

Law, Science and Society

LAW, TECHNOLOGY AND DISPUTE RESOLUTION

PRIVATISATION OF COERCION

Riikka Koulu



Law, Technology and Dispute Resolution

The use of new information and communication technologies both inside the courts and in private online dispute resolution services is quickly changing everyday conflict management. However, the implications of the increasingly disruptive role of technology in dispute resolution remain largely undiscussed. In this book, assistant professor of law and digitalisation Riikka Koulu examines the multifaceted phenomenon of dispute resolution technology, focusing specifically on private enforcement, which modern technology enables on an unforeseen scale. The increase in private enforcement confounds legal structures and challenges the nation-state's monopoly on violence. And, in this respect, the author argues that the technology-driven privatisation of enforcement – from direct enforcement of e-commerce platforms to self-executing smart contracts in the blockchain – brings the ethics of law's coercive nature into the open. This development constitutes a new, and dangerous, grey area of conflict management, which calls for transparency and public debate on the ethical implications of dispute resolution technology.

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Law, Technology and Dispute Resolution

Privatisation of Coercion

Riikka Koulu

First published 2019
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

a Glasshouse book

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing-in-Publication Data

Names: Koulu, Riikka, author.

Title: Law, technology and dispute resolution : privatisation of coercion / Riikka Koulu.

Description: New York, NY : Routledge, 2018. | Series: Law science and society | Includes bibliographical references and index.

Identifiers: LCCN 2018027087 | ISBN 9781138555389 (hbk)

Subjects: LCSH: Dispute resolution (Law) | Technology.

Classification: LCC K2390 .K68 2018 | DDC 347/.09--dc23

LC record available at <https://lcn.loc.gov/2018027087>

ISBN: 978-1-138-55538-9 (hbk)

ISBN: 978-1-315-14947-9 (ebk)

Typeset in Galliard
by Integra Software Services Pvt. Ltd.

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Part I

**Theoretical implications
of dispute resolution
technology**



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1 Introduction

1.1 The past and future of law and technology?

Between 1811 and 1816 in North of England owners of textile mills found themselves facing a Luddite uprising. The rioters borrowed their name from General Ned Ludd, who supposedly had broken stocking frames in anger in 1779 and was claimed to have led the riot from Sherwood forest. The frustrated textile workers saw no alternative to violent protest against the rapid changes in production mechanisms that had left them unable to provide for their families. As the situation grew worse and societal stability came under threat, legislation was harnessed to restrain the uprising by increasing the penalties for attacks against the manufacturing houses and equipment. According to the UK's Frame-Breaking Act of 1812 (officially The Destruction of Stocking Frames, etc.), all crimes against the machines were punishable by death:

'If any person or persons shall, by Day or by Night, enter by Force into any House, Shop or Place, with an Intent to cut or destroy any Framework knitted Pieces, Stockings or Lace, or other Articles or Goods being in the Frame, or upon any Machine or Engine thereto annexed, or therewith to be used or prepared for that Purpose; ... or shall willfully and maliciously, and without having the Consent or Authority of the Owner, break and destroy any Machinery contained in any Mill or Mills used or any way employed in preparing or spinning of Wool or Cotton, or other Materials for the use of the Stocking or Lace Manufactory, every Offender being thereof lawfully convicted shall be adjudged guilty of Felony, and shall suffer Death, as in cases of Felony without Benefit of Clergy.'

What really happened in England during the first decades of the nineteenth century to invoke the need for such drastic legislative measures? It was not simply the introduction of new technology, although one can pinpoint important milestones on the road to the invention of the spinning jenny or the steam engine. Instead, the social implications linked with technological innovations led to the changes in manufacturing, which can be described as the automation of routine manual labour. The interplay between society, law and technology gave rise to tensions that burst into violence.

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Now, in the twenty-first century, ‘Luddite’ has become a pejorative word for describing someone who resists technological change. Neoluddites are seen as old-fashioned fools who are unable to find any reason, other than their own inability, to oppose technological innovation. However, a look into history reveals that the original Luddites did not object to advances in technology as such, but to the social implications inherent in the mechanisation of manual labour, which left them unemployed and on the verge of famine.

Two hundred years later we are talking about a new chapter in automation, namely that of non-routine cognitive labour. We are amidst a change the impact of which expands into the established field of law. The question that arises is, how should we react to the shifts in the legal system brought on by technology, especially those transforming the core of many legal practices, dispute resolution? Should we become luddites and claim ownership of the term, and, in a bid to preserve the fundamental elements of our old-established practices in the name of justice, break the new frames of technology? Or are we to embrace the change, come to grips with it, define its nature, to create a frame for technology inside law? In order to find answers, we must first understand what are the implications of this complex and multifaceted change created by the interplay between law, technology and society. 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 place technological innovation in its historical context to define how the current disruptive trends affect the application of law.

This is a book about on-going technological change in the society, about digitalisation of legal practices, and about the impact that digital technologies have on the most quintessential of legal practices, dispute resolution. I claim that the implementation of digital technologies 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.¹ This objective connects with the wider inquiry into what exactly technological disruption² means for the legal system. Over recent years disruption has become almost synonymous with technological innovation, and, although it is probable that data analytics, AI applications such as neural networks and machine learning as well as increasing automation will alter the legal profession’s working methods, it remains open to what extent these emerging technologies will, in fact, disrupt the essence of legal practice. However, one consequence of legal technologies has already become visible. Technological solutions developed by non-lawyers to tackle legal problems are gaining ground and thus challenge the lawyers’ professional hegemony on deciding how dispute resolution should be organised.

Questions on the implications of technology tend to voice both our hopes and fears. Will computer judges driven by artificial intelligence soon replace human intuition? Is human error removed from the equation? Are we finally reaching an era of true access to justice or are we endangering the stability of society? By

emphasising digital technologies, are we about to face the gruesome triviality of case management software, reading too much into these aspirations that should be regarded simply as instruction manuals? Or are we talking about a fundamental change? At the core of all these questions two constants remain: what is law and how does technological innovation influence it?

Some questions can be, and have already been, answered. However, much remains to be seen, and there is still a lack of comprehensive analysis of the intersections between dispute resolution and digital technologies. The role of scientific examination is first and foremost to formulate necessary questions rather than simply providing answers to pre-set questions that reflect the threat and promise of technology. Against this nuanced background, this book evaluates how digital technology disrupts and changes one fundamental aspect of law, namely the enforcement of decisions rendered in dispute resolution. The objective here is to formulate a theoretical framework for evaluating the implications that digital technologies have for the legal system and then to apply this to dispute resolution.

The study consists of two main parts. In the first part I focus on the privatisation of dispute resolution through digital technologies. I demonstrate how the use of ICT creates new possibilities for privatisation of enforcement and how this development, in turn, affects the underlying methods of justifying dispute resolution in the first place. Through an analysis influenced by social systems theory I describe how the interactions of law, technology and society contribute to societal change of digitalisation and how the legitimacy of dispute resolution is created, renewed, reinterpreted and harnessed within the legal system. This analysis describes how digital technologies are giving rise to unforeseen privatisation, leading to a justificatory crisis examined in the second part of the study through three justificatory narratives of sovereignty, consent, and access to justice.

Understanding the delicate interplay between law, technology and society is the critical first step towards assessing the impact of technology on dispute resolution. This interplay is embedded in legal structures formulated over time and through these it defines the environment for future technological innovation. Thus, one cannot understand the future of dispute resolution technology without simultaneously looking into the past.

1.2 Interfaces of dispute resolution and digital technologies

In this section I briefly describe different areas where dispute resolution and technology overlap. Technological innovation for dispute resolution is often discussed either from the perspective of the courts or from the perspective of private dispute resolution providers. In the public sphere courtroom technology has been developed to improve existing practices, whereas in the private sphere of e-commerce use of digital technologies has enabled automated, scalable processes often called online dispute resolution (ODR). This two-pronged development and its implications for enforcement, which is the overarching theme of this book, brings the relationship between public and private dispute resolution to the fore. In

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addition to these, we can distinguish other interfaces between dispute resolution and technology, which do not easily fall into either of these categories, such as technology-specific procedural rules as well as the buzz-words ‘legal technology’.

It should be noted that these categories often overlap and should not be understood as exclusive. In this study, the term ‘dispute resolution technology’ is used when referring to all technology applications related in some way to conflict management, regardless of the public or private nature of the resolution model.

Courtroom technology

Courtroom technology refers to different applications of technology used in courts and the digitalisation of these existing practices, which often includes civil justice reforms. These applications include videoconferencing technology, case management systems, service of documents by email, access to legal information by electronic means, automated document generation, and e-archiving, to name but a few. Most of these applications of dispute resolution 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.³ The role of technology is mainly auxiliary, 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. Implementing digital technologies might seem especially tempting as one-time investments and relatively low maintenance costs may permanently reduce labour costs.

Issues related to technology-enhanced trials are extensively regulated by and conform 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. Many of these interpretative problems can be answered by *ex analogia* interpretation of the existing provisions. For example, privacy of email 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 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.⁴

Online dispute resolution

Private conflict management augmented by technology is often called online dispute resolution (ODR), although the term is slowly falling out of fashion and

many developers nowadays refer to their applications as legal technology. In any case, ODR can be seen as a pioneer of dispute resolution technology, having its roots in web applications as early as the 1990s.⁵

Originally ODR was developed as a mechanism for providing some form of redress for online disputes that would otherwise be left outside the courts owing to the low value of the claim or the jurisdictional challenges of cross-border litigation. Typically used in cases concerning e-commerce or other low intensity disputes,⁶ ODR processes are often partly or completely automated. Although there is no uniform definition, ODR is seen as private dispute resolution based on the consent of the parties, similarly to alternative dispute resolution (ADR).⁷ Because of this close relation to ADR and its criticism of the existing courtroom practices, ODR is often examined as part of ADR doctrine. 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.⁸

It follows from ODR's nature as private dispute resolution that its development has not been burdened by slow legislative, unlike innovations of courtroom technology; neither is ODR bound by due process criteria like the courts, which raises questions about the quality of such services. The role of digital technologies 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, in a bid to assure due process. In the EU, the ODR Regulation and ADR Directive established a union-wide ODR platform through which individual disputes are directed to the applicable national ADR entities.⁹ The EU's framework is focused on non-binding ODR.¹⁰ Also, the United Nations Commission on International Trade Law (UNCITRAL) has attempted to draft uniform procedural rules for both binding and non-binding ODR. However, the work was terminated in 2016 having produced technical notes on ODR.¹¹

Interestingly, ODR has never actually lived up to the expectations regarding its popularity.¹² A single triumph has been named and referenced over and over again, namely eBay, which solves 60 million e-commerce cases per year through its Resolution Center.¹³ In the face of increasing difficulties,¹⁴ many ODR providers have turned towards the public sector in the hope of investment. It still remains to be seen how the legislative work of the EU will affect the dispute resolution environment. Nonetheless, despite disappointments and new promises, the emergence of ODR has signified an important chapter in development of dispute resolution technology.

Legal technology

Around 2015 the term 'legal technology' became the household name for different applications of dispute resolution technology. Originally this new term referred to software developed for law firms, such as e-billing systems, case flow analysis tools and client portals. Recently the definition has become more

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inclusive, encompassing software that was earlier understood as courtroom technology or ODR applications.¹⁵ Discussions on legal technology often focus on the changes in practice of law enabled by technology, emphasising the disruption of the legal market.¹⁶

Procedural rules for technology disputes

In addition to courtroom technology, ODR and legal technology, another interface can be found in disputes over technology, e.g. conflicts of patent law and utility model rights. 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.¹⁷ However, this interface is excluded from the scope of this study, as examination of these substantive norms does not contribute to the analysis of privatisation of enforcement.

In the following section, the overarching theme of this study – how digital technology increases privatisation of coercion and influences the fundamental justification of dispute resolution – is approached by describing different examples of how technology affects enforcement of decisions rendered in different dispute resolution models.

1.3 Technology and enforcement

Despite their differences in implementing technology, 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. Voluntary compliance may often frustrate the need for any further enforcement, but this does not suffice. The functioning of markets presupposes a functioning model of governance complete with a mechanism for coercion, either private or public.¹⁸ The need for enforcement becomes tangible when the threat of coercion does not produce compliance on its own.¹⁹

Still, the relevance of enforcement for dispute resolution cannot be reduced to its practical importance. Enforcement also provides a vantage point to the core of conflict management and to legal practice, where the legal system's inherent nature in legitimising use of force in the society becomes visible. The state's monopoly on violence is often organised through the national courts and private forms of enforcement often challenge this monopoly. The juncture of private and public enforcement is further escalated by technological advances that enable increasing privatisation.

In this section, I describe seven examples of encouraging – or forcing – compliance in private and public models of dispute resolution. By these examples, I provide an overview of different forms of enforcement and elaborate on how new technology-driven forms of forcing compliance overlap, cooperate and challenge the old ones.

A. Starting point: dispute resolution and enforcement through the public courts

This first example describes the traditional court-focused approach to enforcement, in which an unpaid debt is collected with the help of the national 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 contesting the judgment, the adjudicative process may be expensive due to court fees and the legal costs of using a lawyer. 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 may cause Bob to re-evaluate his situation or even decide not to continue to pursue the matter.²⁰ 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 adjudication and debt recovery might reduce the overall expenses of money and time.

B. Private arbitration and public enforcement through the courts

In this second example the well-established system of international arbitration is used to resolve the dispute, after which enforcement is sought through the court system.

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

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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 the 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.²¹ Also, the due process criteria of the 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.²²

C. Coaxing compliance online without enforcement

This example describes the use of alternative mechanisms such as reputational systems that are often used in an online setting to remedy the lack of actual dispute resolution and enforcement mechanisms.

Montrealer Matthieu browses around an e-commerce site in the hopes of finding a modular synthesiser 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 synthesiser from another seller.

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.²³

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.

D. Dispute resolution and enforcement through chargebacks

This fourth example describes the use of credit card companies' chargeback processes that can at times provide an alternative to dispute resolution and enforcement.

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 and 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.²⁴ The latter issue could be improved by raising consumers' awareness. Should the credit card company refuse the chargeback, the consumer needs to turn to out-of-court redress services dealing with financial services.²⁵

E. ODR and private enforcement on e-commerce platforms

This fifth example describes private dispute resolution and enforcement provided by an Internet platform based on the platform's user agreement.

The German sound system expert Bob orders some wires for his home-built modular synthesiser online from an US-based company, Oscillating Vibes. The wires, although functioning, are not to Bob's liking as 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 e-commerce 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

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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 or not the private provider follows the minimum criteria of due process.

F. Dispute resolution and direct enforcement of ICANN

This sixth example describes the *sui generis* form of non-binding arbitration and private enforcement developed for specific dispute category, domain name disputes.

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 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.²⁶

G. Enforcement through self-executing smart contracts

This last example describes the use of blockchain-based smart contracts, where Violetta, the Finnish artist of our first example, 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 digital technology, a platform for smart contracts built on the infrastructure of cryptocurrencies.²⁷ 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, 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 the withholding of 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?

The use of digital technology, together with emerging behavioural models of Internet users, has contributed to the emergence of new enforcement mechanisms. Some of these mechanisms make use of existing structures in new situations (chargebacks), some are more or less new (ICANN, direct enforcement on platforms). Some alternatives to enforcement highlight conflict prevention (reputational systems) and in some prevention and resolution coincide (smart contracts). These examples portray enforcement as a complex phenomenon that cannot be reduced to court-oriented debt recovery.

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 for 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,²⁸ or simply an organically evolved solution for situations where public governance models have not yet been able to provide enforcement measures.

Of course, private governance 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.²⁹

Countless other examples of past private regimes can be found in the medieval *lex mercatoria* with its market courts,³⁰ in the European trade companies exercising sovereign power in the colonies,³¹ and in the Sicilian Mafia,³² among others. This is to say that the phenomenon of private governance is not new either within the legal system or outside it.³³ 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.

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 had previously 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 does 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 or not to participate but have often restricted or non-existent possibilities to negotiate the terms of participation.³⁴

Instead, e-commerce communities are not clearly defined or stable and the adopted sanction mechanisms steer participants' trust to the intermediaries and not to the community.³⁵ Also, the distribution of information is at the discretion of these intermediaries, whose private nature often makes use of coercion

invisible. In short, private enforcement is changing our understanding of who is entitled to use force, against whom, on what grounds, and how this coercion is made visible, monitored and justified.

1.4 Towards a crisis of justificatory narratives

The examples demonstrate that enforcement is changing as a result of digital technologies but the question remains, what are the implications of privatised coercion for law, for society and for dispute resolution? Needless to say, the effects are multifaceted. Adding alternatives to court-based enforcement 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. In contrast with arbitration, private enforcement often remains hidden from established legal structures. Yet we define enforcement through the connection between law and state, the epitome of which are the public courts, although this model no longer sufficiently explains the diversity of enforcement.

This development brings about a crisis of justifying coercion 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 sufficiently explain these phenomena. The result of this is that the narratives are losing part of their credibility and adaptability. This means that 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 normal functioning of the legal system. If the legal system does not find a way to react to the privatised 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.³⁶ 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 digital 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 be resolved, the irritant neutralised, and the justification of coercion restored.

Although there is nothing new about the tension between private and public conflict, the emergence of digital technologies 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 digital technologies call for a reaction within the legal system. The legal community should take a decisive stance whether or not private use of coercion is acceptable and whether or not it should be regulated in more detail. 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 objective of this study is to describe *how the implementation of digital technologies into dispute resolution encourages privatisation of enforcement and thus challenges the justification of law as a legitimised mode of violence.*

To this end, it is necessary to examine how we should understand digital technologies in the context of dispute resolution. Answers 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 technology. In addition to these, I discuss the agency of technology in the spirit of Friedrich Kittler's work on media theory.

Also, it should be noted that the procedural law doctrine operates based on a distinction between courtroom technology and ODR. However, this book evaluates the disruptive qualities of dispute resolution technology without making such differentiations. Based on this emphasis it is suggested that the doctrinal distinction between different resolution processes, i.e. court procedures and alternative dispute resolution, is no longer solid. As the use of technology in these processes is changing the ways in which they are organised, courtroom technology and ODR applications are slowly converging, even more so than their counterparts, adjudication and ADR. In addition to this convergence, new applications of dispute resolution technology, coined legal tech, escape these previous categorisations. Hence, this study adopts a joint approach to examine both publicly and privately funded applications of dispute resolution technology.

When we look at the implications of digital technology in privatisation of coercion, we look at the mechanisms for justifying use of force in the society. Justification of coercion is not straightforward. To address the issue, it is necessary to recognise the argumentation 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 previously 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 into 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 the 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. It should be noted that in the end, justificatory narratives are argumentation tools that can be employed to defend or oppose the *in casu* acceptability of any given technological innovation, similarly to Professor Martti Koskenniemi's theory on ascending and descending arguments in international law.³⁷

The first justificatory narrative examined more closely in Chapter 6 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.³⁸ 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.³⁹

The second narrative is explored in Chapter 7 by asking 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.

The third narrative examined in further detail in Chapter 8, 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 the authority of institutions such as 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 this tell us about the law?

Based on this examination, I propose the following: the existing justificatory narratives do not provide an answer for justifying new forms of private enforcement. Hence, it is necessary to evaluate whether these narratives could be adapted to this task by reinterpretation. The foundational assumption that has motivated this study is 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 digital technologies, 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

Different applications of dispute resolution have been the object of study for several scholars. The work of Professor Fredric Lederer has been paving the road for courtroom technology,⁴⁰ and the Cyberjustice Laboratory continues examining the implementation of technology in courts.⁴¹ In addition to these, Dory Reiling's comprehensive doctoral dissertation in 2009 has shed light on the many ways in which IT may assist future judicial reforms.⁴² Also national legislative reforms, as well as international studies, have produced important practical information on courtroom technology,⁴³ although such studies seldom address the more abstract issues of justification.

ODR has received much scholarly attention. Early monographs on ODR focused mainly on defining ODR and its uses, adopting a role of advocacy.⁴⁴ The majority of research on ODR is published in journal articles, and there is no established common framework,⁴⁵ which has led to a strong emphasis on case examples and to the adoption of a practical approach. Contributions to a more elaborate research agenda include the 2004 book by Gabrielle Kaufmann-Kohler and Schultz and the compilation of articles edited by Abdel Wahab, Katsh and Rainey in 2012 have contributed to a more elaborate research agenda for ODR.⁴⁶

In the UK, Professor Julia Hörnle examines due process standards for online, arguing for a proportionate model of due process, in which public due process safeguards would be integrated into private dispute resolution procedures.⁴⁷ Professor Pablo Cortés provides a detailed proposal for a European legal framework for consumer ODR that consists of regulation, increasing consumer awareness through accreditation and uniform trustmarks, enabling mandatory ODR clauses and establishing procedural legal standards.⁴⁸ In the Nordic countries, ODR was discussed in Susan Schiavetta's unpublished dissertation at

the University of Oslo in 2008,⁴⁹ and Tapio Puurunen's dissertation at the University of Helsinki in 2005.⁵⁰

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.⁵¹ Thornburg points out that ICANN has found a solution to the enforcement issue but this solution cannot be adopted in other forms of ODR.⁵² 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 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.⁵³ They consider self-enforcement to be the best option for ODR decisions in case voluntary compliance is not an option.⁵⁴ Despite these concise remarks, there is no comprehensive examination of technology-enabled enforcement.

Although scholarship on the impact of dispute resolution technology on enforcement is scarce, 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,⁵⁵ and Calliess,⁵⁶ among others. 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 the theoretical implications of privatisation of coercion brought on by dispute resolution technology.

This study aims to remedy the relative lack of theoretical research on dispute resolution technology. Such abstract inquiry is necessary if we are to provide a framework for assessing how the use of technology changes the practice of law. Implications of such study are also practical, as the results provide much needed background information for legislative reforms. The perspective of conflict management, and ultimately that of access to justice, is a fruitful starting point for assessing the impact new technology has on the practice of law, as procedural structures set the frames in which the law functions. In certain respects this means that the challenge of technology becomes more pronounced in conflict management and hence the results found in this context could be extrapolated to the overall legal system.

This being said, the examination of dispute resolution technology and privatisation of coercion that these applications enable is entwined with the growing demand for efficiency many civil justice systems face nowadays. However, efficiency should not be understood as an end in itself but should be interpreted in connection with the values reflected in conflict management systems. Canadian researchers

Fabien Gélinas et al. emphasise the need for a value-based framework for justice reforms and state that “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”.⁵⁷ This study follows this lead by providing critical insights into justifying privatisation of coercion and simultaneously lays the groundwork for addressing the challenge that technology imposes on the legal system.

This study should be read as a hybrid of legal theory applied to the practice of conflict management, which stipulates a relatively high level of abstraction. This choice excludes a systematic examination of national procedural systems as well as multilateral Conventions. I refer to national legislation and case law, and to Convention-based normative regimes only when necessary for the objective of examining the justificatory narratives on a general level. Privatisation of coercion by technology is a global theme but the writer’s perspective is influenced by Nordic civil law tradition, which might affect the argumentation. Although justifying private enforcement is closely connected with other issues of governance, Internet governance and other rules of virtual worlds are excluded from the scope of this study.⁵⁸

Notes

- 1 It should be noted that technology issues have received considerable attention, especially those related to intellectual property, Internet governance and data protection. Another issue is that the pace of technological innovation often exceeds that of legislation creating new challenges for the legal system. See 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.
- 2 Harvard Business School Professors Joseph Bower and Clayton Christensen explain, through their theory of disruptive innovation, why leading companies fail to maintain their success when markets change. According to their theory, market leaders are fixated on fulfilling their existing customers’ needs to sustain their market share and are thus unable to predict the needs of potential customers in the future. In turn, outsiders to the existing markets are equipped to develop technology for unestablished markets, which in time may lead to disrupting the existing markets as well. See Joseph L. Bower and Clayton M. Christensen, ‘Disruptive Technologies: Catching the Wave’ (1995) 73 *Harvard Business Review* 43.
- 3 See e.g. Fredric I. Lederer, ‘Wired, What We Have Learned About Courtroom Technology’ (2010) 24 *ABA Criminal Justice* 18; Karim Benyekhlef, Emmanuelle Amar and Valentin Callipel, ‘ICT-Driven Strategies for Reforming Access to Justice Mechanisms in Developing Countries’ (2015) 6 *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* (LexisNexis Canada 2010); 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).
- 4 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).
- 5 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).
- 6 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' (*Slaw – Canada's online legal magazine*, 29 January 2014) available at <http://www.slaw.ca/2014/01/29/low-value-high-volume-disputes-defining-the-indefinable> (accessed 15 June 2018); However, this characterisation 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.
 - 7 See e.g. Colin Rule, *Online Dispute Resolution for Business. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass 2002) 45; 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 Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 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, some authors have suggested a joint approach. See Arno R Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010) 170.
 - 8 ICANN (Internet Corporation 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 cooperation 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.
 - 9 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.
 - 10 However, some of the ODR providers listed on the EU platform do offer processes that are binding by default, upon agreement or bidding for traders. Of the around 280 ADR entities listed, about a third provide some type of binding decisions. See Riikka Koulu, 'Improving Consumer Protection through Technology: The Challenge of Compliance' in Immaculada Barral (ed), *La resolución de conflictos con consumidores: de las ADR a las ODR* (Reus 2018) 70.

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- 11 'Online Dispute Resolution for Cross-Border Electronic Commerce Transactions. Technical Notes on Online Dispute Resolution' (UNCITRAL, Working Group III 2016) A/CN.9/888, available at http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf (accessed 19 June 2018).
- 12 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; Poblet and Ross' empirical findings on the status of ODR shed light to the current situation. See closer, 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).
- 13 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.
- 14 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' (*Slaw Canada's online legal magazine*, 10 January 2015), available at <http://www.slaw.ca/2015/10/01/the-end-of-odr/> (accessed 15 June 2018).
- 15 In his article, Markus Hartung makes the important distinction between general purpose office tech and legal tech in the narrow sense, which are considered to refer to technologies that replace tasks previously or currently conducted by lawyers. However, as Hartung points out, such distinctions are not always easy to make and academic debates about their exact meaning are, at least sometimes, pointless. In any case, applications such as online dispute resolution, blockchains and artificial intelligence are discussed in the articles of this important pioneering compilation, emphasising the inclusivity of legal tech terminology. Markus Hartung, 'Gedanken Zu Legal Tech Und Digitalisierung' in Markus Hartung, Micha-Manuel Bues and Gernot Halbleib (eds), *Legal Tech. Die Digitalisierung des Rechtsmarkts* (Verlag CH Beck 2018).
- 16 In their 2014 article, McGinnis and Pearce discuss the impact machine intelligence will have on the legal profession and the practice of law, arguing that data-driven legal technologies will increase process automation and contribute to the disintegration of lawyers' monopoly on legal service production. John O McGinnis and Russell G Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services' (2014) 82 *Fordham Law Review* 3041.
- 17 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights 2004.
- 18 Avinash K Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Princeton University Press 2004) 1–4.
- 19 As Cortés points out, 'consumer protection in e-commerce is meaningless unless effective enforcement mechanisms are provided'. Cortés (n 7) 35.
- 20 The complexity, cost and time of cross-border court proceedings might prevent consumers, especially, 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).
- 21 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 Contracting States may refuse to recognise an award.
- 22 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 ongoing 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, several providers could potentially 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.
 - 23 A different issue is the users' ability to contest 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 Practitioner's View' in Colin Adamson (ed), *Online Dispute Resolution: An International Business Approach to Solving Consumer Complaints* (Author House 2015).
 - 24 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)) available at http://ec.europa.eu/consumers/ecc/docs/chargeback_report_en.pdf (accessed 15 June 2018).
 - 25 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', available at http://ec.europa.eu/finance/fin-net/index_en.htm (accessed 15 June 2018).
 - 26 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, available at <http://www.coe.int/t/informationsociety/icann-and-human-rights.asp> (accessed 15 June 2018); See also Rijgersberg (n 8) 69-NaN, 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.

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- 27 In Chapters 3 and 8 I discuss the example of using cryptocurrencies for self-enforcement. See also Riikka Koulu, 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement' (2016) 13 SCRIPTed 40.
- 28 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.
- 29 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 18) 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 *Journal of Politics* 899.
- 30 However, it is unclear how autonomous the medieval private regime actually was. See Graf-Peter Calliess, 'Lex Mercatoria', ZenTra Working Paper in Transnational Studies No. 52 / 2015, available at ssrn.com/abstract=2597583 (accessed 15 June 2018).
- 31 For example, The Dutch East India Company was granted sovereign rule over Indonesia. See e.g. Wieze van Elderen, 'The Dutch East India Company' (*europaan-heritage.org*) available at <http://european-heritage.org/netherlands/alkmaar/dutch-east-india-company> (accessed 15 June 2018).
- 32 Diego Gambetta, *The Sicilian Mafia: The Business of Private Protection* (Harvard University Press 1993).
- 33 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 to 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 29).
- 34 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.
- 35 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 intermediaries. The architecture of cryptocurrencies is examined in more detail in Chapter 9.
- 36 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' available at <http://www.etymonline.com/index.php?term=crisis> accessed 15 June 2018. 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 and element of change inherent in crises, although they deal with a context other than the legal system. Hence, they provide a sufficient starting point. I return to the description of the justificatory crisis and deal with it in more detail in Chapter 4.
- 37 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press 2005) 59.
- 38 On pluralism, see 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.
- 39 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).
- 40 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 3); Lederer, 'The Courtroom 21 Project: Creating the Courtroom of the Twenty-First Century' (n 3); Lederer, 'Technology-Augmented Courtrooms: Progress Amid a Few Complications, or the Problematic Interrelationship Between Court and Counsel' (n3).
- 41 For scientific articles, see, e.g., Benyekhlef, Amar and Callipel (n 3); 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.
- 42 Dory Reiling, *Technology for Justice: How Information Technology Can Support Judicial Reform* (Leiden University Press 2009).
- 43 See e.g. European Commission for the Efficiency of Justice (CEPEJ), 'Use of Information Technology in European Courts' (Council of Europe) 24, available at https://www.coe.int/t/dghl/cooperation/cepej/series/default_en.asp (accessed 16 June 2018); On videoconferencing, see Sabine Braun and Judith L Taylor (eds), *Videoconference 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 Salzyn, 'A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario' (2012) 50 *Osgoode Hall Law Journal* 429; for a Finnish perspective, see Riikka Koulu, *Videoneuvottelu rajat ylittävässä oikeudenkäynnissä. Sähköisen oikeudenkäynnin nousu* (University of Helsinki Conflict Management Institute 2010).
- 44 See e.g. Katsh and Rifkin (n 5); Rule (n 7).
- 45 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

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- Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2012) 25.
- 46 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).
- 47 Hörnle (n 7) 217–219.
- 48 Cortés (n 7) 191–206.
- 49 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 Caselaw of the European Court of Human Rights’ (2004) 2004 *Journal of Information, Law & Technology*, available at https://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/schiavetta/ (accessed 16 June 2018).
- 50 Tapio Puurunen, ‘Dispute Resolution in International Electronic Commerce’ (University of Helsinki 2005).
- 51 Cortés (n 7) 82, 204.
- 52 Thornburg (n 26) 106.
- 53 Kaufmann-Kohler and Schultz (n 46) 223–233.
- 54 *ibid* 168.
- 55 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.
- 56 Graf-Peter Calliess, ‘Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law’ (2002) 23 *Zeitschrift für Rechtssoziologie* 185; Graf-Peter Calliess, ‘Online Dispute Resolution: Consumer Redress in a Global Market Place’ (2006) 7 *German Law Journal* 647; Graf-Peter Calliess, Jörg Freiling and Moritz Renner, ‘Law, the State, and Private Ordering: Evolutionary Explanations of Institutional Change’ (2008) 9 *German Law Journal* 397; Graf-Peter Calliess and Moritz Renner, ‘Between Law and Social Norms: The Evolution of Global Governance’ (2009) 22 *Ratio Juris* 260.
- 57 Gélinas and others (n 33) 105.
- 58 For regulating cyberspace and sovereignty, see e.g. Lastowka (n 1) 226; Lawrence Lessig, *Code Version 2.0* (Basic Books 2006) 27, available at <http://codev2.cc/download+remix/> (accessed 16 June 2018). It should be noted, however, 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 as the challenge of justifying increasingly privatised enforcement. Technological change creates new unique challenges for most normative systems where it is applied. In terms of procedural law, the examination is focused on civil and commercial cases, in which parties are given more extensive contractual freedom. In the Finnish context this means that only dispositive civil cases are examined and non-contentious cases that are initiated according to Ch.8 of the Finnish Code of Judicial Procedure (4/1734) are excluded. Thus, cases where the parties can find redress only through the public court system (e.g. family cases and criminal cases) will not be discussed.

2 Understanding law and technology

The introduction discussed different interfaces between dispute resolution and digital technologies and presented examples of how the use of technology is increasing private enforcement. In this chapter, we pave the way for a more nuanced approach to technology-enabled private enforcement by depicting law as a system of legitimising coercion that interacts with the social uses of information and communication technologies (ICT). This understanding of law by social systems theory perceives law as a social subsystem of society, whereas the ongoing technological change is interpreted as the emergence of yet another social system, namely the social system of the use of ICT.

This chapter explains the ontological and methodological choices adopted in this study. This examination is divided into two parts, the first of which focuses on understanding law and the second on understanding technology. Using social systems theory as a starting point, the chapter describes how law renews itself autonomously while simultaneously remaining open to influences from other systems, including the system of ICT use.

2.1 Understanding law as legitimised coercion

This study examines how dispute resolution technology – and particularly the shifts towards increasing privatisation it creates in enforcement – affect law. Almost by definition any change from ways things have traditionally been done forces us to decide how we should react to it and why. This means asking whether there are good reasons for preserving the status quo or whether we should embrace the change. In this study, technological innovation alters the organisation of enforcement by enabling new forms of private coercion that bypass and thus challenge the state's perceived monopoly on violence. This change gives rise to the question of how dispute resolution and enforcement is, and should be, organised, by whom, and why. In short, how our current model of state-governed enforcement is justified and whether increasingly privatised enforcement could be justified to the same extent?

In order to accomplish the objective, we need to define the key concepts involved. First, we need to understand what law and technology are, in order to ask how technological innovation in the form of increased privatisation of

coercion changes the role law plays in the society. Secondly, a framework for explaining the interaction between law and technology is called for: how does technology enter the legal system's operations? Thirdly, we need to know the justification for the legal system and how it is created for dispute resolution. Choices regarding these definitions pave the way to providing well-grounded answers to whether privatisation of coercion is problematic from the perspective of the legal system. In other words, an ontology is needed, a way to ask and answer these questions.

What makes enforcement interesting for theoretical analysis is justification. As taking matters in one's own hands is harmful for society overall and therefore forbidden, legally regulated enforcement is necessary for the stability of society. In enforcement law reveals itself as a legitimised form of violence. It should be noted that law's coercive nature should be read not as a normative but as a descriptive claim. One could go even further and claim that dispute resolution and the threat of enforcement are the tools for fulfilling law's function in society. A point of interest is that the doctrine of procedural law seldom touches upon these theoretical dimensions of dispute resolution. Instead, justification is an elusive and dormant structure rarely discussed and can be deduced only by close readings of procedural texts. It appears as hidden assumptions and values that are considered to be self-evident. Demanding to know how coercion is made acceptable by the legal system quickly opens up another set of questions about the extent and methods of these justification-creating moves.

In other words, the question of law's inherent violence is a formulation of its ontological foundation: what is at the bottom of law, on what 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? Suddenly this enquiry into private enforcement becomes a question about law's boundaries, which procedural doctrine is unable to address. This study endeavours to remedy this lack of doctrinal self-reflection through a theoretical analysis of technology-driven change in justifying enforcement.

Law's paradox is that, in the end, it can be construed simply as legitimised violence. In order to provide societal stability, however, this paradoxical nature of law needs to be hidden from sight. To really understand the nature of increasing privatisation of coercion enabled by technology, it is necessary to momentarily reveal the paradox and to ask what strategies we have for hiding it yet again. This study makes use of social systems theory to accomplish this objective. Making law's paradoxical nature as legitimised violence visible is a deconstructive move of sorts that enables the evaluation of possibilities for reconstruction, to borrow German legal scholar Günther Teubner's thoughts on the surprising connection points between German sociologist Niklas Luhmann's systems theory and the French philosopher Jacques Derrida's deconstruction.¹

Why would a systems theory approach provide insight into the shifting forms of private enforcement? There are several reasons for the choice. Firstly, the idea of law as a historical continuum seems to provide one possible explanation to

how justification of dispute resolution has been formulated – and changed – in the course of time by continuous reinterpretation. Of course, the idea of law as a historically sedimented societal structure is not limited to systems theory and other theoretical frameworks would provide equally satisfactory entrance points to this type of examination, which brings us to the second point. Secondly, systems theory perceives law's social function to be that of upholding expectations regardless of disappointment. This function provides tools for upholding law's normativity on a very fundamental level without resorting to the content of material norms of legislation, case law or doctrine. By making the claim that the expectation x is and will be valid on a general level although *in casu* the expectation is not fulfilled positions systems theory beyond mere description, although at first glance systems theory may appear to be mere description without normative claims. However, this interpretation should not be read as contesting the established body of literature on Luhmann's theory. Instead, it is simply pointed out that law's function is not dependent on these deliverables of regulation and case law, that law's normative nature transcends the normativity of these utterances.

Thirdly, this novel approach to law's normativity provides a useful standpoint to evaluating how external influences, such as that of technology, enter and influence the legal system. This means that systems theory enables us to hold on to an internal perspective of the legal system while simultaneously looking beyond law's boundaries. The theory's descriptive force is useful for explaining how the legal system interacts with other social systems in society. In other words, the theory explains law and at the same time makes room for analysis of the disruptive qualities of technology. And lastly, universal theory provides a broad framework for examining the interplay with very distinct rationalities of law and technology. Then again, the universality of the theory also opens it up to criticism and there is the danger that the examination based on such theory will disintegrate owing to its ever-expanding scope. However, the analysis is contained by the perspective of imminent critique, which – unlike fundamental morality-based criticism which imposes a challenge from its external perspective – is internal to the legal system.

2.2 Defining law through systems theory

2.2.1 Law as a stability-preserving social system

In order to apply Luhmann's theory to the examination of privatisation of coercion undertaken here, it is necessary to present the reader with a brief overview of the focal concepts and ontology it presents, as the theory provides a model for understanding the interactions between law, technology, and society. Luhmann's work is not known for its easy-to-understand nature owing to its abstractness. Despite the high level of abstraction, the premises of social systems theory are relatively straightforward. At the core of the theory is functionally differentiated society, which has over time divided into several subsystems to

sustain increasing complexity. For Luhmann, the 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 fact that systems exist. Interestingly, UK Professors Michael King and Chris Thornhill argue that social systems theory has constituted a Kuhnian scientific revolution,² as Luhmann abandons the human subject as the centre of social observations for communication.³ Luhmann's theory also contests traditional legal positivism, 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 between the two and being unable to reconcile it.⁴

Luhmann's theory reflects an understanding of a world which is socially constructed through communication,⁵ making communication, transmission of information, the focal concept through which functional differentiation is achieved. For Luhmann, society, like all social systems, consists of interlinked communication that increasingly leads to functional differentiation of different subsystems. By differentiation into subsystems such as law, economics and politics, the overall system is able to make more varied connections by interlinking communication, which, in turn, provides for the system's existence. If these connections were to stop, the system would cease to exist.⁶ Thus, Luhmann places communication at the core of all social systems. This starting point is useful for our objective, which is to perceive how the use of information and communication technologies are changing dispute resolution and enforcement. Niklas Luhmann's theory of social systems strives to provide a generalised theory of society and in social systems theory the existence of society, its evolution and communication merge into one another. Luhmann describes the evolution of society as the outcome of continuously increasing complexity, where complexity is reined in by communication. In other words, increasing specialisation, i.e. functional differentiation, helps to reduce the devastating effects that increasing complexity would otherwise have. Functional differentiation explains the boundaries between different functions in society, e.g. law, politics and economics, and continuous communication upholds the identities of these separate subsystems. Functional differentiation provides a model for examining the interrelationship between law, technology and society while simultaneously holding on to the legal system's distinct identity in the society.

Functional differentiation is achieved by specific communication that is unique for every differentiated subsystem. By delegating complexity through functional differentiation to the subsystems, the system is able to add to the overall complexity within itself. Continuous functional differentiation describes how the legal system is constantly becoming more complex, continuously making new distinctions to provide more nuanced communication about what is law. However, we cannot examine the effects of functional differentiated subsystems without asking the reasons why exactly these systems have developed their own identity within society. The legal system, which is the object of study here, provides stability for society. The legal system maintains this stability by creating and maintaining normative expectations. In simple terms, one may trust that the law

is on one's side and the more often other people's similar expectations have been fulfilled by the courts, the stronger one's expectation of legal protection can and should be. Normative expectations connect with law's nature as legitimised coercion. This means that one can expect to have the public enforcement at one's disposal but this expectation has further criteria – first, the court has to decide in one's favour, to acknowledge the expectation and to label it as acceptable.

But what happens when one's expectation of legal protection is not fulfilled; what if the court does not grant access to enforcement? What makes social systems theory interesting for the study of law is that law's function of maintaining expectations is not dependent of their fulfilment. Instead, law maintains expectations regardless of disappointment. This means that despite legal protection being refused this time, one can still count on its protection in the future. Although Luhmann's theory has often been criticised its descriptive nature, law's function of upholding expectations even when these expectations are disappointed holds a very distinct approach to normativity. Expectations are normative communications about the future. When an expectation is upheld despite disappointment, the dismissal simultaneously communicates that the expectation is right even though in this case it is not. Simply put, the dismissal should also be read as a claim that a specific norm should be upheld in the future although this time it is not upheld.⁷ The counterfactual substantiation of the norm's future relevance positions Luhmann's theory away from simple description. One could say that, deep down, social systems theory has a normative component because expectations are normative, but this normativity functions differently from that usually associated with the term, on a more foundational level.

If we are to understand law as a functionally differentiated subsystem that provides stability by upholding expectations, we should then ask what law is and how it is created. This is also necessary for perceiving how law interacts with other systems and how technology can influence the legal system. According to Luhmann, law, like all social systems, is communication: the legal system consists of 'all social communication that is formulated with reference to law'⁸ and this communication distinguishes it from its environment and other subsystems. It follows from this that law creates itself by continuous flow of legal communication, individual communicative operations, that reproduce and renew the legal system's boundaries over time in a cycle of self-production called autopoiesis. Luhmann defines autopoiesis as the system's self-production where the system produces itself through its internal operations.⁹ This means that only the legal system defines what belongs to it and what does not,¹⁰ no external communication can directly enter the legal system.¹¹

How does the functionally differentiated system recognise which communication belongs to its self-production? Law, as well as all the other subsystems, upholds its specific identity by applying a system-specific code for deciphering which communication belongs to it. The code is a medium around which all the communication within a system revolves, it represents the system's rationality of sorts. The code is always a distinction between binary oppositions, and the functional differentiation is achieved through its application. Depending on

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which system-specific code is applied, operations are ‘coded’ as belonging within or outside the system. 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 for the distinction.¹² In turn, programmes, which can be understood as structures formulated over time, regulate which side of the code is applied to a given operation.¹³ In the legal system, programmes such as case law or legislation stipulate which expectations are upheld. Programming gives leeway that the strict binary coding does not, programmes balance out the harshness of the code.¹⁴ These tools, the code and programming, help explain how the legal system upholds its boundaries by itself and how external influences such as the use of digital technologies in dispute resolution develop specifically legal identity.

Thus, the legal system is a functionally differentiated social subsystem that produces its boundaries from its environment as well as its identity by applying the code legal/illegal to all its operations. Self-production grants autonomy to the system and simultaneously closes it to external influence. However, this operative closure is complemented by cognitive openness, which explains how external references are able to enter the legal system and to enrich its self-production. This combination of closure and openness is elemental for our examination of technology’s impact on one of law’s central structures, namely dispute resolution, as it explains how the legal system maintains control of its boundaries while simultaneously remaining open to other systems.

2.2.2 Closed and open law and mechanisms of external influence

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. Only the legal system’s operations define the legal system, creating an operationally closed system. However, without making room for external influences, the legal system cannot adjust, cannot evolve, its continuous operations would slowly start withering and the circular referential loop of self-production would eventually lead to tautology, inability to maintain the system’s boundaries and existence. Simply put, the legal system needs to be open to influences but it needs to limit their impact, which also explains how law reacts to the disruptive qualities of digital technologies. Instead of complete openness, Luhmann solves this shortcoming of operative closure by breaking the self-referential circle and opens the system’s information gathering to its environment. This cognitive openness means that the system can enrich its

autopoiesis with external influences while simultaneously controlling its boundaries independently, a delicate interplay between openness and closure.¹⁵ Still, the system regulates how it reacts to impulses from its environment and by controlling these impulses the system controls itself.¹⁶

Impulses from environment and other subsystems cannot be directly included in the legal system, as they often follow a different coding and the legal system only recognises its own coding. Cognitive 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,¹⁷ and structural couplings between different social systems, where an operation has value within both systems although in accordance with each system's binary code. These mechanisms are important for the discussion in Chapter 4, when we examine how justification is created within the legal system and how technology is challenging this justification in private enforcement.

Interpenetration refers to a specific connection between two separate systems that have evolved together over time. In interpenetration both systems offer their internal complexity for the other system to be used in its system-building. Interpenetration increases the system's independence by introducing further complexity, or so to speak computational power, but simultaneously the systems' mutual dependence is strengthened. Interpenetrating systems are in a way co-determined, but not converged.¹⁸ This follows from the autonomous interpretation both systems give to the events they share. Although the events are the same, both systems give different meaning to them and connections made in both systems lead to different consequences. Thus, interpenetration only has meaning separately in each system. When describing interpenetration Luhmann often gives examples of psychic or biological systems: nerve cells that share information between the brain and human consciousness or consciousness and communication.¹⁹ Still, interpenetration is also possible between jointly evolved social systems. For example, in the legal system 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.²⁰

Another mechanism for welcoming external influences to social systems is structural couplings (*strukturelle Kopplung*) that do not require joint evolution. Instead, structurally coupled operations conform simultaneously to the coding of two systems and belong to both systems, each system interpreting the operation autonomously on its side. Structural couplings relay external influences and enrich a system's autopoiesis. For example, contract and property are structural couplings between law and commerce; constitution is a coupling between law and politics.²¹ 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 by the code of paying/not-paying of the economic system and is recognised within its symbolically generalised meaning medium, i.e. money.²² Comparatively, a constitution

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

Interpenetration and structural couplings both provide external influences for a system's self-production and thus balance the effects of operative closure. Cognitive openness brings irritants from the environment into the legal system and the legal system's efforts to include them in its operations immunise the system against external threats.²³

Luhmann's social systems theory seems to provide useful tools for assessing the interplay between law and technology while preserving law's normative autonomy. However, the use of technology in social practices such as dispute resolution is an extremely multifaceted phenomenon that can hardly be subsumed into external information any more than dispute resolution technology can be distanced from the reality of technological artefacts, their production mechanisms, and cultural meaning-creation. This brings us to question the limits of systems theory; is the picture provided by the theory too abstract, so that it loses sight of social reality?

2.2.3 Limits of systems theory and law's paradoxes – law's futile quest for justice, why systems theory – this is necessary for A2 narrative

Although Luhmann's social systems theory provides useful tools for assessing the interplay between economic gain, political power, ethical discourse and legal decision-making, it has been criticised for various reasons. Lack of tools for examining power relations, lack of normative content, and the focus on coherence instead of paradoxes have all been criticised. This criticism has focused on law's relationship with politics and ethics. Understanding how law strives towards unattainable justice exposes the limits of systems theory and is essential for the discussion in Chapter 7 that examines how access to justice perspectives could be used to justify private enforcement.

These notions are by no means new. The notorious Luhmann/Habermas controversy focused on the communicative nature of Luhmann's theory as well as the strong distinction between law and politics. German sociologist Habermas considered Luhmann's theory descriptive to a fault, the 'Hochform of technocratic consciousness, the "apology" of the status quo, meant to preserve the latter.'²⁴ 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'.²⁵ However, counterarguments have also been voiced and social systems theory's view of law complemented. Teubner has addressed systems theory's shortcomings in perceiving power relations by development of what he calls reflexive law, where the legal system is more open to interaction with other systems and thus more able to address social behaviour, more prone to social engineering. 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.²⁶

Luhmann disagrees with Teubner's vision of including reflexive elements in systems theory, as in his view reflexive approaches to be too far-reaching in their search for a synthesis of critical-emancipatory approaches, responsive dogmatics and sociological analysis.²⁷ Drawing on Teubner, Professor John Paterson aims to reconcile systems theory with reflexive elements by introducing different scenarios that might enlarge the scope of structural couplings between law and other systems.²⁸ However, as Professor King points out, the question of reflexive elements in systems theory, and ultimately that of the legal system's openness, is a question of the theory's limits. Simply put, law can only understand law and can only regulate that which can be regulated by law due to its coding. However, immense areas that might affect the fulfilment of regulatory objectives remain invisible to law.²⁹ King perceives Teubner as well as Paterson striving to improve the legal system's performance of regulating social behaviour, which he does not consider Luhmann having ever been interested in. Instead, this expanded opening through inclusion of reflexive elements does disservice to the theory, which King regards best used as a 'way of emphasising its limitations, self-deceptions and paradoxes of law and politics in their various operations'.³⁰

This being said, the strength of systems theory in explaining how the legal system works is in its ability to give impression of coherence despite incoherence, to focus on appearance of control while hiding its foundational paradox. In other words, law is legitimised violence and this paradoxical nature becomes visible when coercion is used in enforcement. It is argued here that digital technologies used for private enforcement reveal law's inherent violence to the extent that this foundational paradox cannot be disguised.

For Luhmann, all self-description of the legal system is based on paradoxes, there can be no normative criteria similar to Kelsen's Grundnorm, or even the concept of justice on which law could be grounded. Foundational paradoxes result from the self-observation of the system that always participates in the system's operations, from applying the code to itself. Without downplaying or deparadoxifying this tautology, the foundational paradox would lead to paralysis of the system's operations and autopoiesis would stop. Through deparadoxification, i.e. by introducing new distinctions, the system is able to pretend that its operations are not based on self-observation.³¹ Michael King and Chris Thornhill exemplify deparadoxification within the legal system through distinctions between reasonableness/unreasonableness and constitutional/unconstitutional that may be substituted for the problem whether the law may be justified by universal morality or by natural law.³²

Although the legal system's autopoiesis would cease in lack of deparadoxification, these paradoxes seem to reveal another side of the legal system, the conflicts, contradictions and crises, the underside of law. These paradoxes are also inherent and necessary for law, which becomes visible in the face of conflict. Teubner raises globalisation as an example of a crisis which begins a 'hectic search for new bases of normative validity'.³³ 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. Based on this, Teubner considers self-contradictions, anomalies and paradoxes to be essential for self-renewal. Thus, it is this unquestioning, voracious need for change that draws us closer to law's paradoxes, forcing us to ask what is behind them, what they are made of. Unravelling law's paradoxes might prove out to be useful for examining the challenge imposed by technology-driven private enforcement, as identifying the pain-spots of deparadoxification mechanisms sheds light to the relationship between law and technology.

Within science and technology studies, the focus is often on interplay between different social practices. For example, Indian American Professor Sheila Jasanoff suggests that technology, 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'.³⁴ 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'.³⁵ German legal historian Cornelia Vismann, in turn, emphasises the impact of a written form, of files (*Akten*), in shaping legal practices throughout history.³⁶

It seems that media theorists focus on the interactive elements between law and technology, which then become entwined. Taking these media-theoretical viewpoints into consideration in evaluating the relationship between law and technology does not necessarily contradict the operative closure of societal subsystems. For example, we can perceive media as having impact on 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.³⁷

Moreover, we can consider the challenge of dispute resolution technology as 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. As Luhmann focuses on deparadoxification, critical systems theory advocated by German legal scholar Andreas Fischer-Lescano focuses on revealing instead of hiding law's foundational paradoxes. Critical systems theory 'regards real contradictions as the societal engine' and aims towards the demystification of these paradoxes.³⁸ By implementing elements of critical theory to systems theory, it could be possible to reveal deconstructively the political elements.³⁹

In addition to this emphasis on paradoxes, critical systems theory is sensitive to political controversies within social orders, which seems to imply that complementing social systems theory with these critical insights might address some of its apparent shortcomings.⁴⁰ 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 usurpers of societal autonomy other than politics.⁴¹ The politically-orientated critique of statism is especially useful for examining technology-driven private enforcement. 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.⁴² 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.

According to Finnish legal theorist Tuori's view, immanent critique aims at introducing an 'inter-subjectively 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 anarchist grounds, is possible only from outside the field of law and thus fundamentalism forms the limits for 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.⁴³ 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.⁴⁴ Also, this study strives for immanent normative critique of law, which is to be separated from such fundamental criticism that aims at the abolition of the legal regime.

Hence, in its critical endeavours this study 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 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'.⁴⁵ It follows from this that the mechanisms of deparadoxification, including justificatory narratives, which create the impression of control within the legal system,⁴⁶ take on a decisive functional role in the examination of private technology-driven enforcement. In the spirit of critical systems theory, the examination of deparadoxifying elements of the justificatory narratives becomes a critical project in which the focus is on revealing the paradoxes instead of hiding them.

2.3 Methodological challenge of private enforcement

This study combines socio-legal studies and particularly social systems theory to evaluate dispute resolution technology and particularly how the privatisation of coercion as it is accelerated by technology affects the justification of coercion. Because of the focus on dispute resolution, this study could be claimed to address

procedural law. However, this study does not take advantage of legal dogmatics, as the research objective takes place on a more abstract level, in the structures of doctrine formation. 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.

Here, the challenge of digital technologies is understood both as an external irritant and through disruptive qualities, which call for a reaction from the legal system. In other words, the question of justifying private enforcement leads us to question the relationship between law and technology and law's ability to accommodate technological change. As the challenge of technology cannot be understood only internally within the legal system, influences from communication theory and history of technology are welcomed to provide a more comprehensive picture of technology. Thus, this study could be labelled 'legal technology studies'.

Owing to the relative newness of dispute resolution technology, the amount of case law and legislation on different applications is scarce. Due to both the lack of interpretative materials and the objectives of this study, this work focuses on identifying different justificatory narratives in the procedural doctrine and evaluating them critically against the challenge of technology-enabled private enforcement. These narratives have been formulated and slowly sedimented into law's self-description over time, for which social systems theory provides a functional vantage point. From social systems theory's perspective, structures are formulated over time by repetitive operations, and although they are necessary for law's operations, they do not define law's identity.⁴⁷ 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.⁴⁸

We identify justificatory narratives by observing how law's self-understanding changes as a response to the challenge of technology. Instead of evaluating these changes directly, we 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, we 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.

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.⁴⁹ Kuhn's initiative towards epistemological change of scientific practices has also paved the way for the sociology of scientific

knowledge, which examines science as a social activity in which 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.⁵⁰ The interdisciplinary aspiration of understanding technology beyond its reflections in the legal system is enabled by two steps. First, legal science has dual citizenship as it belongs simultaneously 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*).⁵¹ Secondly, systems theory itself enables interdisciplinary influences, as operations can be shared by several systems through structural couplings.

As applications of technology-driven private enforcement are by definition private and often also global regimes, no fixed sources doctrine can be applied in this study, but instead focus is on global private regimes that have their own specialised norm production.⁵² In the absence of hard law, soft law adopts a significant role in these private yet normative regimes. Thomas Schultz discusses the same issue from 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.⁵³ 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 come to be seen as legally relevant.⁵⁴

This interdisciplinary approach, together with internal immanent critique, opens the identified justificatory narratives to value critique and critique of statism, which is enabled by critical systems theory's sensitivity to political controversies. Critical close reading of deparadoxifying mechanisms replaces sources doctrine as a methodological tool in this study. This interpretation of justificatory narratives exposes their function of deparadoxification and thus enables critical evaluation of how they adapt to the challenge of technology.

Despite its many merits, Luhmann's social systems theory has shortcomings; the theory does not leave room for social engineering, nor does it accommodate analysis of power balances. Although the theory acknowledges the inherently paradoxical nature of law, this is hidden through deparadoxification. Hence, this theoretical framework is complemented with influences from critical systems theory that strives to combine systems theory with critical theory. This vantage point enables the examination of justificatory narratives as historically formulated structures of the legal system. Before this, however, we need to understand how technology interacts with the legal system.

This examination departs from the turn to technology in social sciences in the 1980s and from the classical theories of media theorists Marshall McLuhan and Raymond Williams, as traces of both McLuhan's technological determinism and Williams's social shaping of technology still affect conceptualisations of

technology. These positions are then complemented with elements from Friedrich Kittler's agency of technology. It is argued that the social element embedded in the use of technology is becoming more pronounced and that technology itself has become a social object in communication. This development, in turn, may lead to the emergence of yet another social system, namely the social system of the use of ICT.

2.4 Understanding technology in dispute resolution

2.4.1 Definition deficit of dispute resolution technology

In order to assess the consequences of technology-driven privatisation of coercion, it is necessary to formulate an overview of what is meant by technology in this context. Although it would be tempting to provide a universal definition of dispute resolution technology and a comprehensive take on its acceptability, such an approach would lead to oversimplification of the various functions performed by different applications of dispute resolution technology. We must content ourselves with assessing the impact of technological change on a macro-level of society and complement this overview with case-by-case analysis of the functions of different applications. At the danger of sounding too obvious, legal technology or even dispute resolution technology should not be considered good or bad, as such generalisation overlooks how technology is used in a given situation and the implications of this usage.⁵⁵

Before proceeding to dispute resolution technology, it is necessary to place it within the broader societal development called digitalisation. Nowadays the term 'digitalisation' is widely used to describe the various changes taking place in society that are related to the use of modern information and communication technologies. The terminology is not well defined; digitalisation is used to explain relatively small-scale shifts in working methods and business models as well as large-scale disruptions of whole industries and societies. In this latter meaning digitalisation refers to the transformation towards a post-industrial information society, which is defined by the growing socio-economic and cultural importance of information instead of the mass production of the previous era.⁵⁶ The emphasis on the social implications of digitalisation creates conceptual distance from a neighbouring term, 'digitisation', which refers to the processes of transforming information into a digital format that facilitates computer processing.

Although digitisation is the prerequisite for the digitalisation of society, this connection is somewhat downplayed here for a reason. This study revolves around the technological change of society that results from the use of digital technologies and argues that such technologies are increasing privatisation of coercion. This being said, we are primarily interested in the ways in which the tools of technology are used in enforcement and what implications these uses have for overall conflict management. This claim is closely linked to societal transformation of digitalisation but its connection with the transformation of information formats of digitisation is only secondary. In its original meaning,

‘digital’ describes the technical execution of signal transmission: digital signals present information in discontinuous, discreet format, and are contrasted with continuous analogue signals. At best, this distinction is irrelevant for examining the implications of technology use such as private enforcement, and at worst, confusing, as signals can be translated from analogue to digital.⁵⁷ Instead, the societal transformation of digitalisation is more accurately defined by the immense increases in computational power that digital signal processing enables. Interestingly enough, computation *per se* does not presuppose digital information processing – in fact, mechanical equipment has been used for computational purposes from rudimentary abacuses to the sophisticated design for a mechanical general-purpose computer presented by the English mathematician Charles Babbage as early as 1837. Computational power, however, enables the expanding use of computation in new fields, and intensifying automation of information processing, which contribute to societal transformations of digitalisation.⁵⁸

This means that the terminology ‘digital technologies’ does not provide a useful description of the scope of this study. However, we are not addressing all potential technologies, but are interested in information and communication technologies and their use in dispute resolution. Some of these ICT applications are data-driven but not all, and some rely heavily on automation, while others tap into the potential of the Internet to provide instant communication regardless of time and space. As no single communality between different applications of ICT in dispute resolution can be found beyond their reliance on computational power, they are simply referred to here as dispute resolution technology.

Surprisingly, dispute resolution technology has gained only minor attention, although some applications are discussed and evaluated extensively. Even legislation policy documents that regulate and direct the use of technology in dispute resolution offer little support for formulating an overview of what exactly is meant by it. This definition deficit is most likely the result of a more functional orientation where the emphasis is placed on the tasks entrusted to technology rather than to its formal definition.

For example, the EU’s ODR Regulation (524/2013) does not include a definition of ODR or even mention technology. However, in the recitals the lack of efficient electronic means for dispute resolution is acknowledged and remedied by the establishment of an EU-wide ODR platform, which ‘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’. 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, direct the claims to competent national alternative dispute resolution (ADR) entities and provide case management tools. These functionalities are described in further detail in Article 5 of the Regulation, which also stipulates that the platform should be user-friendly. In short, the Regulation describes the specific functions 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 for human interaction in dispute resolution processes are not discussed in the impact assessment accompanying the Regulation either.⁵⁹

A 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 sufficiently inclusive not to exclude future developments of technology. The working group has also acknowledged the importance of preserving the principle of technological neutrality.⁶⁰ As policy-makers avoid setting certain technological solutions in stone for good reason, the unfortunate side effect is that the definition deficit of dispute resolution technology cannot be remedied with these authoritative sources.

However, there are some initiatives that aim to produce information for future policy setting. In the UK, the Civil Justice Council is responsible for overseeing and co-ordinating the modernisation of the civil justice system. In February 2015, the Council's ODR Advisory Group produced a background report that includes examples of ODR, detailed recommendations, and suggestions for ODR piloting. 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, advancements in 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. The report also predicts that legal applications of artificial intelligence will function as "intelligent agents for judges" in the 2020s, although the advisory group does not anticipate AI systems replacing human judges.⁶¹ The functionalities discussed in the report provides a useful overview of the use cases for dispute resolution technology.

Also, ODR literature presents discussions on the role of technology in dispute resolution, although these assessments often focus on the similarities between ODR applications and ADR methods. The starting point is often Ethan Katsh and Janet Rifkin's analogy of the technology as the fourth party of the resolution process, in which technology is seen as assisting the third party.⁶² Drawing from the fourth party analogy, Professors Arno R Lodder and John Zeleznikow analyse different types of ODR and discuss the convergence of the third and fourth parties when software is used for decision-making.⁶³

Furthermore, the changes in communication brought on by technology have received scholarly attention, which most likely results from ODR's ideological roots in ADR and the importance of communication in non-binding resolution mechanisms.⁶⁴ Also Professor Cortés considers the lack of face-to-face (F2F) communication to constitute the main difference between ADR and ODR. As ADR mechanisms often emphasise the importance of such communication, Cortés points out that distance and lack of physical interaction does not necessarily signify poorer quality, as sometimes distance may be beneficial and new substitutes

for F2F are continuously developed. Cortés accentuates the role of technology, especially in the absence of physical meeting place.⁶⁵ Gabrielle Kaufmann-Kohler and Thomas Schultz place the discussions on similarities and lack of F2F in a broader context. According to their analysis, two existing views diverge on the issue of ODR's uniqueness. One of these views maintains that ODR is 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.⁶⁶

Professor Hörnle accentuates the 'transformative power of technology' in her examination of different technologies used in online mediation and arbitration.⁶⁷ 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) the 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.⁶⁸ Similarly to this, Professor Richard Susskind has identified ODR as one of 'disruptive technologies' that fundamentally challenge the existing status quo.⁶⁹

In summary, the disruptive qualities of dispute resolution technology have been widely acknowledged but the specifics of this disruption in general are seldom addressed. ODR technology is often addressed as supplementary, as the neutral third's assisting tools, which might result from the relative lack of successful applications, as legal technology has only recently started gaining momentum. However, the transformative power of technology and the role of technology as a set of new tools provide very different, even contradictory perspectives into dispute resolution technology. If we are to look for the implications of dispute resolution technology, we cannot focus on how well technological tools perform their task, but instead we need to evaluate how they reflect disruption of the ritualistic features of dispute resolution processes.⁷⁰

2.4.2 Different approaches to technology

Dispute resolution technology includes a multitude of different tools, the implications of which can only be properly assessed contextually. For example, videoconferencing and document cameras have relatively few disruptive ramifications in comparison with algorithmic decision-making tools. Before discussing such examples in further detail, it is necessary to ask what is meant by technology, to demystify the disruptive force of dispute resolution technology by asking what exactly causes a given technology to become disruptive in the first place. It is important to bear in mind that in 1995 Bower and Christensen used the term 'disruptive technology' to describe shifting power balances in markets resulting from innovation.⁷¹ In this meaning the specifics of technological innovation are

almost secondary, as the focus is on market change. It follows that technology is not simply a question of technological artefacts or know-how but also involves structures of designing, manufacturing, marketing and using these artefacts;⁷² in short, the social practices of society are entwined with technology.

The etymology of technology is in the ancient Greek word meaning craftsmanship or art (*tékhnē*) and from the word study (*-logia*, originally *légō*, 'I speak'). As such, the use of fire, the invention of the wheel, and the development of agriculture, which led to the Neolithic Revolution,⁷³ are all technologies in the original meaning of the word. However, in the meaning of dispute resolution technology we refer to techniques, practices, and devices that can be used for purposes of information and communication without exact knowledge of how they work. For example, using the EU Commission's ODR platform does not require any knowledge of domain names or hypertext protocols. Thus, examination of disruptive qualities of dispute resolution technology deals with social interaction that creates meaning for new ICT.⁷⁴ At the core of ICT is the ability to process vast amounts of information, which, in turn, leads to power struggles over control of information between states, corporations and other actors.⁷⁵

The ways in which information is controlled has also impacted the formation of the legal system. 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 discusses this historical relationship between law and information by examining archived legal files and legal practices, which she considers mutually constitute one another. Deriving several historical examples from the Roman Empire to the formation of Prussia as a sovereign state and to the excavation of the destroyed Stasi files of 1990s, Vismann deduces that record-keeping and handling of files shape the formation of legal procedures and the focal conceptualisations of truth, state, and subject.⁷⁶ 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 record-keeping 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.

It follows that conceptualisations of technology simultaneously reveal and hide perspectives, and participate in ideological struggles and formation of social processes. But the question remains, what is the relationship between the technological application and its use? Early answers to this question were sketched by two main approaches of media theory, the technological determinism of Canadian philosopher Marshall McLuhan and the social shaping of technology presented by Welsh academic Raymond Williams. It should be noted 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, although both approaches remain relevant. The theories differ in the extent to which they consider media technology to have the capability of transforming society and culture. Whereas McLuhan emphasises

fundamental change enabled by technology, Williams perceives technology as reflecting existing social stratification, wealth, and power.

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.⁷⁷ It follows from this 'extension thesis', as it is called by Lister et al.,⁷⁸ that McLuhan does not make a distinction between the terms 'media' and 'technology'; both are extensions of our senses, tools in our hands. In a famous example McLuhan depicts how the simple technology of light bulb has transformed 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, i.e. the influence is identical regardless of whether the shows are children's shows or illustrated violence.⁷⁹ 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 of society. Shortcomings of technological determinism boil down to its lack of sociological sensitivity. McLuhan's position is not interested in sociological analysis of power relations, wealth, and social norms present in technology. Hence, Williams's critique hits a spot as he brings attention to McLuhan's reductionist overtone where the complicated social history of the media is brought down simply to their effects.⁸⁰

Contrary to McLuhan's narrow determinist focus on technology, Williams insists on human agency and calls attention to the social and ideological practices that he considers relevant to the impact of new technology. Instead of fundamental change, he downplays the disruptive nature of modern technology and sees hegemonic and existing ideologies, social classes, and social norms more decisive for reception and use of media than any specific form of technology.⁸¹ By asking why and how certain technology is achieved, Williams is able to establish a more nuanced approach that is more sensitive to ideological elements involved in the acceptance of technology. At the same time, however, technology becomes an extension of already existing social practices and has little disruptive value beyond this scope.

Due to its sociologically comprehensive approach, Williams's theory has become the mainstream of media and communication theory.⁸² 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 adopted an understanding of technology, which combines William's constructivist approach with 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.⁸³ In any case, McLuhan's and Williams' work on theorising media has paved the way for later developments of media theory and still provides a point of reference for these discussions.⁸⁴

For example, the German media theorist Friedrich Kittler expands on McLuhan's determinism by stating that 'media determine our situation'⁸⁵ but contests the notion of media as extensions of man by highlighting the autonomy in technology. Kittler perceives humans as extensions of technology, where machines have required the skill to connect and manage information without any reference to human consciousness.⁸⁶ In one of his interviews Kittler reverses the importance of the Internet for promoting human interaction by stating that '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'.⁸⁷ Kittler's autonomy of technology, which acknowledges the disruptiveness of technology even further than McLuhan, demonstrates that the relationship between technological form, culture and human interaction is multifaceted and reciprocal, if the distinction between technology and humans is even feasible any longer.

In summary, conceptualisations of technology should include elements of both deterministic and constructivist approaches but these should not be considered exhaustive. Focus on disruptive qualities emphasises McLuhan's determinism, but disruptive qualities are often created through interplay between technology, markets, law and society. The constructivist approach detaches the examination from the technical artefact to its social implications, which is vital for our examination of dispute resolution technology, as we are interested in the ways in which this technology reflects and changes existing ideologies embedded in law's justificatory structures. Highlighting that the disruptiveness of technology results from its social element, that the use of technology is created through communication, is necessary for understanding how technology becomes relevant within social systems such as the legal system.

2.5 Technology and systems theory

2.5.1 *How does technology enter law?*

Surprisingly, Luhmann discusses the relationship between technology and social systems relatively briefly. In *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 provide the means for creating a portrait of reality that other social systems can then tap into without losing their internal stability; media adopt the role of memory, in a manner of speaking. However, Luhmann sees mass media as the one-sided relationship between sender and receiver, where there is no real interaction between the sender and receiver.⁸⁸ As discussed in the previous section, such notions disregard the complexity and reciprocity of technology and society. Although Luhmann downplays the importance of technology by perceiving them as 'invisible machines', he admits that any societal theory needs to reserve sufficient place for further technological development and its impact on society. This necessary indeterminacy, theoretical space for future technology, can be found in structural couplings:

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 to 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.⁸⁹

The possibility of using structural couplings to secure indeterminacy seems to vacate a space in social systems theory for future inclusion of technology. It remains unclear, however, between which systems these structural couplings would emerge. The system of mass media does not accurately describe the social complexity of technology use during the last decades, as the development of the World Wide Web and rise of social media have detached information production from established mass media. Could the answer, perhaps, be found in evaluating technology as an autopoietic system in its own right, as the German sustainability researcher André Reichel suggests? Reichel applies systems theory to what he considers to be the core of technology, the technological artefact, which then connects with its physical and social environment and with the human user.⁹⁰ He considers three options for including technology in systems theory: technology as a social system with coding work/fail; technology as a part of other systems; and technology as a *sui generis* autopoietic system. He opts for the third option, as the first two would fail to actualise the full potential of technology. Technology as a self-producing but not social system would be distinct from society and humans. This would depict technology as non-physical and non-living reproduction, as 'technological' instead of social.⁹¹

Although perceiving technology as a *sui generis* autopoietic system might be tempting, there are several issues against it. Reichel's technological system is not a social system and as such it is not based on communication, but instead operates through information.⁹² However, he still connects technology to social systems and psychic systems through the use of language, through meaning and communication,⁹³ which only social systems are able to do.⁹⁴ The interpretation also disregards the social interdependencies between artefacts, markets and cultural elements, the impact of regulation and financial incentives that all reciprocally affect the development of technology. If we separate technology from human interaction, the picture of technology becomes one-sided. Also, without the social element, different subsystems in society cannot form structural couplings with technology.

Another option is to consider the social practices related to technology, the social element, as an internal programme of a social subsystem. However, this

interpretation does not entirely convince, as this would mean each subsystem would manage such a programme independently from others based on its own coding, which would fall short in explaining the simultaneous technological disruption of several systems. Yet another possibility suitable for explaining the relationship between law and technology would be to examine the social elements of technology as a new social subsystem. If technological operations are networked to one another in a continuous web, which then produces the distinction 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.

2.5.2 Use of ICT as an emergent social system

It is suggested here that the social implications and increasing conventions related to technology use can be reconciled within systems theory by interpreting this social dimension as an emergent new system. Such interpretation would provide tools for analysing how the continuous development and use of dispute resolution technology enters the legal system as a disruptive irritant, while simultaneously respecting the theory's limits. The fact that these social implications are not limited to any single subsystem in the society seems to support the interpretation of use of technology as a social system. This wide-spread nature of technological change would imply that the social dimension of technology goes beyond the role of internal programme and would explain the plethora of diverse yet connected interpretative issues arising from the digitalisation of societal practices in different subsystems.⁹⁵ In other words, use of ICT has brought on changes in methods, discourses and practices within a wide variety of different fields, and has created the need to react in several scientific, political, legal and economic ways to new complicated phenomena.

Such widespread social changes following development of new technology are not unprecedented. For example, the development, commercialisation and implementation of the printing press led to the Printing Revolution in the fifteenth and sixteenth centuries, which had wide-ranging consequences for circulation of information, journalism and the democratisation of knowledge. However, it took several centuries before the technology had spread around Europe and before action from the courts and legislation became indispensable. Compared to this, the pace of change in development of information and communication technology is significantly more rapid. Also, the technology we are addressing here is different from changes in manufacturing processes. Modern technology or digitally interactive new media encompasses possibilities for creating new social realities, as information management and communication are at the core of their function. It is this rupture of social meaning creation that leads to the perception of fundamental change and suggests the emergence of new functional differentiation in the society.

Of course, this emphasis on the social element of modern technology gives only a partial picture as the examination of the technological artefacts is absent in

such conceptualisations. However, the physical artefacts and the social element of technology cannot be examined as a single unit while doing justice to the complexity of both aspects. Our focus here is on the social reality surrounding technology use, but the artefacts are increasingly becoming entwined with the social dimension, to the point where these two become impossible to distinguish, for example in augmented reality or artificial intelligence applications. 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 and technology studies.⁹⁶ Actor-network theory considers physical objects as parts of social networks and attributes agency to both human and non-human actors. Thus, the role of technological artefacts could be considered through such networks that participate in social meaning creation.

However, this simultaneous cohesion of the social dimension surrounding use of technology and the increasing distinction 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. This emergent social nature related to technological communication can be addressed as the system of use of ICT, for lack of a better label, to separate it from the non-communicative technology.

This conceptualisation portrays the use of ICT as 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 constituted a similarly extensive crisis within society.⁹⁷ It simultaneously places this study and consequences of new dispute resolution technology within the context of new media. Also, this 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 ICT also calls for reactions within the legal system. The social system enters the legal system through structural couplings and is used in 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) but these facts are not operations in the meaning of social systems. The technological side is left with 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 links with the legal system through its cognitive openness.

The emergence of a new social system requires the development of system-specific coding that grounds all communication around the system's symbolically generalised medium and thus creates the boundaries between the system and its environment. What would be this medium and code for the use of ICT? In his interpretation of technology as a *sui generis* autopoietic system, Reichel suggests distinction between work/fail as the code.⁹⁸ Luhmann, in turn, suggests that the

code of mass media systems is information/non-information.⁹⁹ When examining the social dimension of ICT and the transfer of data on different levels of hardware, programming or online interactions, communication and information become interwoven, or even converge. It seems that the use of ICT even outside the mass media context operates around transmission of information, which could suggest distinction between transmission and non-transmission as a possible candidate for the system's code.

Another option is to look at the infrastructure surrounding this transmission, which creates the possibility of social meaning creation. In this case, the medium for the use of ICT could be located in functionality, operability, information relay or even elegance of the solution. 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. However, no clear-cut answer is to be found as to the content of code by examining the social dimension surrounding the use of ICT. This ambiguity might be the flipside of the system's emergent nature: the code and the medium might still be work in progress, if the system's cohesion had 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 use of ICT and the non-social technology is not always lucid.

How would this conceptualisation of the use of ICT as an emergent system facilitate the task at hand, which is to assess the technology-driven privatisation of coercion? This approach enables us to perceive the disruptive qualities of technology from a perspective internal to the legal system, as it permits us to focus on the social dimension of dispute resolution technology on a general level without oversimplification. Also, it would provide an explanation to why this technological change poses a fundamental challenge for law, an irritant that the legal system must address in its operations. In short, it gives a more nuanced framework for assessing the relationship between law and technology on a macro level without placing the focus on any individual technological application.

2.6 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. Law is a stability-creating social subsystem of society that upholds normative expectations regardless of disappointment. The previous section discussed the theoretical premises of this study and established law as a stability-creating social system that upholds normative expectations regardless of disappointment. Law reproduces itself independently from other social systems through continuous flow of networked communication that conforms to the system-specific coding of legal/illegal, the legal system's grammar that safeguards its boundaries and identity. This operative closure, where other systems cannot interfere with the legal system's operations and its self-production is balanced by cognitive openness, which explains how external

references may enter law's operations. One such mechanism are structural couplings that may emerge between different systems when an operation applies codes of two systems.

It is argued here that the relationship between law and technology could be interpreted as interaction between two distinct systems sharing operations through cognitive openness. This claim departs from an analysis of the reciprocal and complicated relationship between technological artefacts and the culture surrounding their use, suggesting that the social dimension of technology use could be perceived as communication. Based on the social and disruptive properties, it is suggested that the use of ICT be seen as an emergent social system. The next chapter asks how this growing social importance of technology relates to dispute resolution, how it contributes to privatisation of coercion and thus creates a justificatory crisis.

Notes

- 1 'Creative use of paradox is the message that moves autopoiesis [i.e. law's self-creation] beyond deconstructive analysis into reconstructive practice.' See closer, Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (n 39) 1444.
- 2 King and Thornhill also list other reasons for this stance, starting from Luhmann's claim that human rationality cannot act as a normative focus, the theory's operative closure, which we will discuss further in the following, and the theory's ability to demonstrate the inherently paradoxical nature of social systems. See Michael King and Chris Thornhill, 'Introduction', *Luhmann on Law and Politics. Critical Appraisals and Applications* (Hart Publishing 2006) 8.
- 3 In order to position social systems theory within socio-legal theories, it is focal to understand the how Luhmann's conclusions depart from those of his mentors, American sociologist Talcott Parsons' action theory and structural functionalism. However, Luhmann expands on Parsons' systemic conceptualisation and downplays the emphasis given to value commitments in Parsons' theory. For Luhmann's discussion on Parsons, see e.g. Niklas Luhmann, *The Differentiation of Society* (Stephen Holmes and Charles Larmore trs, Columbia University Press 1982) 47–65; Niklas Luhmann, *Social Systems* (John Bedmarz, Jr and Dirk Baecker trs, Stanford University Press 1995) 103–136. Parsons' macro-level analysis perceives the society as a complex system, where different constituent parts work together for overall stability. The main difference between the two scholars is that Parsons places human action at the centre of his theory whereas Luhmann abandons the subjectivity of human actors for communication. For a detailed discussion on the differences between Luhmann and Parsons, see John W Murphy, 'Talcott Parsons and Niklas Luhmann: Two Versions of the Social "System"' (1982) 12 *International Review of Modern Sociology* 291, 291.
- 4 Niklas Luhmann, *Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004) 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 based on 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 Niklas Luhmann, *The Differentiation of Society* (n 3) 90–121.
- 5 Niklas Luhmann, *The Differentiation of Society* (n.3) 47–65; Niklas Luhmann, *Social Systems* (n 3) 103–136. Parsons' macro-level analysis perceives society as a complex system, where different constituent parts work together for overall stability. The main

- difference between the two scholars is that Parsons places human action at the centre of his theory whereas Luhmann abandons the subjectivity of human actors for communication. For a detailed discussion on the differences between Luhmann and Parsons, see; John W Murphy, 'Talcott Parsons and Niklas Luhmann' (n 3) 291.
- 6 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 Niklas Luhmann, *Social Systems* (n 3) 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 discusses 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.
 - 7 But this function of 'ought' is not unique to law and is not sufficient to separate it from other systems which employ the same function, namely the systems of religion or morals. Luhmann, *Law as a Social System* (n 4) 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 3) 110.
 - 8 Luhmann, *The Differentiation of Society* (n 3) 122.
 - 9 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. Maturana and Varela, in turn, derive the term autopoiesis 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. Luhmann's systems theory transfers the original concept of *autopoiesis* to social sciences.
 - 10 As Luhmann puts it, 'Es gibt kein Input von rechtlicher Kommunikation in das Rechtssystem, weil es überhaupt keine rechtliche Kommunikation ausserhalb des Rechtssystems gibt. ... Und es ist eine Konsequenz der These, dass nur das Rechtssystem 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 4) 100.

- 11 Luhmann himself refers to this as ‘operative constructivism’. See Luhmann, *Law as a Social System* (n 4) 79.
- 12 In short, the code cannot be applied to itself. Applying the code to itself would unfold another paradox. *ibid* 191–210.
- 13 ‘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.’ *ibid* 209.
- 14 *ibid* 192–193.
- 15 ‘... 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.’ *ibid* 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.
- 16 Luhmann, *Social Systems* (n 3) 466–468, 475.
- 17 *ibid* 210–254.
- 18 Kenneth C Bausch, ‘The Habermas/Luhmann Debate and Subsequent Habermasian Perspectives on Systems Theory’ (1997) 14 *Systems Research and Behavioral Science* 315, 205.
- 19 Luhmann, *Die Gesellschaft der Gesellschaft I* (Suhrkamp 1997) 108.
- 20 Luhmann, *Law as a Social System* (n 4) 115–116.
- 21 *ibid* 381–422.
- 22 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 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.
- 23 *ibid* 384.
- 24 See e.g. 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; Andreas Fischer-Lescano, ‘Critical Systems Theory’ (2012) 38 *Philosophy and Social Criticism* 3, 3.
- 25 McCarthy (n 24) 133–134; See also Bausch (n 18) 326.
- 26 On reflexive law see, Günther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Review* 239; For an analysis of reflexive law within private transnational regimes see Graf-Peter Callies, ‘Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law’ (28 June 2010). 23 *Zeitschrift für Rechtssoziologie* 185–216, available at SSRN: <https://ssrn.com/abstract=531063> (accessed 17 June 2018); Also, Hydén discusses reflexive elements within the Scandinavian context. See closer, Håkan Hydén, ‘Towards a Theory of Law and Societal Development’ (2014) 60 *Scandinavian Studies in Law* 443.
- 27 ‘Überdies ist die Vorstellung des Programms belastet durch die Absicht, damit eine Synthese von Theorien der “kritisch-emanzipativen” Richtung mit Vorstellung über “responsive Dogmatik” und mit soziologischen Analysen des “Rechtssystems”

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- 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 26).
- 28 John Paterson, ‘Reflecting on Reflexive Law’, *Luhmann on Law and Politics. Critical Appraisals and Applications* (Hart Publishing 2006) 24.
- 29 Michael King, ‘What’s the Use of Luhmann’s Theory?’, *Luhmann on Law and Politics. Critical Appraisals and Applications* (Hart Publishing 2006) 47.
- 30 *ibid* 51.
- 31 ‘Deparadoxification means to invent new distinctions which do not deny the paradox but displace it temporarily and thus relieve it of its paralysing power.’ Gunther Teubner, ‘Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann’ (2001) 18 *Theory, Culture and Society* 29, 32.
- 32 King and Thornhill (n 2) 22.
- 33 Teubner, ‘Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann’ (n 31) 39.
- 34 Sheila Jasanoff, ‘The Idiom of Co-Production’, *States of Knowledge: The Co-Production of Science and Social Order* (Routledge 2004) 3.
- 35 Friedrich A Kittler, *Gramophone, Film, Typewriter* (Geoffrey Winthrop-Young and Michael Wutz trs, Stanford University Press 1999) xl.
- 36 Cornelia Vismann, *Files: Law and Media Technology* (Geoffrey Winthrop-Young tr, Stanford University Press 2008) 12.
- 37 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. 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. 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 increases. In other words, do the changes in communication media affect the constitution of system boundaries? Unfortunately, this issue cannot be further discussed in this context.
- 38 Fischer-Lescano (n 24) 8.
- 39 ‘[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 (n 24) 4.
- 40 Adopting Luhmann’s theory as a starting point does not mean that the theory should be applied in its entirety without the possibility of conceptual supplements. Presumably Luhmann would not be completely averse to this. 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 3) 4.
- 41 Fischer-Lescano (n 24) 13.
- 42 *ibid*.

- 43 Although Tuori particularly points out that also normative criticism is not limited to internal approach but instead fundamental autonomous criticism is normative as well. See closer, Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002) 29–30.
- 44 Luhmann, *Law as a Social System* (n 4) 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 3) 323.
- 45 Thomas Wilhelmsson, *Critical Studies in Private Law: A Treatise on Need-Rational Principles in Modern Law*. (Kluwer Academic Publishers 1992) 49.
- 46 Michael King: ‘What’s the Use of Luhmann’s Theory?’ In *Luhmann on Law and Politics. Critical Appraisals and Applications* (Oxford: Hart Publishing 2006) 37–52.
- 47 Luhmann, *Law as a Social System* (n 4) 78.
- 48 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, *Rettsens Sosiale Funksjon* (Universitetsforlaget 1976) 180–186.
- 49 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.
- 50 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.
- 51 It should be noted that Luhmann considers truth a symbolic medium of communication. This means that truth is a characteristic neither 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.
- 52 Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’, in *Global Law Without a State* (Brookfield: Dartmouth 1997) 3–28 5.
- 53 See e.g., Thomas Schultz, ‘Private Legal Systems: What Cyberspace Might Teach Legal Theorists’ (2008) 10 *Yale Journal of Law and Technology* 151, 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, ‘Between Law and Social Norms: The Evolution of Global Governance’ (2009) 22 *Ratio Juris* 260, 260–280.
- 54 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 4) 123–124.
- 55 For example, American media theorist Neil Postman considers technology as inherently biased. According to Postman, technological change always has its advantages paired up with disadvantages and these are not distributed equally between different groups in society. It should be noted that Postman’s position reflects deterministic approach to technology. The danger of oversimplification is present in Postman’s argument as well. A point of interest is that we can contrast this position with the

- technology-religious view, which considers technology as a cure-all, and both of these are subject to the same pitfall of oversimplification. 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) available at <http://www.cs.ucdavis.edu/~rogaway/classes/188/materials/postman.pdf> (accessed 18 June 2018). As a highly critical media theorist Postman underlines that there is always a philosophy embedded in technology and that it affects 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.
- 56 The American Professor of Linguistics Robert Wachal was the first to describe digitalisation as a societal change in his 1971 article on social implications of computers. See, Robert Wachal, 'Humanities and Computers: A Personal View' (1971) 256 *The North American Review* 30.
- 57 For example, modems were used in 1990s to access the World Wide Web through analogue telephone lines.
- 58 Also McGinnis and Pearce attribute the challenges of technology that the legal profession must face largely to increasing computational power, exemplified by Moore's Law. See JO McGinnis and RG Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services' (2014) 82 *Fordham Law Review* 2041, 2041–3066.
- 59 'Impact Assessment on Directive on Consumer ADR and Regulation on Consumer ODR' (European Commission 2011) SEC (2011) 1408 final.
- 60 '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.
- 61 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 18 June 2018).
- 62 '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, 'Online Dispute Resolution: Resolving Conflicts in Cyberspace' (San Francisco: Jossey Bass 2001) 93.
- 63 AR Lodder and J Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010) 79–85.
- 64 For example, Colin Rule considers the main difference between ODR and ADR to be in communication methods, as technological applications enable a variety of different options from asynchronous emails and threaded discussions to synchronous communication such as chatting, instant messaging, or video conferencing. See Colin Rule, *Online Dispute Resolution for Business. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass 2002) 44–48.
- 65 '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 way 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.’ P Cortés *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 83–85.
- 66 G Kaufmann-Kohler and T Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004) 60.
- 67 J Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 74–86.
- 68 *ibid* 86–89.
- 69 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press 2010) 99, 217–225.
- 70 Closer scrutiny of our tools provides a description of how legal practices have come to be. The German media theorist Cornelia Vismann points this out in relation to files, which have for centuries formed the foundation of legal practices. Files form the information architecture for structuring legal work and influence how truth and validity are built in legal practices. ‘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 36) 11.
- 71 Bower and Christensen (n 3).
- 72 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).
- 73 The transition from foraging to agriculture signified unprecedented demographic growth and revolutionised human societies. See Jean-Pierre Bocquet-Appel, ‘When the World’s Population Took Off: The Springboard of the Neolithic Demographic Transition’ (2011) 333 *Science* 560.
- 74 For a critical overview of ‘newness’ of new media, see M Lister and others, *New Media: A Critical Introduction* (2nd edn, Routledge 2009) 9–104.
- 75 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 74) 11.
- 76 Vismann (n 36) xii–xiii.
- 77 McLuhan calls attention to the forms of technology through his assertion of the medium as the message: ‘Societies have always been shaped more by the nature of the media by which 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* (Ginkgo Press 1967) 8.
- 78 Lister and others (n 74) 89.
- 79 Marshall McLuhan, *Understanding Media. The Extensions of Man* (McGraw-Hill 1964) 18–20.
- 80 ‘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.
- 81 As Lister et al. formulate Williams’ position: ‘The extent to which the technology can have transformative “effects” is more or less in relation to other pre-existing patterns of wealth and power’. Lister and others (n 74) 87.
- 82 *ibid* 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.
- 83 See Bruno Latour, *Science in Action* (Open University Press 1987).
- 84 For example, Katsh and Rifkin refer to McLuhan in their work on ODR. See Katsh and Rifkin (n 62) 21–22.
- 85 Kittler (n 35) xxxix.
- 86 ‘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 technologically 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.’ Winthrop-Young (n 37) 394–395.
- 87 See e.g. Stuart Jeffries, ‘Friedrich Kittler Obituary’ *The Guardian* (21 October 2011) <https://www.theguardian.com/books/2011/oct/21/friedrich-kittler> (accessed 18 June 2018).
- 88 Niklas Luhmann, *The Reality of Mass Media* (Polity Press 2000) 2.
- 89 ‘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.
- 90 André Reichel, ‘Technology as a System. Towards an Autopoietic Theory of Technology’ (2011) 5 *International Journal of Innovation and Sustainable Development* 105, 106.
- 91 *ibid* 110.
- 92 *ibid* 111.
- 93 *ibid* 112.

- 94 See, Luhmann, *Die Gesellschaft Der Gesellschaft I* (n 19) 81. Psychic systems operate through the form of consciousness and biological systems through life.
- 95 Professor of Linguistics Robert Wachal was the first to discuss the social implications of what he called 'digitalization of society'. See Wachal (n 56) 30.
- 96 Lister and others (n 74) 98, 337–339.
- 97 Of course, we can argue that the Industrial Revolution in the nineteenth century and the introduction of Gutenberg's movable-type printing press both changed society rapidly and caused extensive need for reinterpretation. However, I claim that the effects of these means of production were not as fundamental as the emergence of ICT in the twentieth century. Both of these events resulted from new technology, but that 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 place over several centuries, as Tapper depicts. See, Colin Tapper, 'Genius and Janus: Information Technology and Law' (1985) 11 *Monash University Law Review* 75.
- 98 Reichel (n 90) 109.
- 99 Luhmann, *The Reality of Mass Media* (n 88) 15–.

3 Emerging crisis

The previous chapter examined ways of conceptualising technology and concluded with the suggestion that the social meaning creation embedded in the use of information and communication technology (ICT) could be considered as a new emergent social system. This chapter draws a picture of the crisis the use of ICT has provoked within the legal system by enabling increasing privatisation of enforcement. First, different concrete examples of dispute resolution technology are discussed to provide an overview of existing applications. Second, the need to categorise these applications is addressed by introducing a taxonomy for dispute resolution technology. After this, the shortcomings of the analogy of technology as the fourth party of dispute resolution procedure are examined before moving on to the second part of the chapter which explains the changes in enforcement. Privatisation of coercion is then placed in the context of private regimes and then discussed in relation to dispute resolution before continuing with examples of private enforcement including direct enforcement of e-commerce sites, ICANN's UDRP procedure for domain name disputes, chargebacks, user reviews, trustmarks, and smart contracts. It is argued that enforcement is crucial for all dispute resolution and this possibility of coaxing compliance without reference to the state's monopoly on violence is the most fundamental difference between old and new private regimes of dispute resolution.

3.1 Technology in dispute resolution

3.1.1 *Examples of dispute resolution technology*

Dispute resolution technology should be understood as an inclusive definition of ICT applications that facilitate different aspects of conflict management. Such applications may ease access to legal help on a general level through legislation and case law portals, diagnostic tools and chatbots, or expedite resolution of a dispute through case management systems, communication tools and user portals, decision support tools, videoconferencing, to name but a few. In addition to such functions, legal design is increasingly becoming an aspect of the development of different user-friendly applications that place the experience of law's end-users ahead of that of the legal profession,¹ a trend that is connected with the often

unsustainable costs of legal presentation and the increase in self-presentation, as well as the growing importance of conflict prevention instead of conflict resolution.²

Dispute resolution technology forms a diverse field and different applications often overlap, which means that distinctions between courtroom applications, legal tech and ODR become impossible to maintain. Also, the field is continuously evolving and descriptions of current state of the art applications will without fail be outdated within couple of years. However, the development of dispute resolution technology is not linear or progressing similarly in different countries.³ Instead, different court practices and needs of the stakeholders call for different solutions and one system design does not necessarily follow different work methods and cultures elsewhere.

Recently, civil justice reforms have introduced several technology applications in the public courts that aspire to improve access to justice. Launched in 2014, the Dutch Rechtswijzer portal is one of the forerunners of public dispute resolution technology. The online platform designed for self-presenting laypersons facing divorce, unemployment, consumer protection or other private law issues provides information and diagnostic tools, step-by-step plans for conflict resolution, negotiation and communication tools, and interfaces to payment systems and e-identification. Empirical studies show that users generally considered their experience with the website positive and the information provided trustworthy.⁴ The findings underlined the importance of access to information as most visitors in divorce cases stated a need for problem-focused help rather than emotional or social help.⁵ Whereas the Dutch initiative focuses on end-user experience, the Finnish justice reform AIPA initiated in 2010 adopts a more court-based approach to digitalise the working methods in the court system while simultaneously creating an extensive case management system with decision support tools.⁶ The case management system is designed for all court cases ranging from precautionary measures and petitions to criminal and civil procedure. The system has interfaces with legal aid offices, enforcement officials, and prosecutors to enable swift case flow and in the future will also include a citizen portal.⁷ In turn, the Civil Resolution Tribunal in British Columbia provides an ODR tool backed up with the public court system for litigants in small claims or strata disputes.⁸ The tribunal strives for user-centred design of early ODR for activating people in solving their disputes.

Dispute resolution technology is discussed also outside civil litigation. In Canada, fines could soon be contested and parking ticket disputes resolved through online platform.⁹ However, adoption of dispute resolution technology, especially in criminal cases, has strong ethical implications for the administration of justice, as the recent debate on the feasibility of the decision support tool Northpointe Compas demonstrates. The software that applies artificial intelligence to find renewable patterns in vast amounts of statistics is used in courts in Wisconsin, US, at sentencing to assess a defendant's risk of recidivism. As it is unclear how the software produces its assessment and claims have been made of its ethnic bias,¹⁰ a defendant sentenced with the algorithm contested its use based on due process. However, the Supreme Court of Wisconsin held that due

process standards do not prevent courts from considering the software's assessment.¹¹ As this example demonstrates, use of dispute resolution technology may strengthen the existing power structures and biases and make decision-making less transparent.

In addition to court-focused initiatives, some legal tech companies provide services for consumers to aid them in reaching their legal rights without intervention from lawyers or courts. For example, consumers may use the chatbot app DoNotPay to contest their parking tickets or FlightRight to claim compensation from airline companies for flight delays they are entitled to, based on EU Regulation 261/2004. Such dispute resolution applications could be considered as access services, as their goal is to lower the threshold for legal help while, of course, making a profit from these relatively marginal use cases. Another aspect of such services is access to legal information in an easy and user-friendly manner. Online legislation and case law portals as well as information design and social media play a role in making law more accessible and, at times, more transparent to laypeople.

A point of interest is that while some applications of dispute resolution technology focus on improving legal processes and facilitating access through relatively simple solutions such as chatbots, legal design and user portals, others experiment with artificial intelligence, machine learning and data analytics towards algorithmic decision-making. Despite differences in technology, most applications strive for automation of routine legal labour, of those tasks that do not require far-reaching *in casu* consideration, those relatively easy cases that have little variation. Law firms are experimenting with automation of legal research and argument with the help of machine learning-based applications such as Lawyer Ross, a customisable software built on IBM's computer system Watson that can answer questions posed in natural language.¹²

When compared to these recent developments, it seems that the emphasis of dispute resolution technology has shifted away from ODR. Naturally, this shift does not trivialise the importance early ODR research has played in establishing the field. Early ODR applications included communication platforms and complaint management systems as well as settlement support tools such as blind bidding systems, where parties suggest a monetary settlement sum without the other party seeing and the algorithm generates an agreement when both enter the acceptable range.

The EU's ODR platform is a prominent example of current ODR applications. The platform directs consumers' claims against online traders to national ADR entities. Since February 2016, over 46,000 complaints have been filed through the platform¹³ – a surprisingly small number when taking into consideration that the EU's Single Market accounts for 500 million consumers and 21 million small and medium-sized enterprises (SMEs).¹⁴ Another, often quoted example of successful ODR is eBay's Resolution Center, which is claimed to handle around 60 million e-commerce disputes annually.¹⁵ eBay is an online marketplace where the sellers list items for sale and buyers may bid for the items and thus enter into a binding agreement with the seller for the sale of goods. As conflicts may arise

when the payment is not made or the buyer does not receive an item, eBay has included an ODR process on its website. In addition to ODR, the platform includes the possibility of private enforcement enabled by the connection between eBay and its payment mechanism, PayPal. However, the coercive nature of dispute resolution and private enforcement has been downplayed by collectively referring to these as the Money-Back Guarantee.

The relative lack of success of most private ODR providers corresponds with the shift in dispute resolution technology described above. The reasons for this are various but most probably the difficulties in funding private ODR, the lack of enforcement options outside market leaders such as eBay, complexity of redress options and the low level of consumer awareness all play a role. Because of this lack of success of private ODR, civil justice reforms have become an essential venue for ODR functionalities.

The publicly funded ODR schemes also have the potential to extend their usability through interfaces to payment mechanisms, identity verification, public land registers and other public databases. To conclude, the field of dispute resolution technology is continuously evolving and different examples reveal different sides of the complex phenomenon. However, such examples reveal only a partial truth, as we often lose sight of the overview when focusing on specific functionalities.

3.1.2 Possible taxonomy for dispute resolution technology

As the development of dispute resolution technology is often fragmented, overlapping, shifting in focus and multi-voiced, different applications are often difficult to categorise and the overview is missing. Still, a taxonomy of dispute resolution technology is necessary for evaluating the broader context beyond individual examples, for perceiving the change in dispute resolution brought on by technology, and for examining technology-driven private enforcement. One option for taxonomy would be to follow the doctrinal distinction between ODR and courtroom technology,¹⁶ but as the shift away from private ODR and the potential of public dispute resolution technology demonstrate, this distinction seems to provide little value for categorisation. Although the tension between private and public ODR models remains, we might as well ask whether the differences between models are, in fact, as definite as the doctrinal divide would lead us to believe.¹⁷ The preservation of the doctrinal distinction in debates about dispute resolution technology may hamper in-depth analysis of its potential for both forms of dispute resolution and hide the convergence points from sight. Despite doctrinal differences, conflict management in both the public and in the private sphere carries a public function in the end,¹⁸ places value on fairness of outcomes and requires tools to encourage sustainable digitalisation of dispute resolution.

The emerging social system of the use of ICT converges the ways in which different dispute resolution models are used and dilutes the differences when it comes to the role granted to technology in the procedure. When courtroom technology and ODR are discussed separately from each other, only in connection

with their traditional equivalents, the role of technology diminishes. This may cause the false perception that technology's impact on dispute resolution is minor at best, which does not reflect the technological disruptiveness already affecting dispute resolution. As some applications of legal technology (e.g. access services) do not easily follow this doctrinal distinction, it is suggested here that we abandon the terminology of courtroom technology and ODR for dispute resolution technology to emphasise their overlap and convergence.¹⁹

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 it is tempting to define dispute resolution technology through generalisations that downplay the need for case-by-case analysis. Instead of all-encompassing theory on the impact of technology on dispute resolution we need to content ourselves with the overview of current developments in addition to more detailed *in casu* analyses.

Another option is to categorise dispute resolution technology based on the trends and development of the field over the past decades. As such chronological categorisation would provide more tools for context-based evaluation and help in understanding individual applications as parts of a historical continuum, this categorisation strategy is suggested here. This means dividing different functionalities of dispute resolution technology to three distinct categories based on the role of technology and time of their adoption. The first, preparadigmatic phase of dispute resolution technology ranges from 1960s to the end of 1980s, the second phase characterised by the introduction of World Wide Web that popularised the Internet from the early 1990s to the end of the 2000s and the third phase defined by the rapid advancement of technology from 2010s onwards.

The first preparadigmatic phase of dispute resolution technology was related to the increasing automation of data processing that resulted from the breakthroughs in computer technology and its commercialisation. As mainframe computers became the norm for processing bulk data, legal scholars saw advantages to be gained from the new technology, especially for case law research and analysis.²⁰ Towards the end of 1980s, improvements in word processing, as well as the introduction of video depositions and in some cases electronic terminals in court-houses for e-filing, signified the beginning of dispute resolution technology. In this first phase technology was mostly auxiliary to legal processes, its potential mostly in making data processing easier.

In the second phase the possibilities of newly discovered cyberspace signified both challenges and possibilities for national legal systems. The World Wide Web enabled online databases for legal information, whereas email and later videoconferencing technology gave rise to early ODR applications.²¹ Internet-based legal services emerged to provide help for laypersons in need of legal documents without lawyers and contributed to the growing demand voiced by the ADR movement for making law more accessible. In the second phase the role attributed to technology became more pronounced, but applications were still mostly there to assist lawyers.

In the third phase, which we are currently living, rapid technological changes are increasingly felt as a pressure to redesign legal services and re-evaluate the role

of the legal profession. Applications of artificial intelligence, machine learning and big data all contribute to automated decision-making. Whereas pattern recognition based on neural networks provides new tools for prediction and risk assessment, contract automation, practice management and compliance challenge traditional law practices. It remains to be seen what are the applications of blockchain architecture behind cryptocurrencies, which provides tools for decentralised trustless transactions in general and for self-executing smart contracts in particular, in law, as they can potentially remove the need to place trust in any intermediaries be it an e-commerce site, credit card company, escrow service, or the public courts.²² As technological advances make automated decision-making more science and less fiction both in routine cases and at some point also in hard cases, the role of technology becomes constantly more autonomous, giving rise to completely automated procedures and new legal practices.

This chronological taxonomy provides an overview of dispute resolution technology, in which continuous development has led from early data processing to autonomous decision-making, making use of artificial intelligence and blockchains. As the role of technology is constantly changing also in the legal system, it becomes apparent that there can be no universal definition of dispute resolution technology any more than there can be a straightforward and simple description of its consequences for the legal profession.

3.1.3 Problems of the fourth party analogy

At this point it has become necessary to address the famous analogy of technology as the fourth party in dispute resolution, as this conceptualisation has been very influential in ODR literature. Although the analogy provides an easy to understand and even elegant conceptualisation, it oversimplifies the multiformity of dispute resolution technology described above.

The fourth party analogy is a word play, where the configuration of dispute resolution, the triad of parties and the neutral third, a judge or an arbitrator, is complemented with an additional fourth party, namely technology.²³ Originally Katsh and Rifkin considered the fourth party in the context of cross-border online disputes, where technology would be working with and assisting the neutral third.²⁴ The analogy builds on McLuhan's determinism, where the use of technology fundamentally impacts its use, in this case the dispute resolution process.²⁵

The shortcomings of the analogy become clear when taking into consideration Williams' criticism on the neglected social dimension of McLuhan's technological determinism. Williams' focus on social dimension of technology provides a critical counterpoint for evaluating determinist approaches. For Williams, the determinist conceptualisation of the medium's focal impact on its reception – the medium is the message – presents objectification of essential social practices. Borrowing from Marxist theory, this objectivisation, or reification, reduces social relations to relations between traded objects, which leads to transforming such objects into subjects and, vice versa, rendering human subjects into passive objects.²⁶

Such critique reveals how determinist approaches to technology attain universalist nature and how universalist arguments about technology may lead to attributing agency to technology that is not there. This thingification of technology and objectification of persons takes the form of the fourth party analogy in ODR literature. Generalised claims about dispute resolution technology's impact, in turn, mystify technology, distancing its use and functionalities from the concrete practice of dispute resolution, highlighting rather than downplaying its role while simultaneously leaving aside further analysis of its various consequences. Instead of contextual analysis of individual use cases, dispute resolution technology becomes a decisive element in the whole process.

If we are to understand technology as the fourth party, its use then becomes a participant in the resolution process, linguistically equivalent to other participants but unable to meet the expectations of such agency. Thus, we are left with a procedure which has several participant roles, but one of which is permanently vacated. By such stances, the technology of dispute resolution is reified into subjectivity, and consequently 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 shifted from the participants to the technology, making it difficult to assess those social factors that are also relevant to the dispute resolution process, e.g. power imbalances or lack of access.

Similar warnings about mystifying technology has also been voiced by the American academic Lawrence Lessig, who 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.²⁷

Despite these shortcomings of objectification and dogmatism, we need to consider the feasibility of the fourth party analogy for describing the changing autonomy of dispute resolution technology as well as its role as a metaphor for revealing the networked structures behind its adoption. Although these insights do not follow from the original conceptualisation of Katsh and Rifkin, they may reveal possibilities for future theory development.

If we apply the embedded suggestion in the fourth party analogy that technology has an active and autonomous role in dispute resolution to the taxonomy described in the previous section, we notice that the role attributed to technology has changed significantly since 1960s data processing to applications of legal artificial intelligence in 2010s. Although the agency of technology is far-fetched for first-generation and many applications of second-generation dispute resolution technology, this may not hold true for autonomous decision-making that employs machine learning and neural networks. After all, third-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. Although third-generation dispute resolution

technology may give the impression of social interaction, of being able to create social responses, this does not necessarily mean there is social interaction. At the moment, portrayal of interaction does not constitute mutual recognition of the other's subjectivity, that fundamental essence of communication. Despite advances in neural networks and pattern recognition, artificial general intelligence capable of consciousness is still not on the horizon – much to the relief of those worried about singularity.

Another possible use for the fourth party analogy could be in its ability to describe the networks embedded in its adoption. For example, Lodder and Zeleznikow have developed the analogy further by adding a fifth party, namely the service provider.²⁸ If we are to consider other subject positions present in dispute resolution technology, we might include the programmer behind the code to the analogy as the sixth party, or the Internet service provider. Interpreted this way, the fourth party analogy might help in conceptualising the human intention that is always present in programming. Such further theorisation bows towards the French sociologist Bruno Latour's actor-network theory, in which the social world is created by the networked interactions of human and non-human actors, such as concepts, ideas, processes and artefacts. Combining these elements with the fourth party analogy could provide a solution for maintaining the analogy while 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 technology itself. However, it is unclear whether such a theoretical exercise would indeed be true to the analogy's original meaning or provide sufficient added value to justify it. Also, conceptualising such complexity through party metaphors ties the examination to the actual dispute resolution process, which limits its applicability.

To conclude, the analogy comes burdened with certain embedded ambiguity and the need to make further, often problematic distinctions between different uses of technology that the analogy does not leave room for. Based on this, it seems that the theory of technology as the fourth or fifth party is not sufficient for describing the complexity. Technology is not a party to the resolution procedure, but a structure which frames the process. Although the metaphor of the fourth or fifth party is appealing, it is an oversimplification that hides the complexity of dispute resolution technology. Instead of using the analogy, a more context-orientated approach is needed to create a more nuanced picture of dispute resolution technology with added explanatory power.

In addition, the fourth party analogy focuses on the resolution process, which means that technology-driven changes in enforcement and the theoretically interesting shift towards privatisation of coercion have remained in the margins of literature on dispute resolution technology. By simultaneously holding on to the overview of technological change and the contextual approach of different functionalities, this privatisation development is made visible as an example of the rupture brought on by dispute resolution technology.

3.2 Reflections of rupture in dispute resolution

3.2.1 *Emergence of private regimes*

As suggested by the contextual approach advocated in the previous section, the impact of dispute resolution technology should be evaluated based on the change its implementation creates within the legal system. One of these consequences is that the introduction of dispute resolution technology accelerates the emergence of private regimes, as is the case with private ODR such as eBay's Resolution Center or chargeback procedures of credit card companies, both of which provide redress mechanisms. Such alternative mechanisms of redress and enforcement become essential when the national legal systems are unable to provide court-based public enforcement for low-intensity disputes. The emergence of private regimes and its connection with the increasing importance of technology form the background for evaluating private enforcement.

The reason why private regimes are capable of providing redress where public systems cannot is that they are not as bound to the nation-state as national court systems by definition are. This means that private regimes are gaining more momentum at the expense of the public regimes. The tension between private and public, as well as other contradictions, are embedded in law, which is by no means a harmonious system – the legal system's function of upholding normative expectations even when those grounded expectations are disappointed attests to this. At times, this tension between public and private escalates into conflicts and disputes, and the battle for hegemony becomes visible. 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.

Professor Thomas Schultz discusses legal pluralism by examining how private Internet regimes become private legal systems by attaining normativity. Autonomous legal systems emerge when they acquire autonomous jurisdictional powers of prescription, adjudication, and enforcement, which enable formal legal institutions to recognise it. By evaluating the prescriptive, adjudicative and enforcement institutions of ICANN and eBay's Resolution Center, he argues that they should be recognised as autonomous private legal systems despite modern legal theory's close attachment to the concept of political sovereignty.²⁹ Schultz's examination explains how the tension between private and public is embedded in our understanding of law only in connection with the nation-state and how the emergence of the Internet is contributing to this tension.

Similarly, the German legal scholar Günther Teubner discusses the conceptual dominance of the nation-state in relation to debates on the legal nature of *lex mercatoria*, the medieval body of commercial law applicable throughout Europe.³⁰ Teubner claims that *lex mercatoria* as a privately emerged legal system challenges the close connection between law and state by enabling the 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.³¹ According to Teubner, *lex mercatoria* locates itself in the periphery of law and thus finds its dynamic stability by means other than creating a centre, which is typically a practice of national legislation. Such differences between private regimes and national legal systems are not necessarily defects; they are simply differences.³²

In addition, Teubner addresses the collision between law and technology that results from differences in their scope of application; law as we understand it is closely interlinked with the political system of the nation-state, whereas technology forms a global system. These self-producing subsystems of society, such as technology, compete with the politics of nation-states in the formulation of a global autonomous society.³³ This interpretation explains why the increasing privatisation of coercion that results from the use of dispute resolution technology is problematic from the perspective of the legal system, as the two systems are not compatible, the tensions between private and public, global and regional, unrecconciled. The social implications of legal privatisation are not easy to predict, as the American law professor Elizabeth Thornburg demonstrates in her assessment of different forms of privatisation. By examining ICANN, notice-and-take-down of websites, 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’.³⁴ Thornburg’s analysis seems to suggest that the perspective of dispute resolution rather than material law may prove to be a fruitful vantage point for evaluating the tension between private regimes and public legal systems.

3.2.2 Why enforcement matters in dispute resolution

Why should we approach dispute resolution technology through the tension between private and public, through privatisation of coercion? As enforcement is at the core of sovereign power and its privatisation is contradictory from the perspective of nation-state law, privatisation of coercion can reveal the essence of technological change. Technology-driven private enforcement calls attention to the ways in which legal practices are changing and how this change impacts our understanding of law. In short, use of force is the window through which the disruptive qualities of dispute resolution technology can be observed.

The Oxford Dictionary defines enforcement as ‘the act of compelling observance of or compliance with a law, rule, or obligation’.³⁵ This definition sheds light to the most interesting element of enforcement, i.e. to compelling compliance. In layman’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 problematised. 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;³⁶

In this study, enforcement is referred to in this general meaning of legitimised obtaining of funds based on an existing legal decision. In other words, this examination targets the core area of enforcement, where the use of the legal system provides legitimisation of the use of coercion. A point of interest is that indirect ways of coaxing compliance may involve similar use of coercion as state-governed enforcement. The social pressure of tribal communities and the following social sanctions, which Norwegian sociologist Vilhelm Aubert has studied,³⁷ are also methods of forcing compliance, and thus it can be seen as an alternative to enforcement.

As compliance is the social expectation, enforcement is a question of exception. Most decisions reached both in litigation and ADR procedures are carried out voluntarily and there is no need for coercive measures. From this perspective, enforcement is always a glitch in the system, although a necessary one, as economic action requires the safety valve of enforcement. This means that the importance of enforcement is not decreased by its exceptionality.

In addition, private enforcement epitomises the tension between private and public and provides a peephole to the engine room of law, as difficulties in justifying private coercion through state-bound law become apparent. Law’s inherent violence cannot be hidden when decisions are put into action by force. As it is, enforcement reveals something relevant about law on a linguistic level, an issue raised already by the French philosopher Jacques Derrida. As Derrida 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.’³⁸

This means that, in enforcement, law cannot hide its embedded violence. We can claim that law ceases to be law if the coercive element that provides for normative expectations is removed. As the paradox cannot be downplayed, we face the abyss

of its deconstructive power. Simply put, violence has to be justified but at the same time it cannot be justified. Into this gap we fit justificatory structures and hope that they function as mechanisms of deparadoxification.

Enforcement is relevant for finding 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 record-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 reimbursed and may turn to dispute resolution and enforcement to reach this outcome.

It is the 'if' in making voluntary payments that underline 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 constitutive elements 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 marketplace but a kitchen chair instead, she should have 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,³⁹ chargebacks, and reputation systems. These mechanisms cannot be considered simply as contractual issues because they deal with the other side of dispute resolution – they deal with the violence. A point of interest is that the rhetoric does not start from the claim that there should not be use of coercion in these situations. Instead, the question is, whose coercion and by which means? Another layer is added but the paradox itself does not disappear.

For decisions rendered in the private sphere, the situation has been exactly the opposite. Traditionally, ADR procedures promote easy access to conflict resolution, which is guaranteed by the relatively low fees and 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. Traditionally, ADR decisions had to resort to the state's enforcement mechanism, which meant that they were subordinated to *ex ante* control of due process before being enforced. This

strange interaction between the private and the public takes place within enforcement, in accessing enforcement. However, it is specifically at this stage where private enforcement comes to the fore and shuffles the deck.

Privatisation of enforcement makes law's inherent violence visible, reveals the grounding paradox of law, makes it a good vantage point for examining the disruptive qualities of technology. Privatisation of coercion connects with justification, as private enforcement mechanisms bypass the state's monopoly on violence, which forms the basis of national court systems as well as the focal concept for modern understanding of law. The internal private enforcement mechanism is not based on international Conventions or national legislation but instead it leads its jurisdiction from user agreements and other consensual models. Why, then, examine private enforcement as a procedural and theoretical issue and not simply as a question of acceptable contract terms? There are two reasons for this. Firstly, privatised enforcement is nevertheless use of force, even if we call it by another name, and use of force has to be justified. Secondly, in the absence of efficient public enforcement mechanisms, there is no actual choice besides resorting to the offered private mechanisms, which calls to question how consensual these mechanisms actually are.⁴⁰ This does not contest that there is a question of contract law entwined within ODR, but private autonomy is very much a part of ODR, as will be discussed in the following chapters.

Rather than claiming that private enforcement is one or the other, it is more reasonable to state that both perspectives can be employed, but they produce different types of information. Arguments about the importance of material norms, *pacta sunt servanda*, or 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 on valid contract terms. If a standard contract includes norms on the method of resolving disputes related to the activities arising from the contract, then there is 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 the 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 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 the invisible hand, but it is not 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 Internet.

3.2.3 *Private enforcement mechanisms and their alternatives*

After establishing that private enforcement goes beyond contractual terms despite its jurisdictional basis on consent and private autonomy, an overview of existing private enforcement mechanism is needed. These private mechanisms, however, should be evaluated against the established framework for granting access to public enforcement for private decisions.

Although it is unclear whether the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards would apply to ODR decisions, the mechanism demonstrates how the interface between private dispute resolution and public enforcement is organised by multilateral Convention without bypassing state control.⁴¹ The Convention is intended for international commercial arbitration, where cases are often of high value, which affects the organisation of the recognition procedure. 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 might pose an insurmountable threshold for low-intensity cases, making this established interface mechanism unsuitable for most of them.

Chargeback procedures have been proposed as another functional equivalent of enforcement, especially for B2C transactions in the US. Chargeback means that the credit card company assumes responsibility for allocating money after a decision is reached within an ODR procedure. The credit card company forcibly reverses the payment made and returns the money to the buyer if the ODR decision considers that the seller did not follow through with her contractual responsibilities.⁴² The system is funded through the chargeback fees that businesses engaging in sale of goods have to pay in order to accept payments made through the payment method. The amount of these fees depends on the track record of the business and the amount increases if the seller has reoccurring chargebacks on its transactions.

Chargebacks are an enticing solution for disputes arising from e-commerce, especially for the typical cross-border, small-value disputes on 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 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.⁴³ 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. However, it is still

unclear whether the scope of chargebacks could be expanded beyond their current use.

In addition to chargebacks, 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, seller and 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 on the ground that negative feedback does not necessarily describe what has actually been the issue with the transaction. It is stated that negative feedback can be left out of spite or positive feedback can be manipulated.⁴⁴ However, the main issue with feedback systems is that they do not provide redress for individual cases but try to affect future behaviour at the market place.

Another form of reputation system tries to provide a trust mark for those market places with a functioning ODR system that follows certain criteria of access to justice. Ponte suggests that these trust marks be granted by a transnational authority, which would be established by the cooperation of governmental institutions. Such trust mark would include an enforcement function as well as 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 temporary or permanent loss of the trust mark.⁴⁵ 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, government action is needed. Until now, the success of engaging different states in developing ODR standards has been low. Also, there is an issue related to Internet governance. Ponte suggests that a non-complying merchant would be banned from e-commerce altogether – a task that is not an actual option when taking into consideration the disharmonious infrastructure of Internet. Regardless, trust marks have a similar inherent problem as feedback systems: they regulate future behaviour, but outside a 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, such as ICANN's supremacy over the domain name system and self-executing blockchains.

For example, ICANN's dispute resolution procedure emerged from the need to solve disputes arising from a new global infrastructure of the domain name system. ICANN is responsible for distribution and maintenance of the global domain name system. ICANN has established a Uniform Dispute Resolution Policy (UDRP) in cooperation 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 in bad faith a domain name that is confusingly similar to the complainant's own trademark (also known in the US as cybersquatting). The UDRP provides for a mandatory administrative proceeding in domain name disputes. ICANN also upholds a list of approved providers of UDRP resolution. At the time of writing, these are the Asian Domain Name Centre, National Arbitration Forum, WIPO, the Czech Arbitration Court Arbitration Center for Internet Disputes, and the Arab Center for Domain Name Dispute Resolution.⁴⁶ The registrar does not intervene in the work of the administrative panel and the UDRP resolution process does not prevent the parties from accessing a court of jurisdiction. 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.⁴⁷

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, e.g. allocates money, once the contractual terms are fulfilled. All these models of private enforcement have far-reaching consequences for 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, which is pay/not-pay, but they do not conform 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 questions of damages. Also, trust marks and feedbacks are communications of the economic system. Their decisive force for the legal field does not convince the procedural researcher, although there is value in additional courses of action. This lack of credibility can be explained by the coding. The participant in 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, about being 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. 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 follow a different rationality from the inherent violence of law. Chargebacks come the closest, as the reversal of payment does indeed return money to the buyer. But depending on the content of the chargeback, these systems either present problems similar to private

enforcement, i.e. the issue of making a normative decision and enforcing it without the ex post 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. Both these models employ the familiar code through which the legal system recognises them as belonging to its sphere. Although both options are relatively new phenomena, mostly unregulated, the legal system recognises the element that makes these operations communications about law. Both of 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 programmes 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 for the 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.⁴⁸

Excursion 1: The case of eBay's user agreement

Private enforcement mechanisms base their jurisdiction on consent of the parties, which is often given by the acceptance of the user agreement. Acceptance of the standard contract terms is the condition for using the service. In eBay's case both sellers and buyers are required to accept the user agreement and obey its rules on private enforcement before commencing commerce on the market place. Interestingly enough, eBay's Resolution Center, which renders the decision concerning a dispute that has arisen on the marketplace, was reworded as Money Back Guarantee around 2014. Despite the rewording in the user agreement, eBay's Resolution Center still exists and renders decisions on the Money Back Guarantee, although the Resolution Center is no longer mentioned in contractual terms. Hence, the Money Back Guarantee corresponds to the internal enforcement mechanism of the Resolution Center.

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 an e-commerce platform for sellers and buyers, eBay has access to the world's largest Internet payment company, PayPal, which has been a subsidiary of eBay since 2002.⁴⁹ The combination of access to the payment method and internal dispute resolution procedure is necessary for producing an effective private enforcement mechanism.

By the user's acceptance of the user agreement of 1 November 2017, eBay has the user's permission to make the final decision on whether or not a buyer is

reimbursed in a dispute. The contractual terms give eBay the right to request PayPal to remove funds from a seller's account or charge the amount reimbursed to the buyer by eBay's decision from the seller's payment method.⁵⁰ In addition, the seller has to agree to eBay using other collection mechanisms such as collection agencies in case they cannot get the reimbursement directly. Based on eBay.com's request, PayPal may decide on restricting the user's funds according to PayPal policies. This restriction policy of PayPal has been criticised both for its arbitrariness and its controversial nature.⁵¹

This private enforcement mechanism is directed against the seller. The contractual relationship is stipulated in the user agreement, which grants eBay access to the seller's PayPal account. Thus, the contractual terms enable enforcement of the final decision on the transaction between the seller and the buyer that eBay renders through its Resolution Center. 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. It is noteworthy that automation forms an integral part of the mechanism, which also explains the huge number of cases resolved annually.

As is clear from the above, the private enforcement mechanism of eBay and PayPal is undeniably an economic mechanism created for protecting consumer trust in the e-commerce market place. It conforms to the rationality of the markets and we could perceive well-functioning ODR in a similar manner to 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 Resolution Center and Money Back Guarantee.

As it allows the use of force, the Money Back Guarantee conforms to the logic of the legal system. If a final decision against the seller is rendered by 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, based on the terms in the user agreement. Instead of underlining this as enforcement, which would be hazardous from the perspective of 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 a 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 making it into a grey area, a legal no-man's land, where the sole option of redress is to look into the material legislation of the ODR provider's place of domicile. As such redress to state courts would be impossibly expensive, the argument leaves much to be hoped for. The redress from material legislation is easily illusory, if there is no de facto redress mechanism.

The example of eBay's direct enforcement mechanism seems to challenge our way of conceptualising enforcement only in relation to the law of the nation-state, and to the nation-state's monopoly on violence. Hence, the tension between private and public becomes emphasised, the need to find justification for privatised coercion immanent.

3.3 Reacting through justification

How, then, does the legal system go about justifying the use of coercion, the basis of its authority? How is this authority changing as a result of changes in social practices? G elinas 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 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.⁵²

As the demand for efficiency of judicial proceedings gains ground, G elinas et al. draw attention to the possible repercussions of 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.⁵³ However, the foundation of legitimacy is not straightforward. In contrast to public dispute resolution, arbitration proceedings usually put 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,⁵⁴ compensates for the lack of ritual and restores legitimacy. Based on the example of arbitration, G elinas et al. suggest that legitimacy of judicial institutions could be founded on partly contrasting grounds, the ritual and participation of the parties.⁵⁵

As this example depicts, changes in social practices impact law's justification, law is unable to remain indifferent to societal ruptures. At this point, it is possible to sketch an overview of the challenge posed by technology-driven private enforcement and how its emergence intensifies the tension between private and public. As private enforcement challenges the boundaries of state-bound law, the need to justify private use of coercion and the inability to do so leads to a justificatory crisis.

From the Luhmannian perspective adopted in this study, the introduction of a new emergent social system of technology, which refers to the use of ICT as a communicative operation (rather than technology as combination of physical artefacts and social elements), constitutes a point of crisis. This new social system is located in society, in the environment of other functionally differentiated, established social systems such as legal, political and economic systems. The social technological system has an 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, as is apparent from the NSA discussions of 2015.⁵⁶ The economic system addresses the possibilities of monetising technological innovation.⁵⁷ 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 use of ICT.⁵⁸

The emergence of the social system 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.⁵⁹ 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 a 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 by reacting promptly to new possibilities. Still, the affected systems aim to answer the societal rupture. If left to its own devices, the rupture caused by technology creates a significant risk to the overall cohesion of society, which then threatens social 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.

Thus, the legal system also receives an aftershock and needs to respond to the irritants from the social system of technology. As the operation of law, communication about the application of the code, has changed, this is also reflected in 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 the code, translate into the demand for finding answers on the theory level. The irritants enter the legal system in different ways, but in procedural law this has led 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 a new irritant. Law, as much as other social systems, has to provide itself with 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 in which law's quest for justification starts off. This is the crisis and the challenge that the legal system needs to face and answer.

3.4 Conclusions

This chapter concludes the first part of this study, which has focused on theorisations on law, technology and social change that all interact in dispute resolution technology. It presented an overview of the developments that have given rise to technology-driven private enforcement and are leading to the justificatory crisis, which will be discussed in further detail in the second part of this study. The first part of this chapter focused on examples of dispute resolution technology, whereas the second part addressed the theoretical implications of increasing privatisation of coercion enabled by the use of dispute resolution technology. In the first part, the examples of different applications depicted the diversity of dispute resolution technology, whereas chronological categorisation of their development over the past decades provided insight into how the role of technology is changing towards increasing autonomy. In the second part, the discussion on dispute resolution technology is combined with theorisations on the emergence of private regimes that confound the modern conception of law as connected to the nation-state. The tension between public and private, as well as law's inability to detach from the nation-state, become visible particularly in private enforcement, as justifying the use of coercion reveals the basis of law's authority. Thus, the pursuit of justifying private enforcement provides a vantage point for assessing the societal change brought on by the use of ICT.

Notes

- 1 Margaret Hagan, 'The User Experience of the Internet as a Legal Help Service: Defining Standards for the next Generation of User-Friendly Online Legal Services' (2016) 20 *Virginia Journal of Law and Technology* 395.
- 2 For example, the UK's ODR Advisory Group suggests that the state shifts focus to conflict avoidance, as this would save cost and increase access. See Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low Value Civil Claims' (Civil Justice Council 2015) available at <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/odr-report-february-2015/> (accessed 18 June 2018) 17–18.

- 3 See K Benyekhlef, E Amar and V Callipel, 'ICT-Driven Strategies for Reforming Access to Justice Mechanisms in Developing Countries' (2015) 6 *World Bank Legal Review* 325.
- 4 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.
- 5 *ibid* 37.
- 6 Marko Loisa, 'AIPA - The Project for the Digitalisation of the General Courts and Prosecution Offices in Finland' in Riikka Koulu and Jenni Hakkarainen (eds), *Law and Digitalisation: Rethinking Legal Services* (University of Helsinki Legal Tech Lab 2018).
- 7 Ministry of Justice, 'AIPA-hanke' (26 October 2017) available at <https://oikeus.fi/fi/index/ajankohtaista/aipa-hanke.html>. (accessed 18 June 2018).
- 8 Shannon Salter and Darin Thompson, 'Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' 3 *McGill Journal of Dispute Resolution* 113.
- 9 Jane Bailey, 'Working Paper on Digitization of Court Processes in Canada' (Laboratoire de Cyberjustice, Université de Montréal 2012) available at http://www.cyberjustice.ca/files/sites/102/WP002_CanadaDigitizationOfCourtProcesses20121023.pdf (accessed 18 June 2018); 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 18 June 2018).
- 10 Jeff Larson and others, 'How We Analyzed the COMPAS Recidivism Algorithm' *ProPublica* (23 May 2016) <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> (accessed 18 June 2018)
- 11 *State of Wisconsin v Eric L Loomis* [2016].
- 12 'ROSS Intelligence' <http://www.rossintelligence.com/> (accessed 18 June 2018).
- 13 European Commission, 'Online Dispute Resolution. Reports and Statistics' <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.statistics.show> (accessed 18 June 2018).
- 14 European Commission, 'The European Single Market', https://ec.europa.eu/growth/single-market_en, (accessed 18 June 2018).
- 15 E 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) 2.
- 16 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).
- 17 Some scholars argue for a more comprehensive approach to conflict management. For example, the American Professor Richard Reuben calls 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 an expansion of our understanding of public civil justice. Richard C Reuben, 'Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice' (2000) 47 *UCLA Law Review* 949. Within ODR theory, 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. See AR Lodder and J Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010) 170. Also Cortés as well as Benyekhlef and Vermeys consider court-annexed ODR the next logical step. See Benyekhlef and Vermeys, 'ODR and the

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- Courts', *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2012) 295; P. Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 223. As ADR and now also ODR is often advocated by the courts we can should ask whether the doctrinal distinction has been able to reflect the complexity and overlap between different processes.
- 18 J Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 217.
- 19 For more in-depth analysis see e.g., Riikka Koulu, 'Domstolsrättegångar och alternativ tvistelösning – innebär användning av nutida teknologi i tvistelösning en upplösning av separata paradigmer?' (2013) 2013 Retfaerd: Nordisk juridisk tidskrift 60.
- 20 Robert A Wilson, 'Computer Retrieval of Case Law' [1962] *Southwestern Law Journal* 409.
- 21 EM Katsh and J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey Bass 2001) 45–70.
- 22 See e.g., 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.
- 23 On the universality of conflict management triad, see Aubert, 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution'(1963) 7 *Journal of Conflict Resolution* 26.
- 24 Katsh and Rifkin (n 21) 15–16.
- 25 *ibid* 21–22.
- 26 M Lister and others, *New Media: A Critical Introduction* (2nd edn, Routledge 2009) 88–89.
- 27 '... 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.' L Lessig, *Code Version 2.0* (Basic Books 2006) available at <http://codev2.cc/download+remix/> (accessed 19 June 2018) 59.
- 28 Lodder and Zeleznikow (n 17) 79; see also AE 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.
- 29 Thomas Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' (2008) 10 *Yale Journal of Law and Technology* 151, 166.
- 30 Teubner has also approached themes of 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.
- 31 See Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Günther Teubner (ed), *Global Law Without a State* (Dartmouth 1997) 7.
- 32 *ibid* 16.
- 33 *ibid* 5.

- 34 Elizabeth G Thornburg, 'Going Private: Technology, Due Process, and Internet Dispute Resolution' (2000) 34 University of California Davis Law Review 151, 187.
- 35 'Oxford Dictionary: Enforcement' <http://www.oxforddictionaries.com/definition/english/enforcement> (accessed 19 June 2018).
- 36 Recommendation of the Committee of Ministers to Member States on enforcement 2003 I.a.
- 37 Aubert, 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution' (n 23); Aubert, *Retten Sociale Funksjon* (Universitetsforlaget 1976) 180–186.
- 38 Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 Cardozo Law Review 919, 925–927. Another example of from Derrida is the German word 'Gewalt' which can be translated both as 'violence' and as 'authorised power'.
- 39 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 17) 60.
- 40 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 Journal of Technology and Intellectual Property 55, 88.
- 41 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 19 June 2018).
- 42 It should be noted that a chargeback process can also be independent of the ODR decision. For example, PayPal may make a decision on 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.
- 43 Ichiro Kobayashi, 'Private Contracting and Business Models of Electronic Commerce' (2005) 13 University of Miami Business Law Review 161, 215.
- 44 On reputation systems see, Louis Del Duca, Colin Rule and Zbynek Loebel, '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.
- 45 Ponte (n 40) 88–89.
- 46 'List of Approved Dispute Resolution Service Providers' https://www.icann.org/resources/pages/providers-6d-2012-02-25-en?routing_type=path/ (accessed 19 June 2018).
- 47 'Uniform Domain Name Dispute Resolution Policy' (26 August 1999) 4.k https://www.icann.org/resources/pages/policy-2012-02-25-en?routing_type=path/ (accessed 19 June 2018).
- 48 N Luhmann, *Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004) 171.
- 49 However, in 2014 eBay 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)

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- <http://www.reuters.com/article/us-ebay-divestiture-idUSKCN0HP13D20140930> (accessed 19 June 2018).
- 50 'eBay User Agreement (1 November 2017)' section Money Back Guarantee, <http://pages.ebay.com/th/en-us/help/policies/user-agreement.html#13c> (accessed 19 June 2018).
- 51 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 6.6, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20535&lang=en> (accessed 19 June 2018). 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 Electronic Commerce Model' (2003) 19 Computer Law & Security Review 468.
- 52 F Gélinas and others, *Foundations of Civil Justice: Toward a Value-Based Framework for Reform*. (Springer International Publishing 2015) 16.
- 53 *ibid* 34.
- 54 Allan E Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988) 215.
- 55 Gélinas and others (n 51) 34.
- 56 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 19 June 2018).
- 57 E.g., Henry Chesbrough, Wim Vanhaverbeke and Joel West (eds), *Open Innovation: Researching a New Paradigm* (Oxford University Press 2006).
- 58 E.g., Aaron Ben-Ze'ev, *Love Online. Emotions on the Internet* (Cambridge University Press 2004).
- 59 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 reflect 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 described as a causal relation.' See Luhmann, *Law as a Social System* (n 48) 119.

Part II

**Three quests for
justification:
sovereignty, contract
and access to justice**



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4 Heading towards justification

In Chapter 2 the new social practices involved in using modern technology were seen as an emerging social system named the use of information and communications technology (ICT), which explains how the disruptive elements of technology enter the legal system as external irritants. In Chapter 3 this overview of technology was applied to dispute resolution in order to demonstrate how public enforcement is slowly becoming a redundant means of providing conflict management for low-intensity cross-border disputes.

This chapter connects the theoretical framework of systems theory with the changing private forms of coercion enabled by technology. Here, it is argued that technology-enabled privatisation of coercion is challenging the state's monopoly on violence and thus creates a justificatory crisis for conflict management. The chapter begins with a description of how the difference between public and private dispute resolution was originally reconciled in the aftermath of the alternative dispute resolution (ADR) movement. This reconciliation in a peaceful coexistence and cooperation is called the Traditional Ideal Model, referring to the public acceptance of private ADR as long as the state's monopoly on enforcement is preserved. However, the use of ICT is increasing privatisation of coercion, which, in turn, challenges the status quo portrayed through the Traditional Ideal Model and creates a justificatory crisis. After establishing this, the function of justification within the legal system is discussed and it is argued that justification should be understood as a structural coupling between the legal system and other societal sub-systems that transmits external rationalities to the legal system's operations. The chapter concludes with a brief description of existing justificatory narratives that will be discussed in further detail in the following chapters.

4.1 The breaking point of consensus

4.1.1 Traditional ideal model and cross-border disputes

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 1980s. Instead, ADR methods have been incorporated into the traditional model of understanding the state as the gatekeeper of enforcement, creating an intricate cooperation 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 respect for 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 1980s brought in their 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 remained 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 (Figure 4.1):

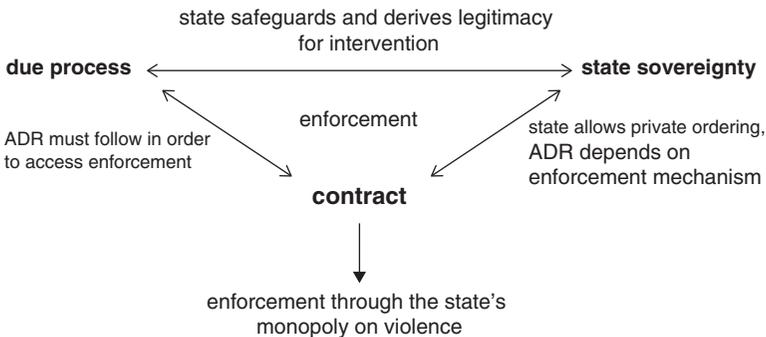


Figure 4.1 Traditional ideal model

The structure of the argument in this interplay is interesting. The sovereign state accepts contractual ADR by neutral thirds if and when state control is enabled before such decisions utilise the state monopoly on violence. In order to enable enforcement at a later stage, ADR applications must 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 means of this manoeuvre, the modern nation-state has been able to avoid the potential crisis that the emergence of the 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 ADR in 1980s was an irritant to the legal system but the operation of the law immunised the system and incorporated the phenomenon into its communication.

Nonetheless, the traditional model depicts how justification may be theorised within the current doctrine of procedural law. The question is whether or not dispute resolution is able to apply similar justificatory argument to private enforcement. 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 (Figure 4.2), where the dispute between parties (P1 and P2) is resolved by a neutral third party (P3) and then enforced:

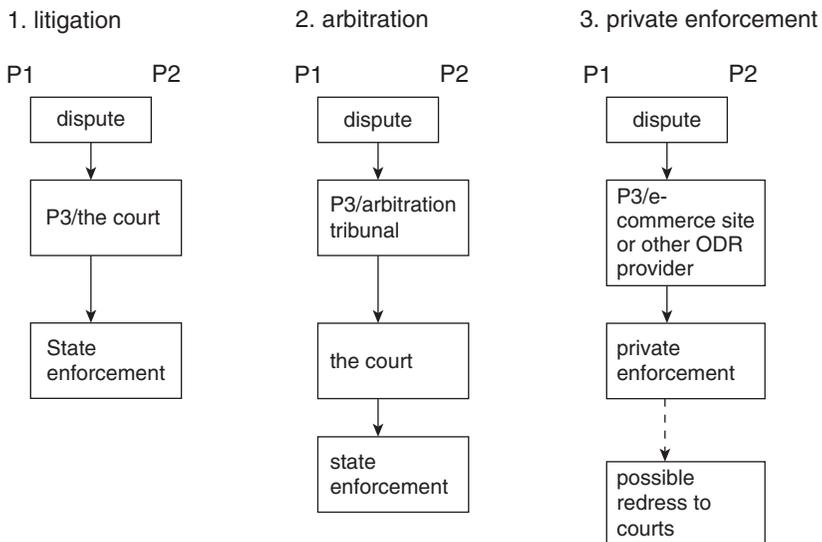


Figure 4.2 Changes in enforcement

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 online dispute resolution (ODR) decision may be enforced without resorting to the 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 also bypasses state control on enforcement 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 other. 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* inasmuch as 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 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 procedure 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 from that 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 (Figure 4.3):

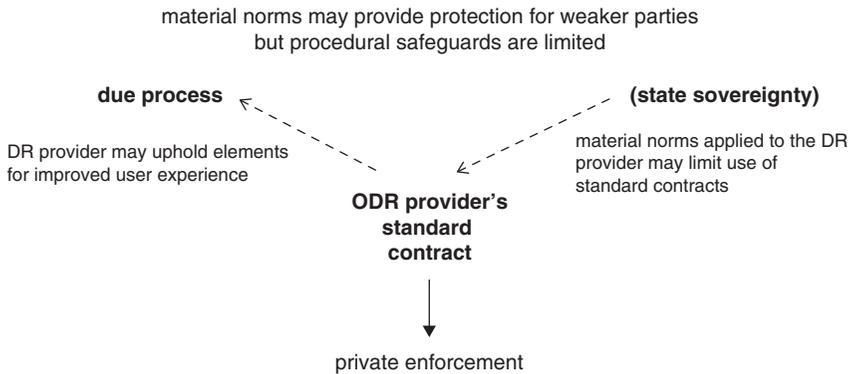


Figure 4.3 Cross-border private enforcement model

The graph depicts how the role of the state changes in relation to private enforcement. The nation-state loses the possibility of extending 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 the ADR movement cannot be employed for reconciling private enforcement with state control.

As the rationality behind private enforcement does not correspond to the 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 traditional model towards cooperation, 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 no longer function. 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 the 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 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.

4.1.2 Multifaceted implications of privatisation of coercion

We have established that the traditional ideal model, which reflects the current doctrine of procedural law, is challenged by private enforcement. However, 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.

Other characteristics of privatisation also contribute to the justificatory challenge: the lack of public precedents and the increase in the number of cases that are left outside the public courts for various reasons. These phenomena are not new and they have already been addressed in the wake of ADR. In this section, these issues are discussed briefly in order to elaborate the complexity of the justificatory crisis and to demonstrate how private enforcement is just the latest 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.¹ 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.² The argument against private dispute resolution's 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.³ 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 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 the debate on vanishing trials depicts,⁴ but this issue does not connect with law's existence or upholding the system/environment boundary. This explains why the emergence of ADR in the 1980s did not create the need for complete re-evaluation but could be reconciled through the traditional ideal model.⁵ This does not indicate that values attributed to public precedents have an important role for law's function. Also, the question still remains, whether the increase in the number 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 are likely to exceed the value of the dispute. When these disputes take place in the cross-border context, the complexity of litigation increases. Even deciding on the court of jurisdiction becomes challenging and time-consuming and hence taking disputes to public courts may 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 localisation. Cross-border cases arising from the 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-localisation tools enables deciphering territorial location of the dispute and thus removes the earlier challenges for territorial jurisdiction.⁶ This argument has its merits, but tools for geo-localisation are not sufficient to solve the challenge for territorial jurisdiction. Also, Pollicino and Bassini resort 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 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 the Internet. The traditional model applies only 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 positions of the triangle, sovereignty (which state?) and due process (whose standards?) depend on which state, if any, claims the jurisdiction.

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 a 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.⁷ 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 a regulatory framework for ODR or for private enforcement, or should we ban them? If we want to restrict their use or bring them back into 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 criteria. Instead, we face the issue of what is justification, and whether or not these implications of privatisation can be justified within the legal system.

4.2 What is justification for the legal system?

4.2.1 Three options of interpretation

The challenges imposed by the privatisation of justice in general and accelerated by the implementation of ICT do not comply with the doctrinal understanding of cooperation 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 the justification for the legal system?

As discussed, justification is produced by the operations of the legal system, which form long-lasting structures through continuous repetition and renewal. Hence, justification should be interpreted as internal to the legal system.⁸ Because justification is formed slowly and over 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.⁹ 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 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 influence 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 also have meaning within the coupled systems. What, then, is the relationship between structural couplings and autopoiesis? How does self-production relate to irritations from the system's environment? It is clear that structural couplings are necessary 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.¹⁰

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.¹¹ Interpenetration is a special type of structural coupling but requires the dependent coexistence of the interpenetrating systems.¹² 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 for society generally. 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, there are only slight differences in emphasis, depending on the chosen interpretation.

4.2.2 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.¹³ 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.¹⁴

The legal system does not operate in a vacuum but 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, according to Luhmann, the programming level adopts the role earlier attributed to natural law in pre-modern societies. 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 in human nature and natural necessity.¹⁵ 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.¹⁶

Luhmann makes a distinction between purpose-specific and conditional programmes. Law's programmes are always conditional: they set out the conditions on which the allocation of legal or illegal depends.¹⁷ For example, a 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 meet 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.¹⁸

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 rather at future facts. 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'.¹⁹

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 as per Luhmann, such resolutions would not necessarily be legal operations but would belong outside the legal system as extra-legal. In this, Luhmann's position seems to be coherent. Such procedures have elements that point in 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 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 also has implications outside it.

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 for dispute resolution. Although justification is internal to the legal system, operations that provide justification internally must also be able to abide by these other rationalities. Simply put, justification as law's programme does not provide a sufficient explanation for the use of ICT in dispute resolution.

4.2.3 Justification as autopoiesis?

We have discarded the possibility of considering justification as law's programme, as this would simply render justification of dispute resolution an internal method of attributing the code to operations and this would provide an insufficient image for understanding dispute resolution 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 upon 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, whereas 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 or not justification is limited to these internal implications.

Legal theorist Emilios Christodoulidis touches upon this interpretation of justification as autopoiesis in his article on sedition.²⁰ 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 defendants 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 be justified only 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 Christodoulidis, external sources of justification, such as authority, bring uncertainty in their wake.²¹ His 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.²²

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 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 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 illustrate, 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 is 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

conforms 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.

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 a more long-lasting link with other systems. Autopoiesis and structural couplings are both operational couplings in the sense that they link operations to each other. Whereas autopoiesis links operations within the system, structural couplings link operations between different systems.

Dispute resolution technology certainly links operations within the legal system, but this does not appear to explain why law cannot provide us with 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 illustrate, the close connection between the legal system and the political system of the nation-state has proved 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 technology.

4.2.4 Justification as structural couplings?

In the previous sections, it was 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 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 observes 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 is also unable to comprehend it.

Instead of asking how we establish due process requirements for private dispute resolution, we come to ask how 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. There are many reasons for the unpopularity of ODR, but lack of trust is one that has been acknowledged in the literature. To overcome this, state-issued trust marks are suggested.²³ Also, ODR applications are more and more often linked with the public court system, as completely private applications have mostly failed notwithstanding marketplace integrated models such as eBay. One reason for this failure and sudden return towards the public system may 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 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 reference. It is suggested here that law's quest to find 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 the system/environment distinction and at the same time borrow the rationality of the other system for producing its self-transcendence. In other words, the legal system concurrently goes beyond law and remains within its boundaries.

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 were 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 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 also contains 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 with each system's own unique code. All social systems need a narrative of their rationality, an origin myth or a reason for their existence, they need to 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 by 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 conceptualisation 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 level of structural couplings different from a simple contract, which can be read by both the legal and economic systems. Here, the structural coupling is given more strength. I am referring to structural couplings in the sense of shared values

and abstract conceptualisations. This can be exemplified by sovereignty and contract, both of which I will discuss more fully in the following chapters. Luhmann uses a constitution created in the democratic legislative process as an example of structural coupling between the political and legal systems. When discussing sovereignty as a structural coupling between these same systems, I am referring not to the legislative act or the document, but to the concept of sovereignty, the value, the abstraction. Similarly, I refer to contract as a structural coupling, but rather than the concrete simple legal/economic act of selling or buying I am alluding 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 conceptualisations. 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 maximising 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 maximising 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.

4.3 The quest for justification

We have established that dispute resolution technology challenges the modern concept of law connected with the nation-state and thus creates the need for new bases of justification. This need for justification becomes visible in privatisation of coercion simultaneously with the difficulties of going beyond the connection of law and state for finding it. In turn, the difficulties relate to the broader developments of globalisation and emergence of private regimes that bring the concept of state-bound law into question. As Luhmann puts it, the difficulties in finding justification result from excessive differentiations in situations where the need for interdependencies is not met.²⁴

For the purposes of examining potential ways of building legitimacy for private enforcement, we should understand justification as a structural coupling, a conceptualisation which turns our attention to other systems connected with dispute resolution technology. Within the legal system, these justificatory couplings to other systems take the form of argumentation tools that explain the foundations of law internally. Thus, the structural couplings that function as sources of justification within the legal system are justificatory narratives. In the following chapters, different justificatory narratives are examined further, but before this it is necessary to recognise which couplings have emerged within the

legal system to justify the use of coercion and what limitations follow from their theoretical examination.

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, which is the reason why the close association with the legal system and the system of politics of the nation-state provides us with a self-evident starting point. Binding the legal system to the state machine has its historical roots in early conceptualisations of sovereignty and the establishment of territorial jurisdiction in the Westphalian Peace Treaties of 1648 that ended the Thirty Years' War in Europe. Sovereignty still forms the basis of international, Convention-orientated procedural law.²⁵ Luhmann considers the constitution a perfect example of the structural coupling between the systems of law and politics, where the political system recognises the operation through its coding of power/opposition and the legal system through its own.²⁶ In dispute resolution the justificatory narrative corresponds with primacy of the state-governed litigation, which also explains its shortcomings in justifying privatised coercion that cannot be located geographically. In the following chapters, the justificatory coupling between law and politics is referred to as sovereignty.

As the limitations of state-orientated law led to the justificatory crisis of private enforcement in the first place, the next logical step is to evaluate whether the alternative structures used to justify the interplay between private and private forms of dispute resolution might provide ways forward. The emergence of ADR in the 1980s has provided procedural law with a new structure for finding justification in private autonomy, although the division of labour between state litigation and out-of-court dispute resolution has relied on state control of enforcement.²⁷ In ADR, the source of jurisdiction is the parties' contract, e.g. arbitral clauses. The meeting of the minds to agree upon something, the logic of agreement, of contract, puts emphasis on the consent of a legally competent, rational individual who takes her best interests into calculation before entering into a contract. This rationality follows that of 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.

Another contestant to provide justification in the context of dispute resolution is the discourse of human rights, that gained significant momentum during the twentieth century. As a source of justification, this discourse, worded here as access to justice, can be reduced to the idea 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 in the aftermath of the Second World War when the European renaissance of human rights took up the form of the Charter of Fundamental Rights of the European Union and the rapidly 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 constitutive narratives of sovereignty and private autonomy. Instead of naming an authoritative source, this structure seems to be calling for a more qualitative definition, suggesting an ethical connection.

Hence, the justificatory narratives examined in relation to private enforcement are sovereignty, consent and access to justice, as these can be found in the background theory of dispute resolution. 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. However, such justificatory structures are a freeze-frame that depicts the mechanism of justifying the use of force within enforcement. In legal practice, they seldom make appearance in such a pure form as theoretical examination but instead are often entwined with each other or just presupposed. As is often 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.

In the following, justification is referred to as justificatory structures that take the form of narratives within the legal system, emphasising 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. 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 would the individual operations. In order to provide a source of justification for the legal system, a single unrepeated 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.

It should be noted that justification is seldom perceivable 'in pure form'. This means that different justificatory structures may be engaged simultaneously and in association with one another. For example, state litigation may be justified both by reference to state sovereignty and by agreement of the parties. However, distinguishing between justificatory narratives is necessary for evaluating their capability in addressing privatised coercion. This simplification of justification connects with 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 is it possible to steer its self-production and connect the system's elements with consequences. Through this process of turning symmetry of communication into asymmetry, an individual communication becomes simplified and more easily comprehensible. This freeze-frame of asymmetrical action

is the final element of the system.²⁸ Like all communication within the legal system, establishing justification consists of multifaceted interlinked operations. 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 oversimplifications.

4.4 Conclusions

This chapter began with an examination of how the interplay between public and private dispute resolution has been organised through a division of labour dependent on state control over public enforcement. This preservation of the state's monopoly on violence is apparent in the traditional ideal model, that does not necessarily reflect the reality but the theoretical aspiration instead. Following this, it was argued that this model no longer provides a feasible explanation of the tension between private and public, as there is no state control when it comes to private enforcement. The question about alternative ways of justifying privatised use of coercion led to asking what is justification. Justification was located within the legal system but as the traditional ideal model depicted, use of coercion and the authority of law are often explained by external references, as is the case with state control over enforcement. It was argued that justification should be interpreted as structural couplings that take the form of narratives within the legal system. The existing, historically sedimented narratives used in the context of dispute resolution were recognised as sovereignty, private autonomy and human rights.

Notes

- 1 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.
- 2 Kaufmann-Kohler discusses the practice of referring to earlier cases in arbitration practice, 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.
- 3 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.
- 4 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.

- 5 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 N Luhmann, *Social Systems* (John Bedmarz, Jr and Dirk Baecker trs, Stanford University Press 1995) 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.
- 6 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.
- 7 *ibid.*
- 8 This follows Luhmann's understanding. According to Luhmann, who considers the issue on a higher level of abstraction, 'Questions of final justification can only be answered within the self-referential theories of self-referential systems'. See Luhmann, *Social Systems* (n 5) 485.
- 9 On programmes and programming see Luhmann, *Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004) 118.
- 10 *ibid* 381.
- 11 Baraldi et al. formulate this elegantly: 'Ohne Teilnahme von Bewusstseinsystemen 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.
- 12 *ibid* 85–88.
- 13 As Luhmann states, this example is a simplification. See, Luhmann, *Law as a Social System* (n 9) 189.
- 14 *ibid* 190–193.
- 15 *ibid* 193.
- 16 Günther Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' (2009) 72 *Modern Law Review* 1, 11.
- 17 Luhmann, *Law as a Social System* (n 9) 196–201.
- 18 *ibid* 195.
- 19 *ibid* 201.
- 20 Emiliios 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).
- 21 '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.
- 22 *ibid* 198.
- 23 On trustmarks see P Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 60–66.
- 24 According to Luhmann, another example of this is "the much-decried erosion of traditional societies' cultural heritage". See, Luhmann, *Social Systems* (n 5) 92.
- 25 This truism is often so self-evident that it is not necessary to express it in words; however, it is still presumed to be a template for formulating cooperation instruments.

Such acknowledgement of territorial jurisdiction can be found, for example, in the preamble and general provisions of Brussels I Regulation (44/2001).

26 Luhmann, *Law as a Social System* (n 9) 389.

27 Although nowadays state litigation and ADR are seen as competing models, this has not always been the case. Interestingly enough, Scottish American legal scholar Ian Macneil has pointed out that the negative attitude of litigation towards ADR is a relatively new phenomenon. In the nineteenth century the attitude towards arbitration was usually favourable. See Ian R Macneil, *American Arbitration Law. Reformation – Nationalization – Internationalization* (Oxford University Press 1992) 18–21. See also J Resnik ‘Many Doors – Closing Doors – Alternative Dispute Resolution and Adjudication’ (1995) 10 *Ohio State Journal on Dispute Resolution* 211, 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.’

28 Luhmann, *Social Systems* (n 5) 165.

5 Sovereignty and state agenda

In the previous chapters we established the emergence of a new social system, the use of ICT, and examined how it disrupts the operations of the legal system by increasing privatisation of coercion. The legal system is seen as facing the challenge of immunising itself against the new irritant of dispute resolution technology that takes the form of technology-driven private enforcement. The impact of privatised coercion affects the justification of dispute resolution, which in this study is interpreted as resulting from structural couplings with other societal subsystems. These structural couplings reflect rationalities external to the legal system.

Chapter 6 is first of the three chapters that apply the theoretical model developed in earlier chapters. All of the following three chapters are structured in the same way and the examination proceeds from the origins of the structural coupling to locating its reflections in dispute resolution and further to evaluating the shortcomings of the coupling in answering the justificatory challenge posed by private enforcement. In this chapter the structural coupling between law and politics, i.e. constitution or sovereignty, is discussed as a source of justification for dispute resolution. After establishing the close link that has existed between law and the state ever since the birth of sovereignty in the Westphalian Peace Treaty of 1648, it is asked whether sovereignty could be used to justify private enforcement. This question is answered in the negative, as the possibilities of creating multilateral Convention instruments to regulate private enforcement are scarce and any instrument would face significant problems in its application. The chapter concludes with remarks on the future role of sovereignty in dispute resolution.¹

5.1 Finding sovereignty

5.1.1 *Whose conflicts are they anyway?*

To whom do conflicts belong? They emerge between people, both natural and legal, grow into disputes and are then resolved, with the help of either a judge or some other neutral third. It is evident that they do not belong to the disputing parties themselves, as vigilantism is often criminalised.² The parties have no options for accessing their legal rights other than to agree between themselves

or turn to a third party. By criminalising vigilantism, the power over the conflict is transferred from the parties to the neutral third, which can be private or public providers 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 these are often the prominent effects.³ 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?

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 the state, and even the markets, also 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 an amicable solution. Still, such a solution has been seen to lead to vigilantism and blood revenge, 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 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 the social development and functional differentiation of 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,⁴ 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 carries the most weight? The answer to the question of whose word we trust has implications for 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 take, 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. Conversely, we may contest the state's role by emphasising the perspectives of the markets (and the interests of private providers of resolution). Taking 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, it would be an oversimplification to hold on to the idea that one group might have a *prima nocta* 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.⁵ As Hörnle states, even arbitration, which is often particularly identified as being confidential and private,⁶ 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.⁷ 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 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.⁸ Then again, this view can be criticised by claiming that, in the end, such an influence of litigation on private dispute resolution is hard to measure and may, 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.⁹ 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 referred to as the state monopoly of dispute resolution.

5.1.2 The concept of sovereignty

The concept of sovereignty is difficult to define, as the concept is loaded with history and philosophical debate.¹⁰ As Mutanen points out, it is impossible to give a comprehensive study of the philosophical work on sovereignty or even a

general overview, owing to the vast attention it has received in literature.¹¹ 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 of state and government and of independence and democracy’.¹² Since the eighteenth century, constitutional theory has mostly considered sovereignty and state power to be entwined, as both of them boil down to the monopoly on violence.¹³ 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 eighteenth century. After the French and American revolutions in the eighteenth century, sovereignty was sometimes 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 eighteenth century sovereignty was linked with absolutism. As is often the case with such idealised principles, sovereignty can be dressed up to serve multiple and even contrasting objectives.¹⁴ This fluidity and ambiguity of this idea may very well be the reason sovereignty and the nation-state have proved such long-lived fundamental concepts in constitutional and international law, as Mutanen suggests.¹⁵

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, as Foucault demonstrates.¹⁶ Although a comprehensive study of sovereignty is beyond the scope of this book, a short description of its philosophical roots is needed.

5.1.3 Deconstructing the origins of state monopoly

The concept of sovereignty was formally introduced by the 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’,¹⁷ 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 intended to describe 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.¹⁸ Concurrently with the addition of external effects, the concept has expanded beyond the borders of sovereign states to the 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 centralised system of governance that signified the transformation from feudalism to early nationalism.¹⁹ 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.²⁰

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 coordinating the solving of territorial conflicts between sovereign states. However, although such a system did not emerge, the Westphalian model of sovereign territorial states remained as the model of international cooperation for European states.²¹

In the seventeenth 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 as 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.

Hobbes' absolutist sovereign

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 to be penalised, 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.²²

According to Kingsbury and Straumann, 'there is nothing, no possible violation that could trigger a right to punish' in Hobbes' state of nature.²³ 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,²⁴ the sovereign has the right of judicature in all legal and factual cases.²⁵

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.²⁶

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 one another.²⁷ 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.²⁸ Thus, interpretations of Hobbes suggest that providing efficient dispute resolution is a part of the sovereign's responsibility, transforming the sovereign's rights into 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.²⁹ 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 from emotion and revenge rather than from fairness and objectivity.³⁰ 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,³¹ in order to preserve the individual's right to property and to act for the good of the society.³²

In Locke's theory, the power surrendered to the sovereign is absolute yet limited to the objective for which it was constituted, for the good of the public. Owing to these restrictions on the scope of its prerogative, we may ask whether Locke's concept of the scope of sovereign power is different from that of 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. 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'.³³ 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 owing to a 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.³⁴

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 eighteenth century. This idea of popular sovereignty saw the people as the source of sovereign power. This interpretation was later incorporated into the revolutionary constitutions of America and France in the end of that century.³⁵

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.³⁶

Several scholars have discussed the future of sovereignty in a globalised world, where European integration and the 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 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'.³⁷ 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 dependent on one another and other players of the power network.³⁸

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 illustrates how 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 of 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.³⁹

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 proved persistent concepts. Despite fundamental and rigorous criticism, both concepts still act as a starting point for theorisations 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 be at least partly explained by the ambiguity and contextual nature of the concept itself, as interpretative flexibility enables its adaptability to changing societal environment.⁴⁰

The question I am asking departs from here. Is the interpretative flexibility of sovereignty sufficiently adaptable 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 dispute resolution? If we change the context from European integration to global dispute resolution technology, what are the roles of the state and the scope of its sovereign power?

5.2 Sovereignty in dispute resolution

5.2.1 *Sovereignty as state monopoly of dispute resolution*

We have reached 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, from which justification is derived. After this, I demonstrated how the concept of sovereignty emerged, was interpreted and reinterpreted during the centuries after the Westphalian Treaty. Next, the question of sovereignty needs to be reframed in the context of dispute resolution 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 technology.

This leads us to question what state sovereignty means in dispute resolution. As state politics rarely take a stance in individual resolution processes, the close link between law and the state is realised 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 challenging it, and where it draws 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 defined in terms of power and influence, the increasing interdependency between different states on a global playground.⁴¹ 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 follows the language of politics, i.e. the generalised medium of power that makes the distinction between power and 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 no longer necessarily applies 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 the languages of both power and law.⁴² 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 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 of 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 once again becomes apparent.

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 conceptualisation preserves the interests of a sovereign state, it also creates obstacles for the functioning of law when two or more state legal systems overlap. In order to promote commerce and interaction, effective solutions for cooperation 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 sovereignty beyond its territory. This happens reciprocally. The trade-off insists on allowing similar acts of another state on the territory of the first state.⁴³

International procedural law has followed this principle of sovereignty, as granting effect to foreign judgments is most often created by international multilateral Conventions.⁴⁴ 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.⁴⁵

This connects with the Hobbesian state of nature and the question of 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 up until now been sufficiently provided for by local territorial methods and by such relatively insignificant consent-based methods as *lex mercatoria* for cross-border situations.⁴⁶ However, in the era of online dispute resolution (ODR), individual citizens increasingly access this external normative space through e-commerce and by other cross-border communication 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 cooperation the sovereigns all fail in their internal duties, as

individuals' actions would not be tied to 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 a binary concept, including the external and the internal aspect. External sovereignty protects the sovereign from the 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 types of dispute arising online. Instead, ODR schemes are promoted by private operators and, increasingly, are also receiving public support, e.g. from the EU and 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.⁴⁷

Internet disputes are particularly difficult, 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 technology will be, we need to understand the connection between state-governed 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 cooperation 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,⁴⁸ 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 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 historical, 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 law and politics. However, this relationship is experiencing some technical difficulties, so to speak.

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 for most consumers to cross. 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 localised to any state's territorial jurisdictions, no state monopoly may exist and if one state claims jurisdiction, it violates the 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 organising dispute resolution through the state.

It should be emphasised 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 centralised 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.⁴⁹

Private dispute resolution is nothing new in itself, but two other developments have rendered the traditional state-based model of enforcement dysfunctional. First, the number of cases left outside the sphere of litigation has increased significantly as a result of Internet activity. Second, the 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 case load, 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.

5.2.2 *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 cooperation in procedural law. However, such principles can rarely be found in the case law of international Conventions. This means that it is not their existence, but their nature as self-evident truths, that is under question. 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 therefore 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 illustrates 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 authorisation 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 dispute resolution should be organised 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 few 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 louder than the territorial borders that limit its application.

Thirdly, national legislation is more and more often complemented by multi-national 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 cooperation and these instruments contribute to shared European conceptualisations 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 Europeanisation or internationalisation 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 recognised and applied. Also, the EU instruments of procedural law have 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 were ignored. Two examples of UNCITRAL's work are discussed. The first is the 1958 New York Convention negotiated through UNCITRAL, which has 159 parties, established case law, and is widely recognised and respected.⁵⁰ 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.

National legislation

In Finland, the separation of powers between the legislative body and the 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.⁵¹

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 organisation, 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 organisation of the judiciary and the right to a fair trial is not out of the ordinary. Neither one of the quoted provisions are surprising, nor do they reveal some hidden meanings on closer inspection. What makes their

examination worthwhile is in plain sight: judicial powers 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.⁵² 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 in 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 the 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 exist, but they often derive their mandate from sector-specific legislation, as is the case with the Consumer Disputes Board.⁵³ No dispute resolution market as such exists in Finland at the time of writing, and ADR has been established and advocated by different projects of public actors.⁵⁴ 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 10 June 1958. With 159 Parties, 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.⁵⁵ 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 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 New York 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 recognises 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 intended 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 of

improving enforcement was to use the existing infrastructure of courts within the Contracting States.⁵⁶

Thus, the parties to 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 recognising the award and refusing to recognise 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 legislation.

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 conceptualisation 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 widespread 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.⁵⁷ But is the link to the state still a feasible option for finding justification for dispute resolution technology? Could the logic of the NY Convention also be applied to ODR?

Uniform procedural rules for ODR

An effort has been made in this direction, to create a cross-border instrument for ODR. In addition to facilitating international arbitration, since 2010 UNCITRAL has focused on drafting uniform procedural rules for ODR. 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 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 was made and, finally, the work was terminated in 2016 with the result of producing technical notes on ODR, the meaning and nature of which are somewhat unclear. However, UNCITRAL's work sheds light on the difficulties of drafting cross-border Convention instruments for ODR and thus demonstrates the shortcomings of state-based models in governing dispute resolution technology.

From the beginning, in 2010, the working group's efforts encompassed both business to business (B2B) and business to consumer (B2C) disputes. By the time the ambitious unification project had begun, it had already become clear that one of the key issues at hand consisted of the policy differences between countries which accept pre-dispute consumer arbitration and countries which do not.⁵⁸ 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, and, as EU established its own regulatory framework for ODR based on this rejection, the contrast between jurisdictions was further emphasised.

Later, an attempt was made to reconcile these differences of opinion by establishing a two-track system, whereby 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.⁵⁹ The binding arbitration track would be applicable to B2B disputes, and to B2C disputes in jurisdictions where binding pre-dispute arbitration was accepted. Thus, in track 1 the parties would have agreed at the time of purchase that any dispute would be resolved in an ODR procedure 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 2, 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?

Owing 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.⁶⁰ It follows from this that the work seemed to have come to a standstill. In February 2015, the discussion turned to the question whether the work should be discontinued due to the lack of progress. This discussion stems directly from the problems of the basic model, i.e. whether pre-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, others thought the need for a compromise, even a weak one, more urgent than the alternative of *laissez-être*. In July 2015, UNCITRAL’s 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’. At the same time the commission decided that the working group will be continued for one year until summer 2016, after which it would be terminated regardless of the outcome.⁶¹

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’.⁶² 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 lack of clarity, the document is bound to reflect UNCITRAL’s encouragement for the increasing use of ODR.

As UNCITRAL’s work on ODR ended with the adoption of the technical notes, UNCITRAL Member States were left to their own devices to address the problematic procedural issues of cross-border e-commerce and regulation of ODR. The lack of a more ambitious instrument was probably more difficult for developing economies, while it will have less impact on the EU’s established ODR regime and the US, where chargeback models are commonly used. The

outcome of the working group falls short of the high expectations placed on its work. Understandably, the consensus-based technical notes do not take a stand on the question of one-or-two clicks, which issue substantiated 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 another attempt for regulating ODR through international Conventions is sought later, 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 over 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 into the issues that stand between the aspiration and the realisation of such a regime.

As the example of UNCITRAL's work on ODR illustrates, 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 adoption of UNCITRAL's most successful instrument, the New York Convention. 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, typical e-commerce cases are low-intensity disputes that seldom 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 is no small feat.

Secondly, the typical e-commerce cases delve deeper into the sphere of domestic legislation than does commercial arbitration, as consumer protection regulation varies significantly between different jurisdictions. The national character of consumer protection and the need for upholding sufficient redress as a means to this end mean that we cannot leave private ODR simply as it is without regulating due process and enforcement, as ODR may easily be the only available redress mechanism. Thirdly, the role and consequences of private enforcement mechanisms have 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, as sovereign states have not found a compromise. It is unclear how such instruments would come about, and to what extent they would be implemented even if an acceptable compromise could 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 this would overlook the procedural element of their dispute resolution function. 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.

5.2.3 What's wrong with sovereignty?

The concept of sovereignty is a risky business. The concept has proved to be especially long-lived, 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.

The question that needs to be asked is, to what extent can we 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 involved. 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 a 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 extend their control to cross-border private dispute resolution? Without actual possibilities of providing sufficient redress, 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 is discussed 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 categorise 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 sixteenth century, later 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 contextualise the concept's content. Originally, sovereignty referred to the person of the sovereign ruler – a context very different from its current-day use. The concept of sovereignty was later transferred from the sovereign king to the people, to the consent of the governed, but did not receive international consequences in a similar way to the earlier absolutist sovereignty. Thus, Henkin argues, sovereignty as a fundamental normative axiom of international law should no longer be perceived as such.⁶³

Others have voiced similar opinions on various different grounds from empiria to philosophy. Koskeniemi 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 for the state's egoism, which is the 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.⁶⁴

Two Finnish legal scholars, Tuori and Syrjänen, suggest that the disintegration of state sovereignty could present a way forward. 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 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.⁶⁵

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.⁶⁶ 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.⁶⁷

The discussion on private enforcement shows 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.⁶⁸ The implications of this change for dispute resolution are evident in the justificatory crisis brought on by dispute resolution 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 violence as well. However, the territorial nation-state has proved to be a long-lasting phenomenon historically and it is still very much the primary provider of power and administration.⁶⁹ 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, owing to the globalisation of economy, the nation-state has lost some of its power, but not its influence.

It seems we cannot rid ourselves of sovereignty, although its role as a source of justification for dispute resolution 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 emphasise 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 a description is not entirely accurate, as private enforcement owes more to the 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. It is unclear to what extent the emergence of alternative enforcement mechanisms could be read as a delegation of state power and how much they owe their existence to creativity in bypassing the litigation threshold.

The second option for reinterpretation is to perceive sovereignty as interdependence between states. Rijgersberg suggests a model for interpreting sovereignty in the context of a globalised legal environment, in which sovereignty and constitutional obligations are considered as interdependence of interconnected states and private operators would provide the organisational 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 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 organisational 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.⁷⁰ Another example is to derive justification from the fundamental right of access to justice, which would be primarily provided and identified in connection with the state.

However, the difficulty with 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 would change the source of justification from the structural coupling between law and politics to somewhere 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 rather than as the other side of sovereignty.

The demise of nation-states caused by technology has also been acknowledged in relation to cyber threats.⁷¹ The argument is similar within that debate to what has been related here concerning dispute resolution: the emergence of technology has created the possibility of cyber threats that have consequences different from crime, terrorism and war outside 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.⁷²

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.⁷³ Also, the relatively low risk of getting caught, prosecuted and sanctioned for transnational criminal action online contributes to the increase of cyber threats.⁷⁴

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.

5.3 The future of sovereignty in dispute resolution?

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.⁷⁵ This shift towards convergence of ODR and courtroom technology has also been suggested by Benyekhlef and Vermeys.⁷⁶ Implementing technology in 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 in 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 proved 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 battleground 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 to be fruitless, which 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 independence, come with different difficulties and reinterpretation of sovereignty, as constitutional pluralism is a more apt choice for constitutional law.⁷⁷ 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 that is 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 emphasised: the role of the state as one of the basic building blocks of democratic societies and global community is first and foremost linked to 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 regulatory 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 sufficient tools, but creating standards for private enforcement needs to include the whole variety of stakeholders.

5.4 Conclusions

This chapter discussed sovereignty, which in dispute resolution is presented as a fictional state monopoly on dispute resolution, as a source of justification for private enforcement. Deriving its current conceptualisation from the social contract theories of Hobbes and Locke, sovereignty is understood as a mandate to provide protection for the people, an idea also present in the role of public courts as gatekeepers of enforcement. The shortcomings of sovereignty in justifying private enforcement become apparent in the insurmountable-looking difficulties faced in trying to preserve the state monopoly by creating state-oriented transnational mechanisms for regulating ODR. In short, sovereignty only provides a model for justifying the state's monopoly on violence. Thus, the quest for finding justification for private enforcement cannot be solved with reinterpretation of the connection between law and the state but instead we need to assess the possibility of finding justification from other narratives. These narratives, private autonomy and access to justice, both compensate for the deficiencies of the sovereignty narrative and provide flexibility in dispute resolution.

Notes

- 1 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.
- 2 See e.g. The Finnish Criminal Code, chapter 17, section 9, which defines vigilantism as an offence against public order, which also includes such crimes as participating in criminal organisations, 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 20 June 2018)].
- 3 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, *Foundations of Civil Justice: Toward a Value-Based Framework for Reform*. (Springer International Publishing 2015) 40.
- 4 For example, see the Finnish Constitution, section 18 on the right to work and the right to engage in commercial activity of his or her choice. The right is also guaranteed 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.
- 5 Discussion on the social functions of dispute resolution is a classic in Scandinavian procedural law, although it is sometimes criticised 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., Tatu Leppänen, *Riita-Asian valmistelu todistusaineiston osalta: prosessioikeudellinen tutkimus* (Suomalainen lakimiesyhdistys 1998) 37–40.

- 6 Then again, Kurkela and Turunen argue that arbitration is not entirely private, the same argument Hörnle later repeats. See M Kurkela S Turunen, *Due Process in International Commercial Arbitration* (2nd edn, Oxford University Press 2010).
- 7 J Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 70.
- 8 The figure of speech is much used in ADR literature. RH Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution' (1979) 88 *Yale Law Journal* 950. However, it is unclear to which extent the legal framework actually influence settlements. See M Moffit, 'Three Things to Be Against ("Settlement" Not Included)' (2009) 78 *Fordham Law Review* 1203, 1207. Moffit refers to empirical studies on how neighbourhood disputes between farmers and ranchers 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), 11.
- 9 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 privatisation of justice departs from similar viewpoint. See O Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073, 1076.
- 10 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.
- 11 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.
- 12 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'.
- 13 K Tuori, *Critical Legal Positivism* (Ashgate 2002) 22.
- 14 '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.
- 15 Mutanen (n 11) 387. Similarly, Castells makes observations of the persistence of nation-states in the globalised modern world. See M Castells, *The Power of Identity. The Information Age: Economy, Society, and Culture Volume II* (2nd edn, Wiley-Blackwell 2010).
- 16 Michel Foucault, *The History of Sexuality Volume I: An Introduction* (Robert Hurley tr, Pantheon Books 1978) 90–93.
- 17 'La souveraineté est la puissance absolue et perpetuelle d'une République.' Jean Bodin, *Les Six Livres de La République* (Gérard Mairet ed, Librairie générale française 1993) 74.

- 18 Beaulac (n 10 25–27.
- 19 Mutanen (n 11) 29.
- 20 Dietmar Willoweit, *Deutsche Verfassungsgeschichte. Vom Frankenreich Bis Zur Wiedervereinigung Deutschlands* (5th edn, Verlag CH Beck 2005) 177–193.
- 21 Douglas Howland and Luise White, 'Introduction: Sovereignty and the Study of States', *The State of Sovereignty. Territories, Laws, Populations* (Indiana University Press 2009) 3.
- 22 Thomas Hobbes and Ian Shapiro, *Leviathan or the matter, forme, & power of a common-wealth ecclesiasticall and civill* (Rethinking the western tradition. Yale University Press 2010), ch. 28, 186–187. 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, emphasising 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) *Philosophical Review* 74, 82–83.
- 23 Benedict Kingsbury and Benjamin Straumann, 'The State of Nature and Commercial Sociability in Early Modern International Legal Thought' (2010) 31(1) *Grotiana* 33.
- 24 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 criticises 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 recognisable 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 Hobbes's Leviathan' (1978) 26(3) *Political Studies* 307–327, 316–322, 308.
- 25 Thomas Hobbes and Ian Shapiro, 'Leviathan or the matter, forme, & power of a common-wealth ecclesiasticall and civill', *Rethinking the western tradition*. (Yale University Press 2010), ch. 18, 109.
- 26 Nancy A Stanlick, 'A Hobbesian View of International Sovereignty' (2006) 37 *Journal of Social Philosophy* 552, 558–561.
- 27 Charles D Tarlton, 'The Creation and Maintenance of Government: A Neglected Dimension of Hobbes's Leviathan' (1978) 26 *Political Studies* 307, 321. 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).
- 28 Benedict Kingsbury and Benjamin Straumann, 'The State of Nature and Commercial Sociability in Early Modern International Legal Thought' (2010) 31 *Grotiana* 22, 43.
- 29 See e.g., Francis Edward Devine, 'Absolute Democracy or Indefeasible Right: Hobbes Versus Locke' (1975) 37 *Journal of Politics* 736, 740. Devine emphasises, in the same manner as Leo Strauss in his *Natural Right and History*, that Locke's theory is in fact based on Hobbes' concept with some alterations.
- 30 '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.

- 31 *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.
- 32 Locke (n 30) 357–361.
- 33 Richard Howard Cox, *Locke on War and Peace* (Clarendon Press 1960) 178.
- 34 Cox (n 32).
- 35 Mutanen (n 11) 34.
- 36 One of the seminal formulations of the democratic justification is Habermas’ theory on the Rechtsstaat. For a comprehensive analysis, see K Tuori, *Critical Legal Positivism* (Ashgate 2002) 77–117.
- 37 Castells (n 15) 330–331.
- 38 *ibid* 357.
- 39 Mutanen (n 11) 389–390.
- 40 *ibid* 50, 386.
- 41 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 15) 303.
- 42 N Luhmann, *Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004) 389.
- 43 On international legal cooperation and territorial jurisdiction see e.g., UA Nissen, *Die Online-Videokonferenz Im Zivilprozess* (Peter Lang GmbH 2004)) 124. In the Finnish context, Risto Koulu describes this combination of cooperation 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 the EU has brought about a change of attitudes in international procedural law and isolationism is no longer a possibility in international cooperation.
- 44 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 Dan Jerker Svantesson, *Private International Law and the Internet* (Kluwer Law International 2007) 5–10.
- 45 See e.g. the work of the 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 Conventions on choice of court from 1958 and 1965 never entered into force and neither did the 2005 Convention on choice of court agreements. The Enforcement of Judgments Convention (1971) is in force but has only five 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 25 June 2018).
- 46 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 G-P Calliess and M Renner, ‘Between Law and Social Norms: The Evolution of Global Governance’ (2009) 22 *Ratio Juris* 260, 260.
- 47 However, the traditional Convention-oriented solution for regulating Internet disputes can be seen in 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 the 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 criticised. See e.g. RW Rijgersberg *The State of Interdependence: Globalization, Internet and Constitutional Governance* (TMC Asser Press 2010) 69-NaN, 215.
- 48 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 47) 16–17.
 - 49 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* (Suomalainen lakimiesyhdistys 1993) 438–439.
 - 50 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 25 June 2018).
 - 51 Unofficial translation of Ministry of Justice, available at <https://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf/> (accessed 25 June 2018).
 - 52 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 11) 45; Tuori (n 36) 18–21.
 - 53 On Consumer Disputes Board see Klaus Viitanen, *Lautakuntamenettely kuluttajariitojen ratkaisukeinona*. (Suomalainen lakimiesyhdistys 2003) 185–.
 - 54 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–.
 - 55 See e.g. Recital (12) of the Brussels I Regulation (1215/2012) according to which the New York Convention takes precedence over the Regulation.
 - 56 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) available at <https://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/NYCDay-e.pdf> (accessed 25 June 2018).
 - 57 *ibid* 13.
 - 58 'Report of Working Group III (Online Dispute Resolution) on the Work of Its Twenty-Second Session (Vienna, 13–17 December 2010)' A/CN.9/716 § 30.
 - 59 '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.
 - 60 *ibid* § 33–35.
 - 61 '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.

- 62 ‘Online Dispute Resolution for Cross-Border Electronic Commerce Transactions. Technical Notes on Online Dispute Resolution’, 30 November 2015, A/CN.9/WG.III/XXXII/CRP.3, available at http://www.uncitral.org/pdf/english/work_ingroups/wg_3/crp3-c.pdf (accessed 25 June 2018).
- 63 Henkin (n 14) 353.
- 64 M Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press 2005) 235–236.
- 65 Jussi Syrjänen, *Oikeudellisen ratkaisun perusteista* (Suomalainen lakimiesyhdistys 2008) 43.
- 66 See Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in Günther Teubner (ed), *Global Law Without a State* (Dartmouth 1997) 3.
- 67 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.
- 68 ‘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 15) 341.
- 69 *ibid.*
- 70 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 Rechtsstaat. 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 36) 94–.
- 71 Susan W Brenner, *Cyberthreats and the Decline of the Nation-State* (Routledge 2014).
- 72 *ibid* 9–23.
- 73 *ibid* 30–31.
- 74 *ibid* 32–88.
- 75 Online Dispute Resolution Advisory Group, <https://www.judiciary.uk/reviews/online-dispute-resolution/> (accessed 25 June 2018).
- 76 K Benyekhlef and N Vermeys, ‘ODR and the Courts’ in *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution*. (Eleven International Publishing 2012).
- 77 Mutanen (n 11) 389.

6 Consent and private autonomy

Chapter 5 addressed the shortcomings of sovereignty, the structural coupling between systems of law and politics, as a justificatory narrative for private enforcement. This chapter examines the structural coupling between law and economics, contract and the private autonomy it reflects, as a possible source of justification for private enforcement. As the emphasis is on evaluating how the consent narrative is, and could be, used to overcome the shortcomings of sovereignty, this treatment is more cursory than in the previous chapter.

The origins of private autonomy as a source of justification for dispute resolution can be traced back to Roman law and to the rekindled interest in contract in the eighteenth century. However, the importance of consent in justifying dispute resolution started to increase in the 1960s, as the ADR movement advocated the use of the parties' agreement as a basis of jurisdiction in order to enable out-of-court dispute resolution models. As with sovereignty, the possibilities of private autonomy in justifying private enforcement are evaluated and its shortcomings are found in its lack of awareness of power imbalances and in the challenges of creating sufficient redress mechanisms. However, the potential of private autonomy is discussed only in relation to the shortcomings of the sovereignty narrative; the attention is directed to asking whether the consent narrative can compensate for the limitations that follow from the connection between law and state and fill the justificatory void of private enforcement.

6.1 Finding consent

6.1.1 *The perspective of the parties*

Whereas sovereignty is focused on the connection between law and state, consent calls attention to the relationship between individuals. Although dispute resolution is about interpersonal communication, the need to sustain the fiction of state monopoly on dispute resolution has downplayed the importance of consent. This does not mean that consensual models are of recent origin even if the current formulation of consent as an alternative jurisdiction is. 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 state

control, the acceptability of consent as a justificatory narrative transforms into a question about the limits of consent. Can we give consent to renouncing the state's role as the gatekeeper of enforcement? 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, or is this truthfulness of consent a fiction to begin with?

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 Chapter 5, 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 the 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 the use of coercion? Is this not contradictory?

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 the disputing parties first and foremost. 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 and 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 the economy brings attention to resource allocation in dispute resolution. By emphasising the importance of private autonomy, sometimes at the expense of sovereignty, the focus shifts to the needs, motives, resources and rights of the parties themselves.¹

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,² 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.³

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.

6.1.2 *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,⁴ 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’.⁵ 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-eighteenth century and in the nineteenth century is linked with individualism, which consecutively was a reaction to the social change brought on by the Industrial Revolution and urbanisation.⁶ 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 proved 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 Chapter 5, social contract theories have often included this premise within their frameworks. The question arises, 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. As discussed in Chapter 5, this results from the simultaneous application of several justificatory narratives, as they seldom appear individually. In addition, sovereignty can be interpreted through private autonomy, as is the case with the fictional consensual element of social contract theories. We might even claim 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 shortcomings of social contract theories 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 organised 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.⁷ Second, consent and sovereignty, although sharing connection points, conform 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.

6.1.3 Deconstructing the Origins of private autonomy

As this examination focuses on the possibility of compensating the shortcomings of sovereignty in justifying private enforcement, it is not possible to provide a comprehensive analysis of the formation and evolution of consent and private autonomy. 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 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'.⁸ Four types of contract were recognised 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.⁹

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 contract, 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 (*emptio venditio*) and letting and hiring (*locatio conductio*). Maine suggests that these types of transaction 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 the Latin language played a central part in disseminating the innovations of Roman contract law to the Western parts of the Empire and making them accessible to medieval scholars.¹⁰

The work of Maine located 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 conceptualisation of legal evolution is often considered to be a transition from status-bound rights and duties to social relations regulated by contracts.¹¹

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 eighteenth and nineteenth 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 nineteenth 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 contract law as the result of increasing functional differentiation of both the economic system and the legal system. Simply put, this increase in commerce could be seen to have led to the development of classical contract theory in the nineteenth century.

English legal academic Patrick S Atiyah examines the emergence and demise of freedom of contract in the nineteenth and twentieth centuries.¹² 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 transaction and on the 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.¹³

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 twentieth century. Growing regulation in consumer protection, labour laws and tenant protection have lessened the significance of classical concepts, and this development has confined contract 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 World War II. 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.¹⁴

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.¹⁵ 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.¹⁶

Third, contractual law has shifted away from the classical executory model of contracts that refers to remaining contractual obligations of the parties in

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.¹⁷ 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.¹⁸

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 sixteenth and seventeenth 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 proved to travel well across disciplinary boundaries and to be exceptionally durable.

In the following section, the role of consent in dispute resolution is evaluated. 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.¹⁹

According to Calliess, the new *lex mercatoria* draws credibility for its neo-liberal agenda from an interpretation of the medieval *lex mercatoria* as an 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 to various interpretations. The ancient *lex mercatoria* had its origins in the medieval commercial revolution, which resulted in the self-governance of market towns, specialised market courts often headed by town officials, general enforcement of informal contracts, and the creation of some customary rules on debt collection. Later on, the growing state agenda of the nation-state led to the seizure of jurisdiction in commercial cases and to the codification of customary law.²⁰

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 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 cooperation with states, as arbitral awards are most often enforced based on the New York 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.²¹ This hybrid nature is also acknowledged by its proponents: for example, Alec Stone Sweet considers the new *lex mercatoria* ‘parasitic on state authority’, resorting to state mechanisms of enforcement when necessary.²² Thus, it seems that the discussion of the new *lex mercatoria* touches upon the same tension between private and public as private enforcement. As such, the debate helps in contextualising these new applications of dispute resolution 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 furnish us with additional tools.

6.2 Consent in dispute resolution

6.2.1 *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 nineteenth century. Next, the issue of consent needs to be reframed in the context of dispute resolution technology, and as a source of justification. This means that instead of adopting a position against or for private autonomy, how the concept is employed to justify dispute resolution in general is evaluated, and how the concept reacts to the new irritant of technology-driven private enforcement. The question is the same as with sovereignty: is principle of consent flexible enough to accommodate the needs for justification presented by private enforcement?

Whereas finding vocalisations about the self-evident presence of sovereignty in dispute resolution was difficult, this is not the case with consent. The importance of consent becomes apparent especially in alternative dispute resolution, which in itself describes the justificatory narrative’s complementary nature in justifying dispute resolution. In ADR, stressing consent has more practical meaning than just the acknowledgment of ideological roots: consent can create the basis for jurisdiction.²³ From ADR, the scope of consent has expanded to other forms of dispute resolution. The importance of consent is also increasing in litigation.

In Chapter 5, the coexistence of ADR and litigation was described through the traditional ideal model, which explained how the fiction of state monopoly on violence can be sustained while simultaneously allowing private dispute resolution. This interplay was based on the state's control over enforcement, where private outcomes needed to resort to the public enforcement mechanism and the ensuing due process control. It was claimed that this model disintegrates as private enforcement bypasses the state control and thus incidentally ends up challenging it. However, it is possible that this challenge can be downplayed by stressing the role of consent, by restoring its value to alleviate the shortcomings that follow from the connection of law and state. 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 institutionalised by using powerful members of the community as go-betweens. The outcome is seldom contested, as the contesting party would then face with both the opposing party and the go-between and their families in the following process.²⁴ 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 run parallel to the criticism of the ADR movement.

The role consent plays in modern dispute resolution can be divided into three different instances: arbitration, non-adjudicative ADR mechanisms and consensual emphasis in litigation.

Arbitration is often depicted as the textbook example of private ordering, in which the meaning of private autonomy becomes particularly pronounced, as the arbitral agreement itself is de facto the basis of the dispute resolution procedure. 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 in arbitration adds to the dominance of the a-national regime of international commerce, a development detaching from the state altogether.²⁵

In international commercial arbitration Kurkela and Turunen have considered the role of the 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*).²⁶ Nader and Shugart see arbitration as an escape from litigation, which unfortunately may lead back to the official judicial system at the enforcement phase.²⁷ 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.²⁸ Julia Hörnle, who examines the resolution of Internet disputes, considers consent as the necessary foundation of all ADR processes.²⁹

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. There are two reasons for this rhetoric of dissociating private dispute resolution from the public by references to consent. 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.³⁰ It is against this background that Lon Fuller sees the rise of mediation as a change of attitude from litigation to ADR.³¹

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. Emphasising 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'.³² 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.³³ 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.³⁴ Thus, contractual 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 denominator, which is the emphasis on the 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 categorisation 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.³⁵ Also, different forms of dispute resolution are more and more often converging, states Resnik.³⁶

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 legislation.³⁷ 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, institutionalisation 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 state of 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.³⁸

6.2.2 What's wrong with consent?

The concept of consent appears to be flexible and open for continuous reinterpretation. At first glance it appears that the structural coupling between the systems of law and economics has more leeway than sovereignty to overcome the justificatory challenge of technology. Justifying dispute resolution through private autonomy does not make a distinction between dispute resolution offered by state authorities and that offered by 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, as well as the weakness, of private autonomy as a source of justification.

The limits of consent are dictated by the binary codes it operates with. Private autonomy conforms to the legal/illegal code of the legal system and to the paying/not-paying code of the economic system. Naturally, the consent narrative is oblivious to the power/opposition coding of the political system, which means that power relations remain outside the narrative's perception. The rhetoric of consent tends to bypass issues of unequal power dynamics between disputing parties, as discussed by the American historian John Auerbach, who analyses the rise of arbitration in low-value consumer cases. Auerbach notes that, historically, arbitration proved to be detrimental for the consumer, because of 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 rejected such claims outright.³⁹ 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 repeatedly use the same mechanism, has been widely discussed and the debate mostly culminates in demands for the professional competence of dispute resolution providers. 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* the use of dispute resolution 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 conforms to the code of the economic system.

Nevertheless, this description is not entirely convincing. As with explaining the state through social construct theories, describing enforcement through the consent narrative appears somewhat artificial. As consent derives its justificatory power from the meeting of the minds, from voluntariness of performance, coercion and consent are more or less incompatible. 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, and although it explains private regimes, it fails to provide a nuanced account of privatised coercion. This, in turn, demonstrates the mostly complementary nature of the consent narrative, which in dispute resolution has often been used alongside the sovereignty narrative to counterpoint the latter's shortcomings. In other words, consent provides a model for examining conflict management outside the courts while simultaneously presupposing their role as the ultimate gatekeepers of enforcement. Currently, the consent narrative is not comprehensive enough to function without its close connection with the sovereign nation-state.

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.⁴⁰ 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. If we assess the examples of existing private enforcement mechanisms, we notice that they have evolved to substitute public redress mechanisms when these are unable to provide sufficient legal protection. However, if there is no actual alternative to these private mechanisms, if there is no true choice to be made for or against their use, there can be no informed consent. If there is no alternative, the consent becomes a fiction and thus challenges the assumption of voluntariness that forms the basis of the narrative's justificatory power. The consent narrative is built on the conception that the consent is 'real', although we can ask whether this assumption is a similar fiction to that of state monopoly on dispute resolution, used to maintain the narrative's theoretical prowess. If the justificatory power of the consent narrative is not in voluntariness, our attention is directed towards the form of consent, the rituals and structures used to give the proper utterances of consent.

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.⁴¹ 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 contract 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 be able to apply the internal safeguards of contract law, i.e. the defences against formation and grounds for setting the contract aside. These safeguards, in turn, presuppose the existence of a proper forum to challenge the contract, which traditionally has been the public courts. The limits of consent stem from the context in which the concept originally emerged; the entwined cooperation between sovereign power and private autonomy does not seem to provide sufficient solutions for new interpretative situations.⁴² Attempts at providing such safeguards internally via industry self-regulation overcome these problems, but face a different set of challenges, such as conflict of interest, lack of incentives and ostensible best practices.

As the means for contesting the validity 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 the norms of contract law 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 the litigation threshold), and, as such, the concept of consent can only be applied without the

element of protection, one-sidedly. The consent narrative is flexible and inclusive enough, to the point of losing its descriptive force, becoming inapplicable as a source of justification.

6.3 The future of consent in dispute resolution

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 conceptualising 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 different models of enforcement, because the economic system does not require *the* system of state enforcement, it simply needs *a* system of enforcement.⁴³ However, this distorts the overall image, downplaying the importance of the irritant for the evolution of both the legal system and society. As stated, consent alone does not provide us with sufficient means of tackling 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 information and communications technology (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.⁴⁴ Still, this debate detaches from the question of justifying dispute resolution technology. Sovereignty fails at justifying private enforcement, because privatised use of force cannot be explained in the political system, which emphasises the political claim on use of power. Thus, private enforcement is incomprehensible 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 contract 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.

6.4 Conclusions

This chapter discussed the structural coupling between the legal system and the system of economics as the source of justification for private enforcement.

Whereas sovereignty emphasises the public interest in private disputes, consent calls attention to the perspective of the parties, to their private interests. It was asked whether the consent narrative can compensate for the shortcomings of the sovereignty narrative in justifying private enforcement by providing interpretative flexibility. The consent narrative has earlier been successfully used to complement sovereignty-based dispute resolution, as was the case with the ADR movement's criticism that resulted in the reconciliation of ADR and litigation through cooperation demonstrated in the traditional ideal model. However, the consent narrative does not provide sufficient justification for technology-driven private enforcement. 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. Also, consent becomes fictional when there are no alternative redress mechanisms, providing only a form without content. This brings into question how the structures that create the form, the mechanism for giving this fictional consent, create justificatory structures. It follows from this that, as the structural coupling between law and economics does not solve the justificatory crisis, it is necessary to evaluate whether private enforcement could be justified through the narrative of access to justice.

Notes

- 1 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, *ibid* 29.
- 2 Andreas Wacke, 'Freedom of Contract and Restraint of Trade Clauses in Roman and Modern Law' (1993) 11 *Law and History Review* 1.
- 3 Graft-Peter Calliess, "Lex Mercatoria" ZenTra Working Paper in Transnational Studies No. 52/2015' available at ssrn.com/abstract=2597583 (accessed 25 June 2018).
- 4 See e.g., Arthur P Monahan, *Consent, Coercion, and Limit: The Medieval Origins of Parliamentary Democracy* (McGill-Queen's University Press 1987) 46–48.
- 5 Oxford Dictionaries, 'Consent' <http://www.oxforddictionaries.com/definition/consent> (accessed 25 June 2018).
- 6 On individualism and its effect on freedom of contract see, PS Atiyah, *The Rise and Fall of Contract* (Oxford University Press 1979) 256–.
- 7 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.
- 8 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.
- 9 *ibid* 290–294.
- 10 *ibid* 294–305.
- 11 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 share 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 6) 261.
- 12 As stated by JH 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 MJ 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 PS Atiyah [Clarendon Press: Oxford. 1979. Xii and 792 Pp. (Incl. Index). £30.00.]' [1980] *The Modern Law Review* 4.
 - 13 Atiyah (n 6) 104.
 - 14 *ibid* 716–726.
 - 15 *ibid* 729–754.
 - 16 *ibid* 727.
 - 17 *ibid* 754–759.
 - 18 *ibid* 763.
 - 19 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).
 - 20 Calliess, 'Lex Mercatoria' (n 3) 4–7.
 - 21 *ibid* 8–15.
 - 22 Alec Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 *Journal of European Public Policy* 627, 627.
 - 23 In a similar vein, some scholars have consequently claimed that ODR has its own jurisdiction in 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 as a Model, A Note' (2002) 25 *Hastings International and Comparative Law Review* 383, 383. Building jurisdiction on consent instead of territorial jurisdiction makes it clear that both sovereignty and consent are used for same ends.
 - 24 V Aubert, 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution' (1963) 7 *The Journal of Conflict Resolution* 26, 35.
 - 25 A Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 *Journal of European Public Policy* 627.
 - 26 M Kurkela and S Turunen *Due Process in International Commercial Arbitration* (2nd edn, Oxford University Press 2010) 43.
 - 27 '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.
 - 28 '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.
 - 29 J Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 49.
 - 30 See above, Chapter 4, section 4.3, The quest for justification.
 - 31 '... 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 attitudes and dispositions toward one another.’ Lon Fuller, ‘Mediation – Its Forms and Functions’ (1971) 44 Southern California Law Review 305, 325.
- 32 See Frank E Sander, ‘Varieties 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.
 - 33 ‘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.
 - 34 RH Mnookin and L Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution’ (1979) 88 Yale Law Journal 950.
 - 35 ‘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 Caroline Harris Crowne, ‘The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice’ (2001) 76 New York University Law Review 1768, 1784.
 - 36 J Resnik, ‘Many Doors – Closing Doors – Alternative Dispute Resolution and Adjudication’ (1995) 10 Ohio State Journal on Dispute Resolution 211, 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 more closely resemble court proceedings. See Risto Koulu, *Kaupallisten riitojen sovittelu* (University of Helsinki Conflict Management Institute 2006) 436.
 - 37 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).
 - 38 It should be noted that consent serves a 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.
 - 39 John Auerbach, *Justice without Law? Resolving Disputes without Lawyers* (Oxford University Press 1983) 126–127. Of course, compulsory material norms limit the scope 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.
 - 40 AK Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Princeton University Press 2004) 1–4.
 - 41 See below, Chapter 7, section 7.1.3.

- 42 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.
- 43 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 40) 2–3.
- 44 Teresa Rodríguez De Las Heras Ballell, a Spanish professor of 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.

7 Access to justice

In the previous chapters, structural couplings between the legal system and the systems of politics and economics were evaluated as possible sources of justification for private enforcement. Inability of sovereignty narrative to explain privatisation and the shift of focus to the structures that follow from the fictional consent call attention to the rituals of dispute resolution, to the idea that how the process is organised caters to its acceptance, produces justification.

The justificatory force of structures, the link between law and ethics, points to ethical discourse on dispute resolution and the growing importance of fundamental right to fair trial since the end of World War II. Here, this justificatory narrative is called access to justice. Although aspects of access to justice have been positivised into due process criteria, access to justice as a justificatory narrative refers to the moral dimension of such procedural rights. Because of this elusive character of access to justice, conceptualising the justificatory narrative connects with the transcendent element of law, namely justice itself. As with private autonomy, the narrative is discussed only in relation to the shortcomings of the other narratives to evaluate how it is used to compensate their limitations.

7.1 Finding access to justice

7.1.1 From constitutive couplings to fundamental rights

The access to justice narrative is different from the more constitutive sovereignty and consent narratives that are produced through structural couplings between the legal system and systems of politics and economics. Unlike these narratives, access to justice is not produced through a coupling to another system, as since the differentiation of ethics and religion, ethical discourse does not belong to any given system. Instead, ethical discourse can be located in all subsystems in secular Western societies. 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. It is argued here that these special characteristics explain the limits of access to justice as a source of justification. Ethical communication about dispute resolution does not provide generalised standards that could be applied as such to provide justification for

private enforcement mechanisms. The access to justice narrative requires a case-by-case analysis or the support of other justificatory narratives if it is to provide an explanation for private enforcement.

Unlike sovereignty or private autonomy, access to justice – in the meaning of the human rights discourse it reflects – is mainly a product of the twentieth 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 World War II, when the need for human rights was acknowledged within the global community and this consensus translated into the first expressions of universal human rights. This increasing significance of human rights has been made possible by sovereignty-based international Conventions and the positivisation of ethical discourse into national legislation, which in relation to dispute resolution demonstrates the importance of the connection between law and state in providing criteria for fairness.

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. The General Assembly later 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.¹ 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 document, 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'.² Within procedural law, the human rights perspective has adopted the role of a *sui generis* legal principle: access to justice. However, the concept of access to justice is not unambiguous and is open to interpretation.

It is noteworthy that the human rights rhetoric is usually applied in connection with the constitutive sovereignty and consent narratives, where references to fairness are used to explain the supremacy of given dispute resolution models. For example, the alternative dispute resolution (ADR) movement has particularly emphasised 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 us something about the concept. Firstly, as a recently emerged discourse its role, application and consequences of human rights within the legal system are still taking shape and arguments on access to justice are used to advance various ends. Secondly, human rights are seen as universal and thus their scope of application is not limited to certain geographical areas, certain fields, contexts, procedures, practices or institutions.

Thirdly and most importantly, this ambiguity demonstrates that it is impossible to establish criteria for what is better without a reference to the objective used to evaluate this superiority. Simply put, the claim about something being better calls for answering the follow-up question of 'in what respect?'. 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 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 but instead justificatory narratives are often applied simultaneously.

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.

7.1.2 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.

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. A system's contingency formula is its *eigenvalue*, the reference point that decides which communication is meaningful in the system, against which all communication is reflected and possible selections limited. Justice is the centrepiece around which all communication is organised, the 'foundation on which the legal system build up its complexity'.³ This means that Luhmann provides no values or criteria for deciding what is justice, no maxims or ethical codes, as all legal communication is about justice. Justice is an internal process of the legal system, the system's self-observation that aims to provide 'adequate complexity of consistent decision-making'.⁴ This 'adequate complexity' goes beyond the formal consistency of the legal system and responds

reflexively to external demands from its environment.⁵ However, justice is closed within the legal system by operative closure, rendering justice as law's necessary but impossible self-transcendence. Justice as law's contingency formula provides the necessary uncertainty for law's operations, provides fuel for the application of the code, which makes distinctions between legal/illegal while leaving their attribution open.⁶ Simply put, justice is the unreachable objective of legal communication that ensures the continual of law's operations by regulating uncertainty within the legal system.

How does this law's contingency formula relate to the principle of access to justice? The unattainability of justice demonstrates the contradictory nature inherent in calls for improved access to justice. As justice is unreachable, we need to focus on what can be perceived: the temporalised ethical communication that has formed structures within the legal system, the due process criteria. This being said, it is important to keep in mind the overarching ideal of access to justice beyond treaty stipulations and the comprehensiveness and scope of it that affects courts and private dispute resolution alike. On the concrete level of due process, demands for access to justice entail 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 demand for access to justice is often too abstract and complex to analyse on a generalised level, 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 organised. Access to justice, however, enables us to ask more far-reaching questions on how access to proceedings is provided for, what about the cases left outside the litigation threshold, and what the bigger picture is. In other words, access to justice cannot be reduced to positivised due process criteria but instead its value is in its ability to express the ethical dimension of law in relation to law's contingency formula of justice. Access to justice opens law towards ethics.

However, ethics do not interact with the legal system as do the systems of politics and economics: references to access to justice are often ambiguous and may be employed in pursuit of contrasting ends. Part of this ambiguity can be explained by the role of justice as law's contingency formula, another part 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, which raises the question of the narrative's potential in providing justification for private enforcement without the support from the other narratives. Like the other narratives, the access to justice narrative needs to conform to two sets of coding, the legal/illegal of law and the code of ethics, which Luhmann pinpoints as allocation of regard/disregard.⁷ According to Luhmann, the code of morality does not refer to good or bad performances of individuals (e.g. as scientists or

soccer players) but to the whole person and her participation in the specific communication.⁸ Luhmann's approach to morality has been described 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'.⁹ 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. However, the search for ethics in modern, functionally differentiated society has proved 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.¹⁰ 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.

This universal application of morals includes the danger of polarisation, communicational fundamentalism.¹¹ 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 polarising 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 at the same time have certain beneficial functions. 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.¹²

Thus, the demand for better access to justice, or the emphasis on human rights in general, is a mode of ethical reflection about 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.

7.1.3 Deconstructing the origins of access to justice

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, as was the case with canon law. However, functional differentiation led to the decreasing importance of religion and to the detachment of moral communication from this subsystem. The doctrine of natural law was later utilised to provide similar constitutive argument, and the external reference, for the purposes of justification.¹³ 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 other 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 is this possible, if moral communication has no home other 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 conform 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. 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 sovereignty and consent narratives. Moral communication about law attributes the code of morality to the application of the legal system's code. Thus, moral communication about law in the context of dispute resolution technology functions in more or less the same way as the more constitutive narratives. This said, access to justice materialises as an unsolvable paradox of ethics, as a one-sided structural coupling that provides no clear-cut answers to moral dilemmas.

Despite this transcendence of ethics, the access to justice narrative gains justificatory force through its positivisation into due process criteria. Communication about fairness of dispute resolution carries an ethical undertone while its legal plausibility stems from the constitutive power it lends from the connection between law and the state. Thus, access to justice narrative is able to complement the sovereignty narrative, and vice versa, by providing material standards for evaluating how dispute resolution should be organised. By continuous reinterpretation, the access to justice narrative has become a programme within the legal system that directs the application of the code. Its use as a justificatory narrative

argues that the material standards can provide justificatory power directed to the structures of dispute resolution. In other words, the ethical communication about dispute resolution takes the form of due process criteria that reflect the transcendence of justice, the values behind the concrete stipulations, but simultaneously constrain this transcendence by subsuming it into concrete stipulations. By examining the values reflected in due process criteria, we are able to perceive the ethical dimension and tap into its justificatory use.¹⁴

It should be noted that these treaty stipulations, in addition to the national legislation on fundamental rights, the case law and the 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 that have been positivised through state-bound law. 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 process, become the access point to observing the moral communication on dispute resolution in the first place.

The criteria for due process is defined in the focal instruments, which reveal in what 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.¹⁵ 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 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, 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 question of the 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, thus nullifying the question of how we impose due process on ODR without referencing to sovereignty-based transnational law. It seems that equality forms the core of the justificatory force of access to justice narrative. Within the legal system equality is often rephrased as the demand for treating similar cases alike and different cases differently, although this formulation hides the inherent arbitrary violence present in decisions on which cases are alike and which are not.

7.2 Access to justice in dispute resolution

7.2.1 *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 applications of legal/illegal intersect 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*, or let the other side also be heard) become an internal programme of the legal system.¹⁶ These programmes 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 historicised 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 programmes 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 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 emphasises 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.¹⁷ 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.¹⁸ The case law highlights that the parties alone have the right to decide whether or not to comment on specific documents.¹⁹

In the case *K.S. v Finland* the 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 the Fund refused on the ground that the applicant had caused the dismissal himself. The decision was based on the binding opinion of the Employment Commission, which the Fund was by law obliged to follow. The plaintiff then appealed first to the Board of Unemployment Benefits, which dismissed the

appeal, and later 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 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 or not to comment on these opinions. As no such possibility had been reserved to him by the Insurance Court, the applicant was not able to participate properly in the proceedings.²⁰ Thus, there had been a violation of Article 6 and the respondent state was obliged 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 the Committee that the damages had been paid to the applicant in accordance with the decision. In addition to this, the Government accentuated the possibility of seeking the annulment of the domestic decisions on the grounds of violation of Article 6.²¹ Although decisions of ECtHR do not cause annulment of the domestic decisions as such, the Government's communication shows that they are closely followed. The ECtHR's decision on the violation of Article 6 provides grounds for annulment within the domestic legal system. Thus, the violation of due process can cause the decision to be set aside, and to lose its validity because the process during which it was reached did not accommodate the moral position adopted in the due process programme of the legal system.

Article 6 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 access to the 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. The case law concerning access to enforcement depicts another different aspect of the right to fair trial than equality of arms and adversarial proceedings, although it does not provide any additional insight into justification beyond the analysis of due process as law's internal programme. 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 recognised 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*, the ECtHR established that the right to execution of judgment is included within the right to a fair trial. The argument behind this position accentuates that access to court would be ineffective without the execution of the final and binding judgment.²² Furthermore, the scope of 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.²³ 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.²⁴ However, certain procedural steps may be expected of the litigant to access enforcement.²⁵ Still, the states must provide the necessary means for enforcing compliance from private individuals but cannot be held responsible for the non-compliance of these third parties.²⁶

Thus, law's internal programme of due process criteria, which is grounded in the moral discourse of human rights, dissects all aspects and phases of the dispute resolution process. These criteria addressed both the threshold of litigation costs,²⁷ 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.²⁸ Sovereignty, in turn, is to be found in territorial jurisdiction and structure of cross-border legal instruments. 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 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.

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 justificatory narrative of access to justice in the structuralised moral communication embedded in the due process criteria.

7.2.2 *What's wrong with access to justice?*

The due process criteria represent 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 system of ethics. As a justificatory narrative access to justice derives its force from fairness as a prerequisite for a decision's validity. 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. As a contingency formula, justice provides contingency for the legal system, and hides the indeterminacy of the possibility of arbitrary decisions while simultaneously upholding it to enable law's renewal.²⁹

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 remains. And the question of justice reveals it. This is the inherent tension always present in law. Re-entry of transcendence is mandatory for law but at the same time its rationality goes beyond law. As Teubner describes 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.³⁰

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'.³¹ As moral communication tends to polarise moral positions owing to its symmetry, it does not provide a solution to the question of the source of morality or to 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. 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 programmes 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 arise 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 at 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 of its inherent 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 provide an answer to the justificatory crisis brought on by dispute resolution 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.³² However, the criteria have no constitutive foundation other than the morality of communication. 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 strives for justice that remains unreachable.

Although institutional formulations provide concrete criteria, these derive their authority from other sources, from the state or from private autonomy, and without their support the access to justice narrative loses most of its justificatory force, its meaning within the legal system. 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 a miscellaneous and fragmented combination of material legislation, soft law, institutional practices and multilateral Conventions. However, the shortcomings of the access to justice narrative follow from its unique nature: there is no 'other' side of the structural coupling, but only ethical communication about law. Still, when the legal system uses access to justice for 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, such as 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 what is provided is of sufficient quality. 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, deparadoxify it, as it provides no criteria for solving polarised arguments. It follows from this that the justificatory narrative of access to justice alone is unable to reconcile on the needed generalised level the justificatory crisis that has emerged as a result of technology-driven private enforcement. Thus, the due process criteria as a source of justification lead us to the paradox of law, where violence and the pursuit of justice 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*.

7.3 The future of access to justice in dispute resolution

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 programme. This programme 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 the Marxist philosopher Walter Benjamin's terms, they are *Richtschnur*, a word translating both as a legal principle and as a mason's plumb line, used for vertical measurements in construction.³³

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. 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 appears also to convey that the cases remaining under the litigation threshold need to be granted access to dispute resolution, and, as a part of this, access to enforcement.

7.4 Conclusions

This chapter discussed the possibility of finding justification for private enforcement from the moral communication on dispute resolution, as the sovereignty narrative was unable to address the privatisation and the consent narrative failed in justifying coercion. Unlike these constitutive couplings, the access to justice narrative does not connect the legal system with an external reference but instead

calls attention to the content of the dispute resolution process as a condition of its validity. Although the narrative's focus on the organisation of dispute resolution seems to avoid the shortcomings of the other narratives, it fails in providing justification for private enforcement. Due to its nature, ethical communication does not provide solutions for moral dilemmas on a general level but only enables their observation. Despite the narrative's concretisation in due process criteria, the narrative derives its justificatory force from the other narratives, from sovereignty-based stipulations or consensual models, without being able to address the justificatory crisis without this support.

Notes

- 1 See United Nations Human Rights Office of High Commissioner, 'Human Rights Treaty Bodies – Individual Communications. 23 FAQ about Treaty Body Complaints Procedures', available at <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx> (accessed 26 June 2018).
- 2 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.'
- 3 On justice as a contingency formula, see Richard Nobles and David Schiff, 'Luhmann: Law, Justice, and Time' (2014) 27 *International Journal for the Semiotics of Law* 325.
- 4 N Luhmann, *Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004) 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 *Modern Law Review* 1, 9–10.
- 5 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 4) 10.
- 6 Luhmann, *Law as a Social System* (n 4) 211.
- 7 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.
- 8 Luhmann examines morals instead of ethics and defines morality as a specific type of communication and ethics as a reflexive theory interpreting the code of morals. This 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.
- 9 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.
- 10 Niklas Luhmann, *Gesellschaftsstruktur Und Semantik. Studien Zur Wissenssoziologie Der Modernen Gesellschaft. Band 3* (Suhrkamp Verlag 1989) 360.
 - 11 Moeller (n 9) 56.
 - 12 *ibid* 57.
 - 13 Luhmann has acknowledged the difficulties of this natural law approach to law's positivist nature. See Luhmann, *Law as a Social System* (n 4) 68.
 - 14 In the scope of this study it is impossible to provide any comprehensive analysis of due process criteria but some notions on the most important treaty stipulations do provide an overview of the values present in the criteria. In the European context, the ECHR is the most important vocalization of due process. It should be noted, however, that the case law of ECtHR is continuously commented and evaluated. See e.g., 'Guide on Article 6 – Civil Limb' (Council of Europe 2013).
 - 15 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).
 - 16 This point interconnects with Tuori's theory on the levels of law, where human rights become sedimented into the deep structure of law. K Tuori, *Critical Legal Positivism* (Ashgate 2002) 197–216.
 - 17 'Guide on Article 6 – Civil Limb', available at https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf (accessed 26 June 2018) 41.
 - 18 '... 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.
 - 19 '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.
 - 20 '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.
 - 21 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 KS against Finland.'
 - 22 '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* 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.
- 23 *Burdov v Russia* (ECtHR) § 35.
- 24 ‘La Cour rappelle à cet égard 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.
- 25 *Burdov v Russia (no 2)* (ECtHR) § 69.
- 26 *Fociac v Romania* (ECtHR) §§ 74, 78.
- 27 *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.
- 28 Naturally, due process criteria conform to the systems of both 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.
- 29 Luhmann, *Law as a Social System* (n 4) 214–217.
- 30 Teubner, ‘Self-Subversive Justice: Contingency or Transcendence Formula of Law?’ (n 4) 13.
- 31 *ibid* 23.
- 32 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.
- 33 See Walter Benjamin, ‘Zur Kritik Der Gewalt’ in Rolf Tiedemann and Hermann Schweppenhäuser (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.’



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Part III

New ways forward?



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8 New bases for justification

As the analysis in the previous chapters has shown, private enforcement cannot be justified by reference to delegation of sovereign (state) power, private autonomy of the parties or the moral communication of access to justice. If private enforcement cannot be justified by reference to axiomatic principles, does this mean that we should simply discard the quest and announce this model of enforcement unacceptable without further inquiry, and, if so, what would be the implications of such a ban that is next to impossible to enforce?

This chapter offers a summary of the results by discussing the interrelationship between the existing justificatory narratives. It is then asked whether a new justificatory narrative could be found from the structural coupling between the legal system and the system of use of information and communications technology (ICT). This possibility is demonstrated by an excursion to blockchain-based smart contracts that are claimed to be self-enforcing. As a decentralised system, blockchain infrastructure is often considered regulation-averse, encouraging its proponents to declare the code itself as law and disregarding the need for other governance models. The chapter concludes with a brief discussion of the possibilities and challenges of regulating private enforcement.

8.1 Justification as interrelationship

Through the analysis undertaken in this study, we have identified three justificatory narratives – sovereignty, consent and access to justice narratives – which have been applied to provide justification for dispute resolution. The sovereignty narrative results from the close connection between law and state and forms the self-evident starting point for assessing the justification of coercion but is not able to explain the privatised use of force, whereas consent and access to justice narratives have developed as complementary mechanisms that aim to remedy these shortcomings. Although none of these narratives can single-handedly justify technology-enabled private enforcement, this does not mean that their importance can be overlooked. The narratives reflect different ideologies and interests present in dispute resolution and thus explain the complexity of the justificatory crisis that emerges as a result of the disruptive qualities of dispute resolution technology.

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. 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 making justification dependent on the decision whether the case at hand is the same as or different from the previous cases. This open-endedness is descriptive of human rights discourse.¹

Justificatory narratives often become entwined, as is the case with the interplay of all narratives portrayed in the traditional ideal model outlined in Chapter 5, and with the access to justice narrative that consists of positivised due process criteria. This interaction results from the temporal sedimentation of these justificatory constructs that demonstrates the reactionary nature of law. Through new structural couplings the legal system has strengthened its immune system against irritants emerging in the broader society, thus enabling increasing complexity. The sedimentation process, where fundamental principles of law become a definitive part of law's self-understanding,² happens gradually over time and each narrative acknowledged here is at a different stage. Also, the emergence of new sources of justification does not undo the importance of previous sources or shatter the existing structural couplings. Nor is it clear-cut which methods of justification are used in a given context. Outside the theoretical pursuit of this study, justificatory concepts interact, become entwined, overlap and are applied together, separately, and incongruently, if at all, deliberately. The examination of justificatory narratives has the objective of dissecting the self-understanding of the doctrine of dispute resolution, and this deconstructive analysis has shown that no unambiguous starting points for reconstruction can be found. This being said, a part of this quest has been to depict the interrelationship between these incommensurate sources of justification.

The problems in finding justification for private enforcement emphasise the increasing tension between private and public that result from the close connection between law and state. Although this division between private and public has existed before, dispute resolution technology is further intensifying the tension that seems to be deeply embedded 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 unravelling up until the justificatory challenge of private enforcement.

As none of the existing justificatory narratives provides an answer to the justificatory crisis caused by technology-enabled private enforcement, what does this mean for the acceptance of private enforcement and for the underlying problem that private enforcement aims to solve, namely the need for fair and low-threshold redress

mechanisms online that also incorporate the possibility of coercion? The question of acceptability of private enforcement connects with the necessity of finding dispute resolution mechanisms that can also provide efficient legal protection online. The existence of actual redress mechanisms is vital for e-commerce, as without them consumers' willingness to trade online and cross-border suffers. As public courts have been unable to provide redress for low-intensity disputes, private online dispute resolution (ODR) has emerged to take its place. Although private mechanisms are able improve trust and encourage online trade, 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,³ and also industry-specific codes of conduct, best practices and self-regulation could provide some methods for steering online behaviour. These methods, however, mostly impact future behaviour and do not provide sufficient redress, as they cannot force compliance in individual cases. Thus, mechanisms such as technology-enabled private enforcement are needed, that are able to provide some form of redress without reference to the state, but at the same time their existence is problematic, to say the least.

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 on due process 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 that is otherwise hard to address but the solution opens up a complement new set of problems. Also, it is noteworthy that we cannot derive what ought to be from what is, i.e. we cannot maintain that private enforcement should be acknowledged legally because it exists in practice.

Still, the difficulties in finding a basis for privatised coercion does not change the fact that the legal irritant needs to be addressed in order to overcome the justificatory challenge brought on by implementing technology to dispute resolution. One way to circumvent the justificatory crisis of private enforcement is to continue to rely on the connection of law and state by developing sufficient public mechanisms through the digitalisation of national courts and the introduction of sovereignty-based standards. However, such mechanisms would require significant court reforms across all jurisdictions in addition to reaching consensus on the content of a multilateral Convention, both options seeming unlikely owing to the required public spending and the failure of UNCITRAL's working group on ODR.

Nevertheless, one more option for finding justification can be proposed. As discussed above in Chapter 4, the social dimension of modern technology and the societal changes that result from its increasing use can be construed as an emergent social system of the use of ICT. As justification for privatised coercion cannot be found from the connection of law and state or from the consent and

access to justice narratives used in its place, it becomes necessary to ask whether a structural coupling between law and technology could provide a way forward. Early sketches of such coupling can be found in the discussions on self-enforcing smart contracts built on decentralised technological infrastructure, where the claim ‘code is law’, coined by Professor Lawrence Lessig, is used to contest the need for any conflict management mechanisms.

8.2 Justification through technology: the promise of blockchain for conflict prevention?

This section addresses the emergence, potential and pitfalls of another candidate for a justificatory narrative: the idea that the technological infrastructure itself could provide justification for private enforcement. Thus, the use of coercion would be justified by the narrative consisting of a structural coupling between systems of law and use of ICT. The discourse around blockchains, the technological infrastructure behind cryptocurrencies, is contributing to the justificatory narrative of ‘code is law’, where the code is the primary form of governance. This means that the number of possible actions is limited on the level of code and there is no way of going against these premediated models, to behave differently.⁴ This narrative supposes a technological network formed with the help of the markets, where the state becomes redundant and national legal systems are replaced by the code infrastructure, a decentralised system which does not rely on centralised authorities such as states or central banks.

The blockchain infrastructure provides an interesting insight into the justificatory crisis of private enforcement, for two reasons. From the theoretical perspective, where the focus is on justifying the use of coercion through law’s structural couplings, conversations around blockchains depict yet another justificatory narrative. This narrative, however, is not built around the same tension between law and state, private and public, as sovereignty; it does not presuppose the existence of any central authority besides the network itself. The potential of this for justification is yet to be evaluated, but the possibility of a new justificatory model is intriguing. From the practical perspective, this potential is reworded as a possibility of improved redress for low-intensity disputes without reference to the state. The promise of this ‘code is law’ narrative is to produce a concrete redress mechanism that would not require multilateral Conventions or trust placed in any central authority but would still provide public, transparent and fair governance for individual conflicts. Instead of trusting in a central authority and its control, in blockchain networks assumptions on the validity of a certain action are based on the network’s decentralisation, the state of the network continuously reconciled between networked actors.

In order to evaluate what the ‘code is law’ narrative entails for the privatisation of coercion, we need to understand the complex blockchain infrastructure and how it enables self-enforcing arrangements, called ‘smart contracts’. Despite the hype around the allegedly regulation-averse nature of blockchain, the vulnerabilities in the code, which have led to vast amounts of digital assets being stolen or

destroyed, call attention to how conflict management is, can and should be organised within the infrastructure. Some users demand conflict management mechanisms and redress, while the supporters of the ‘code is law’ narrative argue against any subsequent actions that would change previous events and thus pull down the irreversibility of the code.

The blockchain-based networks are decentralised public ledgers, where trust is allocated *by* the infrastructure *to* the infrastructure. Individual transactions are linked to one another, forming a chain of blocks, each block containing a transaction or some other change of status. The blockchain infrastructure was developed for the purposes of digital money, cryptocurrencies, the most famous example being Bitcoin, developed by the pseudonym Satoshi Nakamoto in 2008 and later on released as open source software.⁵ Originally, the structure was developed to overcome the shortcomings of traditional trust-based currencies, which out of necessity always rely on the authority of central banks and on the possibility of reversing earlier transactions in the case of fraud or court decision. Modern cryptocurrencies are based on a cryptographically secure ledger, a *blockchain* of earlier transactions, which provides information security and transparency. The ledger is maintained by all participants of the decentralised and anonymous peer-to-peer network. The ledger of past transactions is public,⁶ and no transaction can be removed from the ledger.

The rules on how a transaction can be added to the blockchain safeguard the system from external interference such as fraud or hacking. In order to be added to the blockchain, a transaction needs to include a solution to a specific mathematical problem, a so-called hash function, that is designed to be computationally difficult and time-consuming to solve but the validity of the solution can easily be verified. This computation that validates the new block consumes resources, which is the reason why users who lend their computational resources to it are rewarded by new units of cryptocurrency in a process called ‘mining’. Mining simultaneously enables the decentralised verification of transactions and provides the means for creating new units of the currency.⁷ The regulation-averse quality of blockchains is seen as deriving from this decentralisation and complacency of the network in creating new value true mining.

Although much legal communication has evolved around qualifying cryptocurrencies as property and thus as regulatory and fiscal objects,⁸ the potentially more interesting blockchain applications relate to automation of transactions – and of enforcement. The American law professor Frank Pasquale and systems engineer Glyn Cashwell evaluate different automation scenarios depending on the high or low level of regulation and high or low susceptibility to automation. In their analysis, 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 blockchain-based enforcement regimes that would replace the traditional legal authorities.⁹ 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’.¹⁰

In addition to simple transactions between digital assets, the technology enables programmable contractual arrangements called ‘smart contracts’. These contracts are in fact generalised computation taking place in the blockchain,¹¹ and they provide a form of enforcement that does not presuppose any centralised authorities such as nation-states, e-commerce market leaders or credit card companies. Thus, 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.¹²

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.¹³ For example, we could imagine escrow services, and even dispute resolution, drafted in the form of a smart contract, where both parties transfer assets to the programme and after the dispute is resolved 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, if proved true, gives the buyer the right to obtain the money. We could imagine an interface with the transport company that could provide the information verifying 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 variations for conflict management purposes, and thus the possibilities for automation, are numerous.

Regardless of the promise of blockchains for self-enforcement, mistakes and failures at the code level have called attention to governance of the distributed networks. In June 2016, a decentralised autonomous venture capitalist fund built on the Ethereum blockchain was hacked, leading to around US\$130 million being stolen.¹⁴ The hack took advantage of a mistake in a single smart contract’s code but challenged the whole network’s ability to provide governance in conflict situations. The DAO (decentralised autonomous organisation) hack made visible the potential of fraud within distributed ledger technologies that were supposed to be beyond vulnerability. In addition to a multitude of practical questions, ranging from what happens to the individual investments to finding and punishing the perpetrators, the hack has given rise to more in-depth debates about governance on the blockchain. Are there legal rights and obligations within the network and, if so, how would such norms for behaviour be set in a system that transcends all national borders and escapes state-bound regulation? If, ideally, the code defines the borders of acceptable behaviour and, by definition, unacceptable

behaviour is not possible within its framework, how will the negative implications be mitigated when this assumption does not hold true, when suddenly unacceptable behaviour is proved possible? In short, how is redress organised?

In the wake of the DAO hack, the developers of the whole Ethereum network deliberated between two reactions to the event: either freezing the stolen money and thus preventing the hacker from benefiting from the theft, or reversing all transactions in the blockchain and thus removing the negative effects of the hack. The first option, called 'soft fork', would have meant some people losing their investments for good, whereas the second option, called 'hard fork' would restore the transactions made to the smart contract. In July 2016, the hard fork solution was implemented, thus constituting a human intervention against the irreversibility of the code, breaking the neoliberal ideal of smart contracts as beyond external influence, beyond subsequent redress. Ultimately, the hard fork solution underlined the inadequacy of the 'code is law' approach in providing redress in unexpected conflict situations. Nevertheless, the DAO hack, alongside the recent blunder concerning Ethereum-based Parity multi-signature wallets that led to the supposedly accidental destruction of US\$300 million worth of digital funds and speculations of yet another hard fork,¹⁵ indicate that the blockchain architecture itself is not conflict-averse, and not as independent as claimed. Despite the potential of smart contracts in conflict prevention and private enforcement, distributed ledger technologies have not been able to remove the need for conflict management, but on the contrary have given rise to new types of conflicts that cannot rely on existing state-bound redress mechanisms.

In addition to not seeming to hold true in reality, the 'code as law' approach disguises a troubling neoliberal ideology, described by the blockchain scholar Primavera de Filippi as the libertarian dream advocated by blockchain enthusiasts¹⁶ and by lecturer Alan Cunningham as the combination of decentralisation and distrust. In his analysis, the blockchain technology is seen to emphasise a political ideology that aims at the elimination of the state for increased agency of individuals, an ideology built on a computationalist belief, 'a complete faith in the ability of mathematics and technology to eradicate problems emerging from human behaviour'.¹⁷ The danger of such ideology lies in its mechanic understanding of societal interaction: any gained agency and independence in the decentralised network is individual only and, as human interaction loses its collective dimension, the concept of public interest is eradicated. Despite their neoliberal promise, blockchain organisations and smart contracts cannot operate independently of all external control but instead require governance, *ex post* redress mechanisms, the safety valve of human intervention.¹⁸ For Cunningham, this means that attention should be on developing new ways of building up trust in public society instead of outsourcing it to code.

If it is not sufficient to use code as a regulatory concept to steer behaviour, this raises the question to what extent code architecture can assume the place of the normative provided by law, to what extent code can be law. As the continuously increasing interest in distributed ledger technologies shows, in the majority of transactions the code can provide a sufficient framework for interactions. Code continues to do so until a vulnerability, an unexpected error, takes place, at which

point interference is required, as was the case with the DAO attack. But it is also possible to argue that such systemic steering is not normative in the meaning of the legal system, that it is solely predetermined compliance, behaviour modification through code. Thus, code cannot be law, as law ceases to be anything but control when one cannot go against it, when adherence to the rules is forced.¹⁹

If ultimately code cannot be law, can law be extended to the code – can blockchains be regulated despite their inherently regulation-averse decentralisation that escapes state-bound law and makes it impossible to define the receiver of any regulation attempt? In addition to limiting the negative impact of such new technologies by governance and legal protection, governments face the frequent need to encourage technological innovation and new markets. These conflicting objectives often lead to inconsistent regional regulation of global phenomena, such as the attempts to regulate initial coin offerings (ICOs), that have become a widely popular crowd funding method making use of the monetary side of blockchains. For example, China and South Korea have outlawed ICOs, as offshore financial centres such as Cayman Islands root for the new financial tool, and states with strong regulatory frameworks for financial technology such as the UK, the EU and the US have adopted a careful stance, emphasising the extra-territorial scope of their national legislations.²⁰ In addition to these practical limitations, there is a theoretical side to regulating such complex phenomena as distributed ledgers. Law has limited means of addressing the novel environment of blockchains where economic, social and technological implications become intertwined and regulation is always political. As Professor Michael King puts it, ‘all that law can do is regulate what can be regulated through law, and, while this is no mean achievement, it leaves vast areas of activity ... quite invisible to law’.²¹

Code cannot be law and code should not be law, which admittedly limits the potential of the ‘code is law’ narrative, the structural coupling between law and the use of ICT. The problematic example of blockchain-based smart contracts and the inadequacy of code as redress suggest that the technological narrative does not provide a sufficient source of justification, at least in this form. Instead, as the decentralised quality of distributed ledgers make regulation by state-bound law mostly ineffective and there is no internal conflict management available, the use of code as a regulatory concept seems only to deepen the justificatory crisis of private enforcement. Lessons learned from blockchains demonstrate the ideologies behind technology, warn against computationalism, the idea that law could be reduced to computation. As with other technologies, such as algorithmic decision-making that makes use of machine learning and artificial intelligence, the blockchain vulnerabilities demonstrate that code is never infallible, and and it is dangerous to believe that it is infallible.

8.3 What about the future of private enforcement?

As the example of blockchains illustrates, regulating individual technologies may be extremely complex or even impossible. But even more so, technology-specific regulation of blockchains, artificial intelligence or machine learning does not take into consideration the broader social implications of technological development.

Without a holistic overview of dispute resolution technology, the important issue of privatisation of coercion remains invisible, and with it the signs of a justificatory crisis resulting from the connection of state and law. Privatisation of coercion needs to be addressed as a diverse phenomenon within the legal system, in which different applications of dispute resolution technology and the social dimension, e.g. the ideologies reflected in these applications, all contribute to the overall development. If we are to address the resulting justificatory crisis, it is necessary to respect the boundaries of law, to remember what can be achieved by means of law.

Bearing this in mind, UNCITRAL's work was unable to produce anything more than technical notes, which do not provide a sufficient framework for binding ODR. In addition, the EU's ODR platform has not been as impactful as hoped in providing efficient redress for consumers, as the finality of the outcomes varies inconsistently between different jurisdictions and individual national ADR providers. The Internet Corporation for Assigned Names and Numbers (ICANN), on the other hand, applies a different approach, as the Uniform Domain-Name Dispute-Resolution Policy (UDRP) procedure for resolving domain name disputes relies on the direct enforcement of the organisation. However, ICANN's practice has led to criticism of the lack of acceptable due process criteria.²² Although resolution of domain name disputes leaves much to be desired, the criticism of ICANN's multi-stakeholder model might offer beneficial observations for other governance projects. If regulation of binding ODR or other forms of private enforcement is based on a multi-stakeholder model, critical attention must be paid to include civil society actors and to improve transparency, participation and democracy of such policy setting. However, the difficulties remain when regulation is sought through truly global instruments. In addition to jurisdictional differences, e.g. the acceptability of pre-dispute arbitration clauses in business-to-consumer (B2C) disputes, there is the challenge of respecting such differences while simultaneously establishing a coherent system that works in practice. If another attempt is made for regulating private enforcement, the policy should include all forms of private use of coercion.

Despite the contentious quality of private enforcement and the relative lack of success in developing binding ODR, privatisation of coercion needs to be addressed in itself. There is a danger in considering enforcement only as a part of state-orientated judicial redress mechanisms. Technological possibilities of private enforcement already exist and it would be deceitful to assume that these private enforcement mechanisms would not be employed for the purposes of forcing compliance in the name of contractual arrangements. In fact, it is understandable that private enforcement mechanisms are 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 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. The significance of privatisation of coercion is further emphasised by the importance of enforcement as a part of access to justice. As the case law of ECtHR illustrates, the execution of final and binding judicial decisions should be understood as belonging to the fundamental right of fair trial.²³

However, enforcement is not the only, or even the most central, of due process principles. If this were the case, then the choice would simply be for binding models of dispute resolution, which would lead to accepting private enforcement as it is. However, there are valid reasons for arguing that enforcement of ODR as online arbitration would be detrimental to consumer protection. The unequal power balances between business 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.

As both private and public schemes of enforcing decisions are available, there is no longer the need to consider enforceability only in relation to courts. However, both private and public approaches to enforcement 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 ideological choices behind the technological solutions, what we have called here the neo-liberal dilemma.²⁴ Although private enforcement would most likely provide efficient enforcement within reasonable time, it is unclear how well private actors would take into consideration power imbalances and would uphold due process where 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.

If the decision is made for public redress mechanisms, other challenges need to be taken into consideration. First and foremost, solutions are needed to tackle the threshold issue so that 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.²⁵ 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 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,²⁶ 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 technology, but court-based applications are pressing forward equipped with the keys to the doors of public enforcement. If the digitalisation of public courts indeed reaches the level where the threshold issues no longer form obstacles to access to courts in low-intensity disputes, it is possible that the 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.

Notes

- 1 See e.g. M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press 2005) 563–564.
- 2 On sedimentation of legal values, see K Tuori, *Critical Legal Positivism* (Ashgate 2002) 197–216.
- 3 For an overview on escrow services, feedback systems, and trustmarks see P Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 60–64.
- 4 L Lessig, *Code Version 2.0* (Basic Books 2006), available at <http://codev2.cc/download+remix/> (accessed 27 June 2018) 94.
- 5 See Nakamoto's seminal white paper, Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System', available at <http://nakamotoinstitute.org/bitcoin/> (accessed 27 June 2018). 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 rather than 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), available at <http://www.newyorker.com/magazine/2011/10/10/the-crypto-currency> (accessed 27 June 2018).
- 6 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.
- 7 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*, available at <https://www.chicagofed.org/publications/chicago-fed-letter/2013/december-317> (accessed 27 June 2018).

- 8 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 Cryptocurrency 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*, available at <http://policyreview.info/articles/analysis/bitcoin-regulatory-nightmare-libertarian-dream> accessed 27 June 2018. Interestingly enough, the ECJ also took 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.
- 9 Frank A Pasquale and Glyn Cashwell, 'Four Futures of Legal Automation' (2015) 63 *UCLA Law Review Discourse* 26, 36–37.
- 10 J Fairfield (n 6), 38.
- 11 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 defined smart contracts 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), available at http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_glossary.html (accessed 27 June 2018).
- 12 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 blockchain applications could improve consumers' ability to negotiate their own contractual terms in e-commerce. See Fairfield (n 6) 43.
- 13 For a concrete example of drafting a smart contract on the Ethereum platform, see Koulu, 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement' (2016) 13 *SCRIPTed* 40.
- 14 David Siegel, 'Understanding The DAO Attack' (*Coindesk*, 25 June 2016) available at <https://www.coindesk.com/understanding-dao-hack-journalists/> (accessed 27 June 2018).
- 15 Jordan Pearson, 'Someone "Accidentally" Locked Away \$300M Worth of Other People's Ethereum Funds' (*Motherboard Vice*, 11 July 2017), available at https://motherboard.vice.com/en_us/article/ywbqmg/parity-multi-signature-wallet-vulnerability-300-million-hard-fork (accessed 27 June 2018) 7.
- 16 De Filippi (n 8).
- 17 Alan Cunningham, 'Decentralisation, Distrust & Fear of the Body – The Worrying Rise of Crypto-Law' (2016) 13 *SCRIPTed* 235, 244.
- 18 *ibid* 252–257.

- 19 Similarly, 'A world focused on regulating, influencing or even enforcing behaviours has little to do with legal normativity. If one cannot disobey a law it is not law but discipline, as Hegel suggested.' Mireille Hildebrandt, *Smart Technologies and the End (s) of Law* (Edward Elgar Publishing 2015) 226.
- 20 Caroline Binham, 'ICO Regulation Inconsistent as Cryptocurrency Bubble Fears Growm' *Financial Times* (London, 24 November 2017), available at <https://www.ft.com/content/32315636-cb01-11e7-ab18-7a9fb7d6163e> (accessed 27 June 2018).
- 21 M King, 'What's the Use of Luhmann's Theory?', *Luhmann on Law and Politics. Critical Appraisals and Applications* (Hart Publishing 2006) 47.
- 22 M Zalnieriute and T Schneider, 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values' (Council of Europe 2014) DGI (2014) 12 available at <http://www.coe.int/t/information/society/icann-and-human-rights.asp> (accessed 27 June 2018). Also, RW Rijgersberg, *The State of Interdependence: Globalization, Internet and Constitutional Governance* (TMC Asser Press 2010) 69-NaN, 215. An often quoted criticism of multi-stakeholder 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 multi-stakeholder 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', available at <http://www.coactivate.org/projects/campaign-for.nyc/blog/2012/10/02/governance-of-the-nyc-tld/> (accessed 27 June 2018).
- 23 See above, Chapter 7, section 7.1.3, and 'Guide on Article 6 – Civil Limb', available at https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf (accessed 27 June 2018) 23.
- 24 As discussed above in Chapter 3, section 3.1, Lister et al. have also recognised the neo-liberal underpinnings of promoting ICTs in general. Lister M and others, *New Media: A Critical Introduction* (2nd edn, Routledge 2009) 11.
- 25 De Filippi has addressed the possibilities and challenges of regulating cryptocurrencies. See De Filippi (n 8).
- 26 See e.g., Cortés (n 3) 62–64. For example, World Trustmark Alliance was 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' at <http://www.worldtrustmark.org/index.php/aboutwta/introduction.html> (accessed 27 June 2018).

9 Conclusions

This study has sought to demonstrate how the development of dispute resolution technology has given rise to new forms of private enforcement. Modern technology applied to conflict management enables new forms of coercion, such as direct enforcement on e-commerce sites, ICANN's domain name dispute resolution, and self-enforcing smart contracts. This increasing privatisation of coercion has mostly gone unnoticed, as most of these private enforcement mechanisms deal with low-value civil disputes in which party autonomy has traditionally been extensive. Unlike in cases dealing with criminal liability, the public interest in such civil disputes is less pronounced. In this context, the contractual dimension can easily pass over the need for effective access to justice, although in some instances it cannot be ignored, as is the case with effective consumer protection in e-commerce disputes. However, the emergence of such private mechanisms demonstrates a general trend towards privatising coercion. This shift explains something about the disruptive qualities of dispute resolution despite the fact that it mostly affects cases often disregarded from the fundamental rights perspective. The main finding of this study is that the technologically-enabled privatised coercion cannot be justified by the existing legal concepts.

In order to understand the overall trend of privatised coercion it is necessary to approach dispute resolution technology from a broader, holistic perspective. Dispute resolution technology represents one of the intersections between law, technology and society, its disruptiveness being the result of complex social, economic, political and legal reactions related to the overall digitalisation of society. This study has attempted to provide one perspective on the ways in which the society is changing as a result of the increasing use of ICT. Here, this change within the legal system is portrayed through interpretation influenced by systems theory, and the social dimension of technology is seen as an emergent social system called the use of ICT. Technological development does not take place in a social vacuum. We need to acknowledge the societal implications of increasing legal digitalisation. This being said, we should be aware of how this development at times strengthens and renews existing social ideologies and power imbalances. However, we also need to be cautious not to reduce the impact of dispute resolution technology to reflect existing tensions but instead assess the scope of technological disruption while simultaneously keeping in mind the complex interplay of law, technology and society.

This means that the overview of dispute resolution technology consists of two complementary perspectives. Firstly, a holistic approach helps us to perceive the long-term trends and the overall impact of technological change on the society. Secondly, a nuanced and contextual approach to individual applications complements this overarching perspective and allows us to evaluate the normative consequences of individual use cases of dispute resolution technology. The combination of societal overview and contextual approach to applications makes it possible to find common denominators between different applications of dispute resolution technology such as direct enforcement on e-commerce sites and smart contracts despite differences in their scope, motivation and functionalities. Thus, we can perceive a more general trend towards increasing privatisation of coercion.

Because of their generalised scope and the lack of actual alternatives, the private enforcement mechanisms discussed here differ from other forms of private governance but, ultimately, they present yet another example of the demise of our modern conceptualisation of law in connection with state. These new forms of technology-enabled private enforcement challenge the fiction of the state's monopoly on dispute resolution, in which enforcement is the epitome of its monopoly on violence.

Owing to the particular role attributed to enforcement, its increasing privatisation reveals something about law. From the theoretical perspective, private enforcement renders visible law's inherent nature as coercion; compliance with law can be coerced by use of force. As long as the criteria established by law are followed, such coercion is acceptable, justified, its legitimacy preserved. Simply put, law is a mechanism for justifying coercion. Traditionally, we have disguised law's inherent violence by restricting its use discursively to established legal structures, to public courts and legal professionals, who contribute to making the decision on who has the right to access the state's enforcement mechanism. 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 a legitimised form of violence and forces us to reinterpret who is entitled to use this force, against whom, and on what grounds. Privatisation of coercion embodies the disruptive properties of technology for demarcating the boundary between acceptable coercion and 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 fore.

The need for justifying private enforcement is one of the challenges caused by the fast-paced technological development, to which increasing automation contributes significantly. Interestingly, the tensions behind increasing privatisation of coercion are not simply technological but also societal. Private enforcement mechanisms have emerged to provide binding conflict management in situations where the existing state-governed mechanisms fail to do so, most prominently online. The changes in enforcement and the need to justify coercion become questions of law's ability to address the justificatory challenge posed by private

enforcement mechanisms. Can the challenge be addressed by our existing legal frameworks? Can we find justification for private enforcement by tweaking law, by making use of its established justification mechanisms, by reinterpreting existing legal concepts in new ways through interpretative flexibility?

The need to justify increasingly privatised coercion – together with the uncertainty of how this can be done – leads to a justificatory crisis. In this study, remedies for the lack of justification are sought from existing legal concepts used to provide legitimacy for coercion. These concepts are called justificatory narratives. The analysis identified three different narratives: 1) sovereignty, the structural coupling between law and politics; 2) consent, the coupling between law and economics; and 3) access to justice, moral communication about dispute resolution. Recognition of these narratives requires two theoretical moves. Firstly, it is necessary to perceive how the legal system produces justification through external references, by relaying the rationalities of other subsystems to law through shared structural couplings. Secondly, we need to evaluate which sources were used to provide justification by exploring how the doctrine has previously reconciled similar justificatory crises.

It should be noted that the state's monopoly on dispute resolution has previously been challenged by the critique of the access to justice movement which, among other things, advocated for out-of-court dispute resolution. Interestingly, the justificatory challenge was then reconciled through a collaborative model, which rendered private dispute resolution acceptable as long as the courts' ultimate power over enforcement was maintained. However, the challenge we are currently facing appears to be of more fundamental nature. Instead of advocating for plurality of dispute resolution, the demand is for plurality of enforcement, as in certain online contexts public enforcement has become redundant. This means that it is not possible to reconcile the justificatory crisis of private enforcement through a solution similar to the one achieved through the collaborative model and, due to the limitations of state-bound law, similar balance is difficult to achieve.

Private enforcement poses a justificatory challenge that cannot be resolved with the existing justificatory narratives. The sovereignty narrative mainly provides justification for state monopoly on violence, which private enforcement contradicts, and the narrative cannot explain coercion without connection to state. Private autonomy, in turn, presupposes voluntariness and is thus unable to address the coercive element. In addition, lack of actual alternatives to private enforcement make consent given to their use fictional, refuting its validity and thus its justificatory force. Ethical discourse, or the access to justice narrative, points towards the structures and rituals present in dispute resolution, but does not provide any overarching guidelines or standards on which justification could be based.

As the earlier narratives falter, some seek answers elsewhere and advocate for the regulatory dimension of code, the connection between law and the emerging social system, the use of ICT. The 'code is law' narrative suggests that technological design could assume regulatory qualities and produce both justification and

practical governance. However, it is a computationalist oversimplification of law's complexity to trust in the power of technology to solve problems of human interaction. To some extent, software infrastructure can direct behaviour and prevent conflicts, but, as it is impossible to predict all interactions, the need for the safety valve of conflict management does not disappear. As the DAO hack exemplifies, even the supposedly irreversible, trustworthy and fault-free blockchain infrastructures are not free from conflicts. Although the blockchain network itself functions as predicted, the possibility of human error cannot be removed as long as humans are involved in programming individual smart contracts on the blockchain.

The idea that data-driven technologies could replace law presupposes that law is simple, that it can be translated into clear-cut rules and programmed into straightforward commands of if-then-else. However, law is far more complex than these oversimplifications would lead us to believe, its flexibility and open-endedness leaving us with much needed room for diversity of interpretation. We should not overlook this complexity as purposeless jargon meant to protect the entitlement of lawyers but acknowledge its significance as the result of legal evolution over hundreds of years, and perceive the logic behind the shift from casuistic regulation to generalised principles.

What are the normative implications of this justificatory crisis that cannot be downplayed by a simple reinterpretation of existing narratives or the emergent 'code is law' narrative? Law's normativity lies in its function of upholding expectations regardless of disappointment, in the certainty that an expectation is true although it has this time been proved wrong. Private enforcement challenges the expectation that only decisions reached in due process are enforced and enforcement is granted only after this fairness is evaluated by an independent court. The expectation can no longer be upheld. In addition, the lack of transparency in private enforcement has implications on the renewal of expectations, as no public precedents are created that would provide a basis for future expectations. It becomes unclear what exactly we should expect – confusion about when expectations are met and when they are disappointed. If no distinction between fulfilment and disappointment can be made, law's normativity starts to unravel, and with it the overall trust in the legal system's ability to provide stability.

The insolubility of the justificatory crisis leaves us with unclear expectations. If sovereignty, consent and access to justice narratives fail when it comes to private enforcement, should the narratives still be preserved as bases for expectations? Or is there yet another potential source for law's continuity that follows from the structural coupling between the legal system and the use of ICT, perhaps by another interpretation of the 'code is law' narrative? It remains to be seen whether an option for regulating the use of coercion within these new technologically enabled environments can be found by following a similar logic to that of blockchain infrastructure, namely decentralised law. This possibility needs to be examined further in the hopes of developing new governance models that respond to the new irritant without resorting to such oversimplifications as the 'code is law' narrative currently does.

Also, the disruptive qualities of dispute resolution technology need to be explored further in order to understand the transformation of legal practice taking place, the digitalisation of law. The promise of improved access to justice presented by some applications is contrasted with malicious irritants that some new forms of dispute resolution technology represent. In order to distinguish between these contrary consequences, we need a deeper understanding of these diverse phenomena and to address them simultaneously separately and as a whole. A holistic and contextual approach to the digitalisation of law requires a framework formed by legal technology studies which take the challenge of technology seriously. Legal technology studies need to actively engage in interdisciplinary dialogue in order to ensure the development of legally sustainable dispute resolution technology.

In order to see beyond these fumbling first steps of theory formation, 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 dispute resolution technology. Without the holistic approach to technology suggested here, we face the danger that unconscious assumptions about technology impact on how we design the legal framework for the future development of dispute resolution 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. Such assumptions lead to very divergent evaluations of the feasibility of technology, the potential and the threat. In short, unconscious assumptions are dangerous. Still, assumptions can be set right with critical insights into legal technologies.

We need to understand the challenge posed by private enforcement as the result of fast-paced societal and technological change. Use of dispute resolution technology increasingly automates legal practices, starting from routine cognitive labour, with the potential of transforming conflict management altogether. Surprisingly, there are similarities between legal digitalisation and the Luddite uprising which originated from the automation of routine manual labour. Although the pejorative descriptions would lead us to believe Luddites were against technology per se as well as against all progress, it is necessary to understand that the uprising criticised the social implications of automation that hit the underprivileged groups of society the hardest, the untrained manual labourers. Ridiculing such concerns and calls for action as supposedly backward attitudes demonstrates ignorance of the negative consequences of automation. In order to avoid dramatic negative effects of legal automation, we need to be conscious of the on-going societal and legal transformation.

Law cannot be made redundant by lines of code, the complexity of law subsumed into simple rules. Still, new technologies are already having an enormous impact on law, as examples of algorithmic decision-making and distributed ledger technologies demonstrate. The legal framework is not toothless against the disruptive challenge of technology. On the contrary, society both reacts and predicts change through the legal system, through the boundaries law imposes on future development. With law's function of providing societal stability comes the responsibility to ensure responsible legal digitalisation, the fairness of technological infrastructures. The nuanced perspective of law needs to be taken into consideration in technological system design, otherwise the impact of technology is unpredictable. In dispute resolution technology, there is little room for failure, as the question is about legal protection and access to justice, the ethical dimension of law. It is of utmost importance that we recognise how technology affects legal functions and how technological infrastructure can become legally relevant. The challenge of technology leaves us with the fundamental principles of law. In the end, the big question is not about understanding technology but about understanding the complex interrelationships between law, technology and society.

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