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The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective

*Armin von Bogdandy and Sergio Dellavalle**

Abstract

The idea of a social order based on the spontaneous and autonomous regulation of transnational economic interaction of private actors is by no means a new phenomenon in the history of political and economic thought. This contribution analyses older conceptions of a self-referential order of private actors and outlines their insufficiencies. In light of the deficient previous proposals, the new theory of the lex mercatoria, largely based on epistemological assumptions elaborated by systems theory with reference to a broader scientific background, appears to be a path-breaking innovation. We present the theory's most relevant features and then conclude with some criticism from a public lawyer's point of view, concerning the feasibility as well as the desirability of a social order deprived of the public domain.

Keywords: Systems Theory, Lex mercatoria, Fragmentation of the Legal System, Constitutionalism, Relation between Private and Public Law

1. The Lex Mercatoria as a New Paradigm of Order

For hundreds of years, the conception of social order has been characterised by the substantial priority accorded to the dimension of public interest and, therefore, to the public law system. In this contribution, we will focus instead on those who have been committed to the elaboration of an alternative understanding. According to this strand of thinking, which has—at least for a long time—remained rather marginal, order is conceived as the spontaneous outcome of the interaction of private actors. For a long time, the attempts to concretise this commitment failed to propose a consistent conception of social order without any reliance on interest-setting, intervention and support by public law and institutions. However, in the last

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two decades a new theory of the *lex mercatoria* has been developed, owing primarily to the recent elaboration of an innovative conceptual framework.

Our analysis relies on presuppositions the demonstration of which would exceed the scope of this article.¹ First, we define ‘order’ as the condition in which social interaction is governed by rules which guarantee its peacefulness and an acceptable level in the effective performance of social functions, and which beyond this allow individuals to develop synergies or, in the most far-reaching conceptions of order, even reflexive cooperation. Second, we ascertain that different conceptions of order have been developed throughout the history of humankind, each of them typified by a specific set of fundamental concepts. We propose to define these distinct sets of fundamental concepts that serve as a basis for diverging ideas of order as ‘paradigms of order’. Third, the fundamental concepts of each ‘paradigm of order’ are always centred on two assertions, the first concerning the extent of social order and the second regarding the underlying ontological basis determining its structure. On the basis of these presuppositions, the question we discuss in this contribution is whether the theory of the *lex mercatoria* circumscribes conceptually what can be considered as an *autonomous paradigm of order*, ie a conception that differs substantially from any other notion of social order.

In order to delineate an autonomous paradigm of order, the theory of the *lex mercatoria* would have to formulate a consistent idea of social interaction regulated by rules grounded on a distinct ontological basis, ie on the self-regulating, in particular economic, transactions of private actors on a global scale. In doing this, the theory would have to reveal the rationale of a private law regime that claims to be organised exclusively according to its own principles and basic rules. Furthermore, if validity and effectiveness of the private law regime are to have global scope, the theory of the *lex mercatoria* has to demonstrate that the private law regime is not systematically related to any of the legal systems of single nation states, and does not depend on their normative performance to guarantee its social function, which consists in stabilising the normative expectations of private actors who interact beyond state borders. Finally, a sound theory of the *lex mercatoria* should provide for the self-validation of the private law regime without having to rely on public law, especially constitutional law. A theory of social order that satisfies all these conditions can claim with good reason to be

¹ For a presentation of the conceptual framework on which the theory of the ‘paradigms of order’ is based, see Armin von Bogdandy and Sergio Dellavalle, ‘Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms’ (2009) 10 *German Law Journal* 5; Armin von Bogdandy and Sergio Dellavalle, ‘Universalism and Particularism as Paradigms of International Law’, IILJ Working Paper 2008/3 (History and Theory of International Law Series); Sergio Dellavalle, *Dalla comunità particolare all’ordine universale. vol I: I paradigmi storici* (ESI, 2011).

considered a specific paradigm of order. Such a theory will be both individualistic, since it places individual interests at the centre of the system, and particularistic, because it does not aim at construing a reflexive conception of shared interests and values.

The fundamental purpose of our inquiry is not to substantiate the factual existence of the *lex mercatoria*.² Rather, we concentrate on the question whether the recently elaborated theoretical understanding of *lex mercatoria* successfully addresses all of the aforementioned conditions and, consequently, presents the spontaneous transnational legal regime of private actors as a new and self-reliant idea of social order. None of the earlier approaches consistently refrains from eventually resorting to some kind of link to public law, institutions or interests. We claim that, against this background, the recent understanding of *lex mercatoria* based on systems theory paves the way for an innovative interpretation of the normative regulation of transnational private actor interactions, raising it to an unprecedented conceptual level. The *lex mercatoria* of systems theory for the first time coherently detaches the private law regime from any axiological priority of reflexively formulated common interests and from any public institution aiming to implement these interests. Accordingly, the private law subsystem which globally regulates the interactions between non-public actors and their interests operates exclusively according to its own rationality and is not subordinated to any other legal or institutional dimension. From the operations regulated by the global private law subsystem, a general advantage can indeed arise. However, this advantage—like the effect produced by the ‘invisible hand’ of classic liberal economic theory—is a quasi-natural result and not the outcome of reflexive deliberative processes. For the comprehension of such processes, systems theory simply lacks the organon, namely the idea of a system-overarching and system-independent intersubjective rationality.

To outline the innovative character of the recent proposal, we will briefly present the previous attempts at creating a consistent theory of a global order of interacting private actors (2). Once we have established that none of these early attempts—from the ‘universal economy’ of Antiquity to the free trade doctrine—elaborates a truly autonomous paradigm of order, the second step of the analysis will concentrate on the new theory of the *lex mercatoria*, particularly its development based on systems theory and a post-unitary understanding of order (3). In the final part of the contribution we will discuss the new theory’s coherence and plausibility. We raise some critical concerns, particularly with regard to the independence of private law systems and the unrenounceable centrality of public law at least insofar as we

² References in Tilmann Röder, *Rechtsbildung im wirtschaftlichen ‘Weltverkehr’* (Klostermann, 2006) 317 ff, 330 ff.

submit that a well-regulated society cannot—and should not—be indifferent to reflexively formulated values (4).

2. *First Attempts to Formulate the Idea of a World Order of Private Interests*

If the *lex mercatoria* is to describe a legal regime which autonomously regulates global economic transactions, then the first step in building a corresponding theory is to uncover the logic behind this regime. In the history of the conception of social order, one can distinguish three different approaches which focus on the cross-border interaction of private actors: the ancient theory of ‘universal economy’, the medieval *lex mercatoria*—ie the ‘mercantile trade-law’ of the Middle Ages—and the modern concept of free trade. The first and third conceptions focus on the philosophical framework as well as on the social and economic aspects of a global order of private actors, whereas the second approach emphasises the legal dimension. Consequently, the medieval concept of *lex mercatoria* has been used by contemporary legal theory to describe a transnational legal regime of private actors.

2.1 *The Theory of Universal Economy in Antiquity*

In Greek-Roman Antiquity, trade was initially regarded with scepticism.³ Early authors saw it as a threat to economic self-sufficiency, political stability and social cohesion. Aristotle condemned commercial activity if its sole purpose was profit,⁴ although he valued some of its practical advantages.⁵ Plato was even more resolute and, in the name of the self-sufficiency of the *polis*, rejected the notion of importing non-essential goods.⁶ In the Greek *polis*, political activity was the central focus, and consequently trade and commerce were pushed to the periphery of daily civic life.⁷ In a world where the interests of the individual were seen as ancillary to the interests of the wider community, the individual pursuit of profit was regarded as a moral failure and a threat to common values. Therefore, trade was largely left to foreign merchants. This attitude also shaped the era of the Roman Republic, as indicated by Cicero’s disdain of trade in *De officiis*:

³ Douglas A Irwin, *Against the Tide* (Princeton University Press, 1996) 11 ff. From Irwin’s excellent analysis we have drawn substantial inspiration and many bibliographic suggestions.

⁴ Aristoteles, *Politics* (Harvard University Press, 1967) VII, 6, 1327a ff.

⁵ *Ibid* VII, 5, 1327a.

⁶ Plato, *Nomoi—Laws* (Harvard University Press, 1926) VIII, 847b ff.

⁷ Irwin (n 3) 12.

Trade, if it is on a small scale, is to be considered vulgar; but if wholesale and on a large scale, importing large quantities from all parts of the world and distributing to many without misrepresentation, it is not to be greatly disparaged.⁸

Several decades later, however, a fundamental change occurred. Writing about the sea and, indirectly, about seaborne trade, Plutarch adopts an indisputably positive approach to commerce:

So that it may be said, this element united and perfected our manner of living, which before was wild and unsociable, correcting it by mutual assistance, and creating community of friendship by reciprocal exchanges of one good turn for another. And as Heraclitus said, If there were no sun, it would be perpetual night; so may we say, If there were no sea, man would be the most savage and shameless of all creatures. But the sea brought the vine from India into Greece, and out of Greece transmitted the use of corn to foreign parts; from Phoenicia translated the knowledge of letters, the memorials that prevent oblivion; furnished the world with wine and fruit, and prevented the greatest part of mankind from being illiterate and void of education.⁹

A few years earlier, Seneca had already said that the wind ‘has established intercommunication among all the different nations, and has united tribes far removed from each other in place’.¹⁰ Both Plutarch and Seneca regarded the elements that favoured the exchange of goods as divine providence, as they did not threaten social interaction but instead enhanced development and growth. The goal was no longer to protect the homogeneity of a single political entity, but instead to globally realise the potentialities of the organic whole. The transitional period from the culture of self-contained city-states in Ancient Greece to the cosmopolitanism of the Hellenistic and Roman imperial world witnessed for the first time what was to be called the ‘doctrine of universal economy’.¹¹ The idea of a universal economy is characterised by four features:¹² (a) the stoic-cosmopolitan belief in the universal sociability that unites all human beings; (b) the conviction that all resources are unequally distributed; (c) the emphasis on the benefits generated by the exchange of goods through trade; and (d) the faith in divine providence to balance out the inequalities in the distribution of resources since

⁸ Marcus Tullius Cicero, *De officiis* (Harvard University Press, 1913) Book I, XLII, 151.

⁹ Plutarch, *Morals* (Little, Brown, 1878) V, ‘Whether Water or Fire Be Most Useful’.

¹⁰ Lucius Annaeus Seneca, *Naturales Quaestiones* (Heinemann, 1971) V, 18, 4.

¹¹ Irwin (n 3) 15 ff.

¹² Jacob Viner, *The Role of Providence in the Social Order* (Princeton University Press, 1976) 27 ff; Irwin (n 3) 15.

it is God's will that humans cooperate peacefully. The most accurate description is provided by Philo of Alexandria:

God has given the use of all created things to all men, not having made any one of those things which are only in part perfect, so as to have absolutely no need of anything else, in order that, being desirous to obtain that of which it has need, it may of necessity unite itself to that which is able to supply it, and that other may in its turn unite with it, and both may thus combine with one another; for thus, the two combining and mingling together, and like a lyre which is composed of dissimilar sounds, coming into one combination and symphony, must of necessity sound together, while all things giving and receiving in turn contribute to the completion and perfection of the universal world.¹³

This 'doctrine of universal economy' does not, however, discuss the legal form of a global trade regime. Moreover, it is insufficient because, of the three criteria mentioned above that characterise a coherent conception of a transnational regime of private actors—namely, the focus on individual interests as the rationale of a private law system, the overcoming of national boundaries in the framework of a global order, and the abandonment of the idea of a higher common good—only the second one is fulfilled. Indeed, the idea of the 'universal economy' frees the interaction between economic actors from subordination to the interests of individual political communities. But from a theoretical point of view, it is very difficult to find anything in this doctrine which could satisfy the other two criteria. Neither does the concept of 'universal economy' postulate the exercise of individual interests as the main objective of private actor activity, which still rather has the task of ensuring the homeostasis of the whole. Nor does the concept definitely supersede the idea of a higher common good. The appreciation of free trade is based not on a general approval of individual profiteering but on its advantageous effects on universal harmony. Thus, economic interaction represents only one tool—and not the most important one—to fully realise the potentialities of the *holon*. Therefore, a self-validating system of private law rules cannot be based on a conception like the one elaborated by the theory of 'universal economy'.

2.2 *The Lex Mercatoria of the Middle Ages*

Insofar as it supports the freedom of action of an individual actor on the global market, the theory of 'universal economy' legitimises centrifugal elements that barely fit with the notion of an organicistic society. Consequently, it was condemned by the early Church Fathers.¹⁴

¹³ Philo Judaeus, *On the Cherubim*, in *Works* (Bohn, 1854–90) XXXI, 109.

¹⁴ Irwin (n 3) 17 ff.

During the crises pervading Late Antiquity and the Early Middle Ages, individuals were encouraged to focus on the afterlife and to subordinate their secular interests to it. Over the centuries, however, this criticism lost its uncompromising edge so that during the time of the Spanish scholastic a moderately positive assessment of trade became possible.¹⁵ Trade had expanded already in the High Middle Ages so that the issue of a transnational economy as a factor for growth and welfare increasingly gained importance. The revival of trading activities and merchants' ability to self-organise is closely linked to the development of a legal system called 'lex mercatoria'. Referring to Harold Berman, Emily Kadens provides a widely shared interpretation of this system, defining it as 'a coherent, European-wide body of general commercial law, driven by merchants, and more or less universally accepted and formalized into well-known and well-established customs during the period from 1050 to 1150'.¹⁶ Current scholars find this definition incomplete.¹⁷ In general, they agree that the 'lex mercatoria' originated in the Middle Ages as a legal corpus to regulate commercial transactions, that many of its norms relied on Roman trade law, and that its fundamental aim consisted in avoiding discrimination of foreign merchants in transnational economic relations. Precisely because of this last feature, some of its provisions were deduced from the Roman *jus gentium*.¹⁸ Controversy nevertheless remains concerning the exact influence of the ancient legal doctrine,¹⁹ the comparability of medieval lex mercatoria with contemporary trade law, the uniformity of lex mercatoria in different territories of application, and its independence from political authority.²⁰ The last point is particularly interesting because it indicates that a consistent public sphere is indispensable for the establishment of a stable regime among private actors. And what applied in the Middle Ages with their weak public authorities can hardly be considered obsolete with reference to contemporary societies, characterised as they are by large and influential public administrations.

¹⁵ *Ibid*, 21.

¹⁶ Emily Kadens, 'Order within Law, Variety within Custom' (2004–2005) 5 *Chicago Journal of International Law* 39, 40; see Harold Berman, *Law and Revolution* (Harvard University Press, 1983) 333, 340 ff.

¹⁷ See the special issue of the *Chicago Journal of International Law*, 5 (2004–5).

¹⁸ Richard A Epstein, 'Reflections on the Historical Origins and Economic Structure of the Law Merchant' (2004–5) 5 *Chicago Journal of International Law* 1.

¹⁹ Charles Jr Donahue, 'Medieval and Early Modern Lex Mercatoria' (2004–5) 5 *Chicago Journal of International Law* 21.

²⁰ Kadens (n 16).

The *lex mercatoria* was essentially a *corpus juris* of practical relevance. Among the few historic texts that contain an attempt to outline not only the rules but also the philosophy behind the praxis of this legal system, the most significant is probably *Consuetudo vel Lex Mercatoria*, written by the English merchant Gerald Malynes in 1622 and then republished many times in subsequent decades.²¹ In his philosophical introduction to the legal rules of the *lex mercatoria*, Malynes first defines the activities of the trader as the ‘buying and selling of commodities, or by way of permutation of wares both at home and abroad in foreign parts’.²² He then examines when and why this social role was able to develop. Like the ancient exponents of the ‘universal economy’, Malynes identifies the originally unequal distribution of goods as the origin of the merchant’s role.²³ The trader’s main task is, indeed, to equalise the distribution of goods. Malynes ascribes the causes of the inequality to the non-homogeneous distribution of natural resources. As a second cause, he adds the processing of natural resources, thus emphasising the role of the individual contribution to the accumulation of wealth more strongly than ancient theories did. According to Malynes, the main goal of commercial activity does not appear to be the pursuit of individual success. Rather, commerce is the consequence of the natural division of labour which arises from the social nature of man, who was created by God as a ‘social creature’.²⁴ As a social creature, the human being is not able to live well on its own. When people come together to form a society, they divide the labour amongst themselves according to their abilities. Since each of them possesses certain goods in abundance while lacking others, they need a trader to create an equilibrium between abundance and scarcity.

The conceptual horizon of Malynes is largely consistent with the ancient conceptions of the ‘universal economy’: namely, economic activity remains integrated into an organic context, aiming to preserve the homeostasis of the whole. Individual priorities cannot lead to global order and remain embedded in a God-given metaphysical cosmos. This does not exclude the fact that the merchants of the Greek and Roman era, the medieval age and the early modern period might have been guided, from the point of view of their personal preferences, by egoistic interests. Yet, in all theoretical reflections elaborated—at least until the beginning of the seventeenth century—to clarify the significance of trade for social life, economic activities were embedded in a broader context of human sociality. This was thought to weaken and

²¹ Gerard Malynes, *Consuetudo, vel, Lex Mercatoria, or, the Ancient Law-Merchant* (Redmayne, 1622) 1 ff.

²² *Ibid.*, 4.

²³ *Ibid.*, 2.

²⁴ *Ibid.*

bring under control their individualistic, centrifugal and potentially subversive tendencies, because they had to adapt themselves to a general idea of the *holon*. Therefore, the approach formulated by the theorists of the early *lex mercatoria* is also conceptually far away from the self-reference of an unleashed economic rationality that characterises the contemporary idea of a spontaneous global order of economic actors.

2.3 *The Theory of Free Trade*

At the beginning of the seventeenth century, economic activities still served the organic equilibrium of the whole. By the end of the eighteenth century, however, the focus had shifted to private interests. This transformation was possible because during that time the specificity of individuality emerged as a distinct value which could not be reduced to the organic whole.

In the area of economic theory it is Adam Smith in particular who stresses this new position. His *Inquiry into the Nature and Causes of the Wealth of Nations*, first published in 1776, turned the traditional hierarchy between public and private interests upside down. He argued that it was not the economic failure of private actors but the sheer inefficiency and wastefulness of public administrations that impoverished the nations. The best guarantee for growth and prosperity, therefore, is not provided by the activities of the public sector but by ‘the uniform, constant, and uninterrupted effort of every man to better his condition ... It is this effort, protected by law and allowed by liberty to exert itself in the manner that is most advantageous, which has maintained the progress of England towards opulence and improvement in almost all former times, and which, it is to be hoped, will do so in all future times.’²⁵ For the first time the self-interest of individuals was regarded as the basis of general wealth, with self-interest being neither oriented to the priority of public goods nor aimed, as in Hobbesian contract theory, at empowering political actors.

On the basis of his redefinition of the relationship between private interest and the public dimension, Smith then developed his theory of free trade.²⁶ In order to generate maximum wealth, merchant activities must not be constrained by public restrictions like taxes or import bans.²⁷ A protectionist policy is damaging for society as a whole.²⁸ Smith introduced a new criterion to evaluate economic policy: the real value of the gross domestic product, regardless

²⁵ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Pickering, 1995 [1776]) II, III, 23, 28.

²⁶ Irwin (n 3) 75 ff.

²⁷ Smith (n 25) IV.

²⁸ *Ibid*, IV, II, 368.

of how it is earned.²⁹ Indeed, political statism can only direct the use of capital; it cannot increase its profitability.³⁰ Therefore, to take advantage of the productivity of capital as effectively as possible, it is necessary to use it for activities that promise the greatest return on investment. In Smith's view, these conditions are met if the holders of private capital are free to decide where and how to invest it.³¹ Lifting trade restrictions can enhance the positive effects generated by the international division of labour, since not all goods can be produced with the same profit in every country.³²

According to Smith, public interest cannot be determined reflexively from a social contract, nor from any other process, of intersubjective communication, which would establish fundamental theoretical, practical and social values. Therefore, in Smith's view, public interest does not—and, in order to be properly accomplished, should not—arise from self-conscious reflection. On the contrary, it is the selfish pursuit of private interests that affects society most favourably. The mechanism for the creation of public welfare takes on the form of an almost 'natural' law arising spontaneously as a result of the legally regulated interaction of individuals, particularly economic actors, who concentrate exclusively on the egoistic maximisation of their profits. In Smith's famous conception it is the 'invisible hand' that, like a kind of secular providence, leads to the best social development, beyond any rational attempt individuals might make and with better results than they can knowingly achieve.³³ The 'invisible hand' best ensures both the growth of the economies of single nation states and the overall equilibrium between nations.³⁴

Far more resolutely than his predecessors, Smith introduced a new perspective on the form, composition and possible scope of social order. In his work, he developed for the first time a conception which consistently relies on the priority of individual interests. These produce a global equilibrium independent of public norms and institutions. However, Smith's vision lacks the ultimate consequence. For Smith, indeed, the main goal of the pursuit of private interests is not private but collective welfare. Furthermore, welfare is not understood in global terms but from the perspective of the primacy of the nation. Thus, Smith points out in his 1759 *Theory of Moral Sentiments*:

²⁹ Irwin (n 3) 76.

³⁰ Smith (n 25) IV, II, 185 ff.

³¹ *Ibid*, IV, II, 190.

³² *Ibid*, IV, II, 193 ff.

³³ *Ibid*, IV, II, 190.

³⁴ *Ibid*, IV, VII, 3, 503 ff.

The love of our own country seems not to be derived from the love of mankind. The former sentiment is altogether independent of the latter, and seems sometimes even to dispose us to act inconsistently with it ... We do not love our country merely as a part of the great society of mankind: we love it for its own sake, and independently of any such consideration.³⁵

Then he projects patriotism onto the idea of economic prosperity:

France may contain, perhaps, near three times the number of inhabitants which Great Britain contains. In the great society of mankind, therefore, the prosperity of France should appear to be an object of much greater importance than that of Great Britain. The British subject, however, who, upon that account, should prefer upon all occasions the prosperity of the former to that of the latter country, would not be thought a good citizen of Great Britain.³⁶

The wealth of one's own nation thus becomes the essential criterion, and free trade eventually serves this crucial goal. To point out the supreme role of national welfare—to which the pursuit of private interests is but a subordinated means—Smith explicitly addresses 'the Wealth of *Nations*' in the title of his most famous book.

Smith's theory of free trade is inconsistent in three respects: (a) the call for free trade is eventually connected to national preferences; (b) individual interest has to yield to the needs of the nation; and (c) the subversion of the traditional hierarchy between public and private makes way for a moderate restoration, in which the public dimension is determined not by mechanisms of political legitimation but instead by an idea of the common good that bears 'quasi-natural' features.

These inconsistencies are common to the theories of many of the most important economists who wrote in the first half of the nineteenth century. Although Thomas Malthus's radical plea for an import tax on cereals, and therefore for protectionism,³⁷ remains the exception among English economists of that period, the advocacy of free trade—and thus, of the right to pursue individual economic interests—is generally justified by evoking its contribution to the prosperity of the nation. As David Ricardo wrote in his work *On the Principles of Political Economy and Taxation*:

³⁵ Adam Smith, *The Theory of Moral Sentiments* (Millar, 1790 [1759]) VI, II, 29.

³⁶ *Ibid.*

³⁷ Thomas Malthus, *The Grounds of an Opinion on the Policy of Restricting the Importation of Foreign Corn* (Murray, 1815). See Irwin (n 3) 94 ff.

Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. The pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by regarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and most economically, while, by increasing the general mass of production, it diffuses general benefit, and binds together by one common tie of interest and intercourse the universal society of nations throughout the civilized world.³⁸

John Stuart Mill pursues this contention further. As for the indirect advantages of free trade, he enumerates the benefits society can draw from it at the national level, such as the improvement of the productive processes, the increased division of labour, a better use of technology and the stimulation of entrepreneurship.³⁹ At the same time, he points out the importance of transnational economic activity for the creation of a cosmopolitan society:

Finally, commerce first taught nations to see with good will the wealth and prosperity of one another. Before, the patriot, unless sufficiently advanced in culture to feel the world his country, wished all countries weak, poor, and ill-governed, but his own: he now sees in their wealth and progress a direct source of wealth and progress to his own country. It is commerce which is rapidly rendering war obsolete, by strengthening and multiplying the personal interests which are in natural opposition to it. And it may be said without exaggeration that the great extent and rapid increase of international trade, in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions, and the character of the human race.⁴⁰

Smith, Ricardo and Mill see the interest of the nation as an intermediary between the economic priorities of individuals and a global order that serves all humanity. On the one hand, economic activity generates not only personal wealth but also overall welfare for the entire country; on the other hand, peaceful coexistence is in everyone's best interest, because the nation's wealth depends on the freedom of transnational economic interaction. We can assume, however, that the strong promotion by English economists of the harmonious interplay between the pursuit of individual interests, the prosperity of the nation and international peace was the consequence of Great Britain's economic and geopolitical predominance at the time. Accordingly, free trade met with much more scepticism in

³⁸ David Ricardo, *On the Principles of Political Economy and Taxation* (Batoche Books, 2001 [1817]) 89.

³⁹ John Stuart Mill, *Principles of Political Economy* (Green & Co, 1909 [1848]) III, 17, 13.

⁴⁰ *Ibid* III, 17, 14.

economically less developed countries such as France,⁴¹ Germany⁴² and the United States.⁴³ Indeed, the most important economists of these countries retained a rather traditional understanding of the relationship between private and public interests. As a consequence, they still thought it necessary to restrain the pursuit of private interests for the sake of the nation's public welfare and did not consider the latter the result of free transnational economic interaction.⁴⁴

Thus, not even in its 'golden era' between the middle of the eighteenth and the middle of the nineteenth century could the idea of free trade, still not free of contradictions and reservations in its country of origin and generally rejected by non-British economists, evolve into a coherent theory of a global order of private actors. From the mid-nineteenth century until the Second World War, the emerging nationalism reinforced the idea that the pursuit of private interests was only valuable if it served the common interest of the nation. Therefore, in the course of a growing engagement of public authority in economic priority-setting, decisions and processes, the theory of free trade had to make room for public interventionism.⁴⁵

3. *Reconstruction of Lex Mercatoria in the Light of Systems Theory*

Each of the three historical theories of a global order of private actors ultimately situates private law interactions in an overriding context of general interests. In the universal economy of Antiquity and in the 'lex mercatoria' of the Middle Ages, no priority is accorded to private interests. Even within the modern theory of free trade, economic activity remains subordinate to the wealth of the nation. The autonomy of the private law dimension vis-à-vis the public law dimension is always conditional. Be it embodied in the homeostasis of the whole or in the wealth of the nation, there is always an idea of the common good, which establishes the primacy of public law norms and institutions in case of conflict. Moreover, all of the proposals—with the relative exception of the 'lex mercatoria' of the Middle Ages—are rather socio-philosophical and economic conceptions, whereas the specific *legal* dimension does not receive adequate attention.

⁴¹ Antoine-Augustin Cournot, *Recherches sur les principes mathématiques de la théorie des richesses* (Rivière, 1838).

⁴² Friedrich List, *Das nationale System der politischen Ökonomie* (Akademie-Verlag, 1982 [1841]).

⁴³ Henry Carey, *Principles of Political Economy* (Carey, Lea & Blanchard, 1837–40).

⁴⁴ Irwin (n 3) 98.

⁴⁵ Michael Stolleis, 'Die Entstehung des Interventionsstaates und das öffentliche Recht' (1989) 11 *Zeitschrift für Neuere Rechtsgeschichte* 129.

The question of developing a theory of order centred on the idea of a global law regime regulating private economic transactions arose anew as a consequence of globalisation in the late twentieth century. In this context the suggestion came to the fore again—now, however, with an unprecedented urgency, persuasiveness and coherence—that a global order could develop based solely on the self-regulated transnational activity of private actors and hence fully independent of public institutions. A new and fundamental attempt to give conceptual support to this suggestion has been elaborated in the context of systems theory. By eliminating any reference to a preferential framework of general interests, this approach eventually provides the vision of a global order of private economic actors with the radical theoretical foundation that was missing in the older conceptions.

The approach is based on four assumptions already elaborated by Niklas Luhmann in his general theory of social systems: (a) the continuous differentiation of social subsystems as a sociological constant;⁴⁶ (b) the autopoietic character of social subsystems;⁴⁷ (c) the progressive but unequal globalisation of functional subsystems;⁴⁸ and (d) the definition of law as a subsystem for the stabilisation of normative expectations.⁴⁹ Building on these premises, Gunther Teubner creates a new theory of *lex mercatoria* as a global and autopoietic legal regime to stabilise the equally global and self-referential economic system. His contribution to the new foundation of the *lex mercatoria*, however, is but one aspect of a legal theory that highlights two main trends in contemporary law: its globalisation and its differentiation.⁵⁰

3.1 *Characteristics of Global Law*

Teubner does not see the globalisation of law as the appearance of a new ‘empire’, nor does he see it as a development of a Kantian *World Republic*.⁵¹ Rather, globalisation affects social subsystems which are highly differentiated and auto-referential:

⁴⁶ Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp, 1997) 78.

⁴⁷ *Ibid*, 65 ff, 92 ff, 102 ff.

⁴⁸ *Ibid*, 145; Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, 1993) 572.

⁴⁹ Luhmann (n 46) 60 ff, 125 ff, 131, 143.

⁵⁰ For an interpretation of Teubner’s legal theory from the perspective of the ‘law after the welfare state’ see: Peer Zumbansen, ‘Law after the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law’ (2008) 56 *American Journal of Comparative Law* 769.

⁵¹ Gunther Teubner, “‘Global Bukowina’: Legal Pluralism in the World Society’ in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth, 1997) 3 ff.

Not only the economy, but also science, culture, technology, health systems, social services, the military sector, transport, communication media and tourism are nowadays self-reproducing ‘world systems’ ..., successful competitors with the politics of nation-states.⁵²

Because these areas require normative stabilisation that cannot fully be accomplished by public law, a pluralistic and global law has emerged which consists of *leges* that are attached to discourses among specialists and cannot be understood as parts of a coherent legal system.⁵³ In contemporary *global villages*, law no longer results mainly from regulation by states or international institutions but develops spontaneously and polyarchically at a decentralised level—like in the times of Austrian rule in the Bukowina.⁵⁴

Four characteristics of ‘global law’ can be highlighted:⁵⁵

(a) Largely independent of national territories, the *boundaries* of the global law system invisibly follow the outlines of specialist circles, professional bodies and social networks.

(b) *Regulation* by public institutions, especially through legislative assemblies, loses significance. This is particularly the case for global norms: ‘Global law is produced in self-organized processes of “structural coupling” of law with ongoing globalised processes of a highly specialized and technical nature.’⁵⁶

(c) While state law, due to the constitutional processes in liberal and democratic societies, has developed at a relative *distance* from social interests, global law remains in a state of diffuse but strong interdependence with the respective specialised social areas.⁵⁷ As a consequence, there is a pervasive and obtrusive presence of organised interests—a situation that, according to Teubner, can hardly be accepted any longer and calls for a change.⁵⁸

(d) For nation states, the *unity* of the law is a symbol of their identity and a criterion for justice—at least within national boundaries. In contrast, from a global perspective it constitutes a certain threat according to Teubner, and therefore at present the primary concern should be to ensure sufficient diversity of legal sources within globally standardised law.⁵⁹

3.2. *The Differentiation of Law*

⁵² *Ibid.*, 6.

⁵³ *Ibid.*, 7.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 7 ff.

⁵⁶ *Ibid.*, 8.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

Along with the globalisation of law, we are experiencing its increasing differentiation beyond the nation state.⁶⁰ This evolution becomes particularly evident when looking at the growing number of international courts with sectoral competences.⁶¹ This legal pluralism is ‘not simply a consequence of a political pluralism’ but rather an ‘expression of deep-seated contradictions which concern society as a whole and exist between colliding sectors of world society’.⁶² Social systems require legal norms for their stabilisation. The differentiation of social systems with distinct rationalities on a global level thus leads to the creation of different legal regimes. Since this is ‘only an epiphenomenon of the deeper multi-dimensional fragmentation of global society itself’,⁶³ legal regimes conflict with each other inasmuch as the overlap of sectoral rationalities belonging to different social subsystems leads to collisions.⁶⁴

From the perspective of systems theory, ‘fragmented law’ has the following features:

(a) The globalisation of social systems accompanies the consolidation of *particular rationalities*. To confer order on the different social subsystems and to stabilise their rationality, the law differentiates itself as well. Therefore, global law is fragmented as a consequence of the fact that specialised legal regimes have to follow different rationalities in order to accomplish their task.⁶⁵

(b) In this context the unity of law, generated by the constitution in constitutional states, is lost. In case of conflict, one must resort to so-called ‘*inter-legality*’, i.e. to connections largely independent of vertical layers. **Due to this lack of systematic coherence, the unity of the legal system can only be sought at the operational level.**⁶⁶

⁶⁰ Recently, Teubner has pointed out that systemic differentiation did not arise with globalisation, but characterised already nation states in their most advanced development status. The phenomenon of systemic differentiation was thus only accelerated and ‘aggravated’ by globalisation. See Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalization* (Oxford, 2012) 5 f, 15 ff, 42 ff.

⁶¹ According to Andreas Fischer-Lescano und Gunther Teubner there are at least 125 international courts. See Andreas Fischer-Lescano and Gunther Teubner, ‘Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit’ in Mathias Albert and Rudolf Stichweh (eds), *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung* (Verlag für Sozialwissenschaften, 2007) 37.

⁶² *Ibid*, 40 (translation by the authors).

⁶³ *Ibid* (translation by the authors).

⁶⁴ *Teubner* (n 60) 150 ff.

⁶⁵ Fischer-Lescano and Teubner (n 61) 41 ff.

⁶⁶ *Ibid*, 42 ff.

(c) During the time of classic public international law, cleavages in the global legal system largely coincided with the borders of nation states. In addition to these collisions, today conflicts arise from a *transversal thematic-functional differentiation*. Precisely because of their ‘non-political’ nature they cannot be solved through traditional diplomacy; instead they require new ‘inter-legal’ forms or even the creation of new legal regimes.⁶⁷

(d) As a result of fragmentation, *autonomous private regimes* develop,⁶⁸ consolidating the idea that a global private law regime can guarantee peaceful and effective human interaction at least in its own area of regulation without resorting to the public sphere.

(e) according to the traditional conception of law regimes based on the nation state, the ‘peripheries’ of the legal system, especially private contracts, always relate to its ‘centre’, which is defined by constitutional law. In contemporary law such a clear relationship between ‘centre’ and ‘periphery’ can no longer be ascertained.⁶⁹ Individual branches have developed into ‘*self-contained regimes*’.⁷⁰

(f) Self-contained regimes transform into ‘auto-constitutional regimes’.⁷¹ The attribution of constitutional characteristics to a private law regime implies a fundamental change in the constitutional concept.⁷²

As a consequence of this development, the *hierarchical* legal system becomes ‘heterarchical law’, ie ‘law which is limited to establish a loose connection between fragmented legal regimes’.⁷³ Because the world society divides up into self-referential subsystems in which specific law regimes apply, collisions result which constitute conflicts both between different rationalities of autopoietic systems and between different legal regimes.⁷⁴ These collisions

⁶⁷ *Ibid*, 43 ff.

⁶⁸ *Ibid*, 45 ff.

⁶⁹ *Ibid*, 48 ff.

⁷⁰ On the definition of ‘self-contained regimes’ see Martti Koskenniemi, ‘The Function and Scope of the Lex Specialis Rule and the Question of “Self-Contained Regimes”’ (2003), http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf, 9.

⁷¹ Fischer-Lescano and Teubner (n 61) 50 ff.

⁷² On the redefinition of the concept of ‘constitution’ from the perspective of Teubner’s systems theory, see Teubner (n 60). For critical reflections on Teubner’s interpretation of ‘constitution’, see below, section 4(c).

⁷³ Fischer-Lescano and Teubner (n 61) 51 (translation by the authors).

⁷⁴ Andreas Fischer-Lescano and Gunther Teubner, *Regimekollisionen. Zur Fragmentierung des globalen Rechts* (Suhrkamp, 2006); Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999.

cannot be resolved by a comprehensive legal system. Conflict resolution can only be achieved through mechanisms of horizontal coordination, by ‘reciprocal observation, anticipatory adaptation, cooperation, trust, self-commitment, reliability, negotiations, and a context of permanent reference to one another’.⁷⁵ Correspondingly, expectations are low with regard to the social role of law:

Realistically there is only the chance to contain, through their legal ‘formalization,’ the self-destructive tendencies that may arise from collisions between different rationalities. ... If the strategy of formalization works out, [the law] will translate a—limited—part of these rationality conflicts into the *quaestio juris*, thereby constituting a forum for their peaceful settlement. But even in this case the law does not function as a superior coordinating authority; rather, it could already be considered a success if the law could provide legal guarantees for mutual autonomy against totalizing tendencies and the unilateral overpowering of social fragments. Confronted with the potential threats arising from social fragmentation, the law will have to restrict itself to the narrow tasks of delivering compensation for mutual harms and keeping damages to human and natural environments under control.⁷⁶

3.3 *Theoretical Foundations of the New Lex Mercatoria*

The diagnosis of the globalisation and fragmentation of law leads to the thesis that the *private law regime* is strengthened at the global level. This thesis is important to the history of ideas, because it claims for the first time that there could be a social order without institutional or normative reference to a comprehensive public sphere, to a general interest or to an idea of the common good.⁷⁷ The two most fully developed global private law regimes are the *lex mercatoria* of world economy and the *lex digitalis* of the internet.⁷⁸ Teubner’s *lex mercatoria* introduces two key innovations or, as the author puts it, ‘taboo breaches’ which contribute to the dissolution of the traditional link between law and the state.⁷⁹ First, exclusively ‘private’ institutions (such as contracts and associations) allegedly produce valid law without

⁷⁵ Fischer-Lescano and Teubner (n 61) 52 (translation by the authors).

⁷⁶ *Ibid*, 54 (translation by the authors).

⁷⁷ Among those who claim that there is a *qualitative difference* between the norms produced by *public* international institutions and the agreements adopted by *private* actors, see Jürgen Habermas, *Der gespaltene Westen* (Suhrkamp, 2004) 175. For the opposing position, denying the relevance of such a difference, see Benedict W Kingsbury, ‘Sovereignty and Inequality’ (1998) 9 *European Journal of International Law* 599.

⁷⁸ Fischer-Lescano and Teubner (n 61) 47. On the *lex mercatoria*, see also Peer Zumbansen, ‘Lex mercatoria: Zum Geltungsanspruch transnationalen Rechts’ (2003) 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 637.

⁷⁹ Teubner (n 51) 10.

authorisation and control by the state.⁸⁰ According to both classical theory and prevailing contemporary theory, a private law contract has no validity in and of itself; it is valid only due to public law. The contemporary theory of *lex mercatoria* considers this justification of validity antiquated: the contract is valid of itself without having to rely on state norms. Secondly, *lex mercatoria* is supposed also to be valid outside nation states and even outside international relations,⁸¹ which prompted Teubner—like the public lawyer—to ask: ‘How can authentic law “spontaneously” emerge on a transnational scale without the authority of the state, without its sanctioning power, without its political control and without the legitimacy of the democratic process?’⁸²

The idea of a private law that derives its validity from the spontaneous interaction of its actors is not easy to justify. Rather, it creates a ‘paradox’ that, according to Teubner’s understanding, cannot be solved by means of a purely theoretical approach. Although unable to resolve this ‘paradox’, the theory sees the functioning praxis as eventual confirmation of the initial assumption regarding the self-validation of *lex mercatoria*. As Teubner points out, social praxis actually is more creative than legal doctrine or social theory.⁸³ The global *lex mercatoria* is thus in a process of laying the foundations for its own validity.

To give itself an autopoietic basis, the *lex mercatoria* introduces three distinct elements through its mechanisms and the initiative of its actors.⁸⁴ The first consists in the establishment of a *hierarchy of norms*: the composition of a primary system of norms creates a legal basis that—even if this kind of ‘primary law of the *lex mercatoria*’ does not itself escape the paradox of private law self-confirmation—is sufficiently consistent to generate secondary norms. The second element relates to the *temporalisation* of the paradox: the single contract between private actors is superseded by iterated processes in which a ‘standardisation of rules’ occurs insofar as the contract both refers to the past and projects into the future. The continuity of norms as well as their stabilisation by iteration ‘temporalise’ the paradox of private law spontaneity by restricting it to one single temporary context. The third element to the resolution of the paradox is the technique of *externalisation*: *lex mercatoria* ‘externalizes the fatal self-validation of contract by referring conditions of validity and future conflicts to external “non-contractual” institutions which are nevertheless “contractual”, since they are a

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, 11.

⁸² *Ibid.*

⁸³ *Ibid.*, 16.

⁸⁴ *Ibid.*

sheer internal product of the contract itself'.⁸⁵ The private law normative system thus provides institutions—most notably, arbitration—that monitor the validity and execution of norms. Although these institutions are created by means of private law, they overcome the 'spontaneous' private law dimension because of their institutional nature.

As for the self-justification of a private law regime through the three mechanisms mentioned above, some doubt still exists. But let us put this criticism aside and assume that the autonomy of *lex mercatoria* is a proven fact. On this basis, the main argument of *lex mercatoria*'s alleged self-referentiality extends to three further aspects. The first emphasises the legal character of the transnational economic order. Globalisation has not undermined the law in favour of the economy,⁸⁶ since the transnational economy still requires rules and even regulation: the necessity of securing expectations and thereby guaranteeing legal certainty for the business results in the *lex mercatoria*. The second aspect relates to the fact that private regimes, due to their high level of formalisation, do not create new customary law.⁸⁷ The third aspect concerns the danger of a re-politicisation of the *lex mercatoria* autopoietic system.⁸⁸ The reasons why such a re-politicisation could be a threat are not made explicit, but it has to be assumed that Teubner fears an amalgamation of different rationalities: if politics directly interfered with the legal self-regulatory mechanisms autonomously established by transnational economic actors, *lex mercatoria* would lose its specific function and rationality. As a result, the social system's high complexity and rational diversification, which are indispensable for guaranteeing that its tasks are accomplished, could be at risk, with the consequence that the entire transnational economic system would be likely to fall into a dramatic crisis.

At this point, a question arises that somehow points in the opposite direction. One could ask, indeed, whether the global economic crisis we have experienced in recent years should not be seen as the result of the almost unrestrained autonomy of the economic system and of a lack of control by public institutions representing common interests, rather than as a consequence of the insufficient self-referentiality of transnational interaction between economic actors. The economic crisis would then derive from a lack of public governance, and not from its hubris. Teubner generally rejects the idea that the crisis could be overcome by resorting to the

⁸⁵ *Ibid.*

⁸⁶ Gunther Teubner, 'Privatregimes: Neo-spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft?' in Dieter Simon and Manfred Weiss (eds), *Zur Autonomie des Individuums* (Nomos, 2000) 437, 446 ff.

⁸⁷ *Ibid.*, 440.

⁸⁸ Teubner (n 51) 21 ff.

governance resources of the public sphere. While criticising what he calls ‘economic constitutionalism for the whole society’,⁸⁹ he maintains the essential tenet of the epistemological approach of systems theory, i.e. the denial of a system-overarching rationality as the basis for a successful containment of the hubristic attempts of a single (in this case, economic) subsystem to gain control of the whole society. In keeping with his epistemological premises, he attributes the present economic crisis to a lack of differentiation, insofar as the economic subsystem has increasingly colonised the other social subsystems. While Teubner thus attributes economic crisis to the near hegemony of economic rationality, he remains nevertheless skeptical that the public domain should play any comprehensive role in guaranteeing a well-ordered society.

4. Questions from a Public Law Perspective

With the conceptual tools of systems theory, Gunther Teubner has developed a sophisticated theory of the *lex mercatoria*, raising the discussion to a new level. His contribution is even more relevant if we consider that many of his observations maintain a significant cognitive value even outside the strict theoretical framework of systems theory. Nevertheless, a few critical issues remain.

(a) The thesis of the self-referentiality of *lex mercatoria* is still problematic for many reasons. As Teubner argues, the presumption of the self-referentiality of *lex mercatoria* rests upon the assumption of the possibility of its self-validation. Yet, according to Teubner, the strategies developed by private law regimes in order to autonomously guarantee their validity without reference to public norms and institutions (hierarchisation, temporalisation, externalisation) do not address the fundamental question that lies beneath the paradox of the self-validation of private law. Indeed, the conviction that private law cannot validate itself is based on the assumption that spontaneous agreements between private actors should only be considered valid if they are incorporated into a general normative framework established by means of public law and expressing common interests and values of society. By employing strategies exclusively based on private law regardless of their effectiveness, the *lex mercatoria* system neither aims at building any link to a common set of social interests and values, nor demonstrates the institutional or conceptual capacity to do so. Yet, not only the more

⁸⁹ Teubner (n 60) 30 ff.

ambitious political vision for peace, security and justice,⁹⁰ but also the rather modest need for better governance of globalisation⁹¹ can hardly be satisfied by regimes based only on private law.

Beyond the more general doubts that arise from the attempt to consolidate a mercantile law system which refrains from any consideration touching common values and interests, a further and more technical question has been raised in the discussion regarding the claim of self-sufficiency advanced by the supporters of *lex mercatoria*. It has been argued that the efforts to codify the *lex mercatoria* that were initiated by some of its advocates in order to consolidate its autonomy⁹² actually undermine its goal. This is because these efforts necessarily involve political and social actors not belonging to the system, thus jeopardising the private law regime's self-referentiality.⁹³ Moreover, by becoming an integral part of private international law through this 'creeping codification', the *lex mercatoria* eventually ends up sharing the critical relationship that divides and at the same time binds *private* international law and its *public* counterpart.

(b) The assumption that social systems display self-referentiality, or operative closeness, is central to Teubner's conception. Only if we postulate that every social subsystem accomplishes its task best by operationalising only information elaborated inside itself and according to its specific rationality, can the consequence be drawn that the *lex mercatoria*—a

⁹⁰ Pierre Marc Johnson, 'Creating Sustainable Global Governance' in John J Kirton, Joseph P Daniels and Andreas Freytag (eds), *Guiding Global Order* (Ashgate, 2001) 245; Hans-Ulrich Petersmann, 'From "Negative" to "Positive" Integration into the WTO' (2000) 37 *Common Market Law Review* 1363; Mary Ann Tétréault, Robert A Denmark, Kenneth P Thomas and Kurt Burch (eds), *Rethinking Global Political Economy* (Routledge, 2003).

⁹¹ Christian Tietje, 'Global Governance and Inter-Agency Co-operation in International Economic Law' (2002) 36 *Journal of World Trade* 501.

⁹² These efforts have been concretised in unified codes, projects and principles, like 'Unidroit, the Cornell Common Core Project, the Lando Commission Principles of European Contract Law, the various ICC formulations and, finally, general lists of principles formulated by prominent scholars in the area of *lex mercatoria* such as Berthold Goldman, Lord Mustill, and most recently Klaus Peter Berger' (Celia Wasserstein Fassberg, 'Lex Mercatoria: Hoist with Its Own Petard?' (2004–5) 5 *Chicago Journal of International Law* 67, 69). See Berthold Goldman, 'The Applicable Law: General Principles of Law—The *Lex Mercatoria*' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Queen Mary College, London, 1986) 113; Rt Hon Lord Justice Mustill, 'The New *Lex Mercatoria*: The First Twenty-Five Years' in Maarten Bos (ed), *Liber Amicorum for the Rt Hon Lord Wilberforce* (Clarendon Press, 1987) 149; Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (Kluwer 2nd edn 2010).

⁹³ Wasserstein Fassberg (n 92) 81.

self-sufficient and operationally closed subsystem itself—does not need to derive its validity from state law or from other public law norms (such as European Union law or international treaties). Indeed, Teubner does not reverse the hierarchy between public law and private law norms but limits himself to emphasising the autonomy of private law regimes. By doing this, he realises his goal of emancipating private law from its long-time subordination to public law without falling into the mirror-inverted trap of a hardly provable superiority of private law norms.

Rejecting the idea of an overarching rationality, however, leads to deficits when it comes to the interpretation of norms that cannot adequately be understood merely in functionalistic terms or are deemed to possess universal validity. This holds especially true for human rights norms. To systematically collocate and conceptually explain the specific quality of these norms appears difficult from the perspective of the functionally restricted operative closeness of subsystems in systems theory. Indeed, it is no surprise that with regard to human rights norms even supporters of the systems theory approach have tried to conceptualise a ‘universal law’ (*Weltrecht*) or a ‘global constitution’ (*Globalverfassung*) as formal expressions of a comprehensive *lex humana* centred around the protection of fundamental rights.⁹⁴ It remains unclear, however, how this osmotic conceptual construction is compatible with the fundamental principle of systems theory that is the strict self-referentiality of subsystems.⁹⁵

In Teubner’s recent studies—particularly in the **contraposition between** ‘anonymous communication matrices’ and ‘persons’ or ‘individuals’⁹⁶—a conflict between the system and the lifeworld seems to surface which actually should be extrinsic to the epistemological foundations of systems theory. Systems theory assumes that no information can be brought into the system by individuals endowed with system-external, system-independent and system-overarching rationality. This reduces the interaction between the system and the environment to mere ‘irritations’ of the system’s functional operations.⁹⁷ Although based on

⁹⁴ Andreas Fischer-Lescano, ‘Globalverfassung: Verfassung der Weltgesellschaft’ (2002) 88 *Archiv für Rechts- und Sozialphilosophie* 349; Andreas Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (Velbrück Wissenschaft, 2005).

⁹⁵ Teubner bypasses the problem by re-collocating the conflicts that emerge with the aim to globally protect fundamental rights, themselves within the globalised subsystems, thus avoiding any resort to a kind of supra-systemic *lex humana*. See Teubner (n 60) 124 ff. For a tentative critique of Teubner’s problem solving attempt, see below, section 4(e).

⁹⁶ Gunther Teubner, ‘Die anonyme Matrix’ in Winfried Brugger, Ulfried Neumann and Stephan Kirste (eds), *Rechtsphilosophie im 21. Jahrhundert* (Suhrkamp, 2008) 440, 460 ff.

⁹⁷ *Ibid*, 460.

an attempt to simplify the observation of reality, this assumption actually requires the supporters of systems theory to formulate answers to questions concerning the relationship between system and environment as well as between individuals and social systems, which are unnecessarily overburdened and epistemologically problematic,⁹⁸ or even contradict the conceptual premises of systems theory.

(c) The normative limits that characterise the idea of self-referential private law regimes become even more apparent if we consider the reasons for the polemic that supporters of systems theory raise against a possible ‘re-politicisation’ of structures of social order essentially based on agreements among private actors to pursue private interests.⁹⁹ The proposal that fragmented private law regimes can be overcome by ‘political’ means actually aims at creating a renewed social and normative unity under the primacy of the ‘public’ dimension. In state law this priority is expressed by the primacy of the constitution. In contrast, proponents of *lex mercatoria* argue that the claim of the nation state to give a ‘constitution’ to the whole of society belongs to the past.¹⁰⁰ Allegedly, this development can be compensated neither by pursuing international or supranational constitutionalisation nor by establishing institutions of ‘global domestic policy’. At best, the ‘constitutionalisation of international law’ would only lead to the globalisation of the political system; however, this would not have any direct impact on any of the other systems.¹⁰¹

From Teubner’s point of view, constitutional fragmentation is a *factum brutum*—and, lastly, not a despicable one.¹⁰² Indeed, it generally overcomes the unitary understanding of legal and social order and its suppression of diversity. More specifically, it paves the way for what Teubner calls ‘global civil constitutions’ as an alternative to any hegemonic attempt carried out by public power.¹⁰³ However, a ‘constitution’ that is reduced simply to a set of norms regulating the creation of secondary rules—no matter in what field or to what purpose—or, an even more minimalist ‘constitution’ that is solely ‘civil’, and therefore based on private law, runs the risk of losing the essential reference to the legitimation generated by political representation as it is contained in the democratic understanding of constitutional law. Yet, it

⁹⁸ This is the case, for instance, with the double-blind ‘structural coupling’ of social subsystems which Luhmann introduced to explain their parallel evolution. See Luhmann (n 46) 100.

⁹⁹ Fischer-Lescano and Teubner (n 61) 38 ff.

¹⁰⁰ Gunther Teubner, ‘Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie’ (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1.

¹⁰¹ *Ibid*, 12 ff.

¹⁰² Teubner (n 60) 51 ff.

¹⁰³ Teubner (n 100) 6 ff.

is precisely this aspect that accounts not only for the political character of the constitution but also for its specific *public* dimension. If the concept of ‘constitution’ is deprived of its political and public function, ie of its overarching legitimacy rooted in political participation, shrinking to a simple collection of rules regulating the further production of norms in a private or semi-public field of application,¹⁰⁴ it retains only a few of its hitherto constituent tenets. Different levels of law, the functional relation of the legal system to a specific social system, and the distinction between a formally organised and a spontaneous sector are hardly sufficient, at least in the tradition of liberal constitutionalism, to consider a set of rules—be it exclusively private or not—as a ‘constitution’. It appears rather forgetful of its core normative aspirations.

(d) From the point of view of systems theory—particularly according to Teubner’s interpretation—the establishment of ‘civil constitutions’ aims not only at consolidating the self-referentiality of private law regimes like the *lex mercatoria* but also at generally reshaping the relationship between the ‘public’ and the ‘private’ domain. In the present state of ‘policontextuality’,¹⁰⁵ claims traditionally operationalised by public law institutions are transferred into specific contexts of ‘civil constitutions’. Therefore, ethical, social and political questions, traditionally the substance of discussions within ‘public fora’, are not cancelled—according to Teubner—from the agenda of social communication as a consequence of overcoming the dichotomy between public and private. Rather, these questions are left to the communication occurring within specialised social subsystems and thus emancipated from the paternalistic control usually exercised by the welfare state as the successor of the historical *Policeystaat*.¹⁰⁶

However, what is problematic about this is the unconvincing reduction of the entire public dimension to the illiberal practices of the *Policeystaat*. Indeed, the public sphere is far from simply an expression of authoritarian aspirations. Rather, it provides the context in which *spontaneous* interaction becomes *reflexive*, thus enabling a discourse on shared priorities based on argumentation and going beyond the mere agreement on casually overlapping

¹⁰⁴ *Ibid*, 13 ff.

¹⁰⁵ Gunther Teubner, ‘State Policies in Private Law? A Comment on Hanoch Dagan’ (2008) 56 *American Journal of Comparative Law* 835.

¹⁰⁶ On the *Policeystaat* as the predecessor of the modern welfare state, see Hans Boldt and Michael Stolleis, ‘Geschichte der Polizei in Deutschland’ in Hans Liskén and Hans Boldt (eds), *Handbuch des Polizeirechts* (Beck, 2007) 1; Volkmar Götz, *Allgemeines Polizei- und Ordnungsrecht* (Vandenhoeck & Ruprecht 2001).

private interests.¹⁰⁷ Furthermore, the authoritarian and paternalistic interpretation of public interest constitutes only one strand within the history of state philosophy—admittedly a mighty one, but by far not the most convincing. For hundreds of years, this understanding has been opposed by a liberal and democratic conception of a public domain which arises from the reflexive interaction of individuals—as contract theory or, more recently, democracy theories in the tradition of Kelsen or Habermas show—to protect (and not to oppress) their common rights and interests. Lastly, the public sphere, particularly in its democratic interpretation, was conceived to neutralise, at least partially, the social and economic power that is inevitably rooted in interactions among private actors. For that reason, abolishing the specificity of the public domain would always also risk destroying the political bulwark of equality as the normatively inescapable counterpart of a world of social and economical inequalities.

(e) The realisation of *justice* has always been considered one of the most important tasks to be accomplished by public power. As multifaceted or even controversial as the definition of justice may be, it is nonetheless generally assumed that a ‘just society’ is characterised by the fact that its members jointly accept public law rules in a condition of mutual recognition. According to these rules, inequality is only permitted insofar as it is commonly regarded as necessary—in the sense of a Pareto-superior option—for the benefit and welfare of the entire polity. Following these premises, if public power loses its leading function in expressing the common interests of the whole society, justice becomes a distant and almost unattainable perspective as well. Teubner, generally more sensitive than his predecessor Luhmann to questions concerning equal patterns of order,¹⁰⁸ recognises the centrality of this issue,

¹⁰⁷ The reflexive, non-self-referential and dialogical dimension of public—and in particular constitutional—law and legal discourse is rather marginal, if not completely missing, in authors who still champion a unitary, largely hierarchical and lastly nation-state-based understanding of constitutionalism. As prominent examples of this approach, see Dieter Grimm, ‘The Constitution in the Process of Denationalization’ (2005) 12 *Constellations* 447; Dieter Grimm, ‘Gesellschaftlicher Konstitutionalismus: Eine Kompensation für den Bedeutungsschwund der Staatsverfassung?’ in Matthias Herdegen, Hans Hugo Klein, Hans-Jürgen Papier and Rupert Scholz (eds), *Staatsrecht und Politik. Festschrift für Roman Herzog zum 75. Geburtstag* (Beck, 2009) 67; Martin Loughlin, ‘What Is Constitutionalisation?’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press, 2010) 47. It is no surprise, therefore, and quite an easy target, that Teubner concentrates his criticism on these authors (see Teubner (n 60) 59 ff), while almost entirely avoiding engaging with conceptions that, while maintaining the centrality of public law, collocate it in a post-unitary setting.

¹⁰⁸ For Luhmann’s criticism of the ‘critical-emancipatory’ strand of systems theory, see Niklas Luhmann, ‘Einige Probleme mit “reflexivem Recht”’ (1985) 6 *Zeitschrift für Rechtssoziologie* 1.

proposing that the problem be settled by relocating the justice issue.¹⁰⁹ In Teubner's conception, justice is not a task to be implemented by an overarching public power with its primacy over functional subsystems; it is a 'contingency formula' directly imbedded into the operational logic of the self-referential subsystem. In this sense, the idea of justice as the adequate response to the need to stabilise normative expectations would stimulate the subsystem to continuously transcend its own rational boundaries from the inside. However, if according to the principle of self-referentiality the 'law is what law deems to be law',¹¹⁰ then it remains unclear where the rationality principle that is supposed to transcend the operational routine could originate. If rationality is only and always subsystemic and contextual, it is difficult even to conceive of the transcendence of a given reality and praxis. And if transcendence is supposed to be based on an extra-systemic rationality, the epistemological assumption that subsystems are self-referential is at stake. In general, it seems hard to figure out how a subsystem could transcend itself as a consequence of a rational aspiration to justice without resorting to a system-overarching rational discourse—actually, to a public law framework understood in a post-paternalistic fashion.

It is almost impossible not to agree with systems theory in asserting, in sync with many other theories, that the strictly hierarchical and unitary conceptions of state law tradition are no longer convincing. Yet, the idea of the primacy of the 'public', which is embodied in the conception of a democratic constitution, does not coercively lead to such results. In times of post-unitary models, the idea of vertical and authoritative hierarchies has to be reframed in the light of horizontal and discursive processes of mutual recognition. Nonetheless, the claim for a higher normativity of the 'public' dimension expresses the awareness and conviction that social interactions *are*—and *should be*—regulated by rules that emerge from reflexive discourses on how to implement fundamental rights and common interests. This approach is properly expressed in the principles of liberal-democratic constitutionalism. If we leave this path, neither an adequate knowledge of the social world nor an appropriate interpretation of the law will be possible.

¹⁰⁹ On this question, see also Gunther Teubner, 'Selbstsubversive Gerechtigkeit. Kontingen- oder Transzendenzformel des Rechts?' (2008) 29 *Zeitschrift für Rechtssoziologie* 9.

¹¹⁰ Luhmann (n 48) 143 ff. (engl.: *Law as a Social System*, Oxford University Press, 2004, 157).