Disintegration of the State Monopoly on Dispute Resolution

How Should We Perceive State Sovereignty in the ODR Era?

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Abstract

The interests of state sovereignty are preserved in conflict management through adoption of a state monopoly for dispute resolution as the descriptive and constitutive concept of the resolution system. State monopoly refers to the state's exclusive right to decide on the resolution of legal conflicts on its own soil, in other words, in the state's territorial jurisdiction. This also forms the basis of international procedural law. This conceptual fiction is derived from the social contract theories of Hobbes and Locke, and it preserves the state's agenda. However, such a monopoly is disintegrating in the Internet era because it fails to provide an effective resolution method for Internet disputes in cross-border cases, and, consequently, online dispute resolution has gained ground in the dispute resolution market. It raises the question of whether we should discard the state monopoly as the focal concept of dispute resolution and whether we should open a wider discussion on possible justificatory constructions of dispute resolution, i.e. sovereignty, contract and quality standards, as a whole, re-evaluating the underlying structure of procedural law.

Keywords: online dispute resolution, sovereignty, justification.

1 The Impossible Cross-Border Litigation?

1.1 Emerging Online Dispute Resolution

Many have claimed that the resolution of cross-border civil disputes is in crisis. The free movement inside EU and the prolific rise of borderless Internet activity have significantly contributed to interaction between citizens, organizations and companies as well as governments, resulting in a growing number of cross-border disputes.[1] Simultaneously, regional authorities traditionally responsible for providing dispute resolution models have remained unable to provide a functioning solution for cross-border disputes through litigation. Owing to problematic issues

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1 For an overview, M.E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, 1st edn, Jossey-Bass, San Francisco, 2001, p. 20. *See also*, D.J.B. Svantesson, *Private International Law and the Internet*, 1st edn, Kluwer Law International, Alphen aan den Rijn, 2007, pp. 1-10.

linked to jurisdiction and sovereignty and the difficulties of creating treaties through diplomacy, cross-border disputes arising from Internet transactions are more and more often solved by means of private ordering known as online dispute resolution (ODR).

Definitions of ODR vary, but a common starting point can be found where ODR is seen as private dispute resolution based on the consent of the parties in the same manner as alternative dispute resolution (ADR). Most often, ODR is depicted as ICT-technology-enhanced or totally technology-dependent, taking place partly or completely online.[2] Although ODR is often promoted by governmental agents, *e.g.* the EU, some forms of ODR have been organically formed by the needs of the market.[3]

There is a consensus that the scope and definition of ODR still lack universal agreement.[4] Some writers consider ODR to be 'online ADR',[5] while others see it as a unique phenomenon.[6] The definitions and impact of ODR vary depending on

2 Hörnle's definition includes the stipulation that ODR is out of court resolution in the spirit of ADR. *See*, J. Hörnle, *Cross-Border Internet Dispute Resolution*, 1st edn, Cambridge University Press, Cambridge, 2009, p. 75. Also, P. Cortés, *Online Dispute Resolution for Consumers in the European Union*, 1st edn, Routledge, London, 2010, pp. 53-54. Although technology-augmented litigation and ODR are often conceptually separated, lately some authors have suggested a joint approach. *See*, A.R. Lodder & J. Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology*, 1st edn, Cambridge University Press, Cambridge, 2010, p. 208. Similarly, R. Koulu, 'Domstolsrättegångar och alternativ tvistelösning - innebär användning av nutida teknologi i tvistelösning en upplösning av separata paradigm?', *Retfaerd: nordisk juridisk tidskrift*, Vol. 36, No. 2, 2013, pp. 60-83.

3 However, the role of governmental action in promoting ODR should not be overlooked despite shortcomings of such a policy setting. On EU Regulation, *see*, P. Cortés & A.R. Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress', *Masst J Eur & Comp L*, Vol. 21, No. 1, 2014, pp. 14-38. Although such projects are essential, this article focuses on doctrinal consequences of organically formed ODR, and thus references to these projects or individual ODR platforms are kept to a minimum.

4 *E.g.*, M.S.A. Wahab, E. Katsh & D. Rainey, 'Introduction', *in* M.S.A. Wahab, E. Katsh & D. Rainey (Eds.), *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution*, Eleven International Publishing, The Hague, 2012, p. 3.

5 "ODR has roots in the ADR movement that has been growing for the last twenty-five years. ODR has qualities acquired from the online environment, but it also has traits acquired from ADR." *See*, Katsh & Rifkin, 2001, p. 14. ADR as a part of the access to justice movement originated in the USA in the 1970s and 1980s demanding easier, cheaper and more party-controlled out-of-court dispute resolution models. ADR includes a vast variety of consent-based DR methods, from early neutral evaluation and mediation to adjudicative arbitration, which closely resembles state litigation. Major attributes differ between applications, but ADR is often seen as an alternative to litigation owing to its flexibility, low costs, lower complexity and more participation and party voice, tailored solutions, speed, confidentiality and preservation of relationships between the disputants. In this article, ADR is discussed as an alternative in all these attributes. However, it should be noted that differences between litigation and arbitration might often be smaller than those between arbitration and mediation. Also, some ADR models offer easy access to enforceability (as is the case with arbitration and the New York Convention) and at the same time, other applications such as conciliation are not binding on the parties and do not produce enforceable third-party solutions. However, the focus of ADR doctrine usually transcends such questions as enforcement as it is seen unnecessary when a true voluntary settlement between the parties is reached.

6 *E.g.*, A. Vilalta, 'ODR and E-Commerce', *in* Wahab *et al*., 2012, p. 114.

the specific procedure, *i.e.* is the object of examination the widely used example of e-commerce forum's platform such as eBay's Resolution centre, a separate service provided by a commercial operator, or publicly funded court-annexed platform. A typical solution is to narrow the approach by dispute categories, focusing either on disputes between businesses (B2B), from business to consumers (B2C) or between consumers (C2C) or even between government and consumers (G2C). However, such approaches might easily lead to oversimplifications in more abstract inquiries. Another issue of finding a lasting definition is that, similarly to ADR, the ODR field in its complexity and heterogeneity escapes universal definitions. An objective definition cannot be based either on pure subjective definition by ODR institutions or on dispute categories, as courtrooms are starting to adopt similar work methods as private ODR without adopting the terminology.[7]

Funding, dispute categories, the amount of asynchronous/synchronous communication and the role of third parties and technological implementation should be discussed in addition to enforcement mechanisms in order to reach a lasting definition. However, such an exact definition is not necessary, considering the claim of this article as it moves from ODR procedures as such to a system-level examination of the role of sovereignty and the nation state in all dispute resolution together, and in ODR in particular. For a working definition I would suggest using the umbrella term of dispute resolution and technology (DR&T), combining both public and private technology-augmented procedures and thus adopting an exceptionally wide definition.

Private forms of ODR are taking legal disputes from their established context of state-governed adjudication to a new forum of non-official, non-public resolution, continuing the process originated by ADR. Simultaneously, this development is challenging the customary and exclusive right of the state monopoly to dispute resolution.

1.2 Cooperation of Sovereign States as a Basis of International Procedural Law

Tension between private ODR and state's monopoly becomes particularly visible in cross-border cases where government inaction in promoting efficient litigation has led to particularly high thresholds, thus limiting the access to effective legal remedies through the courts. This inaction is no surprise when considering that the need for litigation of Internet disputes has emerged recently and, at least partly, unexpectedly,[8] as the Internet has enabled interaction regardless of

7 Several ODR scholars have emphasized that public court systems are the next logical step for ODR expansion. *E.g.*, T. Schultz, 'An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR', *in Proceedings of the UNECE Forum on ODR 2003 Geneva June 30-July 1, 2003*, 2003, p. 1; N.W. Vermeys & K. Benyekhlef, 'ODR and the Courts', *in* Wahab *et al.*, 2012, p. 295.

8 According to Rule, the Internet boom occurred in only seven or eight years, and the impact it is going to have on the social environment is very hard to predict. *See*, C. Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, 1st edn, Jossey-Bass, San Francisco, 2002, p. 298.

location and state borders in a globalized society.[9] This has caused new interpretative legal problems, resulting in the need for technology-sensitive legislation,[10] as well as technology-sensitive dispute resolution methods. While the Internet has changed the legal field in its entirety, disputes arising from the Internet have also changed procedural law, with these disputes constituting a new chapter in civil cases.[11]

One widely discussed example is e-commerce. The proliferation of Internet commerce has increased small-value, location-independent and thus often cross-border disputes related to the sale of goods.[12] These disputes have often (but not exclusively) originated online or are otherwise strongly related to the online environment. The volume and novel characteristics of these disputes set a challenge for litigation as the satisfactory resolution of these cases in court is a difficult task, but on the other hand, leaving them unsolved creates obstacles to the functioning of the online marketplace.[13] Threshold issues are especially distinct in cross-border cases because of high costs, length and uncertainty of cross-

9 R.W. Rijgersberg, *The State of Interdependence: Globalization, Internet and Constitutional Governance*, 1st edn, T.M.C. Asser Press, The Hague, 2010, p. 4. Similarly on Finnish legal theory, *see*, J. Syrjänen, *Oikeudellisen ratkaisun perusteista*, 1st edn, Suomalainen lakimiesyhdistys, Helsinki, 2008, p. 295. However, counterarguments to the possibilities of the Internet in solving policy issues have also been presented. *E.g.*, Morozov claims that the promises of the Internet have often been exaggerated through a "solutionist" approach, and instead of adopting this uncritical attitude we should discuss the voices, ideologies and production mechanisms of technology. *See*, E. Morozov, *To Save Everything, Click Here: Technology, Solutionism, and the Urge to Fix Problems That Don't Exist*, 1st edn, Allen Lane, Penguin Group, London, 2013, pp. 356-357.

10 *E.g.*, G. Lastowka, *Virtual Justice: The New Laws of Online Worlds*, 1st edn, Yale University Press, New Haven, 2010, p. 73.

11 However, as Rule points out, location-independent disputes are by no means a new phenomenon, and neither is the emergence of resolution models designed particularly for such disputes. Rule refers to medieval fair courts that were created by local rules for annual fairs, collecting a number of out-of-town vendors and buyers. *See*, Rule, 2002, p. 12. Another issue is that implementation of technology into dispute resolution changes the *modus operandi* of procedural law, not just its research subject as would be the case in other fields, *e.g.* electronic property in inheritance law. This is the result of procedural law's unique role in setting the frames in which the material law functions.

12 According to Hörnle, such e-commerce disputes are, in fact, a subcategory of Internet disputes, which she defines as "disputes of a commercial nature – based on a contractual relationship between the parties". *See*, Hörnle, 2009, p. 29. Although Internet disputes form a diverse class of disputes, in this article the focus is on e-commerce disputes which form a model example of the challenges Internet disputes pose for the traditional state-governed dispute resolution model, the court system. In her work, Hörnle makes the distinction between B2B, B2C and C2C disputes, but concentrates on B2C and B2B disputes. *See*, Hörnle, 2009, p. 26. In contrast, Rule focuses on ODR for business, that is, for B2C and B2B disputes. *See*, Rule, 2002, p. 96.

13 Similarly, *id.*, p. 86. This is also the starting point for EU policy. *See*, A Digital Agenda for Europe, COM(2010) 245 final/2.

border litigation. Simultaneously, consumer protection and trust require efficient means of redress.[14]

Although the need to promote effective methods is acknowledged by governmental actors, attempts at creating cross-border instruments through joint agreement of sovereign states have as yet provided few results. One of the main reasons for this can be found in the complexity of sovereignty that places detailed and often time-consuming requirements for the diplomatic procedure, for the creation of instruments and implementation of these as delegation of power could be considered to diminish the state's own sovereign power in relation to other states. ODR has been seen by some as a God-given gift of bridging this gap in access to justice, and not much thought is put into considering its compatibility with our conceptualization of state sovereignty. But why do we need to discuss sovereignty and justification in relation to ODR if public policy is in favour of it anyway? The answer is simple: justification is closely connected to use of force and coercion is often an elemental part of effective dispute resolution through enforcement. How we perceive sovereignty dictates what options we have for enforcing ODR decisions.

Although some ODRs have developed independently from governmental support and the operational field is still largely unregulated,[15] two main regulatory projects are taken by transnational intergovernmental organizations to promote and regulate ODR. In the EU, the Commission stated in its Digital Agenda for Europe already in 2010 that the efficiency of the Single Market depends on encouraging consumer trust through effective out-of-court dispute resolution methods for e-commerce. The Commission's proposal for ODR Regulation (524/2013) together with the revised ADR Directive (2103/11/EU) were accepted by the Parliament on 12 March 2013. The Directive promotes use of approved ADR institutions, which comply with minimum due process standards, for consumer e-commerce. The Regulation obliges the Commission to establish an interactive ODR platform for directing the disputing parties to competent ADR entities. The use of both the ADR Directive and the ODR Regulation are voluntary for the consumer and the trader, and offline disputes are excluded. The Regulation does not prevent the parties from seeking redress in the public courts. The ADR Directive obligates the Member states to ensure close cooperation between ADR entities and national enforcement authorities, but as such contains no specific clauses on enforcement.

14 The jurisdictional challenge and other problematic issues typical of Internet disputes are commonly recognized as the reason why cross-border litigation is rarely a true possibility for disputing parties. Different forms of alternative dispute resolution (ADR) are often seen as providing the parties with more effective access to justice. *See, e.g.* Hörnle, 2009, p. 46; Svantesson, 2007, pp. 1, 46-47; Katsh & Rifkin, 2001, p. 21. Also, the EU Commission sees promoting ADR through union-wide strategy as a means of improving consumer access to legal remedies in ecommerce. *See*, A Digital Agenda for Europe, COM(2010) 245 final/2.

15 *E.g.*, Cortés and Lodder consider lack of legal standards as one of the reasons why ODR has not taken off. *See*, Cortés & Lodder, 2014, p. 6. Also, S.J. Shackelford & A.H. Raymond, 'Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR', *Wis L Rev*, No. 3, 2014, p. 617.

Another example of an ambitious cross-border policy on ODR is the work of The United Nations Commission on International Trade Law. Since 2010, UNCITRAL has set out to develop a common framework for low-value e-commerce ODR. Working Group III's agenda covers formulation of procedural rules, substantive rules, standards for service providers and enforcement mechanisms. The Working Group's objective is to develop an effective cross-border enforcement mechanism for ODR. Currently, a two-track solution is being discussed, the first track providing non-binding facilitated negotiation and mediation, and the second track providing binding arbitration that can be enforced through the New York Convention. The Working Group's work is still mainly uncompleted, and it remains to be seen what can be achieved through its ambitious agenda setting. In any case, already the acknowledgment of cross-border enforcement as one of the most controversial challenges of ODR has meaning in itself for future policymaking.[16]

For these reasons, many online auction sites have created their own ODR procedures for solving disputes between sellers and bidders,[17] instead of waiting for government action to come up with such methods, and have thereby avoided litigation-based problems such as cross-border jurisdiction or enforcement. Some scholars have consequently claimed that ODR has its own jurisdiction in parties' agreement.[18]

Based on quantity alone, ODR's promise of improved buyer redress becomes difficult to contradict as eBay's Resolution centre alone now handles over 60,000,000 e-commerce disputes a year.[19] Still, ODR has not proven to be the success story it was meant to be, as is stated by several scholars.[20]

An example of enforceable ODR is the UDRP procedure, where a binding third-party decision on domain name disputes is given and directly enforced

16 For more information on EU and UNCITRAL initiatives, *see*, J. Hörnle, 'Encouraging Online Dispute Resolution in the EU and Beyond – Keeping Costs Low or Standards High?', *Queen Mary School of Law Legal Studies Research Paper* 122/2012, 29 September 2012; Cortés & Lodder, 2014, p. 14; M. Philippe, 'ODR Redress System for Consumer Disputes. Clarifications, UNCITRAL Works & EU Regulation on ODR', *IJODR*, Vol. 1, No. 1, p. 57.

17 The most famous example of this is the eBay's Resolution Center: <http://resolutioncenter.ebay.com/>. *See also*, Katsh & Rifkin, 2001, pp. 1-3, 97-98.

18 *See, e.g.*, V.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', *Hastings Int'l & Comp L Rev*, Vol. 25, 2001-2002, p. 383.

19 E. Katsh, 'ODR: A Look at History', *in* Wahab *et al.*, 2012, p. 2.

20 Cortés, 2010, p. 206.

through ICANN.[21] Although ODR's potential has not actualized in its entirety, it is evident that ODR is taking an important role in resolving Internet-related disputes that would otherwise fall on stumbling blocks of cross-border jurisdiction and litigation threshold.

The globalization of conflicts has the potential to create a constitutional crisis of sorts, where one branch of government, namely the judiciary, is unable to perform its customary task of providing equal access to justice for all disputants. This deficiency could quickly lead to private dispute resolution taking over the role of safeguarding public interests such as societal stability, access to justice and fair trial, which have often been considered the state's responsibility and will be discussed later.

Traditionally, private ordering is seen to be in contradiction to state litigation. Thomas Schultz describes ADR as entailing "resistance to government", which also expands to ODR.[22] However, the constitutional crisis created by ODR could more logically be construed through the challenge it places on sovereignty, as ODR cannot be reduced to online ADR. Rainey and Katsh have emphasized that ODR in itself changes the traditional role and responsibilities of the state.[23] It should be noted that ODR does not necessarily have to become mainstream to cause issues for constitutional theory. Instead, the emergence of ODR already creates disturbances in the state monopoly on dispute resolution.

This article examines the state monopoly as the conceptual practice of maintaining state sovereignty in conflict management, and, as such, aiming at protecting the state's interest in relation to other states and to its own citizens. This monopoly is often justified through the state's responsibility to provide protection, *i.e.* due process.

First, I claim that the national legal system, understood from the perspective of social contract theories of Hobbes and Locke and upheld within the political

21 ICANN 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 the Uniform Dispute Resolution Policy (UDRP) in cooperation with the World Intellectual Property Organization (WIPO). Because, in the end, ICANN is a private organization entrusted with responsibilities of public interest, it has been criticized for lack of adequate accountability mechanisms. *See*, Rijgersberg, 2010, pp. 69, 215. For UDRP from the global governance perspective, *see*, G.-P. Calliess & M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance', *Ratio Juris*, Vol. 22, No. 2, 2009, p. 260. For comparison between eBay and ICANN as private legal systems, *see*, T. Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists', *Yale J L & Tech*, Vol. 10, 2007-2008, p. 151.

22 T. Schultz, 'An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR', *in Proceedings of the UNECE Forum on ODR 2003*, Geneva edn, Vol. 1, 2003, p. 1. Schultz contests ODR's inherent resistance to government, and claims that government action might very well be necessary for ODR's future success, as the governments are more capable of providing "an architecture of trust" than private sector's self-regulation.

23 *See*, D. Rainey & E. Katsh, 'ODR and Government', *in* Wahab *et al.*, 2012, p. 248.

ideology of liberalism,[24] is perceived as having the sole right and responsibility of resolving the disputes of individuals by virtue of state sovereignty. However, the concept of a state monopoly on dispute resolution is a legal fiction adopted to preserve a state's interests in relation to other states. Against this background, the international community's failure to provide effective cross-border measures to back up state-governed resolution through recognition and enforcement in cross-border Internet disputes is made easier to comprehend, although no less unacceptable. Secondly, I claim that the conception of a state monopoly on dispute resolution is falling apart, and this disintegration is being further accelerated by ODR.[25] As a legal fiction, the state monopoly is no longer useful and at the same time fails to describe the current state of dispute resolution. This leads us to the question of whether either the dispute resolution monopoly of the nation state or state sovereignty is still justified as the defining concept in procedural law. As a conclusion, I will map out some signposts for finding justification common to all dispute resolution, the basis for justification being other than state sovereignty.

2 Dispute Resolution Monopoly as Sovereignty – The State's Responsibility for Effective Government

2.1 Deconstructing the Origins of the Dispute Resolution Monopoly

In jurisprudence, dispute resolution is often linked to state sovereignty, and this is particularly apparent in cross-border disputes involving conflict of laws, where solving such questions as jurisdiction and the choice of law and enforcement form

24 Another interesting perspective is the analogy between sovereignty and liberty. Koskenniemi claims that in international law sovereignty plays an analogous role to that of liberty in liberal discourse. *See*, M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* [reissue], Cambridge University Press, Cambridge, 2005, p. 300. It should be noted that sovereignty or the whole political theory of modern state cannot be reduced solely to Hobbes and Locke. However, social contract theories have been very influential in formulating modern transnational law and thus provide us with a clear-cut starting point for understanding the formulation of the nation state. Regardless, globalization of law should not be understood solely as denationalization, but instead, as Pollicino and Bassini point out, sovereignty as a concept is far more complex than this and also incorporates a supranational governance element. *See*, O. Pollicino & M. Bassini, 'The Law of the Internet Between Globalisation and Localisation', *in* M. Maduro, K. Tuori & S. Sankari (Eds), *Transnational Law: Rethinking European Law and Legal Thinking*, 1st edn, Cambridge University Press, Cambridge, 2014, pp. 346, 358-362.

25 This claim of disintegrating unity of law is not new. Instead, several openings have been presented for a better understanding of transnational law, *e.g.* Teubner's Regime collisions and legal pluralism discussed later in note 72. Interestingly, Tamanaha considers unity produced by growing central authorities as a slow process after which pluralist forms of law still existed but transformed into norms instead of legal instruments. *See*, B. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', *Sydney Law Review*, Vol. 30, No. 3, 2008, p. 381. He concludes that unity of law has become obsolete, and understanding the historical context of plurality enables the setting of a framework for future plurality without facing the ongoing discussion 'What is law?'. See, *id.*, p. 411.

the necessary prerequisites for effective cross-border dispute resolution.[26] The creation of effective solutions to these issues of private international law requires that sovereignty issues be overcome by providing sufficient grounds for sovereign states to allow certain procedural acts of other states on their territory in order to gain a commensurate expansion of their own sovereignty.[27] This has been aptly described 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 procedural acts.

In relation to external states, the nation state's sole and inviolable jurisdiction on its soil forms the foundation for international cooperation.[28] In other words, the state's territorial jurisdiction prevents other states from claiming jurisdiction in a legal dispute. Based on cooperation, decisions from national courts can be granted some legal effects in other states, although restrictions such as exequatur procedures are placed on their enforceability.

In relation to its own citizens, the nation state maintains its authority by preventing individuals' access to its coercive measures without prior validation of such access by the state courts. In other words, use of force in a society is monopolized by the sovereign state, which grants access to enforcement when it sees fit, namely to decisions made by its own court system or to private ordering after verification by the court system. For maintaining its exclusive right to violence, the state has to provide effective dispute resolution models, which, in its turn, creates the state's responsibility for providing effective dispute resolution.

This leads to the definition of state monopoly as two-sided: on the one hand, territorial jurisdiction guards access to the state's monopoly on violence and protects the *status quo* of upholding the sovereign power, while on the other hand, the monopoly creates the state's responsibility to provide effective legal remedies for its citizens in order to protect the societal stability by outlawing vigilantism. In addition, the justification for the state's monopoly on dispute resolution, and, ultimately, on enforcement mechanisms, can be construed by referring to quality standards, which also encourage trust for the state's DR system.

Cross-border Internet disputes constitute an anomaly of sorts in international procedural law as they cannot be effectively located in the existing system of sovereignty-based international procedural law,[29] as jurisdiction can be claimed by several or none. Hence, no monopoly can exist, and no state can violate another state's right. In this void of sovereign jurisdiction, ODR has evolved

26 On private international law in general and in relation to Internet issues, *see*, Svantesson, 2007, pp. 5-10.

27 On international legal cooperation and territorial jurisdiction, *see*, U.A. Nissen, *Die Online-Videokonferenz im Zivilprozess*, 1st edn, P. Lang, Frankfurt am Main, 2004, p. 124.

28 This truism is often so self-evident that it is not necessary to express it in words; however, it is still the presumed template for formulating cooperation instruments. Such acknowledgment of territorial jurisdiction can be found, for example, in the preamble and general provisions of Brussels I Reg. No. 44/2001.

29 However, Pollicino and Bassini point out that regardless of the Internet's borderless nature, state courts have *de facto* claimed jurisdiction and, as geolocalization tools improve, this will become easier. *See*, Pollicino & Bassini, 2014, pp. 349-357, 360.

as a solution for resolving disputes that do not have easy access to any court system. As is apparent, the change that has taken place is pronouncedly geographical: instead of upholding close connections to geographical pointers of state borders, new conflict types transcend such qualifications. It could be interpreted to follow from this anomaly that neither can a state violate another state's sovereignty by promoting ODR.

The state has been seen as entitled to interfere in the disputes of individuals in order to safeguard the interests of the weaker party and to maintain the basic constitutional rights of equal treatment and rule of law, thus connecting the state's monopoly and responsibility with the material norms created by the state.[30] In these functions, the state's monopoly connects with its sovereignty. First, the state maintains its sovereignty through internal conflict management. Secondly, territorial jurisdiction is an important symbol of sovereignty, reinterpreting its scope in relation to outsiders. This thought construct interprets international relations as a network of individual sovereign states and cross-border dispute resolution as interaction between these states, all of which operate through their own jurisdictions instead of the international community forming a joint jurisdiction. The foundation for such a commonly held perception of the state's responsibilities and functions can be retraced back to the birth of the modern state by the Treaty of Westphalia in 1648.

It becomes apparent that sovereignty as state monopoly is poorly fitted with cross-border Internet disputes. It is noteworthy that this claim on the ineffectiveness of state monopoly as a justification model applies specifically to cross-border contexts. On the national level, there exists no such void of jurisdiction as in cross-border situations. Nationally, disputes arising from the online environment respond to the terms of reference of territorial jurisdiction, although issues of litigation threshold and the uniqueness of Internet disputes might create other obstacles for redress.[31]

However, the sovereign's monopoly still incorporates the general principles and conceptualizations of procedural law, operating as the justificatory element of dispute resolution. To understand the reasons for adopting such a construction it is necessary to look at the theoretical foundations of the sovereign state itself. Two of the most influential works on formation of a sovereign state could be considered to be 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. Surprisingly,

30 Teubner's systems theory offers a useful analytical tool for understanding the connections between state, politics and law on a transnational level. As Teubner points out, law is still largely centred on the nation state although, among others, economy, science, culture and technology form their own global world systems competing with the nation state's politics. *See*, G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society', *in* G. Teubner (Ed.), *Global Law Without a State*, Brookfield, Dartmouth, 1997, p. 3.

31 The question of whether such a distinction between international and national levels should be made in future research is well founded but remains outside the scope of this article.

traces of these two theories can still be found in the justification structure of international procedural law today.[32]

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. For Locke and Hobbes this means surrendering the monopoly on dispute resolution to the Sovereign.

2.2 Absolute Transference of Power to Hobbes's Sovereign

In Hobbes's state of nature, which is often referred to with the quote "war of all against all", an individual has, in theory, unrestricted freedom, but in practice this freedom is limited by continuous fear of attack from others. Hobbes defines punishment only in relation to the Sovereign: "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."[33] As Kingsbury and Straumann formulate it, in the state of nature "there is nothing, no possible violation that could trigger a right to punish".[34] For Hobbes, the surrender of individual autonomy in exchange for peace is absolute; only the right to self-preservation is left to the individual herself. After sovereignty has been established by acquisition or institution,[35] the Sovereign has the right of adjudication in all cases concerning law and fact.[36]

According to Stanlick's reading, 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

32 Hobbes is also widely discussed in modern international law. *E.g.*, M. Corner, 'Has Sovereignty-Sharing a Future in International Relations?', *Contemporary Review*, Vol. 293, 2011, p. 50; J. Goldsmith & D. Levinson, 'Law for States: International Law, Constitutional Law, Public Law', *Harv L Rev*, Vol. 122, No. 7, 2009, p. 1791.

33 T. Hobbes & I. Shapiro, *Leviathan or the Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill*, Yale University Press, New Haven, 2010, pp. 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, emphasizing that Hobbes's concept of individual's obligation was not moral but based on self-preservation. *See*, T. Nagel, 'Hobbes's Concept of Obligation', *The Philosophical Review*, Vol. 68, No. 1, 1959, pp. 74, 82-83.

34 B. Kingsbury & B. Straumann, 'The State of Nature and Commercial Sociability in Early Modern International Legal Thought', *New York University Public Law and Legal Theory Working Papers*, February 2011, p. 33.

35 According to Tarlton's reading, what Hobbes meant by acquisition was the fear of the would-be sovereign, while institution refers to the fear of others. Tarlton criticizes later scholars for disregarding some central themes in Hobbes's theory, such as the creation and maintenance of a stable political system. For Hobbes it is essential to examine what constitutes a recognizable process for creating the Commonwealth in order to understand the legitimacy of that order. *See*, C.D. Tarlton, 'The Creation and Maintenance of Government: a Neglected Dimension of Hobbes' Leviathan', *Political Studies*, Vol. 26, No. 3, 1978, pp. 316-322, 308.

36 Hobbes & Shapiro, 2010, p. 109.

fundamental objectives and the principle of self-preservation.[37] Tarlton goes even further, by claiming that the maintenance of the sovereign political order depends on the efficacy of the Sovereign's control mechanisms, *i.e.* how effectively the Sovereign can prevent individuals from attacking each other.[38] Tarlton suggests that the current situation of Internet disputes could be described in Hobbesian terms as a lapse of sovereign's power. 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: the Sovereign simultaneously resolves internal conflicts and guarantees protection against external attack.[39] Kingsbury and Straumann successfully depict the challenge cross-border disputes place on state's monopoly and the responsibility to provide effective dispute resolution.

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 aspects. The 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.

For Hobbes the state of nature between different sovereign states translates into a vacuum of coherent power, a normative no man's 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 until recently been provided for by local territorial methods and by such relatively insignificant consent-based methods as *lex mercatoria* for cross-border situations.[40] However, in the ODR era individual citizens increasingly access this external normative space through e-commerce, which changes the Sovereign's responsibilities. To carry out its internal responsibility, 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 with the state, but dispute resolution for disputes arising from these actions is.

37 N.A. Stanlick, 'A Hobbesian View of International Sovereignty', *Journal of Social Philosophy*, Vol. 37, No. 4, 2006, pp. 552, 558-561.

38 Tarlton, 1978, p. 321 Also, "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*, Hobbes & Shapiro, 2010, p. 132.

39 Kingsbury & Straumann, 2011, p. 43.

40 However, the significance of *lex mercatoria* as a global regulatory regime has been questioned. On comparative studies between corporate social responsibility, ICANN and *lex mercatoria, see*, Calliess & Renner, 2009, p. 260.

2.3 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.[41] In Locke's natural state, penal authority belongs to all individuals, who act as both judges and enforcers in offences against themselves; however, their obvious bias causes them to act on emotion and revenge instead of from fairness and objectivity.[42] For Locke, natural laws do exist in the state of nature; nevertheless, they are poorly enforced because the right to their enforcement belongs to all individuals.[43] Consequently, sovereign power is given to the communal majority by consent,[44] in order to preserve the individual's right to property and to act for the good of society.[45]

Although the power surrendered to the Sovereign is absolute, in Locke's theory that power is limited to the objective for which it was constituted, for the good of the public. Nevertheless, because of these restrictions placed on the scope of its prerogative, it is reasonable to ask whether the Lockean concept of sovereign power is actually sovereign in the true meaning of the word. Regardless, both Hobbes and Locke define sovereignty through the objectives of the social contract: the Sovereign's existence is based on its capability to protect and maintain peace.

Between States, Locke considers the possibility of global commonwealth arising from the international state of nature. In the state of nature, every country's freedom is limited by the freedom of others. According to Cox's reading, Locke's international 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".[46] In the state of nature a state's foreign policy aims at maximizing 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. However, there exist no cultural and national commonalities between states on a global level that on a national level are essential for the willingness to create a state between individuals. Thus, establishing a global commonwealth would prove to be nearly impossible without such affinity. 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.[47]

41 *See, e.g.*, F.E. Devine, 'Absolute Democracy or Indefeasible Right: Hobbes Versus Locke', *Journal of Politics*, Vol. 37, No. 3, 1975, p. 740. Devine emphasizes, in the same manner as Leo Strauss in his Natural Right and History, that Locke's theory is in fact based on the concept of Hobbes with some alterations.

42 J. Locke & M. Yrjönsuuri, *Tutkielma hallitusvallasta: tutkimus poliittisen vallan oikeasta alkuperästä, laajuudesta ja tarkoituksesta*, 1st edn, Gaudeamus, Helsinki, 1995, 137-138 §§.

43 *Id.*, 6 §.

44 *Id.*, 99 §. Then again, Moots and Forster argue that Locke did not base the social contract on consent but on a "deeper philosophical foundation". G. Moots & G. Forster, 'Salus populi suprema lex: John Locke Versus Contemporary Democratic Theory', *Perspectives on Political Science*, Vol. 29, No. 1, 2010, p. 40.

45 Locke & Yrjönsuuri, 1995, 137-138 §.

46 R.H. Cox, *Locke on War and Peace*, 1st edn, Clarendon Press, Oxford, 1960, p. 178.

47 *Id.*, pp. 184-195.

Both Locke and Hobbes see the right of judicature or dispute resolution as belonging to the duties of the Sovereign after the institution of the social contract. This is because the Sovereign's *raison d'être* is to provide protection. By restricting individual vigilantism, dispute resolution is designated as solely belonging to the Sovereign. In light of both of these theories, the growth of private ordering can be interpreted as limiting the Sovereign's means of providing protection and, simultaneously, limiting sovereign power, without authorization from the state.

It can be questioned whether connecting sovereignty with upholding peace is still relevant. Substantive law, *i.e.* the material norms, are to a significant extent still tied to the nation state although norm plurality through the EU, UNCITRAL and ECHR is increasing. In addition, the traditional dispute resolution methods of state litigation are still largely non-existent for cross-border Internet disputes, although granted that the EU increasingly promotes public DR methods.[48] Cross-border cooperation for providing legal instruments to uphold legal order in the cross-border area is increasingly developed but no legal framework has yet been established through it.

However, e-commerce has not collapsed into anarchy although no sovereign power reaches into the external area. Instead, to a certain extent, legal order does exist, which becomes apparent already from the existence of some independently developed ODR methods, challenging whether such stability is indeed the product of sovereign state power. It is clear that through ODR, law and dispute resolution start losing their close connection with the nation state, expanding to several globalized systems.[49]

In this section, I have briefly described the foundation of the state monopoly on dispute resolution and its theoretical origins, which stem from the beginning of the Westphalian modern state. The state monopoly on dispute resolution coincides with the emergence of the sovereign state, and it can be understood as the internal aspect of the state's exclusive jurisdiction. We can presume that such a monopoly on the central power to resolve its citizens' disputes has been maintained as part of the implementation of state sovereignty. It is very possible that the state monopoly on dispute resolution has been, in fact, not only a description of the theoretical foundation of state jurisdiction but also to a certain extent the reality in internal dispute resolution.

48 *E.g.*, the EU has promoted access to cross-border civil litigation by EU Reg. (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure which provides for claims under €2,000.

49 Both Teubner and Calliess emphasize how law disconnects from national borders. Teubner describes technology and commerce as globalized, specialized systems connected to law through structural couplings. However, law as a social system is still in close connection with the state, creating discrepancies. *See, e.g.*, Teubner, 1997; Calliess & Renner 2009, p. 260. Similarly in Finnish legal theory, Syrjänen questions the connection between peace and sovereignty as old-fashioned, as dispute resolution and law in our late modern society are fragmented into several social systems through globalization. *See*, Syrjänen, 2008, p. 43. The argument on sovereignty's inability to answer legal issues in transnational environment is quite convincing, as its main hypothesis on the extent of the change that has taken place in society since the seventeenth century is impossible to deny.

Following this short description of its origin, we now need to ask whether such a dispute resolution monopoly truly exists; whether it describes the state of dispute resolution in our modern society or whether it merely influences our perception of procedural law without any basis in conflict reality. If we find that the idea of a state monopoly describes, in reality, the present state of conflict management, we need to ask whether the emergence of ODR signifies a breach of this monopoly. On the other hand, if the state monopoly turns out to be merely a legal fiction, we have to evaluate whether such fiction is still useful as a means of understanding justification of dispute resolution.

3 Is Private Conflict Management Truly New?

3.1 Conceptualization of State Monopoly and the Conflict Reality

In addition to its earlier *de facto* existence, state monopoly is adopted as a theoretical concept for explaining state interests in cross-border disputes. However, this monopoly is not, nor has ever been, absolute, nor is it meant to be. Instead, it is this conceptual hypothesis employed as a framework for safeguarding sovereignty issues in international procedural law that is of key interest as it reveals the need for justification.

First, private ordering has existed ever since the creation of nation-state sovereignty, which is often connected with the 1648 Peace of Westphalia. Despite the state agenda of the treaty, informal community-based methods of conflict management, settlement talks and mock courts functioning outside the public system with or without acknowledgment from the central power could be found in most modern states, sometimes with encouragement from the Sovereign.[50]

Secondly, there is a threshold regulating which disputes are granted access to dispute resolution. State-run conflict resolution has traditionally been reserved for disputes that are labelled as 'legal'.[51] Non-legal disputes are often seen as belonging to the private sphere of individuals and are left outside the scope of public interest because they do not affect the rights and obligations of individuals. State intervention in the disputes of individuals is justified when it is necessary for protecting public interests.[52] Also, the parties have the final word on

50 On medieval legal pluralism, *e.g.*, Tamanaha, 2008, pp. 377-385. In Finland, a legislative proposal for establishing informal settlement courts was originally 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*, K. Nousiainen, *Prosessin herruus: länsimaisen oikeudenkäytön 'modernille' ominaisten piirteiden tarkastelua ja alueellista vertailua*, 1st edn, Suomalainen lakimiesyhdistys, Helsinki, 1993, p. 348.

51 What makes a conflict 'legal' is an important doctrinal choice that cannot be discussed in this context. As a generalization, it is possible to differentiate a legal dispute from a non-legal conflict by claiming that the legal nature of a conflict is dormant. Trakman fears that applying the justice system's narrow definitions of 'legal' "circumscribe the social dimensions of family, business, and political conflict". *See*, L.E. Trakman, 'Appropriate Conflict Management Contracts Symposium: Commentary', *Wis L Rev*, No. 3, 2001, p. 919.

52 *E.g.*, Nousiainen, 1993, pp. 109-118.

which disputes they take into the court system.[53] Thirdly, it is always up to the disputing parties to decide what disputes they take to public litigation.

Public interest in all conflict management is understood in connection with due process. According to our modern doctrine, the state has an obligation to guarantee an individual's right to a fair trial, the content of which can be derived from case law of the European Court of Human Rights. Scholars of international arbitration perceive that the legitimacy of dispute resolution is a result of these due process principles.[54] However, in the constitutional theories of both Locke and Hobbes, justice or fairness do not limit the sovereign's power, nor are they an inner quality requirement of legal norms.[55]

3.2 State Control through Enforcement?

As these examples show, many forms of conflict remain outside the scope of public dispute resolution. In addition to this, the systems of private and public dispute resolution overlap. As already mentioned, the most obvious and important overlap between private dispute resolution and state litigation is, in Max Weber's terms, the state's monopoly on violence.[56] In other words, decisions of private dispute resolution are enforced through the state's enforcement mechanism, which evaluates the content of the decision before granting enforceability. Although many ODR models struggle to provide their own means of enforcement, others perform similar functions adequately through adoption of escrows, chargebacks, insurance models or reputational systems.[57] However, rather than being based on the use of force, these models mostly rely on the participation of parties and social control.[58]

53 On the other hand, Risto Koulu has emphasized the courts' role as gatekeepers of dispute resolution. Ultimately, it is up to the courts to decide which conflicts are allowed to enter litigation and which conflicts are left outside. According to Koulu, this is an access to justice issue in the broad sense. *See*, R. Koulu, *Lainkäyttöä vai hallintolainkäyttöä?*, 1st edn, CC Lakimiesliiton kustannus, Helsinki, 2012, p. 19.

54 *See, e.g.*, M.S. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration*, 2nd edn, Oxford University Press, Oxford, 2010, p. 202.

55 Devine, 1975, pp. 747, 750-751. Locke places the legitimacy of decision-making on the process instead of the content. *See*, Moots & Forster, 2010, p. 36.

56 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*, M. Weber, *Economy and Society: an Outline of Interpretive Sociology*, Vol. 2, 2nd edn, University of California Press, Berkeley, 1978, pp. 641-1469, lxiv, 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 globalization. *See*, Rijgersberg, 2010, pp. 16-17.

57 On escrows, chargebacks and feedback systems, *see, e.g.*, Cortés, 2010, pp. 60-72.

58 *E.g.*, ICANN organizes enforcement through its clients' contractual obligation, and no governmental enforcement mechanism is needed. *See*, Hörnle, 2009, p. 188. Internet marketplaces can replace enforcement mechanisms by social control where a disputant's failure to comply with the site's dispute resolution decision may result in user bans. Also, according to the classic ADR argument, voluntary participation in the process may render official enforcement redundant. *See*, Katsh & Rifkin, 2001, p. 113.

Although these mechanisms provide for the same end result of enforcing a decision, the operational methods of state enforcement and private mechanisms differ significantly. It could be claimed that such private mechanisms should not be considered substitutes of official enforcement as coercion requires resorting to the public enforcement mechanism. Consequently, claims that the rise of ODR has somehow undermined the state's monopoly on violence are rare.

However, if an ODR platform establishes its own enforcement mechanism based on standard agreement clauses and based on this can internally transfer assets, then the enforcement mechanism indeed raises an issue relevant to monopoly on violence.

Hence, private enforcement could very well be the choice between Scylla and Charybdis that Odysseus had to make. As lack of effective enforcement has been considered to be one crucial barrier for ODR's success,[59] there is an aspiration to explore enforcement of ODR awards through the New York Convention or through the internal enforcement mechanisms of platforms. However, introducing such mechanisms for bypassing state control opens ODR discussion to complicated theoretical choices in need of extensive research, and specifically internal mechanisms might affect the sympathy that public policy has so far offered to ODR.

Finally, 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. As Hörnle states, even arbitration, which is often particularly identified as being confidential and private,[60] 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.[61] Similarly, Mnookin and Kornhauser have asserted 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.[62] Then again, this view can be criticized by claiming that, in the end, such an influence from litigation on private ordering is hard to measure and might, in fact, be non-existent.

59 *See, e.g.*, Cortés & Lodder, 2014, p. 21; Shackelford & Raymond, 2014, p. 628. Also, T. Schultz, 'Online Arbitration: Binding or Non-Binding?', *ADR Monthly*, November 2002.

60 Then again, it has been argued that arbitration is not entirely private, the same argument Hörnle later repeats. *See*, Kurkela & Turunen, 2010, p. 201.

61 Hörnle, 2009, p. 70.

62 R.H. Mnookin & L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution', *Yale L J*, Vol. 88, No. 5, 1979, p. 950. For ODR uses, *i.e.*, Lodder & Zeleznikow, 2010, p. 11.

Consequently, private and public dispute resolution systems are, have always been and should remain in a process of interaction and overlap in various ways. Furthermore, system overlap is also on the EU agenda.[63]

Because of this overlap, we can question the claim that disintegration of the state monopoly signifies a constitutional crisis. This demonstrates that the concept of a state monopoly on dispute resolution does not describe the actual state of conflict management in society. However, conflict reality does not in itself challenge the claim made earlier that the state monopoly is the conceptual foundation through which we perceive and understand dispute resolution as a whole, from cross-border litigation to transnational legal cooperation.

3.3 Understanding the Change in Procedural Law

Although some ODR procedures have developed independently from state control and others have received public support, the phenomenon behind both models is the same, namely the sudden void of effective resolution methods for newly emerged cross-border online disputes and appliance of technology as a proposed solution. This development has changed the procedural field in two different ways: (1) the number of cases left outside the litigation scope has increased owing to the Internet, and states have not yet developed effective dispute resolution mechanisms as this would call for signing away parts of sovereign power to such cooperation instruments, and (2) implementing technology into dispute resolution changes the operation of the legal system owing to its transformative power.[64]

It is therefore not simply the change of conflict environment from offline to online worlds, or escalated caseload of cross-border civil disputes causing an increase in private ordering, or introducing dispute resolution technology in itself, but instead the combination of such phenomena that challenge the feasibility of the monopoly as the basic structure of dispute resolution. This is what constitutes the crisis.

63 Increasing governmental control has sparked a debate between ODR scholars. According to Cortés, due process requirements set by a neutral authority are necessary for compensating party inequality in consumer disputes. Nevertheless, his attitude towards governmental due process is still cautious because he fears that governmental intervention would harm the flexibility of ODR. *See*, Cortés, 2010, pp. 72, 173. At the same time, Schultz considers that the goodwill value of litigation is highly beneficial for the reliability of ODRs and suggests that ODR and public dispute resolution are interconnected to a large extent. *See*, T. Schulz, 'Does Online Dispute Resolution Need Governmental Intervention – The Case for Architectures of Control and Trust', *N C J L & Tech*, Vol. 6, No. 1, p. 104.

64 Susskind sees ODR as a "disruptive legal technology that […] will fundamentally change the face of legal service". *See*, R. Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, 2nd edn, Oxford University Press, Oxford, 2010, p. 215. Similarly, Katsh and Rifkin have highlighted its important role by coining the phrase of technology as the fourth party, a conceptualization later widely adopted in ODR. *See*, Katsh & Rifkin, 2001, p. 93.

4 The Emergence of ODR – How Is Private Dispute Resolution Changing Our Procedural Sovereignty?

This development affects state sovereignty, as both disputes and their resolution become transnational and detach from the national court systems and their material laws only to reconnect momentarily for enforcement – if no alternative mechanism for realization exists.

4.1 The Need for Regulation

Legal policymaking in the EU is strongly in favour of increasing the use of ODR procedures in e-commerce B2C disputes which have resulted in the new ODR Regulation and ADR Directive.[65] In its original Communication, the Commission describes the shortcomings of state-governed litigation through e-commerce examples related to domestic sale of goods[66] and to cross-border travel agency, and thus indirectly admits that the current litigation model is unable to resolve such disputes in the future. Instead, the Commission would guide both cases through the EU-wide ODR platform to a high-standard ODR procedure, capable of clarifying the facts and facilitating an amicable solution in the domestic e-commerce case and giving a binding decision in the cross-border case.

The Communication repeats the widespread consensus on the limitations of litigation for Internet disputes as obstacles to effective access to justice.[67] The EU is willing to plug the hole created by the ineffectiveness of state-governed dispute resolution in cross-border cases by promoting ODR,[68] and it is thus trying to solve the sovereignty crisis by advancing the private management of public interests instead of rebutting it.

It is noteworthy that different applications of dispute resolution and technology can be either public or private, and as such this distinction is rapidly becoming irrelevant. Also, the new field of ODR expansion would logically be the public court systems. In any case, different dispute resolution methods are converging.[69] Hence, we should discard the separation between courtroom technology and ODR by adopting a joint terminology of DR&T. It follows from such an approach that we have to focus on the shared justification grounds of

65 *See*, 'Alternative Dispute Resolution for Consumer Disputes in the Single Market', COM(2011) 791 final.

66 According to a common ODR perspective, Internet-related disputes are best solved online in the environment where they originated. However, as Katsh and Wing point out, today the use of ODR procedures is no longer limited to online disputes, but is a valid alternative also for offline disputes. *See*, E. Katsh & L. Wing, 'Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future Symposium on Enhancing Worldwide Understanding through Online Dispute Resolution', *U Tol L Rev*, Vol. 38, No. 1, 2006, p. 21.

67 *See*, Katsh & Rifkin, 2001, p. 27.

68 It can be questioned whether the EU is actually promoting private ordering at the expense of state litigation or whether it merely calls for more efficient consumer redress mechanisms through public ADR/ODR schemes. Regardless, it is clear that promoting consumer redress through publicly or privately funded ODR is still alternative to the public court system and thus foregoes the state monopoly.

69 E. Katsh, 'ODR: A Look at History', *in* Wahab *et al*., 2012, p. 12.

both traditions instead of building justification for court-annexed ODR from sovereignty and for private ODR from party consent.

Most notably, both the increase in ODR and the EU's ODR Regulation and ADR Directive indicate a concrete change where Internet disputes are managed and resolved through other means than public litigation. For example, as private dispute resolution and its decisions are usually confidential, the expansion of private dispute resolution might hamper the ability of higher national courts to set precedents for lower courts in order to maintain legal predictability and equality.[70]

However, my claim on disintegrating sovereignty can be contested by EU's policymaking, which highlights the consumer's possibility to take her case to the national courts if ODR has failed. Although this point of ODR complementing litigation without posing a threat to it is valid, it does not lead to discarding the claim on changing sovereignty for two reasons, the first of which is derived from the reality of conflict management, the second from the structure of several existing ODR systems. First, the litigation option rarely becomes reality in cross-border low-value cases where the high litigation costs create a *de facto* litigation threshold that prevents consumers from finding redress. These cases rarely can be litigated if ODR fails, and therefore they would remain outside the litigation scope, creating a void of access to justice. Second, several ODR schemes are based on giving binding decisions that directly prevent parties from seeking later litigation, as could be the case with UNCITRAL's binding ODR and the ADR directive.

In addition, ODR disengages from national borders and is no longer tied to the state's jurisdiction. Instead, it is creating its own jurisdiction and its own fundamental justification. Most notably, ODR is linked to larger changes in the world, *i.e.* to globalization and legal polycentricism.[71] Europeanization, understood as the delegation of legislative power from Member states to the EU, the emergence of soft law, the growing importance of international legal cooperation and the role of international NGOs are all contributing to the fragmentation and plurality of the legal arena and, simultaneously, to diminishing external sover-

70 From a systems theory perspective, this might be problematic as law is a closed self-referential system that renews itself through autopoiesis, and without accessible legal communications this reproduction stagnates. *See*, G.-P. Calliess, 'Reflexive Transnational Law: The Privatization of Civil Law and Civilisation of Private La', *Zeitschrift für Rechtssoziologie*, Vol. 23, No. 2, 2002, p. 196. However, it could be claimed that private ordering carries out the traditional function of precedents in other ways.

71 *E.g.*, A.-J. Arnaud, 'Legal Pluralism and the Building of Europe', *in* H. Petersen & H. Zahle (Eds.), *Legal Polycentricity: Consequences of Pluralism in Law*, 1st edn, Aldershot, Dartmouth, 1995, pp. 149, 152. Teubner claims that "global law can only be adequately explained by theory of legal pluralism which turned from the law of colonial societies to the laws of diverse ethnic, cultural and religious communities in modern nation-states. It needs to make another turn – from groups to discourses." *See*, Teubner, 1997, p. 5. Instead of Polycentrism, Teubner has advocated sector-specific legal regimes as the answer to the diminishing role of states in transnational law. *See*, G. Teubner & P. Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society', *in* M.A. Young (Ed.), *Regime Interaction in International Law. Facing Fragmentation*, 1st edn, Cambridge University Press, Cambridge, 2012, p. 23. On polycentric governance in the ODR context, *see*, Shackelford & Raymond, 2014, p. 648.

eignty. These tremendous shifts are an indication of the changing importance of national legislation and national courts in late modern society.[72]

4.2 Disintegrating State Monopoly in Cross-Border Cases

In legal theory, both Tuori and Syrjänen suggest the disintegration of state sovereignty. They 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.[73] Based on *autopoiesis*, *i.e.* self-referentiality of law, Teubner claims that technology creates its own global system, whereas law is tied to the nation state, creating discrepancies between the structural couplings of different systems.[74] It follows from this that law fails in its task to effectively manage conflicts.

For Tuori, an elemental expression of national sovereignty is the state's exclusive right to enact and apply legal norms. According to Tuori, this sovereignty is disintegrating both nationally and internationally, as is apparent from the private regulation of labour market organizations or the private administration of justice through arbitration.[75] However, from the manner in which the arguments of both Syrjänen and Tuori on the fading of sovereignty are constructed, it is apparent that they both presume the state monopoly on dispute resolution to be a part of sovereignty. Such argumentation substantiates the claim that although the state monopoly on dispute resolution is not the reality of conflict management, it is still uncritically adopted as the descriptive construction for depicting the content and scope of sovereignty in dispute resolution.

It should be noted that this fundamental theoretical conceptualization behind procedural law of state monopoly is binary: on the one hand it is a monopoly, and on the other it translates into an obligation of the state to provide effective dispute resolution systems for its citizens. Hence, the lack of effective dispute resolution for cross-border cases can be construed as the state's failure in this task – leading either to abandoning state monopoly as a key concept or to promoting ODR in order to rectify the failure.

72 Syrjänen claims that in late modern society, the law is disengaging itself from territory and the central power of the state, which signifies a turning point for its localization. *See*, Syrjänen, 2008, p. 40. In Rijgersberg's categorization of globalization approaches, views on the diminishing role of the state could be considered transformalist or even hyperglobalist in comparison with sceptical approaches, which deny the uniqueness of globalization. *See*, Rijgersberg, 2010, p. 52.

73 Syrjänen, 2008.

74 Teubner, 1997, p. 5.

75 K. Tuori, *Oikeus, valta ja demokratia*, 1st edn, Lakimiesliiton kustannus, Helsinki, 1990, p. 279.

5 How Should We Understand Sovereignty?

Through the emergence of private ordering, the role of state monopoly, this conceptual platform of procedural law, changes, and we face two separate options for coping. First, we might be able to hold on to the concept of state monopoly by interpreting private ordering as the delegation of power from the state to private operators. Second, if we conclude that conserving the concept of state monopoly as a part of state sovereignty is not worth the trouble, we have to face the difficulties of replacing it with a working theoretical framework.

5.1 Maintaining the Concept – Hobbesian Power of Delegation as a Way Out?

Hobbes' theory on the Sovereign's power of delegation would seem to provide us grounds for claiming that state inaction does not in fact constitute a failure to provide access to justice. By adopting the idea of the Sovereign's power of delegation from Hobbes's theory, we can claim that the EU's pro-ODR policy has actually delegated the public function of dispute resolution from the judiciary to private dispute resolution, and is thus merely an extension of sovereign power. Consequently, the private management of disputes does not constitute disintegration of sovereignty; rather, it simply changes its appearance. The described interaction and overlap of private and public dispute resolution strengthen this assumption on the delegation of public functions.

Whether this thesis is reliable or a mere façade needs to be examined in further studies. A point of interest for its further exploration is that legal justification in general can be seen as a *post facto* rationalization of past events. We might ask if the ODR-focused policy-setting of the Commission is, in fact, an acknowledgment of the prevailing situation and an attempt to perform, at least, risk management by setting the standards for an ODR sector that is rapidly developing anyway.

Another question is whether Hobbes's theory is applicable in a globalized world, where sovereignty cannot be applied as such. For example, Hobbes's theory presupposes that sovereignty exists in connection to and within the limited territory of a nation state. Hence, no binding international sovereign can be placed above the national sovereigns, for such an acknowledgment would render national sovereignty a paradox. Some efforts have been made in the literature to interpret Hobbes's theory as accepting some forms of international legal order, but, according to Stanlick, the creation of an international sovereign to control the state of nature existing between nation states was never Hobbes's intention.[76]

Even if Hobbes's social contract theory could be reframed and reinterpreted as containing a transnational element, it can be argued that such a reinterpretation would still fail to provide us with a coherent constitutional theory with interpretive power, as its starting point would still contain incompatibilities with modern globalization. Furthermore, it is hard to see what advantages such a theory could offer. For these reasons, we need to examine how an abandoning of

76 Stanlick, 2006, p. 562.

the concept of the state monopoly and a reinterpretation of sovereignty could accommodate the new procedural order.

5.2 Looking Beyond the State Monopoly – Sovereignty as Interdependence?

As I have demonstrated, dispute resolution models are overlapping and have always been so, and the rise of technology and the emergence of cross-border ODR have only served to further emphasize private dispute resolution instead of introducing a completely new form of dispute resolution.[77] These examples could be said to speak for the Hobbesian idea of delegation, although the argument is not necessarily a stable one. One option for explaining the growth of private dispute resolution at the expense of litigation is to ask whether sovereignty, in itself, has changed due to globalization and the Internet.

Rijgersberg presents a model for interpreting sovereignty in a manner sensitive to the globalized legal environment. He suggests that sovereignty and constitutional responsibilities should be understood as a form of interdependence between increasingly interconnected nation states, while private operators participating via the Internet should be viewed as organizational architecture.[78] 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 globalization, constitutional responsibilities can be interpreted as interdependency provides us with a useful insight. However, Rijgersberg's reinterpretation does not bring sovereignty any additional power. Rijgersberg's definition adds modern characteristics to the problem of defining sovereignty in dispute resolution, but it is unclear whether such a reinterpretation would, in fact, be enough to accommodate the disintegrated state monopoly.

Although modern constitutional theory owes much to writers like Hobbes and Locke, using their writings as the theoretical framework for such themes as the Internet or globalized conflict management would, at the very least, demand extensive reinterpretation, and it is questionable whether such an interpretation would remain true to the original writings.

Thus, the issue of justification disengages itself from sovereignty and embarks on a quest for justice that is not defined by the state's monopoly on violence. The question remains, how should the responsibility for due process be allocated without the state? Here, the discussion adopts similar features as the doctrine of civil justice and rule of law.[79]

This detour of sovereignty and justification takes us back to the new ADR Directive through which the EU strives for securing rule of law and maintaining sovereignty through delegation of power. The directive includes a process of

77 However, the new converging methods of private and public DR could very well develop a completely new understanding of conflict management.

78 Rijgersberg, 2010, p. 65.

79 *E.g.*, H. Genn, 'Why the Privatisation of Civil Justice Is a Rule of Law Issue', 36th Mann Lecture, 19 November 2012, available at <www.ucl.ac.uk/laws/academics/profiles/genn/>, retrieved 10 September 2014. Also, O.M. Fiss, 'Against Settlement', *Yale L J*, Vol. 93, No. 6, 1984, p. 1085; T.J. Stipanowich, 'ADR and the "Vanishing Trial', *Journal of Empirical Legal Studies*, Vol. 1, No. 3, 2004, p. 911.

certification and supervision of ADRs conducted by national authorities. Such state trust marks could help in maintaining the concept of sovereignty still in the ODR era. However, it remains to be seen what the role of such supervision will be – whether these national public authorities can *de facto* steer ODRs into taking due process seriously or whether the supervision becomes mainly administrative licensing procedure *de jure* without much qualitative control.

6 Conclusion

The growth of ODR has created the need to reinterpret, or even abandon, the concept of state sovereignty, but this does not automatically represent the end of state-governed dispute resolution, for the systems of litigation and ADR/ODR do coexist and have coexisted, overlapped and converged, and, at least to some extent, even today, require each other. Although private ordering has existed before, it has never before posed a threat to the state monopoly, for it has remained small-scale and at least partly non-legal. The actual change that has taken place is in the rapidly increased volume and character of disputes resolved in ODR procedures, as often cases dealt with in ODR would never reach the litigation threshold owing to legal costs and time. However, as such disputes are legal by nature, considering them apart from civil justice debate is not viable.

The state monopoly has been responsible for safeguarding the interests of the weaker party through due process. In this article, it is claimed that the justification for the state monopoly on dispute resolution is based on its ability to fulfil these tasks. Because the state monopoly is failing in its duty to provide due process when it comes to Internet disputes, it is fair to challenge its validity solely on this basis. However, this does not change the fact that due process is still essential to the resolution of all disputes and for providing parties with procedures they find useful and acceptable; quality standards should not be lowered just because we abandon the concept of a state monopoly.

After the emergence of ODR, it is no longer feasible to use the fictional concept of the state monopoly to bring coherence to the dispute resolution system. The need for coherence has to be met by examining other justificatory concepts such as mutual agreement (often used to understand ADR's jurisdiction) and quality standards, which raises the question of how we can bring fair trial principles into cross-border ODR. Earlier, the interplay of these three discourses of justification, sovereignty, contract and quality formed a system for cooperation between private and public ordering.

However, the emergence of private enforcement mechanisms that bypass traditional ex post state control gives rise to new theoretical issues. It is clear that further theoretical research on the implications of dispute resolution and tech-

nology is needed.[80] A key issue in reconstructing justification is to better understand the role technology plays in ODR, in the spirit of Lawrence Lessig's famous idea "Code is Law", to reveal and discuss the values that are brought to dispute resolution through the software code.[81]

A variety of solutions have been given to reinterpret the state's role in ODR ranging from multi-stakeholder models, where the state is just one of the operators, to soft law and from trust marks to best industry practices. However, the difficult issue, how to secure fair trial and simultaneously promote ODR when there are no coercive safeguards, still remains. As private enforcement becomes more common, understanding the changes it causes in the interplay between justification constructs becomes essential for reconstructing the state's role in future dispute resolution.

80 *See, e.g.*, L. Wing & D. Rainey, 'Online Dispute Resolution and the Development of Theory', *in* Wahab *et al.*, 2012, p. 23. Such theory should also incorporate a deeper understanding of the ways technology changes communication and, as such, interdisciplinary approaches become necessary for legal research. *See also*, R. Koulu, 'Three Quests for Justification in the ODR Era: Sovereignty, Contract and Quality Standards' (forthcoming in 2014).

81 *See*, L. Lessig, *Code: Version 2.0*, 2nd edn, Basic Books, New York, 2006, pp. 4-6.