Against the 'Pestilential Gods'

Teubner on Human Rights*

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La purga dura da sempre, senza un perché.
Dicono che chi abiura e sottoscrive
può salvarsi da questo sterminio d'oche;
che chi obiurga se stesso, ma tradisce
e vende carne d'altri, afferra il mestolo
anzi che terminare nel paté
destinato agl'Iddii pestilenziali.
Eugenio Montale, from 'Il sogno del prigioniero', 1956[1]

1 Human Rights as 'Semiosphere'

Gunther Teubner locates his reconstruction of fundamental rights in the complex framework of societal constitutionalism. The expansion of state constitutions, international law agreements and general principles of law (coupled with comparative law arguments) are, he argues, inadequate as foundations:[2] legal validity is not the result of a sovereign speech act (a 'hyper-constitution' or a global political authority that says 'these are our rights') but a product of complex functioning within each system.[3] Teubner proposes that we look for a foundation in recursive legal decisions (not only by courts): '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'.[4] Judgements produce norms

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1 'The purge is endless, with no reason given. / They say the man who recants and signs / can survive this slaughtering of geese; / that he who blames himself but betrays / and sells the flesh of another man / will gain the upper hand and not end up in the pâté / destined for the pestilential gods'. (Translated by Jonathan Galassi, *Poetry*, October 1989, 12). Montale chooses a lexical form (*Iddii* instead of *Dei*), unusual in the plural (*Iddio* sounds as literary traditional catholic/ *Iddii* is irony in his mourning scene). Terrestrial 'Gods' behave as if they were the only ones: as a Teubnerian anonymous matrix every 'god' asks men for soul and bodies, destroying lives and corrupting consciences.

2 Karl-Heinz Ladeur and Lars Viellechner, "Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globaler Privatrechtsregimes", *Archiv des Völkerrechts*, 46 (2008): 42-73.

3 Andreas Fischer Lescano, "Die Emergenz der Globalverfassung", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 63 (2003): 717-760

4 Gunther Teubner, "Transnational Fundamental Legal Rights: horizontal effect?", in this volume, 4.

through productive mistakes; a legal decision applies a standard that is not yet a norm at the time of judgement; norm-validation is effected through decisions that are not valid as such. The paradoxical nature – *rétroactivité fabuleuse*[5] – of this recursive concretion is reminiscent of the formation of custom.[6]

Why does a mistake succeed? This core question relates not only to recursiveness, but to the framework that creates communicative structures which enable this paradoxical productive recognition – or 'generation' – of validity. The systemic functioning depends on individual communications. Individuals select a set of sources for every act of validation: no transitional semantics here, but a common *intertextuality*.

All systems know occasional points of breakage: an ancient path disappears, a new one affirms itself.[7] With neither organic laws of development as guarantees, nor ontological necessity matching a change in environment with a change within the system, the path of becoming remains uncertain. Fundamental rights are neither an autonomous, partial, legal subsystem nor can we argue for a co-evolution of fundamental rights and positive law as separate entities. The evolutionary process[8] may be understood as a common semiotic ground, which institutionalises itself by a set of writings. We will refer to this as the intertext, or the semiosphere. I use the term intertext, and 'semiosphere', as borrowed from Lotman,[9] to capture something important about what is 'shared' between systems as common resource, as medium, and the modalities of that sharing. Building an intertext and setting boundaries are recursive operations too, not merely a specific internal functioning of each system. A bare semiotics of human rights – a semiosphere – works within and outside systems.

Naturally, each system may produce autonomous sets of writings (internal intertexts) that operate as structures conferring sense or, again, only as common

5 Jacques Derrida, *Otobiographies: l'enseignement de Nietzsche et la politique du nom propre* (Paris: Galilée, 1984), 22.

6 Ernst Zitelmann, "Gewohnheitsrecht und Irrtum", *Archiv für civilistische Praxis* 66 (1883): 323-468.

7 Marie Theres Fögen, "Zufälle, Fälle und Formeln. Zur Emergenz des synallagmatischen Vertrags", *Rechtsgeschichte* 6 (2005): 85.

8 Marc Amstutz, "Widerstreitende Götter - Zu Manfred Aschkes Rekonstruktion der systemsoziologischen Evolutionstheorie und ihrer rechtstheoretischen Bedeutung", *Rechtsgeschichte* 2 (2003): 14-24.

9 Jurij Michajlovič Lotman, *La semiosfera. L'asimmetria e il dialogo nelle strutture pensanti* (Venezia: Marsilio, 1985). Semiosphere is the 'semiotic space, outside of which semiosis itself cannot exist'. Lotman, "On the Semiosphere", *Sign Systems Studies* 33 (2005): 208. 'Semiosphera' and 'intertext' correspond to different theories. 'Intertextuality' refers to complex 'dialogical' structures of literary works. See Julia Kristeva, *Sèmèiôtikè. Récherches pour une sémanalyse* (Paris: Seuil, 1969). There is some disagreement and ambiguity over definitions here: in American legal theory it is wrongly coupled with 'textualism'. Richard Posner has expressed his scepticism about 'intertextuality' in *Law and Literature* (Harvard University Press, 3rd ed.: 2009), 285. I will not compare Lotman's semiosphera with Luhmann's systems theory (though the question of boundaries is essential for semiotics, too: 'the border is a bilingual mechanism, translating external communications into the internal language of the semiosphere and vice versa' (Lotman, *Semiosphere*, 210).

signs, as a 'coerced arena for freely making sense'. It depends on the modes of referring. If actors deal with texts (and so legitimate their acts) as a given unity and not as a source for creating it, we must conclude that intertext is sense and not only a set of signs. However, use as sense is not as diffuse as we think. A constitution is an intertext (the *Charta* and the multiplicity of comments and judicial opinions, the international agreements and so on) that is used as if it meant something; however, supreme or fundamental values are an intertext that is merely a set of signs. So in legal reasoning we do not discuss the salience of the Constitution (we may discuss the rightness of an act of interpretation, not the problem of what we must interpret). On the contrary, we uphold or reject a value in legal reasoning not by discussing *which* interpretation is *right* but *what* the invoked value *is*. *Constitutions say*; *values are*: a constitution deserves interpretation; a value deserves a formal act of position. In the enormous clash of incommensurable epistemic structures, one must first say what a value is, then what one does by applying it.[10] When writing conquers the system, the 'is' of a norm is its text; the 'is' of a value is the communication that builds on this value. '"Text", then, no longer refers merely to the written form of a primarily oral order, but rather describes the legal process as such[11]': the textuality works in a different way on norms and on values.

The concretion of this common semiotics belongs to the environment; the need for infinite functional differentiation within every system is satisfied through processes of linkage and reciprocal enablement. The clash of values, the perennial battle between irreconcilable patterns, the sense-makings of systems, take place within a common semiosphere: to argue and contest we must have at our disposal a common set of linguistic signs. 'Scandalisation' could not be the starting point of a chain of validation[12] if victims and persecutors had no intertext: hegemonic and counter-hegemonic processes develop (and affect each other reciprocally) within a common universe of signs.[13] 'Scandals' simply testify to the system's inefficiency: that's because systems legitimise themselves through their results, not through the semantics of their operations. Human rights are our common semiotic ground; on that ground we dispute meanings, disagree over them, their

10 Maurizio Ferraris, *Documentalità. Perché è necessario lasciar tracce* (Roma-Bari: Laterza, 2009), 131 ff.

11 Ino Augsberg, "Reading Law: On Law as a Textual Phenomenon", *Law & Literature* 22 (2010): 385; Poul F. Kjaer speaks of the 'inter-contextual structure' of transnational law in "The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law, and the Political in the Transnational Space", *Wisconsin Law Review* (2010): 515 ff.

12 It does however remain an essential factor; see Andreas Fischer Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (Weilerswist: Velbrück, 2005), 67 ff; Kathryn Abrams, "Emotions in the Mobilization of Rights", *Harvard Civil Rights-Civil Liberties Law Review* 46 (2011): 551-589.

13 Sonja Buckel and Andreas Fischer Lescano, "Hegemonie im globalen Recht – Zur Aktualität der Gramscianischen Rechtstheorie", in *"Hegemonie gepanzert mit Zwang". Zivilgesellschaft und Politik im Staatsverständnis von Antonio Gramsci*, ed. Fischer Lescano and Buckel (Baden-Baden: Nomos 2007), 85-104. In a different way, signs would be intended as symbols: Marcelo Neves, "Die symbolische Kraft der Menschenrechte", *Archiv für Rechts- und Sozialphilosophie* 91 (2005): 159-187.

enforcement or effects, and even create a chain of validity (as a semantic product of the communication with those signs) from a bundle of incoherent judicial decisions.

What makes a sign a *human rights* sign? Neither necessity, nor ontology; neither free mutual arrangement about dialogical premises nor some *a priori* of communicative action: a semiosphere is an evolutionary achievement. First we have meanings, then signs. At the beginning each social actor semantically communicates through conventional signs. The act of referring differentiates the communication in the variety of systems and then, as in every evolutionary breaking point, the meaning becomes empty, semantics collapses into semiotics. When the incommensurability of meanings breaks out, systemic differentiation elaborates semiotic devices to overcome the obstacle. The recognition of a common semiosphere releases new semantic operations to tackle what we will later call *paranomic* functionings.

This evolutionary phenomenon repeats itself in all sectional systems; it is important to observe, however, that this transition takes place primarily 'at the boundaries between communication and human being'.[14]

Writing paradoxically restores the sign as source of meaning: the constitution as a set of shared signs is the *modus essendi* of constitutional norms. The meaning is the norm and the meaning is inside each constitutional sign: *let all interpretation occur*. But the values – those segments of intertext that pre-exist it, and to which the constitutional sign refers – remain signs: beyond a shared semiotics lies the global civil war.

Recursiveness is thus only one of the two structural elements of validation in the fundamental rights discourse within the legal system. The other (prior) one is intertextuality, a complex network of semiotic fragments, which forms a common ground that underlies and activates the plurality of intensive but incommensurable communications within each sectorial social system. When, therefore, for a moment, two autonomous chains of validity (transnational and national legal orders) meet in a single judicial ruling, we observe an 'entwinement – but not a fusion'.[15] The judge speaks for multiple orders: different discourses, belonging to different chains of validity, irritate each other. In the long run the result is a comprehensive legal system that tolerates within itself incoherence as opportunity, as a reserve for change.

Intertextuality differs from inter-legality, about which Teubner is almost dismissive: the problems with inter-legality arise from the complex mode of validation, which presupposes an entwinement of meanings. Inter-legality is a very interest-

14 Gunther Teubner, "Justice under Global Capitalism?", *European Journal of Legal Studies*, 1 (2008): 4.

15 Teubner, "Transnational Fundamental Legal Rights", note 4: 6.

ing example of heterarchical orders,[16] but it leaves open the question about how institutional learning can develop if it is just interpretation *in conformity to* a set of standards. This kind of interpretation needs a common complex semiotics: first intertext (which involves no validation), then procedural framing of sense-making and, finally, system-internal, recursive, normative operations.

2 When the Anonymous Matrix Speaks the Language of the Pestilential Gods

In *The Anonymous Matrix* – a masterpiece of contemporary legal theory – Teubner suggests a new understanding and function for fundamental rights. They work as social and legal counter-institutions to prevent the expansionist tendencies of social systems. The core question does not concern registering (and lamenting) observed harms perpetrated by one man on another. This is only the surface manifestation of an almost invisible, deeper, perpetual danger. Damages to the integrity of institutions, persons and individuals are now generated by anonymous communicative matrices (institutions, discourses, systems). Each system organises itself through a single communicative *medium* (power, money, beauty etc.); its functionings become an ongoing story of an isolated, well-structured self-fulfilment; its reason harks back to the pathological rhetoric of a one-sided value. '*La raison est excessive*', says Maurice Blanchot, writing about the Marquis de Sade.[17] Each system's operation takes and hides an enormous destructive potential; it powerfully brings forth magnificent structures and objects and, at the same time, can destroy itself and the environment:[18] discourses on the one hand, suffering minds and bodies on the other. Dangers and harms arise from systems' internal organisation. No longer couched (and concealed) in the usual narrative of the infringement of one man's subjective rights by another,[19] causation and liability now fade out in a multiplicity of operations mediated, valued and legitimated by a single anonymous matrix.

What can law do against this systemic *hybris*? Not much: the legal system presupposes a claimant suing a defendant for infringing his rights, hence a mandatory binarisation as interpersonal conflict. Reshaping such a construction as a remedy against the structural violence of anonymous communicative processes imposes a difference: 'human rights in private law' concern only the threat to body/mind integrity coming from social 'institutions', a highly imperfect juristic equivalent for the expansive dynamics of the anonymous 'matrix'. 'The justice of human

16 Marc Amstutz, "In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning", *European Law Journal* 11 (2005): 766-784.

17 Maurice Blanchot, "L'inconvenance majeure", in François de Sade, *Français, encore un effort*... (Utrecht: Pauvert, 1965), 15.

18 Gunther Teubner, "A Constitutional Moment? The Logics of 'Hit the Bottom'", in *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* eds. Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (Oxford: Hart, 2011), 3-42.

19 See Karl-Heinz Ladeur, (2004) *Kritik der Abwägung in der Grundrechtsdogmatik* (Tübingen: Mohr, 2004), 58 ff. for a critique of this position

rights can, then, at best be formulated negatively';[20] it must be constructed outside the state-individual paradigm and it is emphatically *not* grasped by the balancing of subjective rights between individual persons ('an infamous category error'). Preventing and reacting against the dangers of highly self-fulfilling discourses is the future of horizontal effect:[21] through compensation for losses, injunctions, specific performances and so on, remedies must restore a safe communication.

In line with Teubner's argument about the nature and logic of systemic harms I will, in what follows, identify three issues that, I hope, broadly follow Teubner's main track: the functions of systemic politics, the role of fundamental rights' claims and, finally, the sense of direct third-party effect.

3 From Politics to Political Moments

Fundamental rights and societal constitutions come together in Teubner's analysis: the dialectic between individuals and the state loses its meaning, politics ceases to be the sole danger for human life and the constitution is not at all a merely political question. Teubner replies to his critics that the exclusive focus on power, as the communicative medium of the political system, is misleading. Fundamental rights guarantee actual possibilities of communication in a variety of social fields; politics is only a part of the problem.[22] He indeed recognises the political role of private transnational regimes, but invites us not to exaggerate their weight.[23] Politics is undermined, on the one hand, because power is only a communicative *medium*, whereas multiple constitutions work with a greater variety of *media*. On the other hand, however, politics is regarded as a powerful aggregation of totalitarian tendencies: here, societal constitutionalism works as a device to bridle the Leviathan.

Politics, I argue, is not an autonomous system but a set (with uncertain boundaries) of highly intrusive, founding discourses: each power's discourse ultimately entitles someone to do anything. The 'political system' properly refers to the 'system of government', whose politics (including governmental discourses and discourse-shaped institutions such as political parties) is neither the unique, essential nor genealogical modality for conducting politics. So, instead of distinguishing between 'politics' and 'the political',[24] it is better to discuss 'systems of government' and 'political moments'.

20 Teubner, "Transnational Fundamental Legal Rights", note 4: 22.
21 Gunther Teubner, "Constitutionalising Polycontexturality", *Social and Legal Studies* 20 (2011): 215.
22 Teubner, "Transnational Fundamental Legal Rights", note 4: 12.
23 Teubner, "Constitutionalising Polycontexturality", note 21: 215
24 Gunther Teubner, "Societal Constitutionalism Without Politics? A Rejoinder", *Social and Legal Studies* 20 (2011): 248; Emilios Christodoulidis, "Against substitution: The Constitutional Thinking of Dissensus", in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 191 ff.

Political power bears on every system because all leadership is political: the multiplicity of the spheres of human action leads inevitably to the question of justice as the distribution of inclusionary or exclusionary processes. Politics is the language in which these questions are couched; thus politics is a bare form of discourse which we (unfortunately) cannot do without.

Health, law, science etc., do not produce something named 'politics' (because politics is not a trans-systemic object with some fixed recognisable content); they simply bring out its functioning. Every internal discourse that aims to legitimate these functionings has a political quality, whatever semantics it deploys. When, from an internal point of view, someone reproaches somebody else with having used a 'political' argument – 'that's politics, not law (science, health etc.)!' – we argue that the disputed statement could shake or re-configure (whether rightly or wrongly is another question) the system's categorical architecture: an argument is political when its fulfillment would subvert the operative closure at work within a system. It activates the necessary redefining actions of the system's boundaries (effecting re-entries in an autopoietic way). The intention is not to replace the internal, systemic, highly differentiated, communication either by institutions divided along political-party lines (a left- or right-wing health?) or by reducing every statement to an electoral opinion. The categorical mistake would be to move the political discourse from one system to another; every system indeed elaborates an autonomous politics through a chain of *political moments*.

Instead of yielding to the temptation to conceive an 'absolute politics' (which is only a dangerous totalitarian narrative), it is better to recognise the diffusion of a multiplicity of *political moments* – bare forms with internal, ever-changing contents. Political moments are not the image of an external system created by the internal point of view, the way systems theory usually portrays it. They are another kind of internal phenomenon. With Teubner we follow the tracks of power beneath each differentiated structure: the diffusion of power does not mimic the state's power. The constitution of the legal system might not be exhaustively described in terms of structural couplings between law and politics: every societal constitution is a political moment – the main political moment – of its system.[25] The constitution is an evolutionary conquest because it carries all the potential of reflexivity belonging to the system in response to the various irritations of the environment.

25 The main political moment is not always a 'Great Decision'; see Teubner, "A Constitutional Moment? The Logics of 'Hit the Bottom'", note 18: 97. For a *political* societal constitutionalism: Hans Lindahl, "Societal Constitutionalism as Political Constitutionalism: Reconsidering the Relation between Politics and Global Legal Orders", *Social & Legal Studies* 20 (2011): 233 ff.

A constitution is a set of secondary norms that arises out of constitutional moments, but not every political moment is a constitutional one.[26] Conversely, constitutions are made of secondary norms, but not all secondary norms arise from political moments. In the specific sectional structures of positivised legal systems, *a written constitution* (yet written in intertextual form) *is a race to semiotics*: a collective enterprise to overcome the clash of meanings, the violence of semantics, and to build a common space of signs for every act of systemic communication. People say: 'with those communications we have changed (or shored up) our system, these are the new contents, and now write them again on a piece of paper!' Constitution-writing is the attempt to turn a network of semantically oriented communications (the 'revolutionary rise of constituent power') into a semiotics of symbols ('We the people…'), so that the new discourse will be not the meaning but the channel of future communications. For a short time constitutions succeed in taming evolution, until the next semiotic riot, that is![27]

The self-subverting reconstruction of boundaries[28] – always a possible result of political moments – is the internal *transcendental function* of each system. Politics and power are not a contemporary worldwide Proteus, always the same force hidden under a thousand faces; strictly speaking, they are not a 'They', because there exists nothing as 'Politics' or 'Power'. They are not theoretical subjects there to provide convenient shortcuts for the scholar concerned to critique the overall structures of power. There is nothing wrong with this approach as such; we think that confronting the facets of structural violence is a fascinating job. In this sense I too share an 'obsessive fixation on the phenomenon of power, which leads [me] to inflate the concept of power meaninglessly, and as a consequence [I] cannot discern the more subtle effects of other communication media'.[29] My effort aims to recognise the multiplicity of all communication *media* and – as meaningfully as possible – to observe how each anonymous matrix thinks.

Politics and power are only functions, moments, phenomena which appear; not alone but among others, they build (first in hegemonic, then in counter-hegemonic ways) the internal systemic communications. Tracing the differentiated political moments, trying to understand the internal rhetoric of each anonymous matrix, is a way to rebuild an 'ecological' communication, working around the

26 Andreas Fischer Lescano, "Redefining Sovereignty via International Constitutional Moments?", in *Redefining Sovereignty: The Use of Force after the Cold War*, ed. Michael Bothe, Mary Ellen O'Connell and Natalino Ronzitti, (Ardsley: Transnational Publishers, 2005), 364: a constitutional moment is the emancipation of legal system from political pressure (for us: the political moments of legal system free themselves from pressures of the politics of the state governmental systems). Introduced by Bruce Ackerman, this concept might yet be 'transgressive' rather than quietist: Emilios Christodoulidis, "European constitutionalism: The improbability of self-determination", *NoFo* 5 (2008): 76 f.

27 Law is not only '*Immunsystem*', but '*Medium praktischer Weltveränderung*'; not only '*Repression*', but '*Emanzipation*': Hauke Brunkhorst, "Düstere Aussichten – Die Zukunft der Demokratie in der Weltgesellschaft", *Kritische Justiz* (2010): 15.

28 Gunther Teubner, "Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts?", *Zeitschrift für Rechtssoziologie* 29 (2008): 9-36.

29 Teubner, "Transnational Fundamental Legal Rights", note 4: 18, note 71.

resource of all self-subversive tendencies – which systems do have in reply to irritation from human consciousness – as far as, paradoxically, constituted constituent powers.

Societal constitutionalism overcomes state-centred politics and corresponds to the transformation of politics: 'reflexively internal articulations of law and power (…) are generated – sociologically – from within power'; they 'create an adequately abstracted medium for the societal circulation of power'.[30] In other words, instead of 'everything is politics' we can say 'politics is everywhere'.

4 Sailing Away from Paranomia

Claims of fundamental rights are the core phenomena of systemic communication. What kind of consequences does this claim entail?

The overarching demand of a 'totalitarian' sovereignty collapses into a plenitude of differentiated transcendental functions which are no less dangerous than the former, because every matrix is a network of discourses, and every discourse tends to close itself off while maintaining the actual set of knowledge, actions and relationships (that constitutes the politics of the system) against any internal effort to change the pattern of communication. Here is the difference between communication and discourse: the former is unending, the latter not. Discourses end where communication begins, their closure grants no reply. Communications are acts of resistance, they dismantle the discourse's texture (building another discourse that will be dismantled again and again) in a sequence of replies to irritations coming from outside.

Both discourses and communications may express political moments and narratives of power: a 'conservative' exit is a possibility among others: the operative closure (which is not to be thought of in a conspiratorial vein as the strategy of an evil genius!) becomes a conservative opportunity when the discourse closes itself not only to the environment but also to the influence of internal communications, refusing to reply to irritations mediated by communication.

We insist on the fundamentally conflictual nature of every internal systemic communication:[31] systems are not lands where the eternal voice of Sameness resonates in uncorrupted unity. The operative closure is not a strategy of overcoming, but the structural condition of the clash of communications (and of their temporary gathering around the texture of a discourse). We have achieved our state of societal constitutionalism free from the totalitarian narratives of unity (the historical

30 From this point of view only we agree with Chris Thornhill, "Constitutional Law from the Perspective of Power: A Response to Gunther Teubner", *Social and Legal Studies* 20 (2011): 247. The consequence, nevertheless, is not a strong re-politicisation of the legal constitution, but differentiated transcendental functions for politics that spread to all societal constitutions and take different form in each.

31 '*Seditio Sive Ius*': Michael Blecher, "Mind the Gap", *European Journal of Legal Studies*, 3 (2008): 11.

coincidence of state and politics); now we should not repeat the old story and the same mistake. After constitutional fragmentation, systems must not be thought of as peaceful unities shaped by discourse's dominion. Each societal constitution is a site of conflict, a structured perpetual clash between discourses and communications: *keine Aufhebung*, but *eccedenza costituente* (constituent excess).[32] 'The normative language of human rights – dignity, personality, equality – inaugurate conditions that exceed containment' in normative 'gathering' orders.[33]

Coming to the legal system, we propose to define every discursive lack of reply as *paranomic functioning*. Paranomia is the state of a normative system in which: (a) the knowledge of all the observable internal norms does not reveal the normative powers at work within that system; (b) the enforcement of these norms frames distorted images of order that prevent comprehension of the real matter of power that lies behind the validity of norms. When a system has paranomic functionings, the movements beneath the anonymous matrix become unclear: through the system's screens only the *secret* of power shines, whose silence is made up of a thousand valid norms. People do not understand what happens in the realm of Paranomia: they wander through a thick forest of norms, confused and filled with systemic self-descriptions of a reality that looks very different from what it is.

It is this intransparency that 'the cry that expresses pain' pierces.[34] That is what makes it the main source of knowledge about human rights. Fundamental rights are communication's responses to paranomic functionings. The anonymous matrix seems to be the dark side of societal communication: not the radical Evil opposed to the absolute Good (two substances within the same thing), but a perpetual dark possibility, a deadly turn in the system's working. The systemic communication reflexively finds a remedy to paranomic functioning: differentiated claims to redesign powers (which end up in new qualities of internal operations) named 'human rights'.

The appearance of human rights, whatever their historical scene is, is always marked by social protest. They are the *media* of internal conflicts, a differentiated systemic language to reach out to the 'becoming': individual suffering arises as a collective phenomenon and it tracks counter-hegemonic movements.

If one proceeds from the diffusion of politics as the *political moment* of every system, it becomes clear that a claim of a fundamental right is a claim of power: internal-specific power, mediated according to the discursive rhetoric proper of the system. A claim is not a weight on a balance, it brings about a rupture, it is an action aiming at resetting the categorical imagination that feeds the system's pro-

32 Antonio Negri, "La filosofia del diritto contro la sovranità: nuove eccedenze, vecchie frammentazioni", *European Journal of Legal Studies* 3 (2008): 1.

33 Emilios Christodoulidis, "European Constitutionalism: The Improbability of Self-Determination", note 26: 80.

34 Gunther Teubner, "Die anonyme Matrix: Zu Menschenrechtsverletzungen durch 'private' transnationale Akteure", *Der Staat* 45 (2006): 188.

duction of meaning and its inclusion/exclusion strategies. Answering that claim is not a compromise among individualised positions but a review of boundaries and functionings.[35]

Human rights are not 'another law' which collides with the ordinary systemic law: the legal internal oppositions find no dialectical higher degree of unity, but rather perpetually reshape systemic communications and operations.[36] Underneath the system's semantics we find no unity: only in the moment of application does unity reveal itself, when the multiplicity of oppositions temporarily stops in a form of cooperation.[37] Fundamental rights, finally, must not be conceived of as a defense against political power; they cooperate to build it by channelling internal conflicts. They represent a moving plurality and prevent arguments aiming towards a hegemonic control of Becoming.

5 Societal Constitutionalism as the Last Day of *Drittwirkung*

It is difficult to reconstruct this conceptual framework for private law. Teubner rejects human rights' direct horizontal effect, because 'in the long run it nevertheless produces a short-circuit between politics and social fields'.[38] Instead, he prefers indirect effect, but in the form of generalisation and respecification, which displaces the question, stripping it of all past meanings. Horizontality, he says, keeps the human rights issue within the wrong bounds: a relationship caused by harms from one individual to another. The subject is now the anonymous matrix on the one side, with institutions, persons, individuals on the other. 'The problem of human rights in societal contexts governed by private law arises only where the endangerment of body/mind integrity comes from social "institutions".' Justiciability is a very difficult question: just one starting point is the uselessness of the metaphor of balancing.[39]

While in complete agreement with the paradigmatic turn of the anonymous matrix, we would evaluate 'the third-party' effect in a different way. The fear about the hyper-politicisation of the horizontal effect is the heritage of the story where only state-wielded political power was at stake. The coalescence of rights

35 Andreas Fischer Lescano, "Kritik der praktischen Konkordanz", *Kritische Justiz* (2008): 166-178.

36 Searching for a 'human rights order' would betray the proper dynamics of systemic communications: therefore we do not agree with the proposal to build a 'law of collisions' between private law and human rights (Karl-Heinz Ladeur, "Die Drittwirkung der Grundrechte im Privatrecht. 'Verfassungsprivatrecht' als Kollisionsrecht", in *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, ed. Gralf-Peter Callies et alii (Berlin: De Gruyter, 2009), 543 ff. Christian Cappel, "Anachronismus einer Drittwirkung. Das kognitivistische Konzept Karl-Heinz Ladeurs und die Matrix Gunther Teubners im grundrechtstheoretischen Spannungsfeld", *Ancila iuris* (2006), 41-53.

37 Regarding this concept of unity, see Pietro Perlingieri, "Complessità e unitarietà dell'ordinamento giuridico vigente", *Rassegna di diritto civile* (2005): 188 ff.

38 Gunther Teubner, "Transnational Fundamental Rights", note 4: 11 f.

39 Gunther Teubner, "Transnational Fundamental Rights", note 4: 21; Ladeur, *Kritik der Abwägung*, note 19: 77.

and power and the complex differentiation in political moments[40] change the picture: the polarity direct/indirect refers to opposite ideas of evolution. Direct effect means that a set of superior norms must be enforced intensively and cannot be a function of a pre-existing hegemonic network of categories and powers.

Indirect third-party effect is a doctrinal thesis that gives rise to a mandatory rule (implicitly introduced by the theory) that limits the third-party effect up to a *certain point* of compatibility (an undefined reserve for hegemony) with the pre-existent normative structures (according to a dual code of conformity or lack of it with the existing system: *systemkonforme/systemwidrig*). *Direct* third-party effect induces a different (also implicit) mandatory rule for activating all the self-subversive internal force of the system to reshape its framework according to, what H.L.A. Hart would identify as the 'secondary' norms, of its constitution. In this sense the imperative 'uphold the system!' ('no *Systemwidrigkeit*') is not yet the limit of third-party effect. In this context, 'system' must not be confused with 'legal system'. The 'system' of the discourse of system-conformity is the self-description of the order that every legal system produces; it is the received image of order, the internal system, the 'system of the system'. A break within this internal system is again a systemic operation: a self-subversive systemic operation via direct effect remains always within the potentialities of the legal system. Horizontal direct effect is by no means a strategy for the political system to destroy legal autonomy; it is an internal process because the rule that imposes direct effect is mediated by proportionality and regulative efficiency.

The debate over direct/indirect effects arose in the middle of the 20th century, when the law tried not to take the step that politics had taken in the first half of the same century, to give symbolic effect to this process in the postwar constitutions. Far from being constructed in a close relationship state/individuals, fundamental rights become the essential structures of legitimacy. In the 20th century human rights come at the core of the political discourse: as source of legitimacy, they shape not only discourses *about* the power, but also discourses *of* power. Sovereignty is now an achievement, not a given attribute of the sovereign: it is a texture of discourses and conflicts. Under pressure of its transcendental function, the system of government changes. This is a source of irritations for the legal system. In the middle of the 20th century, these irritations caught the legal system completely unprepared: lawyers, courts and scholars did not think that their mission was the representation of systemic conflicts. Now the pattern has changed. No more theodicy is needed for the establishment: fundamental rights work as a claim of (internal) power, a self-subversive strategy.

40 I use a different concept of power to Thornhill, whose meaning does not involve a global dominant social semantics, but a differentiated quality of each political moment produced by every system according to its proper rhetoric. Power follows, not precedes, societal constitutionalism. But I agree with Thornhill in describing power (I would say *powers*) and rights as coalescence: Chris Thornhill, "Re-Conceiving Rights Revolutions: The Persistence of a Sociological Deficit in Theories of Rights", *Zeitschrift für Rechtssoziologie*, 31 (2010): 201

Under the veil of pragmatic continuity and before the proposal to generalise and re-specify it, the indirect effect had protected an image of legal order as representing the normativity of the legal system as a semantic unity – as the voice of a single emperor. It was a desperate effort to perpetuate a narrative of sovereignty that could no longer claim justification. The systemic normativity of contemporary societal constitutionalism is something different (a set of competing models of regulation with internal self-subversive potentialities): consequentially we do not need a theory that, as indirect effect, operates as a register of semantic closure. A fundamental right's claim is a claim that argues for a norm, a 'trigger' for innovation: if the norm is recognised, the enforcement depends solely on its validity, not on its coherence. The imperative of systemic coherence comes later. We ought not to use an argument about *Drittwirkung* as a *condicio per quam* of validity. System-conformity (every indirect effect argument flows into an imperative of conformity) is a way of harmonising pre-existing norms, not an ontological factory of *good* norms. Legal theory is afraid of incoherence and would not to admit the emergence of a constitutional norm (constructed through a chain of fundamental rights claims) which conflicts with pre-existing system structures (shaped by narratives about meanings of ordinary norm). But normativity implies conflict: validity is not merely a judgement about an object; if law is a network of practical sentences, validity means 'you have to enforce this norm, because this norm is a reason for action' and it does not mean 'this norm exists if and only if it reflects the contents of older norms'. Validity implies enforcement, not coherence: when we say '*lex superior derogat inferiori*', we accept the possibility of incoherence. Why suppose that a new (societal) constitutional norm might exist only if it repeats in a new form the meaning of a set of older norms? First comes validity, then the resolution of conflicts on the basis of valid norms; in this coherence is *not* a device that confers validity to constitutional norms, it simply regulates the difference among (constitutional and ordinary) norms.

So the dispute about *Drittwirkung* has lost its value: not intended as a false representation of a *consensus omnium*, legal theory furnishes oppositions with transparency, offering them a chance for temporary, but diffuse, moments of harmonisation. *Only if 'direct effect' signifies 'possibility of self-subversion' do fundamental rights have direct effect.*

6 Three Questions for the 'Counter-Matrix'

For legal theorists the matrix argument raises three challenges:
First, we must develop a metadiscursive theory of torts. When the perpetrator of harm is a paradoxical 'de-subjectivised' subject and harm is generated amongst an intertwinement of discourses and actions (named structural violence), the qualification of a single phenomenon as tort is a serious matter. Harm should neither be connected to the categorical system of hegemony at work (according to which the bare individual sufferings have no legal meaning *per se*) nor argued for directly by expressions *ex foro conscientiae*. Is there a bridge from the cry of the victim to the

adjudication of remedies? We cannot conceive of individual conscience (or the network of mind/body plus their narratives) as if it was always a source of enlightened reasons or of unquestionable goods. The structural coupling between conscience and legal system activated by each human rights' claim is not a verdict of illegality according to the law's binary code; it is a communication which aims at a political moment and tries to rebuild the internal semantic forces of the system against the fiction of practical concordance. It is an upheaval of social thought for the redistribution of discursive internal powers. Reason is at the end, not at the beginning of a claim.

Secondly, we must distinguish between claim and norm in human rights discourse. A claim presupposes a claimant's direct access to his rights-communication. The diffused scepticism of humanitarian intervention – war in the name of rights – emerges amidst this confusion between claims and norms, norm-production by claims on the one hand, and order-regulation by imposing norms (whether just or wrong is another question) on the other:[41] a young Arab girl that will not wear the veil and opposes her father's order makes a (constitutional) claim; an institution (parliament, court) that bans it in public spaces imposes an (unconstitutional) norm. Correctly intended as claims, human rights are self-subversive sources of norms (*a counter-matrix of norms*) ;[42] incorrectly intended as norms, human rights are bare images of order. Claims (invoked by suffering individuals) activate communications to redistribute powers: they are counter-hegemonic. Norms (invoked by authorities) activate communications to expand the boundaries of pre-existent order: they are hegemonic.

Thirdly, we must found the matrix argument – as a methodological concept – on principles of proportionality and regulative efficiency. Proportionality should not be considered as a balancing instrument; it refers to the differentiated strategy of normative systems, a device to plan and control evolutionary changes in the internal structures of adjudication, which adapts each concept by foreseeing (proportionality) and controlling the consequences (regulative efficiency) of results.[43] These are two faces of the same concept: *ex ante* and *ex post* valuations of systemic outputs. Causation, limitation of joint and several liability, specific performance, injunctions and corporate liability are a texture of remedies which only have regulative justification: they work not by the internal development of semantic force, but according to the prospective and effective result of their operations. The matrix argument might develop as an autonomous source of remedies: as a constitutional norm, it could operate either by analogy and teleological reduction of existing norms (about remedies) or by introducing new regulative pattern (whose

41 Jacques Rancière, "Who is the Subject of the Rights of Man?", *The South Atlantic Quarterly* 103 (2004): 297-310; Ernst van den Hemel, "Included but not Belonging. Badiou and Rancière on Human Rights", *Krisis*, (2008): 16-30.

42 Gunther Teubner, "Die Anonyme Matrix", note 34: 188.

43 Gunther Teubner, "Folgenkontrolle und responsive Dogmatik", *Rechtstheorie* 6 (1975): 179-204. In the 'new' constitutionalism 'what is functional re-orients and overdetermines what is normative': Emilios Christodoulidis, "Of Boundaries and 'Tipping Points': a Response to Gunther Teubner", *Social & Legal Studies* 20 (2011): 239.

constitutional legitimacy and derogatory force depend on *ex ante* and *ex post* efficiency valuations).

Finally I would raise the following question about the matrix: why *anonymous*? What's the name that the matrix should lose to win its struggle for life? The matrix dissolves our names, anonymity is a story of deconstruction. Good and Evil have neither name nor author, they are reduced to a plentitude of functionings. Some of these build *Paranomia*, the land of pestilential Gods; others break it: theory is an emergency exit. Human rights, paradoxically, induce anonymous matrices to heal by themselves.