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Exogenous self-binding: How social systems externalise their foundational paradoxes in the process of constitutionalization

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I. Four remarkable phenomena

I aim to establish a link between four remarkable, yet mutually rather distant, phenomena, whose interpretation is subject to considerable uncertainty. The first remarkable phenomenon is that judge-made law is now expanding drastically also in transnational contexts. It was already offensive enough in the nation state that the courts – which after all are supposed to be no more than “*la bouche de la loi*” – produced more and more legal norms on their own, even in the presence of a dominant political legislature, thus diametrically contradicting the basic principles of the separation of powers and of democratic legitimacy. Yet now we find that this trend is continuing unfettered and even accelerating in transnational regimes. In a secondary analysis of empirical data, the sociologist of law Chris Thornhill comes to the conclusion that

“transnational courts and other appellate actors have assumed a remit that substantially exceeds conventional arbitrational functions, and they now increasingly focus on objectives of ‘norm-advancement’: that is, they invoke rights to shape acts of national legislation and, without a clear constitutional mandate, to construct a supra-national normative order.”¹

Critical observers, such as Ran Hirschl, trace this back to power and interest configurations that favour the illegitimate claims to power of a “global juristocracy”.² Apologist observers, such as Josef Esser, on the other hand, consider and maintain that judicial law-making is more rational than its legislative counterpart.³ Neither interpretation is satisfactory.

Secondly, it has recently been possible to observe a striking return of natural law. While philosophers, historians and legal theorists have been diagnosing the demise of natural law, jurisprudence scholars from both progressive and conservative backgrounds – but also judges in their decision-making practices – have been celebrating the resurrection of arguments grounded in natural law.⁴ And not only in the sustained boom of fundamental and human rights. Even here, satisfactory explanations are few and far between. These are either hegemonic tendencies in legal culture, supported by power and interest groups, as diagnosed in Gramsci’s

¹ Chris Thornhill (2013) “A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions”, 20 *Indiana Journal of Global Legal Studies*, 551-603; Yuval Shany (2009) “No longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary”, 20 *The European Journal of International Law*, 81- 91.

² Ran Hirschl (2004) *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge (Mass.): Harvard University Press

³ *Locus classicus*: Josef Esser (1956) *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre*, Tübingen: Mohr Siebeck.

⁴ For an overview of recent natural law theories, see Kenneth Einar Himma: Natural Law, in the Internet Encyclopaedia of Philosophy, <http://www.iep.utm.edu/natlaw/>.

tradition, or, as Lon Fuller maintains prominently, they are powers that work in the arcanum of the law, silently operating an “inner morality of law” that opposes the principle of legal positivism that holds sway politically and legally.⁵

A third remarkable phenomenon is a change in direction among protest movements, which some observers interpret as the implementation of a new political quality.⁶ The conflicts in which these changes can be found today are Brent Spar, the World Social Forum, Gorleben, animal rights protests against universities, companynamesucks.com, Stuttgart 21, Wikileaks, the *indegnados* and Occupy Wall Street. The common denominator is that these civil society protests are addressed not (only) against the state, but also selectively and purposefully against the organised professional institutions of the economy and of other functional systems that they hold responsible for seriously distorted development.

The last remarkable phenomenon is the greatly different status of various types of constitution: the state constitution, the economic constitution and the constitution of science. The dominance, if not exactly the monopoly, of state constitutions is obvious, both in practice and in theory. The status of economic constitutions is already more precarious. Nobody would now deny the actual existence of different economic constitutions and their foundational role for the economy, politics and law. And radical changes to the existing global economic constitution, as laid down in the Washington Consensus, are being advanced with normative bravura at this very moment.⁷ But whether these are actually constitutions in the strict sense of the term and who then acts as the constituent power – the economy? politics? the law? society? – is extremely controversial. The existence of a constitution of science, in its turn, is only really maintained in a metaphorical sense.⁸ Why do social subsystems have such a different constitutional status?

How a constitution deals with its foundational paradox - this is the *pointe* that links these four reciprocally separate phenomena together. This *pointe* is not restricted to the state constitution alone, but is also and pertinently applicable to the constitutions of other social systems.⁹ The starting point is Luhmann’s argument (under II.), that the law, with the aid of the state constitution, externalises its original paradox towards politics, while politics externalises its own towards the law. Over and above

⁵ On the contemporary discussion about Gramsci, see Sonja Buckel and Andreas Fischer-Lescano (ed) (2007) *Hegemonie gepanzert mit Zwang: Zivilgesellschaft und Politik im Staatsverständnis Antonio Gramscis*, Baden-Baden: Nomos. For Fuller’s concept of natural law, see Lon Fuller (1969) *The Morality of Law*, New Haven: Yale University Press.

⁶ Robert O'Brien, et al. (2002) *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements*, Cambridge: Cambridge University Press, 2.

⁷ For example David Schneiderman (2008) *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise*, Cambridge: Cambridge University Press.

⁸ More extensively, although with due caution, Ino Augsberg (2011) "Wissenschaftsverfassungsrecht", in: Thomas Vesting and Stefan Koriöth (ed) *Der Eigenwert des Verfassungsrechts: Was bleibt von der Verfassung nach der Globalisierung?*, Tübingen: Mohr Siebeck, 203-223, 223.

⁹ On the debate about societal constitutions, see Grahame Thompson (2015) "The Constitutionalisation of Everyday Life", in: Poul Kjaer and Eva Hartmann (ed) *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance*, London: Palgrave, forthcoming; Poul F. Kjaer (2014) *Constitutionalism in the Global Realm: A Sociological Approach*, London: Routledge; Gunther Teubner and Anna Beckers (ed) (2013) *Transnational Societal Constitutionalism*, 20 Indiana Journal of Global Legal Studies.

this, the question needs to be raised (under III.) about whether – and if so, how – the law also purses a comparable deparadoxisation vis-à-vis other social subsystems. Meanwhile, the same question is asked, but now in the opposite direction (under IV.), about whether other social systems also behave like politics, externalising their paradoxes towards the law with the aid of a constitution, or whether they employ alternative deparadoxisations. Both of these lead to the concluding question (under V.), regarding which subsequent problems are generated by those externalisations. The differences between various approaches to deparadoxisation may possibly clarify the four original questions, so: why is judge-made law developing new prominence transnationally? Under what conditions will a particular kind of natural law make headway again against positivism even today? How is it that protest movements are shifting the sights of their protests? And for what reasons do social subsystems constitutionalise not in accordance with a standard pattern, but with clear differences of intensity?

II. Reciprocal paradox externalisation in law and politics

The starting point here is Niklas Luhmann's theory of the state constitution, which gives a central role to how law and politics deal with their original paradox.¹⁰ As the law is founded on the binary code of right and wrong, it gets into a tangle with the paradoxes of self-reference when the code is inevitably applied to itself. This foundational paradox exposes law to the suspicion of arbitrariness, undermines its quest for legitimacy and paralyzes decisions. The escape routes only lead to the familiar Münchhausen trilemma of the law: infinite regress (religious natural law), arbitrary interruption (Hans Kelsen) or the circularity of the foundation of norms (Herbert Hart). As none of these three offers a satisfactory way out, in the end only one strategy of deparadoxisation has been found to be successful in the past. Law externalises its paradox towards politics with the aid of the state constitution. In this way, the law seeks its ultimate legitimation in democratic politics, is thus disburdened of its own problem of paradox and no longer needs to concern itself with how politics comes to terms with this externalisation.

Politics, on the other hand, has to struggle with an internally insoluble paradox – “the paradox of the binding of necessarily unbound authority”.¹¹ How could one bind the sovereign to rational rules and above all to its own promises? This was only facilitated when it was externalised towards the law, which once again was accomplished by the state constitution. The constitution commits politically unconstrained sovereignty to the process of the law. The state constitution, as a structural coupling between the law and politics, is thus characterised by the fact that *there is a reciprocal externalisation of the original paradoxes of politics and law*. Law and politics develop complex forms of an exogenous self-constraint that are – not coincidentally – reminiscent of freedom through self-constraint and of the artful conjunction between self-constraint and externally imposed constraint found in the myth of Odysseus.

¹⁰ Niklas Luhmann (1990) "Two Sides of the State Founded on Law", in: Niklas Luhmann (ed) *Political Theory in the Welfare State*, Berlin: de Gruyter, 187-202; idem (1990) "Verfassung als evolutionäre Errungenschaft", 9 *Rechtshistorisches Journal*, 176-220; idem (1973) "Politische Verfassungen im Kontext des Gesellschaftssystems", 12 *Der Staat*, 1-22, 165-182.

¹¹ idem (2004) *Law as a Social System*, Oxford: Oxford University Press, 408.

Is it possible to generalise this theory of the political constitution? Do other social systems externalise their paradoxes towards the law and vice-versa, in such a way that, alongside the state constitution, other subsystem constitutions – an economic constitution, a media constitution, an organisational constitution – also act as instruments of practical paradox management? Luhmann did not pursue this question explicitly. Luhmann, like many state-centred constitutional lawyers, is rather sceptical toward an economic constitution, third-party effects of fundamental rights, societal constitutionalism and also transnational constitutional phenomena.¹² And yet due to the inner logic of systems theory it is virtually compulsory to pursue the question of whether the generalisation of constitutional issues, as they have become visible in politics, and their respecification are indicated in other social systems.¹³ Since not only politics and law, but every, truly every, functional system based on binary coding is enmeshed with paradoxes of self-reference that, if there is no way to circumvent them, end up in paralysis.¹⁴ There is no way to avoid the generalisation. The unanswered question only concerns how deparadoxisation is respecified in other contexts. Is it also successful in other social systems to externalise the relevant original paradox towards the legal system with the aid of the constitution – and vice-versa? Or are other methods of deparadoxisation applied in non-political subsystems?

III. Deparadoxisations of law

1. The state constitution

Externalising the legal paradoxes towards the political system of the nation state was such a runaway success story in the past that, until the end of the twentieth century, it was advanced not only in constitutional law, but across the board in all fields of law. In the state constitution, in the procedural guarantees of the state governed by the rule of law, in the division of power between legislation and the administration of justice and in the constitutional jurisdiction, law-making was ascribed coherently to the political-parliamentary process. Customary law – an evident exception to this – was increasingly marginalised in the nation state. To cap it all, the still-unruly area of private law was constitutionalised, just as the original paradoxes of contract and of private organisations based on private autonomy were “rerouted” into the state constitution.¹⁵ Technically speaking, this was achieved by means of more or less plausible fictions: the comprehensive hierarchy of legal norms, which also incorporated contracts and associations understood as delegation to private individuals, the state’s reception of social norms and/or their relegation into the purely factual domain.¹⁶

¹² idem (1965) *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie*, Berlin: Duncker & Humblot, 115 f.; 205, Fn. 9; idem (Fn. 11) 487 f.

¹³ On the method of generalising and respecifying, see Talcott Parsons and Charles Ackerman (1966) “The Concept of ‘Social System’ as a Theoretical Device”, in: Gordon J. DiRenzo (ed) *Concepts, Theory and Explanation in the Behavioral Sciences*, New York: Random House, 19-40.

¹⁴ Niklas Luhmann (2012) *Theory of Society*, Stanford: Stanford University Press, Ch. 2, XI.

¹⁵ On the constitutionalisation of the legal order as a whole, see Hans C. Röhl (2008) “Verfassungsrecht als wissenschaftliche Strategie?”, in: Hans-Heinrich Trute, *et al.* (ed) *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts*, Tübingen: Mohr Siebeck, 821-836.

¹⁶ For the current discussion about the status of customary law and private law, see Klaus F. Röhl and Hans C. Röhl (2008) *Allgemeine Rechtslehre: Ein Lehrbuch*, Köln: 3. Auflage, Heymann, 541 ff., 554 ff.

It already became obvious in the nation state that the total externalisation of legal paradoxes towards the political system would end up overburdening both the law and politics. The (over)politicisation of law this unleashed demonstrated its most extreme disintegrating effects in the national socialist and real-socialist regimes, but was also painfully perceptible in the post-war welfare state. "Legislation failure" is how this was criticised by jurists, who targeted both how the production of legal norms was instrumentalised by the party-political system and also how politics was not ready to react with legislative activities which were responsive to the needs of the legal system.¹⁷ Externalisation became almost impossible when transnational regimes began to create their own law, as there is no transnational counterpart to the nation state constitution as the structural link between law and politics, within which externalisation could take place. Rule making outside the framework of international law that occurs so massively all over the globe reopens all the problems of the legal paradox which had been encountered in the nation state before they had been successfully transferred to politics.¹⁸ This leads legal doctrine to lose its orientation drastically so that leading jurists describe a "*contrat sans loi*", i.e. a contract that is not founded in the law of a nation state, as logically impossible and pernicious for the law.¹⁹

2. Social constitutions

In the quest for alternative ways to cope with the legal paradox, the law seems to react by forcing an internal differentiation into subsectors, but then, instead of orienting these subsectors on criteria internal to the law, it bypasses the political system and bases its norm production on other social systems. This is already apparent in the nation state, when semi-autonomous subsectors of the law, such as economic law, labour law, social law, medical law, media law and science law, evolve vigorously – undermining the traditional separation of public law and private law.²⁰ Although these special legal fields officially preserve the externalisation towards politics, they actually reduce it progressively in a surreptitious manner, shifting the paradox of forming norms into the regulated social system.²¹

The law's internal differentiation is promoted even more radically at the transnational level. Diverse social fields are governed by highly specialised legal regimes that are

¹⁷ For example, Matthias Ruffert (2001) *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: Eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes*, Tübingen: Mohr Siebeck, 223 m.w.N.

¹⁸ In detail, see Gunther Teubner (1998) "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy", 33 *Law and Society Review*, 763- 787.

¹⁹ Frederick A. Mann (1968) "Internationale Schiedsgerichte und nationale Rechtsordnung", 130 *Zeitschrift für das Gesamte Handelsrecht*, 97-129, 197.

²⁰ The significance of this internal differentiation of the law is acknowledged, albeit in connection with a scarcely plausible polemic, as a loss of unity of private law, by Wolfgang Zöllner (1996) "Regelungsspielräume im Schuldvertragsrecht: Bemerkungen zur Grundrechtsanwendung im Privatrecht und zu den sogenannten Ungleichgewichtslagen", 196 *Archiv für die civilistische Praxis*, 1-36. On the latest discussion, see Tanja Domej (ed) (2008) *Einheit des Privatrechts, komplexe Welt: Herausforderungen durch fortschreitende Spezialisierung und Interdisziplinarität. Jahrbuch Junger Zivilrechtswissenschaftler*, Stuttgart: Boorberg.

²¹ This comes close to Wiethölter's thinking about the "law of the constitutional system", a law, "that holds to the principle of collision for law./moral, law./politics, law./economics etc., more precisely and generally: law as a 'structural coupling' of 'living environment systems'". See Rudolf Wiethölter (2005) "Just-ifications of a Law of Society", in: Oren Perez and Gunther Teubner (ed) *Paradoxes and Inconsistencies in the Law*, Oxford: Hart, 65-77.

to a considerable extent detached from public international law and now coupled closely with the inner rationality of the social fields.²² “Public regimes”, such as the World Trade Organisation, that have come into being as treaties in international law, marginalise the paradox externalisation to politics that had been initially present. They assert far-reaching autonomy vis-à-vis the nation states and establish themselves as “self-contained regimes”, generating new forms of structural coupling with the regulated social fields. In “private” regimes, such as the *lex mercatoria*, the *lex sportiva* or the *lex digitalis*, which are formed from the very start independently of national law and state treaties, the question of externalising the legal paradox towards politics does not even arise. Instead, the original paradoxes of these transnational legal orders are displaced from the very outset into the social fields with which they have entered into a close symbiosis.

If the law no longer externalises its paradox to politics, but diverts it to other social systems, this means much more than a simple change of law’s self-description. Since the application of the legal code to itself not only introduces the abstract question of the law’s legitimation, which is no longer answered with the “legislator’s will”, but more probably with the inner rationality of the social subsystems involved. The law not only changes the founding myth where it conceals its paradoxes, but looks for a different constitutional foundation of its norm production. If it is now no longer the state constitution that is enlisted for externalising paradoxes, but the constitutions of social subsectors, so of the economy, the media, science and healthcare, then there are immediate, tangible consequences. To say it with Robert Cover, who sees the jurisgenerative force of a plurality of legal orders in the interaction between nomos and narrative,²³ the narrative is not the only one to change when the way that paradoxes are tackled is altered: the nomos itself is converted. When the legal paradox is transformed, other processes of norm production move into the foreground and a different kind of substantive legal norms comes into force.

The once-dominant law-making process, which translates collective political decisions into legal norms, is to a considerable extent being replaced in transnational regimes by social norm production that is transformed into applicable law.²⁴ Contract, formal organisation and standardisation are the three great jurisgenerative processes whereby the self-made rules of the economy, but also of science, education, the media and healthcare, becomes valid law. The role played by the political lawmaker with regard to the legislative authorities at work in international politics is then restricted increasingly to merely reformulating this law created within society.

²² On this, see Martti Koskenniemi (2012) "Hegemonic Regimes", in: Margaret Young (ed) *Regime Interaction in International Law: Facing Fragmentation*, Cambridge: Cambridge University Press, 305-324; Andreas Fischer-Lescano and Gunther Teubner (2004) "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", 25 *Michigan Law Journal of International Law*, 999-1045.

²³ Robert M. Cover (1983) "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative", 97 *Harvard Law Review*, 4-68.

²⁴ See for example Richard Nobles and David Schiff (2012) "Using Systems Theory to Study Legal Pluralism: What Could Be Gained?", 46 *Law & Society Review*, 265-295; Leon E. Trakman (2011) "A Plural Account of the Transnational Law Merchant", 2 *Transnational Legal Theory*, 309-345; James Harrison (2009) "Regime Pluralism and the Global Regulation of Oil Pollution Liability and Compensation", 5 *International Journal of Law in Context*, 379-391.

3. Protest movements

This is where we find the explanation why protest movements are changing their addressees, as described above. Protest movements react to the change of externalising the paradoxes of law. They no longer address state authorities as the targets of their protests, but transnational corporations or other social institutions. Protest movements change the direction of their attacks whenever the legal system engages political legislation only for its formal legitimation and turns to contract, formal organisation and standardisation. Protest movements exert social pressure on the points where they believe they detect the causes of distorted social development and, even more so, real chances to bring change about. This explains why protest movements are perceiving stronger potential for a repoliticisation, a re-regionalisation and a re-individualisation of the processes of law-making, which are no longer concentrated in the political system, but can be found in various different social subsectors.²⁵ Some authors see in these direct contacts of protest movements a new quality of political struggles.²⁶

“Constitutionalism from below” – this is the headline under which the protest movements’ contribution to constitutionalism is discussed today. A series of authors – James Tully, Antonio Negri, Gavin Anderson – have observed that the transnational *pouvoir constituant* cannot be found in the political institutions but is now manifested in social movements, i.e. in the multitude, in a variety of protest movements, in NGOs and in transnational segments of the public.²⁷ Anderson identifies such a “transnational constitutionalism from below” in the new “constituent powers found both within and outside the structures of representative democracy, the latter comprising decolonisation and internationalist movements, alternative NGOs and bodies which escape traditional categorisation, such as the World Social Forum.”²⁸

However exaggerated it may sound to identify protest movements completely with the *pouvoir constituant*, serious consideration must be given to one suggestion from these authors. What they mean by *pouvoir constituant* is no longer the all-embracing demos, but just fragmented processes. In transnational relations, it is crystal-clear that there is no such thing as a constitutional dynamic that embraces world society as whole, but that what we have at the most is a series of heterogeneous processes of constitutionalisation. This gives up on the traditional notion, in which the political constitution provides the collective energies of a society as a whole with the form that encapsulates it – in the past as a nation and now as the international community. Instead, modern society’s collective potential is no longer available as a

²⁵ See Gavin W. Anderson (2009) "Corporate Constitutionalism: From Above and Below (but mostly below)", *The Constitutionalization of the Global Corporate Sphere? Paper presented at Copenhagen Business School, Copenhagen, September 17-18*, 1-14.

²⁶ Colin Crouch (2011) *The Strange Non-Death of Neoliberalism*, Cambridge: Polity Press; O'Brien (Fn. 7) 2.

²⁷ James Tully (2007) "The Imperialism of Modern Constitutional Democracy", in: Neil Walker and Martin Loughlin (ed) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 315-338, 319, 323 ff.; Michael Hardt and Antonio Negri (2009) *Commonwealth*, Harvard: Harvard University Press; Gavin W. Anderson (2013) "Societal Constitutionalism, Social Movements and Constitutionalism from Below", 20 *Indiana Journal of Global Legal Studies*, 881-906.

²⁸ Anderson (Fn. 27) 902.

unity, but is increasingly compartmentalised in a multiplicity of social potentials, energies and strengths. And if the law alters the way it externalises its paradoxes, targeting social subsectors instead of politics, then the quality of the *pouvoir constituant* necessarily also changes. Law will then no longer seek its legitimation primarily through the political constitution, but through sectorial constitutions which in their turn need to establish their legitimacy – without the detour via state constitutions – via the *ordre public transnational*.²⁹ These sectorial constitutions derive from the communicative potentials that cluster around society's various specialised communication media.³⁰

3. Judge-made law

This now also illustrates how the expansion of judge-made laws – as indicated above – relates to externalising paradoxes. Judge-made law is now beginning to play an unprecedented role: it is not just self-referentially producing the rules of “case law” in litigation so as to solve individual conflicts;³¹ it now also takes on board the social norms produced by contract, organisation and standardisation, deriving from this a different form of legitimation that is no longer legal, nor political, but social. This upgrades judge-made law vis-à-vis law-making, and not only in quantitative terms. Its new quality comes from the fact that case law takes over a genuine constitutional function; however, it does not derive its norms from the state constitution, but from the constitutions of various social subsystems.³²

This comes across most clearly in one of the most important twentieth-century institutions of private law, in the legal control of standard contracts.³³ Under the guise of contracting, markets have developed authoritative private regulations that no longer govern an individual contractual relationship, but have practically all the characteristics of general legislation. There is no genuine contractual consensus any more: instead, enterprises and business associations establish norms unilaterally, on the basis of asymmetric power relations, comparable to those between state and citizens. Judge-made law has reacted to these privately-imposed norms by taking on a dual constitutional role. On the one hand, it legitimates this form of one-sided norm production backed by economic power, whose problems it downplays by labelling it “contractual”, and uses secondary rules to regulate private norm production. The political legislature then does no more than incorporate the norms drawn up by judge-made law into the civil code. On the other hand, the courts intervene wholesale with strict judicial reviews in the economy's self-made law, whose intensity is on a par with the constitutional reviews exercised on political legislation. Shielded

²⁹ Jacco Bomhoff (2015) "The Constitution of the Conflict of Law (LSE Legal Studies Working Paper No. 4/2014)", in: Horatia Muir Watt and Ralf Michaels (ed) *Private International Law as Global Governance*, Oxford: Oxford University Press, forthcoming; Gunther Teubner (2012) *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford: Oxford University Press, 235 ff.

³⁰ Teubner (Fn. 29) 61 ff.

³¹ Wolfgang Fikentscher (1977) *Methoden des Rechts in vergleichender Darstellung*, Bd.IV. Tübingen: Mohr Siebeck, 199 ff., 201.

³² This is explored in greater detail in Gunther Teubner (2004) "Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?", in: Christian Joerges, *et al.* (ed) *Transnational Governance and Constitutionalism*, Oxford: Hart, 3-28. For the political implications, Pablo Holmes (2014) "The Politics of Law and the Law of Politics: The Political Paradoxes of Transnational Constitutionalism", 21 *Indiana Journal of Global Legal Studies*, 553-583, 569 ff.

³³ A recent excellent analysis is Pasquale Femia (2013) "Desire for Text: Bridling the Divisional Strategy of Contract", 76 *Law and Contemporary Problems*, 150-168.

by such traditional formulae as “good faith” and “*boni mores*”, judge-made law has pieced together a new constitutional control hierarchy, in which the lower-ranking norms of the standard contracts are controlled by higher-ranking constitutional norms. Yet these higher-ranking norms are produced by the principles not of the political constitution, but of the economic constitution, which needs to legitimize itself via principles of public responsibility.

Judge-made law plays a comparable role in other social areas, when it subjects norm production in all sorts of social organisations based on private law – hospitals, universities, trade unions, professional associations, media concerns and recently, internet intermediaries – to a comprehensive legal review. Here, too, it fulfils the dual constitutional function just mentioned, on the one hand, normalising the procedures of social normation, on the other checking the substantive norms of internal organisational law for unconstitutionality. Similarly, judge-made law legitimates and controls processes of standardisation that are either laid down in private standardisation organisations or are pushed through naturally in so-called spontaneous communication processes. Here, too, it is not the state constitution, but the respective sectorial constitution – in healthcare, the system of education, the information media or the Internet – that furnishes the review criteria.

On the global scale, emerging transnational regime laws deal similarly with the problems of their original paradoxes. Here it is only possible to externalise towards politics within extremely narrow confines. Instead, various transnational regimes’ own constitutions cause the regime laws’ original paradoxes to disappear, as they relocate them into their respective social systems. The paradigm here is the *lex mercatoria*, which gives force to “*contrats sans loi*”, i.e. to free-floating contracts without any extra-contractual foundations. This evident paradox can no longer be accommodated in the law of nation states. In a remarkable circularity, it relies on courts of arbitration that it has created itself to produce higher-ranking norms, which in turn find the narrative and nomos of the *lex mercatoria* in economic contractual practice.³⁴

4. Natural law

There is a clear connection between alternative ways of externalising paradoxes and natural law, long believed to be moribund, which is now celebrating its resurrection in specialised fields of law and in transnational legal regimes. When judge-made law gives force to higher-ranking constitutional norms, it derives its criteria from the internal rationality of social subsystems. Efficiency as a legal principle, the functionality of social organisations, the self-definition of art, the neutrality and objectivity of science, the educational mission of schools and universities and the network adequacy of Internet norms - under legal positivism, social rationality formulae of these kinds could only become valid legal principles if the legislative made explicit provision. Yet such formulae are constantly flowing into legal practice from the various different social systems and are transformed into legal principles by judge-made law, then given force as concrete legal norms.³⁵

³⁴ About this, see Gunther Teubner (1997) "Breaking Frames: The Golden Interplay of Legal and Social Systems", 45 *The American Journal of Comparative Law*, 149-169.

³⁵ On the law's recourse to social standards, see Thomas Vesting (2007) *Rechtstheorie: Ein Studienbuch*, München: Beck, 95 ff.

We have long been aware from state constitutions of this inflow of substantive principles. The state constitution is construed as a material constitution, because it contains not only formal procedural norms, but also substantive norms and principles. There is only one way to explain their highly problematic “natural law” character today. It is not the legal system, but the political system that decides, in the course of lengthy conflicts, about certain fundamental principles of politics, which are then constructed juridically by constitutional law and at the same time altered for legal purposes. The rule of law, the separation of powers, democracy, the welfare state and today environmental protection are examples of such reflexive decisions within the political system that flow into the law via the state constitution. Similarly, other social subsystems in their own reflection processes, develop fundamental principles that are legally reconstructed in the economic constitution, in the constitution of science etc. and are used as criteria for the judicial review of norms. The legal principles of the economic constitution, for example, include the classical liberal principles of property, freedom of contract and competition, but also restrictions on contractual freedom, social obligations of property, fundamental rights vis-à-vis economic power and nowadays ecological sustainability and corporate social responsibility.³⁶

The continuity of natural law thinking is perceptible here. Natural law has always been used to make the paradoxes of self-reference in the legal code disappear.³⁷ And this formula has always provided a smooth path for substantive principles to make their way into legal practice: from religion in the Middle Ages, from moral philosophy in the Age of Reason, from the political constitution in the nation state and from multiple societal constitutions in the postmodern era. Unlike the old natural law whose origins were religious, rationalist or political, it is now feasible to talk in terms of a sociological natural law, because it uses societal constitutions to reconstruct the rationalities of diverse subsystems within the legal system and transform them into binding principles. And the law does not care whether or not the democratically legitimated legislator has ordered it.

IV. Deparadoxisation in other social systems

If the law, in the course of its development, has broken politics’ monopoly on externalisation and become internally differentiated in such a way that special legal regimes shift the legal paradox into the social areas under their care, how do things look in the opposite direction? Do other social areas also experience reciprocal externalisation, so that they in turn cede their original paradoxes to the law?

1. The state constitution

As discussed above, the original paradox of politics became visible when the ruler’s power becomes reflexive. When power is forced by power, when hierarchies of power are constructed, then politics is also exposed to an infinite regress – much like the law in the Münchhausen trilemma: the regress of overpowering power. And much as in the law, religious solutions to the problem of *ultima potestas* were convincing in mediaeval unitary cosmology. But if politics has become independent since the Renaissance, if it has broken free of religious bonds, if it has ultimately become

³⁶ For greater detail about this, see Teubner (Fn. 29) 172 ff.

³⁷ Niklas Luhmann (1988) "The Third Question: The Creative Use of Paradoxes in Law and Legal History", 15 *Journal of Law and Society*, 153-165.

sovereign and declared itself to be *legibus absoluta*, then the sovereignty paradox, the paradox of the binding of necessarily unbound authority, comes to the fore in all its poignancy. Within politics it is insoluble.³⁸

It is the state constitution that enables politics to master this paradox, by displacing it outwards. Politics transfers to the law the task of constraining unconstrained sovereignty by means of legal procedures – by means of organisation as the inner bond and of fundamental rights for constraining arbitrariness towards the outside. This takes the edge off the paradox of politics. Admittedly, it implies a loss of sovereignty, as politics is henceforth tangled up in lasting, legally binding relationships. Yet this is compensated for, since binding acts of power by transforming them into acts of law puts political decisions on a permanent footing, so strengthens their efficacy. In this respect, the secret affinity between the communication of power and the normativity of the law shows itself to be more than productive. But politics' bond with the law only becomes bearable when the law-making machinery in turn guarantees politics a decisive influence on law-making. Only then can the state constitution drive the intricate relation between law and politics so far that a legal secondary codification of politics emerges. The rule of law is extended to cover all political events and thus treat every act of power as an act of law. State constitutions get their unique lustre from this externalisation of paradoxes executed in complete symmetry – from politics towards the law and from the law towards politics. This lustre induced Dieter Grimm to speak about the “completeness” of state constitutions and Neil Walker to define their “holistic” character. It is here that we can find the more profound reason why they deny the honorary title of constitution to the fundamental orders of other functional systems.³⁹

2. The economic constitution

What role does the law play when the economy has to cope with its own fundamental paradox – the paradox of scarcity? This paradox paralyses economic action in such a way that acquisition of finite goods does away with scarcity, while at the same time generating scarcity. In the past, the only way to overcome this blockage was by replacing the scarcity paradox with the clear-cut binary code of property/non-property. But that presumes that every act of economic acquisition is sufficiently strict about “condensing” vaguely understood positions of having / not having into durable positions of property / non-property. According to Luhmann, this condensation has played a key role in rendering the economy autonomous.

“Condensation means that structures of meaning are available for repetition from situation to situation; and this happens despite their paradoxical origins and despite their exposition to the opposition of the counter-value. Condensing is repeating the same, ... so that expectations of the future take shape and acquire certainties with regard to fulfilling needs and compensating privations.”⁴⁰

³⁸ Luhmann (Fn. 10).

³⁹ Dieter Grimm (2010) "The Achievement of Constitutionalism and Its Prospects in a Changed World", in: Petra Dobner and Martin Loughlin (ed) *The Twilight of Constitutionalism?*, Oxford: Oxford University Press, 3-22; Neil Walker (2010) "Beyond the Holistic Constitution?", in: Petra Dobner and Martin Loughlin (ed) *The Twilight of Constitutionalism?*, Oxford: Oxford University Press, 291-308.

⁴⁰ Niklas Luhmann (1988) *Die Wirtschaft der Gesellschaft*, Frankfurt: Suhrkamp, 188.

Condensing social positions into binding certainties cannot be achieved by acts of economic acquisition alone, however. At the most, such acts can generate diffuse social expectations in this direction, but cannot shape them strictly enough to achieve a precarious deparadoxisation in three dimensions. In the temporal dimension, property expectations must establish solid bonds that will last for a long time; in the social dimension they must establish the unambiguous inclusion/exclusion of the group of people concerned, which causes considerable difficulties, especially in the case of collective ownership; and in the substantive dimension they must generate clearly defined clusters of expectations with regard to rights of use, rights of exclusivity, rights of exploitation and rights of acquisition and their respective borderlines. This can only be achieved by a highly developed legal system. So it is the constitution of property that generates a close structural coupling between the economy and the law and in practice externalises the scarcity paradox in the law of property.

The property constitution only constitutes the first phase of an economic constitution. As soon as a highly developed monetary economy takes shape, and especially as soon as banks specialise in credit activities, the economic constitution enters a second phase, in which the scarcity paradox takes on a completely different form. Deparadoxisation then correspondingly runs on different tracks. And here the economy once again externalises the paradox, which threatens to paralyse monetary transactions, towards the law. In the banking sector, both the ability and the inability to pay are generated simultaneously. The banking system is based on the paradox of self-reference, on the unity of the ability and the inability to pay. "The banks have the crucial privilege of being able to sell their debts at a profit".⁴¹ This paradox can be mitigated to a certain extent if the payment operations take on a reflexive mode, i.e. if operations involving quantities of money are applied to money operations in daily transactions. However, these reflexive economic operations remain unstable until an internal hierarchy is created within the banking sector, the hierarchy of central banks in their relation to commercial banks.

Yet the banking hierarchy cannot be institutionalised exclusively via self-regulation, and this applies in particular to the institutionalisation of the central bank. It needs to be supported from outside by legal rules, in order to constitute the unique position of the central bank with binding regulations. The parallels with the hierarchies in the political system and the role of the state constitution are evident. The economy, too, only copes with its monetary paradox with the help of the law, which uses the financial constitution, i.e. norms of procedure, of competence and of organisation, to regulate the establishment and operating methods of the central banks vis-à-vis the commercial banks. As an economic corollary to the different branches of government, the executive, the legislature and the judiciary, the "monetative" of the central banks is established by the economic constitution.⁴²

The way that the economic constitution deparadoxises money circulation is always precarious, however: it is always threatened by the danger of a return of the paradox. The hierarchy underpinned by the economic constitution in the relationship

⁴¹ Luhmann (Fn. 40) 145.

⁴² More specifically about this, see Gunther Teubner (2011) "A Constitutional Moment? The Logics of 'Hit the Bottom'", in: Poul F. Kjaer, et al. (ed) *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, Oxford: Hart, 4-42, 21 ff.

between the central banks and the commercial banks has not eliminated the paralysis of the financial system for good:

“The logical and empirical possibility that the entire system will collapse, of a return of the paradox and a complete blockage of all operations by the original equivalence capable of payment = incapable of payment cannot be ruled out, but is made sufficiently improbable.”⁴³

The recent financial crisis demonstrated that this is anything but “sufficiently improbable”. The excessive growth compulsion in global financial transactions gave us all a glimpse of a possible default of the banking sector. This was followed immediately by recent initiatives to reform the financial constitution, which set out to readjust the hierarchy of the banks all over again. Without these reforms, the central banks would have difficulties exercising sufficient control over the money markets: they would only be able to stimulate or destimulate them indirectly by intervening singly. They would only be able to guide the money supply indirectly via the prime rate, which makes credit more or less expensive. With reforms that strengthen the role played by the central banks vis-à-vis the commercial banks, the law embraces the limitative function of the economic constitution, prevents the return of paradoxes and total blockage and at the same time stabilises the self-reflexive relations in payment operations, which would disintegrate if they were not fixed on a legal basis.

The fact that politics externalises the sovereignty paradox, while in parallel the economy externalises the scarcity paradox, both towards the law, and that in this way the state constitution and the economic constitution fulfil the same function, is quite astonishing. And yet, major differences are conspicuous. As for monetary operations within the economy, there is no sign of the complete secondary coding that forces the political system to apply the binary code legal/illegal to all political operations. There are basically three reasons for this. Firstly: there is no doubt that economic transactions are regulated by legal norms and also checked by the courts, but it is notable that the intense relation between political and legal operations has no counterpart in the relation between monetary and legal operations. An administrative act can be construed without further ado as the implementation of existing legal norms, in many cases even as a strictly conditional program. Yet things follow a different course in economic transactions. To be sure, economic transactions are valid only under certain contractual conditions, yet in practice, economic transactions are the diametric opposite of the implementation of existing norms. Secondly: while the juridification of political decisions further strengthens their collectively binding character, it would be simply counterproductive for economic action if individual transactions were collectively binding for the whole economy. The legally guaranteed binding nature of transactions comes about only on the micro-level of contractual relations and economic organisations. Only on the micro-level is it possible to talk in terms of a secondary legal coding of economic transactions in the form of contractual acts or corporative acts. Unlike in the political system, where the collective is bound by political decisions, the macro-level in the economy remains unconstrained. The privity principle in Common Law forbids extending a binding nature to third parties, to say nothing of extending it to the economic order as a whole. Thirdly: the ongoing concatenation of political and economic operations

⁴³ Luhmann (Fn. 40) 146.

differs one fundamentally from the other. Political decisions have precedential effects on subsequent decisions: if it intends to deviate from them, politics has to go through the entire legal procedure once again and the deviating decision must be rendered positive with an explicit *actus contrarius*. Future monetary transactions, on the contrary, are by no means bound normatively by previous transactions. Instead, the individual act of payment generates nothing but cognitive expectations for subsequent acts of payment.

These three reasons explain why, despite the parallels with which the economy and politics externalise their paradoxes towards the law, there are weighty differences in the intensity of their constitutionalisation. The decentralisation of decision-making that is prevalent in the economy, the intended restriction of contractual commitments to the contracting partners and the exclusively cognitive style of expectation that binds economic transactions to one another, in practice rule out the possibility of completing the symmetry of reciprocal externalisations, as they come about between politics and law, in relation to the economy and law. Unlike the state constitution, the economic constitution exhibits a remarkable degree of asymmetry. While it is true, as illustrated above, that law externalises the legal paradox to a considerable extent towards economic norm production – contract, organisation and standardisation – it is nevertheless also true that, if it is to avoid damaging its structural integrity, the economy can only pursue its legal constitutionalisation to a limited extent.

3. The constitution of science

This asymmetry of externalisations is even more marked in the constitution of science. To be sure, science also has its paradox of self-foundation: only scientific operations can determine reflexively what actually constitutes science. The Cretan paradox, which derives from applying cognitive operations to cognitive operations, is probably the best-known case of a self-referential paradox. But unlike politics and the economy, it is mostly impossible to externalise the scientific paradox towards the law. Normative stipulations which are legally or constitutionally binding and which can be changed only with difficulty, are self-destructive for science. It would actually be absurd to interpret cognitive acts as the implementation of rules. Admittedly, even though it portrays itself as undogmatic, science too is no stranger to extensive norm production. Methods are binding; theories are immunised normatively against a change of paradigm; neutrality, objectivity and immunity to interest are accepted professional norms.⁴⁴ And yet the juridification of such social norms would generate a paralysis irreconcilable with the cognitive style. It is no coincidence that the state constitution leaves science the right to self-definition, limiting itself to second order observation.⁴⁵ Nor is it any coincidence that the constantly repeated proposals for scientific courts, whose remit would be to issue binding decisions about the validity of the results of new research, has had no success whatsoever. Only a normative style that is always open to being reversed, of a flexibility quite unknown to the law, is at all permissible in science.⁴⁶

⁴⁴ John Ziman (2000) *Real Science: What It Is, and What It Means*, Cambridge: Cambridge University Press.

⁴⁵ Epistemological insights go into the legal determination of scientific freedom, see Eberhard Schmidt-Assmann (1989) "Wissenschaftsrecht im Ordnungsrahmen des öffentlichen Rechts", 45 *Juristenzeitung*, 205–211, 207.

⁴⁶ Niklas Luhmann (1990) *Die Wissenschaft der Gesellschaft*, Frankfurt: Suhrkamp, 93 ff.

Unlike politics and the economy, science cannot pass its paradox on to the law, but has to seek out other ways to achieve deparadoxisation.⁴⁷ It finds them mainly in processes internal to science itself. Temporalising the paradox, creating a hierarchy of different levels of analysis, enduring contradictions, antinomies and incommensurabilities, tolerating uncertainty, relinquishing the compulsion to decide, creating a constructivist worldview: these are some of the tools used by science in the attempt to make its paradoxes more bearable.

That does not mean, however, that there can be no such thing as a constitution of science, in which scientific and legal reflexions are coupled together structurally. It is just that the internal asymmetry of their coupling is extremely strongly developed. As illustrated above, when the law regulates scientific activities it externalises its paradox to scientific processes without further ado and uses the underlying principles of scientific cognition to legitimate legal norms that impact on science. Science in its turn keeps the integrity of its cognitive operations largely free of legal constraints. Only its external borders should be protected by legal norms. Freedom of science as a guarantee that the cognitive process remains open thus becomes the sole norm of the scientific constitution. The law provides a binding guarantee that science may be bound to nothing but its own freedom. A pertinent part of this is its legal protection against being corrupted by politics, by the economy and by the law itself. The most important task of the constitution of science is “to stabilise the epistemological difference between the knowledge of science, of politics and of the law itself”.⁴⁸ It guarantees this with the aid of “mechanisms that... help stop science being colonised by other, alien system rationalities – in particular by the economy and by politics, but also by the law itself”. Dedifferentiation tendencies whose aim is to “replace relevances internal to science with values and norms external to science are to be averted.”⁴⁹ Yet the law must also guarantee a sufficient plurality of processes within science, so that it is always possible to break down roadblocks that hinder development by adopting a fundamental change of perspective. The requirement for pluralism and for the protection of scientific minorities thus becomes a binding principle of the scientific constitution. And, of course, the external organisational framework of universities, research institutes and professional organisations is also furnished with a legally binding guarantee.⁵⁰

4. Constitutionalisation with differing intensity

Altogether, then, societal constitutionalism – as exemplified here by politics, the economy and science – paints a picture of constitutional pluralism, although one that is anything but uniform, since it realises different degrees of intensity of constitutionalisation. It follows that the model of the state constitution cannot be transferred lock, stock and barrel to other social constitutions. It is true that the issues raised by the state constitution need to be generalised, since all functional systems have to cope with the paradoxes of self-reference, whether they will follow

⁴⁷ Idem (Fn. 46) 172 ff.

⁴⁸ Augsberg (Fn. 8) 217

⁴⁹ Ino Augsberg (2012) "Subjektive und objektive Dimensionen der Wissenschaftsfreiheit", in: Friedemann Voigt (ed) *Freiheit der Wissenschaft. Beiträge zu ihrer Bedeutung, Normativität und Funktion*, Berlin: De Gruyter, 65-89, 82.

⁵⁰ Isabell Hensel (2009) "Grundrechtskollisionen in der Stiftungsuniversität: Überwältigte Einheit oder organisierte Vielfalt", in: Graf-Peter Callies, et al. (ed) *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, Berlin: De Gruyter, 509-530.

the path of externalising completely towards the law, as politics chose to do with the legal secondary codification of its operations, or whether they will opt, like the economy, for only a partial externalisation towards the law, or whether, like science, they will rule out a juridification of their operations and adopt other possible methods of deparadoxisation. However, this choice depends on the affinity between their own structures and the specific normativity developed within the legal system.

This clearly shows why the state constitution occupies a unique position among social constitutions. This position certainly does not derive from the state's constitutional monopoly, as state-centric constitutional lawyers would have us believe, since other disciplines – historiography, economics, sociology and international relations – have long demonstrated the existence of non-state constitutions.⁵¹ Neither is this unique position derived from a hierarchical superiority of the state constitution over the so-called sub-constitutions, as many authors maintain, who certainly admit to constitutional pluralism, but are not prepared to forego the dominant position of the state constitution.⁵² Nor again, lastly, does it derive from the state constitutions being the only ones to have a legal character, while other social constitutions – including transnational regimes – are only “constituted” *de facto*, or only contain social fundamental values, or are constitutions only in a metaphorical sense. Instead, the reciprocal externalisation of politics towards the law and of law towards politics is totally symmetrical – this is responsible for the unique position of state constitutions. While the law, in its diverse legal fields, pursues a variegated approach to externalising paradoxes in all sorts of different social systems and so derives its normative contents from the various constitutions of different social areas, in the opposite direction there are drastic differences in the juridification of social systems' original paradoxes. Structural couplings are generally misunderstood – and social constitutions in particular – when it is said that structural couplings only exist as reciprocal relations. Indeed, it is quite possible for one social system to be closely coupled to another, while the latter system, in its operations, is only partly coupled or largely foregoes a structural coupling. It is like love: it is often only experienced on one side and only in a handful of lucky cases is it truly reciprocated by the person who is loved.

V. Consequent problems

In conclusion, let us take a brief look at the consequences of externalisation. What happens after the constitutional paradox has been externalised? As we have seen, externalising brings major advantages for the system in question, sometimes even making autopoiesis at all possible, but it simultaneously entails some serious costs. The system that outsources its paradox is now delivered up to an extraneous structural logic. As illustrated above, the differences between the constitutionalisation

⁵¹ For history, Reinhart Koselleck (2006) "Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung", in: Reinhart Koselleck (ed) *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache*, Frankfurt: Suhrkamp, 365-401; for economics, James M. Buchanan (1991) *Constitutional Economics*, Oxford: Blackwell; Thornhill (Fn. 1); for international relations, Joel P. Trachtman (2006) "The Constitutions of the WTO", 17 *European Journal of International Law*, 623-646; for political science, Thompson (Fn. 9).

⁵² Christian Joerges and Florian Rödl (2009) "Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der postnationalen Konstellation", in: Graf-Peter Calliess, et al. (ed) *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, Berlin: De Gruyter, 765-778.

of politics, the economy and science can be explained by the incompatibilities that a complete juridification of their paradoxes can generate. Constitutions would then drive social systems systematically in a wrong juridical direction if the extent of externalisation towards the law were incompatible with their own structures. The fact that their operations at the same time also have to be subjected to the conditions for legal operations explains why many social systems adopt routes to deparadoxisation alternative to passing them to the law.

Another aspect is even more problematic: externalisation delivers the system up to the extraneous paradox itself. The law is delivered up to the political paradox, politics to the legal paradox. Formulated in general terms, the law is delivered up to the paradox of the constituted social system, while the social system is delivered up to the legal paradox. There is a danger that the constitution, as a structural coupling of the law with another social system, does not differentiate sufficiently between including and excluding the extraneous, unlike what is found typically in successful structural couplings.⁵³ This then becomes fatal at the latest when the externalisation also embraces the system's contingency formula, so for example when the principle of legal justice is thoroughly politicised or economised. A fair number of authors argue in favour of politicising the contingency formula of justice, whose operative nucleus lies in the equal treatment of similar cases and the unequal treatment of dissimilar cases, in the direction of democracy and the common weal, or of economising it in the direction of reducing scarcity and increasing efficiency. Yet the desired gain in precision fails to materialise, as one contingency formula is only replaced by the other, so one high degree of uncertainty is replaced by another comparably high degree of uncertainty. Even worse: the process of determination, which in all cases ends up in a self-transcendence and calls for creative solutions under the dominance of the respective contingency formula, manoeuvres in the wrong direction. The parties to a legal conflict are offered solutions oriented towards achieving efficiency or policy effectiveness, rather than a fair decision of their conflict: they are offered stone when they want bread. Whenever possible, a clear distinction should be drawn here between the original paradox and the paradox of decision. The unavoidable externalisation of the legal original paradoxes should not be allowed to cause the legal process to be delivered up to the political or economic decision-making paradox. And the same applies to the contrary.

Anderson, Gavin W. (2009) "Corporate Constitutionalism: From Above and Below (but mostly below)", *The Constitutionalization of the Global Corporate Sphere? Paper presented at Copenhagen Business School, Copenhagen, September 17-18*, 1-14.

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⁵³ Neves identifies transverse paradoxes here, which in themselves come about as a result of the constitutional procedure and can be controlled only insufficiently by constitutional courts, Marcelo Neves (2013) *Transconstitutionalism*, London: Hart, 51 ff.

- (2012) "Subjektive und objektive Dimensionen der Wissenschaftsfreiheit", in: Friedemann Voigt (ed.): *Freiheit der Wissenschaft. Beiträge zu ihrer Bedeutung, Normativität und Funktion*. Berlin: De Gruyter, 65-89.
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