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The Destruction and Reconstruction of the Tower of Babel

A Comment to Gunther Teubner's Plea for a 'Common Law Constitution'*

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1 The World After Babel

After the Flood, as is said in the Bible,[1] the descendents of Noah were forced to disperse over the face of the earth. 'And the whole earth was of one language, and of one speech.' Instead of each one going his own way, people stuck together and founded a city in which they started building a tower 'whose top may reach unto heaven'. However, the Lord was not pleased with their efforts to 'make a name' for themselves. He seemed to fear the power of one people united by one language: 'Behold, the people is one, and they have all one language; and this they begin to do: and now nothing will be restrained from them, which they have imagined to do.' Therefore, he decided to 'confound their language', so 'that they may not understand one another's speech'. The people stopped building the tower, left the city and spread all over the earth. The city was named, as is commonly known, 'Babel' (which originally meant freedom, but after its breakdown it signified confusion). It became a symbol of human arrogance or hybris, although opinions differ on the exact nature of the sins committed by man.[2]

Teubner's plea for a 'common law constitution'[3] can be read as a way of dealing with the world after Babel. Our world has fallen apart into many different languages, and each language constitutes a foreign language to the other. How could this happen? Teubner discerns two phases in the downfall of man. The first phase

* The author thanks the anonymous reviewers for their constructive comments and the editor Lyana Francot-Timmermans for her advice and support.

1 The following quotations are taken from Genesis 11:1-9 in the translation of the King James Bible.

2 In Oakeshott's reading of the myth, for instance, the Tower of Babel represents the vain effort to turn the state into an enterprise by compelling people to pursue one and the same goal. See Michael Oakeshott, "The Tower of Babel," in: *On History and Other Essays* (Indianapolis: Liberty Fund, 1999), 179-210. According to Jacques Derrida, "From 'Des Tours de Babel'," in: *A Derrida Reader. Between the Blinds*, ed. Peggy Kamuf (New York: Columbia University Press, 1991), 243-53, its destruction put an end to the imperialistic aspirations of the Semitic family to establish its empire and spread its language (see also note 36). Michel Foucault, *Les mots et les choses. Une archéologie des sciences humaines* (Paris: Gallimard 1966), 51, points out that as a result the original unity between words and things was destroyed. However, he does not give any explanation for this divine punishment.

3 This notion is taken from Hurrell and is cited approvingly in Gunther Teubner, "Transnational Fundamental Rights: Horizontal Effect?", in this volume, 198.

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is located in the paradisiacal state of nature, before Babel so to speak, in which man and nature were one. It marks the transition from a communication-free world to a world of communication: 'The original Fall of Man happens at the Tree of Knowledge: the meaning-producing force of communication, with its ability to distinguish good and evil, destroys the original unity of man and nature, makes man god-like and leads to the loss of Paradise. The origin of alienation lies in the very first communication.'[4] The second phase takes place many years after Babel, in our age of modernity, and is characterised by 'the autonomisation of a multiplicity of separate communicative worlds'.[5] Originally, people shared a mode of communication which made it possible to pass moral judgements, but after the 'second Fall'[6] the world became fragmented into separate social systems each with a code of its own and no prospect of a meaningful exchange between them.

It is for this semantically shattered world that Teubner, in a courageous effort, tries to devise a common normative ground in the shape of fundamental rights. In the confusion of tongues, social systems theory has created a unified scientific language to describe the various social systems that make up society by adopting concepts from different disciplines such as biology, linguistics, sociology and political theory. It does not aim at overcoming our current condition of radical fragmentation (it is no nostalgic attempt to regain a paradise lost), but at setting limits to the communicative imperialism of some systems over others. In that sense, it continues the modern Kantian project of emancipation as an escape from speechlessness,[7] albeit in a postmodern, detached and post-human manner. Below, I first describe in more detail what the world after Babel looks like according to Teubner, what he considers to be its main problems and what kinds of solutions he suggests (section 2). Subsequently, I raise some critical questions about (i) the ambiguous role man plays in his theory, either as a person or as a human being; (ii) the exclusive, if not excessive focus on communication, both as problem and solution; and, above all, (iii) the apparent lack of a solid institutional framework for the creation and enforcement of basic communicative rights (section 3). Finally, some tentative suggestions for an alternative approach are presented (section 4).

4 Gunther Teubner, "The Anonymous Matrix. Human Rights Violations by 'Private' Transnational Actors," *The Modern Law Review* (2006): 327-47, 336. Since Teubner explicitly asked the respondents to take this article – which to some extent overlaps with the paper at hand – into account when discussing his paper, I will refer to it occasionally.

5 Teubner, "The Anonymous Matrix", note 4: 336.

6 Contra Marx (and, before Marx, Rousseau), Teubner denies that the second Fall had anything to do with the emergence of private property. Human rights in their modern sense made their appearance, or so he argues, after the second Fall.

7 Kant famously defined 'Enlightenment' as 'man's emergence from his self-incurred immaturity' or, more properly, 'speechlessness' ('*Unmündigkeit*'; Immanuel Kant, "What Is Enlightenment?," in: *Political Writings* , ed. H.S. Reiss (Cambridge: Cambridge University Press, 2003), 54-60, 54). However, the speechlessness which Teubner refers to is not self-incurred in Kant's sense – that is, it is not a product of man's lack of determination or courage – but is caused by what he calls the 'Matrix' (see further below) .

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2 The Fragmentation of Society

In Teubner's view, modern society (taken as a global entity)[8] is characterised by functional differentiation and fragmentation. It is comprised of various 'autonomous function systems',[9] such as law, politics, religion, economy, science, art and so on, which operate independently of each other and have developed their own modes of communication (based on their specific codes and programs) and their own standards of rationality. The differentiation and dissemination of these autonomous subsystems lead to a fragmentation of society. In this progressive process of fragmentation, steadily new boundaries are created – boundaries between subsystems and people (outside society) on the one hand, and between separate subsystems (inside society) on the other. Thus subsystems are not only closed off from each other but also from human beings: 'society and mind/body are not communicatively accessible to each other'.[10] Communication frees itself from human consciousness, which is merely the 'channel' through which communication takes place: 'Communication becomes autonomous from people, creating its own world of meaning separate from the individual mind.'[11] The greatest threats that face us nowadays, according to Teubner, are the 'dangers stemming from the anonymous "matrix"', that is, 'autonomised communicative processes (institutions, functional systems, networks) that are not personified as collectives'.[12] In particular, he warns against the 'expansive' or 'totalitarian' tendencies of some systems (for instance, science, mass media or economy) that cross their borders and invade other systems (art, religion and, again, science are mentioned as examples).[13]

The fragmentation of society forces us, as Teubner argues, to redefine the concept of fundamental rights as protective rights. Traditionally, fundamental rights can only be invoked when norms are violated by individuals or, under certain conditions, by collective actors (states, companies, associations and so on). So far, the discussion in legal and political practice as well as theory has focused on the question whether fundamental rights could have 'horizontal' effect, that is, could be applied in the relationship between private actors. However, conflicts no longer occur solely or predominantly on the level of individual interactions and collectives, and between those two levels, but increasingly they acquire an (inter- and intra)systemic character. As the HIV catastrophe in South Africa shows, it does not suffice to hold particular pharmaceutical firms liable for charging excessive prices for antiretrovirals; instead, one has to question on a more fundamental

8 Teubner focuses on nothing less than 'world society' in its totality. See Teubner, "Anonymous Matrix", note 4: 341.

9 Teubner, "Transnational Fundamental Rights", note 3: 207.

10 Teubner, Anonymous Matrix, note 4: 334. Niklas Luhmann, *Risk. A Sociological Theory*, tr. Rhodes Barrett (Berlin: Walter de Gruyter 1993), xii, states, 'Consciousness is an indispensable condition for communication, but is not in itself communication.' I owe this reference to Lyana Francot-Timmermans.

11 Teubner, "Anonymous Matrix", note 4: 335.

12 *Ibid*, 340-1.

13 *Ibid*, 342.

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level the logic by which the norms of economic rationality take precedence over norms formed in the health sector.[14] By violating the autonomy of social discourses, powerful communicative processes constituting the Matrix pose a threat to the 'integrity of institutions, persons and individuals'.[15] In order to create a 'counter-principle',[16] Teubner proposes to reformulate fundamental rights at these three levels and to classify them accordingly in (at least[17]) three categories: (1) *institutional rights* that protect the autonomy of social discourses against invasions from other discourses; (2) *personal rights* that secure the autonomy of communications between persons (as 'social artefacts'); and (3) *human rights* which can be invoked when border crossings by communicative media endanger 'the integrity of individuals' body and mind'.[18]

In the end, Teubner is not very optimistic about the success of his own enterprise: 'This program of justice is ultimately doomed to fail and (…) has (…) to face up to its being in principle impossible.'[19] The legal system can only be 'irritated' by it and will inevitably translate and transform its claims in the legal code. Therefore, the stakes are not set too high: instead of trying to create just situations, the enterprise aims at removing unjust situations caused by the 'inhumanities of communication'.[20]

3 The Matrix Revolutions

Originally, in the hands of its founder, Niklas Luhmann, social systems theory offered a detached, almost clinical description of society, focusing on social subsystems and their environment instead of on human beings and their actions. What Teubner adds to social systems theory is an ambitious normative and crypto-humanistic program that is both *self-affirming* – it intends to empower people and social discourses threatened by dominant communicative processes – and *self-defeating* – it acknowledges in advance its defeat against the all-powerful Matrix. As Teubner argues, '[p]eople are the environment for the communicative networks, to whose operations they are exposed without being able to control them'.[21] Though I sympathise with Teubner's emancipatory objective, I will present below some critical comments concerning the conceptual, normative and institutional foundation of his approach, which question the desirability of the means chosen for attaining this objective, as well as their efficacy (for other reasons than only the Matrix's sovereignty). In particular, I have difficulties with, first, the ambivalent role that is assigned to man, either as a person or as a

14 *Ibid*, 327-8 and 344-5, discusses this example in more detail.
15 *Ibid*, 340.
16 Teubner, "Transnational Fundamental Rights", note 3: 215.
17 Teubner, "Anonymous Matrix", note 4: 342, suggests a fourth category of ecological rights (see section 3.2).
18 *Ibid*, 342, and Teubner, "Transnational Fundamental Rights", note 3: 212.
19 Teubner, "Transnational Fundamental Rights", note 3: 215.
20 *Ibid*, 215.
21 Teubner, "Anonymous Matrix", note 4: 333.

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human being; second, the reduction of social problems to problems of communication; and, finally and most importantly, the attempt to conceive of law and politics beyond established legal and political institutions, which in my view is doomed to fail.

3.1 Actual People

At first sight, it may seem odd that a post-human social theory such as systems theory suddenly takes an interest in the human.[22] Social systems theory is primarily focused on social systems; since these systems are considered to be constituted by communication, people can only appear as part of the 'environment'. Social systems are not capable of communicating with people, only through them – human consciousness is the channel through which the codes of different systems flow and are disseminated. Each system creates man in its own image: *homo economicus* in the economic system, *homo politicus* in the political system, *homo juridicus* in the law and so on. From the viewpoint of social systems theory, people can only be conceived of as persons construed by social systems or, in Teubner's words, as 'artefacts of communication',[23] 'social person-constructs' or 'communicative representatives of actual human beings'.[24] Interestingly, however, as the last qualification shows, social systems theory keeps alive the idea that some 'real' entities are hidden behind all these semantic constructions. These 'actual human beings', also referred to as 'people "out there"' or simply 'body/mind',[25] cannot be presented directly by social systems (nor by a social systems theory that aims at describing these systems) but can only be represented in their personhood, although their presence is sensed somehow by mutual irritation: 'It is through the mask of the "person" that the social systems make contact with people; while they cannot communicate with them, they massively irritate them and in turn be irritated by them.'[26] Teubner accuses the traditional human-rights approach of identifying artificial semantic constructions with actual human beings:

> '[I]f one takes the difference seriously by seeing the "person" as a mere semantic artifact of social communication on the one hand, and mind and body as living, pulsing entities in the communication's environment on the other, it becomes clear that the humanistic equation of those semantic arte-

22 I do not intend to claim that social systems theory contributes to a 'dehumanization' of society, as some critics have argued against Luhmann (such as Walter Kargl, "Kommunikation kommuniziert? Kritik des rechtssoziologischen Autopoiesebegriffs", *Rechtstheorie* (1990): 352-73). However, in its description of society social systems theory no longer takes human beings (including their actions, thoughts and emotions) as its object but rather systems and communicative operations within systems. This shift of attention is captured in the notion of the 'posthuman'.

23 Teubner, "Anonymous Matrix", note 4: 337.

24 Teubner, "Transnational Fundamental Rights", note 3: 209.

25 *Ibid*, 212.

26 *Ibid*, 209.

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> facts with actual people is precisely what does *not* do justice to flesh and blood people.'[27]

It is precisely for the 'flesh and blood people', the 'actual people' or 'living, pulsing entities' equipped with mind and body that Teubner has designed his normative program. He wants to protect the 'actual people' from the 'fatal equation'[28] with persons and safeguard their integrity against the manipulations and machinations of the Matrix: 'The human-rights question in the strictest sense must today be seen as endangerment of individuals' integrity of body and mind by a multiplicity of anonymous, autonomised and today globalised communicative processes.'[29] According to Teubner, this threat to the biological, 'natural' existence of human beings calls for the recognition of fundamental rights, conceived as natural, that is, 'original' or intrinsic rights: '(...) communication can irritate psychophysical processes in such a way as to threaten their self-preservation. Or it may simply destroy them. This is the place where the body and mind of individuals (not of "persons") demand their "pre-legal", "pre-political", even "pre-social" (i.e. extrasocietal) "latent intrinsic rights."'[30]

Thus a strict dichotomy is created between 'persons' or artificial constructions fabricated within the various subsystems in society (on whom the traditional human-rights approach is focused) on the one hand, and 'people' or natural beings of flesh and blood (for whom Teubner has designed his normative program of fundamental rights) on the other. This raises, to begin with, the epistemological question how these 'actual' people can be known (if they exist). Who are actually these 'actual' people? Social systems theory is only capable of describing the person as an aggregate of the various, one-sided and defective, representations of man that subsystems produce on the basis of their specific (economic, legal, political or other) code. Social systems and social systems theory have no direct access to the 'actual' or real people 'out there'; they can only sense the people's presence indirectly, by irritation, like when a mosquito is penetrating a foreign body. So in order to really know the real people, one has to step *outside* the systems and systems theory and enter the dark territory called 'environment'. Is there such a place, beyond the current representations and misrepresentations of man within society, where the people can be presented directly and where the 'true' pain of their 'tortured bodies and hurt souls'[31] can be revealed? And, if so, what does it look like? A phenomenologist may appeal to a shared common-sense world which can be known through our immediate experience, but for an adherent of social systems theory (at least in a classical Luhmannian style) this is a no-go area: the world after Babel is tragically and radically shattered into separate islands of communication. As a consequence, it becomes very difficult, if not impossible, to speak about man and his true nature.

27 Teubner, "Anonymous Matrix", note 4: 334 (italics in the original).
28 *Ibid*, 334.
29 Teubner, "Transnational Fundamental Rights", note 3: 211.
30 Teubner, "Anonymous Matrix", note 4: 335.
31 Teubner, "Transnational Fundamental Rights", note 3: 210.

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Teubner's first intimations are not very promising. When referring to 'natural' or real human beings, he uses concepts which are highly 'unnatural', artificial and certainly not commonsensical, including – as indicated heretofore – 'psycho-physical processes', 'living, pulsing entities' and 'body/mind'. Teubner concentrates primarily on the biological, psychological and physical aspects of human existence and on the pain man in his biological existence may suffer. In a language full of pathos, he claims to be speaking on behalf of the 'tortured bodies and hurt souls'[32] or the 'suffering souls'.[33] Leaving the safe havens of society, he seems to fall back on a rather reductive, utilitarian concept of man as a mere receptor of pleasure and pain. Whatever his concept of man as a partly artificial construct and a partly natural entity may be, it does not follow from his social systems theory and will necessarily conflict with its basic premise that our knowledge of the world is always partial and mediated by various system-specific codes.

Obviously, Teubner's construction of natural human beings has significant political implications for his view on the nature of the fundamental rights that have to be protected in our shattered world. In his opinion, human rights should protect the interests of *homo communicans*, in particular man's ability to express his pain and suffering. Why should we care so much for communication and communicative rights?

3.2 The Communication Cure

According to Aristotle, man is by nature a social animal due to his 'gift of speech'.[34] Babel may have deprived us of the hope of ever reaching a universal mutual understanding, but that has not kept us from trying, however desperately and futilely perhaps, to get into contact with other people. In modern times the means of communication have expanded substantially, thanks to information technologies. The internet makes it possible to engage in conversational activities with a steadily increasing circle of virtual friends. Given the omnipresence of communication in our contemporary world, it seems appropriate to translate the current catalogue of fundamental rights into basic communicative rights, as Teubner proposes. One of the main advantages of a reconceptualisation of fundamental rights in terms of communication is that it directs our attention not only to individual instances of fundamental-rights violations (which may otherwise go unnoticed or be minimised) but, more importantly, to possible structural causes underlying these violations. Teubner is surely right when he argues that the HIV catastrophe in South Africa can be imputed to 'imperialistic tendencies'[35] of the economic code, rather than merely to the irresponsible behaviour of some pharmaceutical firms.

32 *Ibid*, 210.
33 Teubner, "Anonymous Matrix", note 4, 335.
34 Aristotle, *Politics*, tr. William Ellis (Middlesex: Echo Library, 2006), 14-5.
35 Teubner, "Transnational Fundamental Rights", note 3: 207.

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However, inevitably something always gets lost in translation.[36] To begin with, some social problems may have other causes than communication or communication only. For instance, the HIV problem world-wide is not only caused by the primacy of economic reasoning but originates in and is sustained by a libertarian sexual morality that allows men to satisfy their sexual urges without having to take responsibility for other people's health. Accordingly, these problems require other solutions instead of or in addition to a fundamental rearrangement of the current communicative world order. In this case, what is needed – at least additionally – is an educational program that informs both (potential) victims and perpetrators about possible risks and preventive measures, as well as a public debate on the scope of man's moral responsibilities towards his fellowmen.[37] Communication may be a cure to some problems, but for other problems immediate action seems required, for instance when a people is threatened by an ecological catastrophe, a terrorist attack or famine due to poor harvests or overpopulation. Teubner seems to recognise that there is more to life than communication (but not much more),[38] when he adds to his catalogue of fundamental rights – though hesitantly and between brackets – a fourth category of so-called ecological rights, which are applicable in situations 'where society endangers the integrity of natural processes'.[39] As soon as one extra-societal category is introduced, the question arises whether more categories of a different kind could or should be distinguished, for example animal rights, group and collective rights or some other legal novelty.

Subsequently, if Teubner is able to show that the given problems and corresponding solutions can be reformulated in terms of communication – I have no doubt that he is able to do so –, the question remains what exactly is gained and lost in this translation. Teubner's common law constitution is even more general and vague than the traditional bills of fundamental rights, which include the right to life, the right to property, the right to privacy and so on. From a legal point of view, this has serious disadvantages in terms of applicability, amongst others (see further below). Politically and morally speaking, the interests at stake are indica-

36 By destroying the Tower of Babel, God has, according to Derrida in "Des Tours de Babel" (note 2: 249), saddled mankind with the both impossible and necessary task of translation: 'He *at the same time* imposes and forbids translation. He imposes it and forbids it, constrains, but as if to failure, the children who henceforth *will bear* his name, the name that *he* gives to the city. (...) Now, this idiom bears within itself the mark of confusion, it improperly means the improper, to wit: Bavel, confusion. Translation then becomes necessary and impossible, like the effect of a struggle for the appropriation of the name, necessary and forbidden in the interval between two absolute proper names.'

37 For a discussion of the different approaches to HIV- and AIDS-related education and their potential effects, see Esther A.J. Miedema, Claire Maxwell and Peter Aggleton, "Education about HIV-AIDS. Theoretical Underpinnings for a Practical Response," *Health Education Research* (2011): 516-25.

38 This is a variation on a songline from Morrissey: 'There is more to life than books, you know / but not much more' (taken from the song 'Handsome Devil', performed by The Smiths and released on their album *Hatful of Hollow*).

39 Teubner, "Anonymous Matrix", note 4: 342. Significantly, this category does not return in Teubner's "Transnational Fundamental Rights".

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ted very roughly in a both abstract and alarming language: communication allegedly threatens the people's 'integrity'[40] and even their 'self-preservation'.[41] According to Teubner, fundamental rights serve a double, inclusionary and exclusionary function. On the one hand they seek to include people in the political sphere so that human beings acquire the opportunity to give expression to their feelings of suffering and pain; on the other hand they intend to exclude politics from other social systems in order to save society from politicisation.[42]

In particular, it is not at all clear, if we build on Teubner's concept of institutional rights, what constitutes the 'proper space' that should be attributed to a given system within the communicative world order. By arguing that some systems (such as economy, politics or science) have the tendency to trespass their boundaries, Teubner seems to imply that they are entitled to a space of their own, albeit within certain limits. How exactly are the boundaries of each and every system to be established, and on which (legal, political, moral or other) grounds? For instance, religion was very dominant in the earlier days of our western civilization, but it has lost its privileged position in the age of modernity, due to the ongoing secularisation. Does that mean that *less* space should be attributed to religion (because many people no longer believe in it, let alone abide by it)? Or, on the contrary, should it be given *more* space (because it possibly has some intrinsic value which many people may fail to see to their own loss)? Likewise, should we resign ourselves to the marginal position art occupies in modern society?[43] Moreover, is it not inevitable that in times of existential crisis some discourses[44] – e.g., the economic discourse of thrift and austerity, the political discourse of safety or the scientific discourse of sustainability – invade and have to invade (to a greater or lesser extent) other discourses for the mere sake of survival? Conversely, it can be argued that some discourses, such as extremist political discourse or the pseudo-medical discourse of quackery, should be banned altogether, because they may be harmful to the people's body and mind. Similar questions can be raised with regard to personal rights: should every person be granted the right to speak his mind, however vulgar, degrading, hateful, racist, sexist et cetera his language?

In sum, definite normative standards are lacking with which the map of the global *nomos* of communication can be drawn and possibly illegal border crossings can be signaled and criticised. The question remains how these normative standards are to be established, by whom and on what grounds. Can there be a legal 'superdiscourse' that regulates the internal and external operations of the various communicative processes composing society world-wide?

40 *Ibid*, 335 and Teubner, "Transnational Fundamental Rights", note 3: 212.
41 Teubner, "Anonymous Matrix", note 4: 335.
42 See further Teubner, "Transnational Fundamental Rights", note 3: 200-201.
43 In the course of the 19th century art has acquired a playing field within society, in which almost everything may be said and done. However, the price for this nearly unlimited freedom is social marginalization, as is demonstrated in Pierre Bourdieu, *The Field of Cultural Production. Essays on Art and Literature* (Cambridge: Polity Press, 1993), part 1.
44 In systems theory, discourse does not equal communication. Discourse may be considered to be one of the modes of communication (or a kind of semantics).

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3.3 Institutional Design

The issues discussed above about the identity of the 'actual' people (section 3.1) and about the content, purpose and scope of basic communicative rights (section 3.2) could be solved, or at least be made manageable, if Teubner would offer some procedure for the creation and implementation of these rights or, in short, an institutional design. However, his suggestions on this point are very sketchy and not very helpful. Following a long tradition in the sociology of law,[45] Teubner is highly critical about the existing legal and political institutions. In his view, they have the irresistible inclination to abuse their power by trespassing their boundaries: 'Absolute power liberates unsuspected destructive forces. Centralised power for legitimate collective decisions, which develops a special language of its own, indeed a high-flown rationality of the political, has an inherent tendency to totalise them beyond any limit.'[46] Moreover, he agrees with Luhmann that in the modern world central authority no longer exists.[47] He argues that it is necessary 'to develop new types of guarantee that limit the destructive potential of communication outside institutionalised politics against body and mind'.[48] For that purpose, fundamental rights have to be realised beyond the state constitution. Instead of imposing a constitution top-down on the people, counter-institutions have to be created bottom-up in the decentralised and less formalised, institutionalised and politicised regions of society. 'Here, social constitutionalism begins directly with the goal of constructing constitutionally guaranteed counter-institutions in social sub-areas.'[49]

Traditionally, an institutional design has to account for three tasks that must be performed by the (state and/or counter-)institutions at hand: the determination and creation of legal norms (legislation), the application of these general norms to concrete cases (adjudication) and the law's execution and enforcement (administration).[50] In Teubner's account, these tasks are aggregated and assigned to a variety of public and private, national and transnational institutions, whose interrelations are not clarified.[51] With regard to legislation, Teubner acknowledges that some sort of positivisation is required. By what right can fundamental rights be called 'rights'? In accordance with a natural law conception of law, Teubner presupposes that fundamental rights, in particular human rights relating to actual people, are 'already there' somehow, before any institution has recognised

45 In the same vein, Eugen Ehrlich introduced the concept of 'living law' in his *Fundamental Principles of the Sociology of Law* (New York: Arno Press, 1975, reprint of the 1936 edition), see chapters V-VIII. Not surprisingly, Teubner refers a couple of times approvingly to this notion (see further below).

46 Teubner, "Transnational Fundamental Rights", note 3: 207.

47 *Ibid*, 13.

48 Teubner, "Anonymous Matrix", note 4: 339.

49 Teubner, "Transnational Fundamental Rights", note 3: 205.

50 These tasks are, of course, distinguished in the classical principle of the *trias politica* and are, according to Oakeshott, essential to the Rule of Law. Cf. Michael Oakeshott, *On Human Conduct* (Oxford: Clarendon Press, 1975), 147 ff.

51 Teubner, "Transnational Fundamental Rights", note 3: 197, speaks about an 'entwinement – but not a fusion – of national and transnational legal orders.'

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them. By nature, people seem to have human rights which can be invoked whenever their mental and physical integrity is at stake. As quoted above,[52] human rights are supposed to be '"pre-legal", "pre-political", even "pre-social" (i.e. extra-societal) "latent intrinsic rights"'. These rights are called 'pre-social' (or 'extra-social'), because they are 'based on the "latent rights" of body and mind to their integrity', and they are 'pre-political' and 'pre-legal' in that they are 'built on the "living law" of human rights arising out of communicative conflicts in politics, morals, religion or law, and the resulting conflicts'.[53] Departing from the natural law conception, Teubner stresses that these 'rights' – for which he himself uses inverted comma's – do not possess 'some pre-legal absolute validity'.[54] At the same time he distances himself from positivism, when he claims that 'positivising them as technical law is not some free decision of the legislator, but is based on this double foundation of self-sustaining processes outside society and conflicts within'.[55]

How then are fundamental 'rights' to be turned into 'real', that is, legally valid, rights, if not by 'free decision of the legislator'? Firstly, the 'latent intrinsic rights' have to become manifest. That does not only mean that people have to give expression to their feelings of suffering but also that society recognises these outcries of the '*colère publique*'[56] and responds to them in one way or another: 'These latent "rights" become overt, however, only if bodily pain and mental suffering no longer remain unheard in their speechlessness, but succeed in irritating society's communication and provoke new distinctions there.'[57] In the legislative process, organisations such as protest movements, NGOs and the mass media play an important mediating role between human beings and society by drawing attention to the people's expressions of pain and suffering. But, as Teubner observes, '"normative expectations of global society" cannot alone justify lawmaking'. What is required in order to 'anchor such expectations'[58] is, secondly, institutionalisation. Ultimately, it is the legal system itself that decides on the validity of claims couched in legal terms: '(...) valid law can only arise where the condemnation of dubious practices as human rights violations under the legal code is for its part reflexively observed by operations governed by the legal code and incorporated into the recursiveness of legal operations.'[59] In the context of world society, decisions on the validity of fundamental rights are not taken by states or state institutions, but primarily by arbitral tribunals within transnational regimes (such as investment tribunals and Internet panels operating under the *lex mercatoria*[60]): '(...) the actual validity decision is made by the arbitral tribunals themselves when

52 See section 3.1.
53 Teubner, "Anonymous Matrix", note 4: 336.
54 *Ibid*, 336.
55 *Ibid*, 336.
56 Teubner, "Transnational Fundamental Rights", note 3: 192.
57 Teubner, "Anonymous Matrix", note 4: 335.
58 Teubner, "Transnational Fundamental Rights", note 3: 194.
59 *Ibid*, 195.
60 *Ibid*, 195.

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they select between different standards of fundamental rights in their individual rulings and specify which fundamental rights are bindingly valid in the particular regime.'[61] So it turns out that, in Teubner's view, arbitral tribunals are the true legislators who are *de facto* responsible for creating a common law constitution for the new global society. The functions of adjudication and legislation, traditionally distinguished in the separation of powers doctrine, coincide fully. Because transnational regimes play a decisive role in the legislative process, Teubner concludes that fundamental rights owe their universalisation to '"social" positivisation' rather than 'state positivisation'.[62]

Basically, what Teubner offers is a rough sociological description of how *natural 'rights'*, as they manifest themselves in the outcries of the people, are gradually transformed, first into *social norms*, through the operations of intermediary organisations, and subsequently into *legal norms* (or fundamental rights without inverted comma's) by the sheer decision of arbitral tribunals. It is not a legal account, because it does not offer a satisfactory explanation of why certain decisions should count as *legal* decisions. On what grounds can arbitral tribunals be attributed the legal authority to validate fundamental rights? The concept of '"social" positivisation' only covers the factual recognition of so-called natural rights as legal norms, but cannot grasp law as a normative phenomenon; no justification is given why the norms at hand *ought to* be recognised as legal norms.[63] Moreover, Teubner is not able to reconstruct the law as a coherent system of norms, because he does not clarify the relationship between the various (state and transnational) decision-making instances and between the possibly contradictory decisions they may take. Although he still operates with the traditional distinction between private and public law[64] – a distinction which can only be made sensibly within the domain of public law[65] –, he seems to reject out of hand any appeal to hierarchy as a relic of the past. As a consequence, possible conflicts between norms cannot be solved and no legal order can be established. What indeed remains is a 'bric-a-brac of decisions',[66] taken 'freely' by institutions of a dubious legal nature, with no apparent concern for legal unity – which provide a very shaky basis for a common law constitution, to say the least.

61 Teubner, "Transnational Fundamental Rights", note 3: 196.

62 *Ibid*, 195-196.

63 As Kelsen argued against Ehrlich, normative claims on the validity of law necessarily presuppose a legal point of view. See Hans Kelsen, "Eine Grundlegung der Rechtssoziologie," in: Hans Kelsen and Eugen Ehrlich, *Rechtssoziologie und Rechtswissenschaft. Eine Kontroverse (1915/1917)* (Baden-Baden: Nomos Verlagsgesellschaft, 2003), 3-54, 14 ff.

64 By holding on to the notion of 'private law' (for instance in Teubner "Transnational Fundamental Rights", note 3: 192), he has by implication recognised the existence of public law. Otherwise, the adjective 'private' would make no sense.

65 Hans Kelsen, *Pure Theory of Law* (second edition), tr. M. Knight (Berkeley: University of California Press, 1967), 280-4.

66 This characterization is taken from Klabbers and is cited approvingly in Teubner, "Transnational Fundamental Rights", note 3: 197.

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Apart from the seemingly technical-legal issues of validity and legality, questions arise about the legitimacy of the decisions taken by legal or quasi-legal institutions. How to assess the quality and acceptability of these decisions? Teubner does seem to rule out the possibility of a 'humanly just self-limitation of communication',[67] but at the same time he denies 'it ever being possible to say positively what the conditions of "humanly just" communication might be'.[68] Instead, he proposes to address the issue of the justice of human rights negatively, in terms of 'removing unjust situations'.[69] The question is, however, how an unjust situation can be recognised without any notion of justice. Moreover, how can it be ensured that the decisions taken actually represent the needs and wishes of the actual people? In Teubner's account, the prospects for public participation in the decision-making process are not very good. By mocking the 'naivety of participatory romanticism', he seems to reject direct democracy.[70] But are there perhaps any other ways for the people to participate in the legislative process and influence its outcomes? Not really, or so it seems. According to Teubner, there is an 'unbridgeable gap between social institutions and actual people'.[71] The problem remains that systems and people cannot communicate with each other; they are only capable of mutual irritation. *Homo communicans* may send out SOS signals and he may even call upon intermediary organisations as a megaphone, but ultimately it depends on the willingness or 'responsiveness'[72] of legal institutions whether he succeeds in getting his message of agony across. If so, the message will inevitably be distorted because the institution at hand has to translate and thereby transform it into the legal code.

This brings us, finally, to the institutional task of application. (I will leave the administration aside, because almost nothing is said about the execution and enforcement of fundamental rights[73]). Legal institutions that have to apply fundamental rights face a nearly impossible mission. To begin with, it is not at all clear *against whom* the fundamental rights should be invoked. In Teubner's understanding, fundamental rights apply in the relation between people on the one hand, and 'autonomised communicative processes' constituting the 'anonymous Matrix' on the other. But 'communicative processes' are not easily summoned before the court, especially not when they remain anonymous. Teubner is, of course, well-aware of this problem: 'Translated into the languages of society and the law, this becomes a problem of attribution. Whodunnit?'[74] However, he reacts by downplaying our expectations regarding the permeability of the legal system and legal doctrine: 'How can the law describe the boundary conflict, when after all

67 Teubner, "Anonymous Matrix", note 4: 346.
68 Teubner, "Transnational Fundamental Rights", note 3: 215.
69 *Ibid*, 215.
70 Teubner, "Anonymous Matrix", note 4: 346.
71 *Ibid*, 333.
72 *Ibid*, 333.
73 Teubner, "Transnational Fundamental Rights", note 3: 212, refers to 'conditions of realization' without explicating them.
74 *Ibid*, 213.

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it has only the language of "rights" of "persons" available? Here we reach the limits not only of what is conceivable in legal doctrine, but also the limits of court proceedings too.'[75] That may be right, but it begs the question why the problem had to be conceptualised in terms of 'rights' in the first place, when legally speaking these so-called rights have no chance of ever entering the realms of legal practice and legal theory.

Furthermore, the question is *what exactly* has to be applied. Teubner seems to assume that human rights are simply given in a mythical state of nature that precedes the legal, political and social order in time – again,[76] they are supposed to be of a '"pre-legal", "pre-political", even "pre-social"' nature – that is located somewhere beyond society in the 'extra-social' space of environment. But how can the content of these 'natural' 'rights' be determined? According to Teubner, '[o]nly the self-observation of mind/body – introspection, suffering, pain – can judge whether communication infringes human rights'.[77] But information from introspection generates only subjective, no objective knowledge. Real people may claim that their feelings are hurt, but does that necessarily mean that their human rights *really* have been infringed? Introspection does not provide a criterion on which basis false or irrelevant claims can be distinguished from *legitimate* claims. On a more principled basis, I would argue that rights cannot be conceived of beyond the space-time continuum of our existing institutions. As Lembcke writes, 'politics is a space that emerges if social norms (morality, tradition etc.) are inefficient in coordinating collective behavior'.[78] After and through political decision-making, legal norms are created.[79] Subsequently, courts have to apply these general norms to concrete cases. This requires a kind of analogical reasoning that Oakeshott has characterised as 'retrospective casuistry': from previous similar cases a general norm is abstracted in which the conditions are specified to assess the case at hand.[80] Since the legal system has to manifest itself as a coherent whole – in order to establish order instead of chaos –, both the creation and application of law have to depart from the already existing and accepted set of legal norms: new norms and new applications of norms have to fit the current legal system.

75 *Ibid*, 213.

76 See section 3.1.

77 Teubner, "Anonymous Matrix", note 4: 346.

78 Oliver W. Lembcke, "Techno-regulation and the Law. Rule, Exception or State of Exception? A Comment to Han Somsen and Luigi Corrias," *Rechtsfilosofie & Rechtstheorie* (2011): 131-8, 132.

79 For an account of how legal norms are created, see Hans Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, tr. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Oxford University Press, 1967), 55-76.

80 According to Oakeshott, in *Human Conduct* (note 50: 136), analogical reasoning has to be distinguished from case-by-case reasoning: 'The reasoning is analogical; it is not concerned with the similarities of "cases" but with what can be abstracted from a judicial conclusion, namely the amplification of the meaning of *lex*.'

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Teubner fails to appreciate that rights have to be articulated and developed from within institutionalised hermeneutic contexts. They do not exist somewhere in the 'atopia'[81] or non-place of environment, but are consciously and constantly created and recreated within existing legal and political institutions that have to decide on the law's content, never entirely freely but inevitably with some distance from the public arena. Evidently, social norms may inspire the creation and application of legal norms, but the '*colère publique*' itself cannot be translated directly into legal terms, not only because it is often too inarticulate and diffuse but, more importantly, because it contains impossible and contradictory demands (people may want too much and different people may want different things). Therefore, the constitutionalisation of global society is no simple matter of making the latent manifest through social positivisation and by means of an arbitrary selection of arbitral tribunals. What is required, in my view, is a more serious and formalised institutional structure consisting of established legal and political authorities that have both the competence to take legitimate decisions and the power to enforce them.

4 Epilogue

Teubner should definitively be praised for 'thinking big'. Whereas contemporary legal theory often contents itself with clever conceptual analyses into the nature of law, he does not shy away from addressing the great social problems of today's world and proposing challenging, if not revolutionary solutions for them. However, to my narrow mind, Teubner's thinking is sometimes too big. Although I appreciate his courage and boldness to propose a common law constitution for global society, I do not think it can be built on these shaky conceptual, normative and institutional foundations. I consider Teubner's celebration of the 'living law'[82] to be a regressive attempt to break away from the institutionalised, and therefore inevitably specialised, professionalised and autonomised structures in which politics is practiced in modern society. But there is no escape: the effort to depoliticise society is a highly political exercise in itself which has to make use of all the resources available in the political system in order to be successful. (Some may be tempted to call it a paradox, but in truth it is a plain contradiction.) So instead of reverting to alternative arrangements with questionable legal and democratic credentials, I would suggest working from established legal and political

81 I have taken this notion from Ludger Heidbrink, *Handeln in der Ungewissheit. Paradoxien der Verantwortung* (Berlin: Kulturverlag Kadmos, 2007), 114.

82 See notes 45 and 53. A critical discussion of this notion can be found in Bart van Klink, "Facts and Norms. The Unfinished Debate between Eugen Ehrlich and Hans Kelsen," in: *Living Law. Rediscovering Eugen Ehrlich*, ed. Marc Hertogh (Oxford: Hart Publishing, 2008), 239-82.

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institutions within a concrete order,[83] despite their imperfections and limitations, to try to improve them. In doing so, we do best not to set our hopes too high. There are things – many things – that cannot be achieved by legal and political means, among them a fundamental reorganisation of the communicative world order.

The point is not to ban the 'political power medium'[84] from certain areas of society – if it were possible[85] –, but to prevent that people are dominated by one medium only. This is what Marquard tries to capture in his understanding of the separation of powers principle. In Marquard's view, freedom is not so much the absence of external forces affecting people as well as the presence of a plurality of forces: 'There is only freedom for the people, if they are exposed to many forces – political formations, economic forces, divine powers, stories, convictions: not to none at all and not to only one, but to many.'[86] Law may contribute to the separation of powers in this sense, particularly by granting people freedom of expression (as always, within limits). For the rest it has to be left to society, as part of the public debate, to develop a multitude of discourses. From this perspective, the dissemination of languages that followed upon the breakdown of Babel can be seen as a blessing rather than a curse.

To conclude, I would recommend that ambitions not be stretched too far, but to start from local traditions and institutions.[87] If we cannot achieve justice for everyone, everywhere and always, we should aim at creating and sustaining as long as we can some islands of peace and quiet in the overwhelming sea of chaos, not by rejecting or bypassing the institutions we have, but on the contrary by mobilising and reinforcing them. Probably we will never succeed in rebuilding the Tower of Babel, but we may at least hope to preserve, however locally and temporarily, a civilised way of living together among its ruins.

83 With 'concrete order' I intend to indicate that every order is a bounded, situated order connected to a particular piece of land. As Carl Schmitt, *The Nomos of the Earth in the International Law of the* Jus Publicum Europaeum (New York: Telos Press Publishing, 2006), 48, argues, every order originates in the taking of land: 'Not only logically, but also historically, land-appropriation precedes the order that follows from it. It constitutes the original spatial order, the source of all further concrete order and all further law.' Because of the necessary connection between order and space, I am sceptical about the possibility of creating an order for the entire globe. For the same reason, I would not be too hasty in writing off the state. For a reappraisal of the role of the state in protecting security, see Ian Loader and Neil Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2007), chapter 7.

84 Teubner, "Transnational Fundamental Rights", note 3, 204.

85 According to Schmitt, any opposition may become political. Cf. Carl Schmitt, *The Concept of the Political*, tr. Gustav Schwab (Chicago: University of Chicago Press, 2007), chapter 2.

86 Odo Marquard, "Apologie der Bürgerlichkeit", in: *Zukunft braucht Herkunft. Philosophische Essays* (Philipp Reklam Jun.: Stuttgart, 2003), 247-60, 252 (my translation). The original text reads as follows: 'Für die Menschen gibt es nur dann Freiheit, wenn viele Mächte – politische Formationen, Wirtschaftskräfte, Sakralgewalten, Geschichten, Überzeugungen – auf sie einwirken: nicht gar keine und nicht nur eine, sondern viele.'

87 Along the lines indicated by Oakeshott 1975.