Three Quests for Justification in the ODR Era

Sovereignty, Contract and Quality Standards

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The interests of state sovereignty are preserved in conflict management by adopting a state monopoly for resolving disputes as the descriptive and constitutive concepts of a resolution system. State monopoly refers to the state's exclusive right to decide on the resolution of legal conflicts arising on its soil — in other words, within the state's territorial jurisdiction, which also forms the basis of international procedural law. This conceptual practice is derived from the social contract theories of Hobbes and Locke. However, this type of monopoly is disintegrating in the era of the internet because it fails to provide an effective resolution method for online disputes, and, consequently, online dispute resolution has become the mainstream solution. This raises the question of whether we should discard the state monopoly as the focal concept of dispute resolution and whether sovereignty as a whole is still a viable background principle for procedural law.

Integrating technology into dispute resolution has implications on the fundamental justification of state intervention in private conflicts as well as on the argumentation structure of due process in general and on concrete interpretive issues arising from individual cases. This paper strives to explain state interests in dispute resolution and how justification is created,

Les intérêts de la souveraineté de l'État sont conservés dans la gestion des conflits en adoptant un monopole d'État pour résoudre les différends. Le monopole de l'État se réfère au droit exclusif de l'État de se prononcer sur la résolution des conflits juridiques ayant lieu sur son territoire, en d'autres termes, de la compétence territoriale de l'État, ce qui constitue également la base du droit procédural international. Cette pratique conceptuelle est dérivée des théories du contrat social de Hobbes et de Locke. Cependant, ce type de monopole se désintègre dans l'ère de l'Internet parce qu'il ne parvient pas à fournir une méthode de résolution efficace des litiges en ligne, et, par conséquent, la résolution des litiges en ligne est devenue la solution traditionnelle. Cela soulève la question de savoir si nous devrions rejeter le monopole d'État comme le concept central de la résolution des différends et si la souveraineté dans son ensemble est encore un principe de base viable pour le droit procédural.

Intégrer la technologie dans la résolution des différends a des implications sur la justification fondamentale de l'intervention de l'État dans les conflits privés aussi bien sur la structure de l'argumentation d'une procédure régulière en général que sur les questions d'interprétation concrètes découlant de cas individuels. Cet

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reinterpreted and grounded in the changing environment of dispute resolution. This discussion connects the emergence of online dispute resolution (ODR) with larger social and legal changes often described through legal pluralism and increasing legal regulation. State intervention is executed through adopting state monopoly as the theoretical starting point, where sovereignty plays a significant role as a justificatory principle. However, sovereignty, formulated as the state monopoly of conflict management, brings the political ideal and the agenda of the modern nation- state into dispute resolution.

article essaie d'expliquer les intérêts de l'État dans la résolution des différends et comment la justification est créée et réinterprétée dans l'environnement changeant de la résolution des différends. Cette discussion fait le lien entre l'émergence de la résolution des litiges en ligne (ODR) avec de grands changements sociaux et juridiques souvent décrits à travers le pluralisme juridique et la croissance de la réglementation juridique. L'intervention étatique est exécutée à travers le monopole d'État comme base théorique, où la souveraineté joue un rôle important en tant que principe de justification. Cependant, la souveraineté, formulée comme le monopole d'État de la gestion des conflits se rapporte à l'idéal politique et aussi comme un agenda de l'État-nation moderne dans la résolution des différends.

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The procedural law doctrine has mainly neglected the formulation of a coherent theory common to all dispute resolution. As demonstrated by the prolific rise of ODR and the European Union's (EU) attempt to regulate ODR models, new justificatory concepts are needed in order to better understand the state's role in the future of dispute resolution. One option is to redefine sovereignty as interdependence; but, such interpretation carries the same state agenda in its wake. Another option is to find the justification in due process rules, which emphasizes the growing importance of procedure over material rules.

1. ODR as a Legal Field in Its Own Right

1.1. 1.1 Why Theory?

Online dispute resolution (ODR) has been the object of academic interest since its emergence in the middle of 1990s.[1] Since 2000, scientific research on ODR has gradually increased and, in addition to systems designs and practitioner's perspectives, the focus has shifted to more theoretical questions of due process,

1. The first articles on ODR were published as early as 1996. See: e.g., M. Ethan Katsh, "Dispute Resolution in Cyberspace", 1996, 28:4 Connecticut Law Review 953; *NCAIR Dispute Resolution Conference* Washington D.C. May 22, 1996, online: <http://www.umass.edu/dispute/ncair/katsh.htm>. Katsh and Rifkin published the first monograph on ODR in 2001depicting the history of ODR analyzing the role of technology and highlighting the importance of ethics. Their work has been widely cited in later ODR research. See: M. Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco: Jossey-Bass, 2001), and, based on their work, e.g., Arno R. Lodder and J. Zeleznikow, *Enhanced Dispute Resolution through the Use of Information Technology* (Cambridge: Cambridge University Press, cop. 2010), at 168.

access to justice and ethical standards.[2] It is likely that ODR will receive further academic attention in the near future as the EU's regulatory framework — i.e., the Commission's proposal for ODR regulation (524/2013) together with the revised Alternative Dispute Resolution (ADR) Directive (2013/11/EU) — was accepted by the Parliament on March 12, 2013, and after publication entered into force as of July 8, 2013. The framework comprises two parts: the directive provides coverage, quality and awareness of ADR procedures in the member states and the regulation establishes an EU-wide ODR platform through which a claim can be redirected to the most suitable regional ADR entity. The EU's regulatory framework as the first binding legal instrument for ODR will very likely generate the need for and interest on ODR research.

Through such regulatory projects, ODR is becoming a prominent *legal* instrument[3] which operates in a cross-border environment and has, at the very least, the potential to improve consumer redress in cross-border e-commerce.[4] Therefore, research on procedural law can no longer overlook ODR as an object of study.

Until now, ODR theory has been based to a large extent on the theory of alternative dispute resolution (ADR).[5] But, as Wing and Rainey argue, there is resistance within

2. For example, Cortés' doctoral dissertation focused on sketching a legal framework for ODR in the European context (see Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (New York: Routledge, 2010). Hörnle's approach puts emphasis on procedural standards. See: Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge: Cambridge University Press, 2009) at 10. However, it is noteworthy that the earlier writings on ODR also discussed trust issues and professional standards (e.g., Katsh & Rifkin, *supra* note 1 at 145), but the chosen perspective has most often been that of the practitioner's. For the academic literature on ODR, see, e.g., Julia Hörnle, "Encouraging Online Dispute Resolution in the EU and Beyond: Keeping Costs Low or Standards High?" (2012) *Queen Mary School of Law Legal Studies Research Paper* No 122/2012 at 1.
3. Without regulation, ODR has been mostly considered as online ADR which, instead of being pronouncedly legal, has focused on the ideals of ADR, i.e., reaching a genuine, tailored solution to the parties' conflict instead of resolving the legally framed dispute through evaluation of rights and obligations. See, e.g., Lodder & Zeleznikow, *supra* note 1, at 12-13; Colin Rule, *Online Dispute Resolution for Business: B2B, e-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (San Francisco: Jossey-Bass, 2002) at 13. Kaufmann-Kohler and Schultz highlight that ODR's definitions usually depict it either as a *sui generis* dispute resolution method or as online ADR. As they point out, both perspectives have their issues. See Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (The Hague: Kluwer Law International, 2004) at 5-10.
4. As an example, in his dissertation, Cortés discussed the advantages and challenges of ODR from a consumer redress perspective (Cortés, *supra* note 2 at 215).
5. ADR is typically defined as the third wave of the access to justice movement, which originated in the United States in the 1970s and 1980s, which demands easier, cheaper and more models of party-controlled out-of-court dispute resolution. ADR includes an extensive variety of consent-based DR methods, from early neutral evaluation and mediation to adjudicative arbitration which closely resembles state litigation. Major attributes differ between different ADR applications, but, most often, ADR is seen as an alternative to litigation due to its flexibility,

ADR doctrine to fully adopting ODR under its theoretical foundation given that face-to-face communication forms the majority of ADR methods.[6] As Wing and Rainey conclude, ADR theory is poorly suited for an online environment due to its disregard of technology's role in ODR.[7] ADR has rarely addressed technology in its procedures; instead, the emergence of technology has almost spontaneously led to establishing ODR as its own subdiscipline. It becomes apparent that ODR has evolved beyond online ADR since the integration of technology transforms dispute

low costs, lower complexity along with greater participation and party voice, tailored solutions, speed, confidentiality and preservation of relationships between the disputants. However, it should be noted that the differences between litigation and arbitration, for example, might often be smaller than those between arbitration and mediation. It should be noted that some ADR models offer easy access to enforceability (as is the case with arbitration and the New York Convention) and, at the same time, other applications such as conciliation are not binding on the parties and do not produce enforceable third-party solutions. However, the focus of the ADR doctrine usually transcends such questions as enforcement since it is seen as unnecessary when a true voluntary settlement between the parties is reached. In jurisprudence, ADR is differentiated from the litigation doctrine by earmarking it as a new paradigm, alternative to and as a substitute for litigation, causing the need to make adjustments to traditional dispute resolution. See, for example, Caroline Harris Crowne "Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice" (2001), 76:6 NYU Law Review 1768. In ADR theory, there has been a discussion whether ADR and litigation are truly separate to a doctrinal extent. For example, Judith Resnik explored claims of differences between litigation and ADR and concluded that both forms are moving closer to each other. According to her, as a result of this meltdown, the focus of procedural research is shifting from adjudication to resolution. See: Judith Resnik, "Many Doors--Closing Doors--Alternative Dispute Resolution and Adjudication" (1995) 10:2 The Ohio State Journal on Dispute Resolution at 257. Similarly, Mnookin and Kornhauser have claimed in their classic article that out of court settlements and ADR are "bargaining in the shadow of the law", i.e., the substance of ADR decisions correlates with the official decisions of the court system. See: Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution" (1979), 88:5 Yale Law Journal 950. An additional point of interest is how different discourses encourage attitudes towards ADR. See: Kathy Douglas, "Shaping the Future: The Discourses of ADR and Legal Education" (2008) 8:1 Queensland University Technology Law & Justice Journal at 128.

6. Leah Wing & Daniel Rainey, "Online Dispute Resolution and the Development of Theory", in Mohamed S. Abdel Wahab, M. Ethan Katsh and Daniel Rainey, eds, *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution,* Eleven International Publishing, 2012, p. 25.
7. *Ibid*. The issue of ODR's close connection to ADR has been widely discussed in ODR literature. ODR's origins in ADR are commonly acknowledged. See: e.g. Hörnle, *supra* note 2 at 75, 10; Katsh & Rifkin, *supra* note 1 at 19. However, there is no universal agreement on the exact definition of ADR. While some authors highlight ODR as online ADR, others choose a wider definition which includes court-annexed ODR procedures. See: e.g., "An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR" in *Proceedings of the UNECE Forum on ODR* Geneva June 30 - July 1, 2003) 1, online: <http:// http://www.ombuds.org/unece2003/unece2003/>; Nicolas W. Vermeys & Karim Benyekhlef, "ODR and the Courts" in Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey, eds, *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution* (The Hague: Eleven International Publishing, 2012) at 295.

resolution significantly from face-to-face communication into technology-assisted or even fully automated dispute resolution procedures. However, a close connection to ADR theory would benefit some approaches to ODR depending on its definition and research objectives; but, as a whole, ADR theory cannot provide ODR research with a complete theoretical framework given that too many critical issues would be left unanswered. Hence, building ODR theory from ADR is no longer a feasible option.

It is evident that technology is a fundamental component of ODR, and, therefore, understanding technology becomes a central challenge for future research. The transformative power of technology has been understood in legal ODR research as well. Originally, Katsh and Rifkin depicted technology as the fourth party in dispute resolution proceedings, in addition to the disputants and the neutral third party,[8] and their terminology has been widely adopted. Later, Lodder and Zeleznikow constructed the role of ODR service providers as being the fifth party through a similar analogy.[9] Susskind tagged ODR with his conceptualization of disruptive technologies, which refers to technological applications and systems that challenge the existing status quo of the legal sector instead of maintaining and renewing it.[10] Whether we interpret technology from a systems theory perspective as a global subsystem of society in its own right in keeping with Günther Teubner,[11] through Bruno Latour's actor-network theory as social actors including networks of humans and technology,[12] or by understanding technology in law through the framework of studies of science and technology following from the work of Sheila Jasanoff,[13] the study of ODR cannot remain indifferent to the significance of the role technology plays. There are several theoretical standpoints which provide insight into technology and individual choices, which may be applied and remain the choice of the individual researcher.

The lack of and need for a theory has been acknowledged in the ODR literature[14] although no consensus has been reached regarding the type of theory needed. Cortés advocates for research on how to attract consumers and businesses into ODR procedures and how to safeguard due process in effective online surroundings.[15]

8. Katsh & Rifkin, *supra* note 1 at 93. For example, Rule has adopted the analogy of the fourth party. See: Rule, *supra* note 3 at 229.
9. Lodder & Zeleznikow, *supra* note 1 at 79.
10. *The End of Lawyers?: Rethinking the Nature of Legal Services* (Oxford: New York: Oxford University Press, 2010) at 99, 274.
11. Günther Teubner, "Global Bukowina: Legal Pluralism in the World Society", in Günther Teubner, ed, in *Global Law Without a State* (Dartmouth: Brookfield, 1997) at 3.
12. Martin Lister et al. *New Media: a Critical Introduction,* 2nd ed, (London: Routledge, 2009) at 98.
13. Sheila Jasanoff, *Science at the Bar. Law, Science, and Technology in America* (Cambridge MA: Harvard University Press, 1997) at 304.
14. Wing & Rainey, *supra* note 6 at 27.
15. Cortés, *supra* note 2 at 216.

Wing and Rainey emphasize the need for interdisciplinary research which could provide answers to questions regarding how technology is changing our interactions in conflicts if we adopt a bi-cultural attitude towards online and offline worlds and what kind of culture emerges from an online environment.[16] Kaufmann-Kohler and Schultz note that both legal and technological issues need to be addressed.[17] Hörnle calls for designing a private order that incorporates public due process standards.[18]

When these two trends are taken into consideration—first, the transformative and central nature of technology and, second, the diverse lack in theory—it becomes apparent that ODR research is in need of a long-lasting and systematic research agenda. In order to develop a sufficient legal theory for future ODR research, we need to understand how technology is changing dispute resolution, and, simultaneously, how this is, in turn, affecting procedural law.

The claim I wish to make in this paper is that in order to create the necessary foundation for the development of ODR theory we must 1) adopt a definition of technology by assessing interdisciplinary approaches in legal science; 2) discuss all dispute resolution simultaneously from a joint perspective, regardless of whether certain procedures are publicly or privately funded or organized through independent institutions or court annexed, thus, overcoming the distinction between litigation and ADR; and 3) again question the basic explanatory models adopted in the theory of procedural law. In my opinion, integrating technology into dispute resolution affects procedural law in a way that challenges old models for the justification of dispute resolution systems (state sovereignty for litigation, mutual agreement for ADR). The impact of ODR on justification constructs is an ideal example of the new challenges technology brings to legal theory, and understanding the changes to justification models constitutes one of the preliminary theoretical issues that needs to be solved in order to form a lasting foundation for ODR theory.

Some ODR theory has tackled some of the main issues of integrating technology, yet the amount of research is still scarce. This ODR-specific theoretical foundation, while still lacking, has achieved several milestones such as coining terminology and naming essential elements of ODR procedures in addition to mapping out the field for future research. However, the image created by current research is still very much that of a work in progress given that the phenomenon of ODR in itself is still being formulated, and work carried out on ODR has largely focused on introductory studies or user perspectives.[19] That said, theoretical studies on ODR from a systems-

16. Wing & Rainey, *supra* note 6 at 36.

17. Kaufmann-Kohler & Schultz, *supra* note 3 at 237.

18. Hörnle, *supra* note 2 at 10, 218.

19. Most of the early published monographs on ODR adopted a more descriptive approach (e.g. Katsh & Rifkin, *supra* note 1; Rule, *supra* note 3) likely in part due to necessity since the entire field had just recently emerged. Since then, more academically focused work has been carried out by e.g. Kaufmann-Kohler & Schultz, *supra* note 3 at 404; Hörnle, *supra* note 2 and Cortés, *supra* note 2. For doctoral dissertations, see: Lodder & Zeleznikow, *supra* note 1 at 19. However,

level perspective do not exist as of yet.[20] However, such examinations are needed — at the very least, they may serve as scaffolding for more detailed academic work in the future. Although such a theoretical approach is not directly applicable to practice, a theoretical understanding also serves the interests of practitioners at a minimum as a tacit understanding of systems-level functions.

1.2. What Theory?

In order to comprehend the change that the emergence of technology has brought, we must understand, first, the way in which science evolves, and second, how law as a distinctive social practice changes.

From a theory of science perspective, the situation surrounding ODR theory can be understood through Thomas Kuhn's conceptualization of the pre-paradigmatic phase of science. In his widely read and quoted book, *The Structure of Scientific Revolutions*, Thomas Kuhn separates normal science from revolutionary science. In Kuhn's assessment, normal science refers to research based on older scientific achievements which are accepted as a prevailing paradigm. Science evolves through periodic scientific revolutions where the established canonized paradigm of normal science is superseded by a new revolutionary paradigm, which, unlike the old paradigm, is able to address newly emerging phenomena in the world. In order to become a paradigm, a theory has to be both unprecedented and open-ended. If these prerequisites are met, new theory leads to the creation of a paradigm as a sign of maturity for a specific field.[21] After being accepted by the research community, a revolutionary paradigm becomes normal science, which, in turn, provides for the continuation and stability of science.[22]

Although Kuhn himself wrote from the tradition of natural science, his theory on science as a social project and structure of change can be applied as an explanatory model within the social sciences as well. Kuhn claims that the emergence of technology has often played a significant role in creating new sciences,[23] although he

these doctoral dissertations mostly aim at practical recommendations instead of the abstract application of legal theory to ODR research. Puurunen's objective is to map out the new global business environment and how international procedural law functions within it. See: Tapio Puurunen, *Dispute Resolution in International Electronic Commerce* (Helsinki: Tapio Puurunen, 2005) at 2. Hörnle provides a model of dispute resolution for the internet, focusing on online arbitration. Cortés, in turn, focuses on evaluating the possibilities of creating a legal framework for business-to-consumer disputes.

20. As a clarification, I refer to theoretical study through legal research that applies the methodology of legal theory to dispute resolution and technology.

21. Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1964) at 11.

22. *Ibid*.

23. According to Kuhn, "Because the crafts are one readily accessible source of facts that could not

refers mostly to the improved possibilities of collecting empirical data for scientific discovery. From a legal theory perspective, Niklas Luhmann highlights that it is not necessary to understand Kuhn's definition of a scientific paradigm precisely in order to apply the theory or to recognize a shift.[24]

Research aiming at the formation of a new paradigm should focus on formulating general concepts and principles and other tools for further research as well as on revealing unresolved issues. According to Kuhn, the formation of a paradigm suggests which questions should be asked and what topics should be examined; but even a new paradigm does not offer a complete ontological theory.[25] I propose that we understand dispute resolution and technology as an emerging branch of law still in its pre-paradigmatic phase trying to create general principles and concepts which would give it a distinct identity. I view the emergence of technology vis-à-vis dispute resolution as a scientific paradigm shift that leaves the old theory unable to answer the new interpretative issues arising from societal change. The role of scientific research is fundamental to the formation of such a theoretical foundation. However, Kuhn's theory on paradigm shifts gives us an understanding of ODR research as a part of scientific evolution, but, simultaneously leaves methodological issues entirely to the researcher's discretion – which is a preferable outcome *per se*.

One ontological option for addressing technology and law would be the perspective of a systems theory approach, which provides a complete image of law on a societal level. As we discuss transnational law, such an approach becomes almost mandatory for understanding the way law operates.[26] I focus on the construction of justifications for dispute resolution and claim that integrating technology into dispute resolution creates the need to reevaluate old issues and discussions of procedural law doctrine. This demand for reevaluation connects procedural law with legal theory.

In the systems theory approach proposed by Niklas Luhmann and Günther Teubner, law is understood as an autonomous regime of societal practices capable of self-creation and regeneration through its own normative practices. Law as a unique societal communications practice differs from other subsystems such as politics, commerce, technology, etc., since it is aimed at the realization of the legal protection of rights and positions recognized and guaranteed by the system. However, these rights and positions should be understood more broadly than as mere legal rights regulated in positive legal norms. Law as a system formulates these rights, legal

have been casually discovered, technology has often played a vital role in the emergence of new sciences". *Ibid* at 15-16.

24. Niklas Luhmann, *Social systems*, translated by John Bednarz, Jr. & Dirk Baecker (Stanford: Stanford University Press, 1995) at 4.

25. Kuhn, *supra* note 21 at 18.

26. By this I mean the universality of the theoretical framework adopted. However, such universality does not mean to claim exclusive correctness or validity, as Luhmann states. See: Luhmann, *supra* note 24 at 15.

conceptions and legal actors at the same time as a legal system is created through social communications, i.e. interaction between actors, within the system.

There is a systems-level rationality embedded in law's normativity. Normativity controls and limits the admittance of impulses from other societal practices into law. Thus, law is an operationally closed system, while informationally open to such filtered impulses from other systems. In systems theory, this operational introversion is a prerequisite for maintaining law's normativity. Legal communication, apart from other societal subsystems, operates through a binary code of law/non-law which differs from codes adopted in other systems and, thus, forms the law's normativity. Any 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 since only the use of legal code produces legal communication acts.[27] Legal communication is best described as normative—i.e., following the binary code of a legal system—and, due to its operative closure, such normativity cannot be produced outside the legal system. In other words, one cannot derive what ought to be (*sollen*) from what is (*sein*). Law changes through self-reproduction, which is reflected in the term *autopoiesis*.

According to Calliess' reading of Luhmann, Luhmann's systems theory opens law to its environment through structural couplings (*strukturelle Kopplung*), which simultaneously facilitate relaying impulses outside the legal system into it and limit the content of such impulses.[28] Luhmann sees contract and property as couplings between law and commerce, and a constitution as a coupling between law and politics.[29] These structural links enable a higher level of complexity and, at the same time, reproduce law as an autonomous system and as consistently interconnected with other systems highlighting its simultaneous independence and dependence.[30]

Systems theory provides a framework for understanding why integrating technology in to dispute resolution in cross-border civil cases is so problematic. Teubner claims 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.[31] In other words, whereas commerce and technology are global

27. Gralf-Peter Calliess, "Systemtheorie: Luhmann / Teubner" in Sonja Buckel, Ralph Christensen & Andreas Fischer-Lescano, eds, *Neue Theorien des Rechts*, 2nd ed (Stuttgart: Lucius & Lucius, 2009) at 56. As Luhmann states, "Es gibt kein Input von rechtlicher Kommunikation in das Rechtssystem, weil es überhaupt keine rechtliche Kommunikation ausserhalb des Rechtssystems gibt." See: *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1995) at 69. Luhmann emphasizes that only a legal system in itself renews law, defines its borders and can apply the code of law/non-law.

28. Calliess, *supra* note 27 at 61.

29. See e.g. Luhmann, *supra* note 27 at 443.

30. See e.g. Niklas Luhmann, *Rechtssoziologie,* 3rd ed (Opladen: Westdeutscher Verlag, 1987) at 6-7.

31. Teubner, *supra* note 11 at 5.

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.

At this point, it should be noted that there are naturally other options of perceiving law from a theoretical perspective than accepting the assumption made in systems theory for law as its own operationally closed system applying its own binary code. A similar distinction between the internal perspective of the actors in a legal system and the external perspective is made by H.L.A. Hart in *The Concept of Law*.[32] Hart makes a distinction between social habits and social rules such as laws, where the breach of a rule is considered wrong and punished by social pressure or a sanction. According to Hart, an internal point of view refers to a member of a group who feels obligated by social rules, accepts them and uses them as guidelines of conduct, where again the external observer can take note that certain rules are accepted within a group.[33] Although Hart's distinction between internal and external perspectives provides insight into differentiating between the action of making a judgment (external) from the judge's understanding of which sources have had an impact on his or her decision (internal), the theory in itself does not provide a clear-cut definition of law's normativity.[34]

In this article, I make the claim 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 technology system in order to be informationally open to its input. Although Hart's differentiation between internal and external viewpoints does not address this question, it should be noted that Hart's theory is by no means incompatible with systems theory. However, as a way of portraying the crisis of justification as a discrepancy caused by law's normativity in relation to other fields, Hart's theory alone does not provide us with the necessary tools. Regardless, the fissure could be construed differently through Hart's or any other theoretical framework; but, as is

32. Herbert L.A. Hart, Joseph Raz & Penelope Bulloch, *The Concept of Law,* 2nd ed (Oxford: Clarendon Press, 1994) at 89-91.

33. *Ibid* at 89. In Luhmann's systems theory, such a distinction follows from the operational differentiation of subsystems, where the system defines itself by the relevance of its operations. Systems observe themselves, but no adequate external observer can be found. See, e.g., Niklas Luhmann, *Die Gesellschaft der Gesellschaft [2]* (Frankfurt am Main: Suhrkamp, 1997) at 866. However, Luhmann tries to solve the issue of the external observer later on by differentiating between different levels of observing, but does not completely abandon his conceptualization of observation only within a system. See *Ibid* at 1118.

34. Such criticism towards Hart has been voiced in Scandinavian realism. See e.g. Pauline C. Westerman, "Impossibility of an Outsider's Perspective", "Impossibility of an Outsider's Perspective" in Jaakko Husa & Mark van Hoecke, eds, *Objectivity in Law and Legal Reasoning* (Oxford: Hart, 2013) at 52.

understandable, other theoretical choices might provide a different set of answers and, thus, would paint a different image of the same issue.

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.

1.3. Understanding Dispute Resolution

My starting point is that all dispute resolution should be evaluated using a joint approach instead of strictly separating courtroom technology and ODR as is done between litigation and ADR in the legal literature. Instead of reinterpreting this distinction between technology-enhanced litigation and private ODR by adopting the ADR-derivative concept of ODR, new terminology should be introduced for future research, thereby overcoming the embedded doctrinal choices.

Given that ODR differs from ADR due to technology's decisive role in the resolution procedure, similarly integrating technology in to official court procedures changes the *modus operandi* of litigation. The common denominator of technology renders the distinction between litigation and ODR useless and, in order to highlight the revolutionary impact of technology, we should instead adopt the terminology of dispute resolution and technology (DR&T).[35] ODR as a term has a strong doctrinal history due to its roots and, therefore, adopting the new terminology of DR&T for such a joint approach is dialectically a more sound solution.

Such a wide definition of DR&T includes different applications from case management and e-filing to ICANN and fully automated dispute resolution procedures, without differentiating applications belonging to private or public DR spheres. In the existing body of research, some writers have adopted the distinction between private and public DR&T models, while others advocate for a wider definition. As Hörnle states, there has traditionally been a dichotomy between public and private dispute resolution systems which are conceptually separated from one another.[36] However, Lodder and Zeleznikow consider the adoption of a

35. For a more in-depth discussion, see, e.g. Riikka Koulu, "Domstolsrättegångar och alternativ tvistelösning - innebär anvädning av nutida teknologi i tvistelösning en upplösning av separata paradigm?" (2013) 36:2 Retfaerd: nordisk juridisk tidskrift 60.

36. 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, *supra* note 2 at 10. 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.

joint approach, including both technology-enhanced litigation and private ADR-based ODR, to be useful for future dispute resolution.[37] As argued by Vermeys and Benyekhlef in addition to Cortés, the next logical step is court-annexed ODR.[38] It follows from here that technology will also invade state-governed litigation, and technology issues in public dispute resolution must be addressed as well. Thus, we have outgrown these doctrinal distinctions for ADR and litigation.

I base this joint approach on the idea that technology has a transformative power (using Richard Susskind's terminology, we can also say disruptive technology, or apply the term fourth party following Katsh & Rifkin's conceptualization of technology), which similarly affects both courtroom dispute resolution and ADR. At this point, we have little research on courtroom technology or ODR and older theoretical constructions developed by litigation and ADR research traditions have no answers to these new emerging questions related to technology. This means that *ex analogia* interpretations between ADR and ODR are rarely useful since they ignore the role of technology. For example, given that technology has the potential to provide low-cost DR methods in both litigation and in ODR, the ADR/litigation juxtaposition is no longer relevant due to technology. In addition, accessing the necessary technology in ODR might create a threshold for non-digital natives, which does not exist in ADR. Thus, the new theory should highlight the significance of technology by taking it into consideration in formulating the fundamental principles.

1.4. Understanding Technology: Going Beyond the Limits of Law?

Legal science cannot answer how technology changes human behavior. Also, we cannot derive a normative position (what ought to be) from the results of empirical studies completed in other disciplines since they focus on describing existing phenomena (what is). This difference in knowledge construction and interest in legal science versus other social sciences creates a discursive divide. However, in order to understand technology, some bridges must be built between law and technology in order to reach a working definition of technological communications in situations involving conflicts.

Already, Katsh and Rifkin have referred to Marshall McLuhan's communications theory as a framework for understanding how technology changes interaction and communication in conflict management.[39] Similarly, Wing and Rainey advocate for an interdisciplinary approach in order to reach a better understanding of how

37. Lodder & Zeleznikow, *supra* note 1 at 170.

38. Vermeys & Benyekhlef, *supra* note 6 at 295; Cortés, *supra* note 2 at 223.

39. Katsh & Rifkin, *supra* note 1 at 21-22.

technology affects communication in conflict situations.[40] Dispute resolution and technology as research subjects create issues that are not simply legal, but instead, overlap with the sociology and psychology of technology. Kaufmann-Kohler and Schultz formulated this problem differently: "The quality of online dispute resolution also raises a number of difficulties. In the context of non-adjudicative methods of dispute resolution, the difficulties are less of a legal nature and more practical, technological or psychological."[41] As stated above, ODR research has acknowledged technology's transformative power, which places its role firmly at the center of future DR&T research.

It should be noted that ODR theory should be a normative theory, although it does not need to perceive material law as the objective of DR. The requirement of normativity derives from ODR's uses. While disputes would be solved using material standards other than law (contesting the "in the shadows of the law"), DR 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.[42]

It, then, follows that we must look beyond law with a mind to an interdisciplinary approach, but remain normative in order to preserve the knowledge construction interests of legal science. If the normativity of law is lost, the research approach becomes mostly descriptive. Influences from communications studies and science and technology studies are *de facto* methodological convictions that direct the researcher's examination to the relevant questions. Determining the effects of technological change precisely depend on the way we perceive technology, which, in the end, is a question derived from the chosen model of communications studies.[43]

40. Wing & Rainey, *supra* note 6 at 36.

41. Kaufmann-Kohler & Schultz, *supra* note 3 at 235. Also, Wing and Rainey have raised questions concerning the need for an interdisciplinary approach to ODR research. See: Wing & Rainey, *supra* note 6 at 32.

42. 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 highlights 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: Leon E. Trakman, "Appropriate Conflict Management Contracts Symposium: Commentary" [2001] 3 Wisconsin Law Review 919. However, it is argued in this paper that 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 its coding of law/non-law.

43. In science and technology studies, the relationship between human interaction and technology is often construed as taking place between Marshall McLuhan's technological determination of "the medium is the message" and the human agency of Raymond Williams. Bruno Latour's actor-network theory perceives reality as a network of social actors which are not exclusively human. Latour has been depicted as a combination between McLuhan's technology-centric and Williams' more constructivist approach. See e.g. Martin Lister et al, *New Media: a Critical Introduction,* 2nd

Combining communications studies and legal science is made possible by the chosen ontology of systems theory. Understanding law as a closed autopoietic system provides normativity and a coherence of jurisprudence. Understanding technology as its own societal subsystem, which interacts with law through structural couplings, provides one option for bringing results from other disciplines to the legal field.

2. Finding Justification

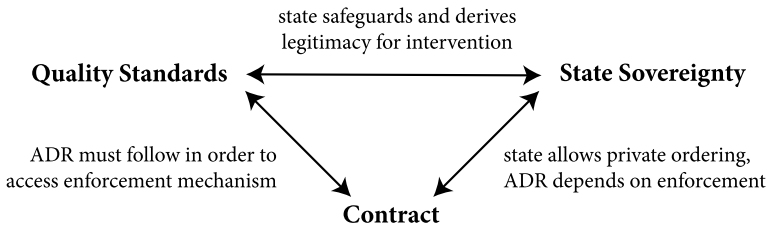
2.1. Justification as an Interrelationship

A prime example of the paradigm shift caused by introducing technology into dispute resolution is justification for dispute resolution. The question of the justification construction is closely connected with the state's role in dispute resolution since, essentially, dispute resolution always comes with the question of how we justify state intervention in private disputes in general.

As technology is integrated into cross-border dispute resolution, the argumentation structure of procedural law becomes visible. This change creates the need to reevaluate how the legitimacy of dispute resolution is built through different justification models. I claim that there are three justification constructions that have been adopted to provide fundamental legitimacy for dispute resolution systems — namely, sovereignty, mutual agreement and quality standards. It should be noted that these justification constructions have no either/or application and their interrelationship is more a question of emphasis than definitive choice.

Sovereignty (linked to the agenda of the modern nation-state) as a justificatory concept is related to other explanatory models such as mutual agreement (often used to understand ADR's jurisdiction) and quality standards (adjudicative procedures and enforcement). The interplay of these different justificatory models is essential for reconstructing the state's role in future dispute resolution.

The interface between justification constructions can be construed through the following graph:



ed (London: Routledge, 2009) at 80-99.

This conceptualization of different elements of justification as a three-fold interrelationship reveals the interdependence between these positions, highlighting the possibility of a shifting focus. State sovereignty as a traditional model for justifying state intervention in private disputes is often validated by the need to grant protection to the weaker party in a conflict. For example, in disputes between businesses and consumers, employers and employees, child access cases and the like, the imbalance of power between parties is thought to result in unequal outcomes without state intervention.[44] The state erects material norms and due process in order to fulfill its responsibility to provide protection as well as effective dispute resolution, simultaneously deriving legitimacy for its monopoly on violence and sole territorial jurisdiction.

Since the state is unable to provide effective dispute resolution, some disputes remain outside the courts. The threshold might be too high due to legal costs, or difficulties related to cross-border litigation or the non-legal nature of a conflict might prevent court access. In order to fulfill its task, the state accepts the existence of private ordering based on party consent, given that such a failure would otherwise lead to disintegration of trust in the state. However, even private ordering commonly relies on the state's enforcement mechanisms when outcomes are not voluntarily followed.[45] This grants the state authority to ensure that private institutions follow acceptable quality standards in resolving disputes and that the application of due process is set as a prerequisite for granting access to enforcement.

In cross-border civil cases where the possibilities for DR&T become even more pronounced, the state's monopoly on dispute resolution cannot be carried out since online disputes cannot be situated within the procedural system through territorial jurisdiction. In addition, ODR institutions do not necessarily turn to the state's enforcement system in order to force decisions; but, instead, they develop alternative mechanisms for reaching the same outcome. This renders the state's control through enforcement ineffective, and adherence to quality standards are left to the private institution's discretion. It follows from here that the claim made earlier on technology changing procedural law is substantiated — that is, finding justification for all dispute resolution cannot be based on symbiosis between sovereignty and contract, where the state controls quality standards through a monopoly on violence. Instead, we

44. For example, Hörnle considers several methods for creating procedural rules for arbitration which would then protect the weaker party. See: Hörnle, *supra* note 2 at 244-245.

45. Different legal instruments rely on different enforcement models. For example, the EU's ODR Regulation (524/2013) together with the revised ADR Directive (2103/11/EU) obligates Member States to ensure close cooperation between ADR entities and national enforcement authorities, but, as such, contain no specific clauses on enforcement. Simultaneously, the UNCITRAL Working Group III on ODR is currently discussing a two-track solution, where the second track would provide that a binding arbitral award is enforced through the New York Convention. See: Report of Working Group III (Online Dispute Resolution) on the work of its twenty-seventh session, New York, May 20-24 2013, p. 4, online: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/840/15/PDF/V1384015.pdf?OpenElement/> retrieved Aug 26, 2013.

must rethink how justification can be reached in the new procedural environment of DR&T.

2.2. Building State Monopoly: Sovereignty as Justification

Effective means for solving internet disputes through state courts are lacking given that international procedural law still stems from the concept of the territorial jurisdiction of the nation-state.[46] Therefore, creating transnational instruments depends on cooperation between sovereign states through diplomatic channels, which is often time-consuming and difficult. As such, the need for redress mechanisms for online disputes by far predate effective instruments. I claim that this is an outcome of sovereignty, which is still perceived as the primary justificatory conceptualization in legal doctrine.

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.[47] 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.

Sovereignty is preserved in dispute resolution by adopting it as the core value of procedural law, which is conceptualized as the ***state's monopoly over dispute resolution***. This refers to the state's exclusive right to decide on the resolution of legal conflicts on its own soil (territorial jurisdiction), which is the basis of international procedural law. The Peace of Westphalia from 1648 and theories on social contract as formulated by Hobbes and Locke link state monopoly to the formation of the modern nation-state.

State monopoly over dispute resolution is the practical application of state sovereignty as a justificatory concept. Sovereignty is maintained by providing internal conflict management; but, simultaneously, territorial jurisdiction is the

46. This truism is often so self-evident that it is not necessary to express it in words; however, it is still a presumed template for formulating instruments of cooperation. Such acknowledgement of territorial jurisdiction can be found, for example, in the preamble and general provisions of Brussels I Regulation (44/2001).

47. See Teubner, *supra* note 11 at 3.

most visible sign of sovereignty externally in relation to other states. This leads to international relations comprising a network of sovereign states instead of a global society of joint jurisdiction. The two most influential works on sovereignty include Thomas Hobbes' *Leviathan* (1651), which is often described as advocating for absolutism for the sovereign ruler, and John Locke's *Two Treatises of Government* (1689), which places limits on the sovereign's power. In these theories of the social contract, the absolute resignation of power by consent from individuals marks the end of a natural state and creates a sovereign authority responsible for providing protection for these individuals, i.e., its citizens.

Hobbes considered the surrender of autonomy from individuals to the sovereign to be absolute. After the transfer of power, the sovereign has the right of judicature in all cases concerning law and fact.[48] For Hobbes, there exists a state of nature between sovereign states — that is, a normative no-man's land exists where no state can claim sovereign jurisdiction. Locke, on the other hand, understood the sovereign's power to be limited by the objective for which it was constituted — that is, for the good of the public.[49] According to Cox, Locke did not provide a model for establishing a global commonwealth between the sovereign states since the lack of commonalities would make such a task impossible despite resource incentives to the contrary.[50]

State monopoly is upheld within our political ideology of liberalism,[51] where the national legal system is perceived to have the sole right and responsibility of resolving individuals' disputes based on sovereignty. First, the concept of a state monopoly over dispute resolution is a legal fiction adopted to preserve state's interests in relation to other states. Against this background, the impact of the international community's failure to provide a state-governed resolution model for online disputes is easier to comprehend. Second, the state monopoly safeguards the state's monopoly on violence since the state grants access to its coercive measures only towards those decisions it recognizes.

State monopoly is two-fold: external monopoly refers to its impact in relation to other states, while internal monopoly refers to its impact on its own citizens. External

48. Thomas Hobbes & Ian Shapiro, *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (New Haven: Yale University Press, 2010) at 109.

49. John Locke, "Two Treatises of Government. In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government", in *The Works of John Locke: A New Edition, Corrected, in Ten Volumes, Vol. V* (London: Printed for Thomas Tegg; W. Sharpe and Son; G. Offor; G. and J. Robinson; J. Evans and Co., R. Griffin and Co. Glasgow; and J. Gumming Dublin, 1823) at 139 §.

50. Richard H. Cox, *Locke on War and Peace,* (Oxford: Clarendon Press, 1960) at 184-195.

51. A point of interest is Koskenniemi's analogy between sovereignty and liberty. Koskenniemi claims that sovereignty plays an analogous role in international law to that of liberty in liberal discourse. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) at 300.

monopoly prevents other states from extending their jurisdiction to the territorial scope of another state.[52] However, each state tries to widen its influence as far as possible and, based on legal cooperation, a state's procedural acts can be granted influence in another state if they satisfy certain restrictions such as *exequatur*. Thus, a prerequisite for enforcing a foreign decision is recognition of the decision by a competent state authority. The internal aspect of the monopoly is also interlinked with enforcement given that access to enforcement is only granted to individuals and rights that have been recognized by the state.

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.

A state monopoly on DR is a dichotomy of the exclusive right of jurisdiction on one hand and the responsibility to provide effective DR on the other. This responsibility can be derived from the sovereign's responsibility to guarantee peace, i.e., through the formation of a sovereign power. One option would be to construe a foundation for private DR based on a sovereign's power of delegation, but this option suggests *in casu* acceptance. Another option would be the general acceptance of contract-based DR; but, this seems artificial since the state does not become aware of such private DR. Hence, quality standards — i.e., due process is the only justification construction which is able to answer to the legitimacy of both litigation and private DR, and, in the end, access to enforcement is an indicator of justification (litigation struggles to overcome threshold issues and create enough enforceable decisions, while ADR struggles for sufficient quality standards).

Another issue altogether is that private ordering is by no means a newly emerged phenomenon. Community-based conflict management, fair courts and early neutral evaluation have existed alongside public courts in modern states since the Westphalian peace. Some of these might have received public acknowledgment, while others might have remained beyond state awareness entirely. The most prominent example of such private but publicly accepted ordering is the establishment of the

52. This state interest in extending the effects of its own procedural acts as far as possible and to restrict the influence of foreign acts on its soil has been described as hypocrisy in international procedural law. In the Finnish legal literature, see: Risto Koulu, *Kansainvälinen prosessioikeus pääpiirteittäin* (Helsinki: WSOY, 2003) at 2. On a larger scale, such an agenda is often connected with legal imperialism. On imperialism and sovereignty in international law, see: Koskenniemi, *supra* note 51 at 282.

transnational law merchant, *lex mercatoria*.[53] In addition, national out-of-court solutions have been encouraged by states.[54] Newer examples of state encouragement can be found in the EU's ODR Regulation and UNCITRAL's working group for establishing procedural guidelines and enforcement mechanisms for ODR. In this light, it becomes clear that the state monopoly is and has been a fiction instead of a clear reflection of conflict reality.

Rijgersberg suggests understanding sovereignty as the interdependence between states, given that such a model would be more sensitive to the globalized legal environment. According to Rijgersberg, modern states in the globalized world society are interconnected with one another and with private operators via the internet forming a global organizational architecture.[55] In his constitutional approach, the state maintains responsibility for public safety, welfare and the protection of property rights.[56] Although Rijgersberg's modernization of sovereignty creates adjustments to legal theory necessary in the era of the internet, it does not add justificatory power to dispute resolution. It remains unclear whether such a reinterpretation would be sufficient *de facto* to remedy the shortcomings of the disintegrated state monopoly.

In summary, a state monopoly on dispute resolution does not provide us with a workable normative framework for finding justification for cross-border DR&T theory; neither does it offer an empirical model for understanding the reality of conflict management.

2.3. Resorting to the Alternative: Mutual Agreement as Justification

The emergence of ADR created the need to find justification elsewhere and the chosen model of ***mutual agreement*** was introduced as a justificatory concept.[57] In

53. On *lex mercatoria* and the constitutionalization of private regimes, see Gralf-Peter Calliess, "Reflexive transnational law" (2002) Zeitschrift für Rechtssoziologie Transnationales Recht 23 185. However, it should be noted that *lex mercatoria* was originally a set of material norms, not procedural criteria. Still, it is probable that such a material code also included procedural criteria for executing such material rights.

54. 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: Kevät Nousiainen, *Prosessin herruus: länsimaisen oikeudenkäytön 'modernille' ominaisten piirteiden tarkastelua ja alueellista vertailua* (Helsinki: Suomalainen lakimiesyhdistys, 1993) at 438-439.

55. R. W. Rijgersberg, *The State of Interdependence: Globalization, Internet and Constitutional Governance* (The Hague: T.M.C. Asser Press, 2010) at 65.

56. *Ibid* at 77-78.

57. Some scholars have consequently conceptualized ODR's jurisdiction through parties' agreement. See e.g. Victoria C. Crawford, "Proposal to Use Alternative Dispute Resolution as a Foundation to Build an Independent Global Cyberlaw Jurisdiction Using Business to Consumer Transactions

the internet era, the emergence of ODR has further disintegrated a state's monopoly over dispute resolution in online disputes and, as such, calls into question the usefulness of sovereignty as a background principle of procedural law.

Mutual agreement—i.e., the parties' joint consent to have their dispute directed to a specific dispute resolution model—is the starting point for ADR. In addition, state litigation respects the parties' agreement on a chosen DR model (such as in the case of arbitration) or on an uncontested fact. In other words, in a single case, the contract overrides quality both in state DR and ADR, and the parties' agreement does not need to conform to material law. Mutual agreement seems well-suited to describing both the reality of the jurisdiction of ADR and also to the formation of a justificatory foundation which is not impeded by restrictions such as sovereignty.

Furthermore, state-governed litigation can be construed through the contract model[58] by understanding social contract according to Hobbes or Locke as a specific contract for dispute resolution. However, social contract is an intellectual fiction of its own and no such contract is actually signed or agreed upon in the formation of a state. Such a fictional construction of acceptance seems, therefore, ill-suited since simultaneously an arbitral clause must be signed after the dispute has emerged in order to be binding on the consumer-disputant.

In addition, parties' acceptance of the DR method is poorly fitted as a justificatory concept given that it leaves questions related to due process and quality standards solely to the discretion of the parties by shutting out state controls. Thus, instead of improving access to justice, consent as justification may create a second-class dispute resolution to disputes remaining outside the scope of litigation.

Although state monopoly can be construed through agreement fiction, it is not able to address justification of state DR, since agreement fiction is insufficiently compatible with a state's monopoly on violence. After demonstrating that these first two justificatory constructions (sovereignty and agreement) lack justificatory force, it becomes apparent that ***DR&T theory should look at the content of DR (i.e., due process values) as the source of justification instead***. Such justificatory conceptualization would also be compatible with the chosen joint approach of viewing both state litigation and ODR simultaneously. It also connects justification with a state's right to intervene in private disputes, but does not yield ready-made answers to questions such as enforcement and the institutionalization of ODR.

as a Model, A Note" (2002) 25:3 Hastings International & Comparative Law Review 383.

58. See, e.g., Gralf-Peter Calliess, "Online Dispute Resolution: Consumer Redress in a Global Market Place" (2006) 7:8 German Law Journal at 650.

2.4. Sketching the Bigger Picture: Quality Standards as Justification

The third variable for finding justification is the quality standard in dispute resolution. The content of dispute resolution procedures have been framed as due process and the rule of law in state-governed litigation and as the effectiveness, trust and expertise of neutrals in the ADR literature. However, both of these quality standards, regardless of their different approaches, refer to the content of dispute resolution as the deciding characteristic of an acceptable framework for DR models.

Finding justification in quality standards is not far-fetched for state litigation given that the modern state's responsibility to provide both effective dispute resolution and protection for the weaker party resonate with safeguarding due process values. In addition, focusing on quality standards as a justification instead of mere party consent is a consistent choice for ADR and private ODR given that private ordering relies either on state enforcement or on its own enforcement methods. State enforcement is possible for private ordering only through reconciliation with the demands of due process. Private enforcement mechanisms escape the state control of *exequatur* and, thus, do not need to comply with due process requirements; but, in relation to consent-based justification models, they add to the problematic issue of second-rate justice for disputes outside the litigation threshold.

As these examples of sovereignty and contract failing as justificatory concepts for ODR depict, border areas between different systems form hotspots for legitimacy. Bearing in mind Teubner's definition of technology and law as their own systems—one connected to the local and the other to global operations—it becomes clear how a systems theory approach might reveal discrepancies that need to be addressed by a further developed ODR theory in the future. As Luhmann states, difficulties in finding justification result from excessive differentiations in situations where the need for interdependencies is not met.[59]

Hart separates social rules, including but not limited to laws, into primary rules or rules of conduct and secondary or power-conferring rules, which refer to rules that are directed at officials and which impact the function of primary rules. Primary behavior-modifying rules state that "*under rules of the one type… human beings are required to do or abstain from certain actions, whether they wish to or not.*" In comparison, the secondary power-conferring rules "*provide that human beings may, by doing or saying certain things, introduce new rules of the primary type, extinguish or modify old ones or in various ways determine their incidence or control their operations*".[60] According to Hart, these secondary rules are situated on another

59. According to Luhmann, another example of this is "the much-decried erosion of traditional societies' cultural heritage". See: Luhmann, *supra* note 24 at 92.

60. Hart, Raz & Bulloch, *supra* note 32 at 81, 94.

level separate from primary rules and try to provide remedies to 1) uncertainty regarding what law is (through rules of recognition), 2) the static nature of law (rules of change) and 3) the inefficiency of social pressure (rules of adjudication).[61] In Hartian terms, sovereignty as a justificatory concept can be understood as a secondary rule — that is, a rule governing rules. Hart considers a contract in itself as a legal power — a private power-conferring rule.[62] However, in contract law, Hart's definition has been contested by Klass, who concludes that neither part of Hart's distinction is useful for the theory of contract law.[63]

Similar to Klass' analysis, Hart's distinction between duty/power does not provide a useful viewpoint for evaluating the change taking place in the theory of procedural law. Although a contract could be evaluated as a secondary rule (a private power-conferring rule), quality standards do not fall into either category simply or neatly. Due process can be seen as rules of adjudication; but, applying due process beyond the scope of litigation to ODR and adding additional content to it that is not tied to national legal systems has characteristics of primary rules. Rather than using this dichotomy, we need additional ways of conceptualizing ODR's justification.

However, adopting a systems theory perspective is not necessarily incompatible with Hart's legal theory. As a legal positivist Hart derives the validity of primary rules from the secondary rule of recognition and refuses to base validity of norms on grounds external to law. According to Hart, the rule of recognition "*can neither be valid nor invalid but is simply accepted as appropriate for use in this way*".[64] Luhmann considers Hart's theory to address the same issue than the self-referentiality (*autopoiesis*) in his own, as externalization of validity always stays as an operation internal to the system. However, Luhmann states that while systems theory always decides upon validity and law/non-law code from one moment to another in a continuous flux, hierarchical positivist theories freeze the validity permanently. As the time horizon is, according to Luhmann, empty and we cannot be conscious of other simultaneous operations within a system, the decisive point in time is now, instead of the past or the future. It follows from this that Hart's rule of recognition falls short of Luhmann's *autopoiesis*. From a systems theory perspective,

61. *Ibid.* p. 94-97.

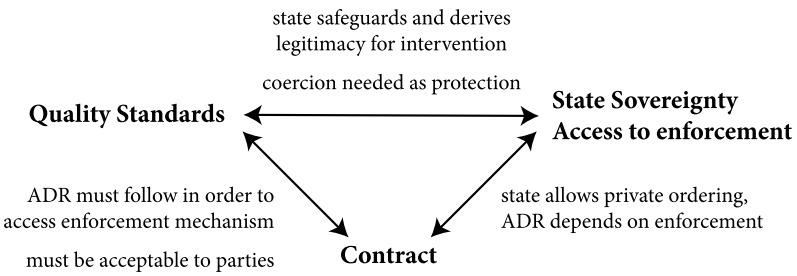
62. "Legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law." *Ibid.* at 27-28.

63. "Together these distinctive features render both pure power-conferring and pure duty-imposing theories of contract law inherently contestable. They also provide support for the idea that contract law partakes in characteristics of both, such that it is best described as a compound rule." See: Gregory Klass, "Three Pictures of Contract: Duty, Power, and Compound Rule" (2008) 83 NYU Law Review at 1783.

64. Hart, Raz & Bulloch, *supra* note 32 at 83.

continuous production and reproduction is necessary for maintaining the system's complexity.[65] Thus, Hart's theory approaches the same issue of justification from another perspective than Luhmann, but the theories share common denominators. However, Hart's theory does not provide us with sufficient tools for the quest at hand, as two of its essential elements are rendered useless; namely, the distinction between rules of conduct and power-conferring rules, and the fixed temporality of the rule of recognition.

A starting point in our quest to find justification is to expand the above figure by adding relationships that extend quality standards and replacing traditional sovereignty with a broader concept which holds access to enforcement. Quality standards as sources of justification do not lose their connection to a state or a contract — they must be acceptable from the perspective of the parties. That is, they must be seen as fair, and the possibility to back them up through some sort of coercion must exist. Thus, the relationships between the concepts become more complex:



This leads to the following: Focusing on quality standards as a justification construct for all dispute resolution would exceed the divide between separate litigation and ADR approaches, which is necessary in order to examine DR&T in its entirety. In addition, quality standards can be understood as global and as separate from the legislation of single nation-states, and hence, well-suited for the cross-border environment of DR&T. Most notably, examining quality standards as a source of justification sustains the normativity of legal science. The content of quality standards can be deciphered through the methodology of legal science since legal dogmatics provide the necessary tools for analyzing specific content based on legal materials such as the case law of the European Court of Human Rights and the European Court of Justice.

However, it should be noted that claiming quality standards as the new justificatory conceptualization leaves the content informationally open. Thus, the question remains: how can we avoid a tautology by claiming that good quality is quality that is good and draft content that is not vulnerable to the exploitation of weaker parties or a growing threshold for accessing justice? Although the task of defining the content

65. Luhmann, *supra* note 27 at 109-110.

of quality standards must remain outside the scope of this article, some points of reference should be stated in order to demonstrate that the argument is sound. One option for determining the quality standards *de facto* is to look empirically at those rules which are used most often in existing ODR services and the emerging legal instruments of UNCITRAL and the EU.[66] However, recommendations cannot be drawn directly from existing mechanisms since this would cross the border between 'is' (*sein*) and 'ought' (*sollen)*. Another option is to adopt a theory of justice similar to that proposed by Rawls or Habermas.[67] If one decides to adopt this option, one should be aware of the theoretical implications of these choices, so that the ontology, methodology and theory of justice are compatible with each other. Still, a third option is to avoid the question of content completely by claiming that the content is only defined based on context *in casu* situations. However, this solution might raise questions of legal certainty.

CONCLUDING REMARKS

It becomes apparent that a new kind of scientific understanding is needed in order to formulate a coherent theoretical foundation for future DR&T research, which is still in its pre-paradigmatic phase. I view the emergence of technology in dispute resolution as a scientific paradigm shift that leaves the old theory unable to answer the new interpretative issues arising from societal change. The role of scientific research is fundamental to the formation of such a theoretical foundation.

Definitions and principles, ontology, epistemology and methodology must be discussed so that the established DR&T theory can provide the necessary tools and direct future studies to shape an advantageous research agenda.

Several challenges for this research agenda exist. First, DR&T research is almost self-evidently transnational given that its promise of better redress specifically targets low-value cross-border cases. This means that we need to overcome divides between legal cultures, language barriers and differences in legal education to create a global interactive discourse on DR&T. Second, DR&T research must rise above the methodology of legal dogmatics and incorporate diversified approaches without losing the normative stance of descriptiveness common in the social sciences. Third, future research must combat the fast pace of development in technology. Given that DR&T is taking advantage of new technologies as soon and as effectively as possible, the fundamental concepts, principles and methodology of a research agenda must be formulated in a technology-neutral manner in order to accommodate future applications without *in casu* solutions. The formulation of lasting principles and

66. A view towards legal instruments has been cast by Kaufmann-Kohler and Schultz. See: Kaufmann-Kohler & Schultz, *supra* note 3 at 237.

67. For example, Hörnle applies Rawls' theory. See: Hörnle, *supra* note 2 at 10.

definitions for future research adds to the coherence of legal science and to the specific identity of the field of DR&T.

In the end, justifying dispute resolution intersects with proving coherence for the legal system. The emergence of ODR renders the fiction of a state monopoly as a source for justification useless for a global dispute resolution system. In addition, the hallmark of ADR (party consent) falls short of providing effective protection for procedural rights. It is suggested in this paper that the need for coherence must be met by a shifting focus from sovereignty and consent to the quality standards for DR procedures. In other words, justification should be found from the internal acceptability of the way in which disputes are resolved.

REFERENCES

Books

Cortés, Pablo. *Online Dispute Resolution for Consumers in the European Union* (New York: Routledge, 2010).

Cox, Richard H. *Locke on war and peace* (Oxford: Clarendon Press, 1960).

Hart, Herbert L.A. Joseph Raz & Penelope Bulloch, *The Concept of Law,* 2nd ed (Oxford: Clarendon Press, 1994).

Hobbes, Thomas & Ian Shapiro. *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (New Haven: Yale University Press, 2010).

Hörnle, Julia. *Cross-border Internet Dispute Resolution* (Cambridge: Cambridge University Press, 2009).

Jasanoff, Sheila. *Science at the Bar. Law, Science, and Technology in America* (Cambridge MA: Harvard University Press, 1997).

Katsh M. Ethan & Janet Rifkin. *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco: Jossey-Bass, 2001).

Kaufmann-Kohler, Gabrielle & Thomas Schultz. *Online Dispute Resolution: Challenges for Contemporary Justice* (The Hague, Kluwer Law International, 2004).

Koskenniemi, Martti. *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005).

Koulu, Risto. *Kansainvälinen prosessioikeus pääpiirteittäin* (Helsinki: WSOY, 2003).

Kuhn Thomas S. *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1964).

Lister, Martin *et al*. *New Media: a Critical Introduction,* 2nd ed (London: Routledge, 2009).

Lodder Arno R. & John Zeleznikow. *Enhanced Dispute Resolution through the Use of Information Technology* (Cambridge: Cambridge University Press, cop. 2010).

Luhmann, Niklas. *Rechtssoziologie,* 3rd ed (Opladen: Westdeutscher Verlag, 1987).

Luhmann, Niklas. *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1995).

Luhmann, Niklas. *Social systems*, translated by John Bednarz, Jr. & Dirk Baecker (Stanford: Stanford University Press, 1995).

Luhmann, Niklas. *Die Gesellschaft der Gesellschaft [2]* (Frankfurt am Main: Suhrkamp, 1997).

Nousiainen, Kevät. *Prosessin herruus: länsimaisen oikeudenkäytön 'modernille' ominaisten piirteiden tarkastelua ja alueellista vertailua* (Helsinki: Suomalainen lakimiesyhdistys, 1993).

Puurunen, Tapio. *Dispute Resolution in International Electronic Commerce* (Helsinki: Tapio Puurunen, 2005).

Rijgersberg, Rudolf W. *The State of Interdependence: Globalization, Internet and Constitutional Governance* (The Hague: T.M.C. Asser Press, 2010).

Rule, Colin. *Online Dispute Resolution for Business: B2B, e-commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (San Francisco: Jossey-Bass, 2002).

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

Articles

Calliess, Gralf-Peter. "Reflexive transnational law" (2002) Zeitschrift für Rechtssoziologie Transnationales Recht 23 185.

Calliess, Gralf-Peter. "Online Dispute Resolution: Consumer Redress in a Global Market Place" (2006) 7:8 German Law Journal 647.

Calliess, Gralf-Peter. "Systemtheorie: Luhmann / Teubner" in Sonja Buckel, Ralph Christensen & Andreas Fischer-Lescano, eds, *Neue Theorien des Rechts*, 2nd ed (Stuttgart: Lucius & Lucius, 2009).

Crawford, Victoria 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) 25:3 Hastings International & Comparative Law Review 383.

Crowne, Caroline H. "Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice" (2001) 76:6 NYU Law Review 1768.

Douglas, Kathy. "Shaping the Future: The Discourses of ADR and Legal Education" (2008) 8:1 Queensland University Technology Law & Justice Journal 118.

Hörnle, Julia. "Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?" (2012) Queen Mary School of Law Legal Studies Research Paper No 122/2012.

Katsh, M. Ethan. "Dispute Resolution in Cyberspace" (1996) 28:4 Connecticut Law Review 953.

Klass, Gregory. "Three Pictures of Contract: Duty, Power, and Compound Rule" (2008) 83 NYU Law Review 1726.

Koulu, Riikka. "Domstolsrättegångar och alternativ tvistelösning - innebär användning av nutida teknologi i tvistelösning en upplösning av separata paradigm?" (2013) 36:2 Retfaerd: nordisk juridisk tidskrift 60.

Locke, John. "Two Treatises of Government. In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown:

The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government", in *The Works of John Locke: A New Edition, Corrected, in Ten Volumes, Vol. V.* (London: Printed for Thomas Tegg; W. Sharpe and Son; G. Offor; G. and J. Robinson; J. Evans and Co., R. Griffin and Co. Glasgow; and J. Gumming, 1823).

Mnookin, Robert H. & Lewis Kornhauser. "Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution" (1979) 88:5 Yale Law Journal 950.

Resnik, Judith. "Many Doors--Closing Doors--Alternative Dispute Resolution and Adjudication" (1995) 10:2 The Ohio State Journal on Dispute Resolution 211.

Teubner, Günther. "Global Bukowina: Legal Pluralism in the World Society" in Günther Teubner, ed, *Global Law Without a State* (Dartmouth: Brookfield, 1997).

Trakman, Leon E. "Appropriate Conflict Management Contracts Symposium: Commentary" [2001] 3 Wisconsin Law Review 919.

Vermeys, Nicolas W. & Karim Benyekhlef. "ODR and the Courts" in Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey, eds, *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution* (The Hague: Eleven International Publishing, 2012) 295.

Westerman, Pauline C. "Impossibility of an Outsider's Perspective" in Jaakko Husa & Mark van Hoecke, eds, *Objectivity in Law and Legal Reasoning* (Oxford: Hart, 2013).

Wing, Leah & Daniel Rainey. "Online Dispute Resolution and the Development of Theory" " in Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey, eds, *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution* (The Hague: Eleven International Publishing, 2012) 23.

Internet materials

Katsh, Ethan. "The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace" in *NCAIR Dispute Resolution Conference* Washington D.C. May 22, 1996, online: <http://www.umass.edu/dispute/ncair/katsh.htm>.

Report of Working Group III (Online Dispute Resolution) on the work of its twenty-seventh session, New York, May 20-24 2013, p. 4, online: <http://daccess-dds ny.un.org/doc/UNDOC/GEN/V13/840/15/PDF/V1384015.pdf?OpenElement>.

Schultz, Thomas. "An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR" in *Proceedings of the UNECE Forum on ODR* Geneva June 30 - July 1, 2003) 1, online: <http:// http://www.ombuds.org/unece2003/unece2003/>.