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DOI
10.1016/j.clsr.2025.106118

Publication date
2025

Document Version
Final published version

Published in
Computer Law & Security Review

Computer Law & Security Review 56 (2025) 106118

Contents lists available at ScienceDirect

Computer Law & Security Review: The International Journal of Technology Law and Practice

journal homepage: www.elsevier.com/locate/clsr

The rise of technology courts, or: How technology companies re-invent adjudication for a digital world

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ARTICLE INFO

Keywords:
Digitisation
AI
Justice
Courts
Big Tech
Digital transformation
Values

ABSTRACT

The article "The Rise of Technology Courts" explores the evolving role of courts in the digital world, where technological advancements and artificial intelligence (AI) are transforming traditional adjudication processes. It argues that traditional courts are undergoing a significant transition due to digitization and the increasing influence of technology companies. The paper frames this transformation through the concept of the "sphere of the digital," which explains how digital technology and AI redefine societal expectations of what courts should be and how they function.

The article highlights that technology is not only changing the materiality of courts—moving from physical buildings to digital portals—but also affecting their symbolic function as public institutions. It discusses the emergence of AI-powered judicial services, online dispute resolution (ODR), and technology-driven alternative adjudication bodies like the Meta Oversight Board. These developments challenge the traditional notions of judicial authority, jurisdiction, and legal expertise.

The paper concludes that while these technology-driven solutions offer increased efficiency and accessibility, they also raise fundamental questions about the legitimacy, transparency, and independence of adjudicatory bodies. As technology companies continue to shape digital justice, the article also argues that there are lessons to learn for the role and structure of traditional courts to ensure that human rights and public values are upheld.

1. Introduction

The legal philosopher Meyerson once explained that "the best way to understand the nature of a court is as an artefact which is intentionally created to perform a particular function in the overall constitutional system of government".[1] Courts are an artefact of any society that gives itself rules to live by, and a central function for courts in democratic societies is to uphold the rule of law, provide a forum to resolve disputes and interpret laws fairly and rationally.[2] Therefore, next to applying the law, judges have an important role in what Michaels calls 'a beneficial updating dialogue between the law and human society".[3] Courts contribute to our collective understanding of what justice requires. In applying, interpreting and upholding the laws, courts have, moreover, an important democratic role in controlling the executive and legislative, the other two parties in the trias politicas.[4]

Another legal philosopher, Lon Fuller, points to the important societal role that courts have. He argues that "adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated".[5] Courts help create a social order by publicly and authoritatively determining the legitimate expectations of citizens vis-à-vis one another and concerning the government and private companies. This is not a static order but one that is constantly changing in response to societal, economic, technological and political factors.

One such factor is digital technology and Artificial Intelligence (AI). AI is permeating all areas of social life, including the way society choses

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[1] Denise Meyerson, "What Is a Court of Law?," *University of New South Wales Law Journal*, no. 1 (2019): 60–90.

[2] Susan Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium," *Monash University Law Review* 25, no. 2 (1999): 209–24.

[3] Andrew C. Michaels, "Artificial Intelligence, Legal Change, and Separation of Powers," SSRN Scholarly Paper (Rochester, NY, September 24, 2019), 1085, https://papers.ssrn.com/abstract=3459069.

[4] Michaels, "Artificial Intelligence, Legal Change, and Separation of Powers"; Alexandra Marks, "What Is a Court" (London: Justice, 2016).

[5] Lon L. Fuller and Kenneth I. Winston, "The Forms and Limits of Adjudication," *Harvard Law Review* 92, no. 2 (1978): 353–409, https://doi.org/10.2307/1340368.

https://doi.org/10.1016/j.clsr.2025.106118

Available online 5 March 2025

to adjudicate rights and make decisions in the legal domain. Justice as a profession is under increasing pressure to re-invent itself and find ways of fulfilling the promises of legal technology – to become faster, more efficient, fairer and more easily accessible. Some even argue that decision-makers, and courts, in particular, *have* to embrace digitization.[6] Courts can utilize AI-enabled services and applications throughout the justice process, including for administrative support, legal research and analysis, document collection, communication with parties involved, trial preparation, and even drafting judicial decisions.[7] And a growing area of justice and legal apps are taking over functions traditionally performed by courts.[8] The push for digitisation goes hand in hand with concerns about the decline of trust in traditional institutions, including the justice sector, and the demands from an increasingly digitised society. In response, we observe an influx of new 'justice-as-a-service' offers that promise more customer orientation, cheaper access to justice, speed and efficiency.

Much of the current debate on the role of AI in the justice sector concentrates on case studies how AI is changing the practice of justice,[9] arising ethical and legal issues and the risks from the use of AI for society and human rights,[10] or questions of how to govern AI in the justice sector.[11] This article takes a different, more conceptual approach and asks: "How does the rise of AI changes what we as society expect courts to be and do"? The article reflects on the way that digitisation and the growing prominence of AI also in the justice sector challenges some core assumptions about courts that so far, we have taken for granted. This is done through the analytical lens of the 'sphere of the digital."[12] The "sphere of the digital" is an analytical framework developed by Sharon, Gellers and Stevens on the basis of Martin Walzer's theory of 'sphere transgressions" and their effect on a justice in society, in his book "Spheres of Justice (1983).[13] Martin Walzer's theory of sphere transgressions is grounded in his thinking about distributive justice. He argues that in a society there are different "distributive spheres", and each sphere is characterised by distinct actors, values and goods, like housing, care, education, that have their own social meaning within a particular sphere. Depending on the goods in question, each sphere is governed by different principles of distributive justice. Transgressions between different spheres can result in a loss of meaning or the disregard of rules for a particular sphere. Sharon and colleagues build on this theory and update it with what they call the "sphere of the digital". Digital products and expertise are the main goods in this sphere, and the main actors commanding these goods within the sphere are Big Tech corporations that have accrued an important advantage in the sphere of the digital. Important for the given article is the observation of the authors that "[t]he sphere transgressions framework suggests that digitalization can also have a transformative and, arguably, corrosive effect on the goods and activities in other societal spheres."[14] As we will demonstrate, many of these new legal services are not even designed and provided for by legally trained experts, but by technology developers and customer experience. Frank Pasquale explains how in turn AI and robotics in law enforcement and governance are largely driven by an economic, efficiency-based narrative and how by turning "to machines to judge persons, they [firms and governments] grant enormous power to those developing AI"[15]. Importantly, this power does not limit itself to the design of algorithmic systems but extends to the re-interpretation of public values and traditional institutions.[16] In an increasingly digitised world, national courts, bound to national jurisdictions and laws are increasingly at odds with the demands of speedy innovation and the ability of globally operating companies to offer and consume services across national jurisdictions. In response, a push can be observed to re-interpret values and human rights to make them of a broader global appeal and to build new institutions that must uphold those values.

The overall goal of this conceptual contribution is to critically analyse how, unsatisfied with the constraints of traditional courts and as the expression of dwindling trust in traditional institutions, the digital society has begun to re-invent courts as we know them.

2. From physical buildings to digital portals

The first notable change in the sphere of courts under the impact of digitisation is their materiality. If we imagine courts, at least in more recent history,[17] we imagine buildings. In an insightful investigation into the rise of digital justice, Donohue refers to the "important symbolic function of the courthouse as the home of justice and the presence of law ", and how this symbolic function is being eroded by efforts in the UK to

[6] Corien Prins, "Digital Justice," *Computer Law & Security Review* 34, no. 4 (August 1, 2018): 920–23, https://doi.org/10.1016/j.clsr.2018.05.024.

[7] Vasiliy A. Laptev and Daria R. Feyzrakhmanova, "Application of Artificial Intelligence in Justice: Current Trends and Future Prospects," *Human-Centric Intelligent Systems* 4, no. 3 (September 1, 2024): 394–405, https://doi.org/10.1007/s44230-024-00074-2.

[8] Tania Sourdin, Jacqueline Meredith, and Bin Li, *Digital Technology and Justice: Justice Apps* (London: Routledge, 2020), https://doi.org/10.4324/9781003127031; Lois R. Lupica, Tobias A. Franklin, and Sage M. Friedman, "THE APPS FOR JUSTICE PROJECT: EMPLOYING DESIGN THINKING TO NARROW THE ACCESS TO JUSTICE GAP," *Fordham Urban Law Journal* 44, no. 5 (November 1, 2017): 1363–1406.

[9] See instead Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford: Oxford University Press, 2017); Jane Donoghue, "The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice," *The Modern Law Review* 80, no. 6 (2017): 995–1025; Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Northhampton: Edward Elgar Publishing, 2021); Jennifer Cobbe, "Legal Singularity and the Reflexivity of Law," in *Is Law Computable? Critical Perspectives on Law and Artificial Intelligence* (London: Hart Publishing, 2020), 107–34; Rebecca Crootof, "'Cyborg Justice' and the Risk of Technological-Legal Lock-In" 119 (2019).

[10] Consultative Council of European Judges, "Opinion No. 26 (2023) 'Moving Forward: The Use of Assistive Technology in the Judiciary'" (Strasbourg: Council of Europe, 2023), https://www.coe.int/en/web/human-rights-rule-of-law/-/the-ccje-adopts-opinion-no.-26-2023-moving-forward-the-use-of-assistive-technology-in-the-judiciary-.

[11] J. E. J. Prins Ettekoven B. J. van, "Nederlands Juristenblad, Artificiële intelligentie en de Rechtspraak | InView," accessed July 9, 2024, https://www.inview.nl/document/id93e57c6725e44df0b7962972c555eeff/nederlands-juristenblad-artifici-ele-intelligentie-en-de-rechtspraak; Prins, "Digital Justice."

[12] Marthe Stevens, Steven R. Kraaijeveld, and Tamar Sharon, "Sphere Transgressions: Reflecting on the Risks of Big Tech Expansionism," *Information, Communication & Society* 0, no. 0 (2024): 1–13, https://doi.org/10.1080/1369118X.2024.2353782; Tamar Sharon and Raphaël Gellert, "Regulating Big Tech Expansionism? Sphere Transgressions and the Limits of Europe's Digital Regulatory Strategy," *Information, Communication & Society*, August 16, 2023, 1–18, https://doi.org/10.1080/1369118X.2023.2246526.

[13] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

[14] Stevens, Kraaijeveld, and Sharon, "Sphere Transgressions."

[15] Frank Pasquale, *New Laws of Robotics: Defending Human Expertise in the Age of AI* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2020), 122, 142.

[16] Paul Nemitz, "Constitutional Democracy and Technology in the Age of Artificial Intelligence," *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* 376, no. 2133 (October 15, 2018): 20180089, https://doi.org/10.1098/rsta.2018.0089.

[17] Interestingly, early courts started as open structures, sometimes even open-air, and only later moved into dedicated buildings, see Sarah Moore, "Digital Government, Public Participation and Service Transformation: The Impact of Virtual Courts," *Policy & Politics* 47, no. 3 (July 1, 2019): 501, https://doi.org/10.1332/030557319X15586039367509; Judith Resnik, Dennis Curtis, and Allison Tait, "Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere," in *Law, Culture and Visual Studies*, ed. Anne Wagner and Richard K. Sherwin (Dordrecht: Springer Netherlands, 2014), 515–45, https://doi.org/10.1007/978-90-481-9322-6_23.

modernise the court system, with the consequence of closing down a significant number of courthouses.[18] The argument centres on the observation that courts as a *place to go to* allow for different forms of communication and access than virtual courtroom meetings via video link. This is the idea of courts as places that "symbolis[e] shared ideals of justice and due process" reassuring citizens "that the law is present and in operation".[19] A similar argument is being made by Haldar who investigated the topographies of law and the architecture of court buildings and remarked that "[a]rchitecture marks off and signifies that authority-to-judge which can only be found inside a court of law and nowhere else, it assigns legal discourse to a proper place, and it is from within these surrounds that a judge makes his discourse, and from which this discourse derives its legitimate source and point of application".[20] The materiality of courts signals moreover that they relate to a physical location that is located in the jurisdiction and under the authority of a particular state, reminding us that the reach of courts and the laws that they enforce are typically bound by the territorial borders of a particular country and its society. And finally, the fact that governments are investing in their often magnificent and impressive buildings also serves as a reminder of courts' dependency on other branches of government, which authorize budgets and shape jurisdictional authority.

With the arrival of the internet and digitisation, the materiality of courts as a physical location was one of the first characteristics societies were ready to let go as a defining feature of the "sphere of courts". Donohue in her study of the digital reform program of the British court system describes how in the UK courts moved to virtual courtrooms and how that program went along with massive closures of courts as physical locations.[21] The pandemic functioned as another catalysator of the de-materialisation of courtrooms.[22] One of many examples is how in response to the pandemic, the US state of Atlanta has embraced a new Online Traffic Resolution portal that allows people to challenge their parking tickets, instead of having to go to a physical building. The move was accompanied by headlines such as "New Platform Offers a Court-Free Solution to Traffic Tickets."[23] There are many other examples, like the Canadian Civil Resolution Tribunal for small claim disputes,[24] the Utah Small Claims Court, the UK HM Courts and Tribunals Service Centre.[25] These examples are part of a more general trend in the US,[26] Europe,[27] Australia,[28] New Zealand,[29] and Asia to digitise courts and court proceedings to offer various court services online, streamline and make processes more efficient, enable remote hearings and improve online accessibility 24 hours a day. These initiatives effectively erode our idea of courts as a location, a place one has to go to get justice, in a move to create more efficient 'court-free' solutions.

Arguments of access to justice but also transparency, and ultimately boosting public trust are often brought to the fore to justify the move away from physical buildings, but so are arguments of cost-effectiveness, efficiency and the underuse of courtrooms.[30] In a report on the reform of the UK justice system, material buildings are described as from 'a different era of travel and communication' and instead, the far more flexible notion of 'justice spaces' is being introduced.[31] Considerations of economic success and the ability to "remain competitive as a judicial location" vis-à-vis the rise of private ODR solutions have been mentioned as another important driver.[32] The European Union's attempts at modernising the justice system bring additional aspects of competitiveness, economic prospering and accessibility across borders into play. Through 'simplifying procedures and offer[ing] legal certainty to people and businesses, the EU hopes that "[g]reater legal certainty, combined with simple and digitalised procedures, will encourage individuals and businesses to engage in cross-border transactions, thereby boosting trade within the EU, and hence the functioning of the internal market."[33]

The shift to remote courts is part of a broader trend of what Moore calls a move to "government as a platform", building the digital infrastructures for our democracy to run on, including the infrastructures for doing justice.[34] There are concerns, too, most prominently about procedural justice and reduced possibilities for interaction and effective communication.[35] Closer to the objective of this paper, however, is the impact that digitisation of court proceedings can have in "changing the meaning of the court hearing as a 'public ritual'".[36] In other words, digitisation can increase access to, and the efficiency of doing justice, but it can also result in a de-coupling of the idea of "justice being done" and courts as institutions.[37]

2.1. The de-mystification of judicial authority

Different spheres come with different actors with different sets of expertise. Expertise in the law and judicial authority are two other criteria that we commonly associate with courts. Courts have been described as a place where we see "justice being done".[38] They are places where we can see justice being done because in courts where we expect to find expertise and experts that can be trusted to adhere to judicial values and procedures. The personification of this expertise is the figure of the judge. Judges are experts that adhere to and possess the necessary substantive and procedural knowledge to apply the law and operationalise judicial values such as impartiality, knowledge of and adherence to principles of due process, respect for transparency and the

[18] Donoghue, "The Rise of Digital Justice," 1006.

[19] Emma Rowden, "Distributed Courts and Legitimacy: What Do We Lose When We Lose the Courthouse?," *Law, Culture and the Humanities* 14, no. 2 (June 1, 2018): 263, https://doi.org/10.1177/1743872115612966.

[20] Piyel Haldar, "In and out of Court: On Topographies of Law and the Architecture of Court Buildings," *Revue Internationale de Semiotique Juridique* 7, no. 2 (June 1, 1994): 185–200, https://doi.org/10.1007/BF01816606; Rowden, "Distributed Courts and Legitimacy."

[21] Donoghue, "The Rise of Digital Justice," 1004.

[22] Tania Sourdin and John Zeleznikow, "Courts, Mediation and COVID-19," *Australian Business Law Review* 48, no. 2 (2020): 138–58.

[23] https://www.govtech.com/biz/new-platform-offers-a-court-free-solution-to-traffic-tickets.html#:~:text=Courts%20across%20the%20country%20have,virtual%20means%20of%20handling%20tickets.&text=COVID%2D19%20has%20had%20a,cybersecurity%20concerns%20to%20court%20proceedings.

[24] Civil Resolution Tribunal Act, BC(2012) c 25.

[25] https://www.gov.uk/government/news/helping-our-online-users-with-a-new-national-digital-support-service

[26] https://www.courts.ca.gov/38374.htm

[27] https://www.gov.uk/government/news/helping-our-online-users-with-a-new-national-digital-support-service

[28] https://www.digital.nsw.gov.au/article/making-court-procedures-more-accessible; https://www.courts.nh.gov/resources/electronic-services

[29] https://consultations.justice.govt.nz/osd/digital-strategy-for-courts-and-tribunals-draft-fo/

[30] Donoghue, "The Rise of Digital Justice"; Moore, "Digital Government, Public Participation and Service Transformation"; Michaels, "Artificial Intelligence, Legal Change, and Separation of Powers."

[31] Marks, "What Is a Court," 5, 22 subsq.

[32] https://www.nortonrosefulbright.com/en/knowledge/publications/3bc3c34a/digitalisation-of-civil-proceedings-in-germany

[33] https://www.europarl.europa.eu/news/en/press-room/20201120IPR92137/digital-justice-ep-endorses-rules-on-service-of-documents-and-taking-of-evidence

[34] Moore, "Digital Government, Public Participation and Service Transformation," 500.

[35] Donoghue, "The Rise of Digital Justice"; Moore, "Digital Government, Public Participation and Service Transformation."

[36] Moore, "Digital Government, Public Participation and Service Transformation," 497.

[37] Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge*, 106.

[38] Moore, "Digital Government, Public Participation and Service Transformation," 495.

ability to reason in line with the judicial method.[39] Typically, admission to the position of a judge is conditional upon the successful completion of a study of the law.[40] But expertise in itself is not sufficient. Public perception and confidence of the public that judges and courts can comply with this task are also important elements of their authority.[41]

With digitisation, not only the idea of courts as virtual buildings is vanishing into the background, but so is the idea of judges as the epitome of judicial authority. Once the central figure in a courtroom that presides over the proceedings, digitised societies are becoming attuned to accepting alternative forms of authoritative decision-making and makers, including citizens themselves. An example is the Aragon Court.[42] The Aragon Court is a blockchain-powered dispute resolution system. Its motto: "Prevent and resolve disputes more efficiently than traditional courts." The Aragon court is networked, comprised of jurors that are financially incentivised to participate in arbitration disputes amongst community participants but that do not necessarily have legal expertise. These 'guardians' (in the words of the Aragon Court) can also be normal citizens. The goal of the Aragon Court is to find 'the subjective truth" as the most common correct outcome of a dispute. Unlike a traditional court, it does so not by applying impartially particular rules, but by consensus. Guardians are asked to anticipate the votes of the majority of guardians, and if they succeeded, they will receive tokens from the guardians who voted in the minority. The heart of the Aragon Court is its Court Dashboard, giving guardians access to past and current disputes, arguments and rulings.[43] Equipped with the right data, laypersons turn into judges. The court is part of a digital network, called the Aragon 'jurisdiction', and if disputes are not settled, there is still a way to the Aragon Constitutional Court. A comparable example is the Kleros Court, "a decentralised arbitration service for the disputes of the new economy",[44] and also here users, not judges, serve as jurors, incentivised by crypto economics.

Companies, too, can be the drivers behind creating new institutions of authoritative judgement, like in the example of ADGM Court - a fully digital court, comprising a Court of First Instance and a Court of Appeals, created by the financial centre ADGM to resolve civil and commercial cases. The ADGM court offers, like a conventional court, the ability to file proceedings, organise electronic hearings and trials, case management and bring in evidence.[45] The ADGM Courts are established by UAE Federal Decree and its jurisdiction extends across Al Maryah Island (northeast of Abu Dhabi). Its legislative framework comprises a single unified statute, the ADGM Courts' Regulations, which has been tailored specifically to ADGM Courts' requirements and draws upon English, Scottish and Australian Federal Law. According to the website: "ADGM provides market participants with a world-class legal system and regulatory regime."[46]

The Aragon, Kleros and ADGM Courts are only three out of a growing number of examples of new forms of online adjudication and dispute settlement services, and also a good example of how in the process of digitisation we have let go of the second requirement that so far identified a court: expertise and judicial authority. The authority of the judge is replaced by alternative authoritative decision-makers with different sets of expertise: citizens, companies … or machines. The Hangzhou Internet Court, for example, is one out of a stack of online courts rolled out in China, specialised in legal disputes over digital matters (including internet trade issues, copyright claims and disputes over online product sales).[47] The decisions are rendered by non-human judges powered by artificial intelligence. People seeking legal action can register their cases on the Internet. They can then take part in a digital court hearing. The system gives users the chance to communicate and receive court decisions by text or through major messaging services, all of this 24 h a day, seven days a week. Or in the words of Frank Pasquale: "authority is increasingly expressed algorithmically" .[48]

One can question, of course, to what extent these new 'courts' still qualify as courts in the conventional sense, particularly if they operate outside judicial oversight and seeing that there are valid questions around the legitimacy, authority and effectiveness of such online courts.[49] Probably not, but the point that matters for this paper is that these new forms of courts very deliberately present themselves as alternatives to courts and performing judiciary-like functions in the sense of Susskind's idea of extended courts.[50] In so doing, they demystify and democratise the idea of judicial authority as another common criterion of what makes a court: everybody can be a judge, even an AI.[51] In this context it is important to note that what a court is or does is not something that is written in stone, but can be subject to change due to societal, economic, political or technological factors. Insofar, the transgression of new AI-enabled actors that have traditionally not been associated with courts and the resulting transformation of what courts are and do can be seen as part of a larger, ongoing and fluid process of rethinking the role of courts and judges in society. As a matter of fact, many of the above-described innovations are probably better described as bodies of arbitration and step into a long-standing history of changing forms of cooperation and divisions of tasks between courts and arbitration bodies that perform court-like functions.[52]

2.2. *From public institution to technological protocols*

Where once masons and architects built courts from brick and marble we now see website developers, consultancies and legal tech companies actively building the courts of the future.[53] The various digital court reform projects are supported by a range of technology companies, large and small, that help to build the necessary digital infrastructure. Technology and consulting companies such as Accenture,[54] Microsoft,[55] PWC

[39] Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium," 214.

[40] Michaels, "Artificial Intelligence, Legal Change, and Separation of Powers."

[41] Meyerson, "What Is a Court of Law?," 74; Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium."

[42] https://court.aragon.org/#/dashboard

[43] https://documentation.aragon.org/products/aragon-court/court-dashboard

[44] https://kleros.io/

[45] https://www.adgm.com/adgm-courts/digital-approach

[46] https://rosemont.partners/adgm-foundation/#:~:text=ABOUT%20THE%20ADGM%20Abu%20Dhabi%20Global%20Market%20%28%E2%80%9CADGM%E2%80%9D%29,participants%20a%20world%E2%80%90class%20legal%20system%20and%20regulatory%20regime.

[47] See also "The Smart Court – A New Pathway to Justice in China? - International Journal for Court Administration," accessed March 22, 2023, https://iacajournal.org/articles/10.36745/ijca.367.

[48] F. Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge, MA, USA: Harvard University Press, 2015).

[49] Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge*, 193–94.

[50] Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*.

[51] And research even indicates that users are prepared to accept an AI as the fairer judge, Natali Helberger, Theo Araujo, and Claes H. de Vreese, "Who Is the Fairest of Them All? Public Attitudes and Expectations Regarding Automated Decision-Making," *Computer Law & Security Review* 39 (November 1, 2020): 105456, https://doi.org/10.1016/j.clsr.2020.105456.

[52] Georgios I. Zekos, *Advanced Artificial Intelligence and Robo-Justice* (Zurich: Springer Nature, 2022), 268–71.

[53] David B. Wilkins and María J. Esteban Ferrer, "Taking the 'Alternative' out of Alternative Legal Service Providers: Remapping the Corporate Legal Ecosystem in the Age of Integrated Solutions," SSRN Scholarly Paper (Rochester, NY, April 27, 2019), 9pp, 15, https://doi.org/10.2139/ssrn.3379056.

[54] https://www.accenture.com/gb-en/blogs/voices-public-service/digitally-transforming-the-justice-system-3

[55] https://www.microsoft.com/en-us/industry/government/public-safety-and-justice and https://www.microsoft.com/en-us/corporate-responsibility/justice-reform-initiative?activetab=pivot_1%3aprimaryr4

play a vocal role in setting out a vision for the courts of the future, as do a growing number of legal start-ups.[56] These inroads of technology companies into the sphere of courts and justice are often accompanied by a rhetoric of urgency and inevitability if justice, as an institution, is hoping to survive. This quote from a PWC management report on the future of digital justice is illustrative: "Courts try to manage 21st-century complexity with 19th-century tools such as paper file keeping. As a result, insufficient digitalisation leads to a bad user experience and eroding trust in our legal institutions."[57]

Courts are framed here not any longer as institutions, but as "processes" that need to be designed.[58] Those seeking justice turn into customers. The technology-driven rhetoric of user-centric design of judicial processes is echoed and amplified by some of the government driven-processes of digital court reforms. The Australian Digital Reform Program, for example, speaks of "improved customer experience" through increased transparency of processes, as well as speed and access,[59] and Moore, in her investigation of the UK Court Reform Project points to the rise of design thinking in tackling policy problems, including court reforms: "The ideal is for twenty-first-century government to be as user-friendly as Amazon, as pervasive as Facebook and as much of a go-to as Google – for life to be unthinkable without it".[60] As a result of the design and service rhetoric, also the roles in the digital courtrooms change: in justice as a service, the judge (or the judiciary) turns into the paying customer (paying for technology design companies), and users turn into customers that judge the quality and user-friendliness of the experience.

And maybe it is in the influx and growing importance of this new category of actors – technology companies - into there sphere of courts and justice that the theory of digital sphere transgressions is most useful in helping us to properly situate these developments. As we can learn from discussions in other areas, technology developers come with their values and ideas. Scholarship in the area of digital journalism, for example, has uncovered how the providers of digital technology (technology companies) and professional users of technology (journalists and news editors) may work in the same sector but differ fundamentally in their convictions of what professional values to pursue and optimise for[61] and this is a trend we observe in other sectors as well. Van Dijk, Poell & De Waal observe in their seminal book on the platform society how under the influence of digital technology companies education as an example of a previously core public sector and even the very idea of education as a common good and public value is changing and being redefined, and how traditional public values such as equal access, professional autonomy and accountability are being disrupted.[62] And very similar trends can be observed in the justice sector. Also in the sphere of courts and the justice sector, technology companies are doing more than 'just' building the digital infrastructure of the courts of the future; they are also importing their own values in the process.

Courts and judges as institutions come with a set of distinctive values that characterise them as a democratic institution. As Meyerson explains, the definition of a court is tied to the features of impartiality, judicial independence and the use of procedures that are a reliable way of ascertaining the facts, and the ability of courts to act with effective authority depends on the courts being perceived to possess these features.[63] In other words, what also characterises the sphere of the court is that distributive decisions are taken based on a particular merit – namely judicial values and the rule of law. But where in traditional courts the rule of law is at the heart of the justice system, according to Accenture: "Data is at the heart of the solution."[64] And in its promotional video for its digital justice suit, Microsoft highlights scalability as one of the core values the systems are optimised for.[65] Donohue, in her investigation of the reform of the UK court system, points to the language of efficiency and outcome-oriented metrics that is dictating digitalisation in courts.[66] In other words, when digital technology companies move into the justice sector, they important not only technologies but also new sets of values, such as scalability, efficiency, user-friendliness. Often, these values are not even specific to one sector, as technology companies often operate across different sectors.

This can be a development to the better, and digitalisation can introduce or enable the realisation of new values in the justice sector. Generative AI can make it easier for, and empower individual users to write complaints in their quest for justice.[67] AI-assisted solutions can increase perceptions of fairness because they blend out elements that can make human-rendered decisions unfair, like emotions, cognitive biases and bad days.[68] Being able to participate in hearings online can increase accessibility and inclusiveness. And alternative forms of adjudication, for example in the form of Online Dispute Resolution, have been argued to reduce procedural inefficiencies and give more decision-making power to the parties of a proceeding.[69]

At the same time, AI-assisted solutions can also introduce new value conflicts. As the Consultative Council of European Judges writes in its Opinion on the use of assistive technology in the judiciary: "A significant move away from physical to hybrid or remote hearings may also undermine the constitutional status of the judicial process, particularly its symbolic nature. Taking part in proceedings from home, in a car, or in a public space may tend to undermine society's understanding of the civic

[56] https://www.pwc.com/ca/en/industries/government-and-public-services/citizen-experience.html

[57] Ibid, p. 4. The report continues: "As the judiciary is a traditionally monopolistic provider of justice, few of the larger trends of digitalization have taken place within it. … As processes at traditional courts and experiences in everyday life diverge more and more, societal friction between the justice system and its users increases. This results in fewer individuals and companies enforcing their rights in court, as evidenced by the dramatic reduction of case numbers in some parts of the justice system in countries like Germany (−40% from 1995 to 2020 in civil proceedings)." (5)

[58] Boston Consulting, "The Future of Digital Justice," 2022, 4, https://web-assets.bcg.com/3a/4a/66275bf64d92b78b8fabeb3fe705/22-05-31-the-future-of-digital-justice-bls-bcg-web.pdf.

[59] https://www.digital.nsw.gov.au/article/making-court-procedures-more-accessible. For the US, see e.g. John Greaces, Institute for the Advancement of the American Legal System, Eighteen Ways Courts should use Technology to Better Serve Their Customers (Report, October 18), 2.

[60] Moore, "Digital Government, Public Participation and Service Transformation," 504.

[61] Mike Ananny and Kate Crawford, "A Liminal Press," *Digital Journalism* 3, no. 2 (March 4, 2015): 192–208, https://doi.org/10.1080/21670811.2014.922322; Valerie Belair-Gagnon and Avery E. Holton, "Boundary Work, Interloper Media, And Analytics In Newsrooms," *Digital Journalism* 6, no. 4 (April 21, 2018): 492–508, https://doi.org/10.1080/21670811.2018.1445001.

[62] José van Dijck, Thomas Poell, and Martijn de Waal, *The Platform Society: Public Values in a Connective World* (Oxford, New York: Oxford University Press, 2018), 129.

[63] Meyerson, "What Is a Court of Law?"

[64] Accenture: "Data is at the heart of the solution", https://www.accenture.com/gb-en/blogs/voices-public-service/digitally-transforming-the-justice-system-3

[65] Public Safety and Justice (microsoft.com)

[66] Cobbe, "Legal Singularity and the Reflexivity of Law," 24; Donoghue, "The Rise of Digital Justice," 1003.

[67] Zekos, *Advanced Artificial Intelligence and Robo-Justice*, 273.

[68] Helberger, Araujo, and de Vreese, "Who Is the Fairest of Them All?"

[69] J.J. Prescott and Alexander Sanchez, "Platform Procedure: Using Technology to Facilitate (Efficient) Civil Settlement," in *Selection and Decision in Judicial Process around the World: Empirical Inquires*, ed. Yun-chien Chang (Cambridge: Cambridge University Press, 2019), 30–72, https://doi.org/10.1017/9781108694469.003.

importance of proceedings."[70] Concerns of algorithmic bias and inequality[71] threaten to affect the moral quality and legitimacy of adjudication rendered with the help of AI.[72] Another example is judicial autonomy and independence as one of the core judicial virtues.[73] With increasing technological complexity of legal technology, judges using that technology are increasingly reliant on the expertise of the technology developers, in other words: "digital corporations [that] may not understand democratic notions nor the rule of law and may reshape judicial activities in unforeseen ways."[74]

The latter is a paradigmatic example of what Sharon et al. describe as "sphere transgressions", as tech companies use their advantage of superior knowledge of the technology to influence the sphere of justice. According to Sharon et al., such influence can be "illegitimate insofar as tech corporations do not have the domain expertise proportional to their new level of influence in these different societal spheres, and insofar as they are not accountable in the way that public sector actors are."[75] This is a valid point that certainly also applies to the growing importance of technology companies in the justice sector. When doing justice, judges and courts are acting as part of a system of checks-and-balances, procedural safeguards and commitments to the rule of law and human rights. These commitments and safeguards do not extend to technology companies, and as private companies they are in the first place accountable to their shareholders and CEOs.

It is important to understand that the transgression of digital technology companies into the judicial sphere, is not simply a matter of technical infrastructure or developing some handy tools, but a project to transform on a far more fundamental level the way 'justice is being done'. Van Domselaar makes a powerful argument how digitisation can result in a more fundamental change of mindset in the sense of 'codified justice:' She explains: "This mindset would focus on binary thinking and disambiguating legal terms rather than on cherishing ambivalence, doubt, insecurity and hesitation."[76] This change of mindset in our understanding of digital justice can, of course, not be seen separately from the mindsets of those building justice and legal tech applications. These are often not experts in the law, but technology experts, UX designers, customer engagement experts, data scientists and cloud solution architects,[77] experts that also come with their values and priorities for which the systems are optimised.[78]

As a result, not only public perceptions of what justice is as an institution can change. Legal professionals themselves may experience growing alienation from these newly digitised institutions of justice. An interview study by the UK Law Society found that legal professionals across the UK were concerned that legal technology developers were not 'speaking the same language' as legal professionals, and that development teams lacked legal expertise and the necessary sector-specific knowledge.[79] And Cobbe concludes that the proliferation of legal AI "reinforces monopolies of knowledge that privilege legal actors and the opacity of algorithmic systems admit computer scientists to the upper echelons of this hierarchy".[80]

2.3. The rise of technology courts

Maybe the most important reason why courts can function as institutions of justice and with authority is that they have received a democratic mandate from the people to do so.[81] Zekos explains: "Courts' legitimacy is intertwined with the fact that courts are arms of the state deriving their powers from the state's sovereignty, which, in turn, defines the scope of the court's legitimate powers."[82] As part of the trias politicas, courts have an important role in reviewing the legitimacy of governments' and private companies' actions and adherence to the laws of a given democracy in their dealings with citizens. How far that role may reach, and if courts are limited to 'only interpreting the laws' or also have a role in actively shaping them is subject to much controversy in legal scholarship. Decisive for the given context is that an important source of their ability to make any authoritative judgement is that they derive their legitimacy from a (democratic) mandate to interpret and safeguard our laws and human rights.

And yet, it is exactly that legitimacy to interpret and safeguard the laws that govern the digital sphere, that is increasingly put into question by Big Tech companies. In an increasingly digitised world, national regulatory frameworks, bound by national jurisdictions and enforced by national courts turn into a challenge for globally operating technology companies and platforms that offer their services cross-nationally. The recent rise of ethics codes and committees around all matters digital is no coincidence[83] and has been suspected to be part of a concerted strategy to avoid the making of laws, which would then be handled by courts.[84] Not only are codes and agreements not tied to traditional democratic procedures and institutions, such as courts, but they are also not linked to a particular jurisdiction. In the following, I will argue that the digitisation of justice has not only slowly eroded the defining features that once characterized a court, but it has also paved the way for a new category of adjudication: technology courts. I would like to elaborate on that point, using the example of the Meta Oversight Board. The Oversight Board is an instructive case study because rather than turning towards traditional courts and human rights standard-setting organisations, it is an example of a technology company creating its own adjudication body. And with the DSA, alternative bodies of adjudicating

[70] Consultative Council of European Judges, "Opinion No. 26 (2023) 'Moving Forward: The Use of Assistive Technology in the Judiciary.'"

[71] Virginia Eubanks, *Automating Inequality: How High-Tech Profile, Police and Punish the Poor* (St. Martin's Press, 2018); Cathy O'Neil, *Weapons of Math Destruction* (Crown, 2017).

[72] Jacob O Arowosegbe, "Data Bias, Intelligent Systems and Criminal Justice Outcomes," *International Journal of Law and Information Technology* 31, no. 1 (July 28, 2023): 22–45, https://doi.org/10.1093/ijlit/eaad017; Ettekoven, "Nederlands Juristenblad, Artificiële intelligentie en de Rechtspraak | InView."

[73] Iris Van Domselaar, "Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship," *Netherlands Journal of Legal Philosophy* 44, no. 1 (April 2015): 24–46, https://doi.org/10.5553/NJLP/.000025.

[74] Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge*, 196.

[75] Stevens, Kraaijeveld, and Sharon, "Sphere Transgressions."

[76] Iris Domselaar, "Inquiry and Imagination in Adjudication," *Netherlands Journal of Legal Philosophy* 51, no. 2 (2022): 26, https://doi.org/10.5553/NJLP/221307132022051002008.

[77] In this sense also Susskind & Susskind, p.128: speaking about the competition to the traditional professions and observes"What is notable about many of these cases of change are that they are being driven by people and institutions outside the boundaries of the traditional professions (often tech start-ups), with very different training and experience to traditional professionals."

[78] Cobbe, "Legal Singularity and the Reflexivity of Law," 24; Richard M Re and Alicia Solow-Niederman, "Developing Artificially Intelligent Justice" 22 (2019): 247.

[79] The Law Society, "ANNEX 2: THE LAW SOCIETY'S RESEARCH ON LAWTECH AND ETHICS", 3, https://www.lawsociety.org.uk/topics/research/lawtech-and-ethics-principles-report-2021.

[80] Cobbe, "Legal Singularity and the Reflexivity of Law," 24.

[81] Robert French, "Essential and Defining Characteristics of courts in an Age of Institutional Change" (Adelaide: Supreme and Federal Court Judges Conference, January 21, 2013); J. Rawls, *Political Liberalism* (New York, NY, USA: Columbia University Press, 1993).

[82] Zekos, *Advanced Artificial Intelligence and Robo-Justice*, 265.

[83] Thilo Hagendorff, "The Ethics of AI Ethics: An Evaluation of Guidelines," *Minds and Machines* 30, no. 1 (March 1, 2020): 99–120, https://doi.org/10.1007/s11023-020-09517-8; Riku Neuvonen and Esa Sirkkunen, "Outsourced Justice: The Case of the Facebook Oversight Board," Text (Intellect, June 1, 2022), 3, https://doi.org/10.1386/jdmp_00108_1.

[84] Nemitz, "Constitutional Democracy and Technology in the Age of Artificial Intelligence," 7; Neuvonen and Sirkkunen, "Outsourced Justice," 4.

conflicts between the operations of platforms and human rights have been officially legitimised.[85]

Launched in October 2020, the Meta Oversight Board is maybe the most paradigmatic example of a new brand of 'technology courts". The board has been created as a response to the growing pressure on Meta to assess its content moderation policies in the light of their implications for human rights, and freedom of expression in particular.[86] Over the past years, the content moderation practices of platforms have raised a growing number of concerns for their compatibility with the human rights of users, be that the right to privacy, non-discrimination or freedom of expression when platforms took down content that the content moderation algorithms found to conflict with national laws, or their own content policies and community guidelines. The examples range from removing pictures of breastfeeding mothers, to disproportionally often removing content from particular cultural or ethnic groups, or failure to remove contents that incite hatred or crime.[87] In response, the Electronic Frontiers Foundation concluded in a report: "Content Moderation System Is Fundamentally Broken"[88] and pointed to the traumatic working conditions of human moderators, inconsistencies and imbalances in the underlying rules for moderators, the lack of due process and transparency, and the considerable impact the decisions can have on real lives and human rights.

Accordingly, a pertinent point of debate over the past years was how and who should make sure that the decisions that these players take are not creating a situation that conflicts with the human rights of their users. The urgency of the question for platforms has further increased with the European Digital Services Act, which made at least the Very Large Platforms and Search Engines that serve European users legally accountable for ensuring compatibility with human rights and European values.[89] From the perspective of platforms, as technology companies, these are difficult decisions to make, requiring knowledge, skills and authority that technology companies do not necessarily possess. This is probably even more true today, after the sector experienced a wave of economic austerity, in the course of which various ethics and content moderation teams were dismissed, and, more recently, content moderation policies have become a battleplace of political ideology. At the same time, there is so far little guidance from regulators or courts on what exactly respect for human rights in content moderation means, and how to measure, respectively operationalise this.[90]

It is no coincidence that the Oversight Board had originally been introduced as 'almost like a Supreme Court' by Mark Zuckerberg himself back in 2018.[91] And indeed, several design choices point towards courts as a source of inspiration: the Oversight Board must be a place of appeal for users, provides for procedural safeguards, states independence as a constitutive value, as well as the need for a reasoned public decision, a constitution and bylaws that define its procedures.[92] According to the Oversight Board "[t]he board uses its independent judgement to support people's right to free expression and ensure that those rights are being adequately respected. The board's decisions to uphold or reverse Meta's content decisions will be binding, meaning Facebook will have to implement them unless doing so could violate the law."[93]

The board is manned with 20+ experts from all over the world, but interestingly, **the expertise** represented in the board differs quite clearly from traditional courts: not only legal experts from various jurisdictions, but also journalists, a former prime minister and human rights activists and, importantly, expertise from different cultural backgrounds. All members are very respected authorities in their respective field of expertise and sphere of influence. And it is through the **authority** that they earned in earlier lives that they lend also the Oversight Board its authority, at least vis-à-vis Meta: the decisions of the board are binding for Meta, much like the decisions of a regular court are binding for the plaintiffs. An interesting question for the future will be to what extent the decisions of the board can set precedents also outside that relationship, and will be referred to by real courts.[94]

The board is not bound to a particular national jurisdiction, a material building or a particular legal order. The jurisdiction of the board is the community of users of Meta.[95] The primary basis for decision making are not laws and constitutions, but Meta's values and content policies. Reviews of the first decisions of the Oversight Board have revealed how the Oversight Board in addition turned to international human rights law as a basis for its decision-making, to lend its decisions a stronger claim to legitimacy.[96] Since the decisions have precedential value, over time the board will create a new body of case law in the form of a 'melange'[97] of human rights norms and Meta's values, but removed from particular national jurisdictions and constitutions towards a truly globalised and customised version of human rights for Meta's platformed world.[98] The board shall "make the final judgment call on what should be acceptable speech in a community that reflects the social norms and values of people all around the world".[99] In other words, this is a project to re-interpret human rights as global values that are universally adaptable to different cultures.

The creation of the board has been followed by a vivid debate about the nature of the board, with some experts ascribing the board almost a quasi-constitutional status by dubbing it 'Facebook's Supreme Court',[100] while others likened the board to a fancy complaint-handling

[85] Article 14 (3) and 21 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), OJ L 277, 27.10.2022, p. 1–102.

[86] Brenda Dvoskin, "Expertise and Participation in the Facebook Oversight Board: From Reason to Will," *Telecommunications Policy*, October 19, 2022, 102463, https://doi.org/10.1016/j.telpol.2022.102463; Kate Klonick, "The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression," *Yale Law Yournal*, 2020.

[87] Neuvonen and Sirkkunen, "Outsourced Justice," 2.

[88] Jillian C. York and Corynne McSherry, "Content Moderation is Broken. Let Us Count the Ways.," Electronic Frontier Foundation, April 29, 2019, https://www.eff.org/nl/deeplinks/2019/04/content-moderation-broken-let-us-count-ways.

[89] Art. 34 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act - DSA) (Text with EEA relevance), OJ L 277, 27.10.2022, p. 1–102.

[90] A notable exception is the Council of Europe Recommendation CM/Rec (2022)13 of the Committee of Ministers to member States on the impacts of digital technologies on freedom of expression and the Guidance Note on Best practices towards effective legal and procedural frameworks for self-regulatory and co-regulatory. mechanisms of content moderation, adopted by the Steering Committee for Media and Information Society (CDMSI) at its 19th plenary meeting, 19-21 May 2021.

[91] Klonick, "The Facebook Oversight Board."

[92] Dvoskin, "Expertise and Participation in the Facebook Oversight Board," 3.

[93] https://www.oversightboard.com/

[94] Laurence Helfer and Molly Land, "The Meta Oversight Board's Human Rights," *Cardozo Law Review* 44, no. 6 (2022): 53., also show how the decisions of the Oversight Board are already being referred to by international human rights standard-setting bodies, more critically Klonick, "The Facebook Oversight Board.".

[95] Article 2 of the Charter.

[96] Dvoskin, "Expertise and Participation in the Facebook Oversight Board," 4.

[97] Helfer and Land, "The Meta Oversight Board's Human Rights," 13.

[98] Neuvonen and Sirkkunen, "Outsourced Justice," 13., pointed out that the outcomes of some cases would probably have looked quite different when adjudicated by regional human rights courts.

[99] Ezra Klein, "Mark Zuckerberg on Facebook's Hardest Year, and What Comes Next," Vox, April 2, 2018, https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge.

[100] https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court

mechanism,[101] a 'quasi-adjudicatory body'[102] or an international human rights tribunal.[103] But whether or not the Oversight Board can qualify as a court, a court-like structure or simply a very expansive advisory board is not the point here. What matters for the argument here is that the board is the example of a major technology company re-configuring courts as institutions of adjudication and their core characteristics: materiality, expertise and authority.

The deliberate positioning of the board by Meta as a court-like institution is a point in case, mindful of our earlier observation that public perception and confidence in institutions of adjudication is a key element to their authority.[104] It is true that past the initial inception stage, both Zuckerberg and Meta refrained from referring to the board explicitly as a court. Having said so, the initial references were sufficient to set off the PR strategy, and it was the media, and academics that subsequently did their share to pick up the reference to a Supreme Court and further publicize it.[105] The reference to a court, therefore, is symbolic, not factual, and a powerful metaphor to lend this new body democratic authority. And the extent to which this metaphor has been embraced and picked up both in the public as well as academic debate reveals a deeper societal search for answers in a changing society. This is the question of who shall have the authority and expertise to make judgements over the compliance of the platform's content moderation policies with human rights.

The boards re-imaging of a body of adjudication as democratic institution cannot be seen separately from the way recent regulatory projects have re-positioned platforms, and technology providers more broadly as part of the more extended governance of the internet. With Article 14 (4) DSA, the European regulator has in a quite extra-ordinary move obliged platform operators to assess the enforcement of the terms and conditions that constitute their legal governance framework in the light of human rights of citizens. In other words, where traditionally human rights law binds public institutions, subject to the interpretation by courts,[106] it is up to platforms to interpret human rights and apply them to the terms of use as the "law of the platform", effectively establishing an "indirect horizontal effect of human rights between online platforms and their users".[107] In a similar way, with Article 34 of the DSA, the European Regulator gives platforms effectively a legal mandate to judge the compliance of their algorithmic systems with a whole range of human rights.[108] Legal scholar Martin Senftleben calls this "Human Rights Outsourcing".[109]

To ensure contestability and procedural rights of citizens, Article 21 of the DSA lays down a framework for out-of-court dispute settlement procedures that must resolve disputes about the decisions of platforms. This legal set-up can be not only expected to lead to the creation of more 'court-like' bodies such as the Oversight Board. It is also a fundamental departure from the idea that the adjudication of human rights conflicts is the exclusive domain of (constitutional) courts. What the DSA does, therefore, is to effectively legitimise instances such as the Oversight Board and supply them with legal authority to interpret and adjudicate conflicts with human rights. And in a situation in which regulators outsource the protection of human rights to technology providers and compel those private actors to define how technology design can comply with human rights, there is a logic to accepting that technology providers will transgress into the public domain and define their own rules and procedures for complying with that task.[110]

This is more so in a situation in which the defining features of the one institution that has traditionally been assigned with that task – courts – sits at odds with the business model and global ambitions of many of those companies. There are clear economic incentives to do away with the traditional focus on materiality and national jurisdiction, or the focus on legal expertise as opposed to the tech and commercial logic that prevails in technology companies. And to the extent we have become accustomed to trusting in the designability of values into technology configurations, it is also easy to see why the authority to conceptualise and defend human rights is no longer considered a privilege of courts only. The creation of institutions such as the Oversight Board must be seen as part of a larger discussion on how to realise human rights in the algorithmic society, and who shall have the power to define and interpret the ground rules and institutions for the online world.[111] In this search for new institutional safeguards, metaphors do matter, and sometimes they can start leading a life of their own. As Cowls et al. so aptly observed: "perpetual, uncritical utterances referring to the OB [Oversight Board] as a 'supreme court' may ultimately make it so".[112]

3. Conclusions

The Meta Oversight Board and similar bodies are no courts in the traditional sense but does it matter? Do bodies like the Oversight Board have to qualify as courts in the traditional sense to be recognised as authoritative decision-makers over the human rights aspects of the technological systems that they build, and that order our society? As a result of digitisation, we have become conditioned to let go of some of the most pivotal features that characterised courts as we once knew them: their materiality and link to a particular jurisdiction, the

[101] https://www.nederlandrechtsstaat.nl/clickbaitrechtspraak-de-facebook-oversightboard-maakt-zijn-debuut/

[102] Andreas Kulick, "Meta's Oversight Board and Beyond – Corporations as Interpreters and Adjudicators of International Human Rights Norms," SSRN Scholarly Paper (Rochester, NY, September 22, 2022), https://papers.ssrn.com/abstract=4226521.

[103] Helfer and Land, "The Meta Oversight Board's Human Rights."

[104] Meyerson, "What Is a Court of Law?," 74; Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium."

[105] Josh Cowls et al., "Constitutional Metaphors: Facebook's 'Supreme Court' and the Legitimation of Platform Governance," *New Media & Society*, April 5, 2022, 12, https://doi.org/10.1177/14614448221085559. argue that by first introducing the metaphor and then observing, without interfering, how the metaphor started to lead its own life, Facebook benefitted from its legitimating effect (p. 13).

[106] Neuvonen and Sirkkunen, "Outsourced Justice," 4.

[107] João Pedro Quintais, Naomi Appelman, and Ronan Fahy, "Using Terms and Conditions to Apply Fundamental Rights to Content Moderation," SSRN Scholarly Paper (Rochester, NY, November 25, 2022), https://doi.org/10.2139/ssrn.4286147.

[108] Natali Helberger, "The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power," *Digital Journalism* 8, no. 6 (July 2, 2020): 842–54, https://doi.org/10.1080/21670811.2020.1773888.

[109] Martin Senftleben, "Guardians of the UGC Galaxy – Human Rights Obligations of Online Platforms, Copyright Holders, Member States and the European Commission Under the CDSM Directive and the Digital Services Act," *Journal of Intellectual Property, Information Technology and E-Commerce Law* 14, no. 3 (2023): 435–52.

[110] Kulick, "Meta's Oversight Board and Beyond – Corporations as Interpreters and Adjudicators of International Human Rights Norms," 7.: "It, therefore, seems that we are for the time being - and some rather long time, it appears - stuck with corporations as flawed interpreters of human rights".

[111] Kulick, "Meta's Oversight Board and Beyond – Corporations as Interpreters and Adjudicators of International Human Rights Norms." In a 2008 New York Times profile of the then Google Deputy General Jennifer Wong and her policy team, Jeffrey Rosen wrote that as a result of Google's market share and moderation model, "Wong and her colleagues arguably have more influence over the contours of online expression than anyone else on the planet."

[112] Cowls et al., "Constitutional Metaphors," 19.

dominance of trained legal expertise and states' monopoly in organising authoritative adjudication. At the same time, we have become accustomed to a push from technology firms to de-construct traditional understandings of courts and adjudication, and our regulatory frameworks pave the way for a new reality in which we increasingly trust technology experts to re-design our values and re-invent the institutions that must interpret and adjudicate them.[113] According to *Re* & Solow-Niederman, "AI Adjucation's development path will affect not just how the technology is used, but also the legal system in which it operates".[114] We are in the middle of the beginning of the corporate-driven re-invention of justice and adjudication – and recent legal reforms such as the DSA create further incentives to critically re-consider the traditional institutional setup and who in the algorithmic society will have the power to shape our institutions, including the courts for the digital world.

What to make of these developments? After all, the legal system we build is ultimately about the kind of society we want to see.[115] Maybe expert bodies and oversight boards are the future and the best we can hope for in terms of new procedures to protect users' right to global free expression. According to Susskind: "In our age of relentless technological advance, it is time to revisit the grand bargain that we have struck with the traditional professions and to ask if this deal remains fit for purpose".[116] In so doing, Susskind is pointing us to a deeper truth: the arrival of new, technology-driven forms of adjudication lay bare a far more fundamental and uncomfortable question: Do our traditional constitutional courts still have the expertise and authority to protect human rights online? All the elements that we once took for granted when thinking about courts are rapidly eroding in the online world: expertise, authority and claims over a certain jurisdiction. Seen in that light the arrival of institutions like the Oversight Board and other forms of technology courts is ultimately a wake-up call that we need to urgently revisit our traditional institutions of adjudication and protecting human rights.[117]

Rather than being content with technology-driven quick fixes, we should start a more fundamental discussion on what is needed to guarantee human rights adjudication in the face of ubiquitous and large-scale content moderation, build and defined by powerful private companies that are not directly bound by human rights. And in doing so we can draw important lessons from the new technology courts, for example about the kind of expertise that is needed to adjudicate conflicts around content moderation, AI and the role of platforms in the digital world. It takes more than legally schooled experts to interpret and apply the law to questions that are technologically, societally and politically as complex as online content moderation and the implications of AI for human rights. Interdisciplinary composition of bodies like the Oversight Board can serve as a source of inspiration also for traditional courts. Courts could look for new cooperations, potentially even with specialised expert bodies like the Oversight Board (while maintaining their independence and autonomy!).[118] And there are certainly important lessons to be learned about the challenges of scale and globalisation, and what it takes to guarantee citizens' access to justice.[119]

Over the past years, societies and regulators have increasingly become accustomed to relying on the expertise, authority and inventiveness of technology providers to remodel our institutions and values in a way that fit the digital realities that they create. By doing so we allow a self-fulfilling prophecy to unfold that will make our traditional institutions gradually redundant.[120] It is good to remember, however, that we do have a choice as long as we do not give up asking: who do we want to define the public values and human rights for the digital world? Social media platforms and technology companies? Or courts and constitutions? And act accordingly.

Declaration of competing interest

No conflicts of interest to report.

Data availability

No data was used for the research described in the article.

[113] Cobbe, "Legal Singularity and the Reflexivity of Law"; Crootof, "'Cyborg Justice' and the Risk of Technological-Legal Lock-In."
[114] Re and Solow-Niederman, "Developing Artificially Intelligent Justice."
[115] Cobbe, "Legal Singularity and the Reflexivity of Law," 25.
[116] Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, 138.
[117] Moore, "Digital Government, Public Participation and Service Transformation."
[118] Helfer and Land, "The Meta Oversight Board's Human Rights," 66.
[119] Donoghue, "The Rise of Digital Justice," 1024.
[120] Michaels, "Artificial Intelligence, Legal Change, and Separation of Powers."