

## Human beings, human rights and functional differentiation

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## *Diskussionspapiere*

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Human Beings, Human Rights and Functional Differentiation

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## **Human beings, human rights and functional differentiation**

This paper aims to bring into dialogue two traditions of thinking in sociology which have previously remained rather unconnected. These are the comparatively minor tradition of the analysis of the borders of the social world, and the strong, widely recognized tradition of the theory of social differentiation; I am particularly interested here in the theory of functional differentiation. I would like to discuss the question of whether there is an inherent connection between a society's border regime and its form of social differentiation. By border regime I mean the manner in which distinctions are made between social persons and other entities. I elaborate this issue for the functionally differentiated society and societies differentiated in a stratificatory way. In the case of the functionally differentiated society, it becomes evident that this form of differentiation is tied to the condition that only living human beings can be social persons. This connection is then discussed in terms of Luhmann's thesis that fundamental respectively human rights can be regarded as the primary institution of a functionally differentiated society. Modernity rests on a cognitive and normative complex of institutions: on the one hand human rights, and on the other the human being as a species made up of individuals who are, in principle, of the same kind. The border regime of societies differentiated along stratificatory lines does not require such cognitive-normative universal assumptions. The circle of possible actors is limited situatively, from case to case.

If the institutional complex of human being and human rights is to be regarded as a precondition of functionally differentiated society, the question arises of how we should interpret the excesses of exclusion and oppression that have accompanied the formation of modern democratic states. The paper closes with a discussion of this problem.

# Human beings, human rights and functional differentiation<sup>1</sup>

This paper aims to bring into dialogue two traditions of thinking in sociology which have previously remained rather unconnected. These are the comparatively minor tradition of the analysis of the borders of the social world (Kelsen [1941] 1982; Latour [1991] 1995; Luckmann 1970), and the strong and widely recognized tradition of the theory of social differentiation (Schimank 1996); I am particularly interested here in the theory of functional differentiation (Luhmann 1997; Parsons 1972).

The analysis of the borders of the social world can be divided into two strands: one focuses on the problem of the actor, while the other asks how various societies draw distinctions between social persons and other entities. The problem of the actor is discussed within neo-institutionalism on the one hand, in science and technology studies on the other. While neo-institutionalism addresses the actor status of corporative actors (organizations, states), science and technology studies investigates the question of whether nonhuman entities, especially technological artifacts, should not also be taken into account as actors in order to understand the stability of social orders. Both Rammert's work and that of Callon, Latour, and Woolgar have raised the question of whether it is only living people that can be viewed as actors or whether technological artifacts must also, at least to some extent, be assigned the status of an actor participating in the entirety of action (Latour 2005; Rammert 2007); however, this only indirectly touches on the question of how borders are constructed for the circle of generally recognized social persons. Rammert (2007) formulates a gradualized concept of agency that reserves conscious and reflected social action for human agents. According to this model, nonhuman agents "act" only in a less rigorous sense. Latour (2005), too, implicitly assumes that human agents have a privileged position: in his approach, technology may have the function of guaranteeing the stability of the social order, but sociality itself is determined with recourse to human agents (Lindemann 2008a). It is humans who can ascribe – or not – an agent status to technological artifacts.<sup>2</sup>

Neo-institutionalism has raised the problem of agency in another way. Meyer and Jepperson (2000) discuss the cultural construction of agents, distinguishing between individual actors, organizations, and states. For Krücken (2005, p. 11), what is new about the neo-institutionalist position is that it regards not only organizations and states, thus corporative agents, but also

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<sup>1</sup> This paper arose from a project funded by the German Research Foundation (DFG), "Consciousness and anthropological difference." I would like to thank the DFG for its support.

<sup>2</sup> In an interesting article, Fuchs and Marshall (1998) follow a systems theory approach. They argue that it is necessary to identify different social processes in order to reconstruct in detail how and to whom the status of being an actor is attributed in specific situations.

individuals and in particular the rationally acting agent itself as cultural constructions. In their analysis of the construction of the agent, Meyer and Jepperson (2000, pp. 110, 113) distinguish two levels, that of the “raw actor” and that of the “agent” or “agentic actor.” This distinction stresses the degree to which action is reflected upon and rationalized. The agentic actor, Meyer and Jepperson argue, is characterized by the fact that it is constructed in accordance with cultural rules. As a responsible and rationally acting agent, the agentic actor is the culturally generated precondition of modern societies (Meyer and Jepperson 2000, pp. 116f). Anyone acting concretely is, in this account, always both a raw and an agentic actor. However, Meyer and Jepperson do not ask which entities fall within the circle of those potentially able to be not only a “raw” but also an “agentic” actor. Implicitly, they assume that only humans – or organizations and states formed by humans – can figure as actors in this sense (Meyer and Jepperson 2000, p. 116). Compared with the question of which entities can be valid as social persons in the first place, that of whether humans appear as raw and/or as agentic actors is surely subsidiary.

The second strand of the analysis of the borders of the social world goes back to the work of Kelsen and Luckmann (Kelsen [1941] 1982; Luckmann 1970). For these scholars, what is specific about western-European inflected modernity is that only living humans can be social actors. Working in the history of ideas, Kelsen traces the paths by which, in western modernity, natural objects have lost the status of a social agent. Although natural objects and technological artifacts are regarded as materially effective, in modernity they have been regarded as beings without the features of a social counterpart that has intentions and expectations. Kelsen shows how the aspect of retribution, in premodern perceptions still part of humans’ relationship with natural objects and artifacts, recedes over time. Relationships with natural objects and artifacts are desocialized. Methodologically, Luckmann’s approach follows Husserl, using a transcendental-theory perspective to pursue the argument that the projection of the other Ego cannot a priori be restricted to living persons. On the basis of rich ethnographic material, he finds that in nonmodern societies animals, plants, gods, and the deceased can hold the status of generally recognized actors.

Extending the line of thought developed by Kelsen and Luckmann and drawing on Plessner’s theory of the *Mitwelt*, or “co-world,” Lindemann (2009: ch. 3) proposes the concept of the “societal border regime.” This model sees societies differing according to how the circle of generally recognized and therefore legitimate social persons is delimited – thus expanding the analysis of the borders of the social world in the direction of a theory of society. In this perspective, it is a characteristic of modern societies that only living human beings can be

social persons. That is not possible for other entities, whether natural (plants, animals), artificial (technology) or transcendent (gods, angels). This explicitly does not exclude the possibility that technology or animals too can exert effects, but in a modern society those effects always have to be understood as effects that have no social character as such. Technology exerts its effects in a technological way, and not like a social actor in relation to other social actors (Lindemann 2008b).

In this paper, I will look in detail at the dimension of the analysis of the borders of the social world that touches on the theory of society, pursuing the question of whether there is an inherent connection between modern society's border regime and its presumed functional differentiation. It seems promising to assume a structural connection for a range of reasons. Stichweh (1994: 88) proposed treating the human being as a problem for macrosociology, since, in his view, the assumption that there exists a humanity made up of congeneric human beings is one that has developed historically. Here, we might follow Luhmann and point out the theory-of-society dimension of human rights. In his *Grundrechte als Institution*, "Fundamental rights as an institution" (Luhmann 1965), Luhmann set out the claim that fundamental rights should be regarded as the primary institution of a functionally differentiated society. Reconstructing Luhmann's argument, Verschraegen (2002) uses only the term human rights. I find it more appropriate to use both terms together, since fundamental rights and human rights refer to two different dimensions of the basic normative institutions of modern society. In this paper I therefore use the somewhat unusual term "fundamental/human rights." How this is to be understood in detail will become clear in section 2.1.3 and the conclusion. In view of the hints arising from Luhmann's work, it seems useful to undertake a closer study of the connection between the manner in which the borders of the social are drawn in any one historical case and the respective society's form of differentiation – for in a cognitive respect, the universal validity of human rights implies a practically effective delimitation of those for whom these rights apply.

Drawing on Parsons (1966), Luhmann (1997, Vol. 2: ch. 4) distinguishes three forms of social differentiation: segmentary, stratificatory, and functional differentiation. The last of these is considered characteristic of modern society. If the theory of differentiation is investigated from the perspective of the analysis of social border regimes, the question as applied to functional differentiation runs as follows: Is there an internal correlation between this form of differentiation and the fact that in modern societies only living humans can hold the status of legitimate, i.e. generally recognized, social persons? Here, fundamental importance for a sociological understanding of modernity would attach not only to the question of human

rights, but also to the problem of how the point of reference for these rights is constructed – the this-worldly, living (in the biological sense) human individual. Similarly, we might pose the question from a historical and comparative perspective: Is there an internal correlation between stratificatory differentiation and the construction of borders between legitimate persons and other entities in, for example, premodern European societies?

The central problem in investigating this inherent connection lies in our understanding of the term “human being.” From the point of view of an analysis of border regimes, living humans are seen as a component of modern society. Yet in this perspective “humans” are not regarded as a natural precondition of sociation, but as one that has taken shape historically. From an autopoietically oriented, system-theory perspective, in contrast, “humans” are as a matter of principle located in the environment of social systems. It is thus important that we first work out in detail the sense in which a border-regime perspective understands living humans as elements of the social (section 1). In a second step, the interrelation between border regime and social differentiation will be addressed; the question being whether there is an internal correlation between the form of social differentiation and the manner of boundary construction between social persons and other entities (section 2). The theory of functional differentiation, once supplemented by the analysis of border regimes, views both the human being and fundamental/human rights as central institutions of modernity. A normative institution is thus regarded as foundational for modernity, obliging us to ask how we should interpret the development of the repressive processes that have accompanied the rise of modernity and which Mann (2005) has described as the “dark side of democracy.” Mann’s study investigates the sometimes genocidal processes of homogenization that characterize the early phases of the development of state democracy – and thus also the early phases of the development of functional differentiation (section 3). In Luhmann’s work on differentiation theory, too little account has been taken of these aspects.

### ***1. The institution of the this-worldly, living human being as a point of reference for human rights***

In the analysis of sociation processes, living humans are usually taken to be a natural precondition. To separate off this assumption using the sociology of knowledge, and study it as itself a noteworthy phenomenon, is the basic methodological operation in the analysis of the borders of the social world. In order to reach conclusions that are substantial in terms of the theory of society, it is necessary to go one step further: we must ask in what relationship the institution “this-worldly, living human being” stands to the other institutions of modernity. Put differently, what significance does the institution “this-worldly, living human being” hold

among the institutions of modern society? Among the central institutions of modernity are – and here I follow Luhmann (1965) – fundamental/human rights, such as liberty and dignity, and rights such as the property guarantee. In other words, like Luhmann I understand fundamental/human rights as institutional preconditions for functional differentiation. In this understanding, human rights are not a system of values which elaborates the general values of dignity and liberty in terms of increasing categorial abstraction. According to Luhmann (1965), fundamental rights articulate, in the language of law, institutions of modernity that either in a general way (like dignity and liberty) or in particular, specific ways (like the property guarantee) make functional differentiation possible. Proceeding from this context, we arrive at the question of whether only a this-worldly, living human being, without a generally binding reference to the beyond, can be considered eligible as the reference point of these institutions. If that question can be answered in the affirmative, then the institutions articulated in fundamental/human rights and the this-worldly human being who is living in a biological sense represent an institutional complex without which the modern form of social differentiation, functional differentiation, cannot exist. And if this interrelation proves convincing, it would yield at the very least a strong reason to draw a systematic theoretical connection between the analysis of border regimes and the analysis of social differentiation.

### **1.1. The biologically living human being: anthropological prerequisite or institutional condition of the modern, functionally differentiated society?**

Investigating the borders of the social world from the perspective of the theory of society, I build on a social theory that is oriented on Plessner – more precisely, on the concept of the “co-world” which Plessner developed within his theory of “excentric positionality” (Plessner 1975, pp. 300ff). Excentric positionality means that the relationship of excentrically structured beings with their environment has three facets. An excentric self experiences itself, and to this extent has an inner world; it distinguishes itself from the external world that it confronts; and it experiences itself as a member of the “co-world.” This co-world is a sphere of reciprocal reference between excentric beings. Because of their reciprocal reference, excentric selves reciprocally adopt each other’s positions; that is, an excentrically positional self behaves toward itself and others from others’ perspective. As a result, both self-reference and reference to others is mediated by the fact that an excentric being experiences itself as a member of a co-world (Plessner 1975, p. 304).<sup>3</sup> Plessner names as “persons” those beings which stand in this kind of relationship to others and to themselves (1975, p. 301). For the problems I discuss here, it is crucial to note that the theory of the co-world does not determine

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<sup>3</sup> On this, see also Lindemann (2008c).



from the outset who can be a member of the co-world; that is, it is not decided from the outset who belongs to the circle of persons and who or what is excluded from that circle:

The assumption of the existence of other Egos is not a projection of a man's own way of existence, in which he lives for himself, onto other things that are present to him only corporeally. That is to say, it is not an extension of the personal circle of being, but rather a narrowing and limitation of this circle of being, originally not localized and indeed actively resisting localization, to the circle of "men." (Plessner 1975, p. 301; my translation)

For Plessner, the restriction to "men" is the outcome of a process of "disenchantment by means of the culture of reason" (1975, p. 301). It is only logical that Plessner distinguishes the co-world in general, the "we-sphere," from a group or community that has been historically separated off from the we-sphere and which can say "we" to itself (Plessner 1975, p. 303). The co-world as a we-sphere *in general* is the precondition for being able to comprehend oneself as a member of a co-world with a particular position (see Plessner 1975, p. 303). This must be distinguished from the circumstance that persons comprehend themselves as members of a *particular*, historically elaborated co-world. Accordingly, a specific historical co-world is characterized by the way it specifically restricts the co-world – that is, how, in each historical case, the circle of possible persons is delimited. In this respect, the theory of the co-world opens up the possibility of enriching the analysis of the borders of the social world with a dimension from the theory of society: it leads into the question of whether societies can be distinguished according to how they delimit their particular co-world.

A particular, concrete restriction of the co-world must be regarded as a structural precondition of the process of sociation of persons, since in practical terms dealing with persons differs from dealing with nonpersons. For example, persons assume that other persons have expectations which themselves need to be expected and interpreted. This forms the basis for a mutual coordination of behavior. When dealing with nonpersons, in contrast, it is not the case that the other's expectations need to be expected and interpreted. The demarcation between persons and nonpersons thus fundamentally determines how personal sociation is carried out in practical terms, and to this extent the demarcation should be seen as an institutional structuration of the sociation process.

On the level of general social theory, Plessner's work allows only the statement that a need exists to draw a border between persons and other entities; border institutions have to be created. It is not, however, possible to say on the level of general social theory what concrete

shape this process of bordering will take. That can only be answered with reference to the specific, historical border institutions of a society.

This social-theory perspective enables us to look at the modern practice of restricting the circle of social persons through a distinction between living human being and other entity as a historically specific form of border construction. This means understanding the biologically living human being as itself a socially fashioned institution which fundamentally structures the process of sociation.

## **1.2. The “anthropological square”**

As an institution, the biologically living human being is the point of reference for conferring human rights. The anthropological features that define this human being can best be understood as a fourfold delimitation. Firstly, from what point onward is a human being sufficiently alive for the specific rights of protection embedded in fundamental/human rights to apply to him or her? Put differently, from what point onward is a human being sufficiently alive to have a right to life? This leads to the well-known problems of drawing borders at the onset of life: What is the status of an embryo, of a fetus, of a premature baby or a newborn? An analogous question arises at the end of life, the issue then being the point from which a human is no longer sufficiently alive to be a person eligible for guaranteed rights of protection. The border questions around the end of life are familiar too: From what point onward is a human being dead? These two forms of delimitation relate to transgressible borders. Something that is not yet a human person becomes one, and a human person becomes something that is no longer a human person, namely a corpse. Then there are two non-transgressible borders, characterized by two distinctions: the human/machine distinction and the human/animal distinction.

My hypothesis is that since the eighteenth century the human being has become a this-worldly natural being which is conceptualized by drawing these four borders. It is important to note that these are not unequivocally fixed ways of constructing borders but, rather, demarcations which are contested from the very outset. The anthropological square names not so much a set of rigid borders as the *dimensions* within which the borders of the human and living are drawn and disputed. The human being is understood here as a living, this-worldly being that lives from an identifiable point in time onward and for a limited period, that as a living being does not share the same level as an animal, and that is not a machine. Other distinctions become meaningless for the generally binding understanding of the human being – the distinction between human and god, for example, or between human and demon. Seen this way, the

anthropological distinction is an institution crucial to modernity, one through which are constructed the borders of the social that are binding for modern society. This understanding of the human being is a cognitive precondition for us to speak of “human being” in a general sense, including all human creatures without regard for the particularities of status or culture or any reference to a religious “beyond.” The cognitive universality of the human being proves to be closely intertwined with the normative universality that finds expression in fundamental/human rights.

## **2. Social differentiation and the border regime**

Having given a general characterization of the institution of the this-worldly, living human, I shall now turn to the question of whether there is a connection between the delimitation of “social person” from “other entity” and the mode of differentiation of the social. To offer a substantial contribution to that topic, a study will need to include a comparison of at least two forms of social differentiation and two forms of delimitation. I will therefore first ask whether there is a connection between the modern border institution of the this-worldly, living human being and the functional form of differentiation; as a cross-check I will then discuss whether stratificatory differentiation shows a comparable link with the distinction social person/other entity.

### **2.1. Functional differentiation and the modern border regime**

Luhmann identified the validity of fundamental/human rights as the decisive institutional condition for an enduring functional differentiation. In the following, I will fill out this assumption by taking the reference point of those rights – the this-worldly human being – as, likewise, a social institution, thus raising the question of how to interpret the connection between the two institutions. In order to answer that question, I will draw out the central condition for the emergence of the new, institutional character of the human being: its becoming “this-worldly.” That means on the one hand the elimination of other-worldly actors like angels and demons, and on the other a new view of the human being as a purely this-worldly, biologically living being that no longer has a soul oriented on the beyond. At present it is not yet possible to reconstruct precisely how animals and machines were excluded from the circle of potentially legitimate social actors. While we can note that this happened, further historical research is needed to work out exactly how the process took its course.

### **2.1.1. Steps in the institutionalization of the living, this-worldly human being: The human right to freedom of conscience**

The great significance of borders being drawn in terms of the anthropological square becomes apparent when we recall what the new understanding of the human being excludes from the realm of the legitimately thinkable. The generally binding understanding of the human being does not include any reference to the relationship – or the distinction – between man and God. Nor is it possible any longer to discuss the relationship or distinction between humans, angels, and demons in a generally recognized way. The anthropological understanding considered legitimate is a scientific understanding, or at least it must be developed in the framework of rational debate with science. An anthropology of this kind guarantees that the anthropological distinction can be identified with the borders of the social.

Anthropologies existed in premodern societies too, but they were not conceived of as a basis to delimit the domain of the social. The theological anthropology of the medieval and early modern period presupposed that effective social contacts with other-worldly beings were possible. To be sure, there were binding principles regulating which other-worldly beings could be contacted and with which – the devil and his associates, for example – contact must be avoided. But even these cases concern “recognized” relationships, in as much as they were recognized as being effective social relationships. When Thomas Aquinas discusses the pact with the devil, the complexity he attributes to relationships with other-worldly actors corresponds to that of a social relationship. It would be perfectly possible to reconstruct these social interactions in terms of a double contingency: the partners expect each other’s expectations, reduce contingency through mutual obligations, and thus establish a social system that transcends the borders between this world and the beyond. For the early modern period and well into the eighteenth century, it seems certain that such interactions should be viewed as interactions between legitimate actors (Neumann 2007). The danger these interactions posed to the prevailing order was judged to be extraordinarily grave, and led to extensive persecution (Behringer 2001). Once the anthropological square had gained acceptance, such relationships become practically impossible as generally recognized relationships. From the perspective of a modern understanding of the borders of the social world, the experienced existence of witches became mere belief in witches, and witch persecutions were thus reclassified as irrational.

In order to establish the institution of the this-worldly living human being as the sole legitimate social actor, reference to the beyond had to be cut back. The institution’s foundations consist of human rights, and especially freedom of religion. According to Jellinek

(1919), this fact represents a (if not *the*) decisive historical starting-point for the articulation of human rights. Freedom of religion was proclaimed initially in some of the states of the emerging USA. An early proponent was Roger Williams, who in the mid seventeenth century demanded that nobody must be oppressed on the grounds of their religion; people's coexistence within the state must be strictly separated from faith, or rather from particular forms of worship. Using state sanctions to make a faith obligatory was, he said, in breach of the principles of Christianity. Williams argued that freedom of faith included not only the various Christian tendencies, but explicitly also Jews and Muslims. It should even be permissible to believe in no other-worldly authority at all. For Williams, this implied the demand for a general freedom of conscience:

All civil states [...] are proved essentially civil, and therefore not judges, governors, or defenders of the spiritual, or Christian, state and worship. [...] [I]t is the will and command of God that, since the coming of his Son the Lord Jesus, a permission of the paganish, Jewish, Turkish, or anti-Christian consciences and worships be granted to all men in all nations and countries, and they are only to be fought against with [...] the sword of God's Spirit, the word of God. [...] [A]n enforced uniformity of religion throughout a nation or civil state confounds the civil and religious, denies the principles of Christianity and civility, and that Jesus Christ is come in the flesh. [...] [T]he permission of other consciences and worships that a state professes only can, according to God, procure a firm and lasting peace; good assurance being taken, according to the wisdom of the civil state, for uniformity of obedience from all sorts. [...] [T]rue civility and Christianity may both flourish in a state or kingdom, notwithstanding the permission of divers and contrary consciences, either of Jew or Gentile. (Williams, 2001, pp. 3-4)

Williams's justification of religious freedom reveals a dynamic inherent to Christianity, and identified as such by Plessner in 1932. In Plessner's view (1932, p. 148; my translation), "the duty to evangelize [corresponding to the fight with the word of God in Williams, GL] [...] simultaneously implies an acknowledgement of a natural community between the heathens and the Christians." In the course of time, wrote Plessner, this acknowledgement was to lose "its theological and confessional significance" and become instead a "life-root of our [i.e. the modern, GL] whole attitude of consciousness" (Plessner 1932, p. 148). Here, Plessner describes from an analytical perspective a dialectic that was already clearly visible in Williams's writings: the this-worldly recognition of all humans as humans, without regard to their faith, in fact developed out of Christianity itself. It is also significant for the problem we

are discussing that the institutionalization of religious freedom does not stand in contradiction to the fact that all the social persons involved practice one or another religion or form of worship. The key point is the relinquishing of a generally binding orientation on the beyond. Civil coexistence as such has no need of such an orientation. Once this principle has been asserted, effective intervention by other-worldly actors becomes restricted to religious subcultures. Other-worldly actors can no longer intervene in civil life in a legitimate, generally binding way.<sup>4</sup>

### **2.1.2. Steps in the institutionalization of the living, this-worldly human: The abolition of torture**

In the human being's process of becoming this-worldly, another important step is the abolition of torture.<sup>5</sup> To understand its significance, we need to recall what was actually abolished when torture was prohibited. Here, I am concerned not with torture in general but with the torture that in the Europe of the mid thirteenth century onward became a regular component initially of canon law, and later of secular law.<sup>6</sup> Pope Innocent IV's bull "Ad Exstirpanda" introduced torture as a legitimate resource in the trials of heretics (Fried 1985, p. 389). It was subsequently carried over into the secular law of western and central Europe, with the exception of England. There were several reasons for this great spread of torture: on the one hand the law of proof, and on the other an understanding of the relationship between body and free will that was characteristic of the medieval and early modern period.

For crimes punishable by death, the law of proof made it very difficult to convict solely on the basis of circumstantial evidence, always requiring witness testimony and/or a confession in addition. In his history of torture, John Langbein summarizes this law of proof as follows:

First, the court could convict and condemn an accused upon the testimony of two eyewitnesses to the gravamen of the crime. Second, if there were not two eyewitnesses, the court could convict and condemn the accused only upon the basis of

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<sup>4</sup> This assumption is supported by the fact that it was Massachusetts, ruled by Puritans in an almost theocratic style, that saw the greatest occurrence of witches. In 1692, what were probably the most extensive witch persecutions of the USA took place in Salem, Massachusetts. Norton (2002) points out that the witch persecution was associated with the fact that in the life-world of those involved, direct intervention by other-worldly actors was regarded as a realistic possibility. The problems resulting from that possibility were regulated by law. According to the 94<sup>th</sup> liberty in the "Body of Liberties of the Massachusetts Colony in New England," blasphemy, worship of another god, and witchcraft are punishable by death (see Kurland and Lerner 1996, p. 46). The implementation of freedom of religion and conscience, and with it the end of theocratic rule, meant that direct intervention by other-worldly actors was no longer considered possible in a generally binding sense. This does not mean that religious rationales within legal discourse were discredited all at once. There is an important difference between the justification for a legal norm referring to the beyond and the assumption that contact with other-worldly actors is itself subject to legal norms.

<sup>5</sup> On the link between the debate on human rights and the abolition of torture, see also Hunt (2007)..

<sup>6</sup> For an anthropological analysis of torture, see Scarry (1985).

his own confession. Third, circumstantial evidence, so-called *indicia*, was not an adequate basis for conviction and condemnation, no matter how compelling.

(Langbein 1977, p. 4)

The great significance of the confession arose from the doubts attaching to circumstantial evidence. This is the crucial difference between continental European and English law. Whereas English law permitted convictions on the basis of circumstantial evidence even without a confession or eyewitness testimony, in canon law and the criminal law that was emerging in the thirteenth century in the continental European lands<sup>7</sup> it was essential for the crime to have been observed by two eyewitnesses. If there were no eyewitnesses, or if only one person had witnessed the crime, judges usually required a confession as a necessary precondition to convict.

If what was in fact a more rigorous law of proof in continental Europe ultimately favored the introduction of torture, this has its grounds not least in the doctrine of free will developed during the twelfth century. In his analysis of the trial of the Knights Templar, Fried asks why the torture-induced confessions of the Templars, accused of heresy, were evaluated as true statements. He concludes that the belief in the truth of confessions obtained under torture rested on a particular conception of the freedom of the will. Fried refers to Bacon and Thomas Aquinas to summarize the doctrine of free will developed within scholasticism:

Roger Bacon and Thomas Aquinas explicitly accept the canonists' doctrine of the *vir constans*, thus demonstrating the unity of the scholastic theory of will across all disciplines around 1300. In respect to the use of torture, it can be encapsulated in the principle that no torture can violate an individual's free will. What the will wills under external coercion may not be *sponte* or *spontanea voluntate*, but it always remains *voluntarie*. When coercion ceases, what was confessed *voluntarie* under torture will become, through repetition or confirmation, *spontanea voluntas* without torture. (Fried 1985, pp. 422f)

The distinction addressed here between *voluntarie* and *spontanea voluntas* refers to the legal practice stipulating that a confession was only valid if made without the threat of torture. An offender could be subjected to torture in the preliminary proceedings. If he made a confession, then although this was willingly it could not be attributed to spontaneous free will. That was only possible if the offender repeated the confession without having his hands tied and being shown the instruments of torture. If, however, he retracted his confession, the confession

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<sup>7</sup> On the development of punishment in the medieval and early modern period, see Achter (1951).

previously made under torture did at least give rise to grave suspicion – and to pursue that suspicion, new preliminary proceedings, with new torture, were fully justifiable. It was, thus, certainly recognized that torture involved coercion, but not that this coercion could touch the innermost core of freedom of will. The higher existence, the soul, could not be coerced by the lower existence, the body. Applying torture served merely to bring the offenders to a state in which resistance to the truth was so seriously weakened that they spoke the truth voluntarily: “freedom and torture are siblings of the approaching western culture of rationality, which asks after truth” (Fried 1985, p. 424; cf. Schmöckel 2000, pp 237ff). Regulations of torture (for example in the *Constitutio Criminalis Bambergensis* criminal code of 1507, or in Emperor Charles V’s *Constitutio Criminalis Carolina*) should not be seen as implying fundamental doubts about the truth of statements obtained by torture. Rather, they are attempts to prevent a particular resource – one that was in principle very well adapted to bringing the truth to light – from being brought into disrepute by improper use.<sup>8</sup>

The practice of torture was based on the assumption of a free will oriented on the beyond. This hints at an egalitarian understanding of personal subjects, for everyone who was subjected to torture was recognized as free in the same manner. In criminal law, which emerged in the thirteenth century with torture as one of its essential components, no distinction was made between the unfree and the free, i.e. the recipients of royal grants of freedom (see Hirsch 1958, p. 234). In secular criminal law and in the practice of torture, a form of equality was thus asserted that in Christian Europe had previously only existed as equality before God.

Once doubt was cast on whether applying torture could really achieve truth – whether it would not rather compel a confession that was random and therefore without value for the court’s search for truth – the abolition of torture ultimately had to follow. I wish to touch only briefly here on the debate among legal historians as to whether the abolition of torture should be seen as a development within legal history, primarily based on a modification of the law of proof (Langbein 1977, p. 48), or rather as a political and societal development (Schmöckel 2000). The first German land actually to abolish torture was Prussia under Frederick II. The process took several years (Schmöckel 2000), and was initiated by the rejection of torture by the newly crowned King himself. The abolition of torture through a cabinet order of 1740 led, however, to problems of evidence in Prussian criminal proceedings: practitioners of criminal

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<sup>8</sup> On this matter, see also the debates among jurists such as Damhouder (1565) or Carpzov (Falk, Ulrich 2001. "Zur Folter im deutschen Strafprozeß. Das Regelungsmodell von Benedict Carpzov." in *Forum historiae juris* - [www.rewi.hu-berlin.de/zitat0106falk-folter.htm](http://www.rewi.hu-berlin.de/zitat0106falk-folter.htm)).



law believed that one could not legitimately alter the law of proof and dispense with confessions. Only with a further cabinet order, in 1754, did Frederick unambiguously open up the possibility of convicting on the basis of circumstantial evidence. This sequence is not easy to reconcile with the assumption that changes to the law of proof preceded the abolition of torture. In Prussia, which took a pioneering role in ending the practice of torture, events took the opposite course: they began with an extensive restriction of torture, while the changes to the law of proof (that is, the recognition of circumstantial evidence) unfolded as a solution to the problems consequent upon this. This shows that the abolition of torture cannot be regarded as a purely internal development within law; it is more reasonable to assume a complex political and societal process (Schmöckel 2000).

Irrespective of which of these historical developments led to the de facto abolition of torture, both interpretations agree that the process of abolishing torture took into account the fundamental doubts regarding the truth of statements made under torture. This implied a decisive turn in the understanding of freedom, now attributed solely to human beings. The radical late medieval and early modern conception of freedom had made it impossible to conceive of the innermost core of free will as being coerced through assault on the body. I conclude from this, conversely, that the abolition of torture meant the possibility of such coercion was now considered the only realistic interpretation of torture. The abolition of torture embodied the subject of freedom of will, and the assault on the body has since then been understood as an assault on the subject – because only then can the body be viewed as a “resource against the conscience” (Bayle, cited in Schmöckel 2000, p. 162). The abolition or prohibition of torture should thus be regarded as a central element of the institutionalization of the free, this-worldly living human being.

The convergence of religious freedom and the prohibition of torture consists in the way that they underwrite a new understanding of the human being within the state. While freedom of conscience excludes the other-worldly actors that had previously been recognized, the prohibition of torture documents a practically effective notion of the human being that understands his/her soul – or free will – as being embodied. The human being of modernity is a bodily being which does not, of itself, include a generally binding reference to the beyond: its subjecthood becomes a phenomenon belonging to this world, residing in the body. The institutional and normative guarantees are conditions for the human being to be cognitively and generally understood as a this-worldly human being in the terms of the anthropological square. Every living human, and every one in the same manner, is a this-worldly, embodied person without a generally binding reference to the beyond. The cognitive reference to this

world alone that is expressed in the modern institution “human being” requires normative guarantees which, in turn, are dependent on a cognitively intelligible reference. It is only in the interplay of cognitive and normative aspects of the distinction between living human and other entities that the human being becomes the institutionalized element of the social. From this perspective, religions can only be understood as cultural phenomena generated by human beings (König 2005); generally recognized and legitimate other-worldly actors lose significance, being increasingly excluded from the modern understanding of the social. The modern human being becomes a purely this-worldly being, without a soul that would authenticate reference to the beyond. This normative-cognitive way of drawing the borders of the social constitutes the border institution of modernity. In order to accentuate its dual character as normative and cognitive, I will refer to this border institution as the institutional complex of the human being/human rights. In the following section it will become clear that the term human being/fundamental rights/human rights would be more precise, but for convenience I will use the shorter term.

### **2.1.3. Functional differentiation and the modern border regime**

The institutional complex human being/human rights enables a mobilization of the elements of the social that leads to societal power developing in a very new way. The crucial feature of this border institution is that membership of the circle of social persons is determined by means of a universal criterion. All living humans are to be recognized as social persons. As a result, all living humans, and only they, become elements of the social in the same manner; they can be mobilized in the same manner for any given interaction. Looking only at the normative aspect, Luhmann (1965) set this out in his analysis of “fundamental rights as an institution.” Fundamental rights guarantee that the the political system in particular, cannot appropriate the human being as a whole. As a result, the human being is set in distinction to the individual functional systems, and can develop his/her individual personality and participate in all functional systems. Luhmann (1965, pp. 192 f) describes this as a mutual transcendence of human and system.

The institution of fundamental rights, enables functional differentiation in a range of ways. The general rights to freedom and dignity guarantee the human being, in a general manner, a space which enables him or her to participate in different communicative contexts as a free human being representing him- or herself as an individual person. In a functional respect, we must distinguish from these general rights specific rights, which should rather be understood as institutional conditions for individual functional domains. Particularly prominent here is,

for example, the right to property, which institutionally safeguards the differentiation of the functional domain of the economy (Luhmann 1965: ch. 6).

The assumption of the institutional character of fundamental rights gains in clarity if we understand the reference point of these rights, the this-worldly living human being, as itself an institution. My analysis of freedom of religion, torture, and the prohibition of torture shows that treating the human being as a purely this-worldly being is by no means self-evident. Only with the rise of fundamental/human rights was the human being made this-worldly, as the subject of those rights. As we see, Luhmann's statement that fundamental rights are the primary institution of modernity is incomplete. Instead, the implementation of the anthropological distinction, normatively underpinned by human rights, as a social border institution is what makes up the institutional complex that should be considered the precondition for the lasting reproduction of a functionally differentiated modernity. This institutional complex guarantees that the human being be freed from the ties of religious transcendence, estate, and the absolutist state, thus generating the basic condition for functional differentiation, namely the this-worldly human being to whom any communication can universally be addressed. The increasing differentiation of functional interactions calls upon the human being as a human being, one who expects – from a reduced, functionally specific perspective, but still universally – to have contacts with all human beings.

This context indicates why it makes sense to use the term “fundamental/human rights” as opposed to speaking only of fundamental rights or human rights. Fundamental rights safeguard the individual from being appropriated by the political system. The individual subject of these rights is addressed as the living human being, and as such is claimed to be an element of the universal community of living humans who can communicate worldwide according to the different logics of particular functional realms. As this universality indicates, it is a precondition of functional differentiation that human beings should be safeguarded not only from being appropriated by the political system but also from being appropriated by any other functional realm. It is to accentuate this double aspect that I use the term “fundamental/human rights.”

If on the level of the theory of society we have found that the biologically living human should be regarded as an element of sociation, this must be reconstructed at the level of social theory for material and, especially, empirical analyses. By this I mean the following: if it is a historically contingent phenomenon that biologically living humans are the vehicles for the sociation process, then the circumstance “biologically living human being” itself must be

understood as an emergent phenomenon. In terms of social theory, an order's emergence can be thought of as stemming from either a dyadic or a triadic constellation.<sup>9</sup> Regardless which of these conceptions of sociality one prefers, the theoretical perspective of border regimes as initiated by Plessner obliges us to distinguish two aspects of Ego and Alter (or Ego, Alter, and Tertius), to the extent that they are human beings. On the one hand, these are practically effective operators within whose relationship the emergent phenomenon arises, and on the other Ego-Alter(-Tertius) – hereafter E-A(-T) – are, as “human beings,” themselves institutionalized circumstances; that is, the circumstance that E-A(-T) recognize each other as humans is an emergent phenomenon. The two aspects interlock, for E-A(-T) can only be practically effective operators to the extent that they have validity for each other as human beings. If they do not, they will drop out of the circle of actors to be recognized.

From this point of view, performing interactions or acts of communication always includes a double reference of the actors to each another. On the one hand they refer to each other as elements of society; on the other, they refer to each other in line with the functional reduction perspective of a subsystem. To the extent that E-A(-T) behave towards themselves and others as human beings, they refer to each other as elements of society, which is functionally differentiated. To the extent that E-A(-T) refer to themselves and each other in line with the requirements of a functional reduction perspective, they actualize the relevances of that perspective and act in, for example, a political, an economic or a scientific way. Since the reference of E-A(-T) to each other as human beings inscribes the reference to functionally differentiated society into every interaction or communication, E-A(-T) as humans constitute the primary element of a society inasmuch as that society is functionally differentiated. However, this also implies that E-A(-T) as humans never constitute the elements of individual functional domains, for the reduction perspectives of those domains impose specified relevances onto acts of communication, relevances that rule out reference to the human being as a whole.

Structurally, this social-theory conception follows the second a priori of social life as formulated by Simmel (1908), and it allows us to integrate Simmel's thinking into the theory of the co-world. Simmel conceives of the relationship between the individual and sociation in such a way that the individual gradually becomes an element of sociation, yet never

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<sup>9</sup> Examples of a dyadic conceptualization of the emergence of order might include the theorem of double contingency as the basis of the emergence of social systems (Luhmann 1984) or Weber's (1921-22) concept of the social relationship as a precondition for social formations such as the “state” to come about. Triadic conceptions can be found in Simmel (1908). For a detailed discussion of dyadic and triadic conceptions of sociality, see Lindemann (2009: ch. 6).

completely dissolves into the sociation process. Even if it were unreservedly mobilized for that process, the individual – as the realization of relating self-to-self and self-to-others – would always remain outside.

Plessner distinguished between the co-world in general, and particular historically formed co-worlds. In the framework of the co-world in general, a person's reference to others and to itself are always thought of as mediated via others. This is an important divergence from Simmel, who sees the Ego's self-reference as the self-reference of an individual Ego to itself. Even so, a structural similarity remains, for Simmel's assumption that individuals as a general rule remain outside of sociation shows a structural correspondence with the distinction between the co-world in general and the fact that a person conceives of itself as a member of a historically determined co-world.

One advantage of Simmel's conception is that, alongside the distinction discussed above, it introduces an empirically relevant set of differentiations. The issue here is not only to point out the fundamental "outside" quality of the sociation process, but also to register the nature of involvement in sociation processes in an empirical and gradual way. From this point of view, 1) the person is always outside society, as a realization of the sociation process, and 2) the person is almost completely part of society to the extent that she/he is recognized as a human being, and as such she/he becomes always addressable as a potential readiness for further acts of communication. This potential is only partially required for the formation of individual functional contexts, and thus 3) the person is only partially sociated into functional subsystems. As a whole human being, E-A(-T) remain outside the reduction perspective of a subsystem, and always remain at others' disposal as universally available opportunities for further acts of communication. As a whole human being, a person can be addressed in any act of communication and can interact with any other human or humans on any topic. This means a specific openness is achieved which enables ever new subsystems to become ever more differentiated.<sup>10</sup>

Thus, the functionally differentiated society displays a characteristic double reference to the human being. He/she is required as a human being, that is, as a potential capable of mobilization, and as an addressee for functionally specific acts of communication with their specified relevances. This can probably be usefully thought alongside the distinction between humans as "raw" and as "agentic" actors made by Meyer and Jepperson (2000). The human as

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<sup>10</sup> Luhmann (1997b) himself has hinted at the connection between modern border regimes and functional differentiation in the sense of a functional context – in his essay on self-organization and microdiversity. Microdiversity means making available elements that together, in their self-organized interaction, add up to a functionally differentiated order. The elements referred to here are differently gifted individual people.

an interactional potential capable of mobilization for a variety of objectives would correspond to the raw, unreflected actor posited by Meyer and Jepperson; the rationalized, agent-like actor would correspond to the human acting under the conditions of a subsystem-specific rationality. If this holds, one would have to go beyond Meyer and Jepperson to evaluate the distinction between “raw” and “agentic” actors as itself a specifically modern phenomenon.

When claiming the biologically living human as an element of sociation, based on the ideas of Plessner, one must always remember that this is not a natural prerequisite; the this-worldly, living human individual is an institution. In the course of their sociation, persons represent themselves for each other as meaningful elements of the social world, by behaving toward each other as biologically living individuals. That is, for the purposes of a generally valid social interaction, actors assume that their social vis-à-vis is a human being like all others. One body embodies one human being, which like all others has no generally binding contacts with the beyond and which is not a transfigured being (animal, other human being, god, and so on).

The cognitive-normative delimitation of the human being is the functional condition for functional differentiation; conversely, this form of differentiation of the social stabilizes the modern border regime. The border institution human being/human rights and functional differentiation are, it seems so far, mutually necessary conditions.

## **2.2. The changing, situative, and locally applicable borders of stratificatory differentiation**

The functionally differentiated society is characterized by a universalist border institution: all living humans are to be recognized as social persons. Now, it might seem obvious to consider the ways premodern societies draw their borders likewise as border institutions with a universal claim to validity, with the sole difference that the circle of entities belonging to those societies is drawn differently. However, this does not appear to be the case. The differentiation of society according to status positions is accompanied by a qualitatively different form of border delimitation. Decisions on who will be awarded the status of a social person to be taken into account, and which entities fall outside that circle, are made case by case. The higher an entity stands in the hierarchy, the more probable is its sustained membership in the circle of social persons. The lower an entity stands in the hierarchy, the more possible is its sporadic exclusion from the circle of personal actors or a sporadic inclusion in this circle. In other words, the framework of this border regime does not establish translocally valid borders oriented on a universal criterion. The crucial aspect is that the recognition of actor status takes place within the hierarchy, from higher to lower. This is why

it seems possible, in this case, to speak of the ascription of actor status. Such ascription can happen or not, and it can be rescinded. It also appears to be the case that ascriptions may only be made from an authorized status position.

I would like to look more closely at this form of border delimitation, using the example of the phenomenon of animals being included into regulated criminal proceedings. Between the thirteenth and the early eighteenth century, in the lands of the former western and eastern Frankish empire, animals were convicted in secular proceedings as persons, with criminal capacity and having committed a criminal act out of malice. The trials did not differ from those of human persons with criminal capacity. From the mid fifteenth until the mid sixteenth century, in addition, animals were arraigned and convicted in canonical trials.

There is broad consensus in the legal history literature on how to classify animal trials in the period between the second half of the thirteenth and the eighteenth century. A distinction is generally made between secular criminal trials, canonical excommunications of animals, and killings of animals in legal rituals. This distinction was, however, not clearly formulated and applied until Berkenhoff (1937) picked up and elaborated the thinking of Amira (1891).<sup>11</sup> The studies by Evans (1906) and Berkenhoff (1937) show a particular wealth of material. To give an impression of this kind of trial, I will now present one example.

On May 9, 1595, the dog Provetie bit a child to death as it tried to snatch a piece of ham from the child's grasp. The victim's father filed a complaint against the perpetrator, which was thereupon taken into custody, but not tortured because it had made a confession. Provetie was condemned to death by hanging. Apparently one of the court's reasons for this penalty was general prevention, because it was decided that the perpetrator must hang a few extra days in order to discourage other miscreants from such deeds. Any assets of the accused dog were to be confiscated by the court (Berkenhoff 1937, p. 129).

Such prosecutions were pursued especially against cattle, pigs, horses, and dogs. All the offenses for which animals were prosecuted, without exception, attracted the death penalty; they involved manslaughter. How the trials were carried out did not differ from criminal trials against humans (see Berkenhoff 1937, pp. 45f).

Whereas in the secular criminal cases it is unambiguously clear that the accused animals were considered subjects with criminal capacity in the same sense as humans, the situation in canonical trials was more complicated. The theological philosophical doctrine of freedom of will saw this as a privilege of the human being. In canonical law, animals were not recognized

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<sup>11</sup> See also more recent work by Dinzelbacher, Peter (2002).

as subjects with criminal capacity until well into the fifteenth century; as a result they could not be punished within canonical proceedings. From the mid fifteenth century, however, renowned theologians and church jurists argued that animals, too, could be punished with a malediction or the ban of excommunication from the Christian community (see Amira 1891, p. 571). This view persisted for around a hundred years, until the mid sixteenth century, when it became disputed and in time entirely abandoned.<sup>12</sup>

The animal actors against which canonical proceedings were instigated were not domestic animals but insects, grubs, rats, and other harmful creatures that endangered the harvest or stores. A complaint before a canonical court could, however, not be pursued until the court had first clarified the question of whether the animals had arrived of their own accord or had been sent by God as a punishment. Only if the animals had come of their own accord could a case be made and a penalty imposed.<sup>13</sup> The harmful animals were sentenced to leave the region. If they failed to obey, the canonical punishment would be a malediction and in some cases excommunication.<sup>14</sup>

Although the canonical trials were not immediately and directly addressed to animals, because the possible intervention of a higher power had first to be taken into account, the conduct of the cases clearly shows that here too animals were regarded as responsible subjects. They were summoned to appear before the court, like the prosecutors they were given a representative in court, negotiations were held with them, the threatened punishment was communicated to them, and so on (see Berkenhoff 1937, pp. 90ff).

From as early as the sixteenth century, canonical proceedings against animals seem to have become less frequent. In the seventeenth century the documents of secular animal trials begin to thin out, and from the eighteenth century on we find only isolated cases.

Looking at this shift in the law more carefully, we cannot account for it with a simple dichotomy between the Middle Ages and modernity. Oexle (1991) has pointed out that the Middle Ages gave rise to institutions that formed the basis of modern developments, among which were “willed agreements based on consensus and contract” (Oexle 1991, p. 62, my translation; cf. Ebel 1953, 1966). With reference to criminal law, Achter (1951) discovered that important features of the modern understanding of criminality in the areas of the eastern and western Frankish realm had already emerged in the twelfth and thirteenth century. These

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<sup>12</sup> In practice, however, curses seem to have been imposed on harmful animals much earlier than the fifteenth century. See Berkenhoff (1937, pp. 84ff) and Evans (1906, pp. 25ff).

<sup>13</sup> See the trials of weevils by the episcopal court in St. Jean-de-Maurienne (Evans 1906, pp. 41ff).

<sup>14</sup> See the court reports of the proceedings against fieldmice pursued in 1519 in the village of Stilfs in the Ortler Alps (Berkenhoff 1937, pp. 98ff).



included, for example, the discontinuation of trial by ordeal, a change in the judge's status in proceedings, and the de facto recognition of the free will which caused a wicked deed. Until the early twelfth century, the judge had the status of an umpire who mediated between the parties; his task was not to link the deed with the perpetrator, but to link the impact of the deed with a claim to compensation. From the twelfth century, in contrast, the law was no longer concerned with compensation alone, but with ascertaining the subjective guilt of the perpetrator. The precondition for recognizing culpable responsibility was that the judge no longer only mediated between the two parties, but also recognized the material legal truth. Only on this basis could an appropriate penalty be imposed (see Achter 1951). These changes are among the key preconditions of the move toward modernity (Lindemann 2009: ch. 3). But it is these developments, pointing the way toward modernity, that we must consider if we are to adequately understand either torture or animal punishments: the recognition of free will and of individual responsibility within secular law is both the condition for the introduction of torture into secular law<sup>15</sup> and the prerequisite for the punishment of animals (Lindemann 2009: ch. 3).

The recognition of actors as being equally gifted with free will is a modern assumption that has a tendency to threaten stratificatory differentiation. What is alien from today's perspective is the fact that the circle of those possessing free will was not established by means of a general criterion. Instead, for several centuries there was no real clarity in secular law as to which entities could be expected to possess free will. The solution to this problem lay in encapsulating it in the stratificatory system. The status of a social person could only be ascribed (or not) by the offices responsible for this in the hierarchy. Thus in individual cases animals too might be acknowledged as possessing will and, correspondingly, be legally prosecuted. In canonical trials this becomes especially clear. The canonical court had first to establish whether the animals had arrived of their own accord or whether their appearance should be viewed as a divine punishment. Only in the former case could they be subjected to trial. Although we have no documents to this effect, it can be presumed that secular courts pursued similar considerations. If they had not, more documents would exist: considering the close proximity in which humans and domestic animals lived, we may suppose that more people were killed by animals than there are recorded prosecutions.

Through the example of this development in law, we can trace a structure that Schwinn (1998) observed for the beginnings of functional differentiation in the Middle Ages. He notes that while medieval society can be partly understood in terms of stratificatory differentiation,

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<sup>15</sup> See the discussion above on the law of proof.

it also displayed elements of functional differentiation, and without these we cannot grasp what was specific about European pre-modernity. For this reason, says Schwinn, it is not tenable simply to speak of a succession of stratificatory, then functional differentiation. On the other hand, Schwinn also observes that functional differentiation in European pre-modernity was not able to assert itself as such but was repeatedly tied back into the order of estates (Schwinn 2007: 28). In my view, a similar process applies to the secular recognition of a free individual will attributed to all actors in the same manner. This move could have had considerable explosive force for the order of estates, but was integrated back into that order in two ways. Firstly, no universal criterion laid down who should be recognized as having this free will; rather, the recognition of free will was based on the decision of the authorities responsible within the hierarchy. Secondly, equality before the judge and thus equality before torture was relativized by the fact that a status-based criterion could permit exemption: local power relations determined whether the free nobility was also subject to the procedure (see Hirsch [1922] 1958, p. 234). Only in the course of the eighteenth century was it established with increasing certainty that only humans have free will, but that, at least in principle, free will was recognized in all humans and that all humans should be subject to legal procedures in the same manner.

Taken as a whole, then, the distinctive features of the medieval as opposed to the modern form of drawing borders relate to two factors. On the one hand, not only humans but also animals were treated as social persons, and on the other there seems to have been no recourse in this procedure to a general criterion – valid across time and space – for recognition as a social person. In each particular case it was in the gift of the relevant authorities within the hierarchy to decide who was a social person. This constituted a delimitation of the social world which was constantly under local renegotiation and thus led to border demarcations that were temporally and spatially restricted. The border was drawn from the perspective of the apex of the hierarchy, in other words from the center of the hierarchically ordered world.

If we consider this circumstance from the perspective of social theory – that is, in terms of the graded involvement of persons in society that I describe above – the following emerges. Social persons are, firstly, fundamentally outside of society in the sense of the realization of the sociation process; secondly, they recognize themselves as situated within a local hierarchical order and are to this extent fully integrated into society. The hierarchy is so significant that some of those occupying the upper ranks hold the legitimate power to decide on the status as persons of entities lower down the hierarchy. In ideal type terms, there is no double reference to the person inasmuch as that person is part of society. As a part of society,

the person is fully integrated into the order of estates and can also be fully excluded from it through a hierarchically legitimized decision. In contrast, the border institutions of modernity – again seen as an ideal type – display a double reference to the person as a part of society: as a part of society, it is on the one hand a human being in general, and on the other reduced to partial participation in line with functionally specific perspectives.

### ***3. The historical shadow cast by functional differentiation***

If we take seriously the normative aspect of the inherent connection between functional differentiation and the institutional complex human being/human rights, it also becomes necessary to examine the processes of exclusion and oppression that accompanied the move toward modernity, processes that Mann (2005) has called the “dark side of democracy.” Mann’s line of argument interests me here not so much as a theory of ethnic cleansing but with the question of how the connection he postulates between democratization and mass murder should be regarded in terms of the theory of society. These phenomena cannot be understood as relics of pre-modernity; they are, rather, genuinely modern phenomena, indications of two possible variations on the modern border regime. In one variation, the normative aspect of the institutional complex human being/human rights can be largely decoupled; in the other, a norm can be established that is oriented on an entirety of state and society. In the former case, the normative aspect as a whole is split off, isolating the cognitive aspect, namely the understanding of the human in terms of the anthropological square: the human being is understood as a solely natural being. In the latter case, a higher-level normative orientation is established that takes priority over human rights, which refer to the individual. What both modifications share is that only living human beings are regarded as social persons – though this does not exclude the possibility that some of them can be attacked or even exterminated.

To grasp the significance of such modifications of the border institution, we must recall the specific role played in the establishment of functional differentiation by the normative aspect of the institution human being/human rights. Fundamental rights “inhibit the structurally conditioned expansionary tendencies of the political system in the interest of maintaining a differentiated order of communication which, in its particular spheres, is oriented on specific functional problems of society” (Luhmann 1965, p. 197; my translation). This remark points up a danger inherent in the process of differentiation: “the danger of de-differentiation, of the politicization of the entirety of communication, arises when the political system is societally emancipated and autonomized” (Luhmann 1965, p. 24; my translation). That is, functional differentiation cannot be maintained in the long term without a normative-institutional

support, since this is what resolves the double reference to the human being. In that double reference, the human being is addressed both as a whole human being and also from a specific perspective of functional reduction. A structural expansion of the political system thus means that the meaningful orientation of interactions on the reduction perspective of the political domain extends ever further. In the most extreme case, every communication or interaction is politicized and the human being is completely appropriated by the political system. By spelling out this possibility, Luhmann anticipates what Colomy (1990), discussing the USSR, calls “blunted differentiation.” To be sure, a perspective drawing on Luhmann’s points will focus less on interest-based conflicts between collective and corporative actors, the importance of which is highlighted by Schimank (1996, p. 235), and more on reconstructing the specific rationale which facilitates the expansion of the political domain.

As long as the normative institutions referring to the individual human being remain valid, a pre-political component is inscribed into the construction of political affiliation. It is not only the state citizen that is at stake, but the this-worldly human being, which as such is freed to undertake any communication. The politicization of belonging is indicated by this pre-political element being eliminated and the political system’s defining who, in what way, is potentially an element of society and who is excluded as not belonging, or in some cases even as an enemy to be annihilated. The politically motivated mass murders described by Mann (at least those which occurred until around 1960) can, in my view, be regarded as part of an expansion of the political system that is temporary or becomes permanent. Through this politicization, either the normative aspect of the institutional complex human being/human rights is split off or else a norm referring to a state whole is established. In the case of the decoupling of the normative aspect, the institution “human being as a this-worldly, living being” becomes the central reference point of sociation. In both cases, we see an orientation on a overarching political goal, to which the individual human being is subordinated. The individual merges into a whole that is accorded absolute priority.

That these cleansing processes are processes of drawing political borders within the circle of legitimate actors is shown by their concern with the ordering of the political system, specifically with the answer to the question of who belongs to “we, the people” (Mann 2005, p. 55). Mann distinguishes two possibilities: the liberal and the organic response. The liberal response intends “the people” in the sense of *demos*, by which Mann understands the people differentiated into classes. In contrast, the organic response to the question of who belongs to “we, the people” is based on an ethnic distinction. In line with these different concepts of “we, the people,” Mann distinguishes between two ways of creating a homogenous nation-state.

The liberal version aims for a cultural homogeneity that is crucially associated with the standardization of language (Mann 2005, pp. 57ff). Local languages are actively suppressed in favor of supraregional languages. Members of oppressed minorities do, however, have the opportunity to see themselves as human individuals independently of their culture, and this means they can adapt to the new situation. Here, homogenization refers to the political creation of large spaces of communication, enabling a more comprehensive mobilization of people for larger, functionally differentiated communicative interrelations. The organic understanding of the nation-state, the people as *ethnos*, is different. If it gains ground, cleansing can become murderous, because implementing ethnic homogenization makes it necessary to drive out or destroy members of other ethnic groups (Mann 2005, pp. 61ff). The individual human being is wholly identified with his or her membership of the other ethnic group. Destructive cleansing is directed not at the culture but at human individuals themselves.

To contextualize Mann's findings in terms of the theory of society, it must be added that murderous cleansing operations seem to occur not in stable democracies, but only in emerging ones (Mann 2005, p. 4).<sup>16</sup> This corresponds in the theory of society to the insight that functional differentiation is not achieved at one stroke: initially, certain domains – perhaps the economic or the political one – become more strongly differentiated. Only gradually, as further domains differentiate in the same way, does a stable, institutionally supported balance emerge with the process of sociation (Luhmann 1965, pp. 199f). Conversely, I conclude from this that if one functional subsystem becomes dominant, continued development toward a functionally differentiated society is, at least temporarily and sometimes locally, blocked.

This can be seen in the example of the former USSR. The USSR's evolution indicates a sustained blocking of societal development due to the dominance of politics. The long-term political objective was not the implementation of an ethnic nationalism but the production of a new human being: not only to politically homogenize “we, the people,” but to actually create them anew. This aspect is largely neglected by Mann, yet Koenen's (1999) synthesis of events in the former USSR shows how important it actually is. Koenen's choice of title reflects a kinship with Mann's later thesis: “Utopia of cleansing – What was communism?” (Koenen 1999). His historical reconstruction portrays Russia as a society that, as the rule of the Tsars ended, found itself in transition toward a functionally differentiated society. That transition

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<sup>16</sup> This is especially true for the settler democracies in colonies in the process of gaining independence: “The more settlers controlled colonial institutions, the more murderous the cleansing. [...] It is the most direct relationship I have found between democratic regimes and mass murder” (Mann 2005, p. 4).

was halted by the rise of the Bolsheviks and the subsequent almost total politicization of all domains of interaction and communication.<sup>17</sup> The communist experiment aimed for a revolutionary redesign of society as a whole (Koenen 1999, pp. 400ff). When the plans for social and, especially, economic development foundered, in practice the response was repeated murderous purges of society, the state, and the dominant Communist Party. Koenen summarizes the findings of his detailed study as follows: “In all cases, the result was a reduction in the degree of the division of labor in sociation and differentiation already achieved, and thus not a ‘progression’ but a deep ‘regression’” (Koenen 1999, p. 404).

In the framework of the social theory I am proposing here, this regression can be pinpointed quite precisely. It means the abandonment of the double reference to the human being as a whole and as partially involved in functionally specific reductions, in favor of a total absorption into the perspective of the political system. The human being is fully integrated into a political development perspective in which the key issue is the creation of the new human being; it becomes impossible for the human being as such to be viewed as pre-political and thus as a being that can be released to pursue any possible type of social communication. As a result, the institutional condition of functional differentiation is demolished.

### ***Summary and conclusions***

The theoretical perspective of social differentiation and that of the analysis of the borders of the social world have hitherto remained unconnected and unmediated. In order to bring them into dialogue, I have worked from Plessner’s theory of the co-world to show how the analysis of the borders of the social can contribute to the theory of society. The question is whether societies can be distinguished by the way in which the circle of social persons is closed in the course of the sociation process. In a second step, I am concerned to know whether there is an inherent connection between social border regimes and the forms of societies’ differentiation; following this idea I argue that the border regimes of stratificatory and functionally differentiated societies have a different structure.

For the stratified societies of pre-modern continental Europe, I traced a border regime that did not function by referring to a universal criterion. Instead, the circle of social persons seems to have been established in a locally and temporally restricted way. The critical issue was not who belonged in general terms, but who, in a given situation, was hierarchically empowered

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<sup>17</sup> On this issue, see also the study by Figes (2007) of the politicization of private life, which was to be achieved by spies and state surveillance.

to decide whether or not someone was a social person and who or what was excluded from that circle.

The border regime specific to a modern, functionally differentiated society is based on the establishment of the cognitive-normative institutional complex human being/human rights, which consists of two elements: fundamental/human rights, and the reference point of these rights, namely the this-worldly, biologically living human being. In the context of this institutional complex, generally binding borders of the social are set down according to a universally valid criterion. At the same time, the institutional complex is a precondition for functional differentiation. To be precise, there is mutual conditionality between the institution human being/human rights and functional differentiation: the institution human being/human rights is the practical precondition for functional differentiation to be possible, and only with the implementation of functional differentiation does the institution human being/human rights become a societally necessary institution.

Especially in the initial phases of functional differentiation, the problem of societal regression arises, an issue that obliges us to go back to the social-theory foundations of the theory of society. In the interrelation of Ego, Alter (and Tertius), these recognize each other as this-worldly human beings who can be mobilized for any reduction perspective. To this extent, they relate to each another as elements of a functionally differentiated society. Within functional reduction perspectives, the participants refer to one another according to the particular functional relevances – in a political or economic way, for example. Here, the normative aspect of the institution human being/human rights is of special significance in relation to the political system, since human rights set limits to the political system's structural tendency to expand, thereby preventing the human being's double reference from becoming leveled and the human being's entire horizon of experience from becoming appropriated by politics. In this way, a pre-political factor – or a factor considered to be non-societal – is brought into the construction of belonging to society. This underlines the usefulness of the double term fundamental/human rights in terms of a theory of society: fundamental rights refer to the need for the political domain to be restricted, whereas human rights describe the normative aspect of the human being as a non-societal factor. The human being becomes a potential for universal communication. For the functionally differentiated society to be structurally reproduced, such a human being must be safeguarded from being appropriated by any one functional domain.

A societal regression has occurred when the restraint on the expansionary tendency of the political system collapses. In this case, the human being as a whole is appropriated by political relevances, with the consequence that decisions about belonging are made according to political criteria. In this case, the institutional complex human being/human rights disintegrates, and the biological human itself is understood politically. The human is integrated within an overarching whole that takes priority. Although it is still only humans that are recognized as social persons, the sociation process here is primarily oriented on the institution of the biologically living human as understood in political terms. The criteria for belonging follow biological characteristics such as "race" or the political ideal of the new human being to be realized on earth, as in the case of the USSR. A lasting politicization of the sociation process results in the development of functional differentiation being blocked; even so, it is still reasonable to talk of a modern society in such cases, in that they recognize only living human beings as legitimate social persons. The political enemy who must be destroyed is recognized as a social person precisely in his capacity as an enemy.

I consider it an open research problem whether or not one should speak here of two paths into modernity: one oriented on the institutional complex of human being/human rights and another dominated by a single functional reduction perspective. For the theory of society, it will be important to ask whether we should expect primarily a dominance of the political, or whether perhaps a dominance of the economic might have comparable consequences for societal development.

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