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
The Impossible Cross-Border Litigation?

Emerging Forms of Online Dispute Resolution

Many have claimed that the resolution of cross-border civil disputes is in crisis. The free movement of persons, goods, capital and services inside EU and the prolific rise of Internet activity, which is oblivious to the borders of the national state, have significantly contributed to the growing amount of interaction between legal actors, i.e. citizens, organisations, and companies as well as governments, resulting in a growing number of cross-border disputes.¹ At the same time, the regional authorities traditionally responsible for providing effective dispute resolution models have remained unable to provide the players with a functioning solution for cross-border disputes. Due to problematic issues linked to jurisdiction and sovereignty and the difficulties of creating a consensus-based multilateral agreement through diplomatic procedures, cross-border disputes arising from Internet transactions are more and more often solved by means of private resolution models known as online dispute resolution (ODR). ODR can be defined in various ways, depending on the writer, but most definitions share a common starting point where ODR is seen as private dispute resolution based on the consent of the parties in the same manner as alternative dispute resolution (ADR) models. Most often ODR is depicted as ICT-technology-enhanced or totally technology-dependent, taking place partly or completely on the Internet.²

There is a consensus that the scope and definition of ODR still lack universal agreement.³ Some writers consider ODR to be ‘online ADR’, and, to share a close connection to ADR doctrine,⁴ some see ODR as a unique phenomenon⁵. Definitions and

¹ For an overview, see: (Katsh and Rifkin 2001) (Svantesson cop. 2007).
² Hörnle’s definition includes the stipulation that ODR is out of court resolution in the spirit of ADR, depicted as access to the justice movement’s third wave by Lindblom. See: (Hörnle 2009); (Lindblom 2008) On defining ODR see: (Cortés 2010) Although technology-augmented litigation and ODR are often conceptually separated, lately some authors have suggested a joint approach. See: (Lodder and Zeleznikow cop. 2010) Similarly on the need for a joint approach including both courtroom technology and ODR see: Riikka Koulu, ‘Domstolsrättegångar och alternativ tvistelösning - innebär användning av nutida teknologi i tvistelösning en upplösning av separata paradigm?’ (2013) 36(2) Retfaerd: nordisk juridisk tidskrift 60.
³ E.g.: (Abdel Wahab, Katsh, and Rainey 2012p. 3.)
⁴ E.g.: “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 and Rifkin 2001) ADR as a part of the access to justice movement originated in the USA in the 1970s and 1980s demanding for 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 resembles closely state litigation. Major attributes differ between different ADR applications but most often ADR is seen as alternative to litigation due 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 alternative in all these attributes. However, it should
impact of ODR procedures vary depending on the specific procedure, i.e. is the object of examination the widely used example of ecommerce forum’s platform such as eBay’s Resolution center, 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 than private ODR without adopting the terminology.6

We should discuss funding, dispute categories, amount of asynchronous/synchronous communication, role of third parties and level of technological implementation in addition to chosen enforcement mechanisms in order to reach a lasting definition. However, this is not particularly fruitful 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. Here, narrowing the scope to particular ODR types is not necessary. For a working definition I would suggest using umbrella term of dispute resolution and technology (DR&T) combining both public and private technology-augmented procedures and thus, adopting exceptionally wide definition.

These 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.

Co-operation of Sovereign States as a Basis of International Procedural Law

This tension between private ODR and state’s monopoly becomes particularly visible in cross-border cases where government inaction in promoting efficient state litigation for cross-border disputes has led to particularly high litigation thresholds, thus limiting the access to effective legal remedies through the courts. The need for state-governed resolution models

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5 E.g.: (Vilalta 2012p. 114.)

6 Several ODR scholars have emphasized that public court systems are the next logical step for ODR expansion. E.g.: (Schultz 2003, 1); (Vermeys and Benyekhlef 2012, 295)
for Internet disputes has emerged recently and, at least partly, unexpectedly. The emergence of the Internet has enabled communication and interaction regardless of location and state borders and has contributed significantly to globalisation. Importance of Internet has rapidly increased during the last two decades, creating new interpretative legal problems and resulting in the need for technology-sensitive legislation, as well as technology-sensitive dispute resolution methods. While the Internet has changed the legal field in its entirety, disputes arising from Internet have also changed procedural law, with these disputes constituting a new chapter in civil cases.

One widely discussed example of new types of disputes is e-commerce disputes. The proliferation of Internet commerce has brought with it a significant rise of small value, location-independent and thus often cross-border B2B, B2C or C2C disputes related to the sale of goods. 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 new challenge for state 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. The reason why such cases usually do not find their resolution in the courtroom is that the threshold for taking small value claims to court is generally considered to be high and cross-border cases are also often regarded as time-consuming and more difficult due to jurisdiction and choice of law issues. Furthermore, because of the low value of the dispute, litigation is seen as too burdensome when compared with the best-case solution. At the same time, the need to provide sufficient consumer

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7 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: (Rule 2002)
8 (Rijgersberg, p. 3) Similarly on Finnish legal theory see: (Syrjänen 2008)
9 E.g. (Lastowka 2010)
10 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 which were created by local rules for annual fairs, collecting a number out-of-town vendors and buyers. See: (Rule 2002) 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.
11 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) Although Internet disputes for 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) In contrast, Rule focuses on ODR for business, that is, for B2C and B2B disputes. See: (Rule 2002)
12 Similarly see: (Rule 2002) This is the starting point of EU’s digital agenda as well. See: (Commission pp. 12-13.)
protection and the needs of the marketplace call for efficient resolution of such claims in order to build consumer trust in online commerce.\textsuperscript{13}

Although the need to promote effective resolution methods is acknowledged by governmental actors, attempts at creating such cross-border instruments through joint agreement of sovereign states have as of yet provided little 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, creation of instruments and implementation of such instruments as delegation of power to such instruments could be considered to diminish the state’s own sovereign power in relation to other states. In addition to such preliminary issues, creation of cross-border instruments requires discussion on jurisdiction, choice of law, cross-border enforcement mechanisms, and coherence of such choices in relation to other international instruments.

Although some ODR procedures have developed independently from governmental support and the operational field is still largely unregulated, two main regulatory projects are taken by transnational intergovernmental organisations to promote and regulate ODR. In the EU, the Commission has stated in its Digital Agenda for Europe already in 2010 that efficiency of the Single Market depends on encouraging consumer trust through effective out-of-court dispute resolution methods for e-commerce. Commission’s proposal for ODR Regulation (524/2013) together with the revised ADR Directive (2103/11/EU) were accepted by the Parliament on 12.3.2013 and after publication have entered into force on 8.7.2013. The Directive promotes use of approved ADR institutions, which comply with the 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 ADR Directive and ODR Regulation are voluntary for the consumer and the trader. Offline disputes are excluded from the ODR Regulation’s scope. The Regulation does not prevent the parties from seeking redress in the public courts. The ADR Directive obligates the Member states to ensure close co-operation between ADR entities and national enforcement authorities but as such, contains no specific clauses on enforcement.

Since 2010, The United Nations Commission on International Trade Law, UNCITRAL, has set out to develop a common framework for low-value e-commerce ODR. The UNCITRAL Working Group III’s agenda covers formulation of procedural rules and substantive rules as well as standards for service providers and enforcement mechanism. The Working Group’s objective is to develop an effective cross-border enforcement mechanism for ODR and currently, two-track solution is discussed where the first track

\textsuperscript{13} 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 i.e. (Hörnle 2009); (Svantesson cop. 2007); (Katsh and Rifkin 2001) Also the EU Commission sees promoting ADR through union-wide strategy as a means of improving consumer access to legal remedies in ecommerce. See: (Commission 12-13.)
provides for non-binding facilitated negotiation and mediation and the second track results in 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 acknowledgement of cross-border enforcement as one of the most controversial challenges of ODR has meaning in itself for future policy-making.

For these reasons, many online auction sites have created their own ODR procedures for solving disputes between sellers and bidders,\(^{14}\) instead of waiting for government action to come up with such methods, and thereby have 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.\(^{15}\)

Based on quantity alone, ODR’s promise of improved buyer redress online becomes difficult to contradict. The scale of ecommerce disputed solved through ODR has increased to a noteworthy level as eBay’s Resolution Center now handles over 60,000,000 e-commerce disputes a year.\(^ {16}\) Still, ODR has not proved to be the success story it was meant to be, as is stated by several scholars.\(^ {17}\) However, ODR is not limited to resolving small claims arising from ecommerce but, instead, ODR is gaining ground in resolving commercial and Internet-specific disputes as well, through dispute-specific procedures or online arbitration. Another much referenced example of enforceable ODR is ICANN’s UDRP procedure where a binding third-party decision on domain name dispute is given and directly enforced through ICANN.\(^ {18}\) Although ODR’s potential has not actualized in its entirety, it is evident that ODR is taking an important role in resolving such Internet-related disputes which otherwise would fall on stumbling blocks of cross-border jurisdiction and general litigation threshold.

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\(^{14}\) The most famous example of this is the eBay’s Resolution Center, found on the auction site’s web page: [http://resolutioncenter.ebay.com/](http://resolutioncenter.ebay.com/). eBay has also attracted academic interest: Katsh and Rifkin had undertaken a pilot project with eBay on ODR to examine disputes arising from auction transactions. See: (Katsh and Rifkin 2001)

\(^{15}\) See e.g.: (Crawford 2001-2002, p. 383.)

\(^{16}\) (Katsh 2012p. 2.)

\(^{17}\) (Cortés 2010)

\(^{18}\) ICANN (Internet Registry for Assigned Names and Numbers) is responsible for the distribution of unique Internet Protocol (IP) address spaces, which are an essential part of the structure and functioning of Internet. ICANN has established its own dispute resolution model called Uniform Dispute Resolution Policy (UDRP) in co-operation with World Intellectual Property Organisation (WIPO). Because in the end, ICANN is a private organisation entrusted with responsibilities of public interest, it has been criticised for lack of adequate accountability mechanisms. See: (Rijgersberg p. 69-, 215.) For UDRP from global governance perspective, see: (Calliess and Renner 2009, 260), for comparison between eBay and ICANN as private legal systems, see: (Schultz 2007-2008, 151-193)
This in turn 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 all disputants. This deficiency could quickly lead to private dispute resolution taking over the role of safeguarding public interests in dispute resolution.

Traditionally, private ordering is seen to be in contradiction with state litigation. Thomas Schultz describes ADR to entail “resistance to government” which expands to ODR as well.\(^{19}\) However, the constitutional crisis created by ODR could more logically be construed through the challenge it places on state monopoly on dispute resolution when taken into consideration that ODR cannot be reduced to online ADR. In ODR literature Rainey and Katsh have emphasized that ODR in itself changes the traditional role and responsibilities of the state.\(^{20}\) It should be noted that in creating such an issue for constitutional theory and procedural law doctrine, ODR does not necessarily have to become mainstream. Instead, already the emergence of ODR creates disturbances in state monopoly.

This article examines the state monopoly on dispute resolution 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. This paper explores how the emergence of the private management of public interests is changing the function of the judiciary.\(^{21}\)

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\(^{19}\) See: (Schultz 2003, 1) However, 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. See: (Schultz 2003p. 10.)

\(^{20}\) See: (Rainey and Katsh 2012p. 248.)

\(^{21}\) In this paper only cross-border civil cases are examined. The reasons for this are various. First, unlike in criminal law, nation states offer parties a choice of resolution models in civil cases, a fact which enables private dispute resolution in the first place. Second, although cross-border criminal procedures face problems partly similar to those of cross-border civil procedures, there are several agreements and other measures for fighting cross-border criminality, perhaps because the political consensus necessary for introducing new multilateral agreements is easier to find “against a common foe”. This difference in instruments means that civil procedure faces unique challenges in comparison to criminal procedure, and therefore their joint treatment would not benefit the already wide-ranging objectives of this paper. A point of interest is that for historical reasons cross-border criminal procedure was often excluded from procedural law examinations, for it was considered criminal law instead of procedural law. In general see: (Koulu 2003)
First, I claim that the national legal system, derived from social contract theories of Hobbes and Locke and upheld within the political ideology of liberalism, 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 a state-governed resolution model for 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. As a legal fiction, the state monopoly is no longer useful, and at the same time it 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.

Dispute Resolution Monopoly as Sovereignty – the State’s Responsibility for Effective Government

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 the necessary prerequisites for effective cross-border dispute resolution. The creation of effective solutions to these issues of private international law requires that sovereignty issues are 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. This has aptly been described as the inherent double standard of international procedural law, which refers

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22 Another interesting perspective is Koskenniemi’s analogy between sovereignty and liberty. Koskenniemi claims that in international law sovereignty plays an analogous role to that of liberty in liberal discourse. (Koskenniemi 2005)

23 These three issues are of often depicted as private international law (or conflict of laws). On private international law issues in general and in relation to internet issues in particular see: (Svantesson cop. 2007)

24 On international legal co-operation and territorial jurisdiction see: (Nissen 2004p. 124.)
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.\textsuperscript{25}

In relation to external states, the nation state’s sole and inviolable jurisdiction on its own soil forms the foundation for international co-operation in the field of procedural law.\textsuperscript{26} This can also be phrased differently; the state’s territorial jurisdiction prevents other states from claiming jurisdiction in a particular legal dispute. Based on co-operation instruments between sovereign states, 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 monopolised 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, the territorial jurisdiction guards access to state’s monopoly on violence and as such, protects the \textit{status quo} of upholding the sovereign power, 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 to this, justification for 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. Such disputes do not belong to the jurisdiction of any specific state, and no

\textsuperscript{25} (Koulu 2003) However, Koulu states that the development of both the ECHR and EU has brought about a change of attitudes in international procedural law and isolationism is no longer a possibility in international co-operation.

\textsuperscript{26} This truism is often so self-evident that it is not necessary to express it in words; however, it is still presumed template for formulating co-operation instruments. Such acknowledgement of territorial jurisdiction can be found, for example, in the preamble and general provisions of Brussels I Regulation (44/2001).
state can claim sole jurisdiction over them. Hence, no monopoly can exist and no state can violate other State’s right. In this void of sovereign jurisdiction, ODR has evolved 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 in international procedural law is pronouncedly geographical: instead of upholding close connections to geographical pointers of State borders, new conflict types resign such qualifications. It follows from this anomaly that neither can a State violate other 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.\textsuperscript{27} In this function, the State’s monopoly on dispute resolution connects with its sovereignty. Firstly, 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 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 interpreted into state monopoly on dispute resolution is poorly fitted with cross-border Internet disputes. It is noteworthy that this claim on ineffectiveness of state monopoly as a justification model applies specifically in cross-border context. On the national level, instead, 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 uniqueness of Internet disputes might cause other obstacles for redress.\textsuperscript{28}

\textsuperscript{27} 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 centered around 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: (Teubner 1997p. 6.)

\textsuperscript{28} The question whether such distinction between international and national levels should be made in the future research as well is well-founded but remains outside the scope of this paper.
However, the sovereign’s monopoly still incorporates the general principles and conceptualizations of procedural law, operating as the justificatory element of dispute resolution. In order to understand the reasons for adopting such construction it is necessary to look at the theoretical foundations of 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 advocating absolutism for the sovereign ruler and John Locke’s *Two Treatises of Government* (1689) which places limits to the sovereign’s power. Surprisingly, traces of these two theories can be found in the justification structure of international procedural law still today.²⁹

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. Both Locke and Hobbes see that the social contract surrenders the penal authority and monopoly on dispute resolution to the Sovereign.

*Absolute Transference of Power to Hobbes’ 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. There is no existing penal authority in the state of nature for Hobbes, for there are no misdemeanours or obligations. 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”.³⁰ As Kingsbury and Straumann formulate it, in the state of nature “there is nothing, no possible violation that could trigger a right to punish”.³¹ 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

²⁹ Hobbes is also widely discussed in modern international law. E.g.: (Corner 2011, 50); (Goldsmith and Levinson 2008-2009, 1791-1868)
³⁰ (Hobbes and Shapiro 2010) 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: (Nagel 1959, p. 74, 82-83.)
³¹ (Kingsbury and Straumann 2010, p. 33.)
established by acquisition or institution,\textsuperscript{32} the Sovereign has the right of judicature in all cases concerning law and fact.\textsuperscript{33}

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.\textsuperscript{34} 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.\textsuperscript{35} Tarlton’s reading of Hobbes 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: on the one hand the Sovereign resolves internal conflicts and on the other hand guarantees protection against external attack.\textsuperscript{36} Kingsbury and Straumann depict successfully the challenge cross-border disputes place on state’s monopoly and 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 binary concept, including the external and the internal aspect. The external sovereignty protects the sovereign from intervention of other sovereigns and simultaneously limits the sovereign’s actions towards other sovereigns. In the external relation the state’s scope of power is limited to inaction.

\textsuperscript{32} According to Tarlton’s reading, what Hobbes meant by acquisition was the fear of the would-be sovereign, while institution refers to the fear of others. Tarlton criticizes later scholars for disregarding some central themes in Hobbes’s theory, such as the creation and maintenance of a stable political system. According to Tarlton, For Hobbes it is essential to examine what constitutes a recognizable process for creating the Commonwealth in order to understand the legitimacy of that order. See: (Tarlton 1978 pp. 307-327, p. 316-322, 308.)

\textsuperscript{33} (Hobbes and Shapiro 2010)

\textsuperscript{34} (Tarlton 1978, p. 321.)Tarlton bases his reading on a quotation in the 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: (Hobbes and Shapiro 2010)

\textsuperscript{35} (Stanlick 2006, pp. 552-565, p. 552, 558-561.)

\textsuperscript{36} (Kingsbury and Straumann 2010, pp. 22-43, p. 43.)
For Hobbes the state of nature between different sovereign states translates into a vacuum of coherent power, a normative no-mans-land, where the power of no single sovereign reaches in. The internal aspect of sovereignty, namely the responsibility to provide effective dispute resolution for its citizens, has been up until now sufficiently provided for by local territorial methods and by such relatively insignificant consent-based methods as lex mercatoria for cross-border situations. However, in the ODR era 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 co-operation, the Sovereigns all fail in their internal duties as individuals’ actions would not be tied with the nation state but dispute resolution for disputes arising from these actions is.

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. 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. 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. Consequently, sovereign power is given to the communal majority by consent, in order to preserve the individual’s right to property and to act for the good of the society.

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37 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: (Calliess and Renner 2009, 260).
38 See i.e.: (Devine 1975, pp. 736-768, 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.
39 (Locke and Yrjönsuuri 1995)
40 (Locke and Yrjönsuuri 1995)
41 (Locke and Yrjönsuuri 1995) Then again, Moots and Forster argue that Locke did not base the social contract on consent but on “deeper philosophical foundation”. (Moots and Forster 2010, pp. 35-45, p. 40.)
42 (Locke and Yrjönsuuri 1995)
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 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”. 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. However, there exist no cultural and national commonalities between states on a global level which 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.

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 growing importance of private dispute resolution in the ODR era can be interpreted as limiting the Sovereign’s means of providing protection and, at the same time, limiting sovereign power, without authorization from the nation state.

43 (Locke and Yrjönsuuri 1995)
44 (Cox 1960)
45 (Cox 1960)
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 EU, UNCITRAL and ECHR is increasing. In addition, the traditional dispute resolution methods of state litigation are still largely non-existant for cross-border Internet disputes, granted that public DR methods are increasingly promoted by the EU. Cross-border co-operation for providing legal instruments to uphold legal order in the cross-border area is increasingly developed but as of yet no legal framework has been established through it.

However, ecommerce has not collapsed into anarchy although no sovereign power reaches into the cross-border external area. Instead, to certain extent, societal peace and legal order in this area do 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.

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 certain extent the reality in internal dispute resolution.

46 For example, the EU has promoted access to cross-border civil litigation by EU Regulation (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 euros. Furthermore, the ODR Regulation (524/2013) and ADR Directive (2013/11/EC) entered into force July 8, 2013. The objective behind this legislation is to enhance consumer redress in cross-border online transactions through out-of-court ODR, and thus, to facilitate the development of the online Single Market.

47 In legal systems theory, both Teubner and Calliess have emphasized 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, 3); (Calliess, p. 185-216); (Calliess and Renner 2009, 260). Similarly in Finnish legal theory, Syrjänen questions 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) The argument on sovereignty’s inability to answer legal issues in transnational environment is quite convincing, as its main hypothesis on the extent and nature of the change that has taken place in society since the 17th century is almost 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 out that the idea of a state monopoly describes, in reality, the present state of conflict management, we need to ask if 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 means of understanding justification of dispute resolution.

**Is Private Conflict Management Truly New?**

*Conceptualization of State Monopoly in Relation to the Conflict Reality*

It can be claimed that a certain state monopoly on dispute resolution does indeed exist, and it is a result of the state’s maintenance of its sovereignty. Furthermore, such a monopoly is adopted as a theoretical concept for explaining state interests in cross-border disputes. However, this monopoly is not, nor has it 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.

First of all, private dispute resolution has existed ever since the creation of nation-state sovereignty, which is often connected with the 1648 peace of Westphalia. Although the centralized modern state expanded its power through the introduction of a state monopoly on conflict resolution, examples of informal community-based methods of conflict management, settlement talks and mock courts functioning outside the public dispute resolution system with or without acknowledgement from the central power can be found in most modern states. Sometimes such informal conflict management models have been encouraged by the Sovereign as well. The newest examples of public encouragement of ADR methods are UNCITRAL model rules and the EU’s ODR Regulation discussed earlier on.

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48 For example, a legislative proposal for establishing informal settlement courts in Finland was drafted at the request of the Russian Tsar. Although no such courts were ultimately introduced, the operational principles behind the proposal greatly resembled the ideals of ADR. See: (Nousiainen 1993)
Secondly, state-run conflict resolution has traditionally been reserved for disputes that are labelled as ‘legal’.\(^\text{49}\) 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.\(^\text{50}\) A point of interest is that Hobbes defined the Sovereign’s right to judicature as including deciding “all Controversies, which may arise concerning Law, wither Civill, or Naturall, or concerning Fact”.\(^\text{51}\) Although at first sight it would seem that Hobbes’s right to judicature belonged exclusively to the Sovereign, references to the dichotomies of civil law/ natural law and legal/factual can be interpreted as restricting the scope of judicature to specifically ‘legal’ cases concerning individual rights, state protection of these rights, and granting relief for assaults on these rights. Because the right of judicature is one of the Sovereign’s means of maintaining the social order, it would be enough to limit the right of judicature to conflicts threatening that order.

However, it can be deduced from Hobbes’s concept of the Sovereign’s duty to give protection that in his theory the Sovereign has no interest in internal conflicts that do not have an effect on its objectives. Instead, involvement in private issues without any larger bearing would be unnecessary and also undesirable for the Sovereign, as they would increase the workload without counterbalance. Thus, we can argue that Hobbes did not mean all disputes to be solved by the Sovereign; rather he was referring only to conflicts that became legal, thereby threatening internal peace.

\(^\text{49}\) What makes a conflict ‘legal’ is an important question for research into dispute resolution. Unfortunately, it is not possible to discuss issues related to legal earmarking 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 still dormant. When it escalates into a matter of law, the conflict emerges as a dispute. Havansi’s definition, based on the wording of the Finnish Mediation Act (663/2005, repealed by new Finnish Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts, 394/2011) and the Finnish Code of Judicial Procedure (4/1734), mainly follows the same line, although he uses dispute as a synonym for a civil case. See closer: (Havansi 2005, pp. 10, 12-13.) Trakman fears that applying the justice system’s narrow definitions of ‘legal’ “circumscribe the social dimensions of family, business, and political conflict”. See: (Trakman 2001, pp. 919-930, p. 919.) On transformation into ‘legal’ and viceversa, see e.g.: (Koulu 2012)

\(^\text{50}\) On the boundaries between public and private interests and the courts’ power to adjudicate, especially from the viewpoint of 19th century German procedure, see: (Nousiainen 1993)

\(^\text{51}\) (Hobbes and Shapiro 2010)
Thirdly, it is always up to the disputing parties to decide what disputes they take to the official dispute resolution model.\textsuperscript{52} According to the discretionary principle, disputing parties are free to end their dispute by a joint declaration of will at any point of the legal proceedings; they can decide how and where they resolve their conflict, whether they wish to engage neutral third parties at all, or whether to withdraw their claims. The legal system recognises parties’ right to decide on the proceedings and jointly stipulate the content of court’s decision even in non-discretionary cases, such as child custody and access.\textsuperscript{53}

Public interest in all conflict management is understood in connection with due process requirements. According to our modern doctrine, the sovereign state has an obligation to guarantee an individual’s right to a fair trial, content of which can be derived from case law of European Court of Human Rights. Scholars of international arbitration perceive that the legitimacy of dispute resolution is a result of these quality standards, these due process requirements.\textsuperscript{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.\textsuperscript{55}

\textit{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 are overlapping. 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.\textsuperscript{56} In other words, decisions of private dispute resolution are enforced through the

\textsuperscript{52} 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 the sphere of state-governed litigation and which conflicts are left outside to be resolved solely through party consent. According to Koulu, this is an access to justice issue in the broad sense. See: (Koulu 2012)

\textsuperscript{53} The importance of public interests is customarily highlighted in cases involving children, where the courts have to take into consideration the best interest of the child, regardless of the parents’ opinions. In non-discretionary cases, the parties’ scope for action is limited by public interests. However, as the Child Custody and Right of Access Act § 10 states, the court has a duty to base its decision on the solution amicably agreed upon by the parties involved, if there is no cause to suspect this to be against the child’s best interest.

\textsuperscript{54} See, i.e., (Kurkela and Turunen 2010)

\textsuperscript{55} (Devine 1975, p. 743-744, 747, 750-751.) According to Moots and Forster, Locke places the legitimacy of decision-making on the process instead of the content.

\textsuperscript{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: (Weber cop. 1978) Rijgersberg uses Weber’s definition
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. However, rather than being based on the use of force, these models mostly rely on the participation of parties and social control instead.

Although these mechanisms provide for the same end result of enforcing a decision, the operational methods between state enforcement and private mechanisms differ significantly. It could be claimed that such private mechanisms should not be considered as substitutes of official enforcement. In most jurisdictions, ODR decisions have to receive an exequatur before they are given access to the public enforcement mechanism. Consequently, claims that the rise of ODR has somehow undermined the State’s monopoly on violence are rare.

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, 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. 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 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, pp. 16-17.)

On escrows, chargebacks and feedback systems see e.g. (Cortés 2010)

For example, the much researched ICANN (Internet Corporation for Assigned Names and Numbers) governs the Internet domain-name system and has the sole jurisdiction for domain-name disputes. ICANN also effectively organizes enforcement through its clients’ contractual obligation, and no governmental enforcement mechanism is needed. See, i.e., (Hörnle 2009) In addition, internet market places 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 and Rifkin 2001)

Discussion on the social functions of dispute resolution is a classic in Scandinavian procedural law, although it is sometimes criticized for its unscientific character. On functions in general see: (Ervasti 2002, 47-72). On criticism see, i.e., (Leppänen 1998)

Then again, Kurkela and Turunen argue that arbitration is not entirely private, the same argument Hörnle later repeats. See: (Kurkela and Turunen 2010)

(Hörnle 2009)
to litigation; instead, can be seen as as “bargaining in the shadow of the law”, where the law also creates the context for out-of-court private settlements.\textsuperscript{62} Then again, this view can be criticised by claiming that, in the end, such an influence from litigation on private dispute resolution is hard to measure and might, in fact, be non-existent.

Consequently, private and public dispute resolution systems are, have always been and should remain in a process of interaction and overlap in various different ways. Furthermore, system overlap is also on the EU’s agenda as the ODR Regulation and ADR Directive depict. This development places a growing amount of pressure on the Member States to create, regulate, and promote both public and private ODR models and, at the same time, bring private ODR processes more and more under governmental supervision.\textsuperscript{63}

Because of this overlap, which shows that the state monopoly has never been absolute, we can question the original 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 our modern society. However, conflict reality does not in itself challenge the claim made earlier that the state monopoly on dispute resolution is the conceptual foundation through which we perceive and understand dispute resolution as a whole. Thus, state monopoly linked with its enforcement mechanism forms the basis for cross-border civil litigation, recognition and enforcement, and also is the starting point for transnational legal co-operation.

\textit{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 amount of cases left outside the litigation scope

\textsuperscript{62} The figure of speech is much used in ADR literature. For the original article see: (Mnookin and Kornhauser 1978-1979, p.950.), p. 950. For ODR uses i.e.: (Lodder and Zeleznikow cop. 2010)

\textsuperscript{63} Growing governmental control has sparked a lively 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) At the same time, Schultz considers that the goodwill value of litigation is highly beneficial for the reliability of ODR’s and suggests that ODR and public dispute resolution are interconnected to larger extent. See: (Schulz 2004-2005, pp. 89-92, 104.)
has increased due to the Internet and the sovereign States have not as of yet developed effective dispute resolution mechanisms as this would call for signing away parts of sovereign power to such co-operation instruments, and 2) implementing technology into dispute resolution changes the operation of legal system due to its transformative power.\textsuperscript{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 of 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.

\textbf{The Emergence of ODR – How is Private Dispute Resolution Changing our Procedural Sovereignty?}

In the previous section we established that the state’s monopoly on dispute resolution is used as a conceptual framework for understanding sovereignty issues in procedural law. In addition to this, we have verified that several disputes, legal and other, are left outside the scope of state resolution, due to their nature or by the specific consent of the parties involved. However, the number of disputes resolved outside the scope of state resolution has quickly proliferated through the use of ODR procedures, which give redress that cannot be granted through litigation.\textsuperscript{65} 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.

\textit{The Growing Need for Regulation}

\textsuperscript{64} Susskind sees ODR as one of ten “disruptive legal technologies that together will fundamentally change the face of legal service”. See: (Susskind 2010) Susskind claims that different technology applications such as automated document assembly, legal open-sourcing, and online legal guidance have the potential to challenge the operational models of legal business significantly, although computers cannot replace all legal work. (Susskind 2010) Similarly, Katsh and Rifkin have highlighted its important role by coining the phrase of technology as the fourth party, a conceptualization later widely adopted by several writers. See: (Katsh and Rifkin 2001)

\textsuperscript{65} 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. Fictional ODR samples for cross-border cases can be found in the legal literature. See, i.e., (Hörnle 2009) For ODR platform descriptions see (Lodder and Zeleznikow cop. 2010) On ODR history in general, see: (Katsh and Rifkin 2001)
The legal policy making 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. In its original Communication, the Commission describes the shortcomings of state-governed litigation through e-commerce examples related to domestic sale of goods and to cross-border travel agency and thus indirectly admits that the current litigation model will also be unable to resolve such disputes in the future. In both examples, litigation entails a lengthy and expensive court procedure that all parties wish to avoid. 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.

As is evident from the Commission’s communication, a wide-spread consensus on the limitations of litigation for Internet disputes exists, and these limitations represent an obstacle to effective access to justice. The EU is willing to plug the hole created by the

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66 See: (Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, p. 7-9.).

67 Although the first example refers to a purely domestic case of sale of furniture, where jurisdictional issues are normally easier to solve than in cross-border cases, domestic cases can also gain from ODR procedures, as the Commission highlights. In this case the sale of goods had been conducted on the Internet. According to a common ODR perspective, internet-related disputes are best solved online in the same 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 for offline disputes as well. See: (Katsh and Wing 2006-2007, p. 21.) The often repeated division between ODR for online and offline disputes is probably the result of ODR’s origin as a dispute resolution model targeted specifically for e-commerce.

68 In the second example, two consumers try to get a refund for the extra expenses they incurred while on a package holiday booked using a service provided in another Member State. The second example emphasizes the problems of cross-border litigation and consumer disputes.

69 The ODR Regulation is interlinked with the ADR Directive. The latter will ensure the existence of quality ADR procedures in all Member States as up until now, ODR procedures have differed significantly from state to state in terms of availability, quality, and the level of information provided. In addition, the ODR Regulation would establish a platform for finding the best available ADR entity. See: Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) COM (2011) 793 final and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes (Regulation on Consumer ODR) COM (2011) 794 final were both published on November 29, 2011. For an overview, see: Hörnle J, 'Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?' (2012) Queen Mary School of Law Legal Studies Research Paper No 122/2012.

70 See also: (Katsh and Rifkin 2001); (Katsh and Rifkin 2001; Katsh 2007, 97) Ethan Katsh. 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace' (2007) 21(2) International Review of Law, Computers & Technology 97; M. Ethan Katsh and Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace (Jossey-Bass 2001) 226 p

Ethan Katsh. 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace' (2007) 21(2) International Review of Law, Computers & Technology 97; M. Ethan Katsh and Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace (Jossey-Bass 2001) 226 p

ineffectiveness of state-governed dispute resolution in cross-border cases by promoting ODR,\textsuperscript{71} 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 appliances of dispute resolution and technology can be either public or private and as such this distinction is rapidly becoming irrelevant. In addition, it is becoming apparent that the new field of ODR expansion would logically be the public court systems. In any case, different dispute resolution methods are converging.\textsuperscript{72} Hence, we should discard the traditional separation between courtroom technology and ODR and adopt suitable terminology for a joint approach, i.e. DR&T. It follows from such approach that we have to focus on shared justification grounds of both traditions instead of building justification for court-annexed ODR from sovereignty and for private ODR from mutual agreement of the parties.

I have stated earlier, Internet disputes are changing sovereignty in dispute resolution in several ways. Most notably, both the increase of 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.\textsuperscript{73}

In addition, ODR constitutes a geographical change, as it is disengaging from the borders of the nation state and is no longer tied to the state’s jurisdiction on its own soil. Instead, it is creating its own jurisdiction and its own fundamental justification. Most notably, ODR is linked to larger changes in the world, in other words to globalization and legal polycentricism.\textsuperscript{74} Europeanization, understood as the delegation of legislative power from Member States to the EU, the emergence of soft law and the growing importance of

\textsuperscript{71} However, 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.

\textsuperscript{72} (Katsh 2012p. 12.)

\textsuperscript{73} From systems theory perspective, this might be problematic as law is a closed self-referential system which renews itself through such autopoiesis and without accessible legal communications this reproduction stagnates. See: (Calliess p. 196.) However, it could be claimed that private ordering carries out the traditional function of precedents in other ways.

\textsuperscript{74} On polycentric law see e.g. (Arnaud 1995, p. 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 1997p. 5.)()}
international legal co-operation and role of international NGOs are all contributing to the fragmentation and plurality of the legal arena and, simultaneously, to diminishing external sovereignty. These tremendous shifts are indicative of the decreasing importance of national legislation and the courts in general in late modern society.  

Disintegrating State Monopoly in Cross-Border Cases

In legal theory, both Tuori and Syrjänen suggest the disintegration of state sovereignty. They both argue that sovereignty as the interpretative framework of law is old-fashioned and has outlived its usefulness. Syrjänen claims that considering societal peace as the product of state sovereignty 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. 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.

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 first hand, it is a monopoly and on the other hand, it translates into an obligation of the State to provide effective dispute resolution systems for its

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75 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) In Rijgersberg’s categorization of globalization approaches, views on the diminishing role of the State r could be considered transformalist or even hyperglobalist in comparison to skeptical approaches, which deny the uniqueness of globalization. See (Rijgersberg, p. 52.)
76 (Syrjänen 2008)
77 (Tuori 1990)
citizens. The practical importance of this becomes even more pronounced in Scandinavian welfare states where the State’s role has traditionally been strong. 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.

How Should We Understand Sovereignty?

Earlier in this paper, I demonstrated how the dispute resolution system is interconnected with state sovereignty in early modern social contract theories, which form the basic components for understanding the state monopoly on dispute resolution. I also stated that the state monopoly should not be understood as the factual reality of legal disputes; instead, it is a conceptual platform for bringing sovereignty issues into dispute resolution. Through the emergence of private dispute resolution, the role of this conceptual platform is changing, and we face two separate options for coping with change. First, we might be able to hold on to the concept of a state monopoly on dispute resolution by interpreting private dispute resolution as the delegation of power from the State to private operators. Second, if we conclude that conserving the concept of the state monopoly as a part of state sovereignty is not worth the trouble, we have to face the difficult question of replacing it with a working theoretical framework.

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

I began this paper with the provocative claim that cross-border dispute resolution is in crisis because the nation state is failing to provide effective litigation services for Internet disputes, and this impediment to access to justice signifies a failure of the State to perform one of the central tasks of its sovereign power. When examining this failure through the theory of Locke, which states that the social contract obliges governments to provide protection, welfare and property rights, it would seem that the State is failing in its task when it is unable to provide effective redress. Because social objectives dictate the scope of sovereign power, failure to provide protection results in the disintegration of sovereignty.

However, 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’ 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 the disintegration of sovereignty; rather, it simply changes its appearance. It seems that the claims made in the previous chapter on the 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 a 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 acknowledgement 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 modern world where the increase of cross-border disputes has created a crisis of sovereignty because territorial jurisdiction fails to function in an international context. For example, Hobbes’s theory presupposes that sovereignty exists in connection and within the limited territory of a nation-state. Hence, no binding international sovereign can be placed above the national sovereigns, for such an acknowledgement 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.\(^78\)

It is apparent that in order to understand and develop the current international legal order, a constitutional theory capable of dealing with the complex nature of cross-border conflicts is required. Even if Hobbes’s social contract theory could be reframed and reinterpreted as containing an international 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 the situation today. Furthermore, it is hard to

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78 (Stanlick 2006, p. 562.)
see what advantages such a theory could offer. For these reasons, we need to examine how an abandoning of the concept of the state monopoly and a reinterpretation of sovereignty could accommodate the new procedural order.

**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 growing importance of cross-border ODR have only served to further emphasise private dispute resolution; they have not introduced a completely new form of dispute resolution.\(^7^9\) 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.\(^8^0\) For Rijgersberg, the state maintains the responsibility for providing public security, ensuring welfare and protecting property rights.\(^8^1\) Rijgersberg’s claim that, from the perspective of globalisation, constitutional responsibilities can be interpreted as interdependency provides us with a useful insight. However, Rijgersberg’s reinterpretation does not bring sovereignty any additional resolutionary 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 fact of the disintegrated state monopoly on dispute resolution.

Although modern constitutional theory owes much to such writers as 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.

\(^7^9\) However, the new converging methods of private and public DR could very well develop completely new understanding of conflict management.

\(^8^0\) (Rijgersberg p. 65.)

\(^8^1\) (Rijgersberg p. 77-78.)
Conclusions

It can be argued that now ODR has become established there is no return to resolving Internet disputes in court. As some writers have claimed and as EU Commission is also stating, ODR procedures might be the best option for solving at least some online disputes. 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 coexist, overlap and converge, and, at least to some extent, require each other. However, this means that the concept of a state monopoly on dispute resolution does not describe the current state of conflict management in Western societies. Furthermore, as I have demonstrated, there have always been disputes and dispute resolution outside formal state litigation. Nevertheless, this private management of disputes 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. These disputes are often consumer disputes where the state’s responsibility to provide protection for the weaker party actualises. In addition, by nature they are often legal conflicts that could be processed in state courts, were it not for the hindrances imposed by problems of cross-border jurisdiction, the risk of high legal expenses, and the small value of the dispute. This changes the field of dispute resolution significantly. After emergence of ODR, it is no longer feasible to of 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.

The efficacy of the concept of state sovereignty as an interpretive framework is based on its ability to reflect the needs and, to some extent, the reality of conflict management in society; however, as both the needs and the reality have significantly changed, we are left no other option than to reinterpret the theoretical basis of procedural law – and to discard the state monopoly as a focal concept.

82 E.g. see: (Rule 2002)
As research into procedural law has revealed, parties in a dispute have the tendency to find the resolution model best suited to their common needs. In many cases, this translates into the quickest and cheapest procedure. The state monopoly has been responsible for providing the framework for their choice and 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 as well. 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.

I have argued that the structure of cross-border civil litigation is based on the concept of a state monopoly on dispute resolution, which explains some of the difficulties in adopting a cross-border civil procedure system. It is clear that further theoretical research on the implications of dispute resolution and technology is needed. As DR&T research is still in a pre-paradigmatic phase, such theory formulation is fundamental for future research. Although this paper highlights the uselessness of state monopoly in understanding justification of dispute resolution, sovereignty as a justificatory concept connects with other explanatory models such as mutual agreement (often used to understand ADR’s jurisdiction) and quality standards (adjudicative procedures and enforcement). The interplay of these different justificatory models is essential for reconstructing the state’s role in future dispute resolution. However, it could be proposed that joint DR&T theory of litigation and ODR should look at the content of DR (i.e. due process values) as the source of justification, as this would suggest a theoretically sound common ground for all DR and put emphasis on DR’s endgame of improving access to justice.

References

83 (Wing and Rainey 2012p. 25.) Such theory should also incorporate deeper understanding of the ways technology changes communication and, as such, interdisciplinary approaches become necessary for legal research as well.


Hobbes, Thomas, and Ian Shapiro. 2010. Leviathan or the matter, forme, & power of a common-wealth ecclesiasticall and civil. Rethinking the western tradition. New Haven: Yale University Press.


