GLOBALIZED SOCIETY – FRAGMENTED JUSTICE. HUMAN RIGHTS VIOLATIONS BY "PRIVATE" TRANSNATIONAL ACTORS *

Gunther TEUBNER **
University of Frankfurt (Germany).

I. HIV/AIDS VERSUS TNC

The disastrous AIDS epidemic, the numbers killed by which worldwide have overtaken those of the dead in all civil wars of the 90s,[1] took a special turn in South Africa with the legal case "Hazel Tau vs. Glaxo and Boehringer".[2] The case translates the multidimensional social issues into the narrower *quaestiones juris*: has the pricing policy of transnational pharmaceutical enterprises violated fundamental human rights? Can AIDS patients assert their right to life directly against transnational corporations? Does "Access to Medication as a Human Right" exist in the private sector?[3] More generally, do fundamental rights obligate not only States, but also private transnational actors directly?

Thirty nine pharmaceutical firms, represented by the Pharmaceutical Manufacturers' Association of South Africa (PMASA), invoked South Africa's national courts.[4] In October 2003 the national Competition Commission had to decide whether the complainants had an actionable right to access to HIV medications against the firms GlaxoSmithKline and Boehringer Ingelheim. From the technical legal viewpoint, they based their legal position on the point that the pharmaceutical firms had breached Art. 8(a) of the Competition Act 89 of 1998 by charging excessive prices for antiretrovirals, to the detriment of consumers. They accused private collective actors of violating human rights: "The excessive pricing of ARVs is directly responsible for premature, predictable and avoidable deaths of

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* Translated from German by Iain L. Fraser.

** I would like to thank Sonja Buckel, Ralph Christensen, Andreas Fischer-Lescano, Soo-Hyun Oh, Thomas and Rudolf Wiethölter for critical comments and helpful suggestions.

1. Report of the High-level Panel on Threats, Challenges and Change (2004) *A More Secure World: Our Shared Responsibility*. New York: United Nations, No. 44, 48; at: www.un.org/secureworld.

2. South Africa Competition Commission, Hazel Tau et al. v. GlaxoSmithKline, Boehringer Ingelheim et al., Competition Commission, Statement of Complaint in Terms of Section 49B(2)(b) of the Competition Act 89 of 1998, available at: http://www.tac.org.za/Documents/DrugCompanies-CC/HazelTauAndOthersVGlaxoSmithKlineAndOthersStatementOfComplaint.doc.

3. See Hestermeyer, Holger (2004): "Access to Medication as a Human Right", 8 *Max Planck Yearbook of United Nations Law*, 101 et seq.

4. Bass, Naomi (2002): "Implications of the TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century", 34 *George Washington International Law Review*, 191 et seq., at 192.

people living with HIV/AIDS, including both children and adults."[5] The surprising outcome was that the South African Competition Commission basically found for the complainants, even though it did allow the firms amortization of development costs.[6]

The "horizontal" effect of fundamental rights, i.e. the question whether they impose obligations not only on governmental bodies but also directly on private actors, is taking on much more dramatic dimensions in the transnational sphere than it ever had nationally. It not only arises for human-rights infringements by pharmaceutical enterprises in the worldwide AIDS epidemic,[7] but has already raised a stir in several scandals in which transnational corporations were involved.[8] I shall single out a few glaring cases: environmental pollution and inhuman treatment of local population groups, e.g. by Shell in Nigeria;[9] the chemical accident in Bhopal;[10] disgraceful working conditions in 'sweatshops' in Asia and Latin America;[11] child labour at IKEA and NIKE;[12] the suspicions levied against sports goods manufacturer Adidas of having footballs produced in China by forced labour;[13] the use of highly poisonous pesticides in banana plantations;[14] disappearances of

5. South Africa Competition Commission (fn. 2) No. 17.

6. South Africa Competition Commission, Competition Commission finds pharmaceutical firms in contravention of the Competition Act, Press Release 33, 16. October 2003, www.compcom.co.za. On the case, see: Law and Treatment Access Unit of the AIDS Law Project and Treatment Action Campaign (July 2003) *The Price of Life. Hazel Tau and Others vs. GlaxoSmithKline and Boehringer Ingelheim: A Report on the Excessive Pricing Complaint to South Africa's Competition Commission*, at: http://www.alp.org.za/view.php?file=/resctr /pubs/20030813_PriceCover.xml; Love, James Packard (2003): *Expert Declaration. Center for the Study of Responsive Law*, at: http://www.cptech.org/ip/health/cl/cl-cases/rsa-tac/love02032003.doc.

7. Details in Fischer-Lescano, Andreas and Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", 25 *Michigan Law Journal of International Law*, 999 et seq.

8. Wood, Stephen G. and Scharffs, Brett G. (2002): "Applicability of Human Rights Standards to Private Corporations: An American Perspective", 50 *American Journal of Comparative Law*, 531 et seq., at 539.

9. See e.g. Saro-Wiwa, Ken (ed.)(1996): *Flammen der Hölle. Nigeria und Shell: Der schmutzige Krieg gegen die Ogoni*, Hamburg, Reinbek.

10. Hoering, Uwe (1985): "Bhopal und kein Ende oder: Der Second-Hand-Kapitalismus und die Ökologie", 6 *Peripherie* 53 et seq.

11. Fung, Archon, O'Rourke, Dara and Sabel, Charles (2004): *Can We Put an End to Sweatshops?* Ann Arbor: Beacon.

12. See e.g. Cleveland, Sarah (1998): "Global Labor Rights and the Alien Tort Claims Act", 76 *Texas Law Review*, 1533 et seq, at 1551 et seq.; Ashagrie, Kebebew (1998): *Statistics on Working Children and Hazardous Child Labour in Brief*, ILO: Geneva, at*:* www.ilo.org/public/english/standards/ipec/ simpoc/stats/child/stats.htm.

13. Holtbrügge, Dirk and Berg, Nicola (2004): "Menschenrechte und Verhaltenskodizes in multinationalen Unternehmungen", in: Bendel, Peter and Fischer, Thomas (eds.): *Menschen- und Bürgerrechte: Ideengeschichte und Internationale Beziehungen*, Erlangen, 178 et seq., at 179.

14. Yozell, Emily (1996): "The Castro Alfaro Case: Convenience and Justice: Lessons for Lawyers in Transcultural Litigation", in: Compa, Lance and Diamond, Stephen (eds.): *Human Rights, Labor Rights, and International Trade*, Philadelphia: University of Pennsylvania Press, 273 et seq.

unionized workers;[15] environmental damage from big construction projects.[16] The list could easily be extended. The scandalous events fill volumes. At the core is the accusation that transnational corporations do lasting, irrecoverable damage to the environment and to people.[17]

In the transnational sphere it is extremely hard to fall back on patterns of solution familiar from national constitutional law. While these have dealt with the horizontal effect of fundamental rights, they usually dodge the ticklish point of whether private actors are subject to direct fundamental-rights obligations by developing a host of doctrines whereby fundamental rights have only "indirect" effects in the private sector.[18] Simplifying grossly, there are two constructions to be found in numerous variants. On the State action doctrine, private actors are in principle excluded from the binding effect of fundamental rights, unless some element of State action can be identified in their actions, whether because State bodies are involved or because they themselves perform public functions.[19] On the doctrine of the structural effect of fundamental rights those rights impact on the whole legal system including private law enacted by the State, so that fundamental rights must be observed in the private sector, but the restriction to the *legal* system simultaneously implies that the private actors themselves are not subject to any obligation under fundamental rights.[20]

In the transnational private sector the question whether collective actors are themselves bound by fundamental rights arises much more acutely. Here the otherwise omnipresent State and national law are almost absent, so that State action and structural legal effect of fundamental rights apply in only a few situations. On the other hand, transnational private actors, especially transnational corporations,

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15. Weber, Gaby (2001): *Die Verschwundenen von Mercedes-Benz*, Hamburg: Libertäre Association. Fischer-Lescano, Andreas (2005): *Globalverfassung: Die Geltungsbegründung der Menschenrechte*, Weilerswist: Velbrück, 31 et seq.

16. Perez, Oren (2004): *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict*, Oxford: Hart Publishing.

17. Baker, Mark B. (2001): "Tightening the Toothless Vise: Codes of Conduct and the American Transnational Corporation", *Wisconsin International Law Journal*, 89 et seq.

18. For a comparative view, Friedman, Daniel and Barak-Erez, Daphne (eds) (2001): *Human Rights in Private Law*, Oxford: Hart, 1 et seq.; Anderson, Gavin W. (2004): "Social Democracy and the Limits of Rights Constitutionalism", 17 *The Canadian Journal of Law & Jurisprudence*, 31 et seq.; for England, Campbell, T., Ewing, K. D. and Tomkins, A. (eds.): *Sceptical Essays on Human Rights*, Oxford: Oxford University, 1 et seq., at 4; for Israel, Barak, Aharon (1996): "Constitutional Human Rights and Private Law", 3 *Review of Constitutional Studies*, 218 et seq., for South Africa: Cheadle, H. and Davis, D. (1996): "The Application of the 1996 Constitution in the Private Sphere", 12 *African Journal of Human Rights*, 44 et seq.

19. See the comparative analysis of Anderson (fn. 18), 31 et seq.

20. This implication becomes obvious at Canaris, Claus-Wilhelm (1999): *Grundrechte und Privatrecht. Eine Zwischenbilanz*, Berlin: de Gruyter, 11 et seq.; a critique of this approach, Brüggemeier, Gert (2005): "Horizontal Effects of Fundamental Rights. A Critical View on the German Cathedral and Beyond", forthcoming, 15 et seq.

regulate whole areas of life through private governance regimes of their own, so that the question of fundamental rights can no longer be evaded.

This faces legal policy and constitutional legal theory with enormous problems. Yet it would be simplistic to politicize the question directly, to reduce it to the political bifurcation between neo-liberal and social-democratic conceptions of fundamental rights, hegemonic or anti-hegemonic strategies or Empire vs. Multitude.[21] That would be tantamount to a political decision between either exclusively State-oriented validity of fundamental rights, or else their enforcement throughout society.[22] I suggest instead leaving the beaten tracks and going a roundabout way through somwehat obscure territories of legal and social theory. The detour is starting with what I call divisional concepts of fundamental rights and ending with ecological ones. This will open up a different view of fundamental rights in the transnational private sector. It amounts to the following question: Can the horizontal effect of fundamental rights be rethought, from interpersonal conflicts between individual bearers of fundamental rights to conflicts between the anonymous matrices of communication on the one hand and concrete individuals on the other? Can we understand human rights in private sectors in such a way that individuals assert their rights against the structural violence of apersonal communicative processes?

II. DIVISIONAL CONCEPTS OF FUNDAMENTAL RIGHTS

What does one gain and what does one lose by taking this detour? What happens if we see the fundamental-rights question no longer as a problem of balancing among rights of actors, but as an "ecological" problem: as a damage that an expansive social system does to its social, human and natural ecologies? Applied to our question, what do we gain from it for the horizontal effect of human rights in globalized sectors of society, outside of institutionalized politics?

The European tradition has always aspired, in the search for just institutions, to an "appropriate" balance between society as a whole and its parts. It has always oscillated between experiences of a divided society and abstract conceptions of the appropriateneness of its internal balance. Justice to people by the institutions was the heuristic formula by which legal semantics reacted to changes in the social structure.[23] The concept responded anew in each case to painful experience

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21. On the political strategies of societal constitutionalism see Anderson (fn. 18), 33 et seq.; Hardt, Michael and Negri, Antonio (2004): *Multitude: War and Democracy in the Age of Empire*, New York: Penguin, 202 et seq.; Davis, Dennis M., Macklem, Patrick and Mundlak, Guy (2002): "Social Rights, Social Citizenship, and Transformative Constitutionalism: A Comparative Assessment", in: Conaghan, Joanne, Fischl, Richard M. and Klare, Karl (eds.): *Labour Law in an Era of Globalization*, Oxford: Oxford University, 511 et seq.

22. This suggestion is from Anderson (fn. 18), 33 et seq.

23. On the relationship of legal semantics and social structures Luhmann, Niklas (1981): "Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft", in: *id*: *Gesellschaftsstruktur und Semantik Bd. 2*, Frankfurt: Suhrkamp, 45 et seq.

of society's internal divisions. Can a fair balance among individuals and between them and society be found in spite of these divisions? Or in non-individualist versions, can there be a fair balance among parts of society —estates, classes, strata, interest groups, ethnic and cultural identities, social spheres, sub-rationalities— and between the parts and society as a whole? Or can institutional justice be achieved at all only once society's divisions have been overcome and a new unity of society brought about?

Justice to people by the institutions was seen on this view, which I shall call *divisional*, as a problem of society's internal division into unequal parts –or more dramatically, of its destructive cleavages, its power and distribution struggles, its antagonistic conflicts. How is an equitable unity of society to be guaranteed despite its self-destructive fragmentation? The classical answer was: Do not eliminate the divisions, but equilibrate them through *suum cuique!* Neutralize the dangerous divisive tendencies by assigning to the parts their due place in the overall order! Actual human beings were regarded as components of society and justice was done to them, through the familiar formulas of *justitia distributiva* —the whole allotting to the parts (individuals, groups, sectors) their due share— and *justitia commutativa* —the equitable relation of the parts (individuals, groups, sectors) to each other—.

Though the divisional view always predominated, the relation of whole to parts and the fair balance between them was perceived differently in the course of history. Feudal society primarily regulated the relations of the estates with each other. It guaranteed justice as the naturally-given hierarchy between the *partes majores*, which at the same time represented the whole of society, understood as *corpus*, and the *partes minores*. Human individuals were always transcended in the estate or in the corporation.[24] Subjective rights were not thinkable, still less fundamental rights, as strictly unilateral entitlements in the modern sense. Instead, the prevailing conception was that of *ius*, as a complex relation of divisional balance, fair in itself, between parts of different kinds, such as between feudal lords and vassals, as relations of loyalty and care in hierarchical reciprocity.[25]

The bourgeois revolution rebelled against the injustice of distributive relationships between the estates. It responded to the divisional injustice by calling for the equality of all parts of society. The fundamental rights in particular followed a new logic which however remained divisional: freedom of the parts in relation to the whole of society, equality among them, and solidarity as mutual support. Liberal theories thought through the new divisionalism consistently to its end. Society consists only of individuals. Fairness is guaranteed by self-regulating invisible hands which, underpinned by fundamental rights, coordinate the individuals'

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24. Gierke, Otto von (1902): "Das Wesen der menschlichen Verbände", Leipzig: Duncker & Humblot, 26 et seq.

25. Villey, Michel (1957): *Leçons d'histoire de la philosophie du droit*, Paris: Dalloz, 249 et seq.

autonomous spheres: economic markets, political elections, competition of opinions, free play of scientific knowledge. Interventions of compensatory justice are admissible only for rectifying the self-regulation among the parts.

The proletarian revolution's theory of society again takes a divisional approach. The totality of society consists of the social classes that spring from economic structural contradictions. Justice will only become possible once the classless society is born out of their antagonistic conflicts. In social-democratic Welfare State conceptions, the parts of society, the classes, are transformed into socio-economic strata. Here again there is a divisional view, especially of the second-generation fundamental rights. Social and participatory rights are aimed at harmonizing the living conditions of different strata as political, State-guaranteed justice.[26]

Ultimately, the great social theories also follow divisional patterns. This is clearest in concepts of a social division of labour that finds the fair balance in organic rather than mechanical solidarity.[27] In classical functionalism, the divisional element is to be found in the fact that a balance comes about through exchange relations among different functional spheres, and ultrastability is brought by compensatory mechanisms when there are occasional disruptions, if necessary through State compensation out of the proceeds of growth.[28] And in conflict theories insoluble permanent conflicts replace the just balance among the parts. In the polytheism of modernity among differing spheres of rationality, the hope for a lasting fair balance has given way to a resigned acquiescience in a chain of tragic decisions.[29]

Specifically for human rights, these divisional theories of society have the consequence that they are conceived of as rights of the parts against the State, which represents the whole of society.[30] Doctrines on the horizontal effect of fundamental rights in the private sector follow this divisional approach.[31] What is involved is the distribution of society's unevenly divided resources —power, wealth, knowledge— on the pattern of *justitia distributiva* or *commutativa*. This means either an extension of the State-citizen distributive pattern into society, or else resource allocation on the commutative pattern: fundamental rights as rights

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26. For example Rothstein, B. (1998): *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State*, Cambridge: Cambridge University.

27. Durkheim, Emile (1997): *The Division of Labor in Society*, New York: Free Press, 68 et seq.

28. Parsons, Talcott (1971): *The System of Modern Societies*, Englewood Cliffs, New Jersey: Prentice-Hall, 4 et seq.

29. Weber, Max (1968): *Gesammelte Aufsätze zur Wissenschaftslehre*, 3. ed. Tübingen: Mohr & Siebeck, 605 et seq.; on this Schluchter, Wolfgang (1988): *Religion und Lebensführung*, Band 1. Frankfurt: Suhrkamp, 302.

30. Alexy, Robert (2002): *A Theory of Constitutional Rights*, Oxford: Oxford University Press, chap. 10.

31. Symptomatic for an individualistic understanding of the effects of human rights Lessard, Hester (1986): "The Idea of the "Private": A Discussion of State Action Doctrine and Separate Sphere Ideology", 10 *Dalhousie Law Review*, 107 et seq.

of the parts of society against each other. When the political human rights are applied directly to citizen-citizen-relations, a balance of the individual fundamental-rights positions of private actors against each other is drawn.[32] All in all, though, it remains unclear how far and on what terms fundamental rights can claim validity in non-political sectors of society.

III. ECOLOGICAL CONCEPTS OF FUNDAMENTAL RIGHTS

There is a deeper question, though: Is it at all appropriate to see the justice of institutions as divisional (distributive) justice between the whole and the parts (or, among the parts)? And to regard human rights as guarantees —formal, material or procedural— to individuals against the societal whole, the State as organizational form of the overall society (or, reciprocal guarantees by the parts)?

Systems theory here puts a different question: Is the internal division of society that creates injustice as inequality among people not just a secondary phenomenon? Society's internal divisions should be understood otherwise, namely as resulting from the interaction of communicative networks with their environment. Actual people are not at the centre of these networks, nor can they get back inside them. People are the *environment* for the communicative networks, to whose operations they are exposed without being able to control them. Systems theory argues that the autonomy of communicative networks excludes people radically from society.[33] Systems theory is here coming close to theorems of social alienation from the tradition of social theory.[34] At this point there are secret contacts with officially hostile theories: with Foucault's analyses of disciplinary power, Agamben's critique of social exclusion, Lyotard's theory of closed discourses and Derrida's deconstruction of justice, even if these contacts are officially denied on all sides.[35] This can only be indicated here, not enlarged on.

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32. Representative the German Federal Constitutional Court, BVerfGE 89, 214 et seq.; see also Alexy, (fn. 30) chap. 10; Brüggemeier (fn. 20) 17 et seq. Very critical towards the subjective rights view, Ladeur, Karl-Heinz (2004): *Kritik der Abwägung in der Grundrechtsdogmatik*, Tübingen: Mohr & Siebeck, 61 et seq.

33. Luhmann, Niklas (1995): *Social Systems,* Stanford: Stanford University Press, *176 et seq.;* Luhmann, Niklas (1990): "The Individuality of the Individual", in: *id*., Essays on Self-Reference, New York: Columbia University Press, 107 et seq.; Luhmann, Niklas (1983): "Individuum und Gesellschaft", 39 *Universitas*, 1-11; Luhmann, Niklas (1991): "Die Form 'Person'", 42 *Soziale Welt*, 166 et seq.

34. Mead, George Herbert (1967): *Mind, Self and Society* from the standpoint of a social behaviourist, Chicago: University of Chicago Press, 135 et seq.

35. This discourse need not be addressed to the cognoscenti among those scornful of systems theory: they see these secret convergences, especially Schütz, Anton (2000): "Thinking the Law With and Against Luhmann, Legendre, Agamben", 11 *Law and Critique*, 107 et seq.; Schütz, Anton (1998): "Sons of the Writ, Sons of Wrath: Pierre Legendre's Critique of Law-Giving", in: Goodrich, Peter (ed.): *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence*, Michigan: University of Michigan Press, 193 et seq.

The legal follow-up question is: If people are not parts of society, but for ever banished from it, how are human rights to be reformulated? Whereas the tradition saw the question of just institutions as being created by the internal divisions of society, and therefore aimed at *institutional justice despite differences*, today much presumably argues in favour of distinguishing the social system from its natural and human environment, and consequently describing *institutional justice as difference*: as responsiveness within the unbridgeable gap between social institutions and actual people. The reaction to this difference cannot be inclusion, but at the most responsiveness. Human rights are then not a response to distribution problems within society, but an answer to problems that transcend society. Human rights demand an ecological sensitivity of communication. And the next follow-up question is: Does the far-advanced fragmentation of society not in turn create new internal boundaries, with other subsystems on the one hand and with environments outside society on the other, so that the fairness of specialized social institutions too can only properly be posed as an ecological problem?

Such an ecological perception of fundamental rights as "just" boundary relations between social systems and their various internal and external ecologies takes on two new dimensions if we compare it with divisional theories that see people as parts of society and justice as a problem of inequality. First, there is the insurmountable difference between communication and people in its environment. Can communication, then, ever at all do justice to people? The second dimension is that the question is no longer one of distribution of social resources in the broadest sense, i.e. power, wealth, knowledge, life chances, among the parts of society. Instead, the point is to constrain the institutions' acts in such a way that they do justice to the intrinsic rights of their social and human ecologies. The overcoming of inequality among people and the fair distribution of resources is then replaced by two quite different demands on social institutions: (1) internal and external limitation of their expansive tendencies; (2) sensitive balancing between their intrinsic rationality and the intrinsic rights of their ecologies.

The human-rights tradition is thereby accused of not taking human individuals seriously.[36] This is not despite but because of its basic humanistic approach, which leads it —against its better knowledge— to set human beings at the centre of the institutions. The category error of the divisional tradition could be formulated using Magritte's familiar caption: *ceci n'est pas une pipe*; or in the fundamental-rights context: *la personne n'est pas un être humain*. Traditional thought, by understanding fundamental rights as areas of personal autonomy, brings about a fatal equation of "mind/body" on the one hand and "person" on the other.[37] But if one

36. Luhmann, Niklas (2004): *Law as a Social System*, Oxford: Oxford University Press.

37. "Talking about human beings in this context, we refer to a self-organizing individual in its whole individuality, in its empirical incomparableness, and no longer to something what could have been integrated into the normative structure of society as an abstraction, as 'the human being'." Luhmann, Niklas (2002): *Einführung in die Systemtheorie,* Heidelberg: Carl-Auer-Systeme, 343.

takes the difference seriously by seeing the "person" as a mere internal construct of social communication on the one hand, and mind and body as living, pulsing entities in the communication's environment on the other, then it becomes clear that the humanistic equation of semantic artefacts with actual people is precisely what does *not* do justice to blood-and-flesh people.

That people are not parts of society but insuperably separate from it, has one inexorable consequence:[38] society and mind/body are not communicatively accessible to each other. Mind and body are each independent, self-sustaining (mental or organic) processes. Both have certainly brought about communication, but cannot control it. Communication becomes autonomous from people, creating its own world of meaning over against the individual mind. This can be used by people productively for their survival, but it can also —and this is the point at which fundamental rights become relevant— turn against them and threaten their integrity, or even terminate their existence. Extreme examples are: killing through a chain of command, sweatshops as a consequence of anonymous market forces, martyrs as a result of religious communication, political or military torture as destruction of identity.

It is in these negative externalities of communication, in their potential to threaten mind and body, that the core of the human-rights problematique lies –not, as the tradition supposed, in social inequality among human beings! The environment-threatening potential of society seen as a communicative ensemble is by no means in contradiction with its operative closure; on the contrary, it is its consequence. To be sure, their mutual closure makes society and people inaccessible to each other. Communicative processes cannot penetrate body and mind; they are external to communication. But communication can irritate psycho-physical processes in such a way as to threaten their self-preservation. Or it may simply destroy them. This is the place where body and mind of individuals (not of "persons") come up against their "pre-legal", "pre-political", even "pre-social" (= extra-societal) "latent intrinsic rights"[39]. They insist on their identity and their self-preservation against destructive perturbations of communication –and at the same time without having any forum available before which they could assert these "rights". And human rights in the strict sense should be restricted to this "crass" matter of society threatening mental and physical integrity and not burdened with quite different

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38. On the division of communication and mind see in addition to Luhmann (references in fn. 33) also Fuchs, Peter (2003): *Der Eigen-Sinn des Bewußtseins, Die Person, die Psyche, die Signatur*, Bielefeld: transcript; Wasser, Harald (1995): "Psychoanalyse als Theorie autopoietischer Systeme", *Soziale Systeme*, 329 et seq.; Stenner, Paul (2004): "Is Autopoietic Systems Theory Alexithymic? Luhmann and the Socio-Psychology of Emotions", 10 *Soziale Systeme*, 159 et seq.

39. To be enjoyed with extreme caution! These are not rights in the legal, political or moral sense, but tendencies to self-maintenance of a chain of differences from the environment. The notion of latent rights goes back to a suggestion by Riccardo Prandini (2005) "La 'costituzione' del diritto nell'epoca della globalizzazione: struttura della societá-mondo e cultura del diritto nell'opera di Gunther Teubner, in: Teubner, Gunther (2005) La cultura del diritto nell'epoca della globalizzazione: L'emergere dell costituzioni civili. Armando, Roma.

problems of social communication– the relevance of which for fundamental rights in the broader sense is by no means thereby denied.[40]

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 set off new distinctions there. The ill-treated bodies' and souls' defences can be "heard" only if they are themselves expressed in communication. Those are the social messages of physical violence as anti-power communication, or of suffering souls complaining and protesting. Only then is there a chance for social conflicts about the core area of human rights to develop. But these can only ever be proxies, able correspondingly only to re-present people in communication, not present them. These communicative conflicts are in no way identical with the real conflict that the communication sets going in relation to its ecologies, mind and body. Nor do they reflect them acccurately, but are merely resonances within society of the external conflicts, mere reconstructions of ecological conflicts within the communication. They then result in rules internal to communication, which in their turn can neither regulate nor protect mind and body. But they can in complicated fashion become relevant for both, if social rules ultimately set extra-communicative bounds on the communication. Here is where the law's central figure —the legal prohibition: thou shall not— derives its effect beyond the boundaries of the communicative: prohibitions of particular communications (ban on killing, ban on torture). Thus "latent rights" (= intrinsic claims of flesh-and-blood people to bodily and mental integrity) become "living rights" in Eugen Ehrlichs sense and "human rights" in the non-technical legal sense, which can be fought for anywhere in society (not just in law or in politics). (This is not to be confused with the distinction in legal philosophy between rights in the state of nature and in the civil state).

That is why it makes no sense to see human rights as a decision of the political sovereign —whether the prince or the self-governing people— in the positive law. While they do not represent, of course, natural law rights in the sense of some pre-political absolute validity, they are pre-social (extra-social) in a quite different sense, as being based on "latent rights" of body and mind to their integrity, and at the same time they are "pre-political" and "pre-legal", as being built on the "living law" of human rights arising out of communicative conflicts in politics, morals, religion or law, and the resulting conquests. Positivizing them as technical law is not some free decision of the legislator, but is based on this twofold foundation of self-sustaining processes outside society and conflicts within it.

40. Luhmann, Niklas (fn. 36), chap. 12.

IV. FUNDAMENTAL RIGHTS AS A PROBLEM OF MODERNITY: EXPANSION OF POLITICAL POWER

The problem of "latent human rights" thus always arises whenever there is communication at all: as "intrinsic rights" of organic life and of mental experience, vis-à-vis the endangerment of their integrity by social communication. In old Europe this was, however, "translated" into the semantics not of human rights, but of the perfection of man in imperfect nature, or of the soul's salvation in the corrupt world. 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 godlike and leads to the loss of Paradise. The origin of alienation lies in the very first communication.

Human rights in their specific modern sense appear only with the second Fall. It does not, as for Marx, coincide with the emergence of private property, but with the autonomization of a multiplicity of separate communicative worlds. First, and everywhere visibly since Macchiavelli, the matrix of politics becomes autonomous. It becomes detached from the diffuse moral-religious-economic ties of the old European society, and extends to infinity the usurpation potential of its special medium, power, without any immanent restraints. Its operative closure and its structural autonomy let it create new environments for itself, vis-à-vis which it develops expansive, indeed downright imperialist tendencies. Absolute power liberates unsuspected destructive forces. Centralized 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 totalize them beyond limit.[41]

Its expansion goes in two diverse directions. First, it crosses the boundaries to other social sectors. Their response is to insist on their communicative autonomy free of intervention by politics –this is the birth of fundamental rights, either as institutional or as personal right to autonomy. Fundamental rights demarcate from politics areas of autonomy allotted either to social institutions or to persons as social constructs.[42] In both cases fundamental rights set bounds on the totalizing tendencies of the political matrix within society. Second, politics expands with particular verve across the boundaries of society, in its endeavours to control the human mind and body. Their defences become effective only once they can be communicated as protest in complaints and in violence, are translated socially into political struggles of the oppressed against their oppressors, and finally end up, via historical compromises, in political guarantees of the self-limitation of politics vis-à-vis people as psycho-physical entities. These are —unlike the pre-

41. Luhmann, Niklas (1965): *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie*, Berlin: Duncker & Humblot, 24.

42. On the transformation of individual to institutional fundamental rights Ladeur (fn. 32) 77.

viously mentioned institutional and personal fundamental rights— human rights in the strict sense.

The fundamental-rights tradition has not separated these "latent" human rights distinctly from individual and institutional fundamental, but has always translated them into compact individual fundamental rights, through a re-entry of the external into the internal. Communication cannot guarantee or regulate the autonomy of the mind, nor even describe it appropriately with any prospect of a correspondence between percept and object. The difference between communication and mind is unbridgeable. But this difference is repeated within communication via re-entry. The same applies to the difference communication/body. Human beings (mind and body) which are not accessible to communication are modelled within the law as "persons", as "bearers of fundamental rights", without any guarantee for correspondence between constructs of persons within society and people outside it. It is to these artefacts of communication that actions are attributed and areas of freedom granted as fundamental rights. The tradition here makes the pernicious equation of person and human being already criticized above, in the unitary concept of individual fundamental rights. It does not distinguish sufficiently between guarantees of communicative freedoms on the one hand and guarantees of psycho-physical integrity on the other. Against this, we must insist on the difference between personal rights and human rights in the strict sense. Human rights in this sense too depend on the technique of re-entry, thus on their attribution to communicative constructs, but are to be understood as having a semantic difference from personal communicative freedoms, namely as intended guarantees of the integrity of mind and body.

V. FRAGMENTATION OF SOCIETY: MULTIPLICATION OF EXPANSIVE SOCIAL SYSTEMS

This model of fundamental rights which is oriented toward politics and the State, works only as long as the State can be identified with society, or at least, the State regarded as society's organizational form, and politics as its hierarchical coordination. However, insofar other highly specialized communicative media (money, knowledge, law, medicine, technology) gain autonomy, this model loses its plausibility. At this point, horizontal effects of fundamental and human rights become relevant. Fragmentation of society multiplies the boundary zones between autonomized communicative matrices and human beings. The new territories of meaning each draw boundaries of their own with their human environments. Here new dangers arise for the integrity of body and mind. These are the issues

43. The institutional aspect is emphasized by Ladeur (fn. 32) 64: "Fundamental rights are then a contribution to the self-reflection of the private law, when – as with the third-party effect of communicative freedom - it is about the protection of non-economical interests and goods."

to which the "third-party effect" of human rights in the strict sense should be confined. Another, no less important, set of issues of constitutional rights would be the autonomy of institutional communicative spheres vis-à-vis their "private" subjugation, and a third the autonomy of personal communicative freedoms.[43]

Thus, human rights cannot be limited to the relation between State and individual, or the area of institutionalized politics, or even only to phenomena of power in the broadest sense.[44] Specific endangerment of physical and mental integrity by a communicative matrix comes not just from politics, but in principle from all social sectors that have expansive tendencies. For the matrix of the economy, Marx clarified this particularly through such concepts as alienation, autonomy of capital, commodification of the world, exploitation of man by man. Today we see —most clearly in Foucault, Agamben, Legendre[45]— similar threats to integrity from the matrices of the natural sciences, of psychology, the social sciences, technology and medicine, of the press, radio and television (keywords: Dr. Mengele[46], reproductive medicine, extension of life through intensive care, the lost honour of Katharina Blum[47]).

By now it should have become clear why it makes no sense to talk about the "horizontal effect" of political fundamental rights. There is no transfer from the State guarantees of individual freedoms into "horizontal" relations between private actors. Something else is instead needed –to develop new types of guarantee that limit the destructive potential of communication outside institutionalized politics against body and mind. The State-action approach thus falls short by letting fundamental rights operate in the private sector only if trace elements of State action can be identified. And the economic-power approach misleads too, by seeing fundamental rights only as a response to power phenomena. This is much too narrow,

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44. Reducing the horizontal effect of fundamental rights to "social power" along the lines of political power is common in labor law. Facing organisational power this stands to reason, yet reduces the question of fundamental rights to a mere phenomenon of balancing powers. See Gamillscheg, Franz (1964): "Die Grundrechte im Arbeitsrecht", 164 *Archiv für die civilistische Praxis*, 385-445. Explicit political concepts concerning the horizontal effect of fundamental rights exhibit similar reductions, e.g. Anderson (fn. 18), 33.

45. Agamben, Giorgio (1998): *Homo Sacer: Sovereign Power and Bare Life*, Stanford: Stanford University Press, 15 et seq.; Foucault, Michel (1991): *Discipline & Punish: The Birth of the Prison*, London: Penguin Books; Legendre, Pierre (1989): *Leçons VIII. Le crime du caporal Lortie. Traité sur le père*, Paris: Fayard.

46. The experiments on people of Dr. Mengele were regarded as an expression of a sadistic personality or as an enslavement of science through the totalitarian Nazi-policy. Later researches however reveal that in fact it is a matter of expansionistic tendencies of science seizing every opportunity to accumulate knowledge impelled by its momentum, especially the international pressure of competition if it is not detained by external social counterpressure. See Schmuhl, Hans-Walter (2005): *Grenzüberschreitungen. Das Kaiser-Wilhelm-Institut für Anthropologie, menschliche Erblehre und Eugenik 1927 bis 1945*, Göttingen: Wallstein.

47. Böll, Heinrich (1994), *The Lost Honor of Katharina Blum: Or How Violence Develops and Where It Can Lead,* New York: Penguin Books.

since while social power is covered by it, the subtler endangerments to integrity from other communicative matrices, e. g. by the monetary mechanism, are not.

Accordingly, it is today the fragmentation of society that is central to the human-rights question. There is not just one single boundary *political communication/individual,* guarded by human rights. Instead, the problems arise in numerous social institutions, each forming their own boundaries with their human environments: *politics/individual, economy/individual, law/individual, science/individual, medicine/individual* (never as a *whole/part* relation, but understood as difference between communication and mind/body). Everything then comes down to identifying the various frontier posts, so as to recognize the violations that endanger human integrity by their specific characteristics. Where are the frontier posts? –Answer: in the various constructs of persons in the subsystems: homo politicus, oeconomicus, juridicus, organizatoricus, retalis etc. These are constructs within communication, enabling classification, but at the same time real points of contact with people "out there". It is through the mask of the "person" that the social systems make contact to people; while they cannot communicate with them, they can massively irritate them and in turn be irritated by them. In tight perturbation cycles, communication irritates consciousness with its selective "enquiries", conditioned by assumptions about rational actors, and is irritated by the "answers", in turn highly selectively conditioned. It is in this recursiveness that the "exploitation" of man by the social systems (not by man!) comes about. The social system as a specialized communicative process concentrates its irritations of human beings on the person-constructs. It "sucks" mental and physical energies from them for its own self-preservation. It is only in this highly specific way that Foucault's disciplinary mechanisms develop their specific effects.[48]

VI. THE ANONYMOUS MATRIX

If violations of fundamental rights stem from totalizing tendencies of partial rationalities, then there is no longer any point in seeing the horizontal effect of fundamental rights as if it rights of private actors have to be weighed up against each other. But the root of infringement of fundamental rights needs to be looked at closer. The simple part-whole view of society has after-effects in the image of "horizontality", unacceptably taking the sting out of the whole human-rights issue, as if the sole point were that individuals threaten other individuals.

Violation of the integrity of individuals by other individuals, whether through communication or direct physical action, is, however, a completely different set of

48. For details on the personal constructs as junction between communication and mind see Teubner, Gunther and Hutter, Michael (2000): "Homo Oeconomicus and Homo Juridicus: Communicative Fictions?", in: Baums, Theodor, Hopt, Klaus J. and Horn, Norbert (eds.), *Corporations, Capital Markets and Business in the Law. Liber Amicorum Richard Buxbaum*, Den Haag: Kluwer, 569 et seq.

issues that arose long before the radical fragmentation of society in our days. It must systematically be separated from the fundamental-rights question as such.[49] In the European tradition it is (alongside other constructions) translated by attributing to persons, as communicative representatives of actual human beings, "subjective rights" against each other. This was philosophically expanded by the theory of subjective rights in the Kantian tradition, according to which ideally the citizens' spheres of arbitrary freedom are demarcated from each other in such a way that the rights can take a generalizable form. Legally, this idea has been most clearly developed in classical law of tort, in which not merely demnifications, but violations of subjective rights are central. Now, "fundamental rights" in their institutional, personal and human dimensions, as here proposed, differ from "subjective rights" in private law. They are not about mutual endangerment of private individuals, i.e. intersubjective relations, but about dangers to the integrity of institutions, persons and individuals which are created by anonymous communicative matrices (institutions, discourses, systems).

The Anglo-American tradition speaks in both cases indifferently about "rights", thereby overlooking from the outset the fundamental distinction between subjective rights and fundamental rights, while in turn being able to deal with them together. By contrast, criminal law concepts of macro-criminality and criminal responsibility of formal organizations come close to the issues in mind here.[50] They affect violations of norms not emanating from human beings, but from non-personal social processes.[51] But they are confined to the dangers stemming from "collective actors" (States, political parties, business firms, groups of companies, associations) and miss the dangers stemming from the anonymous "matrix", from autonomized communicative processes (institutions, functional systems, networks) that are not personified as collectives. Even political human rights should not be seen as relations between political actors (State vs. citizen), i.e. as an expression of person-person relations. Instead, they are relations between anonymous power processes on the one hand and tortured bodies and hurt souls on the other. This is expressed in communication only very imperfectly, not to say misleadingly, as the relation between the State as "person" and the "persons" of the individuals.

It would be repeating the infamous category error of the tradition were one to treat the horizontal effect of fundamental rights in terms of subjective

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49. Certainly people can do worst to each other by violating rights of the most fundamental kind (life, dignity). But this is not (yet) a fundamental-rights question in this sense, but affects one of The Ten Commandments, fundamental norms of the criminal law and the law of tort. Fundamental rights in the modern sense are not opposed to perils emanating from people, but to perils emanating from the matrix of the systems.

50. See e.g. Jäger, Herbert (1989): *Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt*, Frankfurt am Main: Suhrkamp; Gómez-Jara Díez, Carlos (2004): *Fundamentos Modernos de la culpabilidad empresarial*, Doctoral Dissertation Madrid.

51. For clarification it has to be emphasized that by this the individual responsibility does not disappear behind the collective responsibility, rather both exist in parallel.

rights between individual persons.[52] That would just end up in law of tort, with its interpersonal relations. And we would be forced to apply the concrete State-oriented fundamental rights wholesale to the most varied interpersonal relations, with disastrous consequences for elective freedoms in private life. Here lies the rational core of the excessive protests of private lawyers against the intrusion of fundamental rights into private law –though they in turn are exaggerated and overlook the real issues.[53]

The category error can be avoided. Both the "old" political and the "new" polycontextural human-rights question should be understood as people being threatened not by their fellows, but by anonymous communicative processes. These must in the first place be identified. Focault has seen them most clearly, radically depersonalizing the phenomenon of power and identifying today's micro-power relations in society's capillaries as the expression of discourses/practices of "disciplines" (Foucault's problem is, to be sure, his quite obsessive fixation on the phenomenon of power, which leads him to inflate the concept of power meaninglessly, and cannot discern the more subtle effects of other communication media).[54]

We can now summarize the outcome of our abstract considerations. The human-rights question in the strictest sense must today be seen as endangerment of individuals' body/mind integrity by a multiplicity of anonymous and today globalized communicative processes. The fragmentation of world society into autonomous subsystems creates new boundaries outside society between subsystem and human being and new boundaries inside society between the various subsystems. The expansive tendencies of the subsystems aim in both directions.[55] It now becomes clear how the new "equation" replaces the old "equation" of the horizontal effect. The old one was based on a relation between two private actors –private perpetrator and private victim of the infringement. On one side of the new equation is no longer a private actor as the fundamental-rights violator, but the *anonymous matrix of an autonomized communicative medium*. On its other side is no longer simply the compact individual. Instead, protection of the individual

52. Very critical towards the consideration of subjective rights in the range of the horizontal effect: Ladeur (fn. 32) 58 et seq.

53. Medicus, Dieter (1992): "Der Grundsatz der Verhältnismäßigkeit im Privatrecht", 192 *Archiv für die civilistische Praxis*? 35 et seq.; Zöllner, Wolfgang (1996): "Regelungsspielräume im Schuldvertragsrecht: Bemerkungen zur Grundrechtsanwendung im Privatrecht und zu den sogenannten Ungleichgewichtslagen", 196 *Archiv für die civilistische Praxis*, 1 et seq.; Diederichsen, Uwe (1997): "Die Selbstbehauptung des Privatrechts gegenüber dem Grundgesetz", 197 *Archiv für die civilistische Praxis*, 57 et seq.; Diederichsen, Uwe (1998): "Das Bundesverfassungsgericht als oberstes Zivilgericht", 198 *Festschrift für Karl Heinz Briam*, 171 et seq.

54. Foucault (fn. 45), 135 et seq.

55. In more detail see Fischer-Lescano, Andreas and Teubner, Gunther (2006): *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*, Frankfurt am Main: Suhrkamp, Chap. 1. Although not the therapy, the diagnosis is followed by Koskenniemi, Martti (2005): "Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought", *Harvard, 5 March 2005, available at: http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf*.

(hitherto seen in unitary terms) splits up into several dimensions because of the new boundaries. On this other side of the equation, the fundamental rights have to be systematically divided into three or even four dimensions:

— *Institutional rights* protecting the autonomy of social discourses —the autonomy of art, of science, of religion— against their subjugation by the totalizing tendencies of the communicative matrix. By protecting them against totalitarian tendencies of science, media or economy fundamental rights take effect as "conflict of law rules" between partial rationalities in society.[56]
— *Personal rights* protecting the autonomy of communications, attributed not to institutions, but to the social artefacts called "persons".
— *Human rights* as negative bounds on societal communication, where the integrity of individuals' body and mind is endangered by a communicative matrix crossing boundaries.
— (Additionally, though not systematically discussed here: ecological rights, where society endangers the integrity of natural processes).

It should be stressed that specific fundamental rights are to be allocated to these dimensions not one-to-one, but with a multiplicity of overlaps. Some fundamental rights are mainly to be attributed to one dimension or the other (e.g. freedom of art, freedom of science, and property primarily to the institutional, freedom of speech primarily to the personal and freedom of conscience primarily to the human-rights dimension). Some display all three dimensions (e.g. religious freedom). It is all the more important, then, to distinguish the three dimensions carefully within the various fundamental rights.

VII. JUSTICIABILITY?

Let us now concentrate on the third dimension, human rights in the strictest sense, protecting the integrity of mind and body. The ensuing question for lawyers is: Can "horizontal" effects of fundamental rights be reformulated from conflicts within society (person vs. person) to conflicts between society and its ecologies (communication vs. body/mind)? In other words, from interpersonal conflicts

56. Ladeur, (fn. 32), 60, 69 et seq., 71; Graber, Christoph and Teubner, Gunther (1998): "Art and Money: Constitutional Rights in the Private Sphere", 18 *Oxford Journal of Legal Studies*, 61 et seq.; Teubner, Gunther (2000): "Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken", *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaften*, 388 et seq.; Teubner, Gunther (2003): "Expertise as Social Institution: Internalising Third Parties into the Contract", in: Campbell, David, Collins, Hugh and Wightman, John (eds.): *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts*, Oxford: Hart, 333 et seq.

between individual bearers of fundamental rights to ecological conflicts between anonymous communicative processes on the one hand and concrete people on the other?

The difficulties are enormous. To list only a few:

How can destructive system/environment relations "between" the universes Communication and Consciousness at all be addressed by communication as a conflict, as social conflict or indeed as legal conflict –a real Lyotard problem: if not as *litige*, then at least as *différend*? Failing a supreme court for meaning, all that can happen is that mental experience endures the infringement and then fades away unheard. Or else it gets "translated" into communication, but then the paradoxical and highly unlikely demand will be for the infringer of the right (society, communication) to punish its own crime! That means turning poachers into gamekeepers. But bear in mind: several nation states have already, by institutionalizing political fundamental rights, managed precisely this gamekeeper-poacher self-limitation –however imperfectly.

How can the law describe the boundary conflict, when after all it has only the language of "rights" of "persons" available?[57] Can it, in this impoverished rights talk, in any way construct the difference between interpersonal conflicts and communicative endangerments of individuals via external social conflicts? Here we reach the limits of what is conceivable in legal doctrine, and the limits of court proceedings as well. In them, there must always be a claimant suing a defendant for infringing his rights. In this framework of mandatory binarization as person/person-conflicts, can human rights at all be asserted against the structural violence of anonymous communicative processes? The only way this can happen —at any rate in litigation— is simply to re-use the category error so harshly criticized above, but immanently correcting it, in an awareness of its falsehood, by introducing a difference. That means individual suits against private actors, in which human rights, though not rights of persons against persons but of flesh-and-blood human beings against structural violence of the matrix are asserted. In traditional terms, the conflict with institutional problems that is really meant has to take place within individual forms of action. We are already familiar with something similar from existing institutional theories of fundamental rights, which recognize as their bearers not only persons, but also institutions.[58] Who enforces the individual freedom of opinion simultaneously protects the integrity of the political process. But the point here is not rights of impersonal institutions against

57. Glendon, Mary Ann (2000): "Rights Talk: The Impoverishment of Political Discourse", in: Eberly, Don E. (ed.): *The Essential Civil Society Reader*, Oxford: Rowman & Littlefield, 305 et seq.

58. See the impersonal concept of fundamental rights by Ridder, Helmut (1975): *Die soziale Ordnung des Grundgesetzes*, Opladen: Westdeutscher Verlag; Ladeur, Karl-Heinz (1999): "Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie", 32 *Kritische Justiz*, 281 et seq.

the State but, in a multiple inversion of the relation, rights of individuals outside society against social institutions outside the State.

Is this distinction justiciable? Can person/person-conflicts be separated from individual/individual-conflicts on the one hand, and these in turn from communication/individual-conflicts on the other hand, if after all communication is enabled only via persons? Translated into the language of law, this becomes a problem of attribution. Whodunnit? Under what conditions can the concrete endangerment of integrity be attributed not to persons/individuals, but to anonymous communication processes? If so, then a genuine human-rights problem would have been formulated even in the impoverished rights talk of the law.[59]

In an extreme simplification, the "horizontal" human-rights problematique can perhaps be described in familiar legal categories as follows. The problem of human rights in private law arises only where the endangerment of body/mind integrity comes from social "institutions" (and not just from individual actors). Institutions in principle cover private formal organizations and private regulatory systems. The most important cases would here be business firms, private associations, hospitals, schools, universities as formal organizations; and general terms of trade, private standardization and similar rule-settings as private regulatory systems. We must of course be clear that the term institution only imperfectly represents the really intended chains of communicative acts that endanger integrity, characterized by a special medium, —the metaphor of the anonymous "matrix"— and barely makes its expansive dynamic visible. But for lawyers, oriented toward rules and persons, it has the advantage of defining the institution as a bundle of norms and at the same time letting it be personified. The concept of the institution could accordingly respecify fundamental rights in social sectors (as it were, the equivalent for the State as institution and as person in the range of politics). The outcome would then be a formula of "third-party effect" plausible also to the black-letter lawyer: not horizontal effect as a balancing between the fundamental rights of individual bearers of them, but instead human rights and rights of discourses vis-à-vis expansive social institutions.

VIII. HIV/AIDS VERSUS TNC

Let us, with now heightened but at the same time lowered expectations, take another look at the HIV catastrophe in South Africa. I cannot offer a solution, but at best suggest directions the human rights might develop in. It should be fairly clear how inadequate it is to weigh up patients' individual fundamental right to life against the TNCs' individual property right in court proceedings. The matter is not one of corporate social responsibility, with a single corporate actor infring-

59. This problem is comparable to the demarcation of sovereign and fiscal actions in public law or of actions of agents and personal actions in private law.

ing fundamental rights of AIDS patients through pricing policy. A human right of access to medication can become a reality only if the "horizontal" effect of fundamental rights is reformulated from interpersonal conflicts (person vs. person) to system/environment conflicts (communication vs. body/soul, or institution vs. institution).

In the institutional dimension, the conflict needs to be set in its social context, which means to note that the AIDS catastrophe is ultimately due to a clash of incompatible logics of action.[60] The critical conflict arises in the domain of patent rights to medicines and is the contradiction of norms of economic rationality with norms formed in the health context.[61] In this case the point is not, then, to impose price controls on particular pharmaceutical firms, but to develop abstract and general rules on incompatibilities between the business sector and the health sector, and prepare WIPO, WTO and UN law, as part of a transnational patent law, to respond to destructive conflicts between incompatible logics of action by building health concerns into norms of economic rationality. Since there is no paramount court for the conflict, it can always only be solved from the viewpoint of one of the conflicting regimes, here the WTO. But the competing logic of action, here the principles of the health system, has to brought into the economic-law context as a limitation.

It is, however, to be feared that the genuine human-rights dimension will not be adequately taken into account. In other words, if access to medication is not lastingly improved by the measures now decided and the planned WIPO treaties, then the transnational development of patent law in relation to pharmaceutical products will have to be adjusted again, whether by granting, in transparent, procedurally simplified and low-cost fashion, the right to compulsory licensing, or by a licence or patent exception system graded according to economic capacity, or finally by the radical cure of a general settlement completely removing certain medicines from the protection of transnational patent law for a period.[62]

This sketch of legal ways to react to the AIDS catastrophe shows the inappropriateness of the optimism that the human-rights problem can be solved using the resources of legal policy. Even institutional rights confront the law with the boundaries between other social subsystems. Can one discourse do justice to the

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60. Cf. Teubner (2000) (fn. 56).

61. On the details of the current conflict and perspectives of possible resolutions Fischer-Lescano and Teubner (fn. 7) 999 et seq.

62. Correa, Carlos and Musungu, Sisule (2002): *The WIPO Patent Agenda: The Risk for Developing Countries*, South Center Working Papers 12/2002, at: www.southcentre.org/publications/wipopatent/toc.htm; see also Helfer, Laurence (2004): "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intelectual Property Lawmaking", 29 *Yale Journal of International Law*, 1 et seq.; generally on the regulation in the domain of bio-technology: Stoll, Peter-Tobias (2004): "Biotechnologische Innovationen: Konflikte und rechtliche Ordnung", in: Hèritier, Adrienne, Stolleis, Michael and Scharpf, Fritz (eds.): *European and International Regulation after the Nation State. Different Scopes and Multiple Levels*, Baden-Baden: Nomos, 261 et seq.

other? This is a problem the dilemmas of which have been analysed by Lyotard.[63] But it is at least a problem within society, one Luhmann sought to respond to with the concept of justice as socially adequate complexity.[64] The situation is still more dramatic with human rights in the strict sense, located at the boundary between communication and the individual human being. All the groping attempts to juridify human rights cannot hide the fact that this is a strictly impossible project. How can society ever "do justice" to real people if people are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely either irritate or destroy them? In the light of grossly inhuman social practices the justice of human rights is a burning issue, but one which has no prospect of resolution. This has to be said in all rigour.

If a positive concept of justice in the relation between communication and human being is definitively impossible, then what is left, if we are not to succumb to post-structuralist quietism, is only second best. In the law, we have to accept that the problem of body/mind-integrity can be experienced only through the inadequate sensors of irritation, reconstruction and re-entry. The deep dimension of conflicts between communication, mind and body can at best be guessed at by law. And the only signpost left is the legal prohibition, through which a self-limitation of communication seems possible. But even this prohibition can describe the transcendence of the other only allegorically. This programme of justice is ultimately doomed to fail, and cannot just, with Derrida, console itself that it is "to come, *à venir*",[65] but has to face up to being in principle impossible. The justice of human rights can, then, at best be formulated negatively. It is aimed at removing unjust situations, not creating just ones. It is only the counter-principle to communicative violations of body and soul, a protest against inhumanities of communication, without it ever being possible to say positively what the conditions of "humanly just" communication might be.

Nor do the emancipatory programmes of modernity help any further. No information comes from criteria of democratic involvement of individuals in social processes, since only persons take part, not bodies nor minds. From this viewpoint one can only be amazed at the naïvety of participatory romanticism. Democratic procedures are no test of a society's human rights justice.[66] Equally uninformative are universalization theories that proceed transcendentally via *a*

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63. Lyotard, Jean-Francois (1988): *The Differend: Phrases in Dispute*, Manchester: Manchester Univ. Press, cif. 1 et seq.

64. Luhmann, Niklas (1974): *Rechtssystem und Rechtsdogmatik*, Stuttgart: Kohlhammer; Luhmann, Niklas (1981): *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*, Frankfurt: Suhrkamp, 374 et seq.; Luhmann (fn. 36), 214 et seq.

65. Derrida, Jacques (1990): "Force of Law: The Mystical Foundation of Authority", 11 *Cardozo Law Review*, 919 et seq., at 969.

66. Even if there is no doubt that democratic procedures might increase political sensitivity concerning human rights issues.

priori characteristics or via *a posteriori* universalization of expressed needs. What do such philosophical abstractions have to do with actual human individuals? The same applies to economic theories of individual preferences aggregated through market mechanisms.

Only the self-observation of mind/body —introspection, suffering, pain— can judge whether communication infringes human rights. If these self-observations, however distorted, gain entry to communication, then there is some chance of humanly just self-limitation of communication. The decisive thing is the "moment": the simultaneity of consciousness and communication; the cry that expresses pain. Hence the closeness of justice to spontaneous indignation, unrest, protest, and its remoteness from philosophical, political and legal discourses.