Human Rights, and the Destructive Communications and Actions of Differentiated Society

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1   Introductory Remarks

According to Gunther Teubner, the formulation and implementation of human rights in law is a way of realising, through law, law-transcending demands of justice by human beings in danger of being harmed by communications in modern society.[1] Modern society, which tends to destroy the integrity of the body and mind of human beings, and thereby at the same time threatens important presuppositions of its own self-reproduction, is described as a set of autonomous communication systems.

The present contribution poses two questions with regard to this view on human rights. First and foremost, it asks how modern society might be conceived of as posing a threat to human beings. Attention is brought to bear on Teubner's attempt to describe society as a matter of communication, and more specifically as a set of one-sided communication systems. In this regard, I scrutinise the attempt to describe the threat of society in terms of inclusion/exclusion. Secondly, it questions Teubner's description of human beings that lay claim to justice and protection by human rights. Are their demands about the bare existence of body and mind? Moreover, are these concerns identical to worries about the destruction of human presuppositions for the self-reproduction of functional social systems, as Teubner suggests?

Here is our itinerary. In section 2 I will clarify and present the context of these questions with regard to the conceptualisation of 'threatening society' and 'threatened human beings'. Sections 3-6 deal critically with Teubner's answers to them and suggest some alternative arguments. These alternatives will not deny the fruitfulness of the concepts of communication, ascription of meaning to humans, and inclusion in and exclusion from differentiated societal systems, as proposed by Teubner to understand the *problématique* of human rights. His proposals should, however, be reconstructed in a somewhat different socio-theoretical framework to fully deploy their fecundity.

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1   See Gunther Teubner, "Transnational Fundamental Rights: Horizontal Effect?", in this volume: Gunther Teubner, "Self-subversive Justice: Contingency or Transcendence Formula of Law", *The Modern Law Review* 72 (2009): 17 ff.; Gunther Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors", *The Modern Law Review* 69 (2006): 333.

2 What is Threatening? What is Threatened?

In the systems-theoretical tradition, which is the background of Teubner's work, law makes expectations of actions more reliable in situations with a high risk of deviance from these expectations. This contribution of law to society is a result of the explicit formulation of officially prevailing norms, specifically made for these problematic situations by politically supported organisations that have the recognised function of producing 'official' norms.[2] In the case of modern human rights law the risky situations that should be prevented concern above all, in Teubner's opinion, the violation of the integrity of the body and mind[3] of human beings by the communications of function systems. The demands for protection against such violations appear in the modern judicial system as external demands for justice, to be realised by law.[4]

In systems theory the destruction of human bodies and minds is at the same time the destruction of an important ecological condition for society.[5] Human rights laws are, in this interpretation, those laws that bear upon human beings as presuppositions of autonomous communication systems, and they function as prohibitions of communications of these systems that otherwise could lead to a breakdown of these human conditions of the systems and therewith of the systems themselves.

Looking at this constellation of theses it is in the *first* place remarkable that Teubner describes the societal forces that threaten to destroy the integrity of body and mind as one-dimensional and autonomous communicative processes. With this description of the threats of modern society, Teubner calls into question in a certain sense the entire traditional concept of human rights. Compared to the normally accepted assumptions of discussions about human rights, which depict human rights as a response to the threats that human beings experience from modern states and modern markets,[6] he suggests an alternative description of modern society and its relation to humans.

There are three main changes:

a. A replacement of the description of social phenomena in terms of human beings and actions by a description in terms of communications.
b. The way in which the different spheres of society are presented. Modern society is no longer categorised as modern states and modern markets, but as a

2 See Niklas Luhman, *Das Recht der Gesellschaft* (Frankfurt: Suhrkamp, 1993) : 164.
3 Teubner, "Anonymous Matrix", note 1: 336; 341; Teubner, "Transnational Fundamental Rights", note 1: 208; 212.
4 Teubner, "Self-Subversive Justice", note 1: 13.
5 Teubner, "Transnational Fundamental Rights", note 1: 201; Teubner, "Anonymous Matrix", note 1: 333 ff.; Gunther Teubner, "Constitutionalizing Polycontexturality", *Social and Legal Studies* 20 (2010): 224.
6 See Jack Donnely, *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 2003): 57 ff.; Michael Freeman, "The Problem of Secularism in Human Rights Theory", *Human Rights Quarterly* 26 (2004): 282.

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range of specialised, more or less autonomous, global functional systems, encompassing law, politics, defence, medicine, education and science.
c.   The threats originating in these systems are described as resulting from exclusion from and inclusion in these one-dimensional systems, such that both inclusion and exclusion are based on the one-sided logic of each system.

Each of these changes is questionable, as we shall now see:

As concerns (a), the description of society in terms of communication means with respect to human rights that communications, rather than the actions of individuals, are seen as threats to the integrity of human beings.[7] Communications that ascribe meanings to humans appear as violating the integrity of their body and mind. Now, I have no doubt that communications are important in their capacity to harm human beings, but I do not believe that harm can be reduced to them. There are good reasons, from the perspective of 'traditional' thinking about human rights, for being sceptical about Teubner's claim, even though such thinking is admittedly one-sided in emphasising physical threats to the bodies of human beings, even as concerns e.g. freedom of speech or religion. Human rights offences and laws are in large part about being killed, unduly detained, raped, deprived of food and drink, slavery, work and working days that kill or reduce human beings to cripples. In light of this tradition, one cannot but ask whether it is totally wrong to assume that society causes damage through the violent acts of other human beings and that such acts should be prohibited, hence that this view ought to be replaced by a description in which the threat of society is reduced to communication.

Turning to (b), the description of societies as specialised, autonomous and global function systems takes for granted that each of these systems involves its own threats to human beings, which can all somehow be grasped in the formulations of fundamental human rights. Human rights indeed not only deal with politics and economy, but also with e.g. education and health care. The actually existing diversity of threats, prohibitions and rights in modern society is, I believe, indeed more easily understandable in a systems theory of society, which is attentive to the diversity of societal subsystems, than in a theory that focuses on politics and markets.

I am not convinced, however, that societal systems are one-dimensional and that their threats are a consequence of one-dimensional rationality, as Teubner suggests. It is not obvious that the discrimination of women and blacks, and the privileged position of the rich in, for example, the judiciary and the health system, can be interpreted as a consequence of the specific rationality of these systems. Dominance of a problem-oriented rationality does not automatically imply blindness for other meanings than those that are central to the system in question.

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7   Teubner, "Anonymous Matrix", note 1: 333 ff.

Finally, and with respect to (*c*), Teubner frames the relation between differentiated communication systems and human beings as a matter of inclusion/exclusion. Both participation and obstruction of participation in communication systems are depicted as potentially endangering human beings. The manner in which human beings, on the one hand, and social systems, on the other, are conceptualised – respectively as body and mind and as purely communicative systems – makes it difficult, at least at first sight, to understand how inclusion should be defined.

Secondly, the stories Teubner tells about human beings threatened by the subsystems of society are remarkably different. Both the stories and their combinations raise numerous questions.

The first two stories are told from the perspective of human beings who are threatened. From this perspective communications are risky for their self-preservation. Human beings defend their identity and their self-preservation against destructive perturbations of communications. Pain and fear are expressed in communications, in the form of complaints and protests by the humans that clamour for justice in response to violations.[8] This perspective, however, entails two very different strands of arguments, and it is doubtful whether they can be reconciled. On the one hand, justice appears as a matter of participation in social systems; a participation that demands specific socially acquired characteristics of human beings. The demands for participation transcend the actual regulations of inclusion. On the other hand, justice is presented as a matter of staying alive. Demands for justice concern protection against the violations of the 'bare body and mind'.[9]

The third story is a description of threats and violations from the perspective of the continuation of the communications of the societal systems. It narrates the risks that the partial rationalities of the autonomous communication systems build for these systems themselves, as they tend to destroy the human presuppositions of their own self-reproduction.[10] This story seems to be the basis of the interpretation of human rights as a matter of the self-limitation of communicative systems.[11] Explicit and enforced self-limiting rules become parts of the constitutive rules of these systems, as a *sine qua non* for the existence of the systems.

I see no reason why the two different perspectives (harmed humans who demand justice; protecting human beings as presuppositions of society) should coincide. Of course, it is true that human bodies and minds are a necessary presupposition for communication systems, but that does not mean that the demands for justice

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8   Teubner, "Transnational Fundamental Rights", note 1: 194; Teubner, "Anonymous Matrix", note 1: 235.
9   Gunther Teubner, "Transnational Fundamental Rights", note 1: 211.
10   See especially Gunther Teubner, "Constitutionalising Polycontexturality", note 5: 224.
11   *Ibid*, note 5: 223 ff.

of human beings are necessarily restricted to their existence as presuppositions of the communications of function systems.[12]

The two problem-complexes arising from the foregoing considerations will be discussed in some detail in the next four sections. Section 3 summarises Teubner's description of two main threats of modern society, namely, exclusion and exploitative inclusion, and the ways these are produced. Section 4 focuses on the emptiness of inclusion as a key concept in this account, and proposes an alternative account thereof. In section 5 I return to the threats of modern societies to ask whether it makes sense to reduce these threats to threats of communications, and to what extent the threats result from the one-sided orientations of function systems. Section 6 deals with the object of threats from two perspectives: (a) What is threatened by modern society and articulated as vulnerable in human rights principles and laws? Can this be the human being as bare organic and psychic life? (b) What is the nature of the relation between humans demanding human rights and humans as presuppositions of autonomous communicative systems?

3   The Power of Communications to Harm

Teubner discusses two main threats confronting human beings. *First*, human beings can be excluded from the function systems that are main places for participation in modern society. We depend on these systems for education, health care, knowledge, collective decisions etc., and protective fundamental rights should have an inclusionary effect, i.e. give a right to participation. Humans can, *secondly*, be harmed by the destructive forces of modern social systems, autonomously following their own one-sided logic. Once they are freed from the 'diffuse moral-religious-economic obligations of the old society'[13] this one-sidedness gives birth to unsuspected destructive forces. This happens first in the case of politics; but quickly, other systems, like science, education, or medicine, which gain a certain measure of autonomy with respect to politics, become dangerous, too. Here, fundamental rights protect human beings against the destructive potential of the exploitative, totalising claims of autonomous communication systems.

Teubner's description of the *first threat*, namely exclusion from participation, runs as follows. In modern societies the main divides are functional systems, each of which is specialised in providing solutions for a specific social problem. Here all human beings have the status of potential participants in all those systems they depend on.[14] On the other hand, however, the criteria for participation in these systems are such that entire population groups are excluded. The participation criteria are regulations produced by the systems themselves, and are related to

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12   For the moment I accept this description of social systems.
13   Teubner, "Transnational Fundamental Rights", note 1: 207.
14   See Gert Verschraegen, "Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory", *Journal of Law and Society* 29 (2002): 269; Teubner, "Transnational Fundamental Rights", note 1: 204.

the specific orientation of each of the systems. The selective criteria for participation in the function systems imply a threat for human beings as far as they are potentially excluded.

The *second* threat results from processes that follow the inclusion. Now, the very same orientation of the system that led to the exclusion of certain population groups leads, for those included, to the one-sided exploitation of man by social systems. System-specific regulating criteria lead to exploitation that can have destructive effects for the human beings concerned.[15]

Teubner points especially to one regulating criterion: the communication of descriptions of persons. These are important boundary mechanisms of differentiated function systems. The boundary mechanism 'descriptions of persons' is introduced in section IV of Teubner's contribution to this journal, which deals with the control and violation of the included human mind and body, and its protection through human rights. Descriptions of persons have, however, a function at both of the interfaces of social systems and human beings Teubner discusses. They are crucial, on the one hand, for 'inclusion/exclusion', i.e. the answer to the question 'Who can participate?', and, on the other, for the 'use' of included human beings.

When Teubner speaks about 'descriptions of persons' as influential frontier posts in subsystems, he means descriptions of the kind of persons that can be given positions in the processes of these systems.[16] With regard to such constructs he seems to think in the first place of idealised descriptions such as 'economic man', 'organisational man', 'political man' etcetera.[17] A 'person' means in this context a descriptive construction produced in communication[18] that is attributed to human beings. 'Persons' concern meanings created by communications of social systems that are autonomous and separate with respect to human beings, and describe human beings as (fictitious) (rational) actors of/in these social systems.

In a next step Teubner indicates that 'descriptions of persons' are coupled to the autonomous dynamics of body and mind, and in this way lead either to inclusion in, or exclusion from, a system. A(n) (exploitative) use of body and mind by a social system follows in the case of inclusion.[19] In this sense, he thinks, the 'constructions of persons' imply real points of contact of communicative descriptions

15   Teubner, "Anonymous Matrix", note 1: 339; Teubner, "Transnational Fundamental Rights", note 1: 208-209.
16   See also Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt: Suhrkamp, 1997), 621. "Society designates persons and gives positions to them in which they can act according to expectations".
17   Gunther Teubner, "Transnational Fundamental Rights", note 1: 208; Teubner, "Anonymous Matrix", note 1: 339.
18   Gunther Teubner, "Anonymous Matrix", note 1: 334.
19   Michael Hutter and Gunther Teubner, "Der Gesellschaft fette Beute. Homo Juridicus und Homo Oeconomicus als Kommunikationserhaltende Konstruktionen", *Der Mensch das Medium der Gesellschaft*, ed. Peter Fuchs and Andreas Göbel (Frankfurt: Suhrkamp, 1994): 110-111.

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with people 'out there'; this means with human beings beyond the pale of communication.

This argumentation seems quite clear, and the conclusion with respect to fundamental rights seems to be straightforward. With respect to 'inclusion/exclusion' it says: in some way or another there should be a right to inclusion, i.e. there should be regulations that guarantee the participation of human beings in communicative systems.[20] With respect to the 'use' of included human beings it runs as follows: fundamental rights should set boundaries against the destructive, totalising exploitation of human beings by communicative systems.[21]

4   Inclusion in Social Systems

On further inspection, however, things look less simple. In the *first* place, the meaning of the expression, 'inclusion on the basis of person constructs' is not very clear. Insofar as inclusion is defined, however, and this is a *second* point, Teubner's definition seems to make it impossible to understand what exploitation and destruction as a result of participation could mean.[22] A clarification of these points has important consequences for the understanding of (threatening) consequences of 'exclusion' and 'exploitation' of human beings by modern function systems, and, following from this, for the conception of their protection by fundamental rights.

If we follow Teubner, understanding what 'inclusion' or 'participation' of a human being in a communicative system could mean involves knowing what happens when these systems construct descriptions of persons and match these to human beings. The information we get on this point is rather cursory. We mainly learn that the descriptions of persons are drawn up in social systems and are ascribed to human beings. In this way they get a name and an address in these social systems.[23] Getting a name, an address, and a functional description means recognition of the relevance of the organic and psychic systems, and allows them to participate.[24] Through the 'masks of persons' social systems make contacts with people, irritate them and 'suck mental and physical energies from them'.[25] These characterisations of 'inclusions' and their effects are immediately followed by the

20   Teubner, "Transnational Fundamental Rights", note 1: 204-205.
21   Ibid, note 1: 207-208.
22   There are other points that should be clarified. For example processes of "exclusion" and "exploitation" are quite different in the cases of (a) making use of the performances of systems like health care as a "layman", and (b) working on the production of the performances of such systems as a "professional". See for this distinction Rudolph Stichweh, *Inklusion und Exklusion. Studien zur Gesellschaftstheorie* (Bielefeld: Transcript Verlag, 2005).
23   Luhmann, *Gesellschaft der Gesellschaft*, note 17: 621; Rudolf Stichweh (2005), note 24: 197.
24   Niklas Luhmann, "Inklusion und Exklusion", in *Soziologische Aufklärung 6*: (Opladen: Westdeutscher Verlag 1995): 241. See also Antoon Braeckman, "Niklas Luhman's system theoretical redescription of the inclusion/exclusion debate", in *Philosophy and Social Criticism* 32 (2006): 66-67.
25   Teubner, "Anonymous Matrix", note 1: 339.

warning that the descriptions do not mean human beings in the sense of body and mind as such, and that bodies and minds cannot as such be included in social systems.

I think it is a truism to declare that human beings as such cannot be meant or included in communicative systems. But it is also clear that to say what 'person-constructs' do not mean, and which effects they do not have, does not bring about a positive definition of inclusion. Pointing to ascriptions of name, address and function also fails in this respect. The ascription of these features is not equivalent to inclusion in a social system, as it only says that someone *could* be a member of a social system and, if so, where and with which meaning. Inclusion only takes place, however, if ascription is followed up by interactions that deploy recognition.

Notice that part of the characterisation cited above is actually misleading, since it is impossible that ascriptions as such are equivalent to exploitation, to 'sucking mental and physical energies' by social systems. So we cannot be content with these 'descriptions' of 'inclusion', as they remain silent on the main point that should be elucidated. We need a positive definition of what is included. Without it we should avoid speaking of inclusion and exclusion in social systems, and of the threats to human beings that are related to them.

As there is no satisfactory account of inclusion in existing systems theory, I have to draft a description myself.[26] This description should satisfy the following conditions:

a. If 'inclusion' is at all to be a meaningful expression with respect to the relation of human beings to social systems,[27] it should refer to 'something' that is included, i.e. to something that becomes part of a social system.
b. Additionally, speaking about threats of exclusion and inclusion implies that the relations of inclusion and exclusion have a meaning and a value for the humans involved.
c. Furthermore, it should be possible to describe the included 'something' by means of 'person-constructs' that are relevant for its inclusion/exclusion and use in social systems.

In the context of this contribution I can only deal cursorily with these points. Let me formulate the result first: The only 'things/events' I can think of in terms of real inclusion in social systems, and that also fulfil the conditions (b) and (c), are meaningfully related social actions of human beings.

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26 There has been a lot of writing about inclusion/exclusion in systems theory (see e.g. *Soziale Systeme* 2008). But as far as I know none of these contributions faces the question: "What exactly can be thought of as being included in a social system?" I believe that, on the basis of prevailing premises – (a) social systems consist of communications and (b) psychic and organic systems exist fully outside of social systems (i.e. without any overlap) –, a meaningful concept of inclusion is impossible. I cannot justify this fully here.

27 That is also he meaning of the expression given by Luhmann, *Gesellschaft der Gesellschaft*, note 17: 618 ff.

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As concerns (a), *social systems consist of communicative actions* – where action amounts to behaviour directed at intentions – that are meaningfully related to each other. Acting human beings relate the meanings and intentions of their actions to those of other acting humans, and thereby engage in the reciprocal coordination of their actions. This implies that actions function as understandable expressions of meanings and intentions for other human beings. An action that is observed by another human being evokes recognition of intentions and joint attention on the side of the observer, whereby intention and the meaning-background can be understood. In this sense, any human action observed by another human has a communicative dimension that is – in many cases implicitly – known as such to the actor.[28] Some actions, however, are in the first place meant as announcements or representations of meanings and intentions (*Mitteilungen*); here the communicative dimension is prominent.[29] Use of language or other symbols indicates this. Repeated reciprocal coordination of intentional actions produces collective meaning ascriptions and collective intentions.

On this basis we can understand the meaning of 'inclusion/exclusion'. We can see that actions are experienced and understood as intended behaviour of human beings, and as parts of social complexes, i.e. as included in social systems. Actions that are produced as potential moments of a complex of meaningfully related actions can be integrated in a social complex, or they can, although their inclusion is intended, fail to become part of such a complex. In this case they are excluded. Exclusion occurs when actions are not understood and/or not accepted.

With respect to (b), *the exclusion of actions* can be painful, as actions that should be realised collectively have value for the human agents. Rejections of meanings and intentions by others can cause psychic suffering, especially when this rejection amounts to an exclusion from cooperation. Exclusion from cooperation in social complexes is often related to exclusion from the effects/results that occur in the framework of cooperation. These two points readily allow us to understand that exclusion can be a threat for the human beings that suffer from them.

Inclusion of actions can be threatening if the (expected) actions that are agreed for participation in a social complex imply unpleasant, tiring, or even destructive uses of body and mind. Being killed as a(n) (anticipating) response to an (expected) action is an extreme form of destruction. One usually only engages in unpleasant and destructive actions because there are better reasons for (risking) engaging in them than for avoiding them. Pain, damage and destruction related to participation are always relative to the socially acquired dispositions and

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28 This description differs from Luhmann's and Teubner's interpretation of action and communication. Their interpretation is based on the assumption that humans cannot understand each other's actions. This opinion, however, is untenable, especially in view of recent research in cognitive psychology. See: Wil Martens, "Handlung und Kommunikation als Grundbegriffe der Soziologie", in *Dimensionen und Konzeptionen von Sozialität*, ed. Gert Albert, Rainer Schützeichel and Rainer Greshoff (Wiesbaden: VS Verlag, 2010), 173-206.
29 See for 'representations' John Searle, *Making the Social World* (New York: Oxford University Press, 2010), 72-73.

capacities of human beings to participate in culturally specific (collective) actions.[30]

With regard to (c), inclusion in and exclusion from social complexes normally do not take place on an *ad hoc* basis, and concern series of actions rather than single actions. Typical actions with regard to typical social contexts are either generally expected to fit these contexts or to conflict with them, and humans are expected to have dispositions with regard to either acceptable or unacceptable courses of actions. In many cases whole ranges of typical humans are collectively ascribed certain dispositions: those who followed a specific training, have a certain length or an illness are seen as apt to, respectively, play football, carry heavy work-loads, be treated in a hospital, etc. They are *observed* as having dispositions and capacities that are meaningful in some specific social complex; therefore they could be included, whereas others could not. Those included get a name: football-player, bearer, patient; they also acquire a status, whereby they are allowed and often also obliged to execute certain typical actions. I believe this is roughly what Teubner calls *person-constructs*.

In modern functional systems ascriptions pertain predominantly to dispositions and capacities relevant for a contribution to the fulfilment of the function of a system, and in many cases these ascriptions are explicitly formulated. Positions, tasks and obligations in the system, and dispositions and capacities necessary for them, are described in detail and build the basis for inclusion and for obligations during participation.[31]

5   One-Sided Rational Communication Systems?

On the basis of this discussion of 'inclusion/exclusion' we can return to the threats of modern society dealt with above. I will first return to the *prima facie* doubts formulated in section 2 with regard to Teubner's proposal to consider only communications as social threats to human being; then I will deal with the threats of exclusion from one-sided rational societal subsystems.

In section 2 I indicated that violations of human rights, like killing and undue detention, can only be understood as mere communications if we put up with categorical mistakes. On the basis of his communication-theoretical assumptions, Teubner, who clearly does not want to deny that killing and undue detention can be violations of human rights, is condemned to exactly this problematic position. This position seduces him to make formulations suggesting that even in these

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30   'Disposition' means the tendency and predisposition of an object, here a human being, to produce typical effects under typical circumstances. To describe an object in terms of dispositions means to describe it as cause of certain effects. See Ludger Jansen, "Dispositionen und ihre Realität", in *Was ist wirklich. Realismusdebatten in der neueren Philosophie*, ed. Christoph Halbig and Christian Suhm (Frankfurt: Ontos, 2004), 118-137.

31   Descriptions can, however, be related to functions unreasonably, as in the case of excluding blacks from political participation.

cases communications are the events which bring about harm. He insists on communications that turn against human beings and 'threaten their integrity, or even terminate their existence'. 'Communication can irritate psycho-physical processes in such a way as to threaten their self-preservation. Or it may simply destroy them.' His examples include 'killing through a chain of command, sweatshops as consequence of anonymous market forces, martyrs as a result of religious communication, political or military torture as destruction of identity'.[32]

I agree with Teubner that these examples say something about the force of communicated person-constructs. But formulations become very confusing if one tries to *reduce* these violations to communications. A 'chain of commands' or 'market forces'[33] can be weighty reasons for violations, but as such they are really unable to hurt anybody. Even descriptions like 'being a traitor' or 'being sentenced to death' as such do not destroy the human beings involved.[34] They become destructive if related to meaningful actions, like unlocking the guillotine, stabbing with a knife or shooting with a gun. These actions cause harm in the first place because of their physical and biological effects, although they also function as expressions of meaning – indicating e.g. that the victim is an 'enemy' and that the state has the right to kill the enemy – and are part of a complex of communicatively related actions. So what is threatening in many cases is not the descriptions as such but the descriptions in combination with actions, which on the one hand express the same meanings as the descriptions, but on the other hand actually do harm to body and mind.

Having clarified this general point about threats arising from communications and actions, we can now turn our attention to threats involved in exclusion from modern function systems.[35] Exclusion from function systems means that certain kinds of (expected) actions (possibly) aiming at participation in these systems are not accepted, as these are understood to be in contrast with or outside of the logic of the apposite social complex. This rejection is mediated by a connection of 'position-constructs' of a function system on the one hand, and 'person-constructs' ascribed to human beings on the other. Both kinds of constructs and their connections are produced by the excluding social systems. Their application concerns dispositions and capacities of human beings. In the case of the so-called layman, who for example expects that his request for help in a hospital will be addressed by way of healing actions, exclusion means separation from healing. In general, exclusions from function systems mean that positively valued problem solving performances of main structures of modern societies are not available for groups of humans with certain features. This can lead to precluding, diminishing or destroying dispositions and capacities human beings need for participating in specific social complexes of their society.

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32   Teubner, "Anonymous Matrix", note 1: 335.
33   It would moreover be very difficult to describe 'market forces' in terms of communication.
34   Of course these descriptions frighten because it is known that they normally lead to killing.
35   It is only for reasons of space that I will restrict myself to threats produced by exclusion and will not analyse the violating effects of inclusion on humans.

Can the threats resulting from exclusion from function systems all be understood as the result of the one-sided logic of these systems? Of course, the person-constructs that regulate participation are system-specific, as they concern, for instance, participation in the health system and not in the political system. But that does not automatically mean that the descriptions leading to exclusion are produced according to the logic of the system in question. That can be the case, for example, if humans with certain kinds of illnesses are excluded from treatment, as there is no adequate method to deal with them. I do not have a categorised and treatable illness, so I am not a patient and cannot participate in a hospital.

But exclusion – and mistreatment and exploitation – can also be consequences of the form of collective meaning-giving and categorisation often called discrimination. In these cases a person-construct is used suggesting that, for example, women, Jews and the poor cannot participate. These last cases clearly imply that a function system can actually use other meanings and descriptions than those inspired by its dominant functional orientation, which probably has been formulated in system-specific codes and laws.

The meanings and descriptions that regulate inclusion are often not the result of a one-sided logic of the systems, but concern other collective meanings and descriptions of human beings that are also produced and used inside the systems. There apparently can be several reasons for person-descriptions that lead to a rejection of participation. Only one of them is a description of dispositions and capacities of the apposite human being suggesting that his/her actions will not fit the functional logic of the system concerned. Obviously the meanings, descriptions and rules used in function systems cannot simply be reduced to one principle. Instead, these comprise a diversity of principles.

If the obstruction of participation and the destruction of dispositions and capacities for meaningful participation can be grounded in several collective meaning ascriptions, then protection by human rights should be tailored to that. I have the impression that Teubner's description of the self-limitation of function systems through human rights principles, codes and laws takes the purity of the logic of the systems for granted, and then goes ahead to ask how it is possible to defend human beings against the devastating consequences of this pure logic. In that case there can indeed only be one solution: the self-limitation of the functional logic by self-produced codes and laws based on the same logic.

This kind of self-constitution, however, disregards the problems concerning meaning-giving that is not related to the (dominant) function of a system. If, for example, money or ethnic aspects function as excluding features, what human rights demand is precisely a more consistent realisation of the dominant problem-oriented logic of a system. This would mean that human rights principles are not only relevant as points of orientation for the self-limitation of the systems, but also for the realisation of system-specific functional orientation. Perhaps that

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is what Teubner[36] wants to hint at with his category 'institutional rights'. But then he should note that these rights presuppose the existence of impure societal systems.

6 'What' is Threatened, and How Can Fundamental Rights Help?

The foregoing considerations suggest that answers to the question, 'What is threatened by (modern) society in those cases in which we want human rights and laws to shield us?' concern the possibilities of humans to cooperate meaningfully with other humans. Rigorous exclusion from participation in important social contexts, and inclusion of actions that are devastating for socially relevant dispositions and capacities of human agents, means endangering the capacity of these humans to participate in society; in the longer run it kills the social human being.

If the potential to participate in the main social complexes of society is thwarted by collective meanings, rules and actions of that society, the affected humans should have a right to demand a change in the actions, rules and meanings that tend to destruct their social humanity. Another way to formulate this is that human rights are there to protect *the specifically disposed and qualified social human beings* that want to participate in the structures of their specific society by meaningful actions, but who, as a result of collective meanings, rules and actions of this society, are either unable to do so or are threatened in their ability to participate.

Human rights give them, or those who want to speak/write for them, the explicit legitimation to raise their voice and to demand other actions, rules and meanings of society. So human rights are rules that should enhance a specific kind of contested communication, aiming at the prevention of harmful/destructive actions.

Human rights *law* is there for those situations in which communications about these tensions are highly insecure; it makes understanding and acceptance of demands for participation and recognition more probable in those situations where the prevailing meanings, intentions and interests clearly point in another direction. Human rights laws work, first, by explicit formulation of meanings and rules; secondly, by the announcement of related sanctions; and, finally, by the enforcement of these sanctions in cases of non-compliance.

I believe that this argument deviates considerably from the argument provided by Teubner. With regard to 'what is threatened' he speaks rather straightforwardly about bodies and minds that are endangered in their identity and self-preservation. For him, human rights concern above all 'the place where body and mind of individuals (...) demand their "pre-legal", "pre-political", even "pre-social" (...)

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36   Teubner, "Transnational Fundamental Rights", note 1: 211-212.

"latent" intrinsic rights'.[37] Such formulations suggest that human rights are related to an *abstract, pre-social human being*. Of course, body and mind can literally be destroyed, in the sense that they can be crippled, starved or killed, and cease to function anymore, whatever the social context. But these are boundary cases, even if significant when they occur. The current uses of human rights concern not only these but all situations in which certain categories of (potentially) socialised human beings, with socially more or less relevant dispositions, capacities and intentions, are threatened with exclusion from or exploitation in the (main) structures of society.

I believe it is impossible to differentiate between a pre-social and a social right, as the bare body and mind that should be protected by pre-social rights can only be distinguished in a prima-facie sense. Even in the case of a direct threat to the integrity of body and mind, the issue is the protection of a socialised human being that can participate in (the main structures of) society. Saving a human life as such can, even where it is actually at hazard, only in an analytical sense be distinguished from saving a social human being. Rescuing life should lead to life in social contexts, which is only possible because protected human beings possess certain specific habits and capacities. Other human life than life in social relations does not exist and has never existed.

These considerations do not exclude the possibility that, as a result of the one-sided rationality of its own structures, a society threatens its own presuppositions, in the sense of the human beings that contribute to the existence of this same society. But it is certainly not true that there is a necessary coincidence between the demands for justice by certain categories of humans and an endangerment of the presuppositions of this society. Demands for justice are above all demands for changes of meanings and rules that regulate exclusions and violations. These are relative to existing meanings and rules and to existing dispositions and capacities. On this basis there always exist categories of human beings that, in the name of justice, demand education, health service, adapted workplaces, the abolition of discrimination, et cetera. In many of these cases the demands for justice and human rights do not coincide with demands for the reproduction of endangered presuppositions of societal subsystems, neither in the sense of the bare life of human beings nor in the sense of dispositions and capacities of human beings that are adequate for existing positions in these systems.

37   Teubner, "Anonymous Matrix", note 1: 335; Teubner, "Transnational Fundamental Rights", note 1: 211.