

The Juridic Governance of the Internet

[Working Title]
by
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Abstract

For internet governance, Facebook’s Oversight Board is just the beginning. As the governance efforts of online platforms intensify, so does the regulatory as well as public demand for more accountability, better rights protection, and more effective remedies vis-à-vis online platforms. Simply put, many ask for a better rule of law for the internet. In the internet’s heterarchy, however, advancing a rule of law is not an easy task as cyberspace lacks overarching norm-setters as well as universal norm-enforcers. This paper identifies and conceptualizes a major piece of the internet’s rule of law puzzle: *Juridic Governance*. Juridic Governance transplants the method of judicial decision-making and the logics of judicial review of administrative action to private bodies outside the judiciary. In short, Juridic Governance uses adjudication beyond courts to control the power amassed by a few online companies. The reason for this is simple: We relied on adjudication and courts to control the nation-state as the dominant power of the past. Juridic Governance updates adjudication to tame the powers of the future. This paper provides an interdisciplinary analytical framework to conceptualize and evaluate the genesis and effects of post-state adjudicatory bodies in internet – and especially in platform – governance. It conceptualizes judicial decision-making as the key tool of post-state governance and explains how the internet’s normative turn is complemented by an institutional *adjudicatory turn*. This paper draws from legal theory, most important administrative and constitutional law, sociology, and social theory. Conceptualized as ‘Juridic Governance’, we understand bodies like Facebook’s Oversight Board or the recently proposed ‘out of court’ dispute settlement bodies in the DSA as a powerful update to the notions of the rule of law, the separation of powers, and judicial control over power in the 21st century.

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Content

| | |
|--|---|
| <i>Form Follows Function: Introducing the Juridic Governance in the Internet</i> | 1 |
| <i>Methodology</i> | 5 |
| Reflexivity as a guiding principle | 5 |
| Case Selection | 6 |
| Semi-structured Interviews and Discourse Analysis | 7 |

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| | |
|---|-----------|
| <i>Of Consumers and Citizens: Regulatory Juridic Governance in the EU and the Digital Services Act.....</i> | 8 |
| Platform Power and the Public Sphere | 8 |
| Two Competing Visions | 11 |
| Phase I: ‘Sub-Courts’ for Online-Disputes | 11 |
| Phase II: Privatized Administrative Adjudication for Platforms | 13 |
| <i>Individual Justice and Policy Recommendations: Private Juridic Governance and Facebook’s Oversight Board.....</i> | 15 |
| <i>From Umpire to Guardian: Theorizing Juridic Governance</i> | 17 |
| Defining Juridic Governance | 18 |
| Contextualizing Juridic Governance | 19 |
| Ambiguity and Normative Uncertainty | 21 |
| <i>Conclusion: Advancing a Rule of Law in the Internet</i> | 24 |

***** PRELIMINARY NOTE *****

*This paper features parts of a much longer text on Juridic Governance. As the length of the papers for the conference is capped at 10.000 words, this paper focuses on the conceptualization of ‘the Juridic Governance of the Internet’. It gives only a brief overview of the two case studies. The first case study is about the proposed ‘out-of-court’ dispute settlement bodies in Art. 18 of the European Commission’s DSA proposal. The second case study is about Facebook’s Oversight Board. The following paragraphs are short excerpts of the actual case studies. This has two reasons. First, the case studies are still a **work in progress**. The DSA, for example, is not yet passed. The Oversight Board is still moving into its offices in London and is not at full capacity yet. Second, the case studies rely heavily on semi-structured, qualitative interviews with the lawyers working for the adjudicatory bodies and academics, judges, activists, and experts constructing the discourse about them. At least most of the people working directly for the adjudicatory bodies are bound by **non-disclosure agreements** and agreed to be interviewed only under the condition that their quotes would not be shared before the publication of the whole project. Sharing, at this point, only the quotes of people who were not bound by an NDA would bias the sample and generate a false impression of the case studies. Therefore, at this point, I refrain from any direct quotes and give only a brief introduction to the case studies. They will be presentable at a later point. Instead, this paper focuses on the **theoretical framework** to conceptualize the case studies. This theoretical framework benefits inductively from the insights generated in the case studies.*

Form Follows Function: Introducing the Juridic Governance in the Internet

In the late 19th century, the famous US American architect Louis H. Sullivan mused about the accruing skyscrapers in North America: “It is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things superhuman, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that *form ever follows function*.”¹

Form follows function. This is the essence of this article. Judicial forms and methods follow the judicial function. The judicial function is to resolve disputes and to control power. Today, the power of post-state governance – meaning public, regulatory, and private entities beyond the nation-state – threatens individual liberties and collective welfare. To control these new powers and check on power-imbalance in post-state governance, we observe judicial forms and methods scattered over post-state governance, especially on the internet. Private companies establish their own adjudicative bodies – not primarily to resolve disputes, but as a ‘separation of powers’. Regulatory schemes establish adjudicatory bodies to control the might of online platforms vis-à-vis their users in the European Union. In short, judicial decision-making as the judicial function’s form transgressed the judiciary as its traditional institution.

Form follows function: We use judicial decision-making to control the powers of the 21st century. We just do not see courts anymore, but new types of adjudicatory bodies.

This paper looks into such new adjudicatory bodies in internet governance. I argue that in internet governance, the judicial function transgressed the institution of national or transnational courts. Building on concepts of legal sociology, internet and media studies, I theorize this mechanism as the *Juridic Governance of the Internet*. The Juridic Governance of the internet describes how a new type of adjudicatory body emerged online. It transplants judicial decision-making from an old context (courts and the nation-state) to a new context (adjudicatory bodies in post-state governance; conceptualized as Juridic Governance). These adjudicatory bodies converge aspects of Alternative Dispute Resolution, namely individual justice and their private nature, with aspects known from public law, most notably compulsory jurisdiction, a ‘managerial’ policy relationship with platforms, and the function to control structurally dominant powers. Interestingly, such

¹ Louis H Sullivan, ‘The Tall Office Building Artistically Considered’ [1896] Lippincott’s Magazine 57 (emphasis added).

bodies emerge as a regulatory scheme – as exemplified by the ‘out-of-court’ dispute settlement bodies in Art. 18 of the European Commission’s DSA proposal – as well as in entirely private situations – as exemplified by the launch of Facebook’s Oversight Board in 2020.

The rationale behind Juridic Governance is to use judicial decision-making to control power. It infuses the separation of powers to contexts beyond the nation-state. It puts a check on power imbalances threatening individual liberties and collective welfare. Using judicial decision-making to control powerful institutions has two dimensions. Both dimensions are reflected in political, constitutional, and administrative theory. On the one hand, judicial control over power shows administering individual justice in single cases on an individual level. On the other hand, judicial control over power shows on a systemic and institutional level, using individual cases to address structural issues in how power should be exercised. Thus, Juridic Governance’s adjudicatory bodies conflate innovative and traditional forms, normative practices, and institutional designs. From a traditionalist perspective, they emulate the logics of judicial review and rights-based, administrative self-control known from administrative law in democratic systems. However, they do so in a distinctly innovative form inspired by the logics of autonomous, informal, and technocratic norm-setting, (digital) subsidiarity, and, partly, data-driven capitalism.² Therefore, I argue that internet governance experiences a ‘normative turn’ as described by Kettemann³ and an institutional ‘adjudicatory’ turn towards juridified governance.

Today, power over individual liberties and collective welfare diffused over a diverse group of national, inter-and supranational actors as well as private actors. Online, the power diffusion beyond public authority and power accumulation by very few, vastly powerful companies – most of them from the United States – became very visible in the last decade; and was ostensibly discussed since roughly 2016.⁴ Yet, this power shift⁵ is not only a short-lived trend. Instead, the

² See Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0*, (New York: Basic Books, 2006); Richard E. Susskind, *Online courts and the future of justice*, First Edition (Oxford: Oxford University Press, 2019); Shoshana Zuboff, *The age of surveillance capitalism: the fight for a human future at the new frontier of power*, First edition (New York: PublicAffairs, 2019); Robert Gorwa, „What Is Platform Governance?“, *Information, Communication & Society* 22, Nr. 6 (12. Mai 2019): 854–71, <https://doi.org/10.1080/1369118X.2019.1573914>. Natali Helberger, Jo Pierson and Thomas Poell, ‘Governing Online Platforms: From Contested to Cooperative Responsibility’ (2018) 34 *The Information Society* 1.

³ Matthias C. Kettemann, *The Normative Order of the Internet* (New York: Oxford University Press, 2020), 233.

⁴ For an overview with a broader focus on internet governance see Roxana Radu, *Negotiating Internet Governance* (1st edn, Oxford University Press 2019). For a narrower focus on the platform economy see Zuboff (n 3). And for an introduction to the link between politics and social media in particular see Michal Krzyzanowski and Joshua A Tucker, ‘Re/Constructing Politics through Social & Online Media: Discourses, Ideologies, and Mediated Political Practices’ (2018) 17 *Journal of Language and Politics* 141.

⁵ Although ‘power shifts’ are something so regularly detected in political and social science that David Levi-Faur once argued that we should call political science the ‘science of shiftology’ instead. This is not only a witty way to put it, but he has a point. The fact that everything changes all the time should perhaps be the premise of every sensible social scientist – the job of academia is then to describe, analyze, and evaluate the human condition’s ever-going redoing in the *Maelström* of time. See David Levi-Faur, *From “Big Government” to “Big Governance”?* (Oxford University Press 2012) 7.

underlying fragmentation of norm-setting and singularization of experiences is likely to stay.⁶ The internet, especially social media, is a technique used by more people than most other technical achievements in history (far fewer people use, e.g. the combustion engine). Simultaneously, the internet comes with the power to shape our very understanding of reality. As we construct our personal reality increasingly based on discourses we have via Facebook, follow trends we see on Instagram and believe rumors we hear on Twitter, the providers of such services exercise power in an even more fundamental way than liberal constitutional democracies. The platforms' ability to normalize, regulate, and direct discourse and thereby construct reality is so far-reaching and multi-faceted that its authority partly goes beyond the nation-state. In the state context, the individuals' thought process remains, in principle, unfettered of public authority. On online platforms, the users' individualized experience and thought are very much constructed through the platform. From a historical perspective, such authority over individual belief systems reminds of the clergy's role in the Middle Ages, when the Vatican defined the reality, normality, identity and political order for millions of people. This is perhaps not entirely different to the authority of platforms today. The church's power remained unchecked until enlightenment, and the printing press offered an alternative.

So far, platform power remains largely unchecked. The internet was narrated as a 'new frontier', a libertarian space of endless opportunity that outgrew traditional concepts like the nation-state or even regulation from its early days. Yet, we see that unchecked power – be it online or offline – is undesirable. Unchecked power is undesirable because it is arbitrary, unsustainable, and because – as in the case of social media – it touches upon the fundamentals of social, cultural, and political life.

Therefore, as Sullivan put it, it is the 'pervading law of all things' to use the form of power control we know – judicial decision-making – to fulfil the function of putting a check on power. That is why in the European Union's regulatory approach to tame the powers of the digital sphere and the Silicon Valley itself an obvious, yet revolutionary idea unfolded: Let's use judicial decision-making to control the powers of the future.

Apart from the descriptive aspects I just outlined, Juridic Governance raises several fundamental normative questions. Normatively, I ask how to balance the improvements Juridic

⁶ See on the power of online platforms e.g. Zuboff (n 3); Michael A Cusumano, Annabelle Gawer and David B Yoffie, *The Business of Platforms: Strategy in the Age of Digital Competition, Innovation, and Power* (First edition, Harper Business, an imprint of HarperCollinsPublishers 2019); Mauro Barisione and Asimina Michailidou (eds), *Social Media and European Politics: Rethinking Power and Legitimacy in the Digital Era* (Palgrave Macmillan 2017); Gorwa (n 3); Jillian York, *Silicon Values: The Future of Free Speech under Surveillance Capitalism* (Verso 2021); Linnet Taylor, 'Public Actors Without Public Values: Legitimacy, Domination and the Regulation of the Technology Sector' [2021] *Philosophy & Technology* <<http://link.springer.com/10.1007/s13347-020-00441-4>> accessed 10 September 2021.

Governance brings for norm-enforcement (namely, a check on arbitrary norm-enforcement) with its lack of improvement for norm-creation. For example, is it enough to attach a quasi-judicial mechanism to legitimize the enforcement of a rule that is otherwise, if at all, legitimized by expertise and corporate freedom – but not by democratic participation?

Conceptualizing our increasing reliance on adjudicatory bodies like the Oversight Board or the proposed ‘out-of-court’ dispute settlement bodies as Juridic Governance provides us with an analytical and normative framework. It brings together key insights from sociology, legal, and social theory. In legal theory, the core contribution of Juridic Governance is its focus on administrative law and theory. Administrative law is constitutional law in practice. Administrative law-inspired solutions for internet governance may sound a bit more mundane than (digital) constitutionalism. However, implementing a rule of law for the internet requires administrative law’s deep well of ‘best practice examples’ on safeguarding procedural justice and insert checks and balances to independent but dominant governance institutions. In short, Juridic Governance complements the transplants of constitutional theory to internet governance with transplants of administrative theory – only the two together forward the internet’s rule of law. Beyond legal theory, Juridic Governance relies heavily on sociology and social theory. The term *juridic* builds on the concept of juridification stemming from legal sociology.⁷ Juridification, in the abstract, refers to “a process in which human conflicts are torn through formalization out of their living context and distorted by being subject to legal processes”.⁸ That describes neatly what the Juridic Governance of the internet is for – to formalize, structure, and ‘legalize’ the disputes of online platforms with their customers or among customers.

Juridic Governance of the internet is the newest of many examples of internet governance, striving for legitimacy. But can Juridic Governance yield rights-based and process-based legitimacy for governance by platforms? And how does such legitimacy relate to the still dire state of democratic input legitimacy?

Ultimately, this study aims to answer two more fundamental interdisciplinary questions, using internet governance as an example: First, why do we conceptualize many issues in post-state governance, e.g. content moderation, to be predominantly rights issues? Second, how should the governance regime for such issues look like on an institutional and normative level?

⁷ Gunther Teubner, ‘Juridification Concepts, Aspects, Limits, Solutions’ in Gunther Teubner (ed), *Juridification of Social Spheres* (DE GRUYTER 1987), p 3. See further Lars Chr Blichner and Anders Molander, ‘Mapping Juridification’ (2008) Vol. 14 European Law Journal 36. Different versions of ‘juridification’ are used e.g. by Jürgen Habermas (*Verrechtlichung* in his legal philosophy *Faktizität und Geltung*), Max Weber (as part of *rationalization* in the modern world) and by Emile Durkheim as an aspect of the *division du travail* in modern times.

⁸ Teubner, ‘Juridification Concepts, Aspects, Limits, Solutions’ (n 7) 7.

This paper traces two paradigmatic examples of Juridic Governance of the internet. The first case study is a regulatory scheme put forward by the European Union. In the currently debated proposal to a Digital Services Act (DSA), the EU establishes private adjudicatory bodies with compulsory ‘jurisdiction’ over acts of platforms vis-à-vis their users. This model, from the start, envisaged as a “system of sub-courts” providing “extra-judicial redress” shall advance the rule of law on the internet. It relies on dispute-settlement to control and improve the governance of platforms. The individual dispute serves as the keyhole for the adjudicatory bodies to pierce the veil and understand how platforms exercise their power vis-à-vis their users. The key to opening the door to better governance is then the adjudicatory bodies judgement binding the platform.

The second case study is a private adjudicatory body, the so-called ‘Oversight Board’ set up by Facebook, the world’s largest social media company, to decide whether said companies content-moderation practices comply with its own normative framework. It was envisaged by the company’s CEO as a “kind of a Supreme Court” for Facebook. It regularly decides on issues like hate speech. It decides only a few individual disputes but formulates ‘policy recommendations’ to the platform, aiming for better general governance by the platform.

Methodology

This is a mixed-methods paper. The main methodological challenge is to grasp practices and institutions which transgress traditional concepts of law and legality. Thus, reflexivity serves as this paper’s guiding methodological principle. Based on this, I outline my socio-legal methods, the case selection for the case studies in my empirical section, and the methods used in conducting and analyzing the semi-structured interviews in said case studies.

Reflexivity as a guiding principle

This paper uses a socio-legal approach guided by epistemic and substantive reflexivity as described by Pierre Bourdieu. Epistemic reflexivity refers to the reflexive relationship between the (social) scientist and their object of study. Reflexivity in that sense describes how the researchers own disciplinary (and cultural, economic, etc.) background is ‘mirrored’ in his/her research. As Pierre Bourdieu put it, “one cannot talk about (...) an object without exposing oneself to a permanent mirror effect: every word that can be uttered about scientific practice can be turned

back to the person who utters it.”⁹ We, therefore, must think “relationally”¹⁰ when constructing our research object, carving out our research question and our analytical approach to answer it.¹¹

Turning to substantive reflexivity, Juridic Governance’s mirror effect on everything judicial is obvious. The adjudicatory bodies this paper analyzes adjudicate – without being courts in the formal sense. The rules they apply are rarely laws legislated by a democratic body but rather unilaterally set private standards, guidelines, and rules. Often, they are labelled ‘soft law’ norms or ‘quasi-judicial bodies. As the judicial form followed the function to control power, we must follow these forms as well. Therefore, some parts of my study lean more towards a classic ‘law in context’ study, whereas others extract from social and political theory.

Case Selection

The case selection for my case is based on Ran Hirschl’s ‘prototypical cases’-principle for comparative constitutional law.¹² To reflect the most important examples, this paper covers one regulatory approach – the DSA – and one private, self-regulatory approach, Facebook’s Oversight Board. This allows to inductively generate insights for a broader field of examples aligning with the prototype. Further, the selected cases allow for insights into European and US American approaches to internet governance, reflecting the two main schools of ‘liberal’ approaches to internet governance.

The sample does not include case studies from the Global South or Asia. As my argument premises a somewhat liberal political and legal context, it further excludes authoritarian approaches to internet governance. Investigating the approaches of other highly juridified and judicialized legal systems beyond ‘the West’, especially India, promises a fascinating field of future research.

⁹ Pierre Bourdieu, *Science of Science and Reflexivity* (Reprinted, Polity Press 2006) 4.

¹⁰ Pierre Bourdieu and Loïc JD Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992) 224. In the words of Bourdieu: “we must try, in every case, to mobilize all the techniques that are relevant and practically usable, given the definition of the object and the practical conditions of data collections. (...) Needless to say, the extreme liberty I advocate here (which seems to me to make obvious sense and which, let me hasten to add, has nothing to do with the sort of relativistic epistemological *laissez faire* which seems so much in vogue in some quarters) has its counterpart in the extreme vigilance that we must apply to the conditions of use of analytical techniques and to ensuring that they fit the questions at hand.”, *ibid* 227. Bourdieu himself borrows the phrase ‘relationally’ from Ernst Cassirer’s work on ‘relational concepts’ (“Substanzbegriff und Funktionsbegriff” from 1921).

¹¹ See also Andreas von Arnould’s presentation at the Vereinigung der Deutschen Staatsrechtslehrer conceptualizing the ‘public law method’ as a social practice and arguing for more ‘*Responsivität*’ which Arnould describes as ‘informiertes Schnittstellenmanagement’ that, despite falling short of Bourdieu’s concept of epistemic reflexivity, emphasizes a more integrated approach of interdisciplinarity instead of mere disciplinary juxtapositions. See Vereinigung der Deutschen Staatsrechtslehrer, Hans Christian Röhl and Uwe Volkmann (eds), *Öffnung Der Öffentlich-Rechtlichen Methode Durch Internationalität Und Interdisziplinarität: Erscheinungsformen, Chancen, Grenzen: Referate Und Diskussionen Auf Der Tagung Der Vereinigung Der Deutschen Staatsrechtslehrer in Düsseldorf Vom 1. Bis 4. Oktober 2014* (De Gruyter 2015) 39 *et seq* (for *Responsivität* see p 54; using however the term “*reflexiv*” on p 42) - emphases added.

¹² Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (First edition, Oxford University Press 2014) 256 *et seq*.

However, for the moment, the case studies represent the prototypical examples of juridified internet governance in industrialized, Western, liberal democratic systems.

Semi-structured Interviews and Discourse Analysis

Lastly, in each case study, I conduct semi-structured, qualitative interviews with experts. The interviews' core motivation is, on the one hand, to understand the inner workings of Juridic Governance and the introspection of its people. Do they consider themselves 'judges'? Do they see themselves as a bulwark checking on otherwise arbitrary power or as mere administrator of individual justice? What is their relationship to traditional courts? Do we observe differences between the regulatory approaches from Europe and the more libertarian, self-regulatory approach Facebook took with its Oversight Board? How are different legal cultures (common/civil law) and cultures of capitalism reflected in different cases of the internet's Juridic Governance?

On the other hand, I analyze the discourse constructing the public perception of Juridic Governance altogether. So far, a high degree of conceptual ambiguity characterizes the discourse on Juridic Governance. Seemingly, no one knows how to *call* these new adjudicatory bodies. In the legislative process, European lawmakers used concepts like "sub-courts"¹³, "administrative or judicial review proceedings, including or out-of-court dispute settlement"¹⁴, or "extra-judicial redress"¹⁵. Such conceptual confusion makes it virtually impossible to define the nature of the adjudicatory bodies by mere recourse to black letter law. Not even the people creating them agree on what they are. Hence, the terminology creating them varies significantly. The same can be said about Facebook's Oversight Board.¹⁶ The only way to understand what lawmakers envisaged as they pinned down their innovative concepts is to talk to them. Therefore, I analyze how journalists, academics, and politicians talk and write about amorphous bodies like Facebook's Oversight Board and the 'out-of-court' dispute settlement bodies.

My research design for the qualitative interviews is informed by the works of Galletta¹⁷ and especially the socio-legal work of Korkea-aho and Leino-Sanberg¹⁸. Each case study gets around

¹³ See Explanatory Statement p 21/23 European Parliament Committee on Legal Affairs and Tiedo Wölken (Rapporteur), 'DRAFT REPORT with Recommendations to the Commission on a Digital Services Act: Adapting Commercial and Civil Law Rules for Commercial Entities Operating Online (2020/2019(INL))' (22 May 2020) <https://www.europarl.europa.eu/doceo/document/JURI-PR-650529_EN.pdf>.

¹⁴ See Amendment 1127 in European Parliament Committee on Internal Market and Consumer Protection and Christel Schaldemose (Rapporteur), 'Draft Report Christel Schaldemose (PE693.594v01-00), Amendments 1012-1301' (8 July 2021) <https://www.europarl.europa.eu/doceo/document/IMCO-AM-695160_EN.pdf>.

¹⁵ See Art 13 in European Parliament Committee on Legal Affairs and Tiedo Wölken (Rapporteur) (n 14).

¹⁶ See below.

¹⁷ Anne Galletta, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication* (New York University Press 2013).

¹⁸ Emilia Korkea-aho and Päivi Leino-Sandberg, 'Interviewing Lawyers: A Critical Self-Reflection on Expert Interviews as a Method of EU Legal Research' [2019] *European Journal of Legal Studies* 17.

ten interviews. The interviewed experts may be academics, practitioners, or activists dealing with the prototypical case of Juridic Governance analyzed in the case study. Each sample includes internal and external perspectives. These include positive as well as critical voices. I resort to so-called snowballing to identify a sufficiently representative sample. The generated data (interview recordings) is transcribed and subject to computer-assisted data analysis using MAXQDA. The analysis encompasses mainly manual, inductive coding of the data. The coding focuses on substantive, institutional, and emotional patterns as well as structural patterns like certainty/uncertainty about specific issues.

Of Consumers and Citizens: Regulatory Juridic Governance in the EU and the Digital Services Act

This section traces the crafting of regulatory Juridic Governance using the example of Article 18 of the Commission’s proposal for a Digital Services Act. The EU plans to establish adjudicatory bodies resolving disputes between EU users and online platforms. The EU calls these adjudicatory bodies – and here the conceptual confusion begins – “‘out-of-court’-dispute settlement bodies”.

This section answers four questions. First, it investigates why the EU relies on judicial decision-making as a governance tool in the first place. Second, it portrays the competing visions for the future role of judicial decision-making in Europe’s internet governance. Third, we follow how these visions unfold in the legislative procedure of Article 18 DSA, proposing so-called ‘out-of-court’ dispute settlement bodies. Fourth, describe how the European Commission uses judicial decision-making and transplants the whole logic of administrative self-control to the digital sphere.

Platform Power and the Public Sphere

Juridic Governance always begins with a power imbalance. Power imbalances like that between online platforms and users constitute a governance problem.¹⁹ To solve this governance problem, the European Union resorts to several regulatory techniques. On the one hand, it conceptualized the power of platforms as ‘market’ power. Market power is partly balanced by competition law and the Digital Market Act. Yet, as the European Parliament’s resolution states, “competition law enforcement alone cannot effectively address the impact of the market power of certain online

¹⁹ See for an introduction to the power of platforms p 4.

platforms”.²⁰ Instead, the European Parliament states, online platforms “have de-facto become public spheres [...] [and] public spaces must be managed in a manner that protects public interests”.²¹ This assessment is at the core of the EU’s regulatory approach and explains the rationale for transplanting judicial decision-making to a new context.

On the one hand, the power of platforms is so vast and so relevant for public goods like free speech and democratic discourse that it should be ‘managed in a manner that protects public interests’ as the European Parliament’s rapporteur put it. On the other hand, that ‘public sphere’ is, in fact, a private company is driven by the – legally protected²² – interest to make profits and much less the welfare of its users. Hence, we observe an inherent tension between *public* spheres, interests, concepts, and methods and *private* spheres, interests, concepts, and methods on the other hand. Yet, the EU’s fundamental problem with the ‘out-of-court’ dispute settlement bodies is not public or private – it is the imbalance of power. Power can be exercised by public bodies, e.g. through a regulatory agency, or private bodies, e.g., content moderation. And it can be controlled by judicial decision-making.

This gave birth to a somewhat paradoxical image of who Juridic Governance protects in the EU: the *consumer citizen*. The consumer citizen stands in a long line of idealized forms of citizenship in the sixty years of European integration. First, the ‘market citizen’ accumulated wealth in the EU since the 1970s. Later, Union citizenship constructed (partially successful) a sense of political identity among EU nationals since the 1990s. Today, as the internet is relevant for both wealth and identity, the status as a consumer and a citizen are seemingly meshed together into a new type of individual. Therefore, the Parliament calls for a Digital Services act that “lays down transparent, fair, binding and uniform standards and procedures for content moderation, and guarantees accessible and independent recourse to judicial redress [...] while enhancing the protection of *consumers* and *citizens*.” The fascinating thing about ‘consumers and citizens’ is that both are in a position of structural weakness towards a dominant authority – either the businesses or the state. The gist of consumer law is to protect the consumer, and the gist of public law is to protect the citizen. Understood like this, consumers and citizens share a distinct relationship to law and judicial decision-making. At times, both consumers and citizens need judicial decision-making to control the otherwise dominant power of the business or the sovereign. And, admittedly, it makes sense.

²⁰ See Recital D European Parliament, ‘P9_TA(2020)0273, European Parliament Resolution of 20 October 2020 with Recommendations to the Commission on a Digital Services Act: Adapting Commercial and Civil Law Rules for Commercial Entities Operating Online (2020/2019(INL))’ (20 October 2021) <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0273_EN.pdf>.

²¹ Consideration F in *ibid*.

²² In the EU, Article 16 of the Charter of Fundamental Rights expressly protects the ‘freedom to conduct a business’.

The normative framework for content moderation, for example, are the platforms' terms of service. The initial purpose of the terms of service was to simplify dishwasher sales and streamline refund policies. Today, we use terms of service to ban online content ranging from nudity to satire to political extremism. We cannot discuss societal, cultural, and political content on online platforms without being subject to such rules. In short: being a citizen on the internet is impossible without being also a consumer.

To protect their consumer-citizens online, the EU decided to construct a new regulatory tool: transplant judicial decision-making beyond the judiciary to check the power imbalances in the digital sphere. Accordingly, the DSA establishes a new type of judicial actor, certified by national authorities but independent from member state judiciaries and private powers they are designed to control.

That judicial decision-making and adjudicatory bodies are the right governance tool, seemingly, was never questioned by European legislators. This has personal as well as more fundamental socio-political reasons. On a personal level, the debate was dominated by lawyers from the beginning. Tiemo Wölken, the Parliament's rapporteur for the first Resolution on the DSA, is an educated lawyer. The people in the Commission working on Articles 17 and 18 DSA are primarily lawyers. Further, the whole topic of consumer law is highly juridified and judicialized already. Additionally, the EU legislators just reflect the general trend towards increasing juridification and judicialization of governance.

Therefore, this section traces how regulatory Juridic Governance came about in the European Union. How did the idea of 'out of court' dispute settlement evolve in the legislative procedure? What did the legislators hope for? And why did they decide to solve the governance problem of platform power and the possible curtailments of individual liberties by advancing Juridic Governance as a "fast-track legal procedure with adequate guarantees [...] to ensure [...] effective remedies"?²³ We follow the idea through the Parliament's Committees, the Commission's units and the Council's deliberations. Then, relying on interviews with different stakeholders from the European Parliament, the European Commission, the Council, academics, and civil society organizations, the case study shows how regulatory Juridic Governance is set to redefine the rule of law for the European internet.

²³ Consideration G in European Parliament (n 21).

The ascend of regulatory Juridic Governance in the European Union can be best understood as an ongoing wrestle of two competing perspectives on how the judicial function should play out in the DSA.

On the one side, we have a more traditional ‘public law’ perspective envisaging a ‘system of sub-courts’ offering ‘extra-judicial review’ to individuals in the digital sphere.²⁴ Those sub-courts should be run by the member states and not by privates. The model here is akin to a traditional administrative law model: a court with specific jurisdiction over administrative law matters, taming administrative agencies or the police. The only difference is that it is not an administrative agency or the police but an online platform like Facebook and its content moderators. This traditional, public law perspective was brought forward, e.g. by the European Parliaments Rapporteur, Tiemo Wölken, a German national and studied lawyer. Wölken’s proposal was in all its relevant parts adopted by the Parliament in a Resolution, urging the European Commission to make a formal proposal for the Digital Services Act in 2020.

On the other side, we have a more private law inspired perspective conceptualizing said bodies not as ‘sub-courts’ but rather as a form of Alternative Dispute Resolution (ADR). ADR features different premises.²⁵ First, historically alternative dispute resolution is about resolving disputes between, e.g. companies or consumers and companies. Second, although there might be a power imbalance, ADR champions voluntary instead of compulsory jurisdiction. The parties agree to an adjudicatory body – they are not subject to it.

Further, ADR resolves mainly disputes about contractual issues. So far, ADR was not so much about controlling power and safeguarding the rights of ‘citizens’ that are not negotiated or bargained but absolute (like free speech or human dignity). Lastly, private law and ADR is private and not public. From that perspective, private ADR makes total sense as it adjudicates only private aspects like dishwashers. Here we have our paradoxical consumer-citizen again. How can a body be simultaneously about consumer law, and therefore private, while aiming to protect also the consumers’ ‘citizenship dimension’, namely their right to free expression?

Phase I: ‘Sub-Courts’ for Online-Disputes

In the beginning, the more traditional public law understanding of how such adjudicatory bodies should look like was dominant. The initial idea was to establish “a simplified legal procedure

²⁴ See Article 13 and Explanatory Statement p 21/23 in European Parliament Committee on Legal Affairs and Tiemo Wölken (Rapporteur) (n 14).

²⁵ Michael JE Palmer and Simon Roberts, *Dispute Processes: ADR and Primary Forms of Decision-Making* (Third edition, Cambridge University Press 2020).

[...] designed to fit to the nature of content moderation disputes, and at the same time ensure that national courts are not overburdened by such disputes”²⁶. In short, the Parliament wanted to introduce a new type of court for the digital sphere to take the pressure of the national judiciaries.

This project entailed several difficulties, especially conceptual ones. Wölken’s proposal for example, called for “extra-judicial review” by “independent dispute-settlement” bodies. Yet, the proposal remained silent on how to define ‘extra-judicial review’. Instead, it mentioned certain institutional aspects like the bodies’ independence from the platforms and a remarkably clear image of the competing legalities in the different spheres. This is important. The diverging and ambiguous ‘legalities’ or ‘normative orders’ of platforms are one key feature of Juridic Governance. Often, Juridic Governance bodies conflate norms and rules of varying nature and legitimacy. For example, the Parliament’s resolution, and Wölken’s report, differentiate between content moderation based on ‘unilaterally set terms and conditions’ on the one hand and the ‘legality’ of content on the other hand. The latter, arguably, refers to content violating public or civil law, such as libel. The former, however, constituting the vast swath of moderated content, maybe unpleasant and in breach of a platform’s terms of service. However, most content violating a platform's terms of service is not illegal in the traditional sense.²⁷ In most European countries, showing female nipples, for example, is nothing illegal in most situations. In contrast, showing female nipples on US American social media platforms violates their terms of service and often prompts the post to be deleted.

Also, the Parliament took the stance that the “delegation of [...] decisions regarding the legality of content or of law enforcement powers to private companies can undermine the right to a fair trial and risks not to provide an effective remedy.”²⁸ Arguably, legality in that sense does not concern the enforcement of ‘community standards’. Yet, the underlying rationale is remarkable. The ‘right to a fair trial’ mentioned by the Parliament originates from *habeas corpus* rights, bitterly fought for during the enlightenment era and a bedrock of the rule of law. However, the right to a fair trial is something inherently linked to a *public* authority and, most importantly, the realm of criminal law. Originally, the ‘right to a fair trial’ protected citizens from being locked up (or chopped up) by an absolutist monarch. So why does such an inherently public right pop up in a regulatory proposal dealing with private platforms like Facebook, Instagram, or Twitter?

Further, Wölken’s report and the Parliament’s resolution envisaged a central role for the EU Member States. Whereas the Commission would later propose that the Member States only

²⁶ See Explanatory Statement p 22/23 in European Parliament Committee on Legal Affairs and Tiemo Wölken (Rapporteur) (n 14).

²⁷ See the recitals in *ibid.*

²⁸ Recital G in *ibid.*

‘certify’ the privately-run ‘out-of-court’ dispute settlement bodies, the Parliament’s initial resolution wanted them to be established by the Member States. Hence, the idea was originally to mandate EU member states to set up a new type of amorphous adjudicatory body dealing with online disputes. The Parliament rejected several amendments to link the ‘independent dispute settlement’ bodies closer to Alternative Dispute Resolution. Therefore, on 20 October 2020, the Parliament passed a resolution asking the Commission to craft a detailed proposal for the Digital Services Act.

Phase II: Privatized Administrative Adjudication for Platforms

In December 2020, the Commission then issued a Digital Services Act proposal, picking up the Parliament’s resolution. The Commission’s proposal further develops the idea on three major aspects. First, it tones down the language used by the Parliament. Wording like ‘public sphere’ disappeared. Instead, the Commission speaks of

“growing risks brought by digital services will continue to scale. [...] [T]he Commission will [...] support the self-regulatory efforts in place. [...] The legal fragmentation with the resulting patchwork of national measures will not just fail to effectively tackle illegal activities and protect citizens’ fundamental rights throughout the EU, it will also hinder new, innovative services from scaling up in the internal market, cementing the position of the few players which can afford the additional compliance costs. This leaves the rule-setting and enforcement mostly to very large private companies, with ever-growing information asymmetry between online services, their users and public authorities.”²⁹

Although the Commission uses different – more regulatory and less political – wording, the message remains the same. When the Commission speaks of “rule setting and enforcement” that remains with private companies, mentions an “ever-growing information asymmetry” between individuals, platforms, and public authorities, acknowledges self-regulatory measures of “a few

²⁹ See at p 10-11 in European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/32/EC 2020 [COM(2020) 825 final].

players which can afford additional compliance costs”, it speaks of power imbalances in post-state governance³⁰.

Like the Parliament, the Commission uses judicial decision-making as the key to controlling platform power. However, the Commission advanced a more comprehensive model to balance the power of platforms. Articles 17 and 18 DSA virtually copy the two-step model of *internal* administrative and *external* judicial review of administrative action. This means that individuals may complain to the platform, which has to deal with the complaint in “a timely, diligent and objective manner” manner, Article 17(3) DSA. On top of that, users may go to the external adjudicatory bodies, which then review the platforms internal decision. The Parliament’s proposal did not include such a two-step procedure. It remains to be seen whether the two steps remain consecutive or become alternative or cumulative in the final version of the DSA. Whereas the Commission privatized the adjudicatory bodies, it reaches far deeper into administrative law when transplanting *mutatis mutandis*, the two-step model of administrative self-control and judicial review of administrative action to online platforms.

Therefore, we see already in the Commission’s proposal how the two initially opposing ideas of ‘public courts’ and ‘private dispute settlement’ converge into a new type of administrative law-inspired, privately-run, yet publicly certified adjudicatory scheme. The proposed Article 18 DSA would, as Daniel Holzmagel writes, „add another layer of dispute settlement: self-regulatory bodies to which users can appeal to after platform decisions, delivering (partly) binding decisions. Thus, Art. 18 attempts to establish external private bodies that shall have all the essential characteristics of courts.”

As the legislative procedure is still underway, we come to an interim conclusion: Checking platform power in Europe relies – in all likelihood – on a form of judicial decision-making beyond courts. The next months will show how exactly the EU’s regulatory Juridic Governace materializes. How powerful remain the out-of-court dispute settlement bodies? How far-reaching will their judgements be? At the end of the day, these details will be important but not decisive. The direction is set. And there is more to come in the future. However, the current status is this: On the one side, the Commission’s proposal *privatized* the adjudicatory bodies and thereby departed partly from the traditional ‘public law’ idea of ‘sub-courts’ brought forward by Wölken and the European Parliament. However, said private adjudicatory bodies must be certified by the Member States’ Digital Services Coordinator, a new national administrative agency overseeing the DSA’s implementation in each Member State.

³⁰ All quotes are from *ibid*.

Further, the norms/rules applied by the ‘out-of-court’ dispute settlement bodies shall respect certain public law thresholds like “clear and fair rules of procedure” as stipulated in Art 18(2)(e) of the Commission’s proposal. On the other hand, the Commission went much further than the Parliament with its imports from public law. It transplanted the idea of ex-post review by an adjudicatory body and the administrative law structure to include an *internal* complaint-handling mechanism. Article 17 of the Commission’s proposal states that platforms must provide users with “internal complaint-handling mechanisms” against content-moderation decisions. Internal complaint-handling gives the platforms a second chance to readjust their decisions. Only if the platform, in the abstract: the governance body, stands firm with its decision, that decision shall be checked for its compliance with the relevant norms, namely the ‘unilaterally set community standards’ or fundamental rights. As seen in the abstract, this is administrative law in its purest form. To reiterate Sullivan’s mantra of modernist architecture: form follows function. This is Juridic Governance.

Individual Justice and Policy Recommendations: Private Juridic Governance and Facebook’s Oversight Board

The second case study uses Facebook’s Oversight Board to analyze private Juridic Governance. Private Juridic Governance is an umbrella term for adjudicatory bodies in post-state governance run entirely by private actors – without or with little influence of a regulatory mandate. The gist of private Juridic Governance is to transplant judicial decision-making as a form to control private power. Private Juridic Governance uses judicial decision-making – in this case: the Oversight Board – to check an otherwise problematic power imbalance between a structurally dominant private actor – in this case: Facebook – and individual users. Like few other examples in recent political and economic history, the Oversight Board epitomizes how political theory and public law are transplanted to private contexts.³¹

³¹ Much has been published on the Oversight Board. Especially noteworthy are Kate Klonick, ‘The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression’ (2020) Volume 129 Yale Law Journal 2232; Evelyn Douek, ‘Facebook’s “Oversight Board:” Move Fast with Stable Infrastructure and Humility’ Vol 21 North Carolina Journal of Law & Technology; Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2018) Vol 131 Harvard Law Review 1598; Thomas Kadri, ‘How Supreme a Court?’ *Slate Future Tense* (2018) <<https://slate.com/technology/2018/11/facebook-zuckerberg-independent-speech-content-appeals-court.html>>. Also definitely worth reading are the two memos by Noah Feldman to Facebook executives from early 2018. In these memos, Feldman outlines possibilities to use judicial decision-making as a governance tool (and as a tool to fend off regulation). The memos are published by Facebook in its ‘Global Feedback and Input on the Facebook Oversight Board’, Appendix D, p 100-137, see:

I argue that the Oversight Board remodels some core tenets of contemporary public law, most importantly American administrative law and constitutional law. On a fundamental level, that is to use an adjudicatory body to solve a governance problem in the first place. As argued above, this idea also exists in Europe. It is, however, in the case of Facebook, distinctly American. The United States are as judicialized a society like few others. Few societies are so happy to litigate. Few have so many lawyers per capita.³² No other society ascribes its Supreme Court judges the socio-cultural importance and political eminence as the United States. Think of the calendars, mugs, and memorabilia of the late Justice Ruth Bader-Ginsburg often referred to as ‘the Notorious RBG’.

Further, as I will explain in greater detail below, the United States use ‘judicial decision-making’ far more frequently as a governance mechanism. Simply put, much of the American administrative state rests on the idea that, for a fair administration and the separation of powers, decision making in sensitive areas should not be done in a hierarchical form – but in a judicial form. Here the form of judicial decision-making even overtakes the function of (ex-post) control. The US administrative state uses judicial decision-making to *make* administrative decisions as well as to *control* them. According to Hiroshi Okayama, this “is an ideal institutional template” to maintain checks and balances.³³ Therefore, transplanting judicial decision-making to actors other than courts in private governance appears like an almost natural development considering that the people behind Facebook’s Oversight Board are almost all US-educated lawyers.³⁴

The second remarkable infusion of American thinking to private Juridic Governance is the character of the relationship between adjudicatory and supervised governance body. Whereas the continental model in the DSA is dominated by a strong focus on repeated litigation and a high caseload, private Juridic Governance as exemplified by the Oversight Board opts for a more ‘managerial’ role of the adjudicatory body. Remember, the whole point of the ‘out-of-court’ dispute settlement bodies in the DSA was to “ensure that national courts are not overburdened by [...] disputes [on content moderation].”³⁵ This is not the point of the Oversight Board. Quite the contrary. The Oversight Board shall decide only very few cases – but these cases shall be the important ones. Private Juridic Governance, at least in the case of the Oversight Board, uses the

<https://about.fb.com/wp-content/uploads/2019/06/oversight-board-consultation-report-appendix.pdf> (last accessed 30 October 2021).

³² Apparently one in 248 US citizens is a lawyer. That is the world’s highest ‘lawyer per capita’-ratio. For comparison: it is one in 516 in Germany, one in 1221 in France, and only one in 3700 in Poland. See https://www.researchgate.net/figure/Number-of-lawyers-in-different-countries-of-the-world_tbl1_270105553 (visited 28 October 2021).

³³ Hiroshi Okayama, *Judicializing the Administrative State: The Rise of the Independent Regulatory Commissions in... the United States, 1883-1937*. (Routledge 2021) 21.

³⁴ For an overview over the people working at Facebook constructing the Oversight Board see Klonick (n 32).

³⁵ See Explanatory Statement p 22/23 European Parliament Committee on Legal Affairs and Tiemo Wölken (Rapporteur) (n 14).

adjudicatory body in what Judith Resnick called a ‘managerial’ way. The Oversight Board decides only a few cases per year. Compared with the millions of posts Facebook moderates each day, the Oversight Board’s caseload seems minuscule. But the Oversight Board is not about the individual cases. The Oversight Board is about using these individual cases to sway Facebook’s governance on a grander scale. As Resnick put it for the American judge in the emerging ‘public law litigation’ in the 1980s, managerial judging is about “reorient the future dealings” of a governance entity.³⁶ In this model, the adjudicatory body engages in a long-lasting, communicative relationship with the governance body it supervises. It files recommendations, sets boundaries, and experiments until a governance practice is found that appears – from the point of the normative order the adjudicative body resorts to – apt to normalize.³⁷ This is what the Oversight Board does. Most of its decisions include ‘policy recommendations’ to Facebook. It codifies the internal norms and rules of the company.

In that sense, the Oversight Board is not even about individual justice or dispute settlement. Instead, it shall ‘reorient’ the company’s future dealings vis-à-vis its users. This again, albeit to a lesser extent, is also visible in the DSA. The recent compromise of the Council wants annual reports by the ‘out-of-court’ dispute settlement bodies about “systemic and sectoral risks” in the supervised governance bodies.

From Umpire to Guardian: Theorizing Juridic Governance

The two case studies showed two examples of the Juridic Governance on the internet. That is, first, regulatory Juridic Governance in the form of the DSA’s ‘out-of-court’ dispute settlement bodies. And that is, second, private Juridic Governance in the form of Facebook’s Oversight Board. Both are adjudicatory bodies beyond the judiciary. Both control power, and both use judicial decision-making to do so.

The following section uses these case studies to provide an abstract definition for ‘Juridic Governance’ – a phenomenon especially strong on the internet but not limited to it. In essence, Juridic Governance describes how the judicial function and its forms transcended the judiciary in post-state constellations.

³⁶ See Judith Resnik, ‘Managerial Judges’ (1982) Vol. 96 Harvard Law Review 374, 394.

³⁷ See Resnik (n 18) *passim*. See further with a related aspects Abram Chayes, ‘The Role of the Judge in Public Law Litigation’ (1976) 89 Harvard Law Review 1281; Owen M Fiss, ‘The Bureaucratization of the Judiciary’ (1983) 92 The Yale Law Journal 1442.

Defining Juridic Governance

Juridic Governance can be defined as follows: An independent *body* (i) with compulsory ‘*jurisdiction*’ (ii) uses *judicial* decision-making (iii) to make *binding* decisions (iv) to *control* power (v) in *post-state governance* (vi) without being a *court* (vii). Judicial decision-making is understood as the impartial decision by an independent third-party based on pre-set norms/rules.

Juridic Governance is an umbrella term comprising any institutional actor using judicial decision-making to control structurally dominant power without being part of the judiciary. Juridic Governance employs judicial forms, procedures, designs, and practices to act as a ‘guardian’ over executive or private actors, however, without belonging to the traditional guardians in our system of government: courts. Juridic Governance, therefore, exercises norm-based review of acts of dominant actors in post-state governance. Such ‘post-state actors’ are, e.g., large online platforms or independent administrative agencies in the European Union.

Juridic Governance converges lessons from the past with contemporary challenges as it transplants judicial decision-making to new bodies controlling the new powers of post-state governance. The DSA’s ‘out of court’ dispute settlement bodies, for example, provide independent, norm-based review to individual users vis-à-vis structurally dominant platform companies to protect individual users and put a check on the formerly unchecked power of platforms. Equally, Facebook’s Oversight Board uses judicial decision-making to adjudicate how Facebook exercises its power vis-à-vis its users.

The idea behind Juridic Governance is simple. Juridic Governance transplants a method (judicial decision-making) that is known to work well in an old context (courts, the rule of law, judicial review of administrative action) to a new context featuring somewhat similar problems like the old context (power imbalances between actors; norms and rules in need for interpretation; disputes). Like courts iteratively put a check on the state’s structural dominant power – be it the police, in schools³⁸, or independent administrative agencies³⁹ – vis-à-vis its citizens, Juridic Governance uses judicial decision-making to put a check on structured authority beyond the state vis-à-vis structurally weaker actors. Such authority beyond the state may be *public*, most importantly in the context of the European Union, *regulatory*, meaning private or public actors acting upon regulatory mandate, and *private*, meaning private adjudicatory bodies established without a regulatory mandate.

³⁸ For a critical assessment of e.g. *Brown v. Board of Education* see Lani Guinier, ‘From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma’ (2004) 91 *Journal of American History* 92.

³⁹ For the EU see e.g. Court of First Instance (Eight Chamber), Judgement of 8 October 2008, *Sogelma*, ECLI:EU:T:2008:419. For the United States see e.g. US Supreme Court, *Chevron U.S.A. v. Natural Resources Defense Council*, Decision of 25 June 1984, 467 U.S. 837 (1984)

Simply put, Juridic Governance uses dispute resolution as a *means* to achieve its *end*: putting a check on otherwise unchecked power. That method, using the judicial process to infuse checks and balances into a system of governance, so far, is mainly known from the nation-state. Juridic Governance describes how judicial decision-making is used beyond the judiciary to check power beyond the state today.

Contextualizing Juridic Governance

From a contextual perspective, Juridic Governance reflects the increasing juridification of industrialized societies and the ‘judicialization’ of their governance.⁴⁰ Today we understand all kinds of social, cultural, and political issues as featuring a rights dimension, if not to be predominantly a rights issue (juridification).⁴¹ Examples range from the civil rights movement in the United States to European anti-discrimination law or rights-based approaches to protecting personal data. These juridified disputes are then decided by judicial means in courts (judicialization).⁴² Juridic Governance converges these two aspects: juridified issues are decided by judicial means outside the courts. The term *juridic* – stemming from legal sociology and popularized by, among others, Günther Teubner and Jürgen Habermas – captures their reflexivity to courts and the socio-legal meta-trend the last decades: growing juridification within and beyond the state.⁴³ The term *governance* reflects on the bodies’ function as a governance institution in post-state situations. This governance function is an important aspect of Juridic Governance. As argued above, Juridic Governance is about controlling power. To do so, they often engage in long-lasting, ‘managerial’ relationships with the governance bodies they control. Based on single cases, they

⁴⁰ For *Juridification* see Fn **Error! Bookmark not defined.**. For *Judicialization* see further Ran Hirschl, *The Judicialization of Politics* (Oxford University Press 2011) <<http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013>> accessed 26 October 2021; Alec Stone Sweet, ‘Judicialization and the Construction of Governance’ (1999) Vol. 42 *Comparative Political Studies* 147; Torbjörn Vallinder, ‘The Judicialization of Politics. A World-Wide Phenomenon: Introduction’ (1994) 15 *International Political Science Review / Revue internationale de science politique* 91; Chester Neal Tate, ‘The Global Expansion of Judicial Power: The Judicialization of Politics’ in Chester Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995).

⁴¹ Hannah Arendt, way ahead of her time, critically debates her concept of a ‘right to have rights’ in her *Origins of Totalitarianism* as early as 1951. See Hannah Arendt, *The Origins of Totalitarianism (Original Edition)* (1st Edition, Harcourt, Brace and Company 1951) 251–275.

⁴² See further Stone Sweet (n 41); Vallinder (n 41); Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (M Nijhoff; Distributors, for the US and Canada, Kluwer Academic Publishers 1986); Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press 1986); Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1st edn, Univ of Chicago Press 1998).

⁴³ The main texts are Günther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (de Gruyter 1987); Günther Teubner (ed), *Global Law without a State* (Dartmouth 1997); Jürgen Habermas, *Faktizität Und Geltung: Beiträge Zur Diskurstheorie Des Rechts Und Des Demokratischen Rechtsstaats* (1. Aufl, Suhrkamp 1998); Michel Foucault and others, *Sécurité, Territoire, Population: Cours Au Collège de France, 1977-1978* (Seuil : Gallimard 2004); Eric A Posner, *The Perils of Global Legalism* (University of Chicago Press 2009).

develop principles, codify norms and set out targets for how the controlled governance actors – i.e. online platforms – should act.⁴⁴

Simultaneously, much of what matters socially, culturally, politically, or economically today takes place in situations governed not only by the traditional locus of power – the state – but by post-state authority, e.g. the European Union or online platforms.

This diffusion of power beyond the state can be roughly divided into three phases. First, we had a strong role of the nation-state between 1914 and 1989 with increasing internationalization (UN, WTO, European Communities). The first phase brought *public* governance beyond the state, namely the European Union. Then, slightly overlapping, the second phase, commonly called globalization, began in the 1980s but gained global significance after the end of the cold war in the 1990s and brought ‘multi-national companies’ and *private* governance beyond the state. Then, beginning in the 2000s, power diffused globally as during globalization and from the analogue to the virtual sphere converging *private* and *digital* governance.⁴⁵ Especially the inherently globalized sphere of the internet often escapes national regulations. Instead, it is either supra- and international regulators like the European Union, or private companies, effectively exercising governance functions on the internet.

But unchecked, chaotic governance is unacceptable. First, it is unacceptable because it is arbitrary. Second, it is unacceptable because platforms exercise power over individual users and whole societies with questionable legitimation. Third, it is unacceptable because it resembles governance bereft of democracy and a rule of law. And, lastly, it is unsustainable because unchecked, arbitrary governance without a rule of law runs against the *Zeitgeist*: Today, we understand issues like ‘content moderation’ to be predominantly issues of rights. We know courts and judicial decision-making to be a working method to control power.

Therefore, Juridic Governance converges lessons from the past with contemporary challenges as it transplants judicial decision-making to new bodies controlling the new powers of post-state governance.⁴⁶ The DSA’s ‘out of court’ dispute settlement bodies, for example, provide independent, norm-based review to individual users vis-à-vis structurally dominant platform companies to protect individual users and put a check on the formerly unchecked power of

⁴⁴ The aspect with managerial judging refers to the work of Judith Resnick explaining the changing nature of judging in the United States Resnik (n 37). See also Chayes (n 38).

⁴⁵ For an overview see Radu (n 5); Gorwa (n 3).

⁴⁶ From a historical perspectives such transplants, or maybe rather evolutions and adaptations, are nothing unusual. For example, the East India Company governed (colonized) vast parts of the globe, had its own military and judiciary – and yet it was a private company. See further HV Bowen, *The Business of Empire: The East India Company and Imperial Britain, 1756–1833* (Cambridge University Press 2005) <<https://www.cambridge.org/core/books/business-of-empire/7818C058283778F7A068DC347A10215D>>.

platforms. Equally, Facebook's Oversight Board uses judicial decision-making to adjudicate how Facebook exercises its power vis-à-vis its users.

Ambiguity and Normative Uncertainty

One characteristic not mentioned in the section above is the conceptual ambiguity we encounter throughout this study. Juridic Governance transgresses several traditional categories as it exists in private and in public governance. Juridic Governance bodies look and function like courts, yet they are purposely designed not to be courts. They 'adjudicate' issues like free speech or regulatory matters in legalities dominated not by parliaments or public legislation but in normative orders of executive rule-setting, soft law, and private governance. In his work on the 'normative order' of the internet, Kettemann provides an exhaustive framework to trace certain normative aspects through various situations of internet governance.⁴⁷ Yet, the specific methods and institutions of this normative order remain diversified and opaque. Kettemann argues,

“[t]he norms within the normative order [of the internet] are not only primarily *Regimeverfassung* or *Regimerecht* norms, but rather stem from a broad variety of legal and quasi-legal sources, including national law, international law, and transnational regulatory arrangements, such as standards and soft law. As a legal order, it operates through the form of law and analogously to it. Its actors—states, legal persons, natural persons—fulfil diverse functions as norm entrepreneurs, norm appliers, and norm enforcers. Though not without autonomous elements, the normative order of the internet is interlinked through legitimation relationships with national and international legal orders.”⁴⁸

But how can 'the normative order of the internet' simultaneously be a "legal order" if it stems from "quasi-legal" sources? Are its norms 'law' or 'analogous' to it? What does 'analogously to law' mean? And how exactly is the normative order of the internet, or for our purposes the normative frameworks applied by Juridic Governance, interlinked with national and international legal orders? To throw light on these ambiguities of the internet's normative order, Juridic Governance narrows its focus. Juridic Governance focuses on one type of method and institution to describe what could, at least for platforms, eventually amount to an 'adjudicative turn' in internet governance.

⁴⁷ Kettemann (n 4).

⁴⁸ *ibid* 233.

However, a research object characterized by ambiguity and amorphous nature deserves a conceptually clear-cut analytical framework. So far, no such framework exists for adjudicatory bodies on the internet. Therefore, many draw on auxiliary terminology. Especially the term ‘quasi’ appears ubiquitously. The Oversight Board, for example, has been described as ‘quasi-judicial many times.’⁴⁹ The DSA’s out of court dispute settlement bodies are described as “quasi-courts”⁵⁰ and were envisaged as a “sub-court system” offering “simplified legal procedure[s] [...] fit to the nature of content moderation disputes, and at the same time ensure that national courts are not overburdened by such disputes“ by the EU’s legislators.⁵¹

Yet, ‘quasi-judicial’ is an open-ended term, signifying nothing but the strangeness of the new adjudicatory bodies. Except for its deviation to the ‘normal’ judicial body – which itself is impossible to define⁵² – the term ‘quasi-judicial’ tells us nothing about the nature of the actor it describes. Still, the actors analyzed in this paper share distinct features. They issue authoritative and binding decisions, they deliberate, they control authority and enforce individual rights. They are independent and impartial. Juridic Governance’s authority goes beyond the authority of most other accountability mechanisms like Ombudspersons or transparency obligations. Such accountability mechanisms provide a basis for future control by enhancing stakeholder involvement and transparency while lacking authoritative decision-making.

I illustrate the conceptual difficulties common to the whole of Juridic Governance with one of the many blog posts about the Oversight Board’s most important decision, the ban of the Facebook and Instagram accounts of former US President Donald Trump after the attempted coup of 6 January 2021. The blogpost looks into the Oversight Board’s nature and argues that the Oversight Board is not a ‘court’ but

“closer to an international human rights tribunal or quasi-judicial monitoring institution, such as the European Court of Human Rights or the UN human rights treaty bodies. The board is (unlike most domestic courts) [...] not a freestanding

⁴⁹ See e.g. Helfer and Land who argue that the Oversight Board is not so much a real court but “closer to an international human rights tribunal or quasi-judicial monitoring institution, such as the European Court of Human Rights or the U.N. human rights treaty bodies.”, see Laurence R Helfer and Molly K Land, ‘Is the Facebook Oversight Board an International Human Rights Tribunal?’ (*Lawfare*, 13 May 2021) <<https://www.lawfareblog.com/facebook-oversight-board-international-human-rights-tribunal>>.

⁵⁰ Daniel Holznagel, ‘The Digital Services Act Wants You to “Sue” Facebook over Content Decisions in Private de Facto Courts’ [2021] *Verfassungsblog: On Matters Constitutional* <https://intr2dok.vifa-recht.de/receive/mir_mods_00010865> accessed 7 September 2021.

⁵¹ The latter two quotes stem from the European Parliament’s draft report preceding the Commission’s DSA proposal. See the Parliament’s Rapporteur’s Explanatory Statement p 22/23 in European Parliament Committee on Legal Affairs and Tiemo Wölken (Rapporteur) (n 14).

⁵² See the first chapter in Martin M Shapiro, *Courts, a Comparative and Political Analysis* (University of Chicago Press 1981).

legal body but an institution created by the company itself. The board's charter, much like a treaty establishing an international monitoring mechanism, defines the cases it can hear and the issues it can address. In this respect, the board's design mirrors that of international courts and review bodies, whose jurisdiction, access rules and review powers are defined by the consent of the states that created them."⁵³

Their argument epitomizes much of the conceptual problems we currently face when dealing with 'quasi-judicial bodies in post-state governance. A wide range of bodies features an institutional design and uses a method of decision-making that we may describe as 'judicial'. These actors can be national, international, supranational, private, or regulatory. Some call them tribunals. Others call them courts. Others call them bodies and boards.

In their blogpost, Helfer and Land, for example, use the terms 'court' and 'tribunal' and 'quasi-judicial monitoring body', more or less, interchangeably. Their main point is that the Oversight Board is not the 'Supreme Court' as Mark Zuckerberg described. But what is a 'court', or a 'tribunal', or a 'quasi-judicial monitoring body'?

The blogpost makes two analogies: the European Court of Human Rights (ECtHR) and the UN Human Rights treaty bodies. But these are profoundly different things. The ECtHR can issue binding decisions for the state parties to the European Convention of Human Rights. The ECtHR decides based on individual complaints. It can stipulate interim measures. It deliberates and writes reasoned judgements. It decides a dispute between a structurally weaker party – the individual whose human rights might be violated – and the state as structurally dominant party. In a nutshell, the ECtHR has – limited – authority over states as it controls the states when possibly infringing on individual rights. Then there are the "UN human rights treaty bodies", such as the UN Human Rights Committee (HRCttee). Such treaty bodies cannot issue decisions binding upon those states that signed the relevant protocol.

In contrast, UN membership does not entail subjugation to the treaty bodies – each member state can decide for each treaty body whether it wants to join or not. Also, individuals cannot file petitions, claims, or complaints to the treaty body. Treaty bodies do not decide any dispute; they inform, gather reports, and issue statements about the human rights practice in states. They do not have authority over states. Treaty bodies have very little control over the human rights governance regimes of the states which signed the protocols relevant for, e.g. the HRCttee.

⁵³ Helfer and Land (n 50).

How can a body like the Oversight Board – or any other actor in Juridic Governance – be simultaneously analogous to the European Court of Human Rights *and* to rather toothless accountability and monitoring bodies like the UN treaty bodies?

That is because bodies like the Oversight Board, like the DSA’s ‘out of court’ dispute settlement bodies, or the EU’s Boards of Appeal cannot be fruitfully analogized to traditional categories of judicial protection or accountability.

They are a new form of judicial protection. In some aspects, they look more like courts (binding decisions, compulsory jurisdiction, control to power). In some aspects, they look more like private bodies (private set up, some heritage in ADR). But concepts and categories change. So does the functionality of the judicial process and the separation of powers in situations with new powers. Therefore, I argue, such bodies that cannot be analogized to international courts or treaty bodies deserve a more concise term than ‘quasi-judicial’. My offer to bridge this conceptual gap is *Juridic Governance*. Juridic Governance covers both aspects of such bodies and provides a clear-cut definition.

Conclusion: Advancing a Rule of Law in the Internet

This paper described how judicial decision-making transgressed the judiciary in post-state governance. Perhaps the most important area of such post-state governance is the internet. The power amassed by online companies like Facebook or Twitter is vast. Especially so in sensitive areas like individual reality, normality, identity, and political opinion.

Unchecked power, however, is unacceptable. Therefore, many call for a better ‘rule of law’ on the internet. Juridic Governance is an important piece in the internet’s rule of law puzzle. It infuses public law aspects – most importantly, the concept of judicial control over administrative action – to private and regulatory governance. Internet Governance relies increasingly on judicial decision-making. Yet, internet governance does not rely on courts from national and international judiciaries. Instead, the internet spawns its own adjudicatory bodies, developing their very own ‘rule of norms’. Such bodies make binding decisions and control platform power. They use individual cases to administer justice on a grander scale. Future research will show what this means for internet governance’s legitimacy on the one hand and possible fragmentation of different normative orders on the other hand.

Lastly, in terms of legitimacy, the question remains whether it is sufficient to transplant only those public law concepts that concern better norm-enforcement (namely judicial review). Or whether legitimate governance of the digital public sphere should also include public concepts regarding norm-creation, most importantly democratic participation. My project uses public law and theory to answer these questions with a special focus on administrative and regulatory law.