

# Islam and transitional justice assignment

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Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination. (The Curran 4: 59). 5 Transitional Justice, which deals with situations after mass violence, is not well developed in the most Muslim countries. 6 Thus, this paper contributes academic studies that aim to investigate TX concepts and mechanisms based on the Islamic Shari's and its applicability in Somalia.

Methodologically, it draws primarily on the two basic sources of Islam: The Curran and prophetic traditions besides other elevate references. At the beginning, the paper delineates theoretical framework on the basic concepts and classification of Islamic Shari's. Secondly, it offers mechanisms of the TX in Islam and its retributive and restorative system of Justice. Thirdly, it explains historical role of Shari's in Somalia and the development of various schools of Jurisprudence. Finally, conclusions are derived. L.

Theoretical Framework: The Islamic Shari's Islam is a comprehensive religion that provides a complete code of life and guidelines to follow in all spheres, including both personal matters and collective societal issues. Therefore, Islamic Law covers a broad and comprehensive system of legislation in all aspects of life. It has distinctive characteristics and unique qualities, which allowed it to enjoy stability, growth, and relevance for over fourteen centuries. It is a divine law, and its application is part of obedience to Allah and submission to His will.

It offers stability and permanence in principle and flexibility in application. It includes economic order, social organization and codes of civil and criminal laws. The personal aspects include the belief system, ritual worships, manners and values. The collective aspects include political, economic and social systems that offer general frameworks and norms. Muslims in general agree on the personal aspects of Islam, such as the principles of faith, other pillars of Islam and the Islamic value system.

However, many collective aspects that were sidelined during the colonial era and replaced by modern European laws remain contentious. To rectify this anomaly that created conflict between the state and society, modernity and tradition, and Islamic values and Western values, various forms of Islamic movements emerged. They advocate the villa of Islam and comprehensive application of Shari's. Moreover, these movements adopted various strategies and tactics that include moderate and extreme ways.

The role of these Islamic movements is growing, and they have wielded strong societal support, which makes TX mechanism that complies with Islamic Shari's more relevant in the Muslim majority countries. Shari's: Basic Definitions and Classifications Shari's literally means " way to water," signifying the source of life. To Muslims, it signifies the right way to Allah and to the eternal life in the hereafter. It is also fined as " those doctrinal, practical and dispositional regulations which Allah had legislated through one of His messengers. 7 Moreover, its definition can be traced from the verbal Arabic noun " Shari's" that appears in the following verse: " Then We put thee [O Muhammad] on the (right) Way of Religion [Shari's]: so follow thou that (Way), and follow not the desires of those who know not". (The Curran <https://assignbuster.com/islam-and-transitional-justice-assignment/>

45: 18). In addition, its derivative form appears three times: at (The Curran 42: 13) in the form of single verb Sharma's; at (The Curran 42: 21) in the form of the plural verb Sharma's; and t (The Curran 5: 48) in the form off noun Sacristan. According to the modern definition, Shari's is the comprehensive body of Islamic laws that should regulate the public and private aspects of the lives of Muslims through the excessive examination of the primary sources of Islamic Shari's laws: the Curran and the prophetic authentic traditions. 9 There are also two secondary sources: the consensus (Jam) and the Juristic analogy (Assays). 10 Moreover, there are complementary sources such as the concept of considering general welfare (Establish) as basis for legislation 1 and customary practices of particular community (ruff). Based on these basic, secondary and complementary sources, Islamic scholars have developed Islamic Jurisprudence " Fish" to deal with the changing conditions of human interactions in space and time. Islamic Jurisprudence is " the science of extraction of practical religious regulations from their detailed sources. It is the practical implementation of Shari's through its human understanding. " 13 Because the regulations are interpretations of various scholars in different times and space, diverse methodologies were employed and different opinions and legal Judgments were offered to varieties of issues.

Process of deducing new Islamic laws is called " Jihad," which enables to regulate for fresh and contemporary issues and revisits previous scholarly Judgments. 14 As a result, various interpretations of the Islamic Shari's were developed during the course of the Islamic history. These five major schools of Jurisprudence called " Madhya (gig) and midair (plug)" were developed,

namely, Shaft's, Hannibal, Hannah, Malawi and Safari. The first four are followed by Sunnis Muslims, while the fifth, the Safari, is the major school of Jurisprudence for the Shih's Muslims.

The existence of these schools and continuation of the process of Jihad tests that Islamic Jurisprudence is not static but is rather dynamic, flexible and applicable in every circumstance in all times and spaces. This nature of the Shari's demonstrates the soundness of its higher objectives and intents called Massif al- Shari's, the philosophical basics of Juridical theory of Islamic law. Islamic scholars have classified the entire range of massif into three categories: The essentials (dramaturgy), complementary benefits (hazily) and the embellishment (distantly).

The essentials are necessary to normal order in society as well as to the spiritual well Ewing of individuals. They are grouped to preserve the five necessities: faith (Al- adding), life (AH-Naifs), reason (AH-call), lineage (AH-nasal), and wealth (AH-mall). Thus, all Islamic criminal laws revolve to protect and preserve these five necessities. 15 The science of Islamic Jurisprudence in the traditional literature is divided into EBITDA (devotional law) and Malamute (transactional law), due to the simple fact that each has distinct primary objectives.

For instance, the primary objective of devotional law is to regulate the rituals and direct individual worship of Allah. This includes prayers, fasting, Hajj] and Katz. On the other hand, transactional law regulates human activity in the spheres of economic, social and political sectors. It addresses many legal aspects like Criminal Law Intonation), Personal Law (AH-ninja) and

Commercial Law (al- bays). However, in the modern development, Islamic Jurisprudence has attracted immense studies and its scope has been widened to include various fields in response to the growing and changing modern necessities of the time.

Generally, Islamic law classifies all human actions into two grand dichotomous categories: *Ma'ruf* (right and good) and *Unaruf* (wrong and bad or evil). In that conception, communities and states have been commanded “to enjoy the right and forbid the wrong.”<sup>16</sup> The right and good in Islam includes obligatory and recommended actions, while evil includes the discouraged and forbidden actions. In between the right and wrong, there is a permissible position where flexibility and freedom is given to the individuals.

Therefore, all human actions are categorized according to the “quantum of actions,” which has, at its center, the neutral and permissible position, with two degrees of goodness and evilness to either side. Forbidden discouraged permissible Obligatory Figure (1) Quantum of Human Actions recommended For example, the obligatory category includes the five daily prayers, fasting and so on. Recommended categories, also called “*Sauna*,” include many activities that are rewarded if done with good intentions and not punished when they are not done. Permissible” includes all behavior that is neither forbidden nor discouraged, neither obligatory nor recommended.

Discouraged behavior is considered undesirable and constitutes minor sins. Forbidden behavior is explicitly prohibited and includes all infill and criminal actions. TX deals with the last category of forbidden types, in particular with criminal actions. II. Mechanisms of Transitional Justice in Islam The

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mechanisms of TX in Islam could be classified into three categories: criminal persecution, reconciliation and hybrid system.

In the criminal persecution category, all crimes are classified into one of three types; namely, Hued (Allah's boundaries), Assai (retribution) and Ataxia (discretionary punishment). On the other hand, reconciliation includes elements of truth-seeking/telling, compensation, repentance and forgiveness. Hybrid combines some elements of criminal prosecution and reconciliation and is the preferred option to avoid a culture of impunity, although it depends on the changing circumstances and societal context. This section explores these mechanisms, beginning by introducing how Islam envisions individual responsibility.

Islam and Individual Responsibility Islamic criminal law is based on individual responsibility for crimes, and collective punishment is not allowed in general. 17 Guarani's verses state that this responsibility is direct and personal. For instance, Allah says, " That man can have nothing but what e strives for;" (The Curran 53: 39). In another verse, Allah says, " Whoever works righteousness benefits his own soul; whoever works evil, it is against his own soul: nor is thy Lord ever unjust (in the least) to His Servants. (The Curran 41 : 46). Furthermore, " Every soul draws the med of its acts on none but itself: no bearer of burdens can bear of burdens of another... " (The Curran 6: 146). Besides that individual responsibility, Prophet Muhammad explained personal responsibility for the crime, addressing the clan-based communities in which the culture of revenge killing is prevalent. The Haiti, narrated by ABA-Audit, states that " A soul is not held responsible for acts committed by his father or by his brother. This means that believers of Islam must avoid

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revenge killing based on communal fighting. Islamic Jurisprudence in its various schools sets specific conditions for criminal responsibility with subtle differences. These schools consider crimes “ Individual, non-transferable and based on [the] conscious intentional conduct of a person possessing his mental faculties who was not acting under extenuating circumstance. “ 18 In cases where a crime has been committed, individuals and communities are urged o come forth and tell the truth of their responsibility of the crime.

Such confession of culpability (al-literati) by the offender is the first positive step in any reconciliation process. The Curran articulates this point eloquently emphasizing to stand for Justice regardless of race, religion, relationships and class. It is a universal principle of justice, as the Guarani’s verse says, “ O ye who believe! Stand out firmly for Justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both... (The Curran 4: 135).

Truth-telling is fundamental in Islam, and the Curran says, “ And cover not Truth with falsehood, nor conceal the Truth when ye know (what it is). ” (The Curran 2: 42). Moreover, the prophet said, muff must be truthful, for truthfulness leads to righteousness and righteousness leads to Paradise. “ 19 When the responsibility for a crime is established either through voluntary truth- telling or by means of criminal investigation, the process of TX follows the line of retribution or compensation, reconciliation, forgiveness or some other settlement based on mutual agreement.



To achieve the ultimate goal of Justice and community cohesion, criminals must seek repentance and forgiveness from the victims. This repentance and forgiveness may be complemented with some form of retribution and compensation. Elements of the Criminal Punishment in Islam Punishment is Justified in Islamic Shari's by deterrence, retribution, and rehabilitation and to protect the society by incapacitating the offender. The legal framework of Islam has to protect the five universal objectives of Shari's (Mislaid al-Shari's): the life, the religion, the reason, the lineage and the property.

All crimes fall in the category of crimes against Allah and crimes against human being besides being a transgression of Allah's boundaries.

Punishments of these crimes are divided into Hued, Assai and Ataxia. Hued Punishments in Islam The Hued punishments in general are not part of T]; however, they are important to discuss here as part of the overview of the criminal law of Islam. Penalties for Hued crimes are divinely prescribed by the basic sources of Islam: The Curran and the Prophetic traditions. They are the claims of Allah and thus cannot be waived by a judge and authorities.

It includes all forms of theft (Sarnia), armed robbery (Hiram), illegal sexual intercourse (Zinc), false accusation of adultery (Quad), use of toxins (stylist's al-shame), and apostasy (Riyadh) and rebellion (Baggy). 20 For these types of crimes, the Curran prescribes specific punishment, because they abuse and transgress one of the five universal objectives of Islam. For instance, to preserve life, the law of retribution is prescribed, which the following Guarani's verses clearly states, " In the Law of Equality [Assai] there is (saving of) Life to you, o ye men of understanding; that ye may restrain yourselves" (2: 179).

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Moreover, Islam prohibits forceful conversion from one religion to another.

21 However, after accepting Islam voluntarily, there is the law of apostasy in order to protect Islamic belief. On this issue, classical Islamic scholars reached consensus on the punishment for apostasy in the light of their historical and political contexts, although the Curran does not prescribe clearly cut punishment for this. 22 There are, however, many Prophetic traditions on this issue, such as the following: “ The blood of a Muslim who confesses that none has the right to be worshipped but Allah and that

I am His Messenger cannot be shed except in three cases: in Assai for murder, a married person who commits illegal sexual intercourse and the one who reverts from Islam (Apostate) and leaves the Muslims” (Isaiah al-Babushka, chapter 9: 17). Another prophetic tradition says, “ Whoever changes his religion, kill him” (Isaiah al-Babushka, chapter 30: 17). However, some contemporary legal scholars are revisiting this issue with great caution in the light of the new circumstances. 3 Furthermore, to preserve reason, all types of intoxicants such alcohol and similar substances are prohibited, and punishment for their consumption is prescribed. The punishment for using intoxicants is 40 or 80 lashes because of the various narrations from the Prophet Muhammad and different opinions of the Islamic scholars which offers different numbers of lashes. 24 In addition, to preserve a person’s lineage, the penalty for fornication and false accusation is enacted.

For instance, on the punishment for fornication, the Curran says, “ The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of

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the Believers witness their punishment. ” (The Curran 24: 2). On false accusations, the Curran says, “ And those who launch a charge against chaste women, and produce not four witnesses (to support their allegation\* flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors” (The Curran 24: 4).

It is clear from these two verses that 100 and 80 lashes are, respectively, the punishment for fornication and false accusation. Moreover, the punishment of stoning to death for pre-married adulterers is a nonsense of the Islamic scholars based on numerous Prophetic traditions and practices common during the life of the Prophet Muhammad. 25 However, proving a case of adulterous behavior was made so complicated (I. E. One must produce four credible witnesses who actually witnessed the intercourse) that proof became close to unattainable. 6 Finally, to preserve wealth, the punishment for theft and armed robbery according to the Curran is the following: “ As to the thief, Male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in power. ” (The Curran 5: 38). Moreover, armed robbery (Hiram) refers to robbery with violence, and its penalty varies according to whether the robber killed or injured the victim or simply robbed (or threatened to rob) him or her.

The Curran gives various options for punishments ranging from death penalties, crucifixion, cutting off hands and foot on the opposite sides and exile. The Curran says, “ The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and

feet from opposite sides, or exile from the land: that is heir disgrace in this world, and a heavy punishment is theirs in the Hereafter” (The Curran 5: 33).

It is noteworthy to mention here that the crime of rape is not classified in the category of Zinc (consensual adultery), but rather in the crime of armed robbery (Hiram).<sup>27</sup> Moreover, although Hued are crimes that infringe on the right of Allah, some of them infringe both the right of Allah and on the right of individuals. For instance, thefts are crimes that involve taking away the properties of other individual, and a settlement could be concluded between the two parties before coming to courts. Moreover, false accusation of adultery is considered as violating the rights of the individual, and this could also be settled between the two parties.<sup>29</sup> Consequently, TX treats crimes committed against human beings and in this case individuals and communities have total discretion to seek either retribution or compensation. Therefore, Hued punishments, which are limited to the rights of Allah, are out foot’s mechanisms; whereas, crimes that touch on human rights are included within the sphere of T].

**Assai and Ataxia Punishments** Assai punishments deal with all forms of murdering and injuries that were omitted intentionally. The law of Assai is mentioned in the Curran as giving life to the Muslims: “ In the Law of Equality [Assai] there is (saving of) Life to you, eye men of understanding; that ye may restrain yourselves” (The Curran 2: 179). Contrary to the Western Criminal Laws, in Islam, Assai crimes are dealt as civil cases, and four stakeholders are involved. These are the state (authority), the community (tribe, clan, family), the victims and perpetrators.

The state has the full right to lay on additional punishments such as imprisonment, while the victim or his inheritors in case of his death has the final say on whether to choose the option of retribution or compensation. In this process, the two parts of the criminal case are involved and their two families and communities are too. According to the teachings of Islam, retribution is applicable and permitted when the killing or injury was done intentionally, but accidental killing or injuring is excluded.

In the case of unintentional killings or injuries, blood money compensations (day) are applied. The following verse puts forth retaliation with equal measurement saying: “ We ordained therein for them: “ Life for life, eye for eye, nose or nose, ear for AR, tooth for tooth, and wounds equal for equal. ” But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to Judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers” (The Curran 5: 45).

Moreover, the next verse also offers a detailed ruling of Juridical equivalence in retribution and the option of forgiveness and compensation by paying blood money. O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission(s) is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty (The Curran 2: 178).

Assai punishment is well known and applied in the traditional Somali system of justice. Both elements of retribution and compensation have been

practiced among various communities. The same practice remains intact as part of jeer system. In particular, after the collapse of the state in 1991, the available system of Justice was Islamic criminal laws, and it took the center stage besides traditional Jeer system of laws. Jeer mostly emphasizes compensation and reconciliation whenever communal violence erupts.

However, with the growth of the Islamic movements, retribution was widely used. Today, retribution as a form of Justice is prevalent in the Transitional Federal Government, Puntland, and Somalia regions under the control of Al-Shwab and Allah-Sauna WA al-Jam. 30 The Ataxia punishment includes all laws that Allah left for human beings to make their Judgment in changing time, space and circumstances. It covers a wide range of amusements such as verbal reprimands, public exposure, corporal punishment, imprisonment, exiling or even execution for serious cases. 1 Thus, the vast majority of punishments is discretionary in nature and is determined according to the society's local culture. Crimes may infringe on the rights of Allah, such as by breaking fast and not performing daily prayer. It may also be infringing the rights of individuals (for example by insulting them). Making laws in areas not prescribed by Allah is left for the states and authorities. These laws, however, must be compliant with the Islamic legal framework and the universal purposes of Islam that balance the rights of society with the right of the individuals.

These two forms of punishment – Assai and Ataxia – are parts of T]. Besides the possibility for criminal persecution of the perpetrators, Islamic scholars such as Bin Farman have emphasized the importance of reconciliation, in particular when faced with certain types of conflict and cases; for instance, <https://assignbuster.com/islam-and-transitional-justice-assignment/>

when the disputants are relatives or people of authority who are respected in the community, when there is a high possibility of increased animosity between the litigants and their families, or when the nature of the case is such that it is very difficult to make a decision. 2 Restorative TX: Reconciliation, Repentance and Forgiveness Restorative Justice is about restoring both the victim and perpetrator of the crimes back into harmony with the community. Unlike retributive mechanisms such as *Assai* and *Ataxia* which are applied through courts, restorative Justice empowers the victims. The spirit of Islamic Shari's law accords restorative Justice because it attaches values of reconciliation, repentance and forgiveness to the criminal punishments.

Since the ultimate objective of the application of Shari's is to achieve a Just society and harmony, it does not focus on adjudication alone but rather combines it with reconciliation. Furthermore, it should be noted that all TX mechanisms in Islam are always linked with the spirit of piety and God's rewards in the hereafter. Therefore, a combination of restoration and retribution is applied to conflicts and crimes that occur between communities and individuals. " The first step in the reconciliation process is acknowledgment of responsibility and confession by the aggressor, even if accompanied by an excuse for the incursion.

In the Somali cultural context, this is critical for the success of traditional conflict resolution and is the first question to be presented before addressing other fundamental issues. The declaration of responsibility, ' I am an aggressor,' by the respective party is seen as representing more than a third of the path to a solution. " 33 Reconciliation: Primary Objective of

Restorative TX Reconciliation is used as a restorative component of TX that differs from criminal proceedings.

It involves three approaches: religious, human rights and communal. Here, our objective is the religious approach, in particular the Islamic conception of reconciliation (al-sulk), which means to reconcile and make peace with the opponent. In the Somali language, the term is derived from the Arabic roots and is called “Zulus and Muscular”).<sup>34</sup> According to Stayed, Sabina, sulk means to settle any dispute.<sup>35</sup> It also means an agreement between two parties in the process of settling their disputes.

The spirit of reconciliation commences with acknowledgement of the committed crimes, known in Somalia as Adams sierras, repentance (taboo keen) room the perpetrators and forgiveness (cafes) from the victims.<sup>36</sup> It is a well-known conflict-resolution mechanism in the Somali society. In the traditional society, in cases of community conflict, there is either reconciliation or continued fighting, because there is no central authority or system of courts similar to the modern state’s system to adjudicate between disputants.

Its mechanism and processes are founded on forging a settlement based on a compromise between disputants. The Curran generally recommends reconciliation and promises great rewards of Allah or those who accept reconciliations and for these who are engaged in reconciliation and mediation between the people: “If a wife fears cruelty or desertion on her husband’s part, there is no blame on them if they arrange an amicable



settlement between themselves; and such settlement is best; even though men's souls are swayed by greed.

But if ye do good and practice self-restraint, Allah is well- acquainted with all that ye do" (The Curran 4: 128). The narrated Haiti from the Prophet Muhammad said: "' should I inform you of something that is higher in virtue than fasting, praying and charity? They said, Yes O Messenger of God. ' Then the Prophet said, ' To make reconciliation between peoples that are in conflict. '37 Moreover, the topic of reconciliation in Islam is included in the section of " Jihad" in the book of Prophetic tradition (Isaiah al-Babushka).

Among the Haiti cited here is the following: " To make reconciliation is a righteous act of charity. " Further, the Prophet warns against resorting only to adjudication, which sometimes makes mistakes because of the eloquence of one of the litigants. The Prophet said, " Allah's Apostle said, ' I am only a human being, and you people (opponents) come to e with your cases; and it may be that one of you can present his case eloquently in a more convincing way than the other, and I give my verdict according to what I hear.

So if ever I Judge (by error) and give the right of a brother to his other (brother) then he (the latter) should not take it, for I am giving him only a piece of Fire. " 38 Thus, the trial process is not the only truth-finding mechanism that will lead to substantive justice. It can be subverted by the imperfect nature of man; therefore, it should be avoided whenever possible. However, in the case of communal violence or civil conflict, Islam offers impressive mechanisms and clear approaches.

It emphasizes “ peace with justice” as the ultimate goal, and reconciliation as the best mechanism to reach that objective. It also gives guidance on how to deal with aggressors and rejecters of the peace. It calls for the use of military intervention to ensure the compliance of the perpetrators to the ceasefire and negotiated settlement. This intervention force is even permitted to fight alongside the victims against the aggressors. There is no room for neutral positions between aggressors and victims as seen in the following verse.

If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies then make peace between them with Justice and be fair: for Allah loves those who are fair (and Just). (The Curran 49: 9). One of the mechanisms of reconciliation is arbitration, which occurs when a third person selected by the parties is engaged to resolve their disputes either through conciliation or adjudication.

The disputing parties use an arbitrator in order to work awards a settlement in case they fail to conclude a deal by themselves. Arbitration differs from reconciliation in two respects. First, reconciliation is an amicable settlement that may be reached between the litigants with or without a third party, while in arbitration the appointment of a third party is indispensable. Second, the agreement of reconciliation is not binding unless it has taken place before the court, whereas arbitration is binding without court intervention.

Repentance and Forgiveness Repentance and forgiveness are directly linked to one another. Feelings of regret and

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