

# Law and the Politics of Reconciliation

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# Contents

*List of Contributors*

	vii
Introduction <i>Emilios Christodoulidis and Scott Veitch</i>	1
1 The Time of Reconciliation and the Space of Politics <i>Andrew Schaap</i>	9
2 Reconciliation and Reconstitution <i>Fernando Atria</i>	33
3 The Risk of Reconciliation <i>Zenon Bankowski</i>	49
4 Reconciliation as Domination <i>Stewart Motha</i>	69
5 'Spatialising History' and Opening Time: Resisting the Reproduction of the Proper Subject <i>Brenna Bhandar</i>	93
6 Reconciliation: Where is the Law? <i>Lorna McGregor</i>	111
7 Transnational Law and Societal Memory <i>Peer Zumbansen</i>	129
8 <i>Sacrum, Profanum</i> and Social Time: Quasi-theological Reflections on Time and Reconciliation <i>Adam Czarnota</i>	147
9 Reconciliation as Therapy and Compensation: A Critical Analysis <i>Claire Moon</i>	163

# Transnational Law and Societal Memory

Peer Zumbansen<sup>1</sup>

...wherever men become absorbed in a medieval search for the magic formula of universal truth the creeds of government grow in importance and the practical activities of government are mismanaged. Holy wars are fought, orators and priests thrive, but technicians perish. Color and romance abound in such an era, as in all times of conflict, but practical distribution of available comfort and efficient organization is impossible. T.W. Arnold, *The Folklore of Capitalism* (1937) p. 21

## Introduction

The 'big bang' of military or political revolution that accompanies the setting free of powerful dynamics of transition and transformation, of post-conflict, post-apartheid and post-war justice, has triggered a widespread and wide-ranging research agenda around the world that is concerned with the chances of a new 'beginning' and the need to account adequately for the legacies of past experiences in the process (Teitel, 2000). From post-apartheid South Africa (Gross, 2004), the East- and West-German narratives of the Nazi past (Herbert and Goehler, 1992) and Germany's Reunification (see Markovits, 2001), to post-genocide Rwanda (Mgbako, 2005; Agbakwa, 2005) and the 'transformative occupation' (Bhuta, 2005) of Iraq (Anderson, 2004; Frame 2005), the existing accounts of this process challenge our understanding of how to go about the future while minding the past. In a crucial way, such fragile and vulnerable societal projects also challenge the role of law as we learn to recognize its distinct role in ascertaining past deeds committed, plights suffered and answers found to the often unspeakable events of the past. Importantly, coupled with this reconstructive, dialogical dimension of the law's addressing of the (and its) past, we find its institutional dimension.<sup>2</sup> While the former encompasses accountability, reconstruction and 'truth', the latter relates to the re-creation or foundation of

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1 A first sketch of this paper was presented in Glasgow in May 2004. I am grateful to Scott Veitch and Emiliios Christodoulidis for their invitation and to the workshop's participants for their comments.

2 'One of the most important and difficult challenges confronting a post-conflict society is the re-establishment of faith in the institutions of the state. Respect for the rule of law in particular, implying subjugation to consistent and transparent principles under state institutions exercising a monopoly on the legitimate use of force, may face special obstacles' (Chesterman, 2004, p. 154).

democratic institutions, constitutions and the rule of law.<sup>3</sup> But it is this tension between the allegedly extraordinary status of the events on the one hand, and the regular and reliable workings of the legal order on the other that informs and structures our approach to bringing the law to bear upon these challenges. Is law silent in states of exceptions<sup>4</sup>, during *les heures zero*, and at notorious 'new beginnings', suggesting something uniquely separate from the otherwise regular or violent workings of the law (Hay, 1992)? New beginnings offer themselves as opportunities for coinciding legality and legitimacy, yet the law of new beginnings is in fact tainted and burdened by the past experiences of law that question the acceptable meaning and substance of the very term itself (Radbruch, 1946, p.105).<sup>5</sup> As Ruti Teitel (2000, p. 6) puts it, 'What is deemed just is contingent and informed by prior injustice.'

This chapter seeks to bring to contemporary discussions of post-conflict justice and nation-building a uniquely focused perspective. Its basis lies in an understanding of the challenges faced by law in different post-conflict contexts where law is expected to provide the grounding and starting point for national and societal reconstruction. While the distinct experiences that we can observe are deeply embedded in particular histories and trajectories of countries and peoples, the law's response has, at least since the Nuremberg trials, taken on a wider perspective. Far from suggesting a one-size-fits-all answer to the legal void after periods of atrocities and human suffering, we can observe the emergence of a *transnational law of post-conflict justice*. It develops from the increasingly shared experiences in designing a legal answer in situations of post-conflict reconstruction. These situations illustrate the utmost challenge of legally addressing the downfall of law, of reliability, and legitimacy. Whether law can at all adequately address the absence of (a higher sense of) law *ex post*, remains a fundamental conundrum no different from the question of how to adequately speak of the unspeakable (Hunt, 2004).<sup>6</sup> Worldwide experiences with

3 For an excellent overview of the panoply, see Teitel (2000); see also Chesterman (2004).

4 This goes back to Cicero's *oratio pro amio milone*, where he states: *inter arma silent leges*. This has found a great renaissance in the widespread curtailment of civil rights in the international and domestic war on terror. See, for example, Morgan (2004, pp. 525–544); Scheppele (2004, pp. 1001–1083); Oliver Lepsius (2002, III 7). For its legacies, see Schmitt (1986); Koskenniemi (2002, pp. 159–175).

5 See the debate between Hart (1958, pp. 593–628), and Fuller (1958, pp. 630–672).

6 'Die formelhafte Zusammenfassung der Eltern für das Geschehen war der *Schicksalsschlag*, ein Schicksal, worauf man persönlich keinen Einfluss hatte nehmen können. *Den Jungen verloren und das Heim*, das war einer der Sätze, mit denen man sich dem Nachdenken über die Gründe entzog. Man glaubte mit diesem Leid seinen Teil an der allgemeinen Sühne geleistet zu haben. *Fürchterlich* war eben alles, schon weil man selbst *Opfer* geworden war, Opfer eines unerklärlichen kollektiven Schicksals. Es waren dämonische Kräfte, die entweder außerhalb der Geschichte walteten ode Teil der menschlichen Natur waren, auf jeden Fall waren sie katastrophisch und unabwendbar. Entscheidungen, in die man sich nur schrecken konnte. Und man fühlte sich vom Schicksal ungerecht behandelt' (Uwe Timm, 2003, p. 91).

village courts, truth commissions and international and domestic criminal tribunals testify to a border-transcending inquiry into the intricacies of transitional justice. Such experiences are being portrayed, researched, communicated and compared, and they inform contemporary and future efforts. The boundaries between legal process and alternative or complementing forms of societal reconciliation have been shown to become increasingly porous in light of the overwhelming challenge to those engaged in transformative politics. It is against this background that the distinctive role of law warrants closer inspection.

The following section of this chapter will introduce the notion of transnational law [TL]. The subsequent parts will mobilize the concept and idea of transnational law to further explore the particular qualities of law's capacity to address past injustice. The transnational perspective illuminates the impasses and blind spots that straightforward legal approaches to righting past wrongs have in common. While a growing number of examples involving litigation for the compensation of historic crimes have become prominent over the past years (Baumgartner, 2002; Sarkin, 2004), truth commissions in post-apartheid South-Africa or the Gacaca Courts in post-genocide Rwanda have been taken as powerful examples for alternative, or not exclusively law-based, routes to societal reconciliation. The development of alternatives proved to mature quickly, and contemporary assessments reveal an increasingly refined focus of inquiry into the structure of mass crimes (see Eltringham, 2004). This refinement brings into play again the intricate relationship between legal process and other societal communications in post-conflict situations. The transnational law of post-conflict justice, then, unfolds less as a firmly established or contained body of law, than as an approach to structuring, with the help of legal norms and legal theory, processes of establishing accountability and legal responsibility. While contemporary acts of public remembrance might be accompanied with solemn declarations of 'historical', 'moral', or 'political' responsibility,<sup>7</sup> *legal responsibility* seems much harder to attain. The definitive nature of legal responsibility seems to stand in stark contrast to the truth-finding efforts that are illustrated by the examples of South Africa or Rwanda. With victims or their heirs ardently seeking their 'day in court', often many decades after the deed (see Neuborne, 2002), we are confronted with the challenge of designing legal processes in a manner that makes the practice of the law as it was known *then* (that is, in the immediate past) visible and comprehensive while opening all possible ways for reconciliation today. The obstacles we face in the struggle for truth, for a better understanding of the past and, ultimately, for forgiveness and forgetting,<sup>8</sup> may seem insurmountable in light of the arbitrary ways

7 See, for example, the preamble to the Law establishing the compensation fund 'Remembrance, Responsibility and the Future' available at [http://www.compensation-forced-labour.org/pdf/Foundaion\\_law\\_consolidated\\_E.pdf](http://www.compensation-forced-labour.org/pdf/Foundaion_law_consolidated_E.pdf).

8 See on the eminent role of forgetting Margalit (2002), Chapter 6: 'Forgiving and Forgetting'.

in which the rulers are separated from the ruled, the oppressors from the oppressed.<sup>9</sup> as Christodoulidis (2001, p. 221) notes, 'Why should one assume that the end result of our accounting of the past will move us any closer to a shared community rather than a break-down of community?'

It is here, however, where the eminent role of the law shines through, both with regard to its contribution to the preceding, unjust legal state as well as to its current role in shaping the communicative processes that unfold between the perpetrators and the victims during transition.<sup>10</sup> In these highly contested moments of human conflict, the role of the law is itself questionable. Against this challenge, it shall be argued that the law plays a pivotal role in the process of societal post-conflict resolution. It does so by providing for rules and for language that contain and capture otherwise dispersed understandings and value assessments as they once were expressed through a norm; provides, that is, a ruling or legal terminology. While law can only observe the dichotomy between *legal* and *illegal* (Luhmann, 2004), this reductionism is in fact able to capture the tensions that mark conflict communication in highly heterarchical societies. Post-conflict societies are of a dramatically fragile nature, and law assumes an organizing, memorializing, and guiding role in providing part of the communication structure of that society. As law is being put to an existential test in post-conflict situations, the very nature of law becomes open to question. It is in this light, then, that the inquiry into the law of post-conflict justice links ongoing searches of the role of law in society in different, yet comparable contexts. And it is here where the idea of transnational law begins to unfold.

### The meaning of Transnational Law

The first usage of the term Transnational Law (TL) continues to be disputed. While scholarship focused on the origins of the term for a long time, it has since become apparent that the real challenge of TL lies in its scope and conceptual aspiration (Jessop, 1956). Within an interdisciplinary research agenda concerning the transformation of globalized law, TL offers itself as a supplementing and challenging category. Famously conceptualized in a series of lectures by Philip Jessup at Yale Law School (1956), TL 'breaks the frames' (Teubner) of traditional thinking about interstate relationships by pointing to the myriad forms of border-crossing relations among state and *non*-state actors.

Jessup (1956, p. 2) writes that he 'shall use the term "transnational law" to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories'. When examining the inescapable

9 See also the intriguing novel by Vladimir Nabokov, *Bend Sinister* (1947), republished by Vintage, 1990. I am indebted to my friend, Achim Podak, who guided me to this book.

10 See the novel by Achmat Dangor, *Bitter Fruit* (2004), for a forceful illustration of the destructive impact of apartheid rule and human failings on humans even long after the fall of the oppressor regime.

'problem' of people worldwide whose lives are 'affected by rules', Jessup points to the striking contingency 'by which we attribute the label of "law" to rules, norms or customs that govern various situations'. It is the hallmark of TL to identify the hidden agendas and the blind spots of traditional regulatory law understandings. These latter are marked by the clear assignment of law-making authority to certain institutions on the one hand, and on the other, a clear view of which norms of societal guidance are to be recognized as *legal* rules. In contrast, TL suggests a widening of the law-making agenda and of our understanding of law as such. TL emerges from the increasingly interlocking spheres of societal norm production by public, official, and private, unofficial norm-setting agencies and actors.

Based on such an expanded understanding of law, TL has begun to reach deep into the heart of contemporary struggles over the role of law within dispersed and fragmented spaces and places of norm-production.<sup>11</sup> TL reminds us of the very fragility and *unattainability* of law. At the beginning of the 21<sup>st</sup> Century, we are still at a loss to identify a theory of law that would be subtle enough not to stifle emerging identities in a post-colonial era (see, for example, Lyon, 2003), while providing *forms, fora and processes* (Wiethölter, 1986) for the collision of discourses that mark post-metaphysical, legal thinking (Habermas, 1996a; 1996b). TL is characterized by the emergence of norms that are no longer only generated by officially recognized sources of the law, but by a multitude of domestic, foreign and transnational norm-producers. This 'soft law' constitutes a radical challenge to the state-based concept of law-making that began to emerge in the 19<sup>th</sup> Century and that Max Weber, among others (Ehrlich, 1962), so powerfully captured as the rise of 'modern law' (Weber, 1914). In contrast to law originating in an official constitutional order, soft law encompasses norms that are not attributable to an official author of statutory norms, and which do not appear directly enforceable by recognized, traditional means for the execution and application of legal rules. Instead, the soft law that is now emerging in many fields of regulatory law<sup>12</sup> can be read as reactions to incapacities on the side of the state to proceed with adequate legislation. The proliferation of soft law thus offers examples of what anthropologists and legal sociologists have for a long time been describing as 'legal pluralism'.<sup>13</sup> It consists of expert standards, best practices, and recommendations as well as principles and standards that can be seen as fertilizing ongoing searches for 'better law' without due regard to political or geographical borders.

The relevance of TL to an understanding of contemporary regulatory challenges, however, is not restricted to the field of law as such. With regard to law, TL works

11 For the background of the distinction between spaces and places, see Sassen (1998).

12 See, for example, Linda Senden (2004); Blanpain and Colucci (2004); Kirton and Trebilcock (2004); Trubek and Trubek (2005, pp. 343-364); Zumbansen (2006, forthcoming).

13 Moore (1973, pp. 719-746); Griffiths (1986, pp. 1-55); Arthurs (1988, pp. 50-88) describing the persistence of legal pluralism in light of the ever stronger tendencies to centralize law through statutory law and official courts. For further assessments of legal pluralism, see Teubner (1997, pp. 3-28), and Perez (2003, pp. 25-64).

itself like a drill through the few remaining security blankets hastily thrown over an impoverished and internally decaying conceptual body. But, beyond the study and practice of law, TL can serve to illuminate current searches in regulatory theory and societal self-regulation.

### Transnational Law and Transitional Justice

In the context of and in concert with other complementing disciplines, TL is distinctly able to fertilize other conceptual searches while being informed by the transformations occurring within these disciplines. As much as TL has been shown to lay bare the raw and vulnerable foundations of law in all of its absurd contingency,<sup>14</sup> and utopian aspiration, while being based in social practice administered with denominational authority (Moore, 1973; Bourdieu, 1987; Derrida, 1990)<sup>15</sup> law itself reaches out to disciplines such as history, cultural studies and anthropology to tell its own story. With legal history taking form as a transnational enterprise (Merry, 1992; Anghele, 2005)<sup>16</sup> it can build on and learn from the work being done by historians and cultural studies scholars. The emergence of *transnational history* gives overwhelming testimony to a border-crossing inquiry into the legality-legitimacy narratives of state and nation building. Formerly conceived and framed in discrete fashions, domestic or national historical narratives reveal and communicate common experiences and semantic appropriations in comparative, transnational and global perspective (Bright and Geyer, 1995; Bentley, 1996; Middell, 2000).<sup>17</sup>

The law of post-conflict justice shifts between the unattainable poles of retribution and reconciliation, between persecution and justice, between remembrance and forgetfulness (Adler and Zumbansen, 2002). It is destined and cursed to do so while its very foundations are exposed in their inadequacy at every turn. 'Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective' (Teitel, 2000, p. 6). Experiences with alternative routes to societal reconciliation in recent years have shown how very fragile and in many ways ill-suited the legal apparatus is in the context of post-conflict reconstruction. This moment exposes the co-existing poles of law, its *utopia*, *reconciliation* and *forgiving* on the one hand and *revolution* and *retribution* on the other. Law and the functions it serves do not exist outside of human imagination, but law is not merely the result of human action. Instead, it is through its function that we can begin to understand the unique quality of law. As developed by the German sociologist and legal theorist, Niklas Luhmann,

14 See the discussion of law in Jean Anouilh (2000).

15 See also the Special Issue of *German Law Journal*, Vol. 6, No. 1 (1 January 2005), available at: [http://www.germanlawjournal.com/past\\_issues\\_archive.php](http://www.germanlawjournal.com/past_issues_archive.php).

16 See the contributions to *Geschichte-transnational*, <http://geschichte-transnational.clio-online.net/transnat.asp?lang=en>.

17 *Geschichte-transnational*, <http://geschichte-transnational.clio-online.net/transnat.asp?lang=en>.

law serves primarily to stabilize expectations. It does so by producing rules that preserve the identification of something as 'legal' over time and are therefore available for an assessment at a later point in time. The time-binding quality of law is thus the basis and the core of Luhmann's legal theory. By 'moving the problem to the temporal dimension [w]e can see the social meaning of law in the fact that there are social consequences if expectations can be secured as stable expectations over time' (Luhmann, 2004, p. 143).

The law of post-conflict justice can be observed to provide exactly that. It serves to establish a framework for the stabilization of societal expectations. Just which law is most adequate to guide this process remains a great challenge. The very connectedness of the assessment of past injustice with the normative architecture of a new legal order makes it evident that often, in the application of post-conflict justice, it is not merely a specific statute or practice on trial, but a whole system. Taking this into consideration, the realm of questions to be addressed is far greater than any piece-meal approach to remedying a wrong would ever entail (see Pogge, 2004).<sup>18</sup> Recent inquiries into the specific role of constitution-making and of constitutional law in the transitional process have begun to shed some light on the intricate dynamics of legal norms in post-conflict and other transitional contexts (Klug, 2000; Walker, 2002; Gross, 2004; Kumm 2005). But, while the creation of constitutional bodies bears the insignia of a fresh start, of new beginnings,<sup>19</sup> the big bang and bright lights of constitution making are only too likely to render us deaf and blind to the constant struggle for law's dominion in the everyday workings of established legal orders (Gross, 2004, p. 51). The particular attention paid to constitutional processes in periods of transition leads to an isolation of constitutional law and constitution making from the legal order in general. By that, the legal order becomes reified as something that functions smoothly and is in no further need of critical assessment. The exposition of constitutional moments in transition periods functions to cast a shadow on the persisting legitimacy challenges that are inherent to the legal order as such (see Koskeniemi, 2002; Orford, 1999, pp. 689–692). Constitutional beginnings, then, share a decisive characteristic with other narratives of new (legal) orders which we often find presented as creating a forum and framework for an untaunted legitimacy of societal order through law.<sup>20</sup> Eventually, the pomp and glory of constitutional talk dissociates the fragile and constantly endangered emergence of a legal order from a long-standing critique of law. It is against this background that we ought to reflect on the role that law can play in transition periods: not isolated and put on a podium for the world's fleeting attention and excitement, but embedded in a continuing critique of the force and weakness of legal norms.

18 See Pogge (2004, p. 117) highlighting the way in which 'past injustice [...] can affect present moral reasons for action'.

19 See the careful assessment by Dupré (2003); also Renata Uitz (2005).

20 For a critique, see Zumbansen (2002, pp. 400–432; 2004, pp. 197–211).

### Remembrance and Utopia in law

The Reformation and its ensuing energies, as well as the subsequent bourgeois revolutions of early modernity, are characterized by the emergence of the individual subject as the centre of social and political activity. Henceforth, it has been against the individual that order and its legitimacy claims are measured. To the degree in which they are found to be foul and rotten, they are doomed and will be swept away: with the dawn of modernity, man begins to order his world in time. Human history became a search for direction in time, unfolding according to the lights of probability and prudence (Koselleck, 1979c; 1979a). Religious prophecy is replaced by supposedly rationalist forecast, although this forecast radiates a sense of stability similar to that which previously emanated from eschatologic trust in providence or the felt threat of demise. In the maturing interaction between the state and individual, the knowledge of the changeability of things is foundational in the state's creation of its own legitimacy grounds. Time's horizon is no longer as open as it used to be. Adopting the role of interpreter and direction-setter the state gives meaning to progression albeit into a now unknown, but also manageable future. This rupture, however, is not yet absolute. Eschatology remains persistently in the background and the consciousness of one's future is a strange but courageous mix of politics and prophecy (Koselleck, 1979a, p. 33). Within this rationalist philosophy of progress we can see the rationalism of future prognostics unfolding. These are in turn still dominated by an important incorporation of the past into the imagery of the future. The events that are expected within the political horizon of historical development are seen as reoccurring and reappearing events, repeating themselves instead of being grand beginnings or final ends. From this perspective, the future that is actually envisioned for the state is simultaneously present in the past, the realm of political action contemporaneously occupied as well as confined (Koselleck, 1979a, p. 33). Time is important, because with ever more rapid sequences of events – brought about by deliberate human action and understood as such – the 'realms of experience' (*Erfahrungsräume*) shrink and the experience of the present falls victim to an unforeseeability in a way that makes the present's experience of time uncertain vis-à-vis the future (Koselleck, 1979b). Presence can no longer experience itself as presence but is now forced to resort to its own historio-philosophical assumption (*selbstbezogene geschichtsphilosophische Einholung*). In parallel, the semantics used to describe these simultaneously opened and closed spheres of possibilities are changing as well: *Utopia* can no longer characterize the experience horizon of political thinking, only *Revolution*.<sup>21</sup> Yet, it is felt that revolution may put an absolute end to everything. In this respect revolution is always confronted with reaction (Koselleck, 1979c, pp. 34–35) and hence every future oriented action is of a political nature. While utopia and revolution are hence distinguishable by the absence (utopia) and presence (revolution) of deliberate human action and by the belief that change

<sup>21</sup> Die Befürworter lernen, daß Revolution ein langfristiger Prozeß ist, die Gegner sehen Revolution als Folge falscher Ideen (Luhmann, 2000, p. 208).

can be brought about by abruptly ending traditional ways, usually under the *signum* of eventual responsibility, legal practitioners of post-conflict justice are operating somewhere in between the horizons of utopia and revolution.

### The changing face of international law and the law of occupation

The transnational perspective can further illuminate the challenge to law and societal memory that we find in various post-conflict situations around the world. These situations can be seen as entering the legal imagination against the background of a dramatically enlarged and yet fragmented and incoherent human rights agenda. While the scandal of human rights violations drives legal efforts to address wrongdoings beyond jurisdictional boundaries,<sup>22</sup> we still seem far away from a comprehensive human rights regime. However, such a legal order might not even be desired in light of the different claims connected to the expansion of human rights. And yet it is from this ongoing search for a better law that the transnational law of post-conflict justice takes its cue. It develops in the light of a greater global awareness of the need for a human rights agenda and enters existing legal fields that are themselves undergoing dramatic changes (Bhuta, 2005).

Because it is dramatically intertwined with ongoing legal reforms in post-conflict situations, the law of occupation vividly reflects the changed legal agenda. Its recent past points to a much more encompassing agenda of reconstruction and nation-building,<sup>23</sup> in that the future-orientated perspective of the law of occupation has itself been subject to a transformation: from one applicable to post-military situations of (ideally) brief occupation focussed on peace and stability, to a more encompassing legal agenda aimed at administrative reconstruction and state-building. This transformation is nowhere more visible than in the current situation in Iraq. The present state of the law of occupation in Iraq finds a distinctive expression in the United Nations Security Council Resolutions 1483, 1546 and in the letter from the United States' and the United Kingdom's permanent representatives to the UN Security Council of 8 May 2003.<sup>24</sup> In this letter, both governments were explicitly outspoken with regard to the reconstructive efforts that the occupiers ought to undertake,<sup>25</sup> and it is this mandate that the Security Council Resolution adopted, almost *verbatim*, in UNSC Resolution 1483.

<sup>22</sup> Scott (2001, pp. 45–63); Scott and Wai (2004, pp. 287–319); Zumbansen (2005) in ConWEB Paper 4/2005, available at: <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/Research/PaperSeries/ConWEBPapers/>.

<sup>23</sup> See for example the remarkable, new introduction to Eyal Benvenisti (2004).  
<sup>24</sup> S/2003/538, available at <http://www.globalpolicy.org/security/issues/iraq/document/2003/0608usukletter.htm>.

<sup>25</sup> *Ibid.*, 'The United States, the United Kingdom and Coalition partners are facilitating the establishment of representative institutions of government, and providing for the responsible administration of the Iraqi financial sector, for humanitarian relief, for economic reconstruction, for the transparent operation and repair of Iraq's infrastructure and

The transformation of the international law of occupation is closely linked to changes in public international law at large. While this in itself seems obvious, the actual impact is far less so (Williams, 2003). Few observers of the international legal scene today would be willing to testify to the state of its development. Instead, international law ranks among the most contested of legal areas at this time. Its present situation, characterized by a self-understanding still seeking the origins of its current disarray (Byers, 2003), bears witness to the seemingly eternal juxtaposition of international law and politics, of universalism and hegemony. Yet, at the same time, international law has become so much more reflexive that its period of untiring self-questioning and self-reassuring can now safely be declared to be past. Instead, international law's contemporary soul-searching calls for an extended exploration of the discipline's young, but troubled history, with its increased meeting-points and soulmateships with inquiries such as cultural studies, international regime studies, legal theory and transnational law, literary theory and transnational history.<sup>26</sup> At present, however, the noises of the 'real' (Zizek, 2002) are louder than the suggestions of the 'social' (Kennedy, 2003; Rittich, 2004). Current assessments of international law still struggle with old demons of inferiority and irrelevance in the ugly face of international politics, imperialism and hegemony, but they also reach out to encompass the particular nature of international law (Kirsch, 2005). The latter can only begin to be understood when reflecting on the very nature of the international order on the one hand, and of our understanding of law and legal regulation on the other.

Our assessment of the role of law in the dynamic and contested international order depends on our understanding of this order, but there is no simple causal relationship between the social reality and the legal order. Instead, our inquiries into the structure of the international order proceed in relative autonomy from the progress made in legal theory with regard to developing an international law for the global age (Luhmann, 2004, ch. 12). Where our understanding of law passes from first assessments of violence (Bodin, Hobbes) on to formalization (Kelsen) to realism (Llewellyn) or downfall (Schmitt), to reassessment (Kelsen, Hart, Fuller, Dworkin) on to fragmentation and dispersement (Teubner, Sousa Santos), the legal theory of international law has undergone dramatic changes, while international law itself has assumed a contested form that today differs greatly from earlier challenges of its weakness. At present, international law must remember and assess the combination of realism and utopia in its foundational myths only in the context of developments in other fields of regulatory law where changing modes of norm-creation have long been questioning dearly-held beliefs in public-private distinctions of political, legitimate rule-creation on the one hand and private, market-based profit seeking on the other (Zumbansen, 2004).

natural resources, and for the progressive transfer of administrative responsibilities to such representative institutions of government, as appropriate. Our goal is to transfer responsibility for administration to representative Iraqi authorities as early as possible.'

<sup>26</sup> Koskeniemi (2005, pp. 113–124); for further references, see Zumbansen (2006, forthcoming).

The continuing, contested nature of international law illustrates particular challenges to the law in post-conflict situations. There is no well-contained, settled consensus on the scope and content of the international law of occupation, nor is there a ready-to-wear, normative outfit worn by the international law of post-conflict justice. Instead, the *transnational* dimension in which these bodies of law interact, collide and fuse with ongoing searches for better law and better norms of nation-building and societal reconciliation in different parts of the world, demonstrates the degree to which a transnational law of post-conflict justice is undercutting, accompanying and complementing the public international law of occupation in distinct ways. As the nation-state alone ceases to provide the context in which legal experiments unfold, norms are emerging in a de-territorialized sphere of world society. As narratives of post-conflict situations and the role of law and alternative ordering mechanisms continue to be developed and applied, we learn much about the approximation of once isolated and distant regulatory experiments.<sup>27</sup>

The recognition or execution of political will in the task of reconstructing a state after a massive and encompassing change brings to the fore every foundational myth that regularly appears in the context of nation-building. But so much more is produced by that process, as the law and politics of reconstruction collide with demands for societal reconciliation and a future-orientated, reconstructive agenda based on independent, self-governing terms. The law of post-conflict justice, for instance, collides head-on with the programs and ideologies of 'law and development' (Posner, 1998, pp. 1–11).<sup>28</sup> This conflict between shock programs and carefully, implemented, reconstructive and learning modes (Sen, 1999) seems to characterize the options available to international consultants and legal policy programmers. Which model of the state, of the market, of society will likely underlie and guide the reconstructive efforts that depend on the financial and infrastructural support offered by the international community?

In seeking a tentative answer to this question, we are caught between skepticism and enthusiasm as to what conceptions of government, governance, democracy, social welfare and private autonomy will likely evolve from this inquiry. Realizing that path-dependent trajectories of capitalist markets and social welfare regimes reflect – to a certain degree – comparative institutional advantages, our perception can no longer remain blind to the intricate chains of causation between national reformist politics and the impacts of globalized markets. In light of the often repeated complaint of what globalization actually stands for and whether, for example, globalization has caused immense stress on welfare states or whether structural changes within these states instead promote and fuel certain globalization phenomena, we ought to take seriously the growing awareness within many international-orientated disciplines regarding the limits and constraints of their traditional analytical instruments. While legal analysis needs to embrace the sociological research that nourishes the phenomena of legal pluralism, experimental law making and public-private governance combinations

<sup>27</sup> See, for a powerful illustration, Swanee Hunt (2004); Chesterman, (2004, pp. 180–182).

<sup>28</sup> Posner (1998, pp. 1–11), on the one hand, and Rittich (2002), on the other.

(Arthur, 1988), we see a similar eye-opening within the discipline of political science as it moves from a state-orientated international relations approach towards increased research into ever more flexible forms of governance.

Likewise we see a sudden awakening within historical research to the phenomena of 'transnationalism' which to us, however, can be no less than disturbing. If, in law, we proceed in the firm belief that for the purposes of reassurance we can always turn back to law's history, to its tracks of development and even to its crossroads and turning points, it is nonetheless unsettling to have to realize that the historian herself will have had firstly to develop her own adequate analytical approach before being able to firmly guide us. We can recognize and should welcome this insecurity internal to private and public international law, embracing it in the context of questions that touch upon emerging forms of international governance that are quite intricately related to changes within national legal orders. For the participants on both ends of the debate, the *transnationalist* and the *traditionalist*, there is no simple home to be found yet, no ready-made bed to lie in any more. While the transnationalist will, sooner or later, be confronted with a struggle for legitimacy mirrored so pointedly in the history of our national legal and political orders, the traditionalist also can no longer draw the blinds in order to resort to old ways. The nation state and its legal order have undergone radical changes that prompt more questions than there are answers available. Radical changes in public administrative practice, the inescapable and ever-recurring necessity of speculative policy choices and the ensuing reflexive forms of law making in a dense public-private matrix, these features prompt closer inspection – but they do not resemble the quiet home to which some traditionalists want to return. From this it follows that both perspectives, the transnational and the traditional one, are valid and interdependent. In fact, in some sense, we can either be both or none at all.

### Past and Future

Ohne gemeinsame Begriffe gibt es keine Gesellschaft, vor allem keine politische Handlungseinheit.<sup>29</sup>

Aus den Horizonten normativer und formativer Wertsetzungen kommen wir nicht heraus.<sup>30</sup>

At this point it becomes clear that any approach to 'working through the past'<sup>31</sup> creates linkages between the past and the future. 'We cannot ask the historians, as

<sup>29</sup> 'Without common terminology, there is not society, and above all no unity for political action' (Koselleck, 1979a, p. 108).

<sup>30</sup> 'We cannot escape the horizons of normative and formative value assessments' (J. Assmann, 1992, p. 129).

<sup>31</sup> Adorno chose the term, *Aufarbeitung der Vergangenheit*, to address the problems raised by the term, *Vergangenheitsbewältigung*, which would be translated as 'coming to

Ranke did, to tell us 'wie es wirklich gewesen ist'. Instead, history is a reflection on the past from the present, and we must be aware that the common identities that we forge and the narratives that we live with emerge from processes of remembering and forgetting' (Jorges, 2005, p. 250). Indeed, the deciphering of the differently shaded heritages and legacies of emerging polities – such as post-conflict, transitional societies as well as, for example, the European Union – unveils the inseparability of an assessment of the past from the design of the future (Zumbansen, 2005b, p. 331; Veitch, 2004). The law's role in this process of to and fro is crucial as it will aid in selecting (even on occasion completing<sup>32</sup>) and thereby illuminating, some aspects of the past, as well as silencing others. And here we apparently end back where we started. Law appears as a salvaging force that can guide us out of the dark by its very appeal to legitimacy. However, that the law has never been our own, is the tragic lesson learned by the man waiting before the gates of the law, as well as by all the others that wait for law's healing hand (Miller, 2002, pp. 201–211; 2005).

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terms with the past'. See, Adorno (1998, p. 89).

<sup>32</sup> See the remarkable account of the impact of data protection and file archiving laws in Germany by Markovits (2001, pp. 513–563).

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