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Transitional Justice in the Middle East and North Africa – Taking Account of Islam

Hakeem O. Yusuf

The Middle-East and North Africa (MENA) has a longstanding experience of authoritarianism and conflict.[1] Despots in the region positioned themselves as 'bulwarks against the rise of Islamism',[2] ruling with impunity and gross violations of human rights with the support of Western governments.[3] The situation in the MENA continues to have significant impact on the course of international relations, world trade and global politics and lately, the emergence of a humanitarian crisis of grave proportions that has led to mass migration to Europe. Authoritarianism and conflict in the region has spawned violence and extremism across the world. The recent experience of the 'Arab awakening'[4] – a revolt against authoritarianism in the region – in the MENA has led to limited opening up of the political space even if with limited gains such as the institution of democratic governance in Tunisia and the now paradoxical democratic process in Egypt. This trend is expected to intensify as the Arab awakening takes firmer hold in the various states across the MENA given that its impact has produced change that has not been witnessed in about six decades in the region.[5] There is also political transition in post-war Iraq. Each of these situations and others across the MENA calls to mind the relevance of measures to address the needs of

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[1] Dadush, Uri, and Michele Dunne. 2011. "American and European Responses to the Arab Spring: What's the Big Idea?"*Washington Quarterly:* 131-145.

[2] Soguk, Nevzat. 2011. "Uprisings in 'Arab Streets', Revolutions in 'Arab Minds'! A Provocation." *Globalizations* 8(5): 595-599, 596; Ramadan, Tariq. 2012. *The Arab Awakening, Islam and the New Middle East* London: Penguin, 9-10; see also Hanna, Michael W 2014. "God and the State in Egypt" *World Policy Journal*
http://www.worldpolicy.org/god-and-state-egypt Accessed 07 June 2017.

[3] Ottaway, David B. 2010. "The Arab Tomorrow" *Wilson Quarterly* 48
 https://wilsonquarterly.com/quarterly/winter-2010-the-arab-tomorrow/the-arab-tomorrow/ Accessed 07 June 2017; Gray, Doris H. and Terry Coonan. 2013. "Notes from the Field: Silence Kills! Women and the Transitional Justice Process in Post-Revolutionary Tunisia" *International Journal of Transitional Justice* 7 (2): 348-357; African Union Panel of the Wise. 2013. *Peace, Justice, and Reconciliation in Africa Opportunities and Challenges in the Fight against Impunity* New York: The African Union Series.

[4] More popularly referred to as the 'Arab Spring'.

[5]Soguk 2011, 595-596; Dadush and Dunne 2011, 131.

victims and institutional reforms in various parts of the region. There is both a normative and pragmatic need to provide redress for the gross violations of human rights that have ensued from mostly the actions of the state but also from non-state actors in the region at some point in time with some countries requiring processes of transitional justice at this time as is now the case in Tunisia, and others conceivably in a not too distant future as with Iraq for instance.

The core of the argument of this article is that the integration of Islamic notions of justice into transitional justice mechanisms in the MENA makes for a more viable and sustainable transitional justice process in the region. This would mean a critical cultural value in the MENA is given a place in dealing with the past and mapping out a sustainable future in the region. The argument here is premised on the logic that a social transformation-focused enterprise like transitional justice ought to engage with Islam for sustainable outcomes in societies in the MENA where Islam is very influential.[6] Given the significant role and influence of Islam on cultural, socio-political and legal institutions in the MENA, a process of transitional justice that takes account of Islamic values and practices is important for negotiating justice and institutionalising reforms in societies in the region.

Recognition that religion has a strong influence on human beliefs and attitudes[7] has led to exploration of its role in conflict resolution and peace-building.[8] There is also a developing recognition on the need for transitional justice as an interdisciplinary field to engage with

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[6] Ramadan 2012.

[7] An-Naʻim, Ahmed A. 2000. "Islam and Human Rights: Beyond the Universality Debate" *Proceedings of the ASIL Annual Meeting* 94: 95-101; Baderin, Mashood A. 2007. "Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives" *Muslim World Journal of Human Rights* 4 (1): 1-27, 1-3; Sachedina, Abdulaziz. 2009. *Islam and the Challenge of Human Right*s New York: Oxford University Press.

[8] Smock, David. 2008 *Religion in World Affairs: Its Role in Conflict and Peace.* Washington D.C.: United States Institute of Peace; Shore; Megan. 2009. *Religion and Conflict Resolution: Christianity and South Africa's Truth and Reconciliation Commission* Farnham: Ashgate; Brudholm, Thomas and Thomas Cushman (eds). 2009. *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives* Cambridge: Cambridge University Press Cambridge; Huda, Qamarul (ed). 2010. *Crescent and Dove: Peace and Conflict Resolution in Islam* Washington D.C.: United States Institute for Peace Press.

religion.[9] However, this developing body of work has focused primarily on Christian societies. The work of Daniel Philpott is the most prominent in this regard, suggesting that Christianity has had a strong positive impact on the process of truth-telling and a moderate but nonetheless noticeable one on punitive justice measures.[10] Many majority-Muslim societies have been at the coal-face of conflict and authoritarian rule, but there is sparse consideration given to the need to engage with Islam in the design and implementation of the transitional justice mechanisms and processes. Recent developments around transitional justice in the MENA in the shadows of the Arab-awakening inform the need to address this important gap which is the aim of this article.

The structure of this article is as follows: Section one examines the concern about the legitimacy of transitional justice processes generally and with specific reference to the MENA. The legitimacy of social, legal and political processes is important to their viability and this is the case also (if not more so) for a contentious and typically ambitious project of transitional justice in post-authoritarian or post-conflict societies. Section two examines the pattern of exclusion of religion from transitional justice and argues that this is one of the problematic ways in which the processes and mechanism sometimes lack legitimacy. Section three advances the case for taking account of Islam in transitional justice processes in the MENA. What emerges from the analysis is that a combination of three factors firmly suggest the positive need to recalibrate current and future transitional justice in the region to take account of Islam: the reality that there is a religious resurgence across the world; the fact that

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[9] Philpott, Daniel. 2012. *Just and Unjust Peace*: *An Ethic of Political Reconciliation* Oxford: Oxford University Press New York; Philpott, Daniel. 2007. "What Religion Brings to the Politics of Transitional Justice" *Journal of International Affairs* 61 (1): 93-110. Brewer, John D., David. Mitchell and Gerard Leavey. 2013. *Ex-Combatants, Religion, and Peace in Northern Ireland: The Role of Religion in Transitional Justice* Basingstoke: Palgrave Macmillan.

[10] Philpott, Daniel. 2009. "When Faith Meets History: The Influence of Religion on Transitional Justice" in Thomas Brudholm and Thomas Cushman (eds) *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press 2009) 174, 182.

the MENA is easily one of the regions where religion plays a central role in social ordering; and lastly, the affinity of certain transitional justice ethics like reconciliation with religion. The conclusion drawn is that a transitional justice approach in the MENA that takes account of Islam has significant potential for addressing legitimacy concerns and increasing the viability of the project in that part of the world.

Transitional Justice and Legitimacy

The legitimacy of legal and political processes is important to their viability.[11] Legitimacy has been defined by Tyler as 'the belief that authorities, institutions, and social arrangements are appropriate, proper, and just.'[12] Hurd defines legitimacy as 'the normative belief by an actor that a rule or institution ought to be obeyed.'[13] For Suchman, legitimacy is 'a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.'[14] Legitimacy is critical to the viability of any organisation, institution or mechanism because it allows people to defer to legal and various forms of authority or social arrangements.[15]

Internalised norms of justice play a key role in how people respond to legal measures and social institutions. Close alignment between prevalent notions of justice among citizens and the law or social arrangements makes for greater compliance and uptake by citizens thereby

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[11]Tyler, Tom R. and Jonathan Jackson. 2014. "Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement" *Psychology, Public Policy & Law* 20: 78-95; Huq, Aziz Z., Tom Tyler, and Stephen J. Schulhofer. 2011. "Mechanisms for Eliciting Cooperation in Counterterrorism Policing: A Study of British Muslims" *Journal of Empirical Legal Studies* 8: 728-761.
[12] Tyler, Tom R. 2006. "Psychological Perspectives on Legitimacy and Legitimation" *Annual Review of Psychology* 57: 375-400.
[13] Hurd, Ian.1995. "Legitimacy and Authority in International Politics" *International Organization* 53: 379-408, 381.
[14] Suchman, Mark C. 1995. "Managing Legitimacy: Strategic and Institutional Approaches" *Academy of Management Review* 20 (3) 571-610, 574.
[15] Tyler, Tom R. 2006. *Why People Obey the Law* 2nd ed. New Jersey: Princeton University Press.

reducing the cost of enforcement of laws and improving viability of social arrangements as applicable.[16] Social institutions require legitimacy 'to develop, operate and reproduce themselves effectively'.[17] Thus, legitimacy is relevant for example to the work of national, regional and international courts.[18] International human rights and criminal justice courts and tribunals have struggled with legitimacy issues.[19] The concern about legitimacy and the challenge it poses to their work is one of the major reasons why unlike domestic courts, public outreach programmes are considered critical to the success and viability of international (ised) tribunals.[20] This is to ensure they convey their work procedures (including prosecutorial choices) to their publics and connect with the local environment.[21]

There are two main forms in which legitimacy is analysed in political philosophy and legal theory. There is the descriptive or sociological form which focuses on whether those who are the subject of a specific policy, norm, policy, institution, unit or body like the state or an organisation, view it as legitimate and thus deserving of their compliance.[22] The second form of legitimacy is normative in nature and this takes into account whether the assumption underlying the descriptive sense of the concept is correct by investigating if it fulfils certain

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[16] Tyler 2006; Jackson, Jonathan, Ben Bradford, Mike Hough, Andy Myhill, Pau Quinton and Tom R. Tyler. 2012. "Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions" *British Journal of Criminology* 52: 1051-1071.

[17] Jackson *et al* 2012, 1051.

[18] Gibson, James L. and Gregory A. Caldeira. 1995. "The Legitimacy of Transnational Legal Institutions: Compliance, Support and the European Court of Justice" *American Journal of Political Science* 39:459-489; Gibson, James L., Gregory A. Caldeira and Lester K. Spence. 2003. "Measuring Attitudes toward the United States Supreme Court" *American Journal of Political Science* 47: 354-367.

[19] Dzehtsiarou, Kanstantsin. 2015. *European Consensus and the Legitimacy of the European Court of Human Rights*. Cambridge: Cambridge University Press; Çalı, Basak, Anne Koch and Nicola Bruch. 2013. "The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights" *Human Rights Quarterly* 35 (4): 955-984; Gerard Janneke H. and Joseph Fleurens. 2014 *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law: A Comparative Analysis*. Antwerp: Intersentia.

[20] Clark, Janine .N. 2009. "International War Crimes Tribunals and the Challenge of Outreach" *International Criminal Law Review* 9: 99-116.

[21] Oomen, Barbara. 2009. "Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda's Multi-layered Justice Mechanisms". In *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* edited by Kai Ambos, Judith Large and Marieke Wierda, 175-202, 184. Berlin: Springer.

[22] Meyer, Lukas H. and Pranay Sanklecha. 2009. "Introduction: Legitimacy, Justice and Public International Law: Three Perspectives". In *Legitimacy, Justice and Public International Law* edited by Lukas H. Meyer, 1-28, 2. Cambridge: Cambridge University Press.

conditions.[23] Both the descriptive and normative forms of legitimacy are important to the operationalization of transitional justice as a project driven by the international human rights movement, seeking to secure justice for victims of gross violations of human rights and bringing about social reforms in troubled societies. The justice and rule of law arrangements, as well as institutional reforms which are the purview of transitional justice mechanisms and processes in periods of political change, have to be delivered to varying societies across the world. However, neither justice nor the rule of law – or for that matter, human rights – is value-free. Conceptions of social reform, institutional organisation or indeed, the notion of the 'good society,'[24] are all value-laden as no legal, social or political system operates in a vacuum.

It is possible to construct a legitimacy model for transitional justice. Oomen offers a general model of the legitimacy of transitional justice mechanisms and institutions. The model proposes three components of legitimacy: input, demos and output. The input element refers to seeking out the design of the transitional justice mechanisms and processes from the people and society affected by the violations in issue, taking into consideration among others, their religious values and world view. The demos have to do with the acceptance by the relevant stakeholders of the authority which sets-up the transitional justice mechanisms, while the output refers to the outcomes of the processes. Each strand of legitimacy must be

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[23] Meyer and Sanklecha 2009.

[24]For conceptions of and debates on the notion of the good society, see the contributions in *Symposium: The Constitution and the Good Society* (2000-2001) 69 (5) *Fordham Law Review* (focusing on constitutional perspectives); Etzioni, Amitai. 2003. "The Good Society" *Seattle Journal for Social Justice* 1 (1): 83-96 (for a sociological perspective); Galbraith, John.K. 1994. "The Good Society Considered: The Economic Dimension" *Journal of Law and Society* 21 (2): 165-170 (presenting an economic view); Castaneda, Hector N. 1975. "The Good Society and the Complexity of the Structure of Morality" *Iustitia* 3 (1): 55-66 (a moral philosophy perspective); the various contributions to the special issue Davis, D.H (ed.) *Reflections on Moral Decline in America: Consulting the Founding Fathers' Views on the Roles of Church and State in Crafting the Good Society* (2000) 42 (2) *Journal of Church and State* (discussing the implications of the church/state divide). The point here is not the various dimensions (and there is no doubt these are important), but how each dimension is intrinsically informed by certain political, economic and socio-cultural values as well as visions of the individual and society.

established to optimise transitional justice.[25] Arguably, the input aspect remains the most

critical element as it would have significant implications for the nature of the demos and the

output in some form or the other. That input element is the main concern of the analysis here.

In light of the contemporary roots of transitional justice in universal human rights and

democratisation agenda of the post-World War II period,[26] it is not unexpected that the

legitimacy of transitional justice arrangements has come under scrutiny.[27] In any case, as

mentioned earlier, justice mechanisms at various levels have faced legitimacy challenges.

Questions have been raised about the legitimacy of transitional justice mechanisms and

processes.[28] This has been the case in recent times with the deployment of transitional justice

mechanisms in societies and countries in the global south. There is for instance growing

disenchantment of a considerable number of African leaders and even the African Union with

the International Criminal Court (ICC) for its alleged biased focus on 'situations' in the

continent and selective prosecution to the neglect of other regions deserving of its attention.[29]

However, while the current position of many African leaders regarding the ICC is an

important illustration of a major challenge regarding the legitimacy of the ICC as a

transitional justice mechanism, it is fair to note that the legitimacy challenge on this score is

essentially political. A balanced perspective requires establishing the views of the ordinary

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[25] Oomen 2009, 180-183.
[26] Nagy, Rosemary. 2008. "Transitional Justice as a Global Project: Critical Reflections". *Third World Quarterly* 29 (2): 275-289, 275-276; Moyo, Khanyisela. 2012. "Feminism, Postcolonial Legal Theory and Transitional Justice: A Critique of Current Trends". *International Human Rights Law Review* 1 (2): 237-275; Mutua, Makau. 2015. "What Is the Future of Transitional Justice?" *International Journal of Transitional Justice* 9 (3):1-9, 3-5.
[27] Mutua 2009, 3-5.
[28] Ibid.
[29] Imoedemhe, Ovo C. 2015. "Unpacking the Tension between the African Union and the International Criminal Court: The Way Forward". *African Journal of International and Comparative Law* 23 (1): 74-105; M. Du Plessis, Max, Tiyanjana Maluwa and Annie O'Reilly. 2013. "Africa and the International Criminal Court" https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf. Accessed 08 June 17.

people in societies and countries requiring transitional justice measures as result of conflict or authoritarian rule. In this regard, it is not clear for instance that the ordinary person in the North-East of Nigeria, Somalia, Central Africa Republic, Libya, Egypt, Tunisia, Mali, Rwanda, Burundi, and Kenya[30] share the view that African State Parties should renounce their membership of the ICC.[31]

The type of challenge to the legitimacy of the transitional justice project as currently constituted that is of interest here is the sort of criticism recently made by Abdullah An-Na'im. An-Na'im raised concern that 'the grand "modernizing" mission of North Atlantic societies' which imposes 'neo-colonial' approaches to peacebuilding undermines 'indigenous formations of transitional justice'.[32] According to An-Na'im,

> the implied assumption of [transitional justice]… is that the 'developing' society under examination is in transition from the state of being A, which we know, to becoming B, which we can predict. The precise question or theme of the study may vary, but the underlying inquiry seems to be whether that society can still maintain an acceptable level of what we, the 'international community', recognize as justice during transition.[33]

He further argues that transitional justice 'must be homegrown, emerging out of local context and adapted by the people themselves to the specific conditions of their country, through practice, and not as normative ideals imposed from above.'[34] In similar vein, Oomen has

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[30] Variously facing the scourge of insurgency, civil war, terrorism or other forms of serious violence arising from the activities of numerous state actors and non-state actors; military and paramilitary groups, militias, terrorist groups, and so on.
[31] Imoedemhe 2015, 102-104.
[32] An-Na'im, Abdullah A. 2013. "Editorial Note: From the Neocolonial 'Transitional' to Indigenous Formations of Justice' *International Journal of Transitional Justice* 7 (2): 197-204, 197.
[33] Ibid.
[34] Ibid, 199.

argued that legitimacy is the 'core feature' that links 'transitional justice institutions to sustainable peace.'[35]

While identifying with the mechanisms and goals of transitional justice as part of the international system, others have called for 'institutional humility' of international law.[36] In this regard, Nickson and Braithwaite have argued for the need for 'deeper, broader and longer' transitional justice as a strategy for narrowing the rather wide expectations citizens have of transitional justice processes and mechanisms.[37] Broadening transitional justice requires it to adopt a 'holistic, yet multidimensional' conception of justice.[38] On this view, justice is 'immanently holistic' and holism is an important 'theme' of all major world religions.[39] Transitional justice should accommodate pluralistic legal, cultural and religious traditions as contributing to justice.[40] There is reason for universal human rights to 'build on, for instance, religious and traditional values where possible. These two sources do not have to be mutually exclusive.'[41]

Mutua has similarly noted that for transitional justice to become a more 'robust project' in troubled societies there is a need for close attention to the 'context and location.'[42] Those involved in the transitional justice project need to embrace notions of justice that are 'informed by a wider moral and social universe' rather than the deemed normative universality of international human rights law.[43] Such an approach includes at the least, a

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[35] Oomen 2009, 195.

[36] Nickson, Ray and John Brathwaite. 2014. "Deeper, Broader, Longer Transitional Justice" *European Journal of Criminology* 11: 445-463, 450.

[37] Ibid, 445.

[38] Ibid, 445, 449.

[39] Ibid. 450-451.

[40] Ibid. 450-454.

[41] Oomen 2009, 196.

[42] Mutua 2015, 5.

[43] Mutua 2015, 3-5. Indeed, quite a number of scholars have made similar arguments with regarding for respect to human rights.

place for Islamic notions of justice in societies where it has resonance. An-Naʿim as well as Nickson and Brathwaite's position have at their core, engagement with the socio-cultural milieu of the society which requires transitional justice. This approach also finds support in the point made by Habermas for allowing an important place for religious views in the public sphere as exclusion of religion would deprive 'secular society from important resources of meaning.'[44] Such an approach has strong potential to 'substantially strengthen the input legitimacy' of transitional justice mechanisms and processes as the adoption of Gacaca in Rwanda has demonstrated.[45]

Transitional Justice, the Exclusion of Religion and the MENA

Some steps towards transitional justice have been taken in parts of the MENA. There are on-going conversations and debates at both the domestic and international level on addressing human rights violations and the design of appropriate transitional justice measures for various parts of the region[46] including Iraq, Tunisia, Egypt and Libya. There has also been the prosecution of a few individuals like Saddam Hussein and few high ranking officials of his regime and the trial of Hosni Mubarak in Egypt. Syria is currently in grave turmoil, caught in the jaws of a complex civil war and measures taken in relation to transitional justice in the earlier mentioned countries will have implications for securing justice for victims of ongoing atrocities there. However, it is relevant to note that the first democratically elected government in Tunisia following the Tunisian 'revolution' government led by the An Nahda Party established a Ministry for Human Rights and Transitional Justice, the first of its kind in

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[44] Habermas, Jürgen. 2003. *Future of Human Nature*. London: Polity, 109.
[45] Oomen 2009, 196.
[46] Abou-El-Fadl, Reem. 2012. "Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will". *International Journal of Transitional Justice* 6 (2): 318-330; Eljarh, Mohamed. 2011. "Transitional Justice, Reconciliation and Sustainable Peace in Libya". *Middle East Online* http://www.middle-east-online.com/english/?id=49383. Accessed 08 June 2017; Liolos, John J. 2012. "Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes". *Boston College International Comparative Law Review* 35: 589-602.

the world. The Ministry established the *Instance Verite & Dignite*, Truth and Dignity Commission (TDC) on 24 June 2014[47] and it eventually began its public sittings in November 2016. In Egypt, the inaugural cabinet of the elected President Mohammed Morsi included a minster of transitional justice.

The developments around transitional justice in the MENA, though limited, are connected to the fact that transitional justice has assumed the status of a global ethic[48] with the direct involvement of the United Nations, coordinated by an Under-Secretary General.[49] The Tunisian TDC for instance, was the product 'of a long, participatory process of national dialogue that was supported jointly by UNDP and OHCHR, since 2012.'[50] Indeed, the TDC was formally launched at the opening of an international conference organised by the Tunisian government in collaboration with the United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the New York based transitional justice consultancy organisation, the International Centre for Transitional Justice.[51] Moreover, the significance of transitional justice in the international system has recently been amplified with the appointment of a Special Rapporteur by the Human Rights Council of the United Nations General Assembly with a mandate on transitional justice measures; 'promotion of truth, justice, reparation and guarantees of non-recurrence' (Special Rapporteur).[52]

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[47] United Nations Development Programme. 2014. "Tunisia Launches Truth and Dignity Commission" http://www.undp.org/content/undp/en/home/presscenter/articles/2014/06/09/tunisia-launches-truth-and-dignity-commission.html Accessed 07 June 2017

[48] Balint, Jennifer, Julie Evans and Nesam McMillan. 2014. "Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach". *International Journal of Transitional Justice* 8 (2): 194-216, 198; Nagy 2008.

[49] Annan, Kofi. 2004 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: The Report of the Secretary-General'. S/2004/616. Available at: https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/   . Accessed 08 June 2017.

[50] United Nations Development Programme 2014.

[51] Ibid.

[52] United Nations Human Rights Council Resolution 18/7; De Greiff, Pablo. 2012. "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence" United Nations General Assembly Human Rights Council A/HRC/21/46.

The conversations on transitional justice in the MENA among international organisations (IOs) and international non-governmental organisations (INGOs), civil society groups, scholars and policy groups have proceeded with virtually no reference to religious leaders or the role Islam can play in bringing about justice and institutional reforms in the region. To illustrate this point, take the views expressed by an important contributor to the discourse: the Special Rapporteur. He noted the 'distinctive characteristics' of transitions in the MENA in this way:

> a common feature of these recent transitions is the prominent role that claims relating to economic rights occupy in these transitions; claims against corruption and in favour of economic opportunities have been raised to a par in the regions with claims for the redress of violations of civil and political rights.[53]

The issues raised are no doubt important as they highlight the need to focus on structural injustice or violence – violations of economic and social rights and embedded injustice in the social fabric of the societies – but the claim as to their distinctiveness in the transitional context is at best late in time. Such concerns are very important but inattention to them by the transitional justice project has been raised with reference to transitions elsewhere.[54] The concerns arise from the privileging of civil and political rights in the focus of transitional justice and the field's 'relatively presentist…concerns', as Balint, Evans and McMillan and

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[53] De Greiff 2012, 6.
[54] Miller, Zinaida. 2008. "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice" (2008) 2 (3) *International Journal of Transitional Justice* 266; Muvingi, Ismael. 2009. "Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies" *International Journal of Transitional Justice* 3 (2): 163-182; Kent, Lia. 2012. *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor* London: Routledge; Mani, Rama. 2008. "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development" *International Journal of Transitional Justice* 2 (3): 253-265; Laplante, Lisa J. 2008. "Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework" *International Journal of Transitional Justice* 2 (3): 231-252.

others have pointed out. [55] Transitional justice processes have commonly excluded structural injustices linked to major historical events like colonialism and its enduring effects but only engage with 'contemporary episodes of injustice and their recent histories.'[56] Arguably, the distinctiveness of transitional justice in the MENA is located in identifying and reckoning with the dynamics of the socio-cultural norms of justice in the region.

To be fair, the Special Rapporteur's view is situated in the foundations of contemporary practices of transitional justice. The transitional justice template is generally framed in secular terms and usually in the legal language of international law.[57] The current developments and arrangements for transitional justice in the MENA have naturally adopted that approach. The neglect in exploring the relevance of religion as a viable contributor to conflict transformation or securing justice and achieving reconciliation after periods of political turmoil or authoritarianism can be linked to the view that religion – a 'system of belief and practice'–[58] particularly in the post-enlightenment age, is an anachronism.

The Northern Ireland experience of transitional justice following the peace process embodied in the Belfast Good Friday Agreement (1998) exemplifies the institutionalised view that religion and transitional justice should not mix based largely on the foundations of transitional justice on international human rights.[59] Brewer, Mitchell and Leavey have noted that while the 'substance of conflict' in Northern Ireland 'was thoroughly political',[60]

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[55] Balint, Evans and McMillan 204, 199-201; Paige, Arthur. 2009. "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice". *Human Rights Quarterly* 31: 321-367.

[56] Balint, Evans and McMillan 204, 199-201.

[57] Baderin, Mashood. 2009. "Religion and International Law: Friends or Foes". *European Human Rights Law Review* 5: 637-658.

[58] Turner, Bryan S. 2011. *Religion and Modern Society: Citizenship, Secularisation and the State* (Cambridge: Cambridge University Press 2011) xiv.

[59] C/F Turner 2011, xx-xxi, arguing that human rights discourse is a 'new cosmology' that involves a bundle of ideas that are 'profoundly religious'.

[60] Brewer, Mitchell and Leavey 2013, viii.

Northern Ireland is such an 'extremely religious society'[61] where even for those who are not actively religious, religion is a 'cultural reality.'[62] 'Religion' they stated further, 'is seen as both outside the domain of human rights and, indeed, part of the problem that causes human rights abuses in the first place.'[63] Consequently, the dominance of the 'liberal human rights paradigm' excluded engagement with the role of religion in the transitional justice discourse on the important issue of ex-combatants in the Northern Ireland troubles. This is despite the prominent role some religious leaders have played in such processes like the case with South Africa[64] and Sierra Leone. Indeed, the unintended but prominent role Christianity played in the South Africa TRC process has been criticised by some scholars.[65]

Brewer, Mitchell and Leavey's observation on the virtual lack of advertence to religion in transitional justice discourse in Northern Ireland is even more acute with respect to the MENA and majority-Muslim countries in transition. This is in view of the abiding influence of Islam on the lives of Muslims who constitute majority of the population of the MENA. Moreover, there is the fact that Islam is a matter of political discourse in the region. As Saud observes

> the 21st century has thus far been dominated by talk about Islam and political movement within the Muslim world. This talk has not been merely talk, but a political discourse according to which military and economic policies have been articulated. It is difficult to believe though that Islam is everywhere, yet nowhere to be found when

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[61] Brewer, Mitchell and Leavey 2013, viii.
[62] Ibid, viii.
[63] Brewer, Mitchell and Leavey 2013, vii.
[64] See for a discussion of this, Shore 2009.
[65] Wilson, Richard. 2001. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge: Cambridge University Press; Randera, Fazel. 2000. "The Baruti versus the Lawyers: The Role of Religion in the TRC Process". In *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* edited by Charles Villa-Vicencio and William Verwoerd. Cape Town: University of Cape Town Press, 123–31.

Arab Muslims peacefully pursue democracy; but this is exactly what some experts want you to believe.[66]

The exclusion of religion in the formal design and implementation of transitional justice is a reflection of the fact that religion has become a contested issue in contemporary societies and especially in the West.[67] The approach manifests the tension between religion and the public sphere that gained currency in the post-Enlightenment period in Europe.

Further, there has been much focus on religion as a source of conflict and violence. It is undoubtedly the case that many people have and are still being killed in the name of religion. So, religion has come to be viewed as a 'driver of violence'.[68] This view finds expression in the close association that is made between political or other forms of social violence and religion in societies where religion is a prominent cultural fact like majority-Muslim countries[69] and even other countries where Muslims constitute a visible minority as is the case in a number of Western countries like Canada, France, Germany and the United Kingdom.[70] In the circumstance that religion can and has been mobilised in various ways for furthering the cause of conflict, terror and war, it is not surprising that only marginal attention has been devoted to what positive role religion can actually play in social transformation in societies where it has considerable influence.

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[66] Saud, Laith. 2012. "The Islamic Roots of the Egyptian Revolution". *Journal of Islamic Law and Culture* 12 (3): 187. See also Baderin 2009.

[67] Sandal Nukhet A. and Patrick James. 2010. "Religion and International Relations Theory: Towards a Mutual Understanding". *European Journal of International Relations* 17 (1): 3-25, 3-5.

[68] Hayward, Susan. 2012. "Religion and Peacebuilding: Reflections on Current Challenges and Future Prospects". USIP *Peace Brief* 1-10 http://www.usip.org/sites/default/files/SR313.pdf. Accessed 7 June 2017; Sandal and James 2010, 5.

[69] Gopin, Marc. 2002. *Holy War, Holy Peace: How Religion Can Bring Peace to the Middle East*. Oxford: Oxford University Press, 6; Fair, C.Christine, Neil Malhotra and Jacob N. Shapiro. 2012. "Faith or Doctrine? Religion and Support for Political Violence in Pakistan". *Public Opinion Quarterly* 76 (4): 688.

[70] Levey, Geoffrey Brahm. 2009. "Secularism and Religion in a Multicultural Age". In *Secularism, Religion and Multicultural Citizenship* edited by Geoffrey Brahm Levey and Tariq Modood. Cambridge: Cambridge University Press, 2-3.

The experience of increased global visibility of religion in the public sphere has led to a description of the 20th century as 'God's Century.'[71] There is evidence to support the view that despite vigorous attempts at secularization of the public sphere, there has been a resurgence of the influence of religion in all parts of the world, including Western Europe.[72] For example, religion has returned to the public sphere in the former Soviet Republics where it was officially repressed or banished into a limited private space. According to Sherrie Steiner, more 'than 90% of people in the world adhere to one of the major religions.'[73] Pippa Norris and Ronald Inglehart have commented on how 'even in highly secular societies, the historical legacy of religion continues to shape worldviews and to define cultural zones.' [74]

MENA and Transitional Justice – Taking Account of Islam

Religion remains an important part of the socio-cultural experience of many societies and especially in the MENA. The three Abrahamic religions originate in the MENA but the vast majority of the population (about 90 per cent) are Muslims.[75] For more than fourteen centuries, Islam has had cross-cutting influence on social ordering in the MENA and played a visible role in the experience of the 'Arab awakening.'[76] For Laith Saud, 'the Arab Spring has its roots in many things, but of all them the most central is Islam…the historical context

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[71] Toft, Monica D., Daniel Philpott and Timothy Samuel Shah. 2011. *God's Century: Resurgent Religion and Global Politics*. New York: W.W. Norton and Co.

[72] Taylor, Charles. 2008. "What is Secularism?" In *Secularism, Religion and Multicultural Citizenship* edited by Gerard Brahm Levey and Tariq Modood. Cambridge: Cambridge University Press; Toft, Philpott and Shah 2011; Turner 2011.

[73] Steiner, Sherrie. 2012. "Governance Faith-Based Accountability Mechanism Typology: The 2011 Interfaith Summit as Soft Power in Global" (2012) *SAGE Open* 1-15. http://sgo.sagepub.com/content/early/2012/05/25/2158244012450705.

[74] Norris, Pippa and Ronald Inglehart. 2011. *Sacred and Secular: Religion and Politics Worldwide*. New York: Cambridge University Press, 17.

[75] Selvik, Kjetil and Stig Stenslie. 2011. *Stability and Change in the Modern Middle East*. London: I.B.Tauris & Co Ltd, 8.

[76] Ramadan 2012; Saud 2012.

within which the revolutions are transpiring is inundated with Islam.'[77] Islam remains equally an important issue in the post-invasion experience of Iraq and the conflict situation in Syria. It is instructive in this regard too that so-called Islamist Parties came to power following the fall of authoritarian regimes in Tunisia and Egypt. There is the fact of influence and, or participation in the transitional government in Libya of groups asserting 'Islamist' credentials in the civil war in Syria, quite apart from the Daesh group.

While previous research recognises the relevance of Islam as one of the Abrahamic faiths with viable potential tools and mechanisms for conflict transformation, focus on the potential or actual role of Islam in that regard has been marginal. This may be due in part to the fact that generally, with the notable exception of the truth seeking process in Morocco, the trial of Saddam Hussain and the trial of Hosni Mubarak, there have been hardly any transitional justice measures in the much troubled MENA.[78] The notable exception is the creation of the Ministry of Human Rights and Transitional Justice in Tunisia which has established a truth-telling process as mentioned earlier.[79] This situation, Worden *et al* have noted, owes more to 'poor governance' than to 'Islamic legal thinking'[80] which has a 'strong justice narrative'.[81] Correlatively, there is sparse research on the role of Islam in transitional societies in predominantly Muslim societies and countries.[82]

Religion has much to offer political reconciliation practices now required in the MENA. Notwithstanding the framing of transitional justice in secular terms, important aspects of the

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[77] Ibid , 187.

[78] Scott Worden, Shani Ross, Whitney Parker and Sahar Azar 'Analyzing Post-Conflict Justice and Islamic Law' (2011) 87 *USIP Peace Brief* http://www.usip.org/sites/default/files/Analyzing%20post-conflict%20justice%20and%20islamic%20law.pdf.

[79] Rim El Gantrim 'Tunisia in Transition: One Year after the Creation of the Truth and Dignity Commission' (2015) *ICTJ Briefing* https://www.ictj.org/sites/default/files/ICTJ-Briefing-Tunisia-TJLaw-2015.pdf .

[80] Worden *et al* supra n 74, at 1.

[81] Worden supra n 74 *et al* 8, 3.

[82] Worden supra n 74 *et al*, 3.

conceptual approach of transitional justice, even if only subliminally, lend themselves to identification with important religious values of truth, forgiveness and reconciliation. This is because religion is a major 'carrier' of ethics of reconciliation. Religion has the potential for making major contributions to the conception of justice by believers in dealing with past experiences of injustice.[83] In this regard, Philpott has identified an 'ethic of political reconciliation' in societies recovering from a legacy of injustice. This ethic finds 'thorough' expression in religion, specifically, Judaism, Christianity and Islam. As a 'restorative ethic,' reconciliation animates six critical practices relevant to 'political proceedings': building socially just institutions, acknowledgment, reparations, punishment, apology and forgiveness even though combinations of these would be regarded as odd bed fellows in the 'liberal human rights paradigm' institutionalised by the west. He convincingly argues that there are sound reasons for recognising an important role for religion in societies recovering from troubles whether or not the people are religious. An important reason for this is that secular rationales are compatible with 'religious justifications' for political reconciliation practices.[84]

Furthermore, transitional justice processes engage social, cultural, political and legal issues in societies in transition. The handling of such issues is strongly influenced by Islam in predominantly Muslim societies and especially those in the MENA.[85] As John Esposito observed 'Islam today is the dominant symbolic and ideological force in the Muslim world informing social institutions…and politics.'[86] This is because, broadly speaking, Islam as a religion embodies a relatively comprehensive code for living in society. In view of the socio-

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[83] Philpott 2012, 8-9; Gopin 2002, 4-6.
[84] Ibid, 4-10.
[85] An-Na'im supra n 7, 95; John J. Donoghue and John L. Esposito *Islam in Transition: Muslim Perspectives* (Oxford: Oxford University Press 2006); Sachedina supra n 41; S.M. Ghazanfar 'Islamic Economics: Salient Features and a Critical Survey' in Akbar S. Ahmed and Tamara Sonn (eds.) *SAGE Handbook of Islamic Studies* (London: SAGE Publications 2010) 83; Lawrence Rosen 'Islamic Concepts of Justice' in Akbar S. Ahmed and Tamara Sonn (eds.) *SAGE Handbook of Islamic Studies* (London: SAGE Publications 2010) 69.
[86] John L. Esposito *The Oxford History of Islam* (Oxford: Oxford University Press Oxford 1999) x.

cultural dominance of Islam in the MENA,[87] there is an important need to engage with Islam as an institutionalised reference point in the process of justice and social transformation that has been heralded there.[88] Specifically, it is important that Islam be engaged in the process of the design and implementation of transitional justice measures which have already commenced in parts of the region.[89]

Thus far, the analysis has focused on the case for adverting to Islam in transitional justice contexts in the MENA. Meanwhile, with the establishment of international criminal tribunals, criminal trials have become one of the most definitive features of transitional justice in the post-Nuremberg period.[90] The prosecutions for gross violations of human rights have been at the national, but most prominently, at the international level have followed, in the words of Kathryn Sikkink, a 'justice cascade'.[91] According to Luc Huyse, prosecution is 'by far the most radical interpretation of acknowledgment and accountability'[92] which are the two core features of the transitional justice project. However, the prioritisation of trials in the transitional justice project has raised concerns on the appropriate role of victims of gross violations of human rights.[93]

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[87] Saud 2012, 187.
[88] Ramadan 2012.
[89] Abou-El-Fadl 2012; Eljarh 2011.
[90] Nickson and Braithwaite 2014, at 447; Dixon, Peter and Chris Tenove. 2013. "International Criminal Justice as a Transnational Field: Rules, Authority and Victims." *International Journal of Transitional Justice* 7 (3): 393-412, 393.
[91] Sikkink, Kathryn. 2011. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: W. W Norton & Company Inc.; see also Engle, Karen. 2015 "Anti-Impunity and the Turn to Criminal Law in Human Rights." *Cornell Law Review* 100:1069-1128.
[92] Huyse, Luc. 1995. "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past" *Law and Social Inquiry* 20 (1): 51-78.
[93] McCarthy, Connor. 2015. "The Rome Statute's Regime of Victim Redress: Challenges and Prospects." In *The Law and Practice of the International Criminal Court* edited by Carsten Stahn. Oxford: Oxford University Press 1203-1221; Moffett Luke. 2015 "Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague." *Journal of International Criminal Justice* 13 (2): 281-311; Anyah, Morris A. 2015. "Balancing Rights of the Accused with Rights of Victims before the International Criminal Court." In *The International Criminal Court in Search of its Purpose and Identity* edited by Triestino Mariniello, 79-107. London: Routledge; Hobbs, Harry. 2014. "Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice." *Texas International Law Journal* 49 (1): 1-33; Acevedo, Pablo L. 2014. *Victims' Status at International and Hybrid Criminal Courts: Victims' Status as Witnesses, Victim Participants/Civil Parties and Reparations Claimants*. Abo: Abo Akademi

The trial process privileges the international system or the State typically relegating the status of the victim. Such privileging is problematic in whichever form it takes. The State and its institutions (or some of them) is usually directly or at least indirectly complicit in gross violations of human rights which are being addressed and this may generate antagonism from victims. For the international system, while it may be considered as a positive that it is a neutral agent in contrast with a likely complicit State, the fact of its remoteness or distance could create other major problems. Victims could feel a sense of disconnection if not imposition by the trial process. Either of these may generate in victims, feelings of disinterest in the process or lack of satisfaction with the procedures and outcomes. The Islamic legal system offers an approach that could be pragmatic especially for a considerable number of people in various societies and across countries in the MENA. It is thus important to take this into account in the design and implementation of transitional justice mechanisms there. However before moving on to that, it serves the argument advanced so far to illustrate with a concrete instance of the operation of transitional justice in a momentous period in Islamic history.

A Classic Example of Transitional Justice in Islamic History

If transitional justice is concerned at least in part with conflict transformation and sustainable peace in the context of complex political changes as well as justice, then it is useful to refer here to an experience of political accommodation with a view to instituting peace in the earliest epoch of the Islamic era. But before going further it is relevant to advert to the debate about the historicisation of transitional justice namely when did transitional justice begin? Some have argued that transitional justice is a twentieth century phenomenon (much like the view held in some quarters about the history of human rights) which emerged as part of the

University Press; Ochoa, Juan Carlos. 2013. *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*. Leiden: Brill/Martinus Nijhoff Publishers; Hoyle, Carolyn and Leila Ullrich. 2014. "New Court, New Justice? The Evolution of 'Justice for Victims Domestic Courts and at the International Criminal Court" *Journal of International Criminal Justice* 12 (4): 681-703; Bassiouni, M.Cherif. 2006. "International Recognition of Victims' Rights." *Human Rights Law Review* 6 (2): 203-279.

responses to the experiences of the Second World War.[94] Others like Jon Elster have, through a historiographical account, traced a longstanding practice of transitional justice.[95] On this latter view, seeking justice following periods of wide spread repression or aftermath of mass atrocities is not new. David Dyzenhaus states in this regard that it is the 'label' (transitional justice) that is new, not the 'topic'. On this account, societies that have desired to break with a troubled past marked by injustice and repression have adopted various measures in their bid to usher in a 'better future'.[96] It is this approach to the historicisation of transitional justice that is adopted here not the least because it highlights and acknowledges, even implicitly, an important role played by religion and religious figures in the development of aspects of what we now refer to as transitional justice.

It is useful in this regard to illustrate the experience of transitional justice in the classic Islamic period as that period of Islamic history continues to have deep resonance with most Muslims till today in one way or the other. The conquest of Makkah in 630 C.E is a milestone in Islamic history as it marked the consolidation of the Muslim community established by Prophet Muhammad and his followers in Madina. The Prophet and his followers had been persecuted in Makkah for thirteen years before he and many of them went on exile and migrated to Madina. The nascent Muslim group in Makkah had suffered deprivation; economic, social and political boycott, physical and mental torture and even, in some cases, murder, for a thirteen years in the hands of their own people; the powerful and much respected tribe of Quraysh, for accepting the message brought by Prophet Muhammad.

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[94] Paige 2009; Shore 2009, 27.
[95] See notably Elster, Jon. 2004. *Closing the Books. Transitional Justice in a Historical Perspective*. Cambridge University Press.
[96] Dyzenhaus, David. 2003. "Review Essay: Transitional Justice" *International Journal of Constitutional Law* 1(1): 163-175, 164.

Even after the emigration of the Muslims, the nascent community in Madina had to contend with economic, social and political pressure from the Quraysh of Makkah who not only confiscated their properties in Makkah but also waged war against the Muslim community of Madina in several battles. Following a breach of a negotiated truce between the parties by the Quraysh, Prophet Muhammad set out in 630 C.E., eight years after his departure from Makkah, with a ten thousand strong army to confront the Quraysh in Makkah. The Muslim army overwhelmed the Quraysh who could not put up an effective resistance. The invading Muslim army however entered the city with the loss of a few men in skirmishes from slight resistance of two clans as the Muslims entered Makkah. At the moment of victory over those how had persecuted him and his followers, his now defeated enemies and their leaders stood breathless with grave apprehension about their fate. Significantly, Prophet Muhammad allayed apprehensions of punishment on the part of the oligarchs of Makkah and declared a general amnesty with the exception of four individuals (ten according to some accounts) considered the most culpable criminals in the city who he ordered to be punished. The Prophet called on his followers to embrace reconciliation and forgiveness of their persecutors.[97] This is only one major instance of the historical application of notions of transitional justice within the Islamic tradition.

Arguably, any ethic that claims global relevance like transitional justice [98] that ignores religion does so only to its 'detriment.'[99] This is especially pertinent in societies where religion, and or religious leaders play a 'pivotal role' in socio-political affairs, since religion can be effectively used as consensus-builder for reconciliation practices.[100] While the Islamic legal system is not currently referenced in the transitional justice discourse generally, and on

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[97] Ramadan, Tariq. 2007. *The Messenger: The Meanings of the Life of Muhammad,* 174-179. London: Penguin Books.
[98] Nagy 2008.
[99] Philpott 2012, 8.
[100] Ibid.

victims' rights specifically, it is noteworthy that it provides a markedly different approach to participation and status of victims from the dominant system based on international human rights.

Broadening Transitional Justice – The Role of Victims in the Islamic Legal Tradition

The Islamic system provides a comparative exception to the relegation of the role of the victim by the State in the criminal justice system. Importantly, the system on this score has not only a comparative value, but direct relevance in the context of the practice and application of transitional justice measures. The Islamic approach to victims offers opportunity for broadening transitional justice as conceived by those concerned about the rather limited opportunities for justice offered by the current narrow framing of the project. Islam provides a central role for victims within the criminal justice framework. This is important in view of the fact that criminal justice, as stated earlier, dominates the landscape of transitional justice in the handling of impunity. In light of the fact that virtually all the countries in the MENA have a socio-legal system which recognizes or operates aspects of Islamic law, incorporation of the Islamic perspectives for dealing with impunity provides an opening for securing justice for victims of impunity in the MENA as opportunities for transitional justice emerge in the region.

Islam as a way of life with a holistic prescription for individual and communal life, has prescriptions for crime and the role of victims which constitute part of its criminal justice system alongside a civil justice system (with overlaps between the two systems in some areas).[101] The victim plays a key role in the Islamic criminal justice system adapted to

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[101] Doi, Abdur Rahman I. 1984. *Shari'ah: The Islamic Law* 220-221. London. Taha Publishers

varying extents in many Muslim countries. Victim compensation for crimes is a fundamental aspect of Islamic law.[102] The Islamic legal system recognizes three categories of crimes: *Hadd* (plural *Huduud*), *Qisas* and *Ta'zir*. These categories determine the kinds of penalties that attach to the crimes and the level of discretion (or lack of it) granted to the judge.[103]

The literal meaning of *Hadd* is 'limit' and in its technical usage, it refers to the limit of action set by divine prescription in the foundational or 'constitutional' sources of Islamic law; the Qur'an and Sunnah (sayings and approved practices of Prophet Muhammad) regarded as the normative basis of the Islamic legal tradition.[104] When this limit is exceed or transgressed, then a crime of a serious nature is committed because violating *hadd* is considered to be an offence against God and the socio-legal order God has ordained. In other words, it constitutes a violation of limits for action imposed by God.[105] *Hadd* offences are mainly regarded as victimless crimes, or where there is a victim, s/he is only peripheral to the crime committed.[106] For efficiency and to deter impunity, it is generally considered that prosecution of such crimes are best left to the State.[107] Therefore, the intervention of victims is reduced to a minimum in deference to a mandatory regime of punishments prescribed by Islamic law. However, where there is a victim whose rights are directly violated, the interest of such a victim will be recognized.[108]

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[102] Doi 1984, 222-223.
[103] Doi 1984, 220-221.
[104] Rabb, Intisar A. 2011. "The Islamic Rule of Lenity: Judicial Discretion and Legal Canons" *Vanderbilt Journal of Transnational Law* 44 (5): 1299, 1315; Doi 1984, 218-221.
[105] Bassiouni, M. Cherif. 2013. *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, 136. New York: Cambridge University Press; Doi 1984, 221.
[106] Rahami, Mohsen. 2007. "Islamic Restorative Traditions and their Reflections in the Post Revolutionary Criminal Justice System of Iran." *European Journal of Crime, Criminal Law and Criminal Justice* 15: 227-248, 231-232; Doi 1984, 221.
[107] O'Hara, Erin. 2005. "Victim Participation in the Criminal Process." *Journal of Law and Policy* 13: 229-247, 238.
[108] Doi 1984, 222-223.

There are five universally agreed *Huduud* crimes in Islamic criminal law: *hirabah* – highway robbery; *zina* – fornication or adultery depending on the marital status of the defendant; *sarqa* – stealing; *shrub al-khamr* – consuming alcohol; *qadhf* – defamation of a person's chastity or sexual slander. There is no consensus on the definition and elements of two others; *baghi* – armed rebellion and *ridda* – apostasy.[109] The State initiates the proceedings and the victim generally has the limited role of witness and the offence is deemed to be a matter of public nature.[110] This is because the crime committed is deemed to be disruptive of social harmony[111] and in violation of the five core objectives of Islam (*maqāṣid al-sharīʿa*): the protection and preservation of life, religion, sound intellect, lineage, and property.[112] Accordingly, the punishment for such violation is mandatory and as set out in the primary sources of *Shari'a* and Islamic law, just like the offence itself.[113] Nonetheless, from a practical point of view, the absence of a report by the victim means the crime cannot be successfully prosecuted as there are strict evidentiary requirements for establishing such crimes.[114] Moreover, the strict evidentiary rules as well as required social considerations for its implementation limit the actual occasions for the appropriate application of punishments for *hadd* crimes. This is the basis for suspending the implementation of the punishment for theft in a period of famine for instance.

Of specific interest are the last two categories of offences: *Qisas* and *Ta'zir.* In both, the victim is a more active participant because the offences are deemed to usually combine violations of public and private rights as against a public right only characteristic of the *Hadd*

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[109] Bassiouni 2013, 134; Doi 1984, 229-259.
[110] Ammar, Nawwal H. 2001. "Restorative Justice in Islam: Theory and Practice." In *The Spiritual Origins of Restorative Justice* edited by Michael L. Hadley, 161-180, 168-169. New York: State University of New York Press.
[111] Doi 1984, 219, 222.
[112] Al-Raysuni, Ahmad. 2011. *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, 137. London: International Institute of Islamic Thought; Rabb 2011, 1331; Kamali, Mohammad H. 2008. *Maqasid al-Shari'ah Made Simple*. Washington: International Institute of Islamic Thought.
[113] Bassiouni 2013, 133, Doi 1984, 229-267.
[114] Bassiouni 2013, 134-136.

category. This is particularly the case with Q*isas* which means 'equality in punishment' or legal retribution crimes.[115] Some refer to them as crimes punished with 'equivalence' or 'retaliation' but it is even better captured as 'settlement of accounts.'[116] *Qisas* crimes affect the physical integrity or moral dignity of the individual and they are essentially homicide crimes: murder and manslaughter as well as all forms of assault and battery.[117] In contrast with the *Huduud* crimes, *Qisas* empowers the (direct) victim or their family (indirect victims) to play a central role in determining the fate of the offender. Specifically, *Qisas* permits the victim or their family, to play a central role in sentencing after conviction. They are punishable by retaliation or equivalence of punishment if so decided by the victim or the victim's family, by a penal fine or compensation (*Diyya*) paid to the victim.[118] This extends to all cases of physical injury and even homicide, voluntary or otherwise.[119] In this regard, the Qur'an states

> O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment. And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous.[120]

And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers. [121]

The foregoing verses indicate not only the important role of the victim, but also the paramount nature of the prerogative of mercy or pardon solely conferred on the individual rather than the State in contrast with the standard practice in western legal systems. This is because, despite the element of punishment, there is clear encouragement of remission and no compulsion in the direction of punishment.[122] There is ample room for forgiveness and reconciliation between victim and offender and in some cases, even the families on both sides.[123]

Ta'zir crimes are a residual category not covered either by *Huduud* or *Qisas*.[124] *Ta'zir*, meaning 'chastisement' for improper behaviour or discretionary penalty, is also applied where though the crime committed is considered to be of either a *Hadd* or *Qisas* nature, but the evidentiary requirements of either is not satisfied.[125] Further, it is also applied where there is some form of remission on the part of the offender before apprehension and prosecution by law enforcement agents of the State. An example of this latter situation would be where the robber for instance becomes remorseful, restores stolen property to the owner and thereby achieve reconciliation with the victim before arrest. The *Hadd* punishment will not be implemented in such a case.[126] Rather, the judge is at liberty to apply the 'rule of lenity'

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[121] Ibid. Chapter 5 verse 45 http://quran.com/5 .

[122] Hascall, Susan C. 2011. "Restorative Justice in Islam: Should *Qisas* Be Considered a Form of Restorative Justice?" *Berkeley Journal of Middle Eastern and Islamic Law* 4 (1): 35-78.

[123] Rahami 2007, 236, 242; Nickson and Braithwaite 2014, 445, 448; Powell, Russell. 2011. "Forgiveness in Islamic Ethics and Jurisprudence." *Berkeley Journal of Middle Eastern and Islamic Law* 4 (1):17, 26-28.

[124] Doi 194, 226.

[125] Doi 194, 224-225.

[126] Rahami 2007, 233.

rather than the prescribed punishment for the ostensible crime committed.[127] This is particularly relevant because the evidentiary requirements of *Huduud* crimes, as mentioned earlier, are particularly stringent[128] in recognition of the need to maintain the higher level of certainty before the application of grievous punishment. In practice, many situations that should be punished as *Hadd* offences fall to be decided as *Ta'zir* crimes because of evidentiary issues or circumstances leaving room for more transformative experiences of offender encounters with the criminal justice system[129] and implicitly, increasing the scope for the active role of victims.

A third form and, perhaps the most common form in which *Ta'zir* is applied in the Islamic criminal (and also civil) justice system is even more relevant to securing justice for victims in troubled societies. *Ta'zir* is a point of reference for harmful or wrong conduct that is not explicitly covered by the primary or textual sources of Islamic criminal law.[130] In line with the goals and objectives of Islamic law which gives primacy to the preservation and protection of human life and dignity,[131] such crimes are not allowed to fall through the interstices of the rule of law. For such crimes, the political and judicial authorities are conferred with flexible authority and discretion to criminalise and punish offenders respectively. This aspect of *Ta'zir* will operate for covering the spectrum of gross violations of human rights which are not directly provided for in Islamic law but for which victims have suffered deprivations. Both *Qisas* and *Ta'zir* are particularly relevant for protecting the rights and promoting the interests of victims in the post-authoritarian and post-conflict context.

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[127] Rabb 2011, 1315.
[128] Crystal 2001, 476 and Bassiouni 2013, 144-145.
[129] Ammar 2001, 169; Doi 1984, 224.
[130] Rabb 2011, 1316.
[131] Sherman A. Jackson 'Shari'ah, Democracy and the Modern Nation-State: Some Reflections on Islam, Popular Rule and Pluralism' (2004) *Fordham International Law Journal* 88.

Recent research has suggested that the application of *Qisas* in the implementation of transitional justice in Somalia has strong support because of the 'long history and cultural centrality of Somali Islam.'[132] In this regard, Rahma AbdulKadir and Caroline Ackley found that

> The esteem in which the respondents hold Islamic values as guides to peace, education, and justice illustrates the importance of including Islamic values and jurisprudence in mechanisms of transitional justice in Somalia.[133]

This finding speaks to the significance of legitimacy of transitional justice measures in the subject society as a critical issue for their viability as discussed above and with resonance for securing justice for a considerable number of victims of gross violations across the MENA region.

There is also the significant fact that notable aspects of international humanitarian law form an important part of Islamic law developed well over a millennium before the contemporary international humanitarian law. Rules of humanitarian law in Islamic laws of war have been examined both at theoretical and application perspectives dating back to the classical period of Islam; the lifetime of the Prophet Muhammad and his immediate successors right through much of the period of the spread of Islam to different parts of the world.[134] As Bassiouni has argued, Islamic law is not only compatible with transitional justice, but 'Islamic criminal law, by its very terms, demands action in post conflict situations.'[135]

Conclusion

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[132] AbdulKadir and Ackley 2014, 112-113.
[133] Ibid, 117.
[134] Bassiouni 2013, 150-189.
[135] Ibid, 146-147.

Despite the prominence of religion and specifically Islam in the socio-political and cultural life of societies in the MENA, reference to integration of religion in transitional justice processes in the region is virtually absent in the emerging discourses and processes of transitional justice there. Yet, the strong historical affinity for Islam in the MENA makes it problematic to frame the critical project of transitional justice and conflict transformation in the region on foundations that excludes religion as is currently the case. For over fourteen centuries it has been difficult to conceive of religion in the historical sense in majority-Muslim societies like the MENA. Addressing impunity - the suffering and gross violations of human rights that have ensued from mostly actions of the state but also non-state actors as a result of over six decades of authoritarianism and conflict in the MENA – is a pivotal step in instituting sustainable peace and development in the region. The main argument made in the foregoing is that taking account of religion in transitional justice measures is compelling in the MENA.

A major challenge for transitional justice and conflict transformation measures has been the need to secure their legitimacy in subject societies to facilitate their acceptance and efficacy. In view of this, on-going changes in the MENA and engagement with them through transitional justice ought to be considered along with the institutionalised reference to Islam in 'the contemporary Muslim conscience'.[136] Specifically, it is important that Islam is engaged in the process of the design and implementation of transitional justice and conflict transformation measures in the region to ensure their viability and expand the opportunity for satisfaction with the rather limited dividends they tend to deliver. This approach empowers the societies in transition in the MENA in dealing with social change that has been initiated there. It broadens the appeal, legitimacy and efficacy of transitional justice measures in that

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[136] Ramadan 2012, 86.

critical part of the world. These are not simply desirable outcomes for the transitional justice project, but crucial to its currently challenged status as a viable endeavour in post-conflict and post-authoritarian societies.