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Disciplinary Brief

## **JUSTICE IN TRANSNATIONAL LEGAL ORDERS**

Terence C. Halliday

Research Professor Emeritus, American Bar Foundation

Honorary Professor, School of Regulation and Global Governance, Australian National University

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The world confronts enormous problems that very often, perhaps always, require responses beyond the capacity of single national governments or states. Indeed, in my view, we can no longer think about the solution of any vexing problem of any magnitude entirely within the bounds of a single state. Invariably the actors (individuals, organizations, governments) which seek solutions to problems do so through the mechanisms of law.

These laws come in bewildering varieties, not only in their forms, but in the places they apply. Contrast laws promulgated by international organizations, such as UN treaties or the Inter-American Court of Human Rights, or laws produced by national institutions, such as India's Parliament or Brazil's administrative agencies, or state laws and municipal ordinances authorized by subnational or local bodies, such as Nigeria's state governments or the Jakarta city council.

Increasingly these laws are woven together into transnational legal orders (TLOs). These orders penetrate deeply into our national and local "ordinary affairs." Indeed, I propose that we cannot come to terms with the international order in the 21<sup>st</sup> C without recognizing that much of the drama in international social, economic and even political orders is not only about state-to-state relations, the classic focus international relations scholarship and practice, but also about the rise and fall, cooperation and competition of TLOs. These orders shape increasingly more expansive zones of social behavior. We are *all* influenced by many of them, whether or not we are aware of their day-to-day influence in our lives.

I have been working on economic and human rights TLOs for a number of years. Nicholas Wolterstorff's Theology Brief on Justice and Rights (hereafter NWTB) has stimulated me to revisit this work with the fresh theological lens he offers. I seek to apply to TLOs his distinction between first-order justice, which characterizes the everyday and ordinary affairs of our lives, and second-order justice, which responds to violations of first-order justice. I shall offer three propositions about justice and TLOs, each of which raises several questions.

## TLOs Deserve Theological Engagement

### 1. Why TLOs?

A transnational legal order (TLO) arises when individuals or industries or states or non-profit organizations or international organizations or any other kind of social actor seeks to solve problems that span national borders by legal means. These problems are as wide as the human condition:

- If the issue is *violence against women in civil conflicts*, then a body of law has built up through international tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court that penetrates into state courts and reaches to warlords and other violators of international humanitarian law.
- If the problem is how to save *failing businesses*, then there is a Legislative Guide on Insolvency produced by the UN Commission on International Trade Law (UNCITRAL) which is more or less reflected in the legislation of many countries in all regions.
- If the issue is protecting the world from *pandemics*, then a complex of global, regional and national rules run from the World Health Organization to regional and national regulatory bodies to local hospitals.

In practice, a TLO can be the response to any social, economic or political issue that actors or norm entrepreneurs can successfully frame as a “problem” to be solved in whole or in part by law.

### 2. What is a TLO?

I have stated that a TLO rises or falls in response to problems of some sort or other. These problems, of course, are identified and framed in certain ways by actors who can include individuals, industry groups, religious organizations, politicians, civil servants, elected officials, crime control authorities, authoritarian rulers, international civil servants, international NGOs – the list is almost endless. These actors seek to diagnose a problem in a certain way, obtain support for that diagnosis, then implement a solution that will remedy the ill through law, through a TLO.

A TLO has three elements. [ 1 ]

- A TLO is *transnational*: that is, it seeks to bring orderly relationships sometimes across the borders of states such as the US or Mexico, China and South Korea, India and Pakistan; sometimes across entire regions, such as the African Union or the Latin American human rights order; sometimes across the world, such as the UN Commission on International Trade Law’s Rotterdam Rules on carrying goods across oceans where much of world trade occurs.

- A TLO is *legal*. Here I adopt a sociolegal definition of law that is expansive. It includes so-called *hard law*, which is produced internationally in the form of treaties between states and which are binding on those states, or which is produced within states by Parliaments or executive agencies and which are enforced by domestic authorities. It also includes *soft law*, which now embraces a vast array of legal instruments, scripts and accountability devices, ranging from legislative guides and model laws to standards, guides, best practices, principles, codes of conduct and the like.
- A TLO is constructed to produce *order*. For a TLO to be fully established there will be a continuity or similarity or concordance of laws between transnational bodies, national legal institutions and local institutions. For example, the international standards of corporate bankruptcy law are recognizable in Australia's or South Korea's bankruptcy laws, and reach down to local courts in the provinces and towns of both countries. This order is intended to guide behavior in predictable ways that are observable in patterns of behavior.

### 3. Why TLOs now?

My colleagues in international relations at the Australian National University, however, point out another critical reason for thinking about TLOs at this moment in contemporary history. [ 2 ] They express the view that a liberal international order has been dominant in the world since a new architecture of institutions and laws emerged from the ashes of WWII. That architecture led to international institutions (the UN, World Bank, International Monetary Fund, World Health Organization, among hundreds of others) which created and propagated a kind of international rule of law with courts and tribunals to arbitrate amongst conflicting parties in international disputes, such as the rights that China, Vietnam, Philippines and other states have in the South China Sea. Both the architecture and institutions were led and dominated by the victors of WWII and their ways of thinking. The TLOs that have arisen at rapidly rising rates in the last fifty years are embedded within this liberal international order. Many TLOs are premised on the belief that there are universal rules, applicable to all, and binding morally and in law. Disputes are settled by negotiation or arbitration or conciliation or decisions by neutral tribunals. Those decisions should be binding and behavior by states or corporations or individuals should conform to them.

At present, there is something of a revolt against this international order. Most confrontationally it is led by China which chafes at standards and practices of the international community, for example, on rule of law or human rights, that lead to criticism and condemnation of its domestic behavior. Yet there is another line of critique that converges with the theological ethics proposed in the NWTB. There is some justice in the charge that the rules of the international order were ordered and over-determined by powerful western states in the international political economy – the US, European states, and later other rich countries allied with them, conventionally those 38 countries in the Organization for Economic Cooperation and Development (OECD). Justice principles should invigorate a re-appraisal of the existing order.

## **TLOs Warrant Theological Appraisal in terms of Justice and Rights**

If TLOs are widespread, probably growing in number and in the pace of their formation, and if TLOs are consequential, stretching from global/regional/transnational IOs to national capitals to provinces, cities, towns and villages in all regions, then they should be the focus of theological ethics.

NWTB opens up that prospect, beginning with the OT imperative to do “social (systemic) justice”(p1). Where NWTB opens the door to social institutions within the state, we may widen the scale of social institutions to those beyond the state—the international and the global.

What is this field of institutions? It includes: international organizations of states (e.g., UN, EU, OECD, or Mercator, the South American trade bloc); international non-governmental organizations (INGOs); international industry and professional associations; International religious groups; international bodies of indigenous or dominated peoples, e.g., World Uyghur Congress, International Campaign for Tibet; and international media, among others. The list is almost endless and it grows geometrically, given the vibrancy of international civil society and the inter-dependency of states in the 21<sup>st</sup> century.

NWTB’s pairing of the Isaiah 61 and Luke 4 passages opens up the prospect that justice orientations to the institutions, actors, processes and products of TLOs must embrace not only individuals and classes of people within states, but extend to “poor” peoples and first-nation tribes and weak states in the international economic and political orders; “captives” in political prisons in despotic regimes or refugee camps in Bangladesh or Gaza; “oppressed” peoples, such as the Uyghurs in concentration camps in Xinjiang, China, or the billions suffering under repressive rulers; and the “broken-hearted” refugees in Europe or South East Asia who are losing their families, languages, culture and customs.

## **The Ideals of First-order Justice should be Applied to TLOs**

We have seen that NWTB writes of first-order justice as “justice in how we treat others in our ordinary affairs” (6). This justice may be systemic and reach to the institutions of education, finance and business, health and geopolitics, among others. In each of these institutions or social systems, says Wolterstorff, we are charged with giving others their due, affirming their excellences, acknowledging their rights, uplifting their dignity and worth (9). To a considerable extent, TLOs provide the legal skeleton and muscle of first-order justice. Pick any institution in modern societies—the family, education, religion, leisure, the arts, science, business, travel, health, politics—and it will become quickly apparent that there are transnational laws, echoed or crafted by national lawmakers, and integrated into local institutions. What happens in Lima, Peru, or Tacoma, Washington, or Nairobi, Kenya, or Suva, Fiji, is directly or indirectly being shaped by a TLO. If the shape of these first-order institutions are molded by TLOs, then TLOs themselves should be subject, NWTB implies, to the theological ethics of justice and rights.

I have elsewhere argued that a justice orientation derived from the logics of Isa 61 and Luke 4 warrants

particular attention to *weak* actors in TLOs. [ 3 ] That attention is both a matter of pragmatics and ethics. With respect to pragmatics, it acknowledges what Wolterstorff calls “excellences,” in this case of so-called weak states. With respect to ethics, it recognizes that dignity should be accorded to states and organizations at the margins of the international political economy, to transitional and developing economies, to frail states struggling to consolidate the most basic institutions of statehood, such as an economy or education or health system.

Two ethical standards of justice illustrate how common ground can be found for Christian ethics and sociological analysis. I apply both here to the process of creating laws for the world, as building blocks of TLOs, in international organizations.

## 1. Participation

In his writings on the “global common good”, Roman Catholic theologian, David Hollenbach, [ 4 ] critiques “global political institutions” for excluding the voices of many of the world’s peoples from the creation of rules that will influence their lives. He proposes four ways that I find useful to better understand the meaning of my own research on global lawmaking: (a) they need to be sitting at the lawmaking table; (b) they need to be able to “voice” their views; (c) they need to be drawn into dialog where their views are discussed; and (d) they need to be casting votes and exercising influence when decisions are made.

If we take these four ways as Christian ethical ideals for the construction of a just TLO, then a social scientist can readily translate them into empirical research questions, such as:

- What actors (states, organizations) are aware of lawmaking efforts?
- Who is invited to participate?
- Who gets to set the lawmaking agenda?
- Who attends the lawmaking sessions?
- Who gets to participate in the informal dialogs that always characterize international negotiations?
- Who is heard?
- Who has impact, and how?

In all these ways the dignity of the weak, the voices of the marginal, the excellences of the supposedly peripheral can be addressed in two ways. They can be *appraised*—do actual practices fall short of the Christian ideal of participation? They can also be *corrected*—are international organizations changing their practices of lawmaking, of constructing and adapting TLOs in ways that accord with Wolterstorff’s ideals of justice and rights as they are specified more empirically in global forums?

## 2. Creativity

In response to his question, “Can Globalization be Shaped?”, theologian Miroslav Volf [ 5 ] argues for freely exercising “initiative and creativity” in defending the weakest across the world. Similar notes are struck by others—Max Stackhouse in his call for nurture and release of our God-given abilities to pursue the universal common good, and Pope John Paul II for living out, in the global domain, “the creativity which is the distinguishing mark of the human person.”

The transnational and global lawmaking that is an essential part of a TLO invariably requires creativity. Oddly, this is not much studied by social scientists. However, if theologians press social scientists to imagine how global lawmaking might be seen through a theological lens of creativity it opens up several vistas where views may be shared.

For instance, in my reflections on weak global actors in global lawmaking, the institutions conforming to ideals of a first-order justice might enhance creativity in several ways: (a) imagining new forums or the adaptations of current lawmaking forums to draw out the creativities of weak actors; (b) listening to the views of weak actors on which kinds of law (e.g., treaties, models laws, guidelines) are more likely to be accepted by their governments and society; (c) recognizing that weak actors, such as emerging economies, may have particular problems that require attention less relevant to advanced economies; and (d) acknowledging the special expertises of government leaders, lawmakers and law implementers, in what will or will not work in their special circumstances.

For me, Wolterstorff’s term of “excellences” creates a kind of mental shift. It affirms dignity and acknowledges the giftedness of God’s grace given to delegates and delegations too often thought as deprived or unsophisticated or to be treated as law-takers and not law-makers. It demands a theologically-inspired re-orientation towards the architects and builders of TLOs.

## Conclusion

Professor Wolterstorff frames his Theology Brief in terms which enable its extrapolation in two ways that are highly relevant for my research on TLOs.

First, he points to the several levels of social behavior where justice and rights are salient. While he uses interactions between persons, dyads, as his idiomatic mainstay, he notes that the logic of his argument applies to all social institutions within a society. For those of us who work on international institutions and global politics and society, we would take a step farther and explore more thoughtfully what justice ethics and Christian conceptions of rights can be brought to bear on the international sphere.

Second, we should bolster our theological understanding of first-order justice by examining how those “first-order institutions” are permeated by TLOs beyond the state, by the state, within the state. For all laws within a TLO the NWTB calls upon us to bring a theological standard both at the highest levels of

giving others “their due” and recognizing their rights and “excellences”, and at more empirically observable levels of such theological ethics as the enhancement of decision-making participation and affirmations of diverse creativities.

I conclude with two questions.

How can we expand this conversation between theologians and social scientists to help Christians and persons of faith to “think big”, i.e., think beyond the personal or the local and relational to institutions and states? Even farther, in a world of global interdependence and global rivalry, how may we carry further our Christian theological ethics into international organizations, transnational and global orders?

I may also ask a question of myself and all other scholars who work on international institutions. Does a theological ethics of justice and rights exert a special calling on Christian scholars of global governance? What does it ask of me as I study TLOs, global norms and who makes them, how they are made, what opportunities and creativities they open up for those whose voices are marginalized, and how effective they are in bringing justice to the poor, imprisoned, oppressed and heart-broken?



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## Further Reading

Susan Block-Lieb and Terence C. Halliday. 2017. **Global Lawmaking: International Organizations in the Crafting of World Markets** (Cambridge University Press), presenting empirical research on the social processes of international lawmaking for global commerce.

Mark J. Cartledge. "Public Theology and Empirical Research: Developing an Agenda." **International Journal of Political Theology** 10:15-66, offering a call for closer relationships between social scientists and theologians and thereby between empirical research on public institutions and well-grounded theological understandings of those institutions,.

Terence C. Halliday, 2021. "Public Theology and Global Governance: Weak Actors in Lawmaking for the World Economy." **International Journal of Public Theology** 14:415-37. For theological reflections and ethical guidance on the participation and creativity of weak actors in international lawmaking by the United Nations Commission on International Trade Law.

Terence C. Halliday and Gregory Shaffer (eds). 2015. **Transnational Legal Orders** (New York: Cambridge University Press), on the theory of transnational legal orders (TLOs) with empirical studies of TLOs in business and finance, human rights and climate change.

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## End Notes

- [ 1 ] More formally, a TLO may be defined as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.” See Halliday and Shaffer, *Transnational Legal Orders*, p5.
- [ 2 ] I express my appreciation for the insights and mutual support of Benjamin Day, Luke Glanville and Cecilia Jacob, academic colleagues in our [Scholarly Circle](#) of international relations and international organizations at The Australian National University.
- [ 3 ] Halliday, Terence C. 2021. "Public Theology and Global Governance: Weak Actors in Lawmaking for the World Economy." *International Journal of Public Theology* 14:415-37.
- [ 4 ] David Hollenbach, *The Common Good and Christian Ethics* (Cambridge University Press, 2002).
- [ 5 ] Miroslav Volf, *Flourishing: Why We Need Religion in a Globalized World* (Yale University Press, 2015).

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