still, it is unclear how such a reinterpretation would provide us with added value for explaining the role of the state in justifying dispute resolution and technology. Sovereignty as interdependence could help us to include alternative enforcement mechanisms, but what this solution essentially would entail is somewhat elusive. Interdependent sovereignty could assist in expanding the stakeholders in enforcement, but several questions are left open. For example, what is the relationship between private enforcement and the interdependent nation-states and how the organizational infrastructure relates to the principle of democracy?

A third option for reinterpretation is to perceive sovereignty as interaction of different justificatory constructs. Thus, sovereignty would re-enter this discussion through its nature as the consent of the governed or as the safeguard of access to justice. For example, the jurisdiction of state courts would be derived from the consent of the people represented by their system of government, from the principle of democracy. Hence, it would be the consent of the people instead of the interests of state sovereignty that would provide justification for dispute resolution.[463] Another example is to derive justification from the fundamental right of access to justice, which would be primarily provided and identified in connection to the state.

However, the difficulty of this solution is that it would preserve the term but transfer its meaning to other constructs. In the end, such a strategic move would not provide a new role for sovereignty, but instead change the source of justification from the structural coupling between law and politics to some-

463. Fundamentally, sovereignty as justification is constitutive: in the end, it draws its force from democracy. Tuori examines the legitimacy of legislation through Habermas' theory of the Rechtstaat. According to Tuori's view, political process where norms are formed and the legal sphere where they are interpreted are intertwined and the background for their internal connection is the legitimacy of law which law then relayed to the political system. See Tuori (n 406) 94–.

where else. This strategy would remove the dysfunctionality of sovereignty on the surface level, yet it would only hide the problem. We need to consider the applicability of consent and access to justice as their own sources of justification instead of as the other side of sovereignty.

The demise of nation-states caused by technology has been acknowledged also in relation to cyber threats.[464] The argumentation is similar within that debate as what has been related here concerning dispute resolution: the emergence of technology has created the possibility of cyber threats that have different consequences than crime, terrorism and war outside the cyberspace and these threats cannot be addressed within the current framework of nation-states. According to Brenner, these cyber threats cannot be classified as internal (such as crime or terrorism caused by individuals) or external threats (war between sovereign nation-states) to the societal order, as cyberspace introduces a new element to defining and evaluating these disruptive actions.[465]

Enforcement takes a decisive role also in relation to cybercrime. Brenner describes the nation-state's agenda for overcoming internal and external threats as two-fold, where both the containment of external threats by a standing army and containment of internal threats by law enforcement and the judiciary are based on the monopoly on violence. However, the distinction between warfare and individual crime becomes more and more difficult to hold on to, as recognition is no longer as simple, and the two categories may also converge.[466] Also, the relatively low risk of getting caught, prosecuted and sanctioned for transnational criminal action online contributes to the increase of cyber threats.[467]

It follows from Brenner's analysis that the difficulties of addressing cyber threats result from the same aspects of the nation-state as those of addressing private enforcement, namely territorial jurisdiction, the monopoly on violence, the lack of reliable cross-border instruments, and inefficient enforcement.

464. Susan W Brenner, *Cyberthreats and the Decline of the Nation-State* (Routledge 2014).
465. ibid 9–23.
466. ibid 30–31.
467. ibid 32–88.

6.3 THE FUTURE OF SOVEREIGNTY IN DISPUTE RESOLUTION AND TECHNOLOGY

One functional model is bringing ODR technology to the courts, as has been suggested by the report of the ODR Advisory Group of the Civil Justice Council in the UK.[468] This shift towards convergence of ODR and courtroom technology has also been suggested by Benyekhlef and Vermeys.[469] Implementing technology to dispute resolution through the courts would still enable the use of sovereignty as the decisive source of justification. As discussed earlier in this chapter, sovereignty provides a stable source of justification for domestic disputes that are resolved through state litigation despite its shortcomings in the cross-border context. Connecting ODR with the courts would function similarly in the national context and relieve the challenges of access to justice for its part. However, the problem of sovereignty-based justification would still exist in the cross-border context.

Regardless of this, private enforcement, both in domestic and cross-border contexts, still bypasses state control. This means that the justificatory crisis is not limited to the cross-border context but intrudes also the national context instead.

At the beginning of this chapter I described the conventional and modern approaches to sovereignty and demonstrated how the concept has proven out to be easily adapted to changing societal conditions. In the context of dispute resolution, sovereignty adopts the mask of state monopoly on dispute resolution, which has become a battle ground for negotiation and reinterpretation, as the concept of state monopoly *de jure* and the actual governance of disputes *de facto* have moved farther away from each other. The discussion of different possibilities to reconcile the principle of sovereignty with the change in the dispute resolution environment proved out to be fruitless, and suggests that we need to abandon state sovereignty as the constitutive source of justification for dispute resolution (and technology). The question remains, what is the role of state agenda in dispute resolution, if sovereignty loses its primary role as a source of justification?

Discarding sovereignty *as a source of justification* for dispute resolution does not mean that we have to abandon *the principle* itself. As Mutanen states, other suggested terms of constitutional theory, such as autonomy or

468. Online Dispute Resolution Advisory Group (n 258).
469. Benyekhlef and Vermeys, 'ODR and the Courts' (n 341).

independence, come with different difficulties and reinterpretation of sovereignty, as constitutional pluralism is a more apt choice for constitutional law.[470] However, the point I make here is not about the theory, history, application or dominance of the principle as a description of either *de jure* or *de facto* state from internal or external perspective. Instead, the demand for abandoning sovereignty is significantly more limited here, contextually.

Finding the justification of dispute resolution in state sovereignty has been very much a silent practice and the connection is difficult to find in constitutional texts or even codes of civil procedure. This silence of legislative work does not mean that it does not exist, as I established earlier. It is this particular practice of justifying dispute resolution through a reference to the political system, which I find problematic. However, this does not mean that sovereign states should have no interest or no business in dispute resolution. Simply put, the source of justification needs to be re-evaluated in the context of both states and other stakeholders, the limitations of the cross-border context, and the objective of providing efficient redress mechanisms.

As Castells and Mutanen point out, nation-states or the concept of sovereignty are not disappearing or losing their influence. Neither is the public function of dispute resolution in providing predictability of legal decisions, transparency, equality and societal stability. The importance of this public function needs to be emphasized: the role of the state as one of the basic building blocks of democratic societies and global community is first and foremost linked with these objectives.

Private enforcement, which bypasses state control, is challenging the traditional doctrine of cross-border procedural law. Still, private enforcement is currently a relatively small phenomenon although it is gaining ground. However, private enforcement challenges and undermines the State's monopoly on violence. The question is how to reconcile the state's interests in upholding the public function of dispute resolution while simultaneously providing efficient mechanisms for enforcement, both public and private.

Sovereignty alone does not provide sufficient theoretical justification for dispute resolution, nor does the practical framework derived from it provide sufficient means of reacting to the phenomenon of private enforcement. In other words, sovereignty alone is not enough but the sovereign states have impact on the matter of both justification and practice. It remains to be seen whether this impact is actually tapped into and transformed into a regu-

470. Mutanen (n 404) 389.

latory standard for private enforcement. Considering the failure of UNCITRAL's working group, it is becoming increasingly apparent that the network of states alone cannot provide the sufficient tools, but creating standards for private enforcement needs to include the whole variety of stakeholders instead.

6.4 CONCLUSIONS

In this chapter I have evaluated the most long-lasting source of justification that has been applied to dispute resolution, namely the structural coupling between systems of law and politics: state sovereignty. Sovereignty still forms the starting point for discussions about law and this close association preserves the state's monopoly on violence. Justifying dispute resolution and enforcement through sovereignty means that disputes are not considered to belong only to the disputing parties but instead they also have importance from the public perspective.

The connection between law and the nation-state has proven to be particularly enduring despite the several fundamental changes that have happened in the ways of organising government since the Westphalian Peace Treaty in 1648, when the concept of sovereignty became synonymous with the territorial state. Territorial jurisdiction and the authority of the state in private disputes have been present already in the early theorisations on the content of sovereignty. In Thomas Hobbes's social contract theory people escape the state of nature by an absolute power transfer to the sovereign, whereas in John Locke's theory the sovereign's power is limited by its objective, i.e. the good of the public. Some remains of this objective can be found in the traditional ideal model of co-operation between private ordering and state enforcement explained in section 5.1.1, as decisions of private ordering are expected to be first recognised before access to the state's monopoly on violence is granted. The expectation that sovereign power safeguards due process as a part of this enforcement control resembles the undertone of social contract theories, where sovereign power is granted to one authority for the sake of the people.

As a source of justification for dispute resolution, sovereignty often adopts the role of state monopoly on dispute resolution, meaning that the public courts of the nation-state have the authority to resolve disputes or conversely,

to delegate this resolution to private actors. This change of form explains why references to sovereignty itself as a justificatory concept are hard to find in legislation, but references to state monopoly are in plain sight.

The problems of sovereignty as the focal concept of the legal system become visible in the cross-border context where the network of sovereign states has been unable to provide a solution for resolving and enforcing low intensity disputes of a cross-border nature. As sovereignty-based models of regulating private enforcement have at least momentarily failed, alternative, private models of dispute resolution and enforcement have gained momentum. However, these models do not comply with a sovereignty-based perception of the nation-state's authority over dispute resolution; sovereignty only provides a model for justifying the state's monopoly on violence.

The question that remains is whether the flexibility of the concept leaves enough room for its reinterpretation. It is possible that the sovereignty-based model of justification can still be applied to dispute resolution if these low intensity disputes and private enforcement can be brought back under the umbrella of the state through trustmarks or other means of international co-operation than that of drafting multilateral conventions. In other words, justification might still be found from the structural coupling to the system of politics should the state's supervisory role be restored. However, this seems unlikely as the development of private enforcement and the introduction of self-executing smart contracts suggest a trend towards increasing privatisation and the possibilities of extending global state control to these phenomena are limited in many ways. In any case, private enforcement fits ill with the concept of sovereignty, which relies mostly upon contractual instruments as the foundation of jurisdiction. Hence, justification of private enforcement should be evaluated from the perspective of yet another structural coupling, the concept of consent, which is understood both in systems of law and of economics.

7 Consent and Private Autonomy

In the previous chapter, I examined sovereignty as a source of justification for dispute resolution and suggested that it is not necessarily useful in describing private enforcement. In other words, the nation-states possess limited means of comprehending means of enforcement different from the State's monopoly on violence. Also, the feasibility of sovereignty as a source of justification cannot be salvaged by reinterpreting it. I described how the logic of sovereignty ignores voluntary compliance as enforcement, regardless of whether or not it derives from reputation based behavioural systems such as user reviews, because compliance does not require use of force but operates using the logic of private autonomy. However, similar bypasses are more difficult to understand in relation to other alternative means of enforcement, which employ use of force but forgo state control. As we find sovereignty, the structural coupling between law and politics, wanting, the examination turns towards other justificatory constructs.

Communication and information technology has changed the whole society and created a new emerging social system of use of ICT. This new system has brought new irritants, such as private enforcement, in its wake. In order to preserve its existence, the legal system tries to react to this irritant by finding new connecting operations that improve its immunity. As structural couplings are temporally long-lasting structures, their creation requires repeated operations over the course of time. Hence, most justificatory narratives come with history.

The structural coupling between law and politics, in the context of dispute resolution, can be traced back to the 17th century. In comparison, the structural coupling between law and economy, i.e. the contract, and the meaning of consent in dispute resolution are of more recent origin. Still, consent has been well established before the technological change, and private autonomy is a fundamental concept of law with history. It is comprehensible that in its quest to react to the irritant of private enforcement, the legal system turns towards its established structural couplings in general and to the concept of private autonomy in particular.

249 The history of conflict theory has been depicted as a line ranging from the judge circles of ancient communities to the state monopoly of the modern era and further to peaceful coexistence between state interests and ADR resulting from a specific division of labour after the criticism presented by the access to justice movement.[471] As sovereignty is failing to react to new irritants, the next logical step is to evaluate, whether this evolution might continue in the same direction, i.e. whether we can find justification from increasing the significance of contract as a source of it.

This chapter aims at evaluating this possibility of finding justification for dispute resolution from consent as has been done to some extent in the tradition of ADR. Consent has played a role in private conflict management before with relative success. Still, we should ask whether consent would provide a source of justification for the use of ICT in dispute resolution. Often consent has not been considered as a sole source of legitimacy, but instead coupled with state control. As technology offers alternative ways of enforcement without *ex post* state control, the acceptability of consent as a justificatory narrative transforms into a new question about the limits of consent. Can we give consent to renouncing state control? Can we renounce Montesquieu's separation of powers? Can we consent to the democratisation of violence, to private enforcement? What criteria do we place on consent to ascertain that it is acceptable and "true", from which perspective are these limits imposed?

This chapter starts with examining contractual consent, its perspective and origins. Then, I describe its role in dispute resolution. After this, I evaluate how private autonomy as a source of justification might try to react to the irritant of private enforcement. I claim that, like sovereignty, private autonomy also has its part to play in dispute resolution, but this does not sufficiently answer our quest for justification. Instead, we need to look further, to access to justice and the interaction of justificatory narratives.

471. However, Scottish American legal scholar Ian Macneil has pointed out that the negative attitude of litigation towards ADR is a relatively new phenomenon. Still in the 19th century attitude towards arbitration was usually favourable. See Ian R Macneil, *American Arbitration Law. Reformation - Nationalization - Internationalization* (Oxford University Press 1992) 18–21. See also Resnik (n 315) 214. "MacNeil's major assumption – two distinct systems in conversation with each other, with ADR existing apart from the state – is decreasingly reflective of contemporary trends."

7.1 FINDING CONSENT

7.1.1 THE PERSPECTIVE OF THE PARTIES

Private autonomy, i.e. the significance of consent, or freedom of contract is the structural coupling between the systems of law and economy. Contracts employ the binary codes of both systems simultaneously, the legal/illegal of law and paying/not paying of economy. However, the definition, boundaries and application of consent are not clear-cut.

As stated in the previous chapter, voluntary compliance with a decision is understood as a contract, the consent of the parties, and there is no use of force. Whereas sovereignty as justification draws attention to the interests of the State in dispute resolution, the perspective embedded in private autonomy turns focus to the disputing parties. From the perspective of sovereignty, the use of force, the binary code of power/opposition, is a deciding factor in allocating voluntary compliance to the sphere of freedom of contract. But from the perspective of private autonomy, can we expand its sphere to include forms of enforcement that incorporate the use of force?

As discussed in relation to sovereignty, the ownership of conflicts is an elusive concept. Legal conflicts have a public function in providing stability and predictability, but the direct consequences of conflicts impact first and foremost the disputing parties. The demarcation between the public function and the interests of the parties is further supplemented with the perspective of the markets. Both the e-commerce market as well as the dispute resolution market affect the success of different conflict management methods. However, the conflict starts and ends with the parties, their disagreement is the basic element of all dispute resolution, the fuel for reinterpretation and development of law, the discrepancy of business transactions, a valuable asset for the dispute resolution market.

The ownership of conflicts is a question that cannot be answered as such; however, different perspectives reveal different facets of dispute resolution. The examination of sovereignty as a source justification gives insight into the interests of nation-states in conflict management. Through the structural coupling of law and politics we perceive dispute resolution in terms of power in addition to the internal framework of the legal system. Looking at dispute resolution through the lens of private autonomy sheds light on the interests of the parties and the markets. The structural coupling between the legal system

and economy brings attention to resource allocation in dispute resolution. By emphasizing the importance of private autonomy, sometimes also at the expense of sovereignty, the focus shifts to the needs, motives, resources and rights of the parties themselves.[472]

Freedom of contract is often connected with *laissez-faire* liberalism, highlighting the importance of minimum state control in contractual relations between two competent and consenting parties. However, freedom of contract has roots in Roman private law,[473] and was well established as one of the basic principles of medieval trade law, *lex mercatoria*. *Lex mercatoria* was a *sui generis* legal and socio-economical system, based on the self-regulation of merchants themselves, drawing its credibility from best practice and customary law, which were applied in merchant and trade courts along important trade routes. Still, it can be contested whether *lex mercatoria* in fact existed to the extent attributed to it in modern literature.[474]

Although freedom of contract is a well-established principle of contractual law, its significance in dispute resolution is a relatively new development. The importance of consent in dispute resolution owes much to the ADR movement of 1980s. In their efforts to provide alternatives to court proceedings, which were considered expensive, slow and inadequate due to their win-lose mentality, advocates of ADR favoured more flexible and efficient conflict management. These new methods would take into consideration the needs of the parties in a specific case. Instead of enforceable decisions on rights and obligations, the ADR ideology would produce solutions that would transcend the limits of legal dispute resolution, by introducing new mediation and negotiation techniques for coming to a genuine agreement between the disputing parties. The basis of jurisdiction for such alternative resolution methods would lie in the consent of the parties. The individual needs of the parties would be decisive in formulating the procedure *in casu*, as this would also change the focus from courts to the parties and encourage parties to take responsibility and a more active role in settling the dispute.

472. It should be noted that private autonomy has a connection to the concept of sovereignty and finding justification may employ such interconnections. For example, to Bodin the principle of *pacta sunt servanda*, the binding nature of contracts, was the most important rule and the sovereign was responsible for safeguarding its use. See Mutanen (n 404) 29.

473. Andreas Wacke, 'Freedom of Contract and Restraint of Trade Clauses in Roman and Modern Law' (1993) 11 Law and History Review 1.

474. Gralf-Peter Calliess, '"Lex Mercatoria" ZenTra Working Paper in Transnational Studies No. 52 / 2015' <ssrn.com/abstract=2597583> accessed 20 August 2015.

7.1.2 THE CONCEPT OF CONSENT

Similar to the concept of sovereignty, the concept of consent has carried a multitude of meanings that have been subject to continuous reinterpretations. Consent is closely linked with contracts, although neither can be truncated to the other: the history of contracts dates back to Ancient Greek and Roman legal traditions but the emphasis on consent is more recent. Although consent, in the meaning of popular participation in communities, has also been applied in early Christian and Medieval communities,[475] in the following I focus on consent in the framework of contractual law, as individual expression of intent, which is considered to be legally relevant.

Consent, according to the Oxford Dictionary, refers to "permission for something to happen or agreement to do something".[476] What makes consent legally relevant is the subtext of subjectivity, of individual action, of the importance of self-determination, which all flow from the subjectivity of the individual. Thus, the increasing importance attributed to consent in the late 18th century and in the 19th century is linked with individualism, which consecutively was a reaction to the social change brought on by the Industrial Revolution and urbanization.[477]

As such, consent has a reciprocal dimension, as the legal consequence, the contractual relationship with obligations, follows from congruent expressions of consent from parties. This element of incorporating an obligatory meeting of the minds, the binding contract, has proven out to be a particularly useful legal instrument.

Before examining the origins of consent and private autonomy, another point regarding the relationship between consent and legitimacy of government: the application of consent outside contractual law is related to the consent of the governed, the notion that the mandate of the sovereign ruler stems from the consent of the public. As discussed in the previous chapter, social contract theories have often included this premise within their frameworks. The question rises, to what extent are sovereignty and consent congruent, or two sides of the same coin?

It is noteworthy that justificatory constructs are not completely unattached from each other but there can be – and often is – overlap. Sovereignty

475. See e.g., Arthur P Monahan, *Consent, Coercion, and Limit: The Medieval Origins of Parliamentary Democracy* (McGill-Queen's University Press 1987) 46–48.

476. Oxford Dictionaries, 'Consent' <http://www.oxforddictionaries.com/definition/english/consent> accessed 3 September 2015.

477. On individualism and its effect on freedom of contract see PS Atiyah, *The Rise and Fall of Contract* (Oxford University Press 1979) 256–.

can be interpreted through private autonomy, highlighting the consensual element in social contract theories. We might go as far as claiming that establishing the principle of sovereignty requires a contract of private law between the sovereign and the governed, leading to the point where both consent and sovereignty are different aspects of the principle of democracy.

However, the downsides of this argument are numerous. First, it is unclear whether the foundation of a social contract establishing sovereign power is, in fact, embedded in free choice and consent of all concerned parties. As social contract theories imply, the contract on sovereignty is a metaphoric fiction that aims at explaining the conceptual jump from the state of nature to organized society. There has been no constitutive social contract in history and there is no effective opt-out alternative. As such, the social contract does not meet the requirements of free choice and consent placed by classical contract theory, as there is no actual meeting of the minds.[478] Second, consent and sovereignty, although sharing connection points, abide to different rationalities – sovereignty to that of the political system and consent to that of the economic system - and thus joint examination would mean an unavoidable oversimplification of these connections.

Third, social contracts tend to subscribe to geographical borders and presence within them as an outward sign of consent. This logic disintegrates in the context of technology, where geographical markers lose most of their decisive meaning and contractual instruments gain ground. Identifying consent with presence has the potential to obscure the complexity of online actions, leading to unnecessary oversimplifications.

7.1.3 DECONSTRUCTING THE ORIGINS OF PRIVATE AUTONOMY

In this context it is not possible to provide a comprehensive analysis of freedom of contract, consent or private autonomy, the formation of these concepts or their historical developments in detail. However, a short introduction to the theoretical context should suffice for the needs of this study to demonstrate how the constitutive principle of private autonomy has entered into the debate on dispute resolution in the form of consent.

One of the most influential examinations of the origins of contract law is that of Henry James Sumner Maine's in *Ancient Law*, which was published in

478. Atiyah considers the authenticity of consent a major difference between social contract theories of Hobbes and Locke. Locke contests that consent derived by force or out of fear is not 'true', whereas such consent is the basis of Hobbes' theory. See ibid 49.

1861. The objective of Maine's analysis was to portray the early ideas as they were reflected in ancient legal texts and to point out the common nominators between them and the thinking of his time. According to Maine, ancient Roman law saw contracts as a combination of a pact between the parties, resulting from consensus and of an obligation, which was added to the pact. Obligation was considered to be "the 'bond' or 'chain,' with which the law joins together persons or groups of persons, in consequence of certain voluntary acts".[479] Four types of contracts were recognized and could be enforced by law: the verbal contract, the literal contract, the real contract and the consensual contract, which all emerged at different phases of the Roman era.

The first and most common type of enforceable contract Maine distinguishes is the verbal contract, which consisted of a question and an answer, which together created the agency for annexing the obligation to the contractual instrument itself. The verbal contract followed a specific technical form. The literal contract is different from the verbal in that the obligation was formed by an entry of the debt sum to the debit side of a ledger. The literal contract was related to the domestic habits of household bookkeeping. It is unclear whether consent was a required element for the obligation, as the meaning and context of the literal contract changed during the later stages of the Roman Empire.[480]

Unlike earlier contractual forms, the real contract signified the emergence of ethical conceptions, Maine claims. In real contracts, the obligation followed directly from the performance of a party, which imposed a legal duty on the other based on ethics. However, the last form of contracts, the consensual contract transformed Roman contract law by incorporating the obligation directly to the consensus of the parties without the need for any additional acts. However, the scope of application of consensual contracts was limited to commission and agency (*mandatum*), partnerships (*societas*), sale (*emtio venditio*) and letting and hiring (*locatio conductio*). Maine suggests that these types of transactions are the most common legal acts of any trade-oriented community, which is also the reason for forgoing technical formalities as obstacles to trade. The historical significance assigned to consensual contracts is partly due to the possibilities of further doctrinal classifications it enabled, such as natural and civil obligations and quasi-contracts. Also, the use of Latin language has played a central part in disseminating the innova-

479. Henry J Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (10th edn, John Murray 1908) 287.
480. ibid 290–294.

tions of Roman contract law later on to the Western parts of the Empire and making them accessible to medieval scholars.[481]

The work of Maine localized the birth of contract law, and the role of consent, in Roman law. Although consent has played a part in contracts under Roman law, the emphasis granted to the concept is the product of latter social changes. This conceptualization of legal evolution is often considered to be a transition from status-bound rights and duties to social relations regulated by contracts.[482]

Since Roman law, the doctrine of contractual law has undergone significant and diverse changes. However, the increasing importance of commercial exchange formed the societal background for this development of contractual law in the 18th and 19th centuries. This increase of commerce and the need to develop a contractual theory for its needs also explain why Maine's examination in the middle of the 19th century focused on finding the origins of contract law. Maine's interest in the Roman law of contracts reflects the need for finding functional origins for the needs of the new contractual theory. In Luhmann's terms we can describe this growing interest in contractual law as the result of increasing functional differentiation of both the economic system and the legal system. Simply put, this increase of commerce could be seen to have led to the development of classical contract theory in the 19th century.

English legal academic Patrick S. Atiyah examines the emergence and demise of freedom of contract in the 19th and 20th century.[483] Atiyah claims that the consent-based concept of contracts, the binding contract as a meeting of minds, is a relative newcomer in private law. Consent-based contracts did not exist until 1800, before which the legal evaluation of contractual relationships was focused more on particular types of transactions and on the

481. ibid 294–305.
482. Originally, the wording "from status to contract" is Maine's. Maine used this terminology to describe the changes of family law, particularly that in the position of married women. See ibid 151. Maine's analysis has received its part of criticism. For example, Graveson considers it necessary to add limitations to the thesis, as it is an oversimplification of both social relations of feudalism and of modern law. See RH Graveson, 'The Movement from Status to Contract' (1941) 4 The Modern Law Review 261. Atiyah agrees with Maine's analysis but claims that the transition away from contracts had already started in Maine's time. See Atiyah (n 477) 261.
483. As stated by J.H. Baker in his book review, Atiyah's study continues the debate on birth and death of classical contract theory that was begun by American scholars Lawrence M. Friedman, G. Gilmore and M. J. Horwitz. Atiyah's analysis partakes in this debate from the English perspective. Baker also criticises Atiyah's analysis on its historical merits. See JH Baker, 'Book Review, The Rise and Fall of Freedom of Contract. By P. S. ATIYAH. [Clarendon Press: Oxford. 1979. Xii and 792 Pp. (incl. Index). £30 -00.]' [1980] The Modern Law Review 4.

overall fairness of transactions. Classical contract theory culminates in general principles and trust placed in clear-cut "objective" concepts such as an offer and its acceptance, as the result of growing emphasis of freedom of property and the move from a property-based to a contract-based society.[484]

However, Atiyah continues by claiming that classical contract theory has come to the end of the road, to a position where the role of contract had started to decline in the 20th century. Growing regulation on consumer protection, labour laws and tenant protection have lessened the significance of classical concepts, and this development has confined contractual law to a much narrower scope than during its prime in the 1870s. Atiyah attributes this demise to three individual but connected developments. First, the role of contracts in overall society has diminished. This follows from the growing importance of public administrative law in protecting the weaker parties of contractual relations, which is closely linked with the emergence of the welfare state after WWII. The expansion of public activities has changed the concept of society, which was centred on networking individuals freely entering bilateral contracts. According to Atiyah, there has been a broader shift from private to public law.[485]

Second, Atiyah claims, the significance of free choice as a source of legal rights has decreased, as emphasis has moved on from promise-based rights and obligations to non-voluntary rights. This translates into the lessening importance of free choice, consent and promises. In practice, lawyers are increasingly acknowledging that there are other overriding values and not all contractual consequences flow from the intention of the parties. New forms of contractual relations, e.g. standard contracts, which are not individually negotiated, implied contracts such as riding a bus, and compulsory contracts such as compulsory acquisition of land, all contradict the definition of contracts as consensual and voluntary meeting of the minds. Thus, the concept of contracts expands to situations where the consensual element is surpassed by other values and objectives.[486] However, Atiyah points out that in the area of sexual morality the importance of (adult) consent has, in turn, increased, showing an opposing trend to the general current.[487]

Third, contractual law has shifted away from the classical executory model of contracts that refers to remaining contractual obligations of the parties in

484. Atiyah (n 477) 104.
485. ibid 716–726.
486. ibid 729–754.
487. ibid 727.

fulfilling the contract, Atiyah claims. In turn, the executory contract, which focused on intended future performances, marked the shift to classical contract theory, as the earlier doctrine had operated mostly on the concept of completed (executed) contract, i.e. what the parties had done. However, modern doctrine makes a distinction between present and future consent and limits the binding nature of the latter. For example, the possibility of cancelling a binding contract is nowadays considered an integral part of life insurances, several continuous consumer contracts and the sale of goods. Also, contracts on entering marriage are no longer considered binding in the future, a development linked with easier divorce.[488] In addition to and following this, contracts have lost their role as instruments of risk allocation, as protection of future expectations is no longer focal to contractual relationships.[489]

Atiyah's analysis of the emergence and downfall of consent reveals that private autonomy is a relatively new concept in comparison with sovereignty, as the latter dates back to the 16th and 17th centuries. Although consent has suffered from the loss of importance, it is still a central concept of law. It could be claimed that instead of its demise, or in addition to it, consensuality has expanded outside its origins in contractual law, to other fields of law e.g. public administrative law, family law and procedural law. Similarly to what Mutanen and Castells have pointed out about the longevity of sovereignty and the nation-state, consent has proven to travel well across disciplinary boundaries and to be exceptionally durable.

Next, I examine the role consent has taken in dispute resolution. Before this, one last general remark on the evolution of consent needs to be addressed, namely the emerging private regime of a new *lex mercatoria*, as proponents of this tradition consider it a solution for private regimes, a model of contractual networks for an a-national but global, autonomous legal order with its own institutions and without connecting points to the legal systems of the nation-states. Allegedly, this uniform regime can be found in international commercial arbitration and global governance of international commerce.[490]

According to Calliess, the new *lex mercatoria* draws credibility for its neoliberal agenda from an interpretation of the medieval *lex mercatoria* as an

488. ibid 754–759.
489. ibid 763.
490. For an overview on the foundation of the new lex mercatoria, and its codification see e.g., Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (Kluwer Law International 2010).

autonomous legal system co-existing with the domestic public courts. Opponents of the new *lex mercatoria* have claimed the opposite: that the ancient merchant law was not an autonomous legal system but a hybrid of public and private elements. As Calliess points out, it is impossible to cover the exact content of this medieval merchant law, as historical sources are scarce and open for various interpretations. The ancient *lex mercatoria* had its origins in the medieval commercial revolution, which resulted in the self-governance of market towns, specialized market courts often headed by town officials, general enforcement of informal contracts, and creation of some customary rules on debt collection. Later on, the growing state agenda of the nation-state lead to the seizure of jurisdiction in commercial cases and to the codification of customary law.[491]

Based on this assessment, Calliess evaluates the extent to which the new *lex mercatoria* in fact redeems the promise of being a uniform, a-national legal system. The new *lex mercatoria* is advocated as a response to the fragmentation of national legal systems and their inability to provide protection for international commercial disputes. As such, its autonomy comprises of general principles of law and customary business practices, international commercial arbitration and enforcement through social sanctions (e.g. reputation), and codification to principles, standards and business practices. Based on an empiric analysis of these functions, Calliess states that to some extent the regime does its own norm-making, but its enforcement relies on co-operation with states, as arbitral awards are most often enforced based on the NY Convention. Still, voluntary compliance plays a role in enforcement and in certain industries social sanctions may be sufficient.

However, Calliess concludes that the new *lex mercatoria* is a hybrid model of both public and private governance, and as such cannot be described as an a-national, uniform or comprehensive legal system.[492] This hybrid nature is acknowledged by is proponents as well: for example, Alec Stone Sweet considers the new *lex mercatoria* "parasitic on state authority", resorting to state mechanisms of enforcement when necessary.[493]

Thus, it seems that the discussion on new *lex mercatoria* touches on the theme of private dispute resolution and private enforcement. As such, the

491. Calliess, '"Lex Mercatoria" ZenTra Working Paper in Transnational Studies No. 52 / 2015' (n 474) 4–7.
492. ibid 8–15.
493. Alec Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 Journal of European Public Policy 627, 627.

debate helps in contextualizing these new applications of dispute resolution and technology within the interface of law and economics. However, it does not seem to provide a uniform foundation for an examination of these phenomena that would provide us with additional tools.

7.2 CONSENT IN DISPUTE RESOLUTION

7.2.1 WHERE CAN WE FIND CONSENT IN DISPUTE RESOLUTION?

We have established that the concept of consent has roots in ancient Roman contract law but otherwise is extensively the product of the 19th century. Next, the issue of consent needs to be reframed in the context of dispute resolution and technology, and as a source of justification. This means that instead of adopting a position against or for private autonomy, I evaluate how the concept is employed to justify dispute resolution in general, and how the concept reacts to the new irritant of technology. The question is the same I have placed to sovereignty in the previous chapter: is principle of consent flexible enough to accommodate the needs for justification in the era of *dispute resolution and technology*?

In relation to sovereignty I stated that finding the principle in procedural texts is no small feat. Instead of seeking direct references to sovereignty, it was necessary to focus on the state monopoly on dispute resolution, the façade of sovereignty in this specific context. This difficulty, however, does not concern the role of consent, which is often emphasized especially in alternative dispute resolution. In ADR, stressing consent also has more practical meaning than just the acknowledgment of ideological roots: consent can create basis for jurisdiction.[494] From ADR, the scope of consent has expanded to other forms of dispute resolution. The importance of consent is increasingly highlighted also in litigation.

In chapters 4 and 5, I described the coexistence of ADR and litigation and made the claim that the emergence of private enforcement is changing this *status quo*, which is based on mutual acceptance up to the point of accessing enforcement. The reciprocal amicability of state litigation and ADR is based on the preservation of the state's monopoly on violence. This means that the

494. In a similar vein, some scholars have consequently claimed that ODR has its own jurisdiction in parties' agreement. See e.g., Crawford (n 329) 383. Building jurisdiction on consent instead of territorial jurisdiction brings to the front that both sovereignty and consent are used for same ends.

260 ADR institutions do not contest the *ex post* state control of due process before enforcement. However, this model disintegrates as private enforcement bypasses this state control and thus incidentally ends up challenging it. This challenge can be downplayed by stressing the role of consent, which I will discuss later on in this chapter.

In chapter 6 I examined the theoretical origins of the principle of sovereignty, which resulted in the formation of the nation-state and its monopoly on dispute resolution, litigation as its figurehead. It should be noted that before the era of the nation-state, contractual dispute resolution was commonplace, although the concept of consent as we know it was still waiting to be formulated. As Norwegian sociologist Vilhelm Aubert has noted, in tribal communities consent-based dispute resolution is sometimes institutionalized by using powerful members of the community as go-betweens. The outcome is seldom contested, as the contesting party would then face both the opposing party and the go-between and their families in the following process.[495] In addition to depicting social pressure for voluntary compliance as an alternative of enforcement, Aubert's example of tribal practices accentuates the community-oriented, informal origins of conflict management, which have often been interpreted to be consistent with the 1980s ADR paradigm.

As stated, consent can easily be found in dispute resolution, particularly in alternative dispute resolution. Next, I raise some examples of using consent, and contracts, as a method for justifying dispute resolution. The first example concerns arbitration, in which the meaning of private autonomy becomes particularly pronounced, as the arbitral agreement itself is *de facto* the basis of the following dispute resolution procedure. After this I shortly describe other alternative forms of dispute resolution. I conclude by making some remarks on the role of consent in litigation.

Arbitration is often depicted as the textbook example of private ordering. Arbitration is an adjudicative procedure and thus resembles traditional state-governed litigation. As stated above, arbitral awards rely on the state system in the enforcement phase, although voluntary compliance is highlighted especially within the new *lex mercatoria* doctrine. Alec Sweet Stone considers that the increase of arbitration adds to the dominance of the a-national regime of international commerce, a development detaching from the state altogether.[496]

495. Aubert (n 284) 35.
496. Stone Sweet (n 493).

In international commercial arbitration Kurkela and Turunen have considered the role of arbitration clause crucial for the tribunal's jurisdiction. The agreement of the parties forms the jurisdiction based on freedom of contract. However, they make the distinction between this concrete mandate of the arbitrator (mandate *in concreto*) and the abstract mandate of the government that allows the freedom of contract and the delegation of judicial authority (mandate *in abstracto*).[497] Nader and Shugart see arbitration as an escape from litigation, which unfortunately may lead back to the official judicial system at the enforcement phase.[498]

While discussing the history of arbitration, Born notes that it is questionable whether medieval arbitration has, in fact, based its jurisdiction on consent to the same degree as we understand the limits of consent today. Through contrasting the present understanding of consent's meaning for jurisdiction, Born brings forward the premise that consent is an important factor for justifying private dispute resolution.[499] Julia Hörnle, who examines the resolution of Internet disputes, considers consent as the necessary foundation of all ADR processes.[500]

In short, the doctrine of arbitration seems to place emphasis on the consent of the parties, both in the form of the actual arbitral clause and as an opt-out from the official judicial system of the nation-state. This rhetoric of dissociating private dispute resolution from the public by references to consent has two reasons. First, it promotes the significance of consent in dispute resolution and connects the legal system with the economic system, justifying private ordering both on the level of jurisdiction and on a more abstract level of justification. Second, the distinction is based on doctrinal development that has highlighted private dispute resolution particularly as an alternative to courts.[501] It is against this background that Lon Fuller sees the rise

497. Kurkela and Turunen (n 368) 43.

498. 'Even though the arbitration itself is extrajudicial, the law will stand behind and enforce the award. The first potential difficulty with arbitration appears at this point. The consumer may need to use the judicial system to enforce the award, and hence all the problems with that system that the consumer has been hoping to avoid crop up again.' Laura Nader and Christopher Shugart, '2 Old Solutions for Old Problems', *No Access to Law. Alternatives to the American Judicial System* (1st edn, Academic Press 1980) 79.

499. 'It is unclear just how "consensual" arbitrations in the context of medieval guilds and fair really were, since the relevant tribunals appear to have had a degree of mandatory jurisdiction, as well as enormous commercial sway.' Gary B Born, *International Commercial Arbitration. Volume I* (Wolters Kluwer 2009) 28.

500. Hörnle (n 335) 49.

501. See section 4.3.

262 of mediation as a change of attitude from litigation to ADR.[502]

This juxtaposition of litigation and ADR is still present in literature, where ADR is promoted as the "authentic" will of the parties and litigation represents hard and unaccommodating black letter law. Emphasizing harmony and the significance of a genuine real agreement repeats the ideal of contract law with the contract as the meeting of the minds.

In ADR literature the quality of the end result, a genuine understanding between the parties, is portrayed as the ideal outcome. According to the doctrine, the authenticity of the newly found agreement binds the parties to the resolution's outcome and prevents future conflicts from rising, thus making enforcement inconsequential. As the eminent ADR scholar Frank Sander states, the neutral mediators aim to find an agreement "which seeks to alleviate the long-run tensions as well as resolve the immediate controversy". The authenticity requirement is met when non-legal elements such as feelings are brought to the discussion table for "therapeutic effect on the long-term relationship".[503]

According to Sander, such a genuine authentic agreement between the parties can be reached only outside the courtroom where there is no compulsion to affect the parties' opinions.[504] Interestingly, this argument depicts the conditions of eligibility placed on the consent. In order to qualify, the consent needs to be genuine, unforced, freely given. Continuing in the same train of thought, such consent cannot be formed within litigation, as it would lose its authenticity.

Contrastingly, Mnookin and Kornhauser claim in their seminal article from 1979 that ADR solutions take place in the shadow of the law, reflecting the predicted outcomes of taking the case to court.[505] Thus, contractual

502. '… the central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, perception that will redirect their attitutudes and dispositions toward one another.' Lon Fuller, 'Mediation – Its Forms and Functions' (1971) 44 Southern California Law Review 305, 325.
503. See Frank E Sander, 'Varities of Dispute Processings' in Leo A Levin and Russell Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future. Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing 1979) 74–75.
504. 'Of course, it might be suggested that a court could also induce such a settlement. But quite aside from the unlikelihood of a busy court being able to create a climate that encourages the disputants to ventilate their underlying grievances, there is a world of difference between coerced or semi-coerced settlement of the kind that so often results in court and a voluntary agreement arrived at by the parties.' See ibid 75.
505. Mnookin and Kornhauser (n 326).

dispute resolution follows the same outlines as litigation and, in fact, these outlines are created, reinterpreted and upheld by the public dispute resolution system. Although this difference of opinion between Sander and Mnookin and Kornhauser looks like a discrepancy of ADR doctrine, it is not. While Sander speaks about informality of ADR procedures creating an atmosphere void of compulsion, Mnookin and Kornhauser point out that agreements in general are rarely reached without a context, without weighing the pros and cons of ADR in comparison to litigation. Thus, the two notions approach the subject from different angles. However, they do share a common nominator, which is the emphasis on parties' own opinions, attitudes and the need to address these in dispute resolution. Private autonomy and consent are raised above state control and such resolutions of conflicts are considered better than litigation results.

The juxtaposition of ADR and litigation is somewhat artificial in the current context, although historically it is understandable. However, this categorization hides the role of consent in litigation. Unlike the majority of ADR literature seems to imply, litigation increasingly acknowledges the importance of consent-based settlement. For example, Harris Crowne points out that litigation and ADR both work under the auspices of self-determination, and, ADR does not grant disputants more leeway than litigation. Instead, both forms of dispute resolution *share* the same operational sphere, which is based on self-determination.[506] Also, different forms of dispute resolution are more and more often converging, states Resnik.[507]

These bridge-building stances depict the triumph of conciliation, and the expanding scope of consent, also within the sphere of public litigation. The desirability of an amicable solution has been adopted into litigation both by introduction of mediation and by codification of settlement objectives into

506. "ADR functions within the sphere of disputant self-determination that already exists in the court system. It gives litigants no measure of control that they do not have under adjudication. Therefore, ADR programs do not undermine the justice system's current commitment to serving public interests." See Crowne (n 312) 1784.
507. Resnik (n 315) 211. Similar opinions have been voiced also elsewhere. In Finnish jurisprudence Risto Koulu has spoken of this phenomenon together with the traditional distinction between litigation and ADR paradigms. According to Koulu, the great paradox of dispute resolution is the unanimous starting point that litigation has to change radically. This paradox then divides into two different fronts, where ADR protagonists want to see litigation adopting ADR strategies, and litigation protagonists consider that development of litigation is enough. This, in its turn, has resulted in litigation procedures moving closer to ADR methods and ADR procedures starting to resemble court proceedings more closely. See Koulu, *Kaupallisten riitojen sovittelu* (n 346) 436.

legislation.[508] This trend towards "softer" and more diverse methods of dispute resolution appears to be connected to ADR. It is conceivable that the shadow of the law argument functions reciprocally: contractual solutions reflect legal ones but also affect the content of future methods of adjudication. Or, the popularity of ADR methods imposes a pressure for change in litigation. Regardless of causes and consequences, the settlement trend itself cannot be contested.

To sum up, the role of private autonomy is particularly pronounced in ADR, but not limited to these forms of dispute resolution. Instead, public dispute resolution processes increasingly place value on settlements and encourage disputing parties to find an amicable solution. On a different note, institutionalization has brought several ADR schemes closer to public dispute resolution. Also, compulsory forms of mediation are bringing into question the authenticity of forced compliance in consent-based dispute resolution. It is evident that different methods of private and public dispute resolution are converging. Although the current scope of consent is to some extent in a flux, it is impossible to deny that private autonomy can be found in dispute resolution, and that its role is acknowledged and sometimes used to justify different methods of dispute resolution.[509]

7.2.2 WHAT IS WRONG WITH CONSENT?

The concept of consent appears to be flexible and open for continuous reinterpretations. At first glance it seems like the structural coupling between the systems of law and economics has more leeway to overcome the justificatory challenge of technology than the principle of sovereignty. The justification of dispute resolution through private autonomy does not make a distinction between dispute resolution offered by state authorities and by

508. In the Finnish context, ADR methods, e.g. mediation, have mainly been introduced through the public courts. See Kaijus Ervasti, *Sovittelu tuomioistuimessa* (WSOY 2005). The possibility of an amicable solution is also highlighted in the Finnish Code of Civil Procedure. The judges in civil cases are required to exhaust all possible means of finding a settlement before proceeding into adjudicative process (e.g. chapter 5, section 26). On the settlement trend in family law, see Frederik Swennen (ed), *Contractualisation of Family Law - Global Perspectives* (Springer International Publishing 2015).

509. It should be noted that consent serves slightly different function in different ADR methods. For example, it is possible to distinguish jurisdiction-creating consent to solve a dispute through ADR from the consent that is needed for ending the conflict through mediation. Both of these are not necessarily required at the same time. In arbitration, jurisdiction-creating consent takes the form of the arbitral clause and no additional consent is required or even possible for rendering the arbitral award.

private providers and, thus, the principle brushes off the challenge of understanding private use of coercion, which is so insurmountable to the code of politics. Here lies the strength, and weakness, of private autonomy as a source of justification. The concept is flexible and inclusive enough, to the point of losing its descriptive force, becoming inapplicable as a source of justification.

The rhetoric of consent tends to bypass issues of unequal power relations between disputing parties. John Auerbach, who analyses the rise of arbitration in low value consumer cases, has noted that arbitration proved to be detrimental for the consumer, who faces unequal economic power, unilaterally drafted standard contracts with arbitral clauses, and binding arbitral awards. Consumers might also waive their rights through uninformed consent to arbitration, with no redress mechanisms available, as the public courts have outright rejected such claims.[510]

The issue of unequal power distribution has received extensive attention in both ADR and ODR literature. The repeat player effect, i.e. inherent bias in favour of economically stronger parties who use the same dispute resolution method, has been widely discussed and mostly the debate culminates in demands for the professional competence of dispute resolution providers.

The limits of consent are dictated by the binary codes it operates with. Private autonomy abides to the legal/illegal code of the legal system and to the paying/not-paying code of the economic system. The code of economics becomes visible particularly in the ADR context, where discussion has focused on portraying ADR methods as more cost-effective than litigation.

Through private autonomy and the emphasis placed on consent we can *describe* dispute resolution and technology, also including the stumbling block of private enforcement. All enforcement mechanisms can be understood contractually: from the perspective of private autonomy, enforcement is simply an extension of the contract. From the perspective of the economic system, private enforcement can easily be portrayed through contract, as it abides to the code of the economic system. The legal system, however, finds itself wanting: from its perspective, mere description is too open-ended. The focus on private autonomy loses sight of law as coercion; it hides the inherent violence visible particularly in enforcement.

510. John Auerbach, *Justice without Law? Resolving Disputes without Lawyers* (Oxford University Press 1983) 126–127. Of course, compulsory material norms limit the sope of consent, as compulsory rules cannot be set aside by agreement. However, the *de facto* protection that these norms provide depends also on the availability of effective dispute resolution.

 Another issue is whether the economic system itself is able to address these coercive elements of private enforcement.

However, from the perspective of the legal system it is not possible to conceal the element of violence. The legal system responds to this element of violence by using justification as an externalisation in order to maintain its internal coherence. If we come to the conclusion that the element of violence can be disguised or circumvented (or de-paradoxified in Luhmann's terms), we forgo the whole demand for justification. As a result, the quest for justification disintegrates: there is no de-paradoxification and law's ability to maintain its operations through continuous distinctions stagnates.

In other words, consent provides a model for examining conflict management outside the courts. Consent as a source of justification is flexible and resilient enough as long as there is an available recourse to dispute resolution. As Avinash Dixit describes, this recourse does not need to be that of the nation-state as long as some model of governance and enforcement exists. Traditionally this need for a redress mechanism has been provided for by the nation-state.[511] In situations in which the need for such governance is not provided by the nation-state, alternatives are required. It should be noted that the formal right to access to a court is not sufficient, but instead there needs to also be an actual possibility of access, which is often not the case with low intensity cases. This means that the question of the suitability of consent as a source of justification transforms: are there other methods of governance than those provided by the nation-state that could accommodate the need for redress? At present such alternative mechanisms are starting to emerge but it remains to be seen whether they can provide the same stability for private autonomy as the nation-state. At the moment consent as a source of justification is not developed enough to function without the close connection it has with the sovereign nation-state.

The shortcomings of private autonomy as a source of justification come down to the same reasons that are behind the demise of contractual freedom, as described by Atiyah.[512] The scope of application of consent is narrowed by the demands of protection for the weaker party. This protection derives from the demands for fairness and is accommodated in contractual law by special clauses on validity and setting the contract aside. In order to provide such protection while justifying dispute resolution at the same time, we should

511. Avinash K Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Princeton University Press 2004) 1–4.
512. See section 7.1.3.

be able to apply the internal safeguards of contractual law, i.e. the defences against formation and grounds for setting the contract aside.

However, these internal elements of fairness embedded in the structural coupling of the contract cannot be utilized in the context of justification of private enforcement. The limits of consent stem from the context in which the concept originally emerged; this context does not necessarily provide solutions for new interpretative situations.[513]

As the means for contesting the trueness of consent require efficient means of dispute resolution on a micro level, justifying dispute resolution through consent on the macro level has no similar safety valve. Simply put, uninformed consent in a single case could sometimes be contested in public courts, according to contractual law norms, but on an abstract level such internal safeguards cannot be employed. To put it more concretely, there are no concrete ways of contesting the validity of consent given to private enforcement (e.g. due to litigation threshold), and, as such, the concept of consent can only be applied without the element of protection, one-sidedly. Thus, consent gives us a way to understand private enforcement but it is powerless to provide us with a solution to its operation.

7.3 THE FUTURE OF CONSENT IN DISPUTE RESOLUTION AND TECHNOLOGY

As demonstrated above, the difficulty with consent-based models of justification is that they hide the justificatory crisis at hand. The concept of consent does not provide us with a mechanism for conceptualizing private enforcement: from the perspective of consent, private enforcement does not constitute a crisis. Both the traditional coexistence of litigation and ADR, and the new interpretative challenge of private enforcement can be understood through the concept of consent as the focal starting point for legitimacy. In other words, the markets are not picky: there is no distinction between

513. McMurtry formulates the same notion in the context of e-commerce: 'The law of contract was originally developed in an age of face-to-face negotiations and paper contracts, when a time lag between agreement and its fulfilment were expected. The law that developed in a simpler time cannot necessarily accommodate the new reality. Although common-law will continue to evolve, the existing law may simply have become irrelevant in the face of new realities. In these circumstances, we should not torture or twist existing jurisprudence to make it applicable to situations for which it is not equipped.' R Roy McMurtry, 'Information Technologies and Globalization' in Lisa Austin, Arthur J Cockfield and Patric A Molinaryi (eds), *Technology, Privacy and Justice/ Technologies, vie privée et justice 2005* (Canadian Institute for the Administration of Justice/ Institut canadien d'administration de la justice 2006) 23.

268 different models of enforcement, because the economic system does not require *the* system of state enforcement, it simply needs *a* system of enforcement.[514]

However, this distorts the overall image, downplaying the importance of the irritant for the evolution of both the legal system and the society. As stated, consent alone does not provide us with sufficient means of tackling with private enforcement and bypassing the state monopoly on violence. Hence, grounding justification on the principle of private autonomy is not a feasible option.

Consent has not lost its significance in connection to the use of ICT, despite all of this. Contractual instruments are gaining ground and function as the legal foundation for private enforcement. The validity of these contractual models is difficult to contradict in terms of contract law, although they have consequences for our comprehension of procedural law. On a broader scale, it is difficult to imagine that the role of consent would significantly decrease. It is also probable that contractual instruments will gain more ground in the online context and that they will be applied to understand the legal nature of future technological applications.[515] Still, this debate detaches from the question of justifying dispute resolution and technology.

Sovereignty fails at justifying private enforcement, because privatized use of force cannot be explained in the political system, which emphasizes the political claim on use of power. Thus, private enforcement is incomprehen-

514. Avinash Dixit examines alternative ways of legal governance. According to his analysis, economists have considered law as a prerequisite for successful markets. Most often this need for governance has been directed at the nation-state. However, only some evolved nation-states have been able to fulfil this idealized image, which leads Dixit to evaluate alternative models of governance. See Dixit (n 21) 2–3.

515. Teresa Rodríguez De Las Heras Ballell, a Spanish professor on commercial law discusses the changes of contractual law similarly: "Most radical perception of the Web describes as an anarchic world, where the law, born to manage and settle disputes in a national-border scene, is unable to moor territory-based connecting factors in the new digital borderless space. Business strategic response to such gap has been two-fold. On the one hand, relying on contract as a powerful device to manage risks and align interests beyond the law that is undergoing serious and complex difficulties to face challenges issued by the new space. That has boosted an increasing phenomenon of 'contractualization' of activity on the Web. On the other hand, entrusting technological architecture with regulatory tasks further than a mere supporting role. Far from operating as a simple technical infrastructure, technological architecture disciplines user conduct, imposes obligations, limits and determines the exercise of rights." Teresa Rodríguez de las Heras Ballell, 'Terms of Use, Browse-Wrap Agreements and Technological Architecture: Spotting Possible Sources of Unconscionability in the Digital Era' (2009) 2009 Contratto e Impresa/ Europa 841, 860. See also Immaculada Barral-Viñals, 'Electronic Mass Procurement by Means of "Web Technology": Basic Options in Its Regulation' (2014) 20 ILSA Journal of International and Comparative Law 373.

sible from the perspective of sovereignty.

From the perspective of consent the situation is different. Through the structural coupling of consent both the legal system and the economic system can understand private enforcement but this line of thought meets a different type of resistance, the external requirement for fairness. Although there are methods in contractual law for providing fairness and protection for the weaker party on a micro level, these cannot fulfil their function accordingly on a macro level, in justifying private enforcement.

7.4 CONCLUSIONS

In this chapter I examined the structural coupling between the legal system and the system of economics and asked whether the source of justification for private enforcement could be found from the concept of consent and from private autonomy. Whereas sovereignty emphasises the public interest in private disputes, consent calls attention to the perspective of the parties, to their private interests.

The importance of consent in dispute resolution has increased significantly after the introduction of ADR in the 1980s. However, consent has rarely been understood as a sole source of authority for dispute resolution, but instead its justificatory force has often been coupled with that of the state, as the traditional ideal model depicted in section 5.1 demonstrates. Similar to the justificatory narrative of state sovereignty, consent too has a long history dating back to Roman contractual law, going through several changes at different times, especially during the increase of trade in the 19th century. However, the golden age of consent, the epitome of liberal contract theories, took place in the 1870s, after which the focus was shifted to social elements of contractual relationships, giving rise to the turn from private law to more public interests of protecting the weaker party, as English legal academic Atiyah claims.[516]

The justificatory narrative of consent can be easily found in dispute resolution. Grounding jurisdiction on an arbitral clause, on parties' joint expression of intent, provides such an example. As a source of justification, consent is flexible and inclusive, easily explaining private enforcement through its contractual element, be it embedded in a user agreement required in

516. According to Atiyah, the importance of classical concepts of contractual law diminished, as emphasis was placed more on labour law, tenant issues and consumer protection. See Atiyah (n 477) 716–726.

order to enter an e-commerce matket place, execution of arbitral awards on domain name disputes, or self-executing smart contracts built on a cryptocurrency infrastructure. In short, private enforcement follows closely the rationality of the economic system and hence the justificatory narrative of consent would apply to the irritant.

However, as discussed already in chapter 5, perceiving private enforcement simply as a contractual issue hides the procedural perspective. This shortcoming comes close to the demise of classical concepts of contractual law in Atiyah's genealogy. The question rises how do we protect the weaker party in contractual relations if the safety vaulve of public courts does not exist, *de jure* or *de facto*, as is the case with low intensity disputes that do not exceed the litigation threshold? How do we provide reliable redress mechanisms and sufficient control over due process without reference to the state? If such redress mechanisms and sufficient means for monitoring them can be provided, consent-based models of forcing compliance could gain more ground. Then again, how would such monitoring be provided and by whom? In any case, another problem of consent would need to be solved: the limits of consent. To which forms of coercion would it be possible to consent? If there are limits, who decides and maintains them?

The problem with using consent as a source of justification is different from the restrictiveness of the justificatory narrative of sovereignty in explaining private enforcement. Whereas sovereignty-based models of justification have not emerged to bring private enforcement under state control, the problem with the justificatory narrative of consent is embedded in its over-inclusiveness, which provides too much interpretative flexibility to the point of ambiguity and not enough means for safeguarding and monitoring due process. This follows from the rationalities on both sides of the structural coupling. Consent as a source of justification seems to provide a straightforward and easy model for explaining private enforcement, but this simplicity is misleading. The limits of consent and the authority to monitor due process are complicated issues and no easy answer can be found for providing the ncessary transparency and protection of the weaker party. Hence, the role of yet another structural coupling, that between law and ethics, needs to be considered.

8 Access to Justice

In the previous chapters, I examined sovereignty and private autonomy as possible sources of justification for *dispute resolution and technology*. However, the structural coupling between law and the system of politics, sovereignty, turned out to be unsuccessful, despite the interpretative flexibility of the rigid concept, in explaining private enforcement and the state's disintegrating monopoly on violence. Even reinterpretation of the concept did not provide means of understanding or dealing with the challenge imposed by private enforcement. Following this, I discussed the possibility of finding justification from private autonomy, the structural coupling between law and economics. Contrary to sovereignty, private autonomy is *prima facie* able to provide us with an understanding, and justification, for private as well as public enforcement. The problem with private autonomy is the opposite of the one with sovereignty: no reinterpretation is needed to understand private enforcement, but instead the open-endedness of the concept turned out to be too inclusive, as it lost sight of justice, the law's quest for justification. Thus, the analysis of the sources of justification continues towards yet another principle: to the rhetoric of human rights in general and to the concept of access to justice in particular.

In this chapter I evaluate the possibility of applying access to justice, which is the structural coupling between the legal system and ethics, to the challenge imposed by the use of ICT. I ask whether the link to ethics can provide us with tools for understanding private enforcement.

The earlier chapters focused on evaluating sovereignty and consent as justificatory concepts. As was established, these both share a common denominator despite their differences, that is they both are constitutive. They both base their authority on higher principles, externalizing the issue of justification outside the legal system, sovereignty to the political system via the principle of democracy and consent to the economic system via the principle of private autonomy. In relation to these, access to justice is a different kind of an ordeal for the legal system.

Although aspects of access to justice have been positivized into due process criteria, access to justice as a justificatory narrative refers to the moral dimension of such procedural rights. There is no constitutive principle that provides authority for the narrative but its foundation lies in the intrinsic

value of fairness that has been gaining momentum as a part of the human rights discourse. Because of this elusive character of access to justice, conceptualising the justificatory narrative connects with the transcendent element of law, namely justice itself. In other words, the justificatory narrative of access to justice opens up one of law's paradoxes.

8.1 FINDING ACCESS TO JUSTICE

8.1.1 FROM CONSTITUTIVE COUPLINGS TO FUNDAMENTAL RIGHTS

Unlike sovereignty or private autonomy, access to justice – and the human rights discourse it reflects – is mainly a product of the 20th century, although the roots of inalienable universal rights can be traced back to the Age of Enlightenment. However, the human rights rhetoric has gained unparalleled recognition and significance in the aftermath of WWII, when the need for human rights was acknowledged within the global community and this consensus translated into the first expressions of universal human rights.

The first of these expressions, the *primus motor* for legally binding treaties in the future, is the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948. Later on, the General Assembly adopted two significant, binding conventions on human rights: The International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights were both adopted in 1966 and came into force in 1976. The ICCPR is monitored by The Human Rights Committee, which also examines individual petitions in infringement situations and provides an authoritative, although non-binding, interpretation of the treaty.[517]

The most important treaty in the European context is the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) drafted by the Council of Europe in 1950 and in force since 1953. The treaty established the European Court of Human Rights, which examines petitions from both State and individual parties and in infringement situations may order the State to pay damages to the injured party. The ECHR is a living docu-

517. See United Nations Human Rights Office of High Commissioner, 'Human Rights Treaty Bodies - Individual Communications. 23 FAQ about Treaty Body Complaints Procedures' <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#whathappens> accessed 17 September 2015.

ment, meaning that its interpretation is further dynamically developed in the court's case law and is thus susceptible to societal change.

This turn to human rights has taken place pronouncedly in political sciences and within law. Within the legal system human rights have run through most fields of law and the perspective has become focal for legal research, to the point of giving rise to criticism of "human rights fundamentalism".[518] Within procedural law, the human rights perspective has adopted the role of a *sui generis* legal principle: access to justice.[519] However, the concept of access to justice is not unambiguous and is open to interpretations.

It is noteworthy that the human rights rhetoric can be engaged in connection with constitutive principles. For example, the ADR movement has particularly emphasized the access to justice perspective: informal mediation is *better* for providing such access to justice, the ideology suggests. On the other side, state litigation can be defended based on the same argument that it provides better safeguards for respecting due process and thus *it*, in fact, is better. The fact that the argument of access to justice can be employed by proponents of both litigation and ADR tells two things about the concept.

First, access to justice is a relative newcomer to the playground. It is a recently emerged and relatively strong structural coupling and legal theory is still figuring out the role, application and consequences of human rights within the legal system. Second, the language of access to justice has an extensive scope of application, which results from the characteristics of the human rights discourse itself. Human rights are seen as inalienable, universal, inherent rights belonging equally to everyone regardless of origin, ethnicity, gender, income etc. As such, arguments based on human rights are not limited to certain geographical areas, certain fields, contexts, procedures, practices or institutions.

This means that the language can also be used to mislead, to offer arguments for a multitude of contradictory ends. It is, therefore, important to closely inspect human rights argumentation within the present context of

518. See e.g., Miia Halme, *Human Rights in Action* (Helsinki University Printing House 2008) 218 'If the premise that the human rights discourse forms one conception of a possible truth among many is not accepted, and common conceptions - particularly of young urban adults - insist that the discourse forms the truth, trumping all other conceptualizations, the peril emerges that the former religious hegemony will be replaced by the liberal fundamentalism of human rights.'

519. In Finland, fundamental rights have gained ground especially after the ratification of ECHR in 1990 and the reform of the chapter on basic rights of the Finnish Constitution in 1995. On the Finnish development, see Ervo (n 305) 1–56.

 dispute resolution, as such arguments can be just arguments for 'better' instead of claims for concrete human rights requirements.

Also, it demonstrates that justificatory concepts are not distinct from each other. Several justificatory narratives can be employed at the same time and clear distinctions serve the interests of theoretical examination.

The rhetoric of human rights departs from the moral dimension of law. Thus human rights are considered to transcend the limits of national legal systems, enabling their universal application. It follows from this moral aspect that the fundamental rights and access to justice reflect a different discourse than is customary for the legal system. As ethical stipulations, these requirements of access to justice open up to the fundamental questions of what is law, what is justice, and whether these two are interchangeable? Access to justice brings us back to the law's inherent paradox, the never-ending search for the elusive and unattainable ideal of justice.

8.1.2 The Concept of Access to Justice

The concept of access to justice seems to be somewhat imprecise and unfocused, making the demands of fairness difficult to decipher within the legal system. This ambiguity results from the multitude of meanings attributed to the concept; the interpretative ambiguity also reveals something crucial about the role of ethics, about law's quest for justice. In this section I shortly describe both of these reasons.

For the purposes of this study, the concept of access to justice refers to three slightly different meanings. First, the term can be used as an umbrella term to describe the primary content of the fundamental right to fair trial and due process. As such, it is mutually interchangeable with these terms but accentuates the comprehensiveness of fundamental rights instead of subsuming the abstract right simply to concrete treaty stipulations. Second, access to justice refers to the demand for taking both the concrete stipulations and the overarching ideal seriously. This has resulted in the growing importance of well-grounded court decisions in the litigation sphere as well as in the development of ADR methods outside it.

Third, the concept refers to concrete due process criteria, to individuals' procedural rights starting from the equality of arms, i.e. that both parties in a dispute should have the same informational and procedural resources at

their disposal, to legal aid schemes and the impartiality of the tribunal. The European Court of Human Rights (ECtHR) has a central role in substantiating the exact content of these criteria. As the two first perspectives of access to justice are often too abstract to provide a comprehensive starting point, due process criteria form the essential core of the whole rhetoric. This means that treaty stipulations, the argumentative structure incorporated in them and the dynamic interpretation in case law become decisive for evaluating the content of access to justice. It should be noted that access to justice is a broader concept than due process, as the latter refers to how a proceeding should be organized. Access to justice, however, enables to ask more far-reaching questions on how an access to proceedings is provided for, what about the cases left outside the litigation threshold, and what the bigger picture is.

As stated, access to justice, opens law towards ethics. However, ethics do not interact with the legal system in the same way as the systems of politics and economics: as the human rights rhetoric depicts, references to access to justice are often unfocused and ambiguous. Access to justice can be employed for legitimizing contrasting positions; it does not provide us with a clear-cut constitutive conceptualization. Why does the legal system have such difficulties in incorporating access to justice? What does it tell us about the relationship between law and ethics?

Part of this ambiguity can be explained by the unusual nature of ethics. Unlike sovereignty or private autonomy, access to justice does not provide us with an external reference point outside law. In short, ethics is not a social system like law, politics or economics – or even an emerging subsystem like the use of ICT. How, then, should we understand ethics and its connection with the legal system? Can we compare the link between the legal system and ethics to the structural couplings between law and politics (sovereignty) or economics (private autonomy)?

It should be noted that access to justice as a source of justification needs to abide to the internal coding of both law and ethics, the legal/illegal of law and the code of ethics, which Luhmann pinpoints as allocation of regard/disregard.[520] According to Luhmann, the code of morality does not refer to good or bad performances of individuals (e.g. as scientists or soccer players)

520. Niklas Luhmann, *Paradigm Lost: Über Die Ethische Reflexion Der Moral. Rede von Niklas Luhmann Anlässlich Der Verleihung Des Hegel-Preises 1989* (Suhrkamp 1990) 17–18; Dallmann has aptly translated the German terms Achtung/Misachtung as regard/ disregard. See Hans-Ulrich Dallman, 'Niklas Luhmann's Systems Theory as a Challenge for Ethics' (1998) 1 Ethical Theory and Moral Practice 85, 89.

but to the whole person and her participation in the specific communication.

However, Luhmann's approach to ethics is not as straightforward as this short description leads us believe. First, Luhmann writes about the code of morals instead of ethics, and considers ethics to be a reflexive theory that holds its distance to the application of the code of morals regard/disregard. Considering the ambivalence of the distinction between morality and ethics,[521] however, this conceptual choice has no extensive consequences for the task at hand.

Second, Luhmann does not hold morality in high esteem. Hans-Georg Moeller describes Luhmann's approach to morality as sceptical, stating that "the observation of this specific 'problem' of the 'catchword' morality leads Luhmann to a critical examination of morality as a somewhat pathological phenomenon of communication and to establishing a new kind of ethics able to respond to what may be called the specific conditions of morality in the current society".[522] Luhmann's approach to morality starts off from the functional differentiation of modern society, when morality transformed from the habits of a stratified society towards functionally distinct subsystems, and could no longer be based on social customs or religion. Thus, the need for universal morality and ethics needs to be rethought in modern society instead of referring the question to these earlier authorities of morality. This leads us to a surprising outcome about the nature, and limits, of ethics in systems theory.

As stated above, Luhmann does not see morals as a social subsystem of the society like law, politics or economics. According to Luhmann, the application of the code of morals is a specific type of communication, not a social system. As such, it has universal application and is not simply limited within one system. Morals as communication are located at the level of society, in the environment of social subsystems. This is a result of the social evolution towards more complicated social systems and the emergence of further distinctions (and subsystems) to manage the growing complexity of society. Be-

521. Luhmann's distinction between morality as a specific type of communication and ethics as a reflexive theory interpreting the first follows the general line of thought of moral philosophy. The etymology of ethics is in the Greek '*ethike*' meaning the science of morals. As Ransome and Sampford point out, the terms are often used interchangeably especially in normative theories. For an overview of the definition and philosophical debate see William Ransome and Charles Sampford, *Ethics and Socially Responsible Investment: A Philosophical Approach* (Ashgate 2010) 48–50.

522. Hans-Georg Moeller, 'Chapter Four. Morality and Pathology: A Comparative Approach' in Marietta T Stepanyants (ed), *Comparative Ethics in a Global Age, The Council for Research in Values and Philosophy* (The Council for Research in Values and Philosophy 2007) 52.

fore system evolution led to functionally differentiated subsystems, morals were a means for including and excluding individuals from society. However, the search for ethics in modern, functionally differentiated society has proven to be fruitless, according to Luhmann, as ethics cannot provide reasons for morality. No universal justification for moral judgments can be reached, and ethics is left the role of theoretical reflection on the existence of morality.[523] This means that ethics becomes a question of the diversity of moral choices, a paradox of the moral communication, where no final answer can be found.

Regardless, moral communication can be employed within all social systems due to its universality. This means that attributions of good/bad are connected to application of differentiated codes, e.g. we can argue that it is right (or conversely that it is wrong) to apply the legal side of law's code to private enforcement and it would be wrong (or right) to ignore expectations based on such an assumption. As is evident, this application of ethical reflection to law's code closely resembles the use of human rights rhetoric discussed above.

This universal application of morals includes the danger of polarization, communicational fundamentalism, as Moeller points out.[524] Thus moral communication is closely linked with conflict and power, and the escalation of argumentation from which de-escalation is difficult if not impossible. This results from the specific form of moral communication, i.e. moral communication is always symmetric, meaning that the person who communicates morally commits herself. Hence, moral communication includes both sides of the code; the person who communicates identifies with the positive side of the code, with the "good" or "regard" or "esteem" and simultaneously attributes a polarizing position to the other side. This leads Luhmann to consider moral communication as risky, very much like the bacteria living in human bodies that cause sickness but have certain beneficial functions at the same time. It follows from this that ethics as a reflective theory about moral communication is able to reveal why moral positions become overheated but it does not provide solutions for moral dilemmas.[525]

So we come to the following conclusion on the relationship between law and ethics and access to justice: the demand for better access to justice, or the emphasis on human rights in general, is a mode of ethical reflection about

523. Niklas Luhmann, *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der Modernen Gesellschaft. Band 3* (Suhrkamp Verlag 1989) 360.
524. Moeller (n 522) 56.
525. ibid 57.

 law. By making claims on the importance of access to justice we maintain that it is morally right to apply the 'legal' side of law's code instead of the 'illegal' in specific situations that concern the symmetric acknowledgement of a person, i.e. her inclusion in the society. Human rights discourse is moral (and thus risky) communication about law and we cannot derive answers to moral dilemmas through ethics.[526]

So, how does this relate to the objective of this study, how does access to justice as an ethical reflection of the application of law's code relate to the structural couplings of sovereignty and private autonomy? Where does this lead us, then? After establishing that law cannot find justification for private enforcement from the external references of sovereignty and private autonomy, can it be found in this specific form of communication?

In chapter 5, I described sources of justification as structural couplings, where these sources abide to two distinct codes of different social subsystems. Thus, both the code of law and that of politics are applied to sovereignty and private autonomy follows the coding of the legal system and the system of economics. One could claim that access to justice as moral communication about law does not follow this same logic, as ethics is not a social subsystem.

Ethics has turned out to be something else than was expected, communication instead of external reference. As far as we can see there is no structural coupling between the legal system and the system of ethics. Can we, then, compare the constitutive principles of sovereignty and private autonomy to this peculiar form of communication?

The question about the nature of morality brings us back to the functional differentiation of society. Moral communication has previously been attributed to a specific subsystem of society, namely religion. Structural couplings between law and religion have existed, as the power struggles between the secular and divine authorities in medieval Europe demonstrate. The two systems have had shared language, canon law being an example of this. At this point, the system of religion might have provided law with an external reference that could have adopted the role of justification. However, functional differentiation led to the decreasing importance of religion and to the detachment of moral communication from this subsystem. Later on, the doctrine of natural law has been utilised to provide similar constitutive

526. This unresolvedness of moral communication about law, and its implications to the argumentation structure of international law, is discussed extensively by Koskenniemi. See Koskenniemi (n 457).

argument, and the external reference, for the purposes of justification.[527] This would mean that the source of morality could be found embedded in reason, in the human mind itself, or in the emerging system of ethics that transcends connection to religion. So, moral communication about law has come to mean something else than moral communication about law based on religion. This also means that both subsystems of law and religion have evolved beyond the historic point of shared language and thus religion can no longer provide a similar source of justification (through external reference to another system) as once was possible.

However, in access to justice we see a concept that is employed to take the place of the justification of dispute resolution. How this is possible, if moral communication has no home elsewhere than in the environment of subsystems? The answer is simple. There is no longer a structural coupling between law and another subsystem, but the legal system still *presupposes* the existence of a structural coupling that once was there. Law operates as if the structural coupling still provides information from outside the legal system's boundaries, when in fact the reference attained by the coupling is only a reflection of law's own operations: there is no information transfer between two systems. Still, law operates *as if* the information transfer takes place, as if the operations shared by itself and the ghost system abide to two types of coding, that of morality and that of law. This interpretation also explains why moral communication about law lacks a constitutive principle like sovereignty or private autonomy. Simply put, there is none except the reflection of the legal system itself.

This leads us to the following. Although ethics does not relate to any specific subsystem but is located in the environment of these systems, access to justice functions in a similar way to these constitutive principles. Moral communication about law attributes the code of morality to the application of the legal system's code. In other words, in moral communication both the code of law and code of morality are applied simultaneously. Thus, moral communication about law in the specific context of dispute resolution and technology is more or less comparable to the way in which the constitutive principles of sovereignty and private autonomy function as sources of justification.

Still, this position has its shortcomings. Instead of finding a tangible solution to the justification of private enforcement, we are left with abstract ramblings about the nature of morality.

527. Luhmann has acknowledged the difficulties of this natural law approach to law's positivist nature. See Luhmann, *Law as a Social System* (n 74) 68.

280 This moral communication about law does not leave us with solutions to the issue of justification of dispute resolution and technology. As moral communication about law does not solve moral dilemmas, e.g. is private enforcement good or bad, it only leaves us with a way of analyzing the polarized positions at work in here. Is it possible then to derive justification from this oddly one-sided structural coupling?

8.1.3 DECONSTRUCTING THE ORIGINS OF ACCESS TO JUSTICE

All this said about the nature of moral communication, access to justice materializes as an unsolvable paradox of ethics. The origins of access to justice can be traced back to the most important human rights instruments and these stipulations about its constitution aim at exemplifying the relevant instances, where moral communication about dispute resolution is in place.

In the following I shortly describe the most influential of these provisions and pinpoint the specific instances into which the moral communication about dispute resolution is located. However, a comprehensive analysis or even a cursory evaluation of the relevant case law is beyond the scope and purpose of this study.[528] The objective of the description conducted here is to pinpoint the elements of which access to justice consists of and then to place the question, how these instances of moral communication about dispute resolution apply to the irritant of technology, private enforcement as its figurehead.

It should be noted that these treaty stipulations in addition to the national legislations on fundamental rights, and the case law and doctrine that substantiate them, are the most authoritative legal sources for concrete due process criteria. However, they are not the sources of morality but simply applications of moral communication to dispute resolution instead. In other words, they are operations of the legal system, which include the application of the code of morality alongside the code of legal/illegal. This symmetry of moral communication is what distances these stipulations from other operations and structures of the legal system. Still, continuous application of these morally encoded legal operations in case law seems to lose some of the moral emphasis, as they become rule-like routine application in simple cases. These rule-like criteria of what makes dispute resolution fair, i.e. due

528. The case law of ECtHR is continuously commented and evaluated in literature. See e.g., 'Guide on Article 6 - Civil Limb' (Council of Europe 2013); For the Finnish perspective see e.g., Ervo (n 6); Matti Pellonpää and others, *Euroopan Ihmisoikeussopimus* (5th edn, Talentum 2012).

process, become the access point to observing the moral communication on dispute resolution in the first place.

The origins of access to justice can be traced back to human rights discourse discussed above. The criteria for due process is defined in the focal instruments, which reveal, in which concrete instances moral communication about dispute resolution is undertaken.

First, the European Convention of Human Rights article 6(1) on fair trial stipulates concrete rules for both civil and criminal procedure.[529] Article 6(1) states that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Second, the International Covenant on Civil and Political Rights article 14(1) stipulates similarly:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public

529. Other sections of article 6 impose procedural rights in relation to criminal proceedings, i.e. presumption of innocence and minimum rights of the accused. Thus, the examination here is limited to the civil limb of article 6 and focused on section (1).

> except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

When we compare these two formulations of due process criteria we discover several common denominators. Both of the most influential conventions define due process as fair or equal, public hearing in an independent and impartial tribunal, which is established by law, 5) although this publicity may be reduced under certain acceptable conditions.

It seems that the decisive core of due process is equality, the wording functions as a description of elements that are relevant for providing for equality. Equality is mentioned both as itself and as linked with the other stipulations, the constitution of the court, which has to be independent and impartial – to ascertain equality and fairness – and established by legislative order from the political system.

Thus, one instance of moral communication about dispute resolution is a question of constitution of the court, which the provisions solve through reference to the democratic system that establishes courts by law. This criterion reduces equality back to the democratic principle, which then links with the political system and sovereignty. Such reduction would make it futile to discuss due process in global regimes without reference to the State, or would otherwise deem due process solely as belonging to state control, *ex ante* or *ex post*, thus nullifying the question of how do we impose due process to ODR without referencing to transnational law consisting of rules of nation-states.

If access to justice derives its potency from principle of equality we have to define the content of equality. Is equality treating everybody in the same way? Or the old phrasing of same cases similarly and different cases differently? Where does this equality come from? What about the inherent and arbitrary violence behind the decision, which cases are the same and which are different?

8.2 ACCESS TO JUSTICE IN DISPUTE RESOLUTION

8.2.1 WHERE CAN WE FIND ACCESS TO JUSTICE IN DISPUTE RESOLUTION?

Moral communication about dispute resolution takes its form in the rule-like criteria for due process and in the general principle of equality. This due process criteria and the underlying principle may be employed to take the place of justification. Using due process criteria as a source of justification means that a decision loses its formal validity if the procedure in which it was reached had incorporated some procedural shortcomings.

It should be noted that ECtHR's case law on article 6 is an extensive body of moral communication about dispute resolution. As such, these interpretations of the convention articles are applications of both codes of law and that of morality. They are individual operations that become guidelines for future cases. In other words, decisions that there has been a violation of article 6 (or that there has not been one) form structures within the legal system. This means that they become dominant positions of moral communication. These safeguards of due process are formed by a network of specific communications stipulating that certain application of legal/illegal intersects with regard/disregard, i.e. precedent cases. In order to avoid further escalation in applying the legal system's code, these structures of earlier communications need to be accommodated in future cases. It follows from this that the concrete due process criteria (e.g. principle of *audiatur altera pars*) become an internal program of the legal system.[530] These programs are significant elements for networking future operations within the legal system but they have no external reference point outside it. Thus, the authority of case law on access to justice draws its strength from the morality of these communications, which is then historicized internally within the legal system.

It follows from this that we are only able to analyse these individual moral communications on dispute resolution and the programs they form within the legal system. Hence it is possible to evaluate, how they guide the application of legal/ illegal. However, it is not possible to contest, whether the "right" conclusions were drawn in these formative cases on article 6, as such a position would only be another instance of moral communication. There is no external reference in moral communication, which would justify the authority of ECtHR's moral communication, outside the constitution of the

530. This point interconnects with Tuori's theory on the levels of law, where human rights become sedimented into the deep structure of law. Tuori (n 406) 197–216.

court in specific and the delegation of sovereign power from the contracting States to the convention instrument itself or to Council of Europe in general. We may only reach the individual communications of decisions and deduce from those, what has been communicated about dispute resolution with the simple authority of moral communication.

One example of moral communication on due process is the ECtHR's case law on equality of arms and on adversarial nature of the proceedings, which emphasizes the parties' equal means of making their case in adversarial proceedings. According to the Court, adversarial proceedings form the cornerstone of the right to fair trial.[531] The content of adversarial proceedings comes down to the right to have knowledge of all evidence presented in the case and the possibility to comment on said evidence.[532] The case law highlights that the parties alone have the right to decide, whether they comment on specific documents or not.[533]

In the case K.S. v. Finland ECtHR established that there had been a violation of article 6, because no possibility to comment on documents obtained by the court was granted to the plaintiff in an unemployment benefit case. In the case the applicant had been dismissed from his post as a tax inspector with six months' notice in 1991, because he had been found to continuously neglect his duties. After his dismissal the applicant had applied for unemployment benefit from the Unemployment Fund for Lawyers and Legal Associates, which benefit the Fund refused on the grounds that the applicant had caused the dismissal himself. The decision was based on the binding opinion of Employment Commission, which the Fund was by law obligated to follow.

The plaintiff then appealed first to the Board of Unemployment Benefits, which dismissed the appeal, and later on to the Insurance Court. During the proceedings the Insurance Court requested an opinion from the Fund, which was delivered but not communicated to the applicant. Also, the Insurance

531. 'Guide on Article 6 - Civil Limb' (n 528) 41.

532. '... the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial ... The right to an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.' See e.g., *Ruiz-Mateos v Spain* (ECtHR) § 63.

533. 'Nor is the position altered when, in the opinion of the courts concerned, the observations do not present any fact or argument which has not already appeared in the impugned decision. Only the parties to a dispute may properly decide whether this is the case; it is for them to say whether or not a document calls for their comments. What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file.' See *Nideröst-Huber v Switzerland* (ECtHR) § 29.

Court obtained documents from the Supreme Administrative Court, which had solved the case of the applicant's dismissal. The Insurance Court upheld the Board's decision in its judgment in 1995.

In his application to the ECtHR, the applicant claimed that there had been a violation of his right to a fair hearing, as the documents obtained *ex officio* by the Insurance Court had not been communicated to him. According to the Finnish Government, the non-communication did not constitute violation of article 6, because the obtained documents had primarily referred to the appeal and subsequent observations and to the facts of the case but had not contained any new evidence or revealed new facts that would have affected the Court's conclusion. The non-communication was undisputed. The ECtHR stated that the obtained opinion had constituted reasoned opinions on the merits of the applicant's appeals and the objective of these opinions was to influence the decision of the Insurance Court. Hence, the ECtHR concluded that it should have been for the applicant to decide, whether to comment on these opinions or not. As no such possibility had been reserved to him by the Insurance Court, the applicant did not have the possibility to participate properly in the proceedings.[534] Thus, there had been a violation of article 6 and obliged the respondent State to pay damages to the applicant.

In the aftermath of the ECtHR's decision, the Committee of Ministers of the Council of Europe invited Finland to inform it on the measures taken in consequence with the decision. In its communication, the government of Finland informed that the damages had been paid to the applicant in accordance with the decision. In addition to this, the government accentuated the possibility to seek the annulment of the domestic decisions on the grounds on the violation of article 6.[535]

Although decisions of ECtHR do not cause annulment of the domestic decisions as such, the government's communication depicts that they are closely followed. The ECtHR's decision on the violation of article 6 provide

534. 'The Court notes that the opinions in question constituted reasoned opinions on the merits of the applicant's appeals, manifestly aiming at influencing the decisions of the Board for Unemployment Benefits and the Insurance Court by calling for the appeals to be dismissed. Whatever the actual effect which the various opinions may have had on the decision of the Insurance Court in the final instance, it was for the applicant to assess whether they required his comments. The onus was therefore on the Insurance Court to afford the applicant an opportunity to comment on the opinions prior to its decision.' See *KS v Finland* (ECtHR) § 23.
535. See 'Resolution ResDH (2006) 60 Concerning the Judgment of the European Court of Human Rights of 31 May 2001 (final on 12 December 2001) in the Case of K.S. against Finland.'

286 grounds for annulment within the domestic legal system. Thus, the violation of due process can cause the decision to be set aside, to lose its validity because the process in which it was reached did not accommodate the moral position adopted in the due process program of the legal system.

Article 6 of ECHR on the right to fair trial has several different elements. The article addresses equality of arms, the independent constitution of the court, and publicity of the proceedings. In addition to these, the article addresses the access to court as well as access to enforcement. Access to enforcement is not specifically provided for in the convention but has been established in the case law instead.

The case law concerning access to enforcement depicts a different aspect of the right to fair trial than equality of arms and adversarial proceedings, although it does not provide us with any additional insight to justification beyond the analysis of due process as law's internal program. Still, access to enforcement as a part of due process benefits the objective of this study in another way, namely for understanding private enforcement. The case law on access to enforcement is moral communication about the core of the legal system, as it draws the boundaries of legally recognized use of coercion. Thus, we may observe these boundaries as the self-understanding of procedural law concerning coercion, while bearing in mind the unresolvability of moral positions.

In Horsby v. Greece, ECtHR established that the right to execution of judgment is included within the right to fair trial. The argument behind this position accentuates that access to court would be ineffective without the execution of the final and binding judgment.[536] Furthermore, the scope of

536. "The Court reiterates that, according to its established case-law, Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see the Philis v. Greece judgment of 27 August 1991, Series A no. 209, p. 20, para. 59). However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see mutatis mutandis, the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, pp. 16-18, paras. 34-36). Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6 (art. 6); moreover, the Court has already accepted this principle in cases concerning the length of proceedings (see most recently, the Di Pede v. Italy and Zappia v. Italy

access to justice has been elaborated in Burdov v. Russia, where the ECtHR established that some delay in enforcement is acceptable as long as it does not impair the litigant's right.[537]

It has also been established that the enforcement provided should be exhaustive and full, and no partial enforcement suffices to accommodate the demands set by the case law.[538] However, certain procedural steps may be expected of the litigant to access enforcement.[539] Still, the States have to provide the necessary means for enforcing compliance from private individuals but they cannot be held responsible for the non-compliance of these third parties.[540]

Thus, law's internal program of due process criteria, which is grounded in the moral discourse of human rights, dissects all aspects and phases of dispute resolution process. This criteria addressed both the threshold of litigation costs,[541] actual conduct of proceedings as discussed above, and even the enforcement phase after the final decision has been rendered. Unlike sovereignty or private autonomy, elements of these moral communications about dispute resolution can be located overall.[542] Sovereignty, in turn, is to be found in territorial jurisdiction and structure of cross-border legal instru-

judgments of 26 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1383-1384, paras. 20-24, and pp. 1410-1411, paras. 16-20 respectively)." See '*Hornsby v Greece* (ECtHR) § 40.

537. *Burdov v Russia* (ECtHR) § 35.

538. 'La Cour rappelle à cet régard que l'exécution doit être complète, parfaite et non partielle. Dans son arrêt Popescu c. Roumanie précité, elle a jugé que l'attribution au requérant «d'un terrain équivalent qui correspondait pour la plupart de ses caractéristiques déterminantes au terrain fixé et individualisé par le tribunal» (§ 68) ayant eu à statuer sur le droit de propriété du requérant, constitue un défaut d'exécution qui, dans certaines circonstances, peut constituer une restriction du droit d'accès à un tribunal incompatible avec l'article 6 § 1 de la Convention (voir, §§ 68 à 76). En l'espèce, la Cour observe que le requérant a perçu une indemnisation pour faute lourde de l'Etat du fait de son refus de prêter concours à l'exécution de la décision de justice litigieuse. Cette compensation ne saurait cependant combler la carence des autorités nationales dans l'exécution de l'arrêt de la cour d'appel du 11 avril 1988. Il demeure que cette décision n'a pas été exécutée ad litteram dès lors que le requérant n'a jamais pu recouvrer la jouissance de son droit de propriété.' See *Matheus c France* (ECtHR) § 58.

539. *Burdov v Russia (no 2)* (ECtHR) § 69.

540. *Fociac v Romania* (ECtHR) § 74, 78.

541. *Kreuz v Poland (no 1)* (ECtHR) § 60–67 In its judgment, ECtHR holds that court costs per se do not constitute a violation of article 6, but, in casu the requested court fees posed a disproportionate restriction on the applicant's right to access the court.

542. Of course, due process criteria leans on the connection between systems of law and politics. The authority of ECtHR stems from the delegation of power from the contracting States to the treaty instrument, and the judgments have no direct impact on the annulment of domestic decisions without a contribution from the national court system and national legislators. Regardless, as human rights discourse can be employed to take the role of source of justification, this aspect remains beyond the scope of this study.

ments. Private autonomy is located in consent of the parties as an alternative jurisdiction and in respect of the parties' freedom of contract. These effects take place on an abstract level, whereas due process criteria depicted here functions on a more concrete level. Self-evidently, corresponding examples of private autonomy can be located on the same concrete level in sections of procedural legislation providing for parties' freedom of contract also within the court proceedings or in acceptance of arbitral clauses. Concrete workings of sovereignty can be found in treaty stipulations on margins of appreciation and in *ordre public* clauses, which aim at procuring the unity of national legal systems.

Why, then, the sudden jump between levels of abstraction? As stated above, moral communication resides in the environment of all social subsystems but is no longer connected with any particular subsystem, as it has detached from the dominion of religion. There is no constitutive value beyond morality, which would provide us with a reference point external to the legal system – which was the case with sovereignty and private autonomy. Hence, we can observe moral communication as a specific form of communication applying two codes simultaneously, that of morality and that of a social subsystem, but moral communication does not give an answer to existence of morality nor does it solve moral dilemmas.

This leads us to the following. Human rights in general and access to justice in the particular context of dispute resolution are moral communications about law that form lasting structures within the legal system. The non-compliance with these structures, namely with the due process criteria, may lead to disappointment of expectations and to setting aside the judgment rendered at the end of a dispute resolution procedure. Thus we find the elusive, yet emerging source of justification in the structuralized moral communication of due process criteria. It should be noted that this is the emerging narrative that adopts the role of source of justification.

8.2.2 WHAT IS WRONG WITH ACCESS TO JUSTICE?

The due process criteria represents the positivisation of moral communication about dispute resolution. This is to say that due process is a reflection of the structural coupling the legal system presumes it has with a social system of ethics. I have called this overarching moral communication access to jus-

tice, which is gaining ground as a prerequisite for a decision's validity. As a justificatory narrative access to justice derives its force from fairness, from the ideal of justice. Its shortcomings follow from this high level of abstraction, as the law's difficult relationship with justice starts to unravel one of law's paradoxes.

In Luhmann's systems theory justice has been iven the role of law's contingency formula. As a contingency formula, justice provides contingency for the legal system. In this perspective, justice hides the indeterminacy of the possibility of arbitrary decisions.[543]

However, the point remains that law is unable to hide from the paradoxical nature of adopting justice as its necessary formula of formulas, as the super-programme, which surpasses all other programmes within the legal system. The paradox still remains. And the question of justice reveals it. This is the inherent tension ever-present in law. Re-entry of transcendence is mandatory for law but at the same time its rationality goes beyond law. As Teubner depicts it:

> The cause for the internal revolt, for the subversion from within the law in the very name of justice, lies in the glaring failure of law to live up to its own promise - to supply convincing reasons for its decisions, to produce a legitimate basis of rational argumentation that people accept as just. Legal reasoning does not and cannot justify legal decisions - anyone who has had to decide a legal case has been exposed to this disturbing experience. In other words: law cannot stop in principle the intrusion of irrationality into its rational world of norm-oriented decision making and reason-based argument.[544]

According to Teubner, law's desire for justice cannot be fulfilled within the framework of modern law. As such, "juridical justice as societal justice continues to offer the false promise of salvation".[545] At this point, it is necessary to refer back to the surprising similarities between Luhmann and Derrida. The *non liquet* of law is present, law is rendered inoperable by its paradoxical nature, it is turned into non-law while remaining simultaneously law.

As discussed above, moral communication tends to polarize moral posi-

543. Luhmann, *Law as a Social System* (n 74) 214–217.
544. Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' (n 381) 13.
545. ibid 23.

290 tions due to its symmetry. Due to the intrinsic aspect of morality, it does not provide a solution for the question about the source of morality or for specific moral dilemmas. This means that we can access only the individual operations of moral communication on law but we have no external constitutive reference to another subsystem, which was the case with structural couplings to systems of politics and economics. This is the dilemma of moral dilemmas: we cannot solve them but only observe them.

However, this does not mean that moral communication about law is without effect. Instead, moral communication may form long-lasting structures such as programs within the legal system, which is the case with due process.

The case law on article 6 is a prominent example moral communication about dispute resolution. It gives us a well-defined rule-like system of instances, in which moral communication about dispute resolution needs to be taken into consideration. In line with Luhmann's view on moral communication, the due process criteria that rise from the case law serve a purpose within the legal system and are necessary for its identity.

Still, these individual decisions on due process do not solve the deadlock on the abstract macro level of justification, it simply transmits the issue of justification to the micro level, where the fairness of individual dispute resolution procedure justifies the authority bestowed to it. Access to justice works well on the micro level of individual processes but on the macro level of abstract justification its justificatory power falls short of that provided by sovereignty or private autonomy.

Access to justice as a source of justification brings us to the core of law's own paradox that law is violence, and in moral communication it cannot be hidden. This is problematic, as the legal system needs to understand its entirety, its identity as a system and continuation of the system/environment difference as coherent.

It leads us to the following conclusion. Moral communication about law does not directly give us an answer to the quest for justification of dispute resolution and technology. It provides us with an internal programme of the legal system, i.e. the due process criteria that can be employed as a source of justification and is starting to claim ground as such.[546] However, the criteria have no other constitutive foundation than the morality of communication.

546. For example, the possibility of seeking annulment of a domestic decision on the grounds of due process violations emphasizes the importance of positivised due process criteria at the expense of other functions of civil procedure.

It is internal to law and brings the issue of justification back within the law. But, here we face the limits of law, as the legal system is unable to respond to the challenge.

Thus, the due process criteria as a source of justification lead us to the paradox of law, where violence and the pursuit of fairness collide. However, the quest for justification does not end here, as moral communication does not state that justification would be irrelevant to the legal system. Instead, moral communication has a place within society and the legal system. The legal system cannot complete its need for justification but neither can it repudiate it. In other words, we have reached the end of the line, a *non liquet*.

8.3 THE FUTURE OF ACCESS TO JUSTICE IN DISPUTE RESOLUTION AND TECHNOLOGY

Although moral communication does not provide solutions to moral dilemmas, it is by no means irrelevant to the legal system or to the overall society.

As the example of access to enforcement shows, due process criteria provide the legal system with a long-lasting program. This program is based on moral communication but applies the code of legal/illegal and plays an important role as the blueprint for "acceptable" dispute resolution. As such, this moral communication provides us with an established position to evaluate the quality of dispute resolution and the level of procedural justice.

As becomes apparent, justification cannot be derived from rules although such rules provide a reflection. These rules are fundamentally guidelines for providing fairness, not a definition of fairness. In Walter Benjamin's terms, they are *Richtschnur*, a word translating both into a legal principle as well as a mason's plumb bob, which is used for vertical measurements in construction.[547]

However, due process criteria leave us with some comfort, although they do not provide us with a solution for the never-ending quest of justification.

547. See Walter Benjamin, 'Zur Kritik der Gewalt' in Rolf Tiedemann and Hermann Scweppenhäuser (eds), *Walter Benjamin Gesammelte Schriften Band II.1* (Suhrkamp Verlag 1991) 200. "Darum sind die nicht im Recht, welche die Verurteilung einer jeden gewaltsamen Tötung des Menschen durch den Mitmenschen aus dem Gebot begründen. Dieses steht nicht als Maßstab des Urteils, sondern als Richtschnur des Handelns für die handelnde Person oder Gemeinschaft, die mit ihm in ihrer Einsamkeit sich aus einander zusetzen und in ungeheuren Fällen die Verantwortung von ihm abzusehen auf sich zu nehmen haben."

292 It gives us a way forward. Concretely, this particular moral communication about dispute resolution, the case law of ECtHR, relays the message that enforcement matters. It gives guidelines on how enforcement should be provided for. This particular moral communication seems to convey that also the cases remaining under the litigation threshold need to be granted access to courts, and, as a part of this, access to enforcement.

8.4 CONCLUSIONS

In this chapter I have examined the possibility of finding the justification for private enforcement from the structural coupling between law and ethics, which in relation to dispute resolution takes the form of the justificatory narrative of access to justice. As a justificatory narrative, access to justice calls attention to the content of the dispute resolution process, whereas sovereignty emphasises the public interests and consent the private interests of the parties. Unlike these other narratives, ethical communication about dispute resolution does not rely on the constitutive authority of the state or the will of the parties but instead derives its explanatory force from fundamental rights.

The quality of the resolution process also has a role in the traditional ideal model depicted in section 5.1, in which the interplay between private ordering and public enforcement is organised so that only private decisions reached in due process are granted access to the public enforcement mechanism. Access to justice, so to speak, is simultaneously the prerequisite for accessing public enforcement as well as the defining objective of the dispute resolution process.

Although due process perspectives have been a part of procedural law for quite some time, access to justice as a source of justification is a relative newcomer. The importance of access to justice has increased significantly alongside other fundamental rights in the aftermath of WWII. Hence, references to access to justice are becoming increasingly common in dispute resolution. Institutional formulations of access to justice can be found in human rights conventions as well as in procedural rules of arbitration institutes but it should be noted that essentially these stipulations still derive their authority from other sources, from the state or from private autonomy. The question is whether access to justice alone could adopt the role of justification.

The justificatory narrative of access to justice acknowledges the need for a more comprehensive *in casu* analysis and an analysis of the reality of the current conflict management environment, where the protection of due process is provided by miscellaneous and fragmented combination of material legislation, soft law, institutional practices and multilateral conventions.

However, the shortcomings of access to justice as a justificatory narrative follow from its unique nature: there is no 'other' side of the structural coupling, but only ethical communication about law. This follows from the functional differentiation in modern societies, where ethics are no longer connected with the system of religion or any other social subsystem but take place in the overall society. Still, when the legal system uses access to justice as a source of justification it *presumes* that another subsystem exists on the other side of the structural coupling, which explains why access to justice can adopt the role of justification in the first place.

The fact that ethical communication is located in the overall society also explains why there is no constitutive rationality, like those of the state or private autonomy, behind access to justice. This special characteristic also explains why the possibilities of access to justice in justifying private enforcement without reference to other justificatory narratives is difficult. In theory, access to justice could provide justification for private enforcement if there is a method for verifying that sufficient quality is provided. The problem is that there are few concrete applications that can be derived from this outcome. Similar questions arise as with relation to consent: who decides the sufficient level of access, by which authority should such a decision be made, how is monitoring provided, and so on? It seems that access to justice as a justificatory narrative would require a body that produces precedents for the protection of predictability and the stability of the system, in other words, a mechanism for upholding expectations regardless of disappointment. As a source of justification, access to justice provides few answers but instead leads to a deadlock of contrasting argumentation.

This means that the possibilities of access to justice in justifying private enforcement without the support from other justificatory narratives are limited. Ethical communication about dispute resolution reveals law's embedded violence, the use of coercion, but is unable to hide it from sight, or in Luhmann's terms, de-paradoxify it. It follows from this that

the justificatory narrative of access to justice alone is unable to reconcile the justificatory crisis that has emerged as a result of technologically enabled private enforcement.

PART III: NEW WAYS FORWARD?

9 Beyond Justification

In the previous chapters I have sought justification for dispute resolution and technology from three different sources. Justification based on the structural coupling between law and politics proved out to be unable to address the new techno-legal irritant of private enforcement, as it does not fit within the framework of the nation-state's monopoly on both dispute resolution and violence. Finding justification from the system of economics did not provide further insight, as understanding private enforcement through private autonomy hides the use of coercion. Neither is it possible to seek justification from human rights discourse. As references to ethics reveal the law's paradox, it brings out in the open that the inherent violence of law renders its quest for justice unattainable but yet indispensable.

This analysis has revealed that the justification of dispute resolution is complicated by the mystery of technology, and there is no clear-cut solution for this justificatory crisis. We cannot derive legitimacy for dispute resolution and technology from any single source. The question of private enforcement cannot be addressed by references to delegation of sovereign (state) power, private autonomy of the parties or from the moral communication of access to justice. If these axiomatic principles do not provide us with a way forward, where should we turn next? If looking in the abyss has not provided the desired results and law's paradox is unravelled before our eyes, have we reached the end, or at least *an* end? If private enforcement cannot be justified by references to politics, freedom of contract or ethics, should we just discard the quest and announce this model of enforcement unacceptable without further inquiry?

This does not seem to be a plausible option, as dispute resolution and technology is constantly gaining more ground and the validity of private enforcement has not been contested – at least at the time of writing. Yet, we cannot derive what ought to be from what is, i.e. we cannot maintain the claim that private enforcement should be acknowledged legally because it exists in practice. Still, the legal irritant needs to be addressed in order to overcome the justificatory challenge brought on by implementing technology to dispute resolution.

In this chapter I explore two alternative ways of understanding the justification of dispute resolution and technology. First, I shortly describe the

interrelationship of justificatory constructs as a source of justification. The question I ask is, is there a mode of interplay that could provide us with a better understanding? This attempt aims to reach a similar way of seeing enforcement as that of the traditional ideal model of cross-border enforcement depicted in chapter 5.[548]

After this, I make a short excursion to the system of use of ICT. The objective is to demonstrate how the question of private enforcement could be bypassed without stumbling to the justificatory crisis. This analysis takes us to the decentralized technological infrastructure of crypto currencies and depicts how private enforcement relates to smart contracts, self-fulfilling contractual arrangements that leave no room for the question of trust. The question of justification, and that of private enforcement, changes its form here; Nietzsche's abyss looks back at us. Here I conclude my quest for justification by reallocating the problem beyond law.

9.1 JUSTIFICATION AS INTERRELATIONSHIP

Sovereignty, private autonomy and access to justice all adopt the role of providing justification for dispute resolution. However, none of them alone is able to address the justificatory crisis brought on by implementing technology to dispute resolution.

An interesting perspective relates to temporal sedimentation of these justificatory constructs. The development of these structural couplings between law and other societal subsystems portrays the reactionary nature of society. Through new structural couplings the legal system has strengthened its immune system against irritants emerging in the broader society.

The link between law and politics has taken the form of sovereignty. As depicted in chapter 6, sovereignty became the model for justifying territorial jurisdiction, which was first established by the Westphalian Peace Treaty in the aftermath of the thirty years' war. Incidentally sovereignty also provided justification for the nation-state's monopoly on violence and centrally organized dispute resolution. As such, sovereignty as a source of justification has its roots in the 17th and 18th centuries, although the concept has been redefined and reinterpreted countless of times since then.[549]

Private autonomy and the importance of consent as a source of justification is of more recent origin, the formulation of contract as a meeting of

548. See graph 2, section 5.1.2.
549. Mutanen (n 404) 28–.

minds dating back to classical contract theory of the 19th century. However, the reforms of consumer protection, employment rights, tenant protection and other means of providing protection to the weaker party have caused a decline in the importance attributed to the role of consent in the 20th century.[550] Contractual law has reacted to this change by developing alternative ways of handling contractual relations, further improving the doctrine's abilities to pinpoint legally relevant facts. The remnants of private autonomy's precedence can still be found in ADR doctrine.

Access to justice, in its turn, represents a more recent line of legal thought. Moral communication about law, taking the form of human rights discourse, is a product of the 20th century. Access to justice differs significantly from the concepts of sovereignty and private autonomy, as it is not constitutive but a specific form of communication instead. This form of communication can no longer be located in one single subsystem, but instead it is found in the environment of social systems. This enables moral communication within all subsystems of the society, but does not give us an external reference point outside the law, as is the case with sovereignty and private autonomy.

Unlike sovereignty and private autonomy, access to justice cannot draw justificatory weight from ultimate definitions, from institutions like democracy or self-determination, which justify themselves in a circular loop. Instead, access to justice splits into more nuanced demands on the content of resolution proceedings; it adopts the role of law's internal program as the due process criteria. Hence, moral communication about law takes place within the legal system. This construction leads back to itself on a circular orbit, but unlike constitutive constructs it has no concrete answer to offer.

Sovereignty may provide justification based on the authority of the democratic principle, private autonomy based on the fundamental importance of self-determination. Hence, we can justify the public courts by saying that in the end they are the institutions of the nation-state, safeguarding the interests of the state and our interests, which overlap. We can justify consent-based dispute resolution by referring to self-determination. End of discussion. Access to justice provides justification for dispute resolution by saying that the fairness of the procedure justifies the use of force within that procedure. It leaves the question open on a theoretical level, to be solved – or more suitably, to be justified – *in casu*. Thus the issue is delegated to the decision whether the case at hand is the same or different as the previous cases. This open-

550. Atiyah (n 477) 716–726.

 endedness is descriptive of human rights discourse.[551]

In this chapter, I bring another newcomer to the debate of justification of dispute resolution, the structural coupling between law and the emerging social system I have titled the use of ICT. As the social system of the use of ICT is still in its formative stage, it is difficult to predict what form exactly such a structural coupling would adopt. The term used could refer as well to smart contracts as to technological infrastructure as law, or to decentralized verifiability. The key element of this coupling is the allocation of trust by the infrastructure to the infrastructure. At this point, it suffices to say that this structural coupling, and the source of justification it provides, is very much the product of the 21st century.

These justificatory concepts, like the other social subsystems they link with, are not commensurate with each other, as such. This is partly explained by their historical roots, as different constructs highlight the context in which they emerged. The sedimentation process, where fundamental principles of law become a definitive part of law's self-understanding,[552] takes time and these justificatory concepts are in different stages of their processes.

Also, justificatory concepts are not exclusive. The emergence of new sources of justification does not undo the importance of previous sources or shatter the existing structural couplings. Neither is it clear-cut which methods of justification are used in which contexts or even if they are used alone. Outside this theoretical pursuit, justificatory concepts interact, become entwined, overlap and are applied together, separately, incongruently or not at all. The quest for justification has the objective of dissecting the self-understanding of the doctrine of dispute resolution, and no unambiguous starting points for reconstruction can be found. This said a part of this quest has been to depict the interrelationship between these incommensurate sources of justification.

So, we come to the conclusion that the playing field of justification has more than two teams participating in the game at the same time: the interests of nation-states, the freedom of the parties, the demands for equality through due process criteria, and technological innovations all come together in the issue of private enforcement. Although none of these can single-handedly adopt the role of justification, none of these positions can be overlooked: they portray the different interests and demands that *dispute resolution and technology* and private enforcement need to face in order to become feasible

551. See e.g., Koskenniemi (n 457) 563–564.
552. On sedimentation of legal values see Tuori (n 406) 197–216.

options for traditional dispute resolution.

No simple perspective provides an answer to the justificatory crisis brought on by the implementation of ICT to dispute resolution. As this is the result of the quest for justification on the abstract level, the same results apply on the concrete level of organizing dispute resolution. The justificatory narrative of sovereignty has long provided a model for justifying ADR, and theoretically it still provides a point of reference for justification. However, this potential is not easily actualised, as sovereign states' mechanisms of control are not directly applicable to phenomena such as private enforcement. On a concrete level, this calls attention to possible areas of overlap. The co-operation of different systems that form the operational environment for private enforcement could provide concrete methods of control. Concretely, such co-operation between different interest groups would suggest finding solutions from the interface between private and public dispute resolution, e.g. through trustmarks.

The problems in finding justification for private enforcement emphasise the importance of the interface between public and private governance. Although this division between private and public has existed before, the implementation of ICT to dispute resolution is further intensifying the discrepancies between these two spheres. The tension itself seems to run deep in the doctrine of procedural law. One possible interpretation that follows from this unresolvedness of the justificatory crisis is that the tension itself is necessary for dispute resolution. This interpretation would suggest that the different justificatory narratives have been able to balance each other out, and by doing so have managed to leave law's paradox unravelled. In any case, the co-operation of justificatory narratives reflects the complexity of justifying dispute resolution.

9.2 STRUCTURAL COUPLING TO THE USE OF ICT?

As stated above, justificatory constructs of sovereignty, private autonomy and access to justice entwine and interact. Combining their justificatory forces helps us to understand *dispute resolution and technology* both in relation to dispute resolution in its entirety and map out the future challenges of its application, private enforcement being the most urgent one of them. However, the overview we have leaves much to be wished for, as it is frag-

mented and unfocused. Before contending ourselves to this incomplete picture, one further excursion is taken.

In chapter 3 I examined the emerging social system I called use of ICT. The use of ICT is still in the process of diverging from the system of technology. To summarize, by the system of technology I refer to technology in its traditional meaning, as the study of the cunning of the hand, of knowledge, which includes technologies such as agriculture as well as technological artefacts and their development. Technology itself is a system but does not operate based on communication, thus, it is not a social system. The use of ICT, in turn, refers to the social element that modern technology brings in its wake. The use of ICT, which operates through the transmission of information, is a social system.

Since the introduction of the Internet, a new phase of technological development has begun, leading to the introduction of a new type of technology, namely information and communication technology. As I argued in chapter 4, the emergence of this technology has created a social change, a society-wide discrepancy to which all societal subsystems try to find an answer for. The decisive difference between technology in its original meaning and information and communication technology these two forms of technology is that the latter operates based on meaning; it incorporates a communicative element. I have interpreted this characteristic as a sign of a new emerging social system – of use of ICT – which cannot be subsumed to the earlier technological system. The relationship between systems of technology and of the use of ICT resembles that of social systems with system of consciousness.

EXCURSION 2: SMART CONTRACTS

As discussed in chapter 5, different social systems form the operational environment for private enforcement and for implementing technology to dispute resolution. I have identified these systems as the legal system, the political system, the system of economics, and the use of ICT. In chapters 6 to 8 I have examined the potential of the three first mentioned systems to justify private enforcement. In this section I briefly address the question of whether the use of ICT might at some point provide its own justificatory narrative for private enforcement.

At this point it has become evident that the resolution of low intensity online disputes is an urgent matter to address. As these disputes are often cross-border, the costs of resolving them in national courts often exceed the value of the case and therefore traditional litigation is not a real feasible option. The existence of actual redress mechanisms is vital for e-commerce, as without them consumers' willingness to trade online and cross-border might decrease. Private ODR has emerged to improve trust and to encourage online trade but without a method of enforcement, private ordering is often left without an actual effect. Different alternatives for steering online behaviour have developed, e.g. "soft" instruments such as user reviews, reputation systems, chargebacks and trustmarks.[553] Other soft law instruments, like industry-specific codes of conduct, best practices, and self-regulation could also provide soft methods for steering online behaviour. These methods, however, mostly impact future behaviour and cannot force compliance in individual cases.

Better tools for redress are still under discussion but enforcing ODR as arbitration would require the help of national courts and would cause court fees at the enforcement stage. Of course, digitisation of the courts is another issue that could partly reduce the cost and time of court proceedings and simultaneously provide convincing protection of due process. Still, private enforcement, where the combination of e-commerce platform, ODR service, and payment mechanism enable forcing compliance without additional transaction costs, provides the most convincing solution to the problematic issue of enforcing decisions of low-intensity disputes. Private enforcement comes with a multitude of other issues that are not easily solved, as private use of coercion bypasses the state's monopoly on violence and circumvents state control as the prerequisite of enforcement. Although private providers are bound by the national legislation of their place of business, such norms often fall short of regulating the due process of private enforcement. The issue becomes even more complicated when the elements of dispute resolution and use of force are disguised as insurance models or contractual issues. This said, private enforcement seems to fulfil a need for redress but the solution is somewhat controversial.

A new chapter of private enforcement comes in the form of cryptocurrencies, where trust is allocated *by* the infrastructure *to* the infrastructure. The technological means for addressing the challenge of ODR through crypto-

553. For an overview on escrow services, feedback systems, and trustmarks, see Cortés (n 241) 60–64.

304 currencies, i.e. how to provide effective enforcement for ODR decisions and maintain due process at the same time, are quickly gaining momentum as the technological applications are further developed. The infrastructure of cryptocurrencies can adopt the position of enforcement without resorting to centralized authorities such as nation-states or the banking sector. Thus, these solutions seem to share the potential of reducing enforcement costs, but it is still unclear whether they could provide a lasting solution. In the following, I shortly describe blockchain-based cryptocurrency infrastructure and its application in smart contracts to shed light on one of the possible futures for dispute resolution and technology, and for private enforcement.

Cryptocurrencies are digital, decentralized and anonymous peer-to-peer networks. The most famous example of cryptocurrencies is Bitcoin, which was developed by Satoshi Nakamoto in 2008 and later on released as open source software.[554] The original idea was to overcome the shortcomings of traditional trust-based currencies, which out of necessity always rely on the authority of central banks, and enable reversal of already completed transactions in case of fraud or when a dispute resolution procedure has led to setting aside the transaction.

Modern cryptocurrencies operate by including a cryptographically secure ledger, a *blockchain* of earlier transactions, which provides information security and transparency. The ledger of past transactions is public,[555] and no transaction can be removed from the ledger. The rules on how a transaction can be added to the block chain safeguard the system from external in-

554. See Nakamoto's seminal white paper, Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' <http://nakamotoinstitute.org/bitcoin/> accessed 14 October 2015. A point of interest is that Nakamoto's true identity is still unknown and there is speculation, whether the technology was in fact developed by a group of computer scientists instead of a single person. The veil of mystery has gained further weight by his disappearance from the bitcoin context in April 2011. See Joshua Davis, 'The Crypto-Currency, Bitcoin and Its Mysterious Inventor' *The New Yorker* (10 October 2011) <http://www.newyorker.com/magazine/2011/10/10/the-crypto-currency> accessed 27 October 2015.

555. Professor Joshua Fairfield describes the ledger through the following example: "For example, imagine a list on a whiteboard in a dormitory floor, keeping track of who paid for pizza last time. The advantages to such a list – public availability and ease of editing – are clear. The disadvantages are equally clear. Someone might attempt to edit the list to their personal advantage. A solution that immediately suggests itself is that the dorm RA might be entrusted to keep the list. Yet then there is the concern that the RA may make a mistake, or be unavailable over the weekend, or be untrustworthy and edit the list to benefit himself. What is needed is a public ledger that is constrained by rules of consensus to prevent individuals from modifying the list to their exclusive benefit. That is the central technology underlying Bitcoin: the 'trustless public ledger' (TPL)." See Joshua Fairfield, 'Smart Contracts, Bitcoin Bots, and Consumer Protection' (2014) 71 Washington & Lee Law Review Online Edition 35.

terference such as fraud or hacking. In order to be added to the block chain, a transaction needs to include a solution to a specific mathematical problem that is designed to be computationally difficult and time-consuming to solve but easily verified. Thus, validation of transactions requires resources and volunteers doing this are rewarded by new units of cryptocurrency in a process called "mining". There is no central registry of the transactions but instead the block chain is distributed to all computers within the network. Mining simultaneously enables the decentralized verification of transactions and provides the means for creating new units of the currency.[556]

The legal reactions to cryptocurrencies often focus on their qualification as currency or digital assets and the issue of regulation,[557] and other applications of the block chain infrastructure still remain mostly in the margins of the discussion. However, some remarks on other applications have emerged. For example, Pasquale and Cashwell analyse legal automation and its impact on the legal profession by distinguishing different scenarios depending on high or low level of regulation and high or low susceptibility to automation. In their categorization blockchain applications exemplify the scenario of high regulation and high automation, where public functions are outsourced to computation. As Pasquale and Cashwell point out, the infrastructure could be employed to take over legally complicated functions, which is evident in the unconventional proposals on enforcement regimes that would replace

556. As François Velde describes, "Bitcoin solves two challenges of digital money – controlling its creation and avoiding its duplication – at once". François Velde, 'Bitcoin: A Primer' (2013) 317 Chicago Fed Letter <https://www.chicagofed.org/publications/chicago-fed-letter/2013/december-317> accessed 30 October 2015.

557. See e.g., Shawn J Bayern, 'Dynamic Common Law and Technological Change: The Classification of Bitcoin' (2011) 71 Washington & Lee Law Review Online Edition 22, 22; Reuben Grinberg, 'Bitcoin: An Innovative Alternative Currency' (2011) 4 Hastings Science and Technology Law Journal 160; Ed Howden, 'The Crypto-Currency Conundrum: Regulating an Uncertain Future' (2015) 29 Emory International Law Review 741; Eric P Pacy, 'Tales from the Cryptocurrency: On Bitcoin, Square Pegs, and Round Holes' (2014) 49 New England Law Review 121. Brito et al. examine bitcoin from a policy perspective in their comprehensive article. See Jerry Brito, Houman B Shadab and Andrea Castillo, 'Bitcoin Financial Regulation: Securities, Derivatives, Prediction Markets, and Gambling' (2014) 6 The Columbia Science and Technology Law Review 144, 148. De Filippi observes that although regulation of cryptocurrencies is needed, at the current stage self-regulation would probably provide better results, as it would not hinder future innovation. See Primavera De Filippi, 'Bitcoin: A Regulatory Nightmare to a Libertarian Dream' (2014) 3 Internet Policy Review <http://policyreview.info/articles/analysis/bitcoin-regulatory-nightmare-libertarian-dream> accessed 5 October 2015. Interestingly enough, ECJ has also taken a position regarding cryptocurrencies in October 2015. In its preliminary ruling the court made an analogy between virtual and traditional currencies, as it ruled that the trade of virtual currencies is exempt from value added tax as is the case with traditional currency. See *Skatteverket v David Hedqvist* [2015] ECJ C-264/14.

306 the traditional legal authorities.[558] Following a similar line of thought, Fairfield states, "it is time to start looking past routine financial applications of such [trustless public] ledgers as currencies".[559]

If the blockchain has such disruptive potential to earn these statements, how is the potential realized? The blockchain enables the development of complex transactions of digital assets as well as decentralized autonomous organizations.[560] The most interesting examples of these applications are the self-executing transactions called smart contracts, which could be defined as generalized computation taking place in the blockchain.[561] It follows from this that smart contracts are contracts embedded in software code that include the contractual arrangement, the preconditions that define the contractual responsibilities and the actual execution of the contract.[562]

To say that smart contracts are self-enforceable means that the software executes the contract, e.g. allocates digital assets, autonomously and regardless of trust between the parties. Payment of the funds is not dependent on voluntary compliance nor is it affected by later changes in the position of the parties (e.g. bankruptcy). Simply put, digital assets are transferred to the smart contract and later on allocated by the software according to the contractual obligations. No external monitoring or enforcement is needed and self-execution functions as conflict prevention. It is even possible to include external data points to a smart contract, which could be employed for the purposes of obtaining evidence.[563]

558. Frank A Pasquale and Glyn Cashwell, 'Four Futures of Legal Automation' (2015) 63 UCLA Law Review Discourse 26, 36–37.
559. Fairfield (n 555) 38.
560. The white paper on Ethereum platform provides further technical information about these applications of the block chain infrastructure, 'White Paper A Next-Generation Smart Contract and Decentralized Application Platform' <https://github.com/ethereum/wiki/wiki/White-Paper> accessed 30 October 2015.
561. It should be noted that the concept of smart contracts is not new, although the blockchain infrastructure for their realization is. Legal scholar Nick Szabo has defined smart contracts already in 1995 as 'A set of promises, including protocols within which the parties perform on the other promises. The protocols are usually implemented with programs on a computer network, or in other forms of digital electronics, thus these contracts are "smarter" than their paper-based ancestors. No use of artificial intelligence is implied.' See Nick Szabo, 'Smart Contracts Glossary' (1995) <http://szabo.best.vwh.net/smart_contracts_glossary.html> accessed 30 October 2015.
562. The legal status quo of smart contracts is undecided, as there are no policy proposals and case-law and legal research on the new phenomenon is still scarce. Also a uniform definition of the term is lacking. However, Fairfield examines the potential of smart contracts for better consumer protection, as block chain applications could improve consumers' possibilities to negotiate their own contractual terms in e-commerce. See Fairfield (n 555) 43.
563. For a concrete example of drafting a smart contract on the Ethereum platform, see Koulu,

For example, we could imagine dispute resolution as a smart contract, where both parties transfer money to the program or a neutral third party concludes the transactions based on her authority. The lines of code of the contract could be only changed based on the third party's decision but the parties could not revise the code. The legal issue between the parties (e.g. "the sold item never arrived and the buyer requests her money back") is a factual circumstance that proven true gives the buyer the right to obtain the money. We could imagine an interface with the transport company that could provide the information whether the item was indeed received by the buyer. This information would then be accessed by the smart contract, which would then allocate the money depending on the facts. The possibilities of this for variation and automation are numerous.

The question remains whether the idea of smart contracts could be used to take the place of dispute resolution and enforcement, as the technology for this does exist. Most probably the technological innovations will develop and be applied within the sphere of freedom of contract before the legal system can come up with a way to address the issues and adopt its own applications of blockchains to its structures such as the court system.

It is unavoidable that the private enforcement of e-commerce sites and the self-execution of smart contracts change our understanding of both dispute resolution and enforcement. On the one hand, it is possible that self-executing smart contracts go further than private enforcement of e-commerce platforms and contribute to the justificatory crisis by making it worse. In decentralized dispute resolution, the use of force would no longer be limited to the state's monopoly on violence and there would be no state control of due process. It is unclear how removing the nation-state from the equation of enforcement would affect due process and whether it is a good idea in the first place. However, the blockchain infrastructure could solve the difficult issue of providing effective enforcement for low-intensity disputes.

On the other hand, law's quest for justification could find a resolution here, as the external reference would then be to the system of use of ICT, which in its turn could transform the question to its own medium of computation. On a macro level, this would mean taking a step closer to Lawrence Lessig's impression about software code as a regulatory concept.[564] On the micro level of individual cases, it is unclear whether use of ICT could provide

'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement' (n 257).

564. Lessig (n 261) 5–6.

justification, as commoditized applications are still lacking. Still, there is the potential for providing protection of due process through the code embedded in applications.

As stated, the whole field of cryptocurrencies is filled with questions with only few answers. The potential is there but so are the challenges. The automation of dispute resolution and enforcement through the block chain could both improve and impede access to justice. The block chain functions as a public ledger, which means that its applications in dispute resolution could cater to transparency and the need for precedents. From this perspective, disputes would belong also to the society and not only to the parties or the neutral third. Then again, the lines of code behind smart contracts are not neutral but legally relevant instead. Although it is likely that the commoditization of smart contracts will take place through web-based solutions, this does not completely erase the issue of digital literacy. As legally relevant decisions are embedded in code, the issue of programming skills becomes more pronounced and could result in power discrepancies between the parties. In other words, it remains to be seen what use smart contracts will be in dispute resolution, but it is clear that their use comes both with possibilities and challenges.

9.3 WHAT ABOUT THE FUTURE?

The implementation of technology in dispute resolution has caused a justificatory crisis within the legal system, where new technologically augmented alternatives to enforcement contest our traditional understanding of the use of coercion. The justificatory crisis cannot be solved with references to any constitutive authority such as democracy or self-determination, nor is the demand for taking access to justice seriously sufficient to overcome the disruptive potential of technology. In this section I shortly evaluate some ways forward that are partly taken by EU and UNCITRAL projects, and frame future discussion on dispute resolution and technology from the perspective of justification.

It is very likely that future legislation and policy setting as well as other legal practices such as case law and legal science, alongside industries' self-regulation and other soft law instruments, try to address the justificatory crisis by resorting to one or several existing narratives of justification. Although

regulation of cross-border commerce and private regimes is difficult, some combination of soft and hard law is adopted to bring the undecided crisis back to the fold of the legal system. How well are the current projects to this end progressing?

As discussed, UNCITRAL's working group has focused on drafting uniform procedural rules for ODR since 2010. The stumbling block of the work has been the issue of binding predispute arbitration clauses in consumer cases, as discussed in section 6.2.2. The decision of UNCITRAL's Commission to terminate the work in 2016 regardless of possible progress describes the difficulty of establishing sovereignty-based cross-border instruments for ODR. This development also brings the importance of enforcement to the front, as the work has become to a standstill because of differences of opinions regarding methods of enforcing ODR and reconciliation of consumer protection with the easy enforceability of arbitral awards. This incompatibility of different nation-states' interests also portrays that regulatory projects need to adopt a stance regarding enforcement, even when the decision is made to stick with unenforceable ADR methods. It seems that at least this attempt to regulate private ODR has not lived up to the expectations placed on it, and no regulatory framework for binding and/or non-binding ODR can be found within UNCITRAL at the present. The outcome of the project, i.e. the technical notes on ODR, has an unclear meaning and mostly signal UNCITRAL's support for ODR.

The other important regulatory project discussed earlier, the EU's ODR Regulation, focuses on non-binding out-of-court ODR. The chosen approach is understandable, as the regulatory project is designed particularly to address the need for redress mechanisms in B2C cases by developing cross-border ADR models. The outlook behind this is that consumers do not seek redress in their e-commerce disputes because they consider national court proceedings to be expensive, time-consuming and burdensome.[565] It follows from this offset that the development of non-binding ADR schemes would facilitate consumer protection.

The specific objective of the EU regime is two-fold. First, the objective is to ensure coverage of high quality ADR schemes in all Member States for both domestic and cross-border cases, which is achieved by the ADR Directive leaving the choice of methods to the Member States themselves. Second, the objective is to ensure that consumers and businesses can rely on a

565. See e.g., 'Executive Summary of the Impact Assessment on Directive on Consumer ADR and Regulation on Consumer ODR' (European Commission 2011) SEC (2011) 1409 final 3.

mechanism to solve their cross-border e-commerce disputes online, which is achieved by the ODR Regulation that establishes an EU-wide web platform to direct disputes to applicable national ADR schemes.

Implementation of the ADR Directive is taking place at the time of writing. According to article 24 of the ADR Directive, Member States are obligated to provide the Commission with information about competent national ADR entities by January 9, 2016. The ODR Regulation is applied from the same date as the directive when the Commission's ODR Platform is launched.

Taking this into consideration, it remains to be seen what the impact of the EU project will be in practice, and whether its objectives can be reached. By focusing on non-binding ADR, the project has been able to avoid addressing the issue of enforcing ODR decisions. On the one hand, it could be that the measures taken now are not sufficient to improve the lack of efficient redress online, as the focus remains on voluntary compliance without the possibility for binding enforcement. Still, the regulatory framework does not prevent consumers from taking the matter to court,[566] although the issue of litigation threshold still remains. Also, there are other EU instruments that provide possibilities for enforcing decisions through the courts of another Member State, although these schemes are not particularly targeted to online disputes.[567] On the other hand, the ADR Directive provides due process criteria for the ADR schemes, which potentially improves the quality of ODR within the EU.

The difficulty is that ODR is becoming a mainstream solution for low intensity online disputes, as in reality the litigation threshold might prevent solving these disputes in public courts.[568] This means that if out-of-courts ADR schemes do not solve the issue by voluntary compliance, the disputants' options for forcing compliance are scarce, or they have to rely on unregulated private enforcement.

566. Recital 43 of ADR Directive (2013/11/EU).
567. Brussels I Regulation 1215/2012 focuses on jurisdiction, recognition and enforcement in civil and commercial cases and provides means for enforcing a binding judicial decision in another Member State. The European Payment Order established by Regulation (1896/2006) provides a simplified procedure for uncontested monetary claims based on standardized forms. The European Small Claims Procedure established by Regulation (861/2007) is meant to simplify and speed up cross-border claims up to 2.000 €. For more information, European e-justice, 'Monetary Claims' <https://e-justice.europa.eu/content_monetary_claims-40-en.do> accessed 19 November 2015.
568. See Immaculada Barral-Viñals, 'ODR for Consumers' Crossborder Microcomplaints in the EU' (2015).

An issue linked with both of these regulatory projects is whether private enforcement should be regulated or not. The follow-up question is whether regulation is even possible. As UNCITRAL's harmonization is not producing desired results, and the future of the EU's framework for non-binding ODR is still unclear, the path of multilateral cross-border instruments does not seem promising. However, the possibilities of these instruments are not necessarily exhausted yet. The lessons learned from the existing examples seem to suggest that such regulatory projects could gain from more inclusive stakeholder cooperation in the future.

ICANN, on the other hand, applies a different approach, as the UDRP procedure for resolving domain name disputes relies on the direct enforcement of the organization. However, ICANN's practice has led to criticism on the lack of acceptable due process criteria.[569] Although resolution of domain name disputes leaves much to be desired, the criticism of ICANN's multistakeholder model might offer beneficial observations for other governance projects. If regulation of binding ODR or other forms of private enforcement is based on a multistakeholder model, critical attention must be paid to include civil society actors and to improve transparency, participation and democracy of such policy setting.

There is a danger in considering enforcement only as a part of state-oriented judicial redress mechanisms. Technological possibilities of private enforcement already exist and it would be deceitful to assume that these methods are not employed for the purposes of forcing compliance. It is understandable that private enforcement is reworded as insurance models, internal complaint handling systems, or as non-binding ODR especially by the providers of such services, as otherwise it would be necessary to address the issue of bypassing the state control of due process before engaging in use of

569. Monika Zalnieriute and Thomas Schneider, 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values' (Council of Europe 2014) DGI (2014) 12 <http://www.coe.int/t/informationsociety/icann-and-human-rights.asp> accessed 25 November 2015. Also, Rijgersberg (n 440) 69–, 215. An often quoted criticism of multistakeholder model comes from Paul R. Lehto: "In a democracy, it is a scandal that lobbyists have so much influence that they even write the drafts of laws. But in multistakeholder situations they take that scandal to a whole new level: those who would be lobbyists in a democracy (corporations, experts, civil society) become the legislators themselves, and dispense with all public elections and not only write the laws but pass them, enforce them, and in some cases even set up courts of arbitration that are usually conditioned on waiving the right to go to the court system set up by democracies." The statement is often quoted without references, as it has apparently first appeared within the Civil Society Internet Governance Forum. See e.g., Tom Lowenhaupt, 'Governance of the .nyc TLD' <http://www.coactivate.org/projects/campaign-for.nyc/blog/2012/10/02/governance-of-the-nyc-tld/> accessed 1 December 2015.

312 force. As the quest for justification conducted in this study hopefully demonstrates, there is a certain value in considering these models from a procedural perspective as alternatives to state-governed enforcement. Although this perspective is not the only one of importance, it sheds light on the function of enforcement that otherwise would go unnoticed.

As the case law of ECtHR depicts, the execution of final and binding judicial decisions is a part of fair trial.[570] I suggest broadening this perspective to include the possibility of enforcement as a part of the broader, although ambiguous concept of access to justice. Of course, there remain inherent differences between the chosen approaches in different jurisdictions, as the example of UNCITRAL shows. In my opinion these differences are, however, related more closely to the question whether enforceability should be uniformly mandatory or voluntary. The difficulty in creating truly global instruments comes down to the issue of which approach such instruments should follow, or how to establish a coherent system that includes a variety of approaches.

It is noteworthy that enforcement is not the only, or even the most important part of due process values. If this were the case, then the choice would simply be for binding models of dispute resolution. In the framework of UNCITRAL's working group this binding dispute resolution would have probably meant enforcement as arbitral awards. However, there are valid reasons for arguing that binding ODR as online arbitration would be detrimental to consumer protection. The unequal power balances between businesses and consumers, the danger of repeat player bias, and finality of arbitral awards are all factors that contribute to the lack of sufficient consumer protection.

This leads to the question of what are the most feasible methods for providing effective redress for cross-border online disputes. As both private and public schemes of enforcing decisions are available, there is no longer the need to identify enforceability with public courts. Both possible approaches come with baggage.

The challenge of private enforcement, both in the form of private enforcement of e-commerce platforms and as self-executing smart contracts, relates to the issue I call the neo-liberal dilemma.[571] Although private enforcement would most likely provide efficient enforcement within reasonable time, it is unclear how well private actors would take into consideration power

570. See section 8.1.3 in this study and 'Guide on Article 6 - Civil Limb' (n 528) 23.
571. As discussed in section 3.1, Lister et al. have also recognized the neo-liberal underpinnings of promoting ICTs in general. Lister and others (n 205) 11.

imbalances and would uphold due process in case there is no mandatory regulation and monitoring to force them to do so. Also, human rights obligations are mostly directed towards state actors, as is pointed out regarding ICANN, and it is unclear to what extent they would obligate private actors when they provide services of dispute resolution and enforcement. However, the lack of transparency might improve through legal applications of self-executing smart contracts that could perhaps take a part in providing precedents.

If the decision is made for public redress mechanisms, other challenges need to be taken into consideration. First and foremost, solutions to tackle the threshold issue are needed so that the future models do not end up repeating the shortcomings of public courts regarding the resolution of low intensity online disputes. In addition to this, there is the danger that public mechanisms created through black letter law might forestall future innovation and possible self-regulation.[572]

If public redress mechanisms are the chosen way forward, it is necessary to consider the position of private enforcement and its regulation separately. Otherwise the private use of coercion, which is enabled by technology and bypasses state control, is left in the margins disguised simply as a contractual issue. This in turn could prove out to be a problem for the coherence of the legal system, as the legal irritant would then remain unaddressed.

One option worth looking into could be the formulation of an intermediary model where both public and private schemes would be connected, and some attempts to this end have been made. For example, trustmarks have been discussed in literature and some applications of them exist,[573] but this solution has not yet gained sufficient momentum to form the basis of policy recommendations.

Based on this, it is likely that ODR using non-binding ADR methods does not provide the desired solution for low intensity online disputes. Public courts are latecomers to the field of dispute resolution and technology, but court-based applications are pressing forward equipped with the keys to the doors of public enforcement. If the digitalization of public courts indeed reaches the level where the threshold issues no longer form obstacles

572. De Filippi has addressed the possibilities and challenges of regulating cryptocurrencies. See De Filippi (n 557).

573. See e.g., Cortés (n 241) 62–64. For example, World Trustmark Alliance has been developed in 2010. However, members of the voluntary mechanisms are still few and far between. On members of the alliance, see World Trustmark Alliance, 'Member Introduction' <http://www.wtaportal.org/mbrs.html> accessed 19 November 2015.

for access to courts in low intensity disputes, it is possible that problem of low intensity disputes and their enforcement will solve itself organically.

In order to do so, however, technology needs to be brought to court proceedings knowing that one of the key issues to address is the resolution of cross-border low intensity disputes, which otherwise might or might not be resolved with sufficient due process – if resolved at all. The choices made when regulating private enforcement as well as when reforming court practices have the power to decide whether the justificatory crisis is conquered or not.

10 Conclusions

10.1 INTRODUCTION

In the beginning of this study, I quoted Isaac Asimov's advice to policymakers to embrace a science fictional way of thinking. This was to say that a study on implementing technology to dispute resolution examines issues that are just starting to take form, and in order to see beyond these fumbling first steps we need to look at the present while simultaneously keeping an open mind about the future. The ways in which we conceptualise technology, the discourses we use, the threats and challenges as well as the hopes and opportunities we attribute to technology, shape the use and future development of technology.

The content of policy recommendations vary significantly depending on our approach to technology. For example, we could assume that technology can duplicate human shortcomings, as was the case with the xenophobic and malicious HAL 9000 computer in Arthur C. Clarke's novel *2001: A Space Odyssey*, or ground our understanding on the benevolent central computer of the *Star Trek: The Next Generation* series, where technology transcends limited human capabilities and provides shelter and care for its humans. In this study, I have emphasised the necessity of technological neutrality, where ramifications of technology are evaluated depending on the specific context in which it is applied. The chosen context here is that of dispute resolution and enforcement that adopt new forms of forcing compliance through the application of technology.

A look at the present stage of development portrays an interesting picture. New technologies give rise to new applications of dispute resolution and enforcement, which enable bypassing of the state's monopoly on violence. The privatisation of the use of coercion can be divided into two separate but entwined aspects.

First, private enforcement renders visible the elements of coercion that are inherent to law. Traditionally, we have disguised law's inherent violence by restricting its use to public courts, to legal professionals, who make a decision on who is right. Thus, the use of coercion has become institutionalised in order to provide coherence, predictability and authority to the operations

of the legal system. However, the privatisation of coercion exposes law as violence and forces us to reinterpret who is entitled to use force, against whom, and on what grounds.

Second, different models of private enforcement are privatising the use of coercion beyond the grasp of the public courts and challenge the public courts' monopoly on coercion, demanding a re-evaluation of the limits of sovereign power. Together these two aspects embody the disruptive properties of technology for demarcating the boundary between acceptable coercion from arbitrary violence. In other words, implementing technology to core areas of law, to dispute resolution and enforcement, brings the need to justify coercion to the front.

This study set out to evaluate the implications of implementing technology to dispute resolution and enforcement. In order to facilitate answering this research objective, I divided it into two main parts. The first part of the study (chapters 3 and 4) examined the overall issues of technology by answering two questions: 1) How should we understand technology? and 2) How does it change our perception of dispute resolution? I have sought answers to these preliminary questions from the social construction of technology and by examining the converging models of courtroom technology and ODR.

In the Introduction I formulated the main research question of this study as: *How does implementing technology to dispute resolution challenge the justification of law as a legitimised mode of violence?* The answer to this question was sought by distinguishing three justificatory narratives and evaluating them against the challenge imposed by new forms of technologically augmented dispute resolution.

In these concluding remarks, I briefly describe the main findings of this study drawing attention to both theoretical implications and to the policy implications following from this theoretical examination. I then proceed to setting out the ground for future research on *dispute resolution and technology*.

10.2 THEORETICAL IMPLICATIONS

10.2.1 UNDERSTANDING TECHNOLOGY IN DISPUTE RESOLUTION

In order to examine technology without making a choice between advocacy of or opposition to technological innovations, I have adopted the viewpoint of the social construction of technology, complemented with perspectives on technology's disruptiveness and autonomy. This detailed discussion on the role of technology in dispute resolution can be found in chapter 3. By highlighting the contextuality of the development and the use of ICT, I argue the position that new information and communication technologies constitute an unprecedented change in human interaction on the qualitative and quantitative levels. The debate has received much attention in the social sciences, culminating in the question of whether these technologies are merely an extension of earlier communication tools or whether they actually mark a transformation in our ways of accessing and handling information. In this study, I have made the choice for the latter in order to direct my research question towards the challenge of justification these new technologies impose.

I argue my stance through the social dimension of new technology that detaches its use from the earlier meaning of the word as the study of methods, techniques and knowledge that can be employed without detailed comprehension of their functioning mechanisms. The early use of tools transformed hunter-gatherer cultures into settled agricultural communities and thus gave rise to developed societies, but the development of ICTs in general and the Internet in particular has revolutionised human interaction and information handling. Technology in this sense no longer refers simply to our tools, techniques and skills of production, but participates in the creation of social reality on an unprecedented and global scope. Hence, the conceptualisation of technology I suggest as a starting point for research on *dispute resolution and technology* adopts the approach of the social construction of technology, a social constructivist theory within the field of science and technology studies.

Based on the combination of the theoretical framework of this study, namely systems theory, and the social construction of technology, I have made the claim that the use of ICT should be considered an emerging social system in society. As an emergent system, the use of ICT is becoming functionally differentiated from other societal subsystems and establishing its own operations. In order to enable links between the system of use of ICT and

the legal system, it is necessary to adopt the principle of technological neutrality as a starting point within the legal system. In order to understand the context-dependent element of technology, it should be noted that the implementation of technology might be discriminatory against certain groups while simultaneously improving others' access to justice.

After establishing the definition of technology, I examined the ways in which technology changes dispute resolution. My main finding is that incorporating technology into different phases of dispute resolution brings models of public and private dispute resolution to a point of convergence. This convergence is not caused solely by technology, but it accelerates the existing development. Convergence is slowly taking place regardless of technology, as more and more ADR methods are incorporated in public courts and the institutionalisation of ADR brings more adjudicative features within these proceedings.

However, the implementation of new technologies for the purposes of filing, case management, correspondence, obtaining evidence and document generation takes similar forms regardless of the public or private nature of dispute resolution. In other words, technology is the common denominator between courtroom technology and ODR. Based on the role of technology, I suggest discarding the doctrinal distinction between state-governed litigation and ADR proceedings for the purposes of evaluating chosen approaches in both traditions based on the same criteria. Instead of holding on to the distinction between courtroom technology and ODR, I adopt the inclusive terminology of *dispute resolution and technology*.

However, the context-based approach to the specific functionalities of dispute resolution technology requires distinguishing between different generations of applications. To this end I presented a taxonomy in section 3.2 in which the first-generation of dispute resolution technology refers to such already existing uses of technology as e-filing, case management systems, videoconferencing, automated document generation, case diagnosis and negotiation tools and online access to legal information. These first-generation applications have started to emerge already in the 1990s and are widely adopted in different legal practices. The reason why the implementation of first-generation applications has not caused a rupture in law is that the role of technology in these applications is more supportive of existing practices, meaning that these applications are less disruptive. The second-gener-

ation of dispute resolution technology, in turn, emphasises the disruptiveness of technology, including such emerging technologies as legal artificial intelligence, blockchains, big data, machine learning and automated decision-making.

This image of dispute resolution technology, which is both socially constructed as well as disruptive, autonomous but lacking agency, functionally differentiating to a new unique social system of the use of ICT, explains the power of technology in bringing on the transformation of dispute resolution. After arguing that the use of ICT in dispute resolution has the potential to cause change, I described in more detail the particular change caused by technology when private enforcement enabled by technology bypasses the state's monopoly in violence. Consequently, this discovery paved the way to evaluating the impact that the technological transformation has on justifying the use of coercion within the legal system.

10.2.2 IDENTIFYING JUSTIFICATORY NARRATIVES

The hypothesis of this study argued that *the justificatory narratives used to demarcate the legally accepted use of force do not automatically apply to new, emerging forms of dispute resolution and enforcement enabled by technology, and a re-evaluation is called for in order to overcome the potential justificatory crisis.*

I have contextualised the examination of justification through the theoretical framework of Niklas Luhmann's systems theory described in chapter 2. In chapters 4 and 5 I apply these theoretical observation to the issue of justifying dispute resolution. Using systems theory as a starting point means that I consider law to be an autonomous, functionally differentiated subsystem of the society along with other social subsystems, such as economics, politics and the emerging system I have identified as the use of ICT in chapter 3. Each system produces its own operations by continuously linking previous operations with future ones. The system preserves its own identity separate from other systems by labelling operations as belonging to it. This is done by using a system-specific code, which varies from system to system. This self-production together with the application of the code closes a system from the operations of other systems. Although operationally closed from such external influence, social subsystems can include information from their en-

vironment into their internal operations by translating such information to their own binary codes.

It should be noticed that the lens for the justification of dispute resolution I have attempted to provide is restricted by default. This results both from my generalised scope and from my theoretical framework of reconstructive systems theory. Also, this study can be described as legal theory applied to procedural law. Such a dual role for applied theory exemplifies the possibilities and strengths as well as the shortcomings of this work. However, this choice has been made intentionally. I have sought to alleviate the comprehensiveness of the scope by applying a relatively restricted theoretical framework, which has enabled me to hold on to the boundaries of law while simultaneously opening the legal system to external references from politics, economics and ethics.

Due to this relatively high level of abstraction, this study provides no conclusive solution to ensure that only decisions reached in fair resolution procedures are enforced. Further, it does not provide an exhaustive treatise on the ramifications of technology in dispute resolution. However, the approach adopted in this study succeeds in mapping out the context of further research in the emerging field of *dispute resolution and technology*.

A focal methodological tool that systems theory provides for this study is the concept of structural couplings, which I have identified as having a key role in justifying dispute resolution within the legal system in chapter 5. As structural couplings, specific operations abide simultaneously to the system-specific coding of several systems. For example, a contract conforms to the coding legal/illegal of the legal system and paying/not paying of the economic system. The continuous repetition of these structural couplings creates long-lasting structures between the systems. As these binary codes, such as the law's legal/illegal, do not leave room for third values, I have made the theoretical choice to consider justification to be the effects these structural couplings have within the legal system. This means that the legal system interprets the distinct rationalities of other subsystems through the filter of structural couplings in a way that enables it to use these external references as sources of legitimate authority, as an origin myth of sorts. Structural couplings provide a method for the legal system to include parts of external values to its self-production while simultaneously holding on to its operational closure. In other words, justification is a way of upholding the impression that

law is not violence, which in turn is necessary for law's coherence.

By applying this interpretation of structural couplings, I have identified the existing justificatory narratives of sovereignty, private autonomy and access to justice which are used within the legal system to ground dispute resolution to external values. Although I examine these narratives as theoretical constructions, they have a more concrete application. This function becomes visible especially in the delicate balance adopted in cross-border situations to include private dispute resolution in public enforcement, where the state exerts final control before granting decisions of private ordering access to the state's enforcement mechanism, as depicted in section 5.1 as the traditional ideal model. This model represents the starting point for a more detailed discussion on how technology is changing the justification of the coercive element of dispute resolution and paves the way for more elaborated reflection on individual justificatory narratives.

The traditional ideal model becomes apparent especially in relation to enforcement of arbitration. The enforcement of foreign arbitral awards is based on the New York Convention of 1958, which includes rules on recognising the award in the public courts of the country of enforcement. Before access to public enforcement is granted, a public court examines the arbitral award and recognises it if the arbitration procedure has followed certain minimum criterion of due process. The award may be set aside if these requirements are not met. This example depicts how the sovereign state (through public courts) exerts control on due process before using its monopoly on violence to enforce a decision rendered in private dispute resolution. In this situation, all the justificatory narratives are engaged simultaneously: the parties are entitled to resolve their dispute privately based on their mutual agreement without interference from the state; the state controls its sovereign power by limiting the use of its monopoly on violence to cases that are recognised by the public courts; and this state control can be argued on the basis of safeguarding due process and access to justice.

However, private enforcement does not abide to the traditional ideal model, as there is no need to access the state's enforcement mechanism. In other words, the state's monopoly on violence is a fiction which is difficult to uphold when private enforcement provides alternative models of coercion. The monopoly is no longer a monopoly. This brings the traditional ideal model under scrutiny, as it no longer provides an explanation for the

co-operation between the private and public spheres of dispute resolution. Private enforcement suggests that the disruptiveness of technology brings a justificatory crisis in its wake. If the traditional ideal model no longer applies, the question is are we able to provide justification for private enforcement by other means? Can the individual narratives that are present in the model provide an explanation for private enforcement or a method for reconciling the justificatory crisis?

The narrative of sovereignty discussed in further detail in chapter 6 is a structural coupling between law and the system of politics, and it applies the code of power/opposition. Sovereignty renders dispute resolution and enforcement acceptable if it yields to the control of the nation-state. As territorial jurisdiction and a monopoly on violence are fundamental elements of sovereignty, this narrative forms a natural starting point for examining the use of coercion that is detached from the nation-state. Over the course of time, sovereignty has proven to be a flexible concept that leaves room for reinterpretation. However, sovereignty's potential to explain private enforcement comes down to either considering it as a delegation of state power or reinterpreting sovereignty as interdependency. Neither of these reinterpretations provides a feasible model for grounding private coercion on sovereignty, as private enforcement does not rely on the state's enforcement mechanisms, and without state control of enforcement there are no procedural mechanisms for exerting the coding of the political system. Simply put, the structural coupling between law and politics cannot understand the private use of coercion which bypasses state control. Maintaining sovereignty as the main source of justification would then require introducing mechanisms through which the state's supervisory role could be upheld.

The narrative of private autonomy elaborated in chapter 7 is a structural coupling between law and economics, deriving its justificatory force from self-determination. In addition to the code of the legal system, private autonomy abides to the paying/not paying coding of economics. The narrative of private autonomy has been partly adopted by the ADR movement. However, without the possibility of privatising the use of force, ADR methods have had to rely on the public system. Private autonomy as a source of justification is comprehensive. According to this narrative, private enforcement is acceptable as long as the contract on which it is based is an actual meeting of minds. This inclusiveness also means that, as a source of justi-

fication, private autonomy presupposes equality between the parties and there are no mechanisms for taking into consideration the position of weaker parties. Contractual safeguards that exist within contractual law cannot be applied without sufficient access to redress and they are not available at the level of abstract justification. On an abstract level, private autonomy either explains everything or nothing, its inclusivity and simplicity being misleading. Using consent as the main source of justification would require the introduction of mechanisms that provide protection for the weaker party in contractual arrangements as well as safeguarding due process and creating transparent ways of creating equivalents to public precedents. However, this raises the question how such protection and monitoring could be provided in the first place, and how would the limits of consent be maintained.

The access to justice narrative examined in chapter 8 is essentially ethical communication about law. Before secularisation, this communication belonged to the system of religion, but afterwards it lost this historical connection. The legal system still applies this method of communication, as if it was a structural coupling when in fact no system exists on the other side of the coupling. This lack of the 'other' side explains why ethics cannot provide a constitutive external value like the democracy of sovereignty or the self-determination of private autonomy. Within the legal system, the access to justice narrative follows from the turn to human rights, which are then sedimented to the deep structure of law. According to this justificatory narrative, private enforcement is justified if it follows due process. In other words, due process justifies the existence of the procedure itself. However, the definitions of ethical communication, i.e. what is fairness, reasonable time or effective redress, are decided on a case-by-case basis. Certain guidelines for such *in casu* analysis can be found in international human rights conventions, but this does not remove the need for context-based evaluation.

The possibilities of using access to justice alone as a source of justification for private enforcement, without the support from the sovereign states in the form of human rights conventions or from private autonomy in the form of best industry practices, are very limited. Using access to justice as a source of justification would require a mechanism for ensuring that a sufficient quality of dispute resolution is maintained before decisions are enforced. But

324 the question remains, by which mechanisms could this be provided?

So, how *does implementing technology to dispute resolution challenge the justification of law as a legitimised mode of violence?* The answer is: in several ways. Different forms of technology affect justification in different ways. In my examination I have focused on private enforcement, which can be seen as the most far-reaching application of technology. Different private enforcement mechanisms from ICANN's enforcement of arbitral awards on domain name disputes, direct enforcement of e-commerce giants and self-executing smart contracts based on cryptocurrencies, all contest traditional ways of justifying use of coercion. In my evaluation, none of the examined justificatory narratives of sovereignty, consent or access to justice alone are able to provide a feasible source of justification for the phenomenon of private enforcement. Without a simple solution, the justificatory crisis remains.

The answers provided for the research question have proven my hypothesis to be correct; the existing methods of justifying coercion, i.e. sovereignty, private autonomy, and access to justice, are unable to provide justification for private enforcement without reinterpretation. I have discussed some starting points for this reinterpretation at the end of each chapter on the justificatory narratives, but my preliminary findings suggest that the limitations of re-evaluation might impede its potency.

Based on my examination of these three justificatory narratives, I came to the conclusion that none of these narratives alone is sufficient to explain and justify private enforcement. The careful balance adopted in cross-border cases and state control of due process before granting access to enforcement to decisions of private dispute resolution through the traditional ideal model, has existed for a reason. A similar balance is difficult to achieve for private enforcement.

However, one option for justifying private enforcement could be found in the emerging system of use of ICT, which I briefly address in chapter 9. The question would then be whether the technological infrastructure itself could be employed to provide a sufficient source of justification. Self-executing smart contracts rely on the infrastructure of cryptocurrencies, which aim to create decentralised public networks that do not leave room for fraud. The possibilities of these applications to dispute resolution are still to be discovered and will provide a fruitful ground for future research. At this point, it suffices to say that allocating justification to technology

would mean using a software code for the purposes of regulation, following the conceptualisation of Lawrence Lessig.

10.2.3 A PORTRAIT OF PRIVATE ENFORCEMENT

The examination of justificatory narratives has led me to focus on private enforcement as an example of the disruptive power of ICT as discussed in chapter 4. From direct self-enforcement of e-commerce sites to blockchain-based smart contracts, private enforcement escapes the nation-state's monopoly on violence, challenges the role of sovereignty and brings the protection of due process into question.

Combined with the growing number of low intensity cases, this automation of enforcement intrudes on the core area of the public enforcement mechanism. In other words, the disruptiveness of technology and its effects on the justification of dispute resolution draw a picture of private enforcement as a pinnacle of increasing privatisation.

As the examples of enforcement described in the introduction depict, privatisation of coercion to execute decisions of dispute resolution procedures is underway. This development is closely linked with the broader discussion on the potential of private governance to provide conflict management when governments cannot. However, legal research on the technology-enabled privatisation of enforcement is still relatively scarce. Hence, one of the main results of this study has been to draw attention to this new phenomenon.

A definition of private enforcement is the by-product of the overall examination on justification conducted in this study. In simple terms, private enforcement refers to a private entity's methods of forcing compliance with an obligation that derives its authorisation from a contractual instrument or from a source other than a direct mandate of the law.

This definition is open to counterarguments and reinterpretations. Depending on the point of view, we could argue that private enforcement is an issue of contractual terms, or a specified model of insurance, or simply a method of conflict prevention. The standpoint I have chosen is that of procedural law, which means that my examination has emphasised its function as an instrument of enforcement, a method of forcing compliance. From this perspective, understanding private coercion simply as a contractual term does not suffice; such a reading would hide the element of coercion and leave

the justificatory crisis unsolved.

It should be noted, however, that this conceptualisation of private coercion as enforcement is by no means comprehensive. This multitude of potential interpretations partly explains why private enforcement is complex. Also, the limits between different interpretations from contractual terms to insurance models and enforcement are not clearly defined. Furthermore, smart contracts might increasingly muddle up boundaries between contractual arrangements, dispute resolution, conflict prevention and insurance models. In short, private enforcement is elusive by nature.

10.3 THE ELUSIVE NATURE OF ENFORCEMENT

What have we learned from this abstract treatise on justificatory narratives and how does the failure of justificatory narratives in explaining private enforcement reflect back to the examples depicted in the Introduction? In this section I briefly return to these examples from the perspective of justification.

In the first example, a dispute had arisen when Helsinki resident Violetta had bought an amplifier from Bob's Berlin-based company and refused to make the payment due to a scratch. Bob decided to file a claim at Violetta's court of jurisdiction, which provided easy access to enforcement after the decision was granted by the public court. From the perspective of justification, the dispute between Bob and Violetta is straightforward. Opting for the courts to provide dispute resolution and enforcement works on the basis of the justificatory narrative of sovereignty. Due process is controlled during the whole process by the court, transparency is provided, there is a possibility of appealing against the decision, and Violetta's rights as debtor are taken into consideration.

The problem with court-provided dispute resolution and enforcement is not enforcement or due process but instead the high threshold of accessing the court in the first place, a threshold that is further raised for low intensity disputes in cross-border situations. However, the implementation of technology in court proceedings is gaining ground and a promise exists of facilitated access to the public system. This is a positive development especially if these measures are translated into lowered costs and faster procedures that could facilitate lowering the threshold also for low intensity cases. It is important that the specific circumstances of cross-border low intensity cases

are taken into consideration in designing the overall digitisation processes, as otherwise the impediment to cross-border commerce, i.e. the lack of effective redress mechanisms, still remains. However, it is unclear whether such complicated issues as jurisdiction or choice of law in cross-border cases can be solved simply by these national applications. This means that other ways forward, e.g. trustmarks and international conventions, also need to be examined.

In the second example, Jacqueline's demand for compensation from Bob's company is solved in private arbitration based on the arbitral clause in their original sale of goods contract and then enforced through the public court at Bob's court of jurisdiction. From the perspective of justification, this method follows the logic of the traditional ideal model explained in section 5.1, where the state's monopoly on violence is preserved by public courts functioning as gate-keepers of enforcement for private ordering. This means that both justificatory narratives of sovereignty and consent apply. This mechanism still uses the public courts for enforcement based on the NY Convention that regulates the interface between arbitration and enforcement. Due process is provided by the institutional rules of the arbitration institute and the final control is left to the courts. Although this mechanism preserves the traditional ideal model, the problem is that arbitration is often a feasible option only for commercial cases of high value – it is unclear whether online arbitration could provide a solution for low intensity cases, even if we overlook the inevitable threshold of accessing the courts for enforcement. For example, is it possible to provide efficient low cost arbitration services to low intensity cases without lowering the due process standards or should the possibilities of public funding be examined? In any case, the easy enforceability of arbitral awards should not lead to calling all dispute resolution processes arbitration in the hope of gaining this easy access.

In the third example, Matthieu decides to buy a synthesizer from somebody else than Bob after reading some bad user reviews from Bob's previous customers. This example follows the logic of consent, where free markets direct behaviour. However, the element of coercion is very limited in this example, as reputation systems like user reviews focus more on conflict prevention. Due to this objective, such systems provide little solution for already existing disputes and they do not replace dispute resolution mechanisms.

In the fourth example, Pierre's simple problem of non-delivery of goods he has already paid for is resolved through the reimbursement of his payment by the chargeback mechanism of his credit card company. From the perspective of justification, chargeback mechanisms abide to the rationality of private autonomy. Chargeback mechanisms are limited in their scope of application, as they only reverse a payment already made but provide no solution for damages. In Pierre's case, he is back to square one: he did not lose his money to Bob but neither did he get the synthesizer he wanted. Increasing the use of chargebacks to solve the problem of low intensity disputes is problematic, as decision-making is transferred to a company who does not necessarily even consider it to be dispute resolution. There is also a lack of transparency in chargeback mechanisms that should be addressed.

The final three examples describe different models of private enforcement. In the fifth example, private enforcement is conducted through an e-commerce platform, where Bob is reimbursed by the e-commerce site as the purchase he made proved to be flawed. Private enforcement follows the logic consent but as discussed above, consent alone does not provide a source of justification for private enforcement. Problems with such private enforcement concern the lack of transparency as well as the limited possibilities of safeguarding due process and monitoring. Another issue with private enforcement of e-commerce sites is that they are not necessarily considered to be dispute resolution in the first place, as is also the case with chargeback mechanisms. This, in turn, disguises the use of force that is still embedded in these mechanisms.

The sixth example demonstrates the direct enforcement of ICANN, where Jacqueline's right to her domain name is confirmed in an arbitral tribunal and then enforced through ICANN's sole authority over the domain name system. ICANN is a unique organisation that derives its authority over the domain name system from its contractual agreements with the United States Department of Commerce and Internet Engineering Task Force. From the perspective of justification, ICANN's direct enforcement represents a hybrid model, as elements of both consent and sovereignty can be found in the organisation's structures and functions. ICANN's direct enforcement is similar to private enforcement on e-commerce platforms. However, the difference is that ICANN's direct enforcement is clearly a dispute resolution, as multiple arbitration providers are eligible to render an award based on

institutional rules and ICANN then enforces the awards. However, ICANN has also been criticised for its lack of transparency.

The last example depicts a self-executing smart contract on the sale of a digital music piece between Violetta and Alex, where the programmable contract allocates money to Violetta after verifying that Alex has downloaded the work. In addition to abiding to the logic of consent, smart contracts might suggest the materialisation of a new justificatory narrative to the system of use of ICT. Still, the most thought-provoking characteristic of self-executing smart contracts is that the blockchain architecture removes the need for trust from digital transactions. It remains to be seen what exactly will be the consequences of this trustless network for dispute resolution: whether the possibility of blockchain-based ODR will become a reality, whether such trustless models of dispute resolution could in fact play a role in safeguarding due process, or whether the potential of democratisation of coercion will simply distort into a reflection of already existing structures of power and wealth. However, it is clear that attention must be paid to secure sufficient protection for the weaker party, *de facto* access to redress mechanisms, and proper safeguards and monitoring of due process standards.

In short, different applications of private enforcement are problematic from the perspective of justification, whereas state-oriented models, despite their severe shortcomings in addressing the specific needs of cross-border low intensity cases, do not impose a similar challenge. The emergence of new models of private enforcement, enabled by technology and unlimited to sector-specific professional regimes, is one of the reasons why the traditional ideal model is failing. The question is how should we react to this change, which I have described as inducing a justificatory crisis, and more importantly, how can we reconcile the need for protection of due process with different forms of democratisation of coercion.

10.4 POLICY IMPLICATIONS

The difficulties of finding justification for the private use of coercion have several implications for future policy setting. First and foremost they depict the complexity of organising efficient and fair dispute resolution. Further research, both theoretical and empirical, is required before evaluating future reforms, as Gélinas et al. suggest.[574] At this point it suffices to say that

574. See Gélinas and others (n 268) 105.

the delicate balance present in enforcing arbitral awards through public enforcement mechanisms cannot be applied to private enforcement, as the latter bypasses the state control exercised in recognition procedures. Instead, other ways forward need to be identified and discussed in detail.

Two main avenues for future reforms may be identified. First, the possibilities of regulating private use of coercion need to be taken into consideration in future policy recommendations. At the moment it is still unclear whether regulations on the private use of force could be drafted on a multilateral or even a global level. The example of UNCITRAL's work on developing procedural rules for ODR did not fulfil the promise of establishing a global regime. If another attempt is made for regulating private dispute resolution and enforcement, the policy should include all forms of private use of coercion. However, it is possible that such a regulatory project is too ambitious and extensive, as differences between jurisdictions and the challenges of online transactions might prove to be insurmountable to overcome.

If a regulatory attempt is sought, regardless of whether such a project is initiated on a national level or between several jurisdictions, the principle of technological neutrality should be adopted as a starting point. The principle's application to legislative projects on dispute resolution entails that the protection of minimum due process should not be dependent on the chosen model of enforcement. The principle could also guide the actualisation of future court reforms, where special attention should be paid to ensure functional interfaces and compatible protocols that would enable more or less seamless communication between public and private systems.

Also, the possibility of a multistakeholder model should be taken into consideration. As the rise of private governance depicts, other players have entered a field that has traditionally belonged mostly to the nation-states. Although states are very relevant in organising dispute resolution and enforcement, they have lost some of their influence to the private sector. The danger is that without sufficient regulation or state intervention, procedural safeguards are limited to only those disputants who have the means to take their case to court regardless of the expense. In low intensity cases, the obstacles for accessing the courts are not necessarily linked to the binding nature of private resolution, but are caused by the litigation threshold. Without sufficient regulation of private ordering and enforcement, we might face the fragmentation of procedural justice. Another issue linked with this is the

potential of promoting procedural safeguards through material norms on consumer protection.

However, if the multistakeholder model is employed, attention must be paid to its application. The objective should be to promote participation and transparency by including relevant interest groups in the decision-making. As the criticism of ICANN demonstrates,[575] a multistakeholder model might otherwise advocate mainly the interests of private corporations as the starting point of future policy.

Second, the needs of low intensity cases need to be taken into consideration in the development of courtroom technology. These reforms tend to be national or regional by definition, which directs attention primarily to domestic cases. However, cross-border cases form an important part of online disputes and their importance should not be downplayed. As the litigation threshold is often too high for this category of disputes, effective redress mechanisms are either not available or they are private. Reforms of courtroom technology could remove at least some of the obstacles that prevent parties from seeking redress. The same applies to low intensity disputes in which both parties are within the same jurisdiction. If the special needs of low intensity online disputes are not taken into consideration, this could create an issue of credibility for the public system.

10.5 RECOMMENDATIONS FOR FUTURE RESEARCH

This study has described the multifaceted and complex phenomenon of implementing technology to dispute resolution that is taking place both inside and outside courtrooms, on e-commerce sites and in the blockchain. Much, however, remains unsaid. The privatisation of justice is reaching unseen levels through these new technological solutions. Private enforcement and other forms of private (legal) governance need to be discussed in further detail, and this discussion should focus on three different branches.

First, theoretical evaluation is necessary to create a solid foundation with sufficient definitions, concepts, principles and methods to facilitate further research. Theoretical research is necessary to establish a common framework that can be used as the basis of more concrete and empirical research. This research branch also includes examination of due process principles and their possible reinterpretation to provide tools for more concrete research

575. See section 9.3.

projects. Interdisciplinary approaches and theories can help manage the interface between legal and other sciences.

Second, concrete applications of technology should be discussed within dispute resolution. This branch should focus on evaluating systems design, the best practices of implementing technology, and the overall impact of technology to access justice. New innovations such as cryptocurrencies should also be addressed, as software code is adopting functions earlier attributed to legal regulation.

Third, there is a dire lack of empirical research, and this needs to be remedied. Empirical research on the implementation of technology and its impact on communicative processes is vital for future policy recommendations. It also enables the evaluation of theoretical standpoints. The experiences of the EU's ADR and ODR regime will provide a starting point for such empirical research in the European context.

Hence, we arrive at a conclusion. The promise of technology for dispute resolution is only outshone by the challenges its implementation imposes. The promise of improved access to justice comes with the challenge of safeguarding procedural values and fairness in the changing environment of conflict management. The science-fictional way of thinking needs to be balanced by an understanding of the complex functions dispute resolution plays in the overall society.

In the history of human evolution, there have been slow and fast phases of development, which bring forward the need for human communities to adapt in different ways. Currently, we are standing on the verge of an unforeseen era of technological innovation and social change that can adopt forms which are at present completely unforeseen. The adaptability and limitations of our thinking stipulate what we will make of this inevitable transformation, whether we cling desperately to our old ideals of what the world should have been or whether we are able to look beyond, to boldly ask questions that no one has asked before.

Bibliography

Abdel Wahab M.S., Katsh E. and Rainey D. (eds), 'Introduction', *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012)

—— (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012)

'A Digital Single Market Stategy for Europe' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2015) COM (2015) 192 final

Ali R., 'Technological Neutrality' (2009) 14 Lex Electronica 1

Aristotle, *The Art of Rhetoric* (Penguin Classics 1991)

Asimov I., *Asimov on Science Fiction* (Doubleday 1981)

Atiyah P.S., *The Rise and Fall of Contract* (Oxford University Press 1979)

Aubert V., 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution' (1963) 7 The Journal of Conflict Resolution 26

——, *Rettens sosiale funksjon* (Universitetsforlaget 1976)

Bailey J., 'Working Paper on Digitization of Court Processes in Canada' (Laboratoire de Cyberjustice, Université de Montréal 2012) <http://www.cyberjustice.ca/wordpress/wp-content/uploads/webuploads/WP002_CanadaDigitizationOfCourtProcesses20121023.pdf/> accessed 24 March 2015

Baker J.H., 'Book Review, The Rise and Fall of Freedom of Contract. By P. S. ATIYAH. [Clarendon Press: Oxford. 1979. Xii and 792 Pp. (incl. Index). £30 -00.]' [1980] The Modern Law Review 4

Baraldi C., Corsi G. and Esposito E., *Glossar zur Niklas Luhmanns Theorie Sozialer Systeme* (Suhrkamp Verlag 1997)

Barral-Viñals I., 'Electronic Mass Procurement by Means of "Web Technology": Basic Options in Its Regulation' (2014) 20 ILSA Journal of International and Comparative Law 373

——, 'ODR for Consumers' Crossborder Microcomplaints in the EU' (2015)

——, 'Consumer Trust and Business Benefits with ODR' in Colin Adamson (ed), *Online Dispute Resolution: An International Business Approach to Solving Consumer Complaints* (Author House 2015)

Bausch K.C., 'The Habermas/Luhmann Debate and Subsequent Habermasian Perspectives on Systems Theory' (1997) 14 Systems Research and Behavioral Science 315

Bayern S.J., 'Dynamic Common Law and Technological Change: The Classification of Bitcoin' (2011) 71 Washington & Lee Law Review Online Edition 22

Beaulac S., 'The Social Power of Bodin's "Sovereignty" and International Law' (2003) 4 Melbourne Journal of International Law 1

Benjamin W., 'Zur Kritik Der Gewalt' in Rolf Tiedemann and Hermann Scweppenhäuser (eds), *Walter Benjamin Gesammelte Schriften Band II.1* (Suhrkamp Verlag 1991)

Bentham J., *A Treatise on Judicial Evidence* (Baldwin, Cradock and Joy 1825)

Benyekhlef K., Amar E. and Callipel V., 'ICT-Driven Strategies for Reforming Access to Justice Mechanisms in Developing Countries' (2015) 6 The World Bank Legal Review 325

Benyekhlef K., Callipel V. and Amar E., 'La médiation en ligne pour les conflits de basse intensité' (2015) 135 Gazette du Palais 17

Benyekhlef K. and Vermeys N., 'ODR and the Courts', *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012)

——, ''Low-Value, High-Volume' Disputes: Defining the Indefinable' <http://www.slaw.ca/2014/01/29/low-value-high-volume-disputes-defining-the-indefinable> accessed 4 January 2016

——, 'The End of ODR' <http://www.slaw.ca/2015/10/01/the-end-of-odr/> accessed 1 August 2016

Ben-Ze'ev A., *Love Online. Emotions on the Internet* (Cambridge University Press 2004)

Berger K.P., *The Creeping Codification of the New Lex Mercatoria* (Kluwer Law International 2010)

Bernstein L., 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 Journal of Legal Studies 115

——, 'Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions' (2001) 99 Michigan Law Review 1724

Bickel E.A., van Dijk M.A. and Giebels E., *Online Legal Advice and Conflict Support: A Dutch Experience* (Department of Psychology of Conflict, Risk & Safety, University of Twente 2015)

Bocquet-Appel J-P., 'When the World's Population Took Off: The Springborad of the Neolithic Demographic Transition' (2011) 333 Science 560

Bodin J., *Les Six Livres de la République* (Gérard Mairet ed, Librairie générale française 1993)

Born G.B., *International Commercial Arbitration. Volume I* (Wolters Kluwer 2009)

Braun S. and Taylor J.L. (eds), *Videoconference and Remote Interpreting in Criminal Proceedings* (Intersentia 2012)

Brenner S.W., *Cyberthreats and the Decline of the Nation-State* (Routledge 2014)

Brier S., 'From Second-Order Cybernetics to Cybersemiotics: A Semiotic Re-Entry into the Second-Order Cybernetics of Heinz von Foerster' (1996) 13 Systems Research 229

Brito J., Shadab HB. and Castillo A., 'Bitcoin Financial Regulation: Securities, Derivatives, Prediction Markets, and Gambling' (2014) 6 The Columbia Science and Technology Law Review 144

Brunet E., 'Questioning the Quality of Alternative Dispute Resolution' (1987) 62 Tulane Law Review 1

Calcagno A., 'Foucault and Derrida: The Question of Empowering and Disempowering the Author' (2009) 32 Human Studies 33

Calliess G-P., 'Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law' (2002) 23 Zeitschrift für Rechtssoziologie 185

——, 'Online Dispute Resolution: Consumer Redress in a Global Market Place' (2006) 7 German Law Journal 647

——, '"Lex Mercatoria" ZenTra Working Paper in Transnational Studies No. 52 / 2015' <ssrn.com/abstract=2597583> accessed 20 August 2015

Calliess G-P., Freiling J. and Renner M., 'Law, the State, and Private Ordering: Evolutionary Explanations of Institutional Change' (2008) 9 German Law Journal 397

Calliess G-P. and Renner M., 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22 Ratio Juris 260

Casanovas P. and Sartor G., 'Foreword: What LGTS Intends to Be' in Giovanni Sartor and others (eds), *Approaches to Legal Ontologies. Theories, Domains, Methodologies* (Springer International Publishing 2011)

Castells M., *The Power of Identity. The Information Age: Economy, Society, and Culture Volume II* (2nd edn, Wiley-Blackwell 2010)

'Chargeback in the EU/EEA. A Solution to Get Your Money Back When a Trader Does Not Respect Your Consumer Rights' (The European Consumer Centre's Network ECC-Net (undated)) <http://ec.europa.eu/consumers/ecc/docs/chargeback_report_en.pdf> accessed 25 November 2015

Chesbrough H., Vanhaverbeke W. and West J. (eds), *Open Innovation: Researching a New Paradigm* (Oxford University Press 2006)

Christodoulidis E., 'The Objection That Cannot Be Heard: Communication and Legitimacy in the Courtroom' in Antony Duff and others (eds), *The Trial on Trial Volume 1: Truth and Due Process* (Hart Publishing 2004)

Clarke B. and Hansen M.B.N., 'Neocybernetic Emergence: Returning the Posthuman' (2009) 16 Cybernetics and Human Knowing 83

Committee on Technological Literacy; National Academy of Engineering; National Research Council, *Technically Speaking: Why All Americans Should Know More about Technology* (Greg Pearson and Thomas Young eds, National Academies Press 2002)

Conley Tyler M., '115 and Counting: The State of ODR in 2004', *Proceedings of the Third Annual Forum on Online Dispute Resolution* (2004)

Cortés P., *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011)

Council of Europe/ Parliamentary Assembly/ Committee on Culture, Science, Education and Media, 'Council of Europe Draft Resolution for the Motion on the Right to Internet Access' (4 March 2014) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20535&lang=en> accessed 28 June 2016

Cox R.H., *Locke on War and Peace* (Clarendon Press 1960)

Crawford V.C., 'Proposal to Use Alternative Dispute Resolution as a Foundation to Build an Independent Global Cyberlaw Jurisdiction Using Business to Consumer Transactions as a Model, A Note' (2002) 25 Hastings International and Comparative Law Review 383

Crowne C.H., 'The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice' (2001) 76 New York University Law Review 1768

'Cyberjustice Laboratory' <http://www.cyberjustice.ca/en> accessed 14 January 2016

Dallman H-U., 'Niklas Luhmann's Systems Theory as a Challenge for Ethics' (1998) 1 Ethical Theory and Moral Practice 85

Davis J., 'The Crypto-Currency, Bitcoin and Its Mysterious Inventor' *The New Yorker* (10 October 2011) <http://www.newyorker.com/magazine/2011/10/10/the-crypto-currency> accessed 27 October 2015

Davis N.J., 'Presumed Assent: The Judicial Acceptance of Clickwrap' (2007) 22 Berkeley Technology Law Journal 577

De Filippi P., 'Bitcoin: A Regulatory Nightmare to a Libertarian Dream' (2014) 3 Internet Policy Review <http://policyreview.info/articles/analysis/bitcoin-regulatory-nightmare-libertarian-dream> accessed 5 October 2015

Del Duca L., Rule C. and Loebl Z., 'Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)' (2012) 1 Penn State Journal of Law and International Affairs iv

Derrida J., 'Force of Law: The Mystical Foundation of Authority' (1990) 11 Cardozo Law Review 919

Devine F.E., 'Absolute Democracy or Indefeasible Right: Hobbes Versus Locke' (1975) 37 Journal of Politics 736

Dixit A.K., *Lawlessness and Economics: Alternative Modes of Governance* (Princeton University Press 2004)

Douglas K., 'Shaping the Future: The Discourses of ADR and Legal Education' (2008) 8 Queensland University of Technology Law and Justice Journal 118

'eBay User Agreement' (19 May 2016) <http://pages.ebay.com/help/policies/user-agreement.html> accessed 15 June 2016

Edwards H.T., 'Commentary. Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 Harvard Law Review 668

Eltis K, *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Irwin Law 2012)

Encyclopaedia Britannica, 'Sovereignty' <http://www.britannica.com/EBchecked/topic/557065/sovereignty/> accessed 26 May 2015

Ervasti K., 'Lainkäytön funktiot' (2002) 100 Lakimies 47

——, *Käräjäoikeuksien sovintomenettely: empiirinen tutkimus sovinnon edistämisestä riitaprosessissa* (Oikeuspoliittinen tutkimuslaitos 2004)

——, *Sovittelu tuomioistuimessa* (WSOY 2005)

——, 'Tuomioistuimet ja oikeuslaitos tutkimuksen kohteena: lähestymistavan valinta' in Heidi Lindfors (ed), *Tuomioistuintutkimus muuttuvassa maailmassa* (University of Helsinki Conflict Management Institute 2007)

Ervo L., *Oikeudenmukainen oikeudenkäynti* (WSOY 2005)

European e-justice, 'Monetary Claims' <https://e-justice.europa.eu/content_monetary_claims-40-en.do> accessed 19 November 2015

'Executive Summary of the Impact Assessment on Directive on Consumer ADR and Regulation on Consumer ODR' (European Commission 2011) SEC (2011) 1409 final

Fairfield J., 'Smart Contracts, Bitcoin Bots, and Consumer Protection' (2014) 71 Washington & Lee Law Review Online Edition 35

Farrow T.C.W., 'Public Justice, Private Dispute Resolution and Democracy' in Ronalda Murphy and Patric A Molinari (eds), *Doing Justice: Dispute Resolution in the Courts and Beyond = Règlement des conflits: la justice n'appartient-elle qu'aux tribunaux? 2007* (Canadian Institute for the Administration of Justice/ Institut canadien d'administration de la justice 2007)

Fechner F., *Medienrecht* (12th edn, Mohr Siebeck 2011)

'FIN-NET Financial Dispute Resolution Network' <http://ec.europa.eu/finance/fin-net/index_en.htm> accessed 11 January 2016

Fischer-Lescano A., 'Critical Systems Theory' (2012) 38 Philosophy and Social Criticism 3

Fischer-Lescano A. and Teubner G., *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Suhrkamp Verlag 2006)

Fiss O., 'Against Settlement' (1984) 93 Yale Law Journal 1073

Foucault M., *The History of Sexuality Volume 1: An Introduction* (Robert Hurley tr, Pantheon Books 1978)

Franzén T., 'The Popular Impact of Gödel's Incompleteness Theorem' (2006) 53 Notices of the American Mathematical Society 440

Fuller L., 'Mediation – Its Forms and Functions' (1971) 44 Southern California Law Review 305

Galanter M., 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 Journal of Empirical Legal Studies 459

——, 'A World without Trials?' [2006] Journal of Dispute Resolution 7

Gambetta D., *The Sicilian Mafia: The Business of Private Protection* (Harvard University Press 1993)

Gautrais V., *Preuve technologique* (Lexis Nexis 2014)

Gehring P., 'Benjamins Kritik und Luhmanns Beobachtung: Perspektiven einer Zeittheorie der Gewalt' (1999) 5 Soziale Systeme 339

Gélinas F. and others, *Foundations of Civil Justice: Toward a Value-Based Framework for Reform.* (Springer International Publishing 2015)

González A.G., 'eBay Law: The Legal Implications of the C2C Eletronic Commerce Model' (2003) 19 Computer Law & Security Review 468

——, 'PayPal: The Legal Status of C2C Payment Systems' (2004) 20 Computer Law & Security Review 293

Graveson R.H., 'The Movement from Status to Contract' (1941) 4 The Modern Law Review 261

Griffiths J., 'What Is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1

Grinberg R., 'Bitcoin: An Innovative Alternative Currency' (2011) 4 Hastings Science and Technology Law Journal 160

'Guide on Article 6 - Civil Limb' (Council of Europe 2013)

Hague Conference on Private International Law, 'Status Chart' <https://www.hcch.net/en/instruments/status-charts> accessed 28 June 2016

Halme M., *Human Rights in Action* (Helsinki University Printing House 2008)

Havansi E., 'Riidanratkaisun vaihtoehtoinen skaala "pähkinänkuoressa"' in Heidi Lindfors (ed), *Vaihtoehtoista riidanratkaisua vai vaihtoehtoista konfliktinratkaisua?* (University of Helsinki Conflict Management Institute 2005)

Henkin L., 'The Mythology of Sovereignty' in Ronald St John MacDonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff Publishers 1994)

Hobbes T., *Leviathan. Or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill* (Ian Shapiro ed, Yale University Press 2010)

Hormia L., *Asianosaisen poissaolosta siviiliprosessissa: tutkimus yksipuolisesta eli kontumasiaalimenettelystä erityisesti ns. dispositiivisia riita-asioita silmällä pitäen* (Suomalainen lakimiesyhdistys 1988)

Hörnle J., *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009)

Howden E., 'The Crypto-Currency Conundrum: Regulating an Uncertain Future' (2015) 29 Emory International Law Review 741

Howland D. and White L., 'Introduction: Sovereignty and the Study of States', *The State of Sovereignty: Territories, Laws, Populations* (Indiana University Press 2009)

Huovila M., *Periaatteet ja perustelut: tutkimus käräjäoikeuden tuomion faktaperusteluista prosessuaalisten periaatteiden valossa arvioituna* (Suomalainen lakimiesyhdistys 2003)

Hydén H., 'Towards a Theory of Law and Societal Development' (2014) 60 Scandinavian Studies in Law 443

Ikemoto L.C., 'Race to Health: Racialized Discourses in a Transhuman World' (2005) 9 DePaul Journal of Health Care Law 1101

'Impact Assessment on Directive on Consumer ADR and Regulation on Consumer ODR' (European Commission 2011) SEC (2011) 1408 final

Jansen S. and Cusumano M.A., 'Defining Software Ecosystems: A Survey of Software Platforms and Business Network Governance' in Slinger Jansen, Sjaak Brinkkemper and Michael A Cusumano (eds), *Software Ecosystems. Analyzing and Managing Business Networks in the Software Industry* (Edward Elgar Publishing 2013)

Jasanoff S., 'The Idiom of Co-Production', *States of Knowledge: The Co-Production of Science and Social Order* (Routledge 2004)

Jeffries S., ‘Friedrich Kittler Obituary’ *The Guardian* (21 October 2011) <https://www.theguardian.com/books/2011/oct/21/friedrich-kittler> accessed 9 June 2016

Johnston D.R. and Post D., ‘Law And Borders: The Rise of Law in Cyberspace’ (1996) 48 Stanford Law Review 1367

Jonkka J., *Syytekynnys: tutkimus syytteen nostamiseen vaadittavan näytön arvioinnista* (Suomalainen lakimiesyhdistys 1991)

Kamecke U. and Körber T., ‘Technological Neutrality in the EC Regulatory Framework for Electronic Communications: A Good Principle Widely Misunderstood’ [2008] European Competition Law Review 330

Katsh E.M., ‘Dispute Resolution in Cyberspace’ (1996) 28 Connecticut Law Review 953

——, ‘The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace’ (1996)

——“ODR and Government in Mobile World’ in Marta Poblet (ed), *Mobile Technologies for Conflict Management. Online Dispute Resolution, Governance, Participation* (Springer International Publishing 2011)

——, ‘ODR: A Look at History - Few Thoughts About the Present and Some Speculation About the Future’ in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012)

Katsh E.M. and Wing L., ‘Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future’ (2006) 38 University of Toledo Law Review 19

Katsh E.M. and Rifkin J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey Bass 2001)

Kaufmann-Kohler G., ‘Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture’ (2007) 23 Arbitration International 357

Kaufmann-Kohler G. and Schultz T., *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004)

King M. and Thornhill C., *Niklas Luhmann’s Theory of Politics and Law* (1st edn, Palgrave Macmillan UK 2003)

Kingsbury B. and Straumann B., ‘The State of Nature and Commercial Sociability in Early Modern International Legal Thought’ (2010) 31 Grotiana 22

Kittler F.A., *Gramophone, Film, Typewriter* (Geoffrey Winthrop-Young and Michael Wutz trs, Stanford University Press 1999)

Kobayashi I., ‘Private Contracting and Business Models of Electronic Commerce’ (2005) 13 University of Miami Business Law Review 161

Koskenniemi M., *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press 2005)

Koulu Risto, *Kansainvälinen prosessioikeus pääpiirteittäin* (WSOY 2003)

——, '*Kaupallisten riitojen sovittelu* (University of Helsinki Conflict Management Institute 2006)

——, 'Eurooppalaistuuko vai kansainvälistyykö prosessioikeuden tutkimus?' [2012] Defensor Legis 482

Koulu Riikka, *Videoneuvottelu rajat ylittävässä oikeudenkäynnissä: sähköisen oikeudenkäynnin nousu.* (University of Helsinki Conflict Management Institute 2010)

——, 'Virtuaaliläsnäoloa istuntosalissa - oikeudenkäynnin tulevaisuus vai teknologiauskoisten utopia?' [2011] Defensor Legis 73

——, 'Domstolsrättegångar och alternativ tvistelösning – innebär användning av nutida teknologi i tvistelösning en upplösning av separata paradigm?' [2013] Retfaerd: Nordisk juridisk tidskrift 60

——, 'Disintegration of the State Monopoly on Dispute Resolution: How Should We Perceive State Sovereignty in the ODR Era?' (2014) 1 International Journal of Online Dispute Resolution 125

——, 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement' (2016) 13 SCRIPTed 40

Koulu S., *Lapsen huolto- ja tapaamissopimukset: oikeuden rakenteet ja sopivat perheet* (Lakimiesliiton kustannus 2014)

Kuhn T.S., *The Structure of Scientific Revolutions* (University of Chicago Press 1964)

Kurkela M. and Turunen S., *Due Process in International Commercial Arbitration* (2nd edn, Oxford University Press 2010)

Landsman S., 'So What? Possible Implications of the Vanishing Trial Phenomenon' [2004] Journal of Empirical Legal Studies 973

Lappalainen J., *Vahingonkorvausvaatimuksesta rikosjutussa: prosessioikeudellinen tutkimus* (Suomalainen lakimiesyhdistys 1986)

Larson D.A., 'Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator' (2010) 25 Ohio State Journal on Dispute Resolution 105

Lastowka G., *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010)

Latour B., *Science in Action* (Open University Press 1987)

Laukkanen S., *Tuomarin rooli: prosessioikeudellinen tutkimus tuomarin roolista dispositiivisen riita-asian valmistelussa silmällä pitäen riidan kohteen selvittämistä* (Suomalainen lakimiesyhdistys 1995)

Lederer F.I., 'The Courtroom 21 Project: Creating the Courtroom of the Twenty-First Century' (2004) 43 ABA Judges' Journal 39

——, 'Technology-Augmented Courtrooms -- Progress Amid a Few Complications, or the Problematic Interrelationship Between Court and Counsel' (2005) 60 NYU Annual Survey of American Law 675

——, 'The Road to the Virtual Courtroom? A Consideration of Today's - and Tomorrow's - High-Technology Courtrooms' (2009) 50 South Carolina Law Review 799

——, 'Wired, What We Have Learned About Courtroom Technology' (2010) 24 ABA Criminal Justice 18

Leppänen T., *Riita-asian valmistelu todistusaineiston osalta: prosessioikeudellinen tutkimus* (Suomalainen lakimiesyhdistys 1998)

Lessig L., *Code Version 2.0* (Basic Books 2006) <http://codev2.cc/download+remix/> accessed 15 January 2016

'Let's Try Settling Traffic Ticket Disputes Online instead of in Court: Editorial' *The Star* (Toronto, Ontario, 9 March 2015) <http://www.thestar.com/opinion/editorials/2015/03/09/lets-try-settling-traffic-ticket-disputes-online-instead-of-in-court-editorial.html> accessed 24 March 2015

Lien M.W., 'Technocentrism and the Soul of the Common Law Lawyer' (1998) 48 American University Law Review 85

Lind A.E. and Tyler T.R., *The Social Psychology of Procedural Justice* (Plenum Press 1988)

Lister M. and others, *New Media: A Critical Introduction* (2nd edn, Routledge 2009)

'List of Approved Dispute Resolution Service Providers' <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en?routing_type=path/> accessed 28 June 2016

Locke J., *Two Treatises of Government* (Peter Laslett ed, student edition, Cambridge University Press 1988)

Lodder A.R. and Zeleznikow J., *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010)

Lowenhaupt T., 'Governance of the .nyc TLD' <http://www.coactivate.org/projects/campaign-for.nyc/blog/2012/10/02/governance-of-the-nyc-tld/> accessed 1 December 2015

Luhmann N., *The Differentiation of Society* (Stephen Holmes and Charles Larmore trs, Columbia University Press 1982)

——, 'Einige Probleme mit "reflexivem Recht"' (1985) 6 Zeitschrift für Rechtssoziologie 1

——, *Gesellschaftsstruktur und Semantik: Studien zur Wissenssoziologie der modernen Gesellschaft. Band 3* (Suhrkamp Verlag 1989)

——, *Paradigm Lost: über die ethische Reflexion der Moral. Rede von Niklas Luhmann anlässlich der Verleihung des Hegel-Preises 1989* (Suhrkamp 1990)

——, *Die Wissenschaft der Gesellschaft* (Suhrkamp Verlag 1992)

——, *Das Recht der Gesellschaft* (Suhrkamp Verlag 1995)

——, *Social Systems* (John Bedmarz, Jr. and Dirk Baecker trs, Stanford University Press 1995)

——, 'The Paradoxy of Observing Systems' (1995) 31 Cultural Critique 37

——, *Die Gesellschaft der Gesellschaft I* (Suhrkamp 1997)

——, *The Reality of Mass Media* (Polity Press 2000)

——, *Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004)

——, *Theory of Society. Volume I* (Rhodes Barrett tr, Stanford University Press 2012)

——, *A Sociological Theory of Law* (Martin Albrow ed, Elizabeth King-Utz and Martin Albrow trs, 2nd edn, Routledge 2014)

MacKenzie D. and Wajcman J., 'Introductory Essay' in Donald MacKenzie and Judy Wajcman (eds), *The Social Shaping of Technology*, vol 2 (Open University Press 1999)

Macneil I.R., *American Arbitration Law: Reformation - Nationalization - Internationalization* (Oxford University Press 1992)

Maine H.J.S., *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (10th edn, John Murray 1908)

Main T.O., 'ADR: The New Equity' (2005) 74 University of Cincinnati Law Review 329

Maturana H.R. and Varela F.J., *Autopoiesis and Cognition: The Realization of the Living* (D Reidel Publishing Company 1980)

Mavrofides T., 'From Humans to Persons: Niklas Luhmann's Posthumanism' (2010) <http://www.academia.edu/434382/From_Humans_to_Persons_Niklas_Luhmanns_Posthumanism> accessed 25 January 2016

McCarthy T., 'Complexity and Democracy: Or the Sediments of Systems Theory' in Axel Honneth and Hans Joas (eds), Jeremy Gaines and Doris L Jones (trs), *Communicative Action: Essays on Jürgen Habermas's The Theory of Communicative Action* (MIT Press 1991)

McCormack T.W., 'Privatizing the Justice System' (2006) 25 Review of Litigation 735

McLuhan E. and Zingrone F. (eds), *Essential McLuhan* (Basic Books 1995)

McLuhan M., *Understanding Media: The Extensions of Man* (McGraw-Hill 1964)

McLuhan M., Fiore Q. and Agel J., *The Medium Is the Massage. An Inventory of Effects* (Gingko Press 1967)

McMurtry R.R., ‘Information Technologies and Globalization’ in Lisa Austin, Arthur J. Cockfield and Patric A. Molinaryi (eds), *Technology, Privacy and Justice/ Technologies, vie privée et justice 2005* (Canadian Institute for the Administration of Justice/ Institut canadien d’administration de la justice 2006)

Menke C., ‘Subjektive Rechte: Zur Paradoxie der Form’ (2008) 29 Zeitschrift für Rechtssoziologie 81

Messerschmitt D.G. and Szyperski C., *Software Ecosystem: Understanding an Indispensable Technology and Industry* (MIT Press 2003)

Ministry of Justice, ‘Muistio Aineistopankkihanke’ (2012) OM 15/31/2010 <http://www.oikeusministerio.fi/material/attachments/om/valmisteilla/kehittamishankkeet/NMmokEaIp/AIPA_JulkinenTavoitetila_2012_11_23.pdf>

Mnookin R.H. and Kornhauser L., ‘Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution’ (1979) 88 Yale Law Journal 950

‘MODRIA - The Service Vault - Online Dispute Resolution’ (24 July 2012) <https://www.youtube.com/watch?v=qQExT7krWkw/> accessed 24 March 2015

Moeller H-G., ‘Chapter Four. Morality and Pathology: A Comparative Approach’ in Marietta T. Stepanyants (ed), *Comparative Ethics in a Global Age, The Council for Research in Values and Philosophy* (The Council for Research in Values and Philosophy 2007)

Moffit M., ‘Three Things to Be Against (“Settlement” Not Included)’ (2009) 78 Fordham Law Review 1203

Monahan A.P., *Consent, Coercion, and Limit: The Medieval Origins of Parliamentary Democracy* (McGill-Queen’s University Press 1987)

Moots G. and Forster G., ‘Salus Populi Suprema Lex: John Locke Versus Contemporary Democratic Theory’ (2010) 39 Perspectives on Political Science 35

Mutanen A., *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain Other EU Member States* (Anu Mutanen & Hansaprint 2015)

Nader L. and Shugart C., ‘2 Old Solutions for Old Problems’, *No Access to Law. Alternatives to the American Judicial System* (1st edn, Academic Press 1980)

Nagel, T., ‘Hobbes’s Concept of Obligation’ (1959) 68 The Philosophical Review 74

Nakamoto S., ‘Bitcoin: A Peer-to-Peer Electronic Cash System’ <http://nakamotoinstitute.org/bitcoin/> accessed 14 October 2015

Nariman F.S., ‘The Convention’s Contribution to the Globalization of International Commercial Arbitration’, *Enforcing Arbitration Awards under the New York Convention* (United Nations 1999) <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf> accessed 12 August 2015

Newcomer K.G., ‘Online Dispute Resolution Decision Making – A NetNeutrals Practitioner’s View’ in Colin Adamson (ed), *Online Dispute Resolution: An International Business Approach to Solving Consumer Complaints* (Author House 2015)

Nissen U.A., *Die Online-Videokonferenz Im Zivilprozess* (Peter Lang GmbH 2004)

Nobles R. and Schiff D., *A Sociology of Jurisprudence* (Hart Publishing 2006)

Nousiainen K., *Prosessin herruus: länsimaisen oikeudenkäytön ‘modernille’ ominaisten piirteiden tarkastelua ja alueellista vertailua* (Suomalainen lakimiesyhdistys 1993)

‘ODR: PARLe’ <http://www.cyberjustice.ca/en/projets/odr-plateforme-daide-au-reglement-en-ligne-de-litiges/> accessed 28 June 2016

Online Dispute Resolution Advisory Group, ‘Online Dispute Resolution for Low Value Civil Claims’ (Civil Justice Council 2015) <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/odr-report-february-2015/> accessed 16 February 2016

‘Online Dispute Resolution for Cross-Border Electronic Commerce Transactions. Technical Notes on Online Dispute Resolution’ (UNCITRAL, Working Group III 2016) A/CN.9/888 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/021/29/PDF/V1602129.pdf?OpenElement> accessed 30 May 2016

‘Online Etymology Dictionary’ <http://www.etymonline.com/index.php?term=crisis> accessed 12 January 2015

Ortolani P., ‘Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin’ [2015] Oxford Journal of Legal Studies 1

Oxford Dictionary: ‘Consent’ <http://www.oxforddictionaries.com/definition/english/consent> accessed 3 September 2015

‘Oxford Dictionary: ‘Enforcement’ <http://www.oxforddictionaries.com/definition/english/enforcement> accessed 4 March 2016

Pacy E.P., ‘Tales from the Cryptocurrency: On Bitcoin, Square Pegs, and Round Holes’ (2014) 49 New England Law Review 121

Pasquale F.A. and Cashwell G., ‘Four Futures of Legal Automation’ (2015) 63 UCLA Law Review Discourse 26

Pearlstein A., Hanson B. and Ebner N., 'ODR in North America' in Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012)

Pellonpää M. and others, *Euroopan ihmisoikeussopimus* (5th edn, Talentum 2012)

Pinch T.J. and Bijker W.E., 'The Social Construction of Facts and Artifacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other' in Wiebe E. Bijker, Thomas P. Hughes and Trevor J. Pinch (eds), *The Social Construction of Technological Systems: New Directions in the Sciology and History of Technology* (MIT Press 1987)

Poblet M. and Ross G., 'ODR in Europe' in Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012)

Pollicino O. and Bassini M., 'The Law of the Internet between Globalisation and Localisation' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge University Press 2014)

Pölönen P., *Henkilötodistelu rikosprosessissa* (Suomalainen lakimiesyhdistys 2003)

Ponte L.M., 'Throwing Bad Money after Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper' (2001) 3 Tulane Journal of Technology and Intellectual Property 55

Postman D., 'Five Things We Need to Know About Technological Change, Talk Delivered in Denver Colorado March 28, 1998' (Denver, Colorado, 28 March 1998) <http://www.cs.ucdavis.edu/~rogaway/classes/188/materials/postman.pdf> accessed 2 May 2015

Postman N., *Technopoly: The Surrender of Culture to Technology* (Alfred A Knopf Inc 1992)

Poulin A.B., 'Criminial Justice and Videoconferencing Technology: The Remote Defendant' (2004) 78 Tulane Law Review 1089

Press S., 'Institutionalization: Savior or Saboteur of Mediation?' (1997) 24 Florida State University Law Review 903

Puurunen T., 'Dispute Resolution in International Electronic Commerce' (University of Helsinki 2005)

Ransome W. and Sampford C., *Ethics and Socially Responsible Investment: A Philosophical Approach* (Ashgate 2010)

'Rechtwijzer 2.0: Technology That Puts Justice in Your Hands' <http://www.hiil.org/project/rechtwijzer> accessed 28 June 2016

Recommendation of the Committee of Ministers to member states on enforcement 2003

Reichel A., 'Technology as a System. Towards an Autopoietic Theory of Technology' (2011) 5 International Journal of Innovation and Sustainable Development 105

Reiling D., *Technology for Justice: How Information Technology Can Support Judicial Reform* (Leiden University Press 2009)

'Report of Working Group III (Online Dispute Resolution) on the Work of Its Twenty-Second Session (Vienna, 13-17 December 2010)' (UNCITRAL, Working Group III 2011) A/CN.9/716

'Report of Working Group III (Online Dispute Resolution) on the Work of Its Twenty-Seventh Session (New York, 20-24 May 2013)' (UNCITRAL, Working Group III 2013) A/CN.9/769

'Report of Working Group III (Online Dispute Resolution) on the Work of Its Thirtieth Session (Vienna, 20-24 October 2014)' (UNCITRAL, Working Group III 2014) A/CN.9&827

'Report of Working Group III (Online Dispute Resolution) on the Work of Its Thirty-Second Session (Vienna, 30 November-4 December 2015)' (UNCITRAL, Working Group III 2015) A/CN.9/862

'Requesting a Final Value Fee Credit' <http://pages.ebay.com/help/sell/credits.html/> accessed 15 June 2016

Resnik J., 'Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication' (1995) 10 Ohio State Journal on Dispute Resolution 211

'Resolution ResDH (2006) 60 Concerning the Judgment of the European Court of Human Rights of 31 May 2001 (final on 12 December 2001) in the Case of K.S. against Finland.'

Reuben R.C., 'Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice' (2000) 47 UCLA Law Review 949

Rijavec V., Keresteš T. and Ivanc T. (eds), *Dimensions of Evidence in European Civil Procedure* (Kluwer Law International 2016)

Rijgersberg R.W., *The State of Interdependence: Globalization, Internet and Constitutional Governance* (TMC Asser Press 2010)

Rodríguez de las Heras Ballell T., 'Terms of Use, Browse-Wrap Agreements and Technological Architecture: Spotting Possible Sources of Unconscionability in the Digital Era' (2009) 2009 Contratto e Impresa/Europa 841

Rossner M., Tait D. and Goodman-Delahunty J., 'Students vs. Jurors: Responding to Enhanced Video Technology' (2014) 3 Laws 618

'Ross - Your Brand New Super Intelligent Attorney' <http://www.rossintelligence.com/> accessed 14 June 2016

Roth M.D., 'Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth' (2000) 48 UCLA Law Review 187

Rudder C.E., 'Private Governance as Public Policy: A Paradigm Shift' (2008) 70 The Journal of Politics 899

Rule C., *Online Dispute Resolution for Business. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass 2002)

Salyzyn A., 'A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario' (2012) 50 Osgoode Hall Law Journal 429

Sander F.E., 'Varities of Dispute Processings' in Leo A Levin and Russell Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future. Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing 1979)

Saranpää T., *Näyttöenemmyysperiaate riita-asiassa* (Suomalainen lakimiesyhdistys 2010)

Schiavetta S., 'The Relationship Between E-ADR and Article 6 of the European Convention of Human Rights Pursuant to the Case Law of the European Court of Human Rights' (2004) 2004 Journal of Information, Law & Technology <https://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/schiavetta/> accessed 13 January 2016

——, 'Electronic Alternative Dispute Resolution - Increasing Access to Justice Via Procedural Protections' (University of Oslo 2008)

Schmitz A.J., ''Drive-Thru' Arbitration in the Digital Age: Empowering Consumers Through Binding ODR' 62 Baylor Law Review 178

Schultz T., 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' (2008) 10 Yale Journal of Law and Technology 151

Seeger M.W., Sellnow T.L. and Ulmer R.R., 'Communication, Organization, and Crisis' in Michael E Roloff (ed), *Communication Yearbook 21* (Routledge 1998)

Seetharaman D. and Mukherjee S., 'EBay Follows Icahn's Advice, Plans PayPal Spinoff in 2015' (30 September 2014) <http://www.reuters.com/article/us-ebay-divestiture-idUSKCN0HP13D20140930> accessed 12 March 2015

Senécal F. and Benyekhlef K., 'Groundwork for Assessing the Legal Risks of Cyberjustice' (2010) 7 Canadian Journal of Law and Technology 41

Sinha S.P., 'Legal Polycentricity' in Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth 1995)

Smith E., 'Mundtlighed ved domstol i Danmark' in Eric Bylander and Per Henrik Lindholm (eds), *Muntlighet vid domstol i Norden. Ett rättsvetenskaplig, rättspsykologisk och rättsetnologisk studie av presentationsformernas betydelse vid domstol i Norden.* (Iustus Förlag 2005)

Snowden E., 'NSA Surveillance Is about Power, Not "Safety" An Open Letter to the People of Brazil' (17 December 2013) <http://www.commondreams.org/views/2013/12/17/nsa-surveillance-about-power-not-safety/> accessed 16 June 2015

Solove D.J., ' Panel VI: The Coexistance of Privacy and Security: Fourth Amendment Codification and Professor Kerr's Misguided CaLl for Judicial Deference' (2005) 74 Fordham Law Review 747

Sossin L. and Yetnikoff Z., 'I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources' (2007) 25 Windsor Yearbook of Access to Justice 247

Sourdin T. and Liyanage C., 'The Promise and Reality of Online Dispute Resolution in Australia' in Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012)

Stanlick N.A., 'A Hobbesian View of International Sovereignty' (2006) 37 Journal of Social Philosophy 552

Stone Sweet A., 'The New Lex Mercatoria and Transnational Governance' (2006) 13 Journal of European Public Policy 627

Stringham E.P., *Private Governance: Creating Order in Economic and Social Life* (Oxford University Press 2015)

Susskind R., *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press 2010)

Svantesson D.J., *Private International Law and the Internet* (Kluwer Law International 2007)

Swennen F. (ed), *Contractualisation of Family Law - Global Perspectives* (Springer International Publishing 2015)

Syrjänen J., *Oikeudellisen ratkaisun perusteista* (Suomalainen lakimiesyhdistys 2008)

Szabo N., 'Smart Contracts Glossary' (1995) <http://szabo.best.vwh.net/smart_contracts_glossary.html> accessed 30 October 2015

Tapper C., 'Genius and Janus: Information Technology and Law' (1985) 11 Monash University Law Review 75

Tarlton C.D., 'The Creation and Maintenance of Government: A Neglected Dimension of Hobbe's Leviathan' (1978) 26 Politicial Studies 307

Taschwer K., 'Science as System vs. Science as Practice: Luhmann's Sociology of Science and Recent Approaches in Science and Technology Studies - a Fragmentary Confrontation' (1996) 35 Social Science Information 215

Teubner G., 'Substantive and Reflexive Elements in Modern Law' (1983) 17 Law & Society Review 239

——, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 Law & Society Review 727

——, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 Cardozo Law Review 1443

——, 'Global Bukowina: Legal Pluralism in the World Society' in Günther Teubner (ed), *Global Law Without a State* (Dartmouth 1997)

——, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (2001) 18 Theory, Culture and Society 29

——, 'Hybrid Laws: Constitutionalizing Private Governance Networks' in Robert Kagan, Martin Krygier and Kenneth Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Berkeley Public Policy Press 2002)

——, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' (2009) 72 The Modern Law Review 1

Teubner G. and Fischer-Lescano A., 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999

Thornburg E.G., 'Going Private: Technology, Due Process, and Internet Dispute Resolution' (2000) 34 University of California Davis Law Review 151

——, 'Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process' (2002) 6 Computer Law Review and Technology Journal 89

Tokson M.J., 'Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?' (2007) 74 The University of Chicago Law Review 1581

Trakman L.E., 'Approriate Conflict Management' (2001) 2001 Wisconsin Law Review 919

‘Tuomioistuinlaitoksen kehittämiskomitean mietintö’ (Ministry of Justice of Finland 2003) OMKM 2003:3 <http://urn.fi/URN:ISBN:952-466-132-2> accessed 27 June 2016

Tuori K., *Critical Legal Positivism* (Ashgate 2002)

UNCITRAL, ‘Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)’ <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 28 June 2016

‘Uniform Domain Name Dispute Resolution Policy’ <https://www.icann.org/resources/pages/policy-2012-02-25-en?routing_type=path/> accessed 28 June 2016

United Nations Human Rights Office of High Commissioner, ‘Human Rights Treaty Bodies - Individual Communications. 23 FAQ about Treaty Body Complaints Procedures’ <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#whathappens> accessed 17 September 2015

Vaitoja J., *Väittämistaakka, tuomarin kyselyvelvollisuus ja pakottavaan yksityisoikeudelliseen sääntelyyn perustuvien vaatimusten tutkiminen siviiliprosessissa* (Suomalainen lakimiesyhdistys 2014)

Vanderstraeten R., ‘Parsons, Luhmann and the Theorem of Double Contingency’ 2 Journal of Classical Sociology 77

van Elderen W., ‘The Dutch East India Company’ <http://european-heritage.org/netherlands/alkmaar/dutch-east-india-company> accessed 25 November 2015

Velde F., ‘Bitcoin: A Primer’ (2013) 317 Chicago Fed Letter <https://www.chicagofed.org/publications/chicago-fed-letter/2013/december-317> accessed 30 October 2015

Venette S.J., ‘Risk Communication in a High Reliability Organization: APHIS PPQ’s Inclusion of Risk in Decision Making’ (North Dakota State University 2003)

Verkuil P.R., ‘Privatizing Due Process’ (2005) 57 Administrative Law Review 963

Vermeys N., ‘Fostering Trust and Confidence in Electronic Commerce: Will the EU-Canada Comprehensive Economic and Trade Agreement Really Effect Change?’ (2015) 20 Lex Electronica 63

‘Videoneuvottelupilotoinnin Loppuraportti’ (Ministry of Justice 2006) OMTH 2006:31

Viitanen K., *Lautakuntamenettely kuluttajariitojen ratkaisukeinona.* (Suomalainen lakimiesyhdistys 2003)

Vilalta A.E., 'ODR and E-Commerce' in Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012)

Virolainen J., *Lainkäyttö* (Lakimiesliiton kustannus 1995)

——, 'Periaatteet prosessioikeudessa' in Dan Frände (ed), *Prosessioikeus* (4th edn, WSOYPro 2012)

Vismann C., *Files: Law and Media Technology* (Geoffrey Winthrop-Young tr, Stanford University Press 2008)

von Glasersfeld E., 'An Introduction to Radical Constructivism' in P Watlawick (ed), *The Invented Reality* (Norton 1984)

Vuorenpää M., *Syyttäjän tehtävät: erityisesti silmällä pitäen rikoslain yleisestävää vaikutusta* (Suomalainen lakimiesyhdistys 2007)

Wacke A., 'Freedom of Contract and Restraint of Trade Clauses in Roman and Modern Law' (1993) 11 Law and History Review 1

Walamies J., *Tuomioistuimen yleistoimivalta siviiliprosessissa: tutkimus tuomioistuimen kansainvälisestä toimivallasta prosessinedellytyksenä ja ulkomaisen tuomion tunnustamisen edellytyksenä* (Suomalainen lakimiesyhdistys 1982)

Wallace A., '"Virtual Justice in the Bush": The Use of Court Technology in Remote and Regional Australia' (2008) 19 Journal of Law, Information, and Science 1

Weber M., *Economy and Society: An Outline of Interpretive Sociology. Volume 2* (Guenther Roth and Claus Wittich eds, University of California Press 1978)

'White Paper A Next-Generation Smart Contract and Decentralized Application Platform' <https://github.com/ethereum/wiki/wiki/White-Paper> accessed 30 October 2015

Wilhelmsson T., *Critical Studies in Private Law: A Treatise on Need-Rational Principles in Modern Law.* (Kluwer Academic Publishers 1992)

Williams R., *Television: Technology and Cultural Form* (Schocken Books 1975)

Willoweit D., *Deutsche Verfassungsgeschichte. vom Frankenreich bis zur Wiedervereinigung Deutschlands* (5th edn, Verlag C H Beck 2005)

Wing L. and Rainey D., 'Online Dispute Resolution and the Development of Theory' in Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution.* (Eleven International Publishing 2012)

Winthrop-Young G., 'Silicon Sociology, Or, Two Kings on Hegel's Throne? Kittler, Luhmann, and the Posthuman Merger of German Media Theory' (2000) 13 The Yale Journal of Criticism 391

World Trustmark Alliance, 'Member Introduction' <http://www.wtaportal.org/mbrs.html> accessed 19 November 2015

Wotherspoon D. and Cameron A., *Electronic Evidence and E-Discovery* (Lexis Nexis Canada 2010)

Yarn D., 'The Death of ADR: A Cautionary Tale of Isomorphism through Institutionalization' (2004) 108 Penn State Law Review 929

Zalnieriute M. and Schneider T., 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values' (Council of Europe 2014) DGI (2014) 12 <http://www.coe.int/t/informationsociety/icann-and-human-rights.asp> accessed 25 November 2015

Zeleznikow J. and Bellucci E., 'Family_Winner: Integrating Game Theory and Heuristics to Provide Negotiation Support' in Danièle Bourcier (ed), *Legal Knowledge and Information Systems. JURIX2003 The Sixteenth Annual Conference* (IOS Press 2003)

EUROPEAN COURT OF HUMAN RIGHTS

Burdov v. Russia 7/5/2002 (Application number 59498/00)
Burdov v. Russia (no 2) 15/1/2009 (Application number 33509/04)
Fociac v. Romania 3/2/2005 (Application number 2577/02)
Hornsby v. Greece 19/3/1997 (Application number 18357/91)
Kreuz v. Poland (no 1) 19/6/2001 (Application number 28249/95)
KS v. Finland 31/5/2001(Application number 29346/95)
Matheus v. France 31/3/2005 (Application number 62740/00)
Nideröst-Huber v. Switzerland 18/2/1997 (Application number 18990/91)
Ruiz-Mateos v. Spain 23/6/1993(Application number 12952/87)

COURT OF JUSTICE OF THE EUROPEAN UNION

C-170/11 *Lippens and others v. Kortekaas and others* [2012]
C-264/14 *Skatteverket v. David Hedqvist* [2015]

FINNISH ABSTRACT/ SUOMENKIELINEN TIIVISTELMÄ

Tämä tutkimus kuuluu kansainvälisen prosessioikeuden, oikeusteorian sekä oikeuden ja teknologian tutkimuksen kosketuspinnalle. Tutkimuksessa arvioidaan niitä muutoksia, joita teknologian tuominen erilaisiin riidanratkaisumenettelyihin tuo tullessaan. Tutkimuksessa kysytäänkin, miten riidanratkaisun pohjimmainen oikeutus muuttuu teknologian käyttöönottamisen myötä.

Tutkimuksen teoreettisena viitekehyksenä (luku 2) sovelletaan Niklas Luhmannin systeemiteoriaa. Tällöin oikeusjärjestelmä näyttäytyy yhteiskunnan funktionaalisesti eriytyneenä osasysteeminä, joka erottautuu muista osasysteemeistä soveltamalla sisäisiin operaatioihinsa omaa, muista systeemeistä poikkeavaa koodiaan laillinen/laiton. Systeemiteoreettinen lähestymistapa tarjoaa keskeiset välineet arvioida riidanratkaisun oikeuttamistapoja, kun tutkimuksen toisessa osassa tarkastellaan oikeuttamisen roolia oikeusjärjestelmälle sekä oikeuden sisäisten paradoksien käsittelyä. Perustavanlaatuisin näistä oikeuden paradokseista liittyy niihin tapoihin, joilla oikeusjärjestelmän sisäisesti pyritään selittämään vallankäytön eli pakon oikeutusta. Oikeusjärjestelmä legitimoituna väkivaltana tulee ilmi erityisesti tuomioiden täytäntöönpanossa.

Tutkimuksen lähtökohtana on, että teknologian aiheuttamat muutokset tuovat näkyviksi sellaisia riidanratkaisun oikeuttamisen rakenteita, jotka yleensä jäävät prosessioikeudellisessa keskustelussa taka-alalle. Täten riidanratkaisuteknologian tarkempi analyysi tarjoaa ikkunan prosessioikeuden syvärakenteen tarkastelulle. Yhtenä esimerkkinä teknologian luomasta oikeutushaasteesta käsitellään täytäntöönpanon yksityistymistä, joka merkitsee uudenlaista poikkeamista perinteisestä valtion täytäntöönpanomonopolista (luku 4). Yksityisen riidanratkaisun ja täytäntöönpanon teknologiapohjaiset sovellukset ovat kehittyneet vastaamaan konfliktinhallinnan tarpeeseen niissä tilanteissa, joissa rajat ylittävä oikeudenkäynti ei tarjoa todellista vaihtoehtoa intressiltään vähäisen riidan ratkaisemiseen.

Uudet informaatio- ja kommunikaatioteknologian sovellukset ovat mahdollistaneet täytäntöönpanon yksityistymisen. Verkkokauppapaikat ratkaisevat sisäisesti palveluissa syntyneet riidat ja saattavat nämä ratkaisunsa voimaan käyttöehtojensa perusteella ilman valtiollista tuomioistuinlaitosta tai

sen tarjoamaa täytäntöönpanomekanismia. Myös kryptovaluutoille rakentuvat ja itsensä täytäntöönpanevat älykkäät sopimukset muuttavat perinteistä käsitystä täytäntöönpanon kuulumisesta valtion väkivaltamonopoliin. Nämä uudet täytäntöönpanon muodot ulottuvatkin pidemmälle kuin perinteinen yksityinen riidanratkaisu, minkä seikan yksityisen täytäntöönpanon vertaaminen välitystuomioiden täytäntöönpanoon New Yorkin konvention pohjalta osoittaa. Toisin kuin verkkokauppariidat tai älykkäät sopimukset, välitystuomioiden täytäntöönpano on rakentunut valtiollisille tuomioistuimille, koska välitystuomion täytäntöönpantavuudesta päättää toimivaltainen alioikeus ja täytäntöönpano suoritetaan valtiollisen täytäntöönpanomekanismin kautta. Käytännössä tämä on tarkoittanut sitä, että viimesijainen päätösvalta täytäntöönpantavuudesta on edellyttänyt julkisen tuomioistuimen kontrollia, jossa täytäntöönpano on voitu evätä välitystuomion ollessa mitätön tai tuomioistuimen päätöksellä kumottu.

Täytäntöönpanon yksityistyminen tarkoittaa, ettei yksityisesti ratkaistuja riitoja tarvitse saattaa tuomioistuimen arvioitavaksi edes täytäntöönpanovaiheessa. Tämä johtaa siihen, että näihin riitoihin ei pystytä kohdistamaan tuomioistuinkontrollia ennen niiden täytäntöönpanoa. Tästä syystä yksityisen riidanratkaisun sekä valtiollisen täytäntöönpanon yhteistoiminnalle perustuva malli, (joka esitellään jaksossa 5.1.1), ei sellaisenaan sovellu yksityiseen täytäntöönpanoon. Siten yksityinen täytäntöönpano paljastaa riidanratkaisuun yleisesti liittyvän pakon ja tämän pakon käyttämisessä tapahtuvat muutokset vuorostaan tarjoavat tarkastelukulman riidanratkaisun oikeuttamiseen yleisellä tasolla ja riidanratkaisun oikeusturvatakeiden turvaamiseen. Tämän poikkeusluonteensa vuoksi yksityinen täytäntöönpano – kuten osaltaan myös muut riidanratkaisuteknologian sovellukset – muodostaa haasteen riidanratkaisun oikeuttamiselle: riittävätkö perinteiset oikeutustavat selittämään uuden ilmiön? Ja mikäli eivät, miten oikeusjärjestelmän tulisi reagoida tähän ärsykkeeseen?

Tutkimus koostuu kolmesta osasta. Ensimmäisessä osassa (luvut 3 ja 4) arvioidaan teoreettisella tasolla riidanratkaisuteknologian määritelmää ja sen vaikutuksia prosessioikeudelliselle tutkimukselle. Mediatutkimuksen suuntaan aukeavassa analyysissa teknologiaa arvioidaan sekä sen muutosvoiman ja häiritsevyyden (disruptiveness) kautta että olemassa olevia sosiaalisia hierarkioita uusintavana. Uusi kommunikaatio- ja viestintäteknologia näyttäytyy tällöin aiempaan massaviestintäteknologiaan verrattuna voimakkaan in-

teraktiivisena, korostuneen sosiaalisena sekä älykkäänä (smart technologies), mikä vuorostaan viittaa uuteen teknologiseen murroskohtaan. Tutkimuksessa esitetään, että modernin informaatio- ja kommunikaatioteknologian käytön muodostamaa sosiaalista toimintaa voidaan arvioida myös uutena, emergenttinä sosiaalisena systeeminään.

Tällöin korostuu tarve arvioida teknologian käyttöä kontekstisidonnaisesti. Siten myös riidanratkaisuteknologian kategorisoinnissa on syytä kiinnittää huomiota yksittäisiin tehtäviin, joihin automaatiota ulotetaan. Riidanratkaisuteknologia voidaan ryhmitellä teknologian roolin perustella ensimmäisen sukupolven sovelluksiin (mm. videoneuvottelu, asianhallintajärjestelmät, sähköiset tietokannat) sekä toisen sukupolven sovelluksiin (mm. tekoäly, koneoppiminen, kryptovaluutat).

Tutkimuksen toisessa osassa (luvut 5-8) siirrytään arvioimaan riidanratkaisun oikeutusta eli niitä keinoja, joilla riidanratkaisuun liittyvä pakottaminen oikeusjärjestelmässä legitimoidaan. Systeemiteoreettisen lähestymistavan kautta tunnistetaan ja arvioidaan kolmea eri oikeuttamisen narratiivia: suvereenisuutta, suostumusta sekä ihmisoikeusdiskurssista saatavaa oikeudenmukaisen oikeudenkäynnin ideaalia. Näitä narratiiveja arvioidaan rakenteellisina kytkentöinä oikeusjärjestelmän ja muiden yhteiskunnan osasysteemien välillä, jolloin oikeusjärjestelmässä oikeuttamiseen käytettävät narratiivit noudattavat oikeuden koodaamisen laillinen/laiton lisäksi myös rakenteellisen kytkennän toisella puolella olevan järjestelmän koodausta. Tästä johtuen oikeuttamiseen käytetyt narratiivit välittävät oikeusjärjestelmään sen ulkopuolisia elementtejä (luku 5). Kutakin oikeuttamisnarratiiveista verrataan teknologian mahdollistaman yksityisen täytäntöönpanon haasteeseen.

Riidanratkaisun oikeutus on perinteisesti haettu oikeuden ja valtion läheisestä yhteydestä eli suvereenin narratiivista (luku 6). Rakenteellinen kytkentä oikeuden ja politiikan systeemien välillä heijastuu riidanratkaisuun valtiollisena riidanratkaisumonopolina. Rajat ylittävät tilanteet ovat territoriaalitoimivallan vuoksi säännelty suvereenien valtioiden keskinäisillä sopimuksilla. Tällöin oikeuttaminen tuotetaan valtiollisen lainkäytön ideaalilla, jossa yksityinen riidanratkaisu ja täytäntöönpano on oikeutettua, mikäli se seuraa suvereenin vallan delegoimisesta ja valvontavastuu jää viime kädessä valtiollisille toimijoille. Yksityisen täytäntöönpanon synnyttämä haaste kuitenkin paljastaa suvereenille perustuvan oikeuttamisnarratiivin rajallisuu-

den tilanteessa, jossa sääntelyä ei ole onnistuttu ulottamaan rajat ylittäviin tilanteisiin. Kun perinteisesti oikeusturvatakeiden turvaaminen on hahmotettu valtion kontrollin kautta, onkin kysyttävä, miten vastaava oikeudenmukaisuuden taso olisi mahdollista taata ilman valtiollista kytkentää.

Suvereenisuutta uudempi oikeuttamisnarratiivi löytyy oikeuden ja talouden järjestelmien välisestä rakenteellisesta kytkennästä eli suostumuksesta ja yksityisautonomiasta (luku 7). Riidanratkaisun oikeuttamisperusteena suostumus muodostaa oman itsenäisen toimivaltaperusteensa, esimerkiksi välityslausekkeen kautta. Yleensä suostumuksen narratiivi toimiikin yhdessä suvereenisuuteen perustuvan mallin kautta. Tämä käy ilmi muun maussa välitystuomion täytäntöönpanon järjestämisestä julkisten tuomioistuinten kautta. Inklusiivisuutensa vuoksi suostumuksen narratiivi sinällään kyllä pystyy selittämään yksityisen täytäntöönpanon haasteen, mutta ilman riittäviä prosessuaalisia keinoja heikomman suojan toteuttamiseen sen selitysvoima jää vaillinaiseksi.

Uusin riidanratkaisun oikeuttamisnarratiivi on löydettävissä riidanratkaisua koskevasta eettisestä diskurssista, joka tässä tutkimuksessa on nimetty access to justice -narratiiviksi (luku 8). Tällöin riidanratkaisun oikeutus perustuu sen oikeudenmukaisuudelle. Oikeuttamisnarratiivin heikkous on sen kontekstisidonnaisuudessa - mikäli riidanratkaisun hyväksyttävyys riippuu menettelyn oikeudenmukaisuudesta, miten määritellään oikeudenmukaisuuden rajat yksittäistapauksellisesti ilman narratiivin yhdistämistä suvereenisuuteen? Tutkimuksen kolmannessa osassa (luvut 9 ja 10) arvioidaan lyhyesti oikeuttamisnarratiivien yhteistoimintaa sekä kysytään, olisiko oikeutus mahdollista löytää itse teknologisesta infrastruktuurista. Tutkimuksen viimeisessä luvussa esitetään lopuksi kokoavia johtopäätöksiä.

Väitöstutkimuksen keskeinen väite on, ettei yksikään tarkastelluista oikeuttamisnarratiiveista sellaisenaan riitä selittämään yksityisen täytäntöönpanon ilmiötä. Käytännössä tämä tarkoittaa, että on epäselvää, miten yksityiseen täytäntöönpanoon saadaan riittävät oikeusturvatakeet. Yksityinen täytäntöönpano on luonteeltaan ylikansallista. Tästä syystä valtiollisen valvonnan kytkeminen yksityisiin prosesseihin ilman julkista täytäntöönpanovaihetta edellyttää pitkälle menevää järjestelmän uudelleenarviointia. Siten yksityinen täytäntöönpano muodostaakin uuden oikeudellisen harmaan alueen, joka horjuttaa olemassa olevaa ymmärrystämme riidanratkaisun oikeutuksesta.

Dispute Resolution and Technology:
Revisiting the Justification of Conflict Management

The rapid increase in e-commerce transactions has led to the emergence of new dispute resolution models, e.g. online dispute resolution (ODR). Simultaneously, public courts embrace new information and communication technologies in order to overcome the shortcomings of the public court system. Technological development has also facilitated the privatisation of coercion in an unseen way, as redress is more and more often sought within the private regimes of e-commerce instead of through public courts. But what exactly does this shift to technology in dispute resolution entail?

In this book Koulu examines the multifaceted phenomenon of dispute resolution technology, using private enforcement as an example, and the impact it has on justifying dispute resolution. The implementation of technology in dispute resolution reveals the hidden justificatory narratives of procedural law and thus provides possibilities for their critical examination. Koulu argues that the privatisation of enforcement – as it is enabled by different forms of technology from the direct enforcement of e-commerce market leaders to self-executing smart contracts in the blockchain – brings the inherent violence of law out into the open. This increase in private enforcement, in turn, challenges the nation-state's monopoly on violence, which has traditionally formed the main source of justification for dispute resolution and the enforcement of judicial decisions. After examining the possibilities of finding justification for private enforcement from other sources, e.g. from private autonomy or from human rights discourse, Koulu claims that private enforcement constitutes a new grey area of conflict management.

Koulu's doctoral dissertation gives unique insight into contemporary debates both in global procedural law and law and technology studies.

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